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Pakistan

PROJECT FINANCE

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This country-specific Q&A provides an overview of project finance laws and regulations applicable in Pakistan.

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PAKISTAN
PROJECT FINANCE

1. What are the typical ownership structures for project companies in your jurisdiction? Does this vary based on the industry sector?

Project companies in Pakistan are generally incorporated as limited liability companies with the Securities and Exchange Commission of Pakistan (the "**SECP**"). Project companies are usually either incorporated as public unlisted or private limited companies and in certain cases, subsequently listed on the Pakistan Stock Exchange in order to raise capital from the public; such companies are either wholly owned by private corporate or individual shareholders (local or foreign) and/or are partially owned by the federal government and/or provincial governments or statutory bodies. Industry specific requirements/restrictions regarding ownership structures may also be applicable and are required to be taken into consideration when incorporating a company in Pakistan depending on the nature of business it proposes to undertake. Further, a branch office of a foreign company may also be established to undertake workstreams of a defined project.

2. Are there are any corporate governance laws or accounting practices that foreign investors in a project company should be aware of?

Companies incorporated in Pakistan are regulated by the Companies Act, 2017 (the "**Companies Act**") read with the rules and regulations thereunder. Section 225 of the Companies Act requires companies to prepare financial statements which give a true and fair view of the state of affairs of the company, comply with the financial reporting standards notified by the SECP and are prepared in accordance with the requirements set out in the Third Schedule of the Companies Act. The Third Schedule of the Companies Act sets out the applicable accounting framework based on the type of the company and such accounting framework varies between public interest companies, large sized companies, medium sized companies and small sized companies (each as classified in the Companies Act). The classification of companies is based on the previous year's audited financial statements of the company and takes into account, factors such as the paid-up capital, turnover and number of employees of such company. The disclosure requirements for listed and unlisted companies and their subsidiaries are set out in the Fourth and Fifth Schedules of the Companies Act. Listed companies are required to follow the International Financial Reporting Standards whereas companies other than listed companies are required to follow the applicable financial reporting framework based on the classification of the company as set out in the Third Schedule of the Companies Act.

From a corporate governance perspective, listed companies are required to comply with the Listed Companies (Code of Corporate Governance) Regulations, 2019 (the "**CCG Regulations**"), which are based on a "comply or explain approach" (unless a requirement has been stated as mandatory therein) i.e., a listed company may exercise its discretion with respect to non-mandatory provisions of the CCG Regulations either to comply or provide an appropriate explanation as to any impediment in its compliance of the compliance report of the company along with the financial statements. The CCG Regulations provide for diversity in the board of directors of a listed company, representation of minority shareholders, female directorship, remuneration of directors, committees of the board, audits and reporting and disclosure requirements.

Public sector companies[1] are mandated to comply with the Public Sector Companies (Corporate Governance) Rules, 2013 which govern *inter alia*, the responsibilities, power and functions of the board of directors of a public sector company, the composition of the board of directors, the requirements as to related party transactions and committees of the board of directors. The aforementioned rules additionally require public sector companies to adopt the International Financial Reporting Standards.

Footnote(s):

[1] Public sector company is defined in the Companies Act as "*a company, whether public or private, which is directly or indirectly controlled, beneficially owned or not less than fifty one percent of the voting securities or voting power of which are held by the Government or any instrumentality or agency of the Government or a statutory body, or in respect of which the Government or any instrumentality or agency of the Government or a statutory body, has otherwise power to elect, nominate or appoint majority of its directors, and includes a public sector association not for profit, licensed under section 42* [of the Companies Act]…".

3. If applicable, what forms of credit support from sponsors or host governments are typically provided?

Typically, in project financing transactions in Pakistan, sponsors agree to provide support to the project company under a sponsor support agreement. The forms of credit support vary between projects; however, sponsors typically provide letters of credit to backstop their equity contributions and provide debt service reserve support to the project company. Further, sponsors also provide support by way of guarantees (corporate or otherwise) for the due and punctual payment to the secured creditors of any amounts due by the sponsors under the finance documents (whether in the form of equity or funding). Sponsors/shareholders of a project company may also agree to provide subordinated loans to the project company.

In power projects, the Government of Pakistan typically guarantees the payment obligations of certain government counterparties (including the power purchaser) under the relevant project document, in the event certain circumstances, as set out therein, arise.

Other than credit support, the Government of Pakistan also generally provides its support under a concession agreement, wherein it agrees to aid the project company in relation to *inter alia*, the procurement of consents, foreign currency, work permits and visas, changes in law etc.

In the context of foreign investment in the power and infrastructure sector, the Government of Pakistan and the Government of the People's Republic of China entered into an agreement in respect of the China-Pakistan Economic Corridor Energy Project Cooperation (the "**CPEC Agreement**") to consolidate the partnership between the two countries. Pursuant to the CPEC Agreement, various power and infrastructure projects as set out therein, are to be implemented and are currently being (or will be) financed by Chinese commercial banks and financial institutions. To incentivise such foreign investment, the Government of Pakistan agreed to the opening of a revolving account in respect of each project being implemented under the CPEC Agreement into which amounts equal to no less than 22% of the monthly payments owed to the power generation company by the power purchaser (i.e. Central Power Purchasing Agency Guarantee Limited ("**CPPA-G**")) under power acquisition contracts are to be deposited and maintained by CPPA-G in order to provide for a shortfall against recoveries by power generation companies against CPPA-G. The relevant implementation agreements of the projects implemented under the CPEC Agreement also contemplate such revolving accounts and further oblige the Government of Pakistan to provide a guarantee to fund the revolving account in the event of a failure by CPPA-G to place or maintain the aforementioned funds. However, despite the commitment of the Government of Pakistan under the CPEC Agreement and in certain cases, revolving accounts agreements being executed to reflect the same, substantial concerns arose regarding the non-opening and non-funding of the revolving account. To address such concerns, the Economic Coordination Committee of the Federal Cabinet approved the opening of an account titled the Pakistan Energy Revolving Fund (later named the Pakistan Energy Revolving Account) with the State Bank of Pakistan (the "**SBP**") wherein a supplementary grant of PKR 50 billion was deposited for withdrawal by CPPA-G to pay outstanding dues to the power generation companies in respect of projects being implemented under the CPEC Agreement.

In projects that are based on the public-private partnership ("**PPP**") mode, the Government of Pakistan generally provides financial and administrative support to project companies under a state support agreement. Under such agreement, the Government also agrees to provide a guarantee in favour of the project company with respect to the obligations of the grantor of the relevant concession under the relevant project document and in the event of early termination of the relevant project document. Moreover, in PPP projects, the relevant provincial or Federal Government generally recognise that there are projects where the revenues collected by the project company (such as tolls) may not be certain or sufficient to meet the required return therefore, the PPP laws in Pakistan recognise the concept of a viability gap fund whereby the relevant provincial or Federal Government undertake to provide a minimum revenue guarantee to meet the deficient amount between actual revenues and the benchmark revenues.

4. What types of security interests are available (and suitable) for a project financing in your jurisdiction?

The type of security interests created in project finance transactions in Pakistan typically include the following:

Mortgage: a mortgage is defined in the Transfer of Property Act, 1882 (the "**TPA**") as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability. In Pakistan, the following types of mortgages may be created: (i) simple mortgage i.e., the mortgager binds himself to personally pay the mortgage money, without delivering possession of the mortgaged property and agrees that in the event of his failure to pay, the mortgagee shall have the right to cause the mortgaged property to be sold and the proceeds of sale to be applied in the payment of the mortgage money; (ii) mortgage by conditional sale i.e., where the mortgagor ostensibly sells the mortgaged property on the condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute or that on such payment being made, the sale shall become void or that on payment, the buyer shall transfer the property to the seller; (iii) usufructuary mortgage i.e., the mortgagor delivers possession or expressly or impliedly binds himself to deliver possession of the mortgaged property to the mortgagee and authorises him to retain such possession until payment of the mortgage money and to receive the rents and properties from the property (or part thereof) in lieu of interest or payment of mortgage money (either partially or wholly); (iv) English mortgage i.e., where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee; (v) by deposit of title deeds i.e., where a person delivers to a creditor or his agent, documents of title to immovable property with the intent to create security thereon; and (vi) anomalous mortgage i.e., where the mortgage does not fall within any of the categories above.

The most prevalent form of mortgage effected in the Pakistani market is a mortgage by deposit of title deeds on account of its ease of creation and cost effectiveness in its registration and perfection.

Lien: a lien is commonly defined as the legal right or interest to retain possession of property belonging to another person until a debt owed by such person is discharged. Typically, a lien and charge are created over local and foreign accounts of the project company and all amounts standing to the credit of such accounts and any amounts deposited therein from time to time. Further, the financiers or their security agent/trustee is also granted a right of set off and is entitled to instruct the relevant account bank to apply the whole or part of the deposits in the accounts toward the repayment/prepayment of the facility in accordance with the terms of the relevant financing documents.

Pledge: a pledge is essentially a bailment of goods as security for the payment of a debt or performance of a promise. The pledgee may retain the goods pledged not only for the payment of the debt but also for the interest in respect of the debt and all necessary expenses. In project financing transactions in Pakistan, a pledge is usually created by the shareholders of the project company over the shares held by such shareholders in the project company. In the case of shares in physical form, a pledge is created by the deposit of the share certificates pertaining to such shares by the pledgor (i.e. the shareholders), with the intent to create a pledge thereon, with the pledgee (i.e. the financiers or their security agent/trustee). In case of shares in book entry form, a pledge is created by placing the pledged shares in a pledged position in the Pledgor's account in the Central Depository Company of Pakistan Limited in favour of the pledgee or its agent.

Hypothecation: a hypothecation involves the creation of a fixed charge over movable assets of the project company without the transfer of title or possession. A charge by way of hypothecation is normally created over present and future, tangible movable and fixed assets of the project company (including plant and machinery).

Assignment: an assignment is created by way of mortgage and as a matter of practice in Pakistan, is created by the project company in respect of its rights, title and interests (present and future, actual and contingent) in the project documents (including government guarantees, concession/implementation agreements and insurance contracts). Where reinsurances are in place, an insurer also generally assigns its rights, title, benefit and interest in respect of the reinsurance policies in favour of the financiers or their security agent/trustee. Further, in the case of shareholder loans, it is typical for the relevant shareholders to assign and subordinate their respective rights, title and interest in and to the loans granted by such shareholders, in favour of the financiers or their security agent/trustee.

5. How are the above security interests perfected?

The perfection requirements for security interests vary based on the entity creating the security interest and the type of property over which the security interest has been created.

Section 100 of the Companies Act provides that a company (which refers to a company formed and registered under the Companies Act or company law) that creates a mortgage or charge[2] or pledge must file a Form 10 in the form specified in the Companies Regulations, 2024, along with a copy of the instrument by which the mortgage or charge is created or evidenced (subject to certain conditions as set out in the Companies Act). Section 100 applies to, *inter alia*, a mortgage or charge on any immovable property wherever situate or any interest therein, a mortgage or charge on the book debts of the company and a mortgage or charge or pledge on any movable property of the company (which shall include a pledge of shares by a company). The requirement to perfect a security interest under the Companies Act is only applicable to companies incorporated in Pakistan and is not applicable to foreign entities or security created by individuals (local or foreign). A mortgage or charge created by a company and not registered under Section 100 of the Companies Act shall not be taken into account by a liquidator or any other creditor of the company; however, non-registration does not prejudice any contract or obligation for repayment of money thereby secured.

Further, the Financial Institutions (Secured Transactions) Act, 2016 (the "**Secured Transactions Act**") states that a customer[3] may create a security interest to secure its own obligation or that of another person in accordance with the provisions of the Secured Transactions Act. The Secured Transactions Act requires a security interest[4] in movable property (which refers to any tangible or intangible property other than immovable property) to be perfected by registration[5] with the Secured Transactions Registry. A security interest in a right to payment of funds credited in a deposit account may also be perfected by control and a security interest in collateral covered by a title document may be perfected by possession of the title document by the secured creditor[6]. Additionally, a security interest in tangible movable property may also be perfected by possession of the property by the secured creditor.

An assignment of receivables[7] (other than an absolute assignment of receivables) may also be perfected by registration with the Secured Transactions Registry under the Secured Transactions Act (in the case of an entity[8]) or under Section 100 of the Companies Act (in the case of a company). Failure to perfect a security interest required to be registered with the Secured Transactions Registry shall deem such security interest to be void against the liquidator, administrator or receiver; however, it shall not prejudice the right of the secured creditor to repayment of finance as an unsecured creditor.

Additionally, an assignment in favour of an assignee requires a notice to be issued by the assignor to the relevant counterparty under the contract in respect of which the assignment is being undertaken. Perfection of assignment by way of security requires delivery of such notice as a matter of Pakistan law. While an acknowledgement in respect of such notice of assignment is not mandatory, it is nevertheless prudent to obtain the same.

A non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish (whether in present or in future) any right, title or interest (whether vested or contingent) of a value of PKR 100 or more in immovable property is required to be registered under Section 17 of the Registration Act, 1908 (the "**Registration Act**") with the relevant registrar or sub-registrar of the concerned district. A document shall not be accepted for registration unless presented for such purpose to the proper officer within four months from the date of execution of such instrument. In case a document executed by all or any of the parties outside Pakistan is not presented for registration till after the expiration of four months, the registering officer may accept such document for registration if it is satisfied that the instrument was so executed, and that it has been presented for registration within four months of its receipt into Pakistan. Failure to register a document which is compulsorily registrable under the Registration Act (or under any preceding law providing for or relating to registration of documents) shall be precluded from operating to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property or conferring any power to adopt, subject to the exceptions set out in the Registration Act.

<u>Footnote(s):</u>

[2] Mortgage or Charge is defined in the Companies Act as "*an interest or lien created on the property or assets of a company or any of its undertakings or both as security*".

[3] Customer is defined in the Secured Transactions Act "*as having the same meaning as is assigned to it under clause (c) of Section 2 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and shall be deemed to include an entity*" and set out in footnote 9 below.

[4] Security interest is defined in the Secured Transactions Act as "*(a) right, title, encumbrance or interest of any kind upon moveable property created or provided for by*

a security agreement in relation to a transaction that in substance secures the payment or performance of a customer's obligation without regard to the form of the transaction or the terminology used by the parties or identity of the person who has title to the moveable property, and includes any charge, mortgage, hypothecation, fixed charge, floating charge, assignment, lien, pledge, assignment of receivables by way of security and transactions under which a secured creditor retains title such as a finance lease, hire purchase agreement, sale and lease back arrangement, conditional sale agreement and retention of title arrangement, having similar effect; and (b) an absolute assignment of receivables".

[5] Registration is defined in the Secured Transactions Act as "*(a) in relation to a security interest created by an entity, means that the financing statement and modification statements in relation thereto, if any, have been registered in the register in respect of such security interest in accordance with the provisions of Part IV of [the Secured Transactions Act]; or (b) in relation to a security interest created by a company, means that a Form 10 and Form 16, if any, have been registered in the register of mortgages and charges in respect of such security interest in accordance with the provisions of the* [Companies Act]".

[6] Secured creditor is defined in the Secured Transactions Act as "*a financial institution or a consortium of financial institutions in whose favour a security interest is created by the customer and in the case of a security interest that is an absolute assignment of receivables, the secured creditor is the assignee*".

[7] Assignment of receivables is defined in the Secured Transactions Act as a transfer of rights, title, interests and benefits of the receivables by the assignor to the assignee. "Receivables" is defined in the Secured Transactions Act as "*a contractual or non-contractual right to receive money, whether such right is existing, future, accruing, conditional or contingent and includes rents, profits, dues, a money award by an arbitrator, monies payable as salaries of employees; dividends; tolls, user-fees or any sum, by whatever name called; monies payable under decrees; monies payable under guarantees; actionable claims and all kinds of actual or contingent monetary obligations; and excludes a right to payment of funds credited in a deposit account and right to payment under a negotiable instrument.*"

[8] Entity is defined in the Secured Transactions Act as "*a person other than a company, and includes a natural person, a sole proprietorship, a partnership or association of persons, a non-government organization registered under the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 (XLVI of 1961) or any other law for the time being in force for the registration of a non-government organization, a cooperative society registered under the Co-operative Societies Act, 1925 (VII of 1925) or any other law for the time being in force for the registration of a cooperative society, a society registered under the Societies Registration Act, 1860 (XXI of 1860) or any other law for the time being in force for the registration of a society, a trust created under the Trusts Act, 1882 (II of 1882); and a body corporate established pursuant to a law*". The term 'company' shall have the meaning ascribed to it in the Companies Act and set out in Question 5 above.

6. Please identify how security is enforced (notably the enforcement options available for secured parties) both pre and post insolvency/bankruptcy of the project company?

Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "**FIO**") pertains to a right of sale of mortgaged property. In terms of Section 15(2) of the FIO, in case of a default in payment by a customer[9], the financial institution may send a notice to the mortgagor demanding payment of the outstanding mortgage money within fourteen days from service of the notice and in case of a failure to make payment, a second notice of demand for payment may be sent within fourteen days thereafter. In case the customer on the due date of the second notice, continues to default in payment to the financial institution, the financial institution shall serve a final notice on the mortgagor demanding payment of the outstanding mortgage money within thirty days from service of the final notice on the customer. Upon lapse of the time period specified in the final notice, the financial institution may (without the intervention of any court and subject to any rules made by the Federal Government) sell the mortgaged property or any part thereof by public auction and apply the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money in the manner set out in the FIO.

Additionally, in cases where a customer has obtained property or financing through a finance lease, or has executed an agreement in connection with a mortgage, charge or pledge in terms whereof the financial institution is authorised to recover or take over possession of the property without filing a suit, the financial institution may, at its option: (i) directly recover the same if the property is movable; or (ii) file a suit under the FIO and the banking court may pass an order at any time, either authorising the financial institution to recover the property directly or with the assistance of the court. However, if the financial institution wrongly or unjustifiably exercises the direct power of recovery it shall be liable to pay such compensation to the customer as may be adjudged by the banking court in summary proceedings to be initiated on the application of the customer and concluded in thirty days.

Part VII of the Secured Transactions Act also set out the mechanism and modes for the enforcement of security interests. However, the Secured Transactions Act is not applicable in relation to a security interest, *inter alia*, in any immovable property, in a book entry security or created by operation of law. Section 57 of the Secured Transactions Act states that a secured creditor may, after the occurrence of an event of default, enforce a security interest under Section 58 or 59 of the Secured Transactions Act. An event of default is defined in the Secured Transactions Act in relation to a security agreement as either the failure to pay or to otherwise perform the obligation secured under the security agreement when due, or an event that gives the secured creditor the right to enforce the security interest under the security agreement.

Under Section 58 of the Secured Transactions Act, a secured creditor may enforce a security interest by filing a suit for recovery against a customer in the Banking Court in accordance with the provisions of the FIO. Alternatively, a secured creditor may enforce the following security interests without intervention of the courts:

i. a security interest that is perfected by possession;
ii. an assignment of receivables by way of security[10];
iii. a security interest in a negotiable instrument that is perfected by possession;
iv. a security interest in a right to payment of funds credited in a deposit account that is perfected by control;
v. a security interest in a motor vehicle based on retention of title arrangement; and
vi. a security interest in a title document that is perfected by possession.

Upon deciding to enforce a security interest set out above after the occurrence of an event of default, the secured creditor may give a written notice of demand to the customer in writing and require the customer to satisfy its obligation within fourteen days from the date of receipt of the notice. The notice shall specify the details of the amount payable by the customer and specify the collateral that may be enforced in the event the customer fails to satisfy its obligation. The requirement to send a notice may be dispensed with in certain circumstances set out in the Secured Transactions Act. The above mechanism for enforcement without the intervention of the courts is without prejudice to a secured creditor's right to enforce a security interest under any other law for the time being in force.

Under the Contract Act, 1872 (the "**Contract Act**"), if a pledgor defaults in the payment of a debt or performance at the stipulated time of the promise in respect of the goods which were pledged by it, the pledgee may bring a suit against the pledgor upon the debt or promise and retain the goods pledged as collateral security. The pledgee may also sell the pledged goods upon giving reasonable notice to the pledgor.

Under the TPA, unless otherwise contractually agreed, at any time after the mortgage money has become due and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited, the mortgagee has a right to obtain a decree from the court that the mortgagor shall be absolutely debarred of its right to redeem the property (i.e., a suit for foreclosure), or obtain a decree that the property be sold. The mortgagee also has a right to sue for the mortgage money in the cases set out in Section 68 of the TPA.

Additionally, a creditor of a company may file a petition in court for the winding up of a company and enforcement of security created in its favour.[11] Pursuant to Section 301 of the Companies Act, a company may be wound up by the court in the situations set out in clauses (a) to (m) of Section 301 of the Companies Act including, *inter alia*, where the company is unable to pay its debts[12] or if the court is of the opinion that it is "just and equitable" for a company to be wound up.

A winding up of a company by the Court shall be deemed to commence at the time of presentation of a petition for winding up which may be presented either by (i) such company, (ii) any creditor(s) (including any contingent or prospective creditor(s), (iii) any contributory(ies)[13], (iv) all or any of the aforesaid parties (together or separately), (v) by the registrar[14], (vi) by the SECP, or (vii) by a person authorised by the SECP in this respect. It is further provided that the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

The enforcement of security and the enforcement options available for secured parties would also largely depend upon the terms of the underlying financing arrangement and the remedies available to the secured parties under the financing documents.

Footnote(s):

[9] Customer is defined in the Financial Institutions (Recovery of Finances) Ordinance, 2001 as "*a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier*." The term finance as defined in the Financial Institutions (Recovery of Finances) Ordinance, 2001 includes, *inter alia*, a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer and the term financial institution is defined in the aforesaid Ordinance to mean and include (i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a government savings bank, but excludes the SBP ; (ii) a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and (iii) any company authorised by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify.

[10] The right to enforce an assignment of receivables by way of security and a security interest in a negotiable instrument includes the right to enforce any security over movable property or a mortgage of immovable property by deposit of title deeds that secures the payment of the receivables or the negotiable instrument.

[11] The procedure for winding up of a company is further elaborated in the Companies (Court) Rules, 1997.

[12] Pursuant to Section 302 of the Companies Act, a company shall be deemed unable to pay its debts if: (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred thousand rupees, then due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or (b) execution or other process issued on a decree or order of any Court or any other competent authority in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

[13] The term "contributory" is defined in the explanation to Section 296 of the Companies Act as "*a person liable to contribute toward the assets of a company on the event of its being wound up*".

[14] Registrar is defined in the Companies Act as a "*registrar, an additional registrar, an additional joint registrar, a joint registrar, a deputy registrar, an assistant registrar or such other officer as may be designated by the* [SECP], *performing duties and functions under* [the Companies Act]."

7. What are other important considerations in relation to the security regime in the jurisdiction that secured parties should be aware of?

As a matter of practice, in syndicated loans, financiers opt for an arrangement whereby security is created by the project company and its shareholders in favour of a security trustee acting on behalf of the finance parties under the security documents and the security trustee declares a trust over such security for the benefit of the finance parties.

Following the Eighteenth Amendment to the Constitution of Pakistan, 1973 (the "**Constitution**"), the subject of trusts devolved to the legislative purview of the provinces in Pakistan and as such, is no longer a federal matter. Accordingly, the relevant Provincial Assemblies enacted laws in respect of matters pertaining to trusts. Pursuant to the trust laws applicable in each province of Pakistan and the Islamabad Capital Territory (i.e., the Sindh Trusts Act, 2020; the Khyber Pakhtunkhwa Trust Act, 2020; the Balochistan Trust Act, 2020; the Punjab Trusts Act, 2020; and the Islamabad Capital Territory Trust Act, 2020 (the "**Provincial Trust Laws**")), no trust shall be functional unless it is registered with the relevant authority under applicable law. Therefore, under the provisions of the Provincial Trust Laws, all trusts (as defined in the Provincial Trust Laws), including as created under the Trust Act, 1882 or registered under the Registration Act or any other law, for the time being in force, are subject to compulsory registration. The effect of non-compliance and the failure to register a trust as such shall result in such trust ceasing to function or operate in any manner whatsoever and shall be proceeded against by the relevant authority under each of the Provincial Trust Laws. Accordingly, any finance documents of a project wherein a trust is declared over any property/assets are now required to be registered in order to remain valid and functional. While the relevant Provincial Governments have not notified any specific period within which such registration is to take place as of yet, it is advised that such registration is carried out at the earliest.

In the provinces of Sindh, Punjab and Khyber Pakhtunkhwa, this requirement has been extended to trusts in which the author, trustee and beneficiary are legal persons and have therefore brought within its ambit, the trust structures adopted in project finance transactions. However, in Islamabad and Balochistan, only natural persons are contemplated to act as a trustee, author or beneficiary.

Notwithstanding that registration as aforesaid is compulsory, since the Provincial Trust Laws are fairly recent and due to the absence of precedent/practice in such area, and on account of administrative hurdles, the process of registration is quite cumbersome; therefore, secured creditors are considering alternate security structures in project finance transactions such as the appointment of an agent rather than a trustee and parallel debt arrangements.

Another consideration with regard to the security regime and the enforcement of security in Pakistan through the courts is that matters pending before the courts in Pakistan face considerable delays due to, *inter alia*, the high volume and persistent backlog of cases and delays in hearings. Ultimately, the speed in which a case proceeds would depend on the parties involved and the urgency, interest and bona fides that both parties apply thus ensuring the case proceeds diligently to conclusion. In such cases, it is possible that cases be decided within a minimum of one year to three years despite the fact that the FIO provides for a summary procedure (i.e., that the banking court shall dispose of the suit within ninety days from the day on which leave to defend was granted by the banking court).

8. What key project risks should lenders be aware of in project financings in your jurisdiction? This may include, but may not be limited to, the following risks: force majeure, political risk, currency convertibility risk, regulating or permitting risk, construction/completion risk, supply or feed stock risk or legal and regulatory risk).

Pakistan's regulatory and foreign exchange framework imposes measures to control and monitor the remittance of funds outside the country. Foreign exchange matters are regulated by the SBP (the central bank of Pakistan responsible for *inter alia*, regulating the monetary and credit system of Pakistan, contributing to the stability of the financial system of Pakistan and formulating and implementing exchange rate policies). Such measures and restrictions may affect an investor's ability to freely remit funds for project-related expenses, debt service, profit and other financial commitments thereby affecting project operations and impacting an investor's ability to access its return on investment, thereby creating liquidity issues and its ability to allocate funds for other investments or obligations outside Pakistan. Appropriate approvals from the relevant Pakistani authorities (including the SBP) are necessary to repatriate funds, which are issued on a case by case basis (as elaborated in Question 9 below). Further, the utility of Pakistan Rupees in foreign currency transactions has also significantly decreased in light of the exponential decrease in exchange rates as compared to foreign currency.

Due to the ongoing economic challenges being faced in Pakistan, and in particular, a shortage of foreign currency, in 2022, the SBP implemented capital control measures (including the imposition of restrictions on opening of letters of credit, import of certain goods and making offshore advance payments in respect thereof), to reduce the quantum of foreign exchange being remitted outside Pakistan; this in turn, affected the investment regime and the trade landscape in Pakistan. In particular, as certain outward remittances and issuance of letters of credit require approval of the SBP or an authorised dealer[15] of the project company (as the case may be), such approvals were delayed/refused by the SBP. In this regard, whilst the SBP had issued a circular (bearing EPD Circular Letter No. 20 of 2022 dated 27 December 2022), directing authorised dealers to facilitate, *inter alia*, essential imports (such as food, pharmaceuticals and surgical instruments) and energy imports (such as those related to petroleum (oil and gas) and coal), such circular has been withdrawn (by way of a circular bearing EPD Circular Letter No. 10 of 2023 dated 23 June 2023) demonstrating the SBP's approach of relaxing the previously imposed restrictions and withdrawing the capital controls imposed by it. Nonetheless, there is an inherent risk of such capital controls being reinstated and/or any requested approvals being subject to increased scrutiny due to a shortage of foreign currency in Pakistan and its volatile political climate.

As a result of its unstable political climate, Pakistan remains averse to the risk of civil unrest which may result in disruption to economic activity. Sources also suggest that the political uncertainty in light of the recent general election held on 8 February 2024 could affect the economic stability of Pakistan. In particular, the outcome of the election has allegedly raised concerns among investors and created potential for delay of crucial investments in the country. The aforesaid may constitute as a political force majeure event (being in the nature of civil commotion or political sabotage) and may attract the applicable remedies under the relevant project documents. Such remedies may include the entitlement of a project company or a contractor to issue a termination notice in respect of its obligations under the relevant project document.

Further, in recent years, there has been a substantial rise in the inflation rates in Pakistan. In May 2023, the inflation rate peaked at 37.97%[16], which has resulted in a substantial increase in the prices of commodities, raw materials, machinery and utilities such as electricity and natural gas. As a result, an increase in the construction and operating costs of projects and a reduction in the profit margin, may be experienced. However, since May 2023, there has been a decrease in the inflation rate to 28.34% in January 2024 and 23.1% in February 2024[17] which appears to be promising for the future outlook.

Further, in order to adhere to the requirements stipulated by the Financial Action Task Force, certain laws have been amended/enacted to comply with such requirements, including relating to anti-money laundering, countering terrorist financing, anti-bribery and trusts (as discussed hereinabove), leading to increased compliance by stakeholders of a project.

Footnote(s):

[15] Authorised Dealer means a person for the time being authorised to deal in foreign exchange under Section 3 of the Foreign Exchange Regulation Act, 1947. These are the scheduled banks listed in Appendix IV of the Foreign Exchange Manual (which may be accessed at https://www.sbp.org.pk/epd/2004/FE04_Appx1.pdf.)

[16] Source: Pakistan Bureau of Statistics. The statistics may be accessed at: https://tradingeconomics.com/pakistan/inflation-cpi#:~:text=Inflation%20Rate%20in%20Pakistan%20decreased,percent%20in%20February%20of%201959.

[17] Ibid.

9. Are any governmental / regulatory consents required and are any financing or project documents requirement to be filed with any authority in order to be admissible in evidence in a court of law, valid or enforceable?

The requirements to obtain governmental and regulatory consents largely depend on the industry sectors in which the project is being developed; notably however, the following approvals and consents are required and are considered by the stakeholders of a project:

Foreign Exchange Controls:

Foreign exchange policy and its operations in Pakistan, including the regulation of certain payments and dealings in foreign exchange, securities and the import/export of currency and bullion are formulated and regulated by the SBP in accordance with the provisions of the Foreign Exchange Regulation Act, 1947 (the "**FERA**") read with the Foreign Exchange Manual (the "**FEM**").

The FERA imposes restrictions on *inter alia*, the borrowing, buying, selling or lending to, or exchange with, any person not being an authorised dealer, any foreign exchange and the taking or sending of any security outside Pakistan as well as the issuance of securities to persons resident outside Pakistan and the making of any payment to or for the credit of any person resident outside Pakistan.

The FEM governs matters relating to, *inter alia*, borrowing from abroad, repatriation of dividends and disinvestment proceeds, commercial remittances, registration of loan agreements and repayment schedules thereto, securities, creation of certain security interests in favour of persons resident outside Pakistan[18] and guarantees and letters of credit. Depending on the nature of the transaction (and including as elaborated below), the special or general permission of the SBP is required in accordance with the terms and conditions set out under the FEM.

Under Paragraph 7 of Chapter XIX of the FEM, the SBP has granted general permission to companies registered under the Companies Act and independent power producers to raise private sector borrowings from abroad (PSBA) (which includes foreign currency loans from foreign lenders). Such loans can be raised for the purpose of project financing and for meeting the capitalized costs of the projects, for, *inter alia* meeting expenses relating to the establishment of new projects, import of plant and machinery, and procurement of technical expertise. Such loan agreements (as well as amendments thereto) are required to be registered by authorised dealers and in respect of PSBA for project financing, remittances of principal, interest and other fees against PSBA for project financing are allowed only after registration of the repayment schedule with the SBP.

Furthermore, the prior approval of the SBP is required for providing any guarantee, undertaking or opening of letters of credit or stand-by letters of credit (i) which may involve payment to a non-resident either in foreign currency or Pakistan Rupees or (ii) against overseas guarantees or collaterals lodged outside Pakistan.

Additionally, if any foreign currency amounts to be remitted from Pakistan in relation to a project do not fall within any general permission set out under the FEM, such amounts may fall within the purview of 'outward remittances' and accordingly, prior approval would have to be sought from the SBP through an authorised dealer by filing an application in the relevant form prescribed in the FEM, in order to remit such amounts.

Authorised dealers are permitted, without the prior approval of the SBP, to open with them foreign currency accounts of, *inter alios*, all foreign nationals (whether residing abroad or in Pakistan) and firms and companies established/incorporated and functioning in Pakistan (including those having foreign shareholdings, subject to the provisions of the FEM). There are restrictions on the amounts which may be deposited into such accounts, for example such accounts may not be fed with proceeds of securities issued or sold to non-residents. However, account-holders are permitted to deposit, *inter alia*, remittances received from abroad in such accounts. Accounts opened in accordance with the above regime are free from all foreign exchange restrictions and account holders have full freedom to operate their accounts to the extent of the balance available in such accounts (either for local payments in rupees or for remittance to any country and for any purpose or for withdrawals in foreign currency notes and traveller's cheques).

Moreover, firms and companies raising foreign equity and foreign currency loans may be allowed by authorised dealers to open special foreign currency accounts for the receipt and retention of foreign funds. The funds available in special foreign currency accounts may be used by the account holders for making only those payments otherwise permissible under the FEM and which are related to the business of the account holder.

With specific reference to private power projects, authorised dealers are permitted to open special foreign currency accounts for such projects in Pakistan as per the implementation agreements entered into with the Private Power and Infrastructure Board ("**PPIB**"), Government of Pakistan. These accounts may be maintained for, among others: (i) deposit of foreign equity and foreign currency loans; (ii) payment of insurance or reinsurance premia and for receiving insurance or reinsurance claims; (iii) foreign currency costs for operation of the project; (iv) debt servicing; and (v) receiving of remittance of dividends as and when declared and paid by the project company.

Environmental Approvals:

Project companies may also be required to seek environmental approvals in respect of the relevant project from the relevant authority (depending on the province in which such project is located). For a detailed write up in relation to environmental approvals, please refer to Question 11.

Sector-specific Approvals:

The nature of the project may necessitate the procurement of various approvals from regulatory authorities. As an example, project companies intending to undertake construction and operation of oil and gas storage facilities or pipelines may require the relevant licence from the Oil and Gas Regulatory Authority.

Additionally, the Electricity Act, 1910, Petroleum Act, 1934 and the Pakistan Engineering Council Act, 1976 are important legislation in the context of project finance transactions. Project companies are required to procure licences, approvals and/or exemptions thereunder for, *inter alia*, the storage of petroleum, supply of electricity and contractors and operators.

Security Documents:

In order to be enforceable, security interests (including the relevant security documents) are required to be perfected by registration with the SECP or the Secured Transactions Registry, as the case may be. Please refer to the response to Question 5 for a detailed analysis in relation to the perfection of security interests.

Registration:

Under Section 17 of the Registration Act, a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish (whether in present or in future) any right, title or interest (whether vested or contingent) of a value of PKR 100 or more in immovable property is required to be registered with the relevant registrar or sub-registrar of the concerned district. Therefore, any transaction document which creates, declares, assigns, limits or extinguishes any right, title or interest in immovable property should be registered with the relevant registrar or sub-registrar of the concerned district. Failure to do so shall prevent such instrument from operating to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property or conferring any power to adopt, subject to the exceptions set out in the Registration Act.

Stamping and Witnessing:

Under the Constitution, stamp duty is a provincial subject and falls within the legislative domain of the relevant Provincial Assemblies. While the rates of stamp duty vary between the territories of Pakistan, the basic legislation is largely similar, if not identical. The relevant nexus for the attraction of stamp duty under Pakistan law is the place of execution of an instrument, rather than the jurisdiction of incorporation of a party to an agreement.

Pursuant to the Stamp Act, 1899 (the "**Stamp Act**"), stamp duty is payable on:

i. every instrument mentioned in that Schedule[19] which, not having been previously executed by any person, is executed in Pakistan on or after the first day of July, 1899;
ii. every bill of exchange payable otherwise than on demand or promissory note drawn or made out of Pakistan on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in Pakistan; and
iii. every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of Pakistan on or after that day, relates to any property situate, or to any matter or thing done or to be done, in Pakistan and is received in Pakistan.

Pursuant to Section 17 of the Stamp Act, all instruments chargeable with duty (including relevant transaction documents executed for the purposes of project finance transactions) and executed by any person in Pakistan shall be stamped before or at the time of execution. Every instrument chargeable with duty and executed outside Pakistan is required to be stamped within three months after it has been first received in Pakistan as required by Section 18 of the Stamp Act. An original instrument is liable to be stamped and not its copies.

Not stamping a document which is required by law to be stamped could result in it being impounded under the Stamp Act, which would mean that the document cannot be admitted in evidence for any purpose. Execution of a document prior to stamping would render the document liable to a penalty, being the unpaid applicable stamp duty (at the time of execution) plus ten times the applicable stamp duty. Further, pursuant to Section 35 of the Stamp Act, a document which is not stamped may not be admitted in evidence for any purpose unless the stamp duty and penalty have been paid.

Pursuant to Article 17(2) of the Qanun e Shahadat Order, 1984 (the "**QSO**") unless otherwise provided in any law relating to the enforcement of Hudood or any other special law in matters pertaining to financial or future obligations, if reduced to writing, an instrument shall be attested by two men, or by one man and two women. Therefore, all documents pertaining to financial or future obligations are required to be witnessed in the manner set out in Article 17(2) of the QSO so that they may be admissible in evidence in accordance with the QSO. If not so witnessed the instrument is not admissible in evidence in proceedings in Pakistan.

In the context of the above, it is pertinent to note that Section 18(4) of the FIO, provides that notwithstanding anything contained in, *inter alia*, any other law, the Banking Court under the FIO shall not refuse to accept in evidence any document, creating or purporting to create or indicating the creation of a mortgage, charge, pledge or hypothecation in relation to any property or assumption of an obligation by a customer, guarantor, mortgagor or otherwise merely because it is not stamped or is not registered as required by law or is not attested or witnessed as required by Article 17 of the QSO and no such document shall be impoundable by the Banking Court or any other Court or authority.

Footnote(s):

[18] "Person resident outside Pakistan" is defined in Paragraph 1 of Chapter XX of the FEM as "*for the purposes of Section 13 of the [FERA], the term "a person resident outside Pakistan" covers a foreign national including a foreign national of Indo-Pakistan origin as also a Pakistani holding dual nationality for the time being resident in Pakistan and a company registered in Pakistan which is controlled directly or indirectly by a person resident outside Pakistan."*

[19] Stamp duty chargeable in respect of various types of instruments vary from province to province and each province has its own schedule to the Stamp Act which is amended from time to time. Therefore, the stamp duty payable on any instrument will depend on the relevant province of Pakistan in which it is executed.

10. Are there are any specific foreign exchange, royalties, export restrictions,

subsidies, foreign investment, that are relevant for project financings (particularly in the natural resources sectors)?

Please see the response in Question 9 for an overview in relation to the notable foreign exchange controls and approvals that are relevant in the context of project finance transactions.

Additionally, the Foreign Private Investment (Promotion and Protection) Act, 1976 and the Protection of Economic Reforms Act, 1992, contain provisions pertaining generally to the promotion of foreign direct investment in Pakistan, and encourage foreign investment by allowing *inter alia*, concessions in relation to taxation to foreign investors and outline a framework to protect economic policies. The Foreign Investment (Promotion and Protection) Act, 2022 (the "**Foreign Investment Act**") also provides for investment incentives[20] to qualified investments (i.e., those investments, sectors, industries or projects set out in the First Schedule of the aforesaid Act, which currently includes the Reko Diq project in the province of Balochistan) as well as the investors[21] who have made the investment[22] in such qualified investment by the Government of Pakistan. The Government of Pakistan is also empowered to notify additional investments, sectors, industries or projects as qualified investments through a notification in the official Gazette of Pakistan however, it may not amend the First Schedule of the Foreign Investment Act to remove a qualified investment. The investment incentives that may be granted to investors or in respect of qualified investments include exemption or concession from some or all taxes under the Income Tax Ordinance, 2001 (the "**ITO**"), sales tax under the Sales Tax Act, 1990, customs duty under the Customs Act, 1969 and the application of federal or provincial labour and social welfare laws.

Further, pursuant to Section 3(2) of the Import and Export (Control) Act, 1950, no person shall import goods of a specified description (as set out in the prevailing import policy order as notified by the Federal Government) without obtaining a licence from the Chief Controller[23].

Footnote(s):

[20] Investment incentives is defined in the Foreign Investment Act to include, *inter alia*, an exemption (wholly or partially) from any Federal or provincial or local charges, cesses, duties, fees, levies, taxes or tolls payable under any law, an exemption from the operation or application of any provision of any law, regulation, rule, ordinance or other similar instrument, a licence or lease or permit or permission granted or conferred by a concerned government and licences, approvals, no objections, consents, permissions or permits for the remittance to or repatriation of foreign exchange from or into Pakistan.

[21] Investor is defined in the Foreign Investment Act as (i) a foreign natural person or enterprise who invests or has invested in Pakistan, including (1) foreign enterprises and any of their respective direct and indirect agents, contractors, successors, assigns, lenders, directors, employees, servants and service providers, (2) direct and indirect shareholders of an investor referred to in clause (i) and (3) any Pakistani subsidiary that is directly or indirectly owned or controlled by an investor referred to in clause (i), or (ii) any other enterprise established under the laws of Pakistan who invests in Pakistan that is chosen, approved and duly notified by the Government of Pakistan as an investor under the Foreign Investment Act.

[22] Investment is defined in the Foreign Investment Act as any asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and may take, *inter alia*, the following forms: (i) shares, stock, and other forms of equity participation in an enterprise, (ii) futures, options and other derivatives, (iii) intellectual property rights, (iv) exemptions, leases, licences, authorisations, permits, permissions, and similar rights conferred by a concerned Government (including mining leases, exploration licences, surface rights and water rights), (v) insurance policies, and (vi) rights under contracts.

[23] Chief Controller is defined in the Import and Export (Control) Act, 1950 as "*the officer appointed by the* [Federal Government] *to perform the duties of Chief Controller of Imports and Exports under* [the Import and Export (Control) Act, 1950]".

11. Please set out any specific environmental, social and governance issues that are relevant. For example, are project companies subject to certain ESG laws, reporting requirements or regulations?

In Pakistan, the subject of environmental protection is devolved to the provinces; as such, each province in Pakistan has enacted its own environmental protection laws applicable thereto; i.e., the Sindh Environment Protection Act, 2014, the Punjab Environmental Protection Act, 1997, the Balochistan Environment Protection Act, 2012, the Khyber Pakhtunkhwa

Environmental Protection Act, 2014 and the rules and regulations thereunder, and in Islamabad Capital Territory (where federal law continues to apply), the Pakistan Environmental Protection Act, 1997 (the "**Environment Protection Laws**"). The Environment Protection Laws provide for the protection, conservation, rehabilitation and improvement of the environment, the prevention and control of pollution, and the promotion of sustainable development. Further, no person[24] is permitted to discharge or emit or allow the discharge or emission of any effluent, waste, pollutant, noise or any other matter that may cause or is likely to cause pollution or adverse environmental effects[25], or import or otherwise handle hazardous substances[26] in an amount, concentration or level which is in excess to that specified in the environmental quality standards of each province in Pakistan.

Further the Environment Protection Laws provide that no proponent[27] of a project[28] shall commence construction or operation unless it has filed with the relevant environment protection agency (established under the respective Environment Protection Law), an initial environmental examination (an "**IEE**") or an environmental impact assessment (an "**EIA**") and has obtained the approval from the aforesaid agency in respect thereof.

Accordingly, a project company will be required to prepare and submit an IEE or an EIA (depending on the category the project falls into, as listed in the schedules to each of the IEE and EIA regulations/rules promulgated by the relevant provinces). Projects which fall in the ambit of the Environmental Protection Laws (necessitating requisite approvals) include projects relating to agriculture, livestock and fisheries, energy (including hydro-power, thermal, coal, solar, wind, and renewable energy projects), manufacturing and processing (including *inter alia* food items and materials and fibers), mining and mineral processing, water supply and treatment, waste disposal and water supply scheme and treatment plans, transport and urban development and tourism.

Footnote(s):

[24] Person is defined in the Environment Protection Laws as "*any natural person or legal entity and includes an individual, firm, association, partnership, society, group, company, corporation, co-operative society, Government Agency, non-governmental organization, community-based organization, village organization, local council or local authority and, in the case of a vessel, the master or other person having for the time being the charge or control of the vessel*."

[25] The definition of "*adverse environmental effect*" varies slightly across the Environment Protection Laws but generally means the impairment of, or damage to, the environment and includes (a) impairment of, or damage to, human health and safety or to biodiversity or property; (b) pollution to physical, biological, social, economic environment or to geological, hydrological resources or various land forms; (c) damage to public comfort, aesthetic conditions, ecological balance and meteorological conditions, (d) damage to aquifers, vegetal canopy, cultural heritage or archaeological sites, and (e) any adverse environmental effect as may be specified in the rules or regulations made by the respective provinces.

[26] Hazardous substances are those prescribed as such in the relevant provincial hazardous substances rules.

[27] Proponent is defined in the Environment Protection Laws to mean "*the person who proposes or intends to undertake a project*."

[28] Project is defined in the Environment Protection Laws to mean "*any activity, plan, scheme, proposal or undertaking involving any change in the environment and includes— (a) construction or use of buildings or other works; (b) construction or use of roads or other transport systems; (c) construction or operation of factories or other installations; (d) mineral prospecting, mining, quarrying, stone-crushing, drilling and the like; (e) any change of land use or water use; and (f) alteration, expansion, repair, decommissioning or abandonment of existing buildings or other works, roads or other transport systems, factories or other installations*."

12. Has any public-private partnership models or laws been enacted in the jurisdiction, and if so, are they specific to certain industry sectors?

PPPs undertaken in the areas which fall within the Federal Legislative List[29] of the Constitution are governed by federal legislation i.e., the Public Private Partnership Authority Act, 2016 and the rules/regulations thereunder, whereas PPPs intended to be undertaken in areas that do not fall within the Federal Legislative List of the Constitution are governed by the relevant provincial laws (i.e., the Punjab Public-Private Partnership Act, 2019; the Sindh Public-Private Partnership Act, 2010; the Balochistan Public Private Partnership Act, 2021; and the Khyber Pakhtunkhwa Public Private Partnership Act, 2020) and the rules/regulations thereunder.

Each of the aforementioned laws are not industry specific and instead govern the creation, facilitation and regulation of PPPs in each province and on a federal level, as the case may be.

Footnote(s):

[29] The Federal Legislative list is set out in the Fourth Schedule of the Constitution.

13. Will foreign judgments, arbitration awards and contractual agreements to arbitrate be upheld?

Pursuant to Section 44A of the Code of Civil Procedure, 1908, any money judgment obtained in the High Court of Justice in England (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) will be recognized and enforced, as if it were a decree of the District Court in Pakistan, without re-examination of issues of fact, except as provided in Section 13 of the Code of Civil Procedure, 1908.

In relation to foreign judgments, Section 13 of the Code of Civil Procedure, 1908, provides that any foreign judgment (i.e., a judgment of a court situated beyond the limits of Pakistan which has no authority in Pakistan and is not established or continued by the Government of Pakistan) is conclusive as to any matter thereby adjudicated between the parties to such judgment (and as such, would be deemed to be upheld in Pakistan) except where:

i. it has not been pronounced by a Court of competent jurisdiction;
ii. it has not been given on the merits of the case;
iii. it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Pakistan where such law is applicable;
iv. the proceedings in which the judgment was obtained are opposed to natural justice;
v. it has been obtained by fraud; and
vi. it sustains a claim founded on a breach of any law in force in Pakistan.

As regards provisions of foreign arbitration contained in contractual agreements and the enforcement of arbitral awards, Pakistan is a signatory to and has ratified the New York Convention on the Recognition of Foreign Arbitral Awards, 1958 (the "**New York Convention**"). As required by Pakistan's constitutional laws and norms, the New York Convention has been incorporated into domestic law through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("**2011 Act**") and which provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the New York Convention and all matters connected therewith. Pursuant to the 2011 Act, a foreign arbitral award will be recognised and enforceable in Pakistan, subject to the qualifications set out in Article V of the New York Convention. Pursuant to Section 4 of the aforesaid Act, a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court to stay the proceedings in so far as they concern that matter; the court shall refer the parties to arbitration as such, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

In a recent, seminal judgement passed by the Supreme Court of Pakistan in *Taisei Corporation vs. A.M. Construction Company (Private) Limited*, it was held that an arbitral award made in a Contracting State or another State notified by the Federal Government qualifies as a "foreign arbitral award" for the purposes of the 2011 Act. Further, the applicability of the 2011 Act is determined solely based on the location of the arbitration regardless of the governing laws of the contract, the arbitration agreement, or the nationality of the parties involved. Therefore, an arbitral award passed in a Contracting State on the basis of an arbitral agreement governed by the laws of Pakistan would be considered a "foreign arbitral award" for the purposes of the 2011 Act and recognised and enforced in Pakistan.

Further, the Supreme Court of Pakistan also considered the retrospectivity of the 2011 Act i.e., whether arbitration proceedings commenced prior to the enactment of the 2011 Act could be challenged under the 2011 Act or whether its validity would instead be challenged under the Arbitration Act, 1940 (the "**1940 Act**"). The Supreme Court of Pakistan found that while the Eighteenth Amendment to the Constitution transferred the subject of arbitration to provincial legislatures (such that the 1940 Act would apply given its provincial application), the subject of international arbitration remained within the legislative domain of the Federal legislature. Referring to the UNCITRAL Model Law on International Commercial Arbitration, the Court highlighted that international arbitration is primarily determined by factors such as the location of parties' places of business and the place of arbitration, rather than the governing law of the contract or arbitration agreement. Therefore, an arbitral award passed in Singapore (notwithstanding that the arbitral agreement was governed by Pakistan law) would be considered "international arbitration". Consequently, the Court concluded that the 1940 Act, being a provincial law, cannot address matters pertaining to international arbitration, including any awards made therein and the remedies available under the 1940 Act for international arbitration would not persist after the Eighteenth Amendment to the Constitution and the enactment of the 2011 Act by the Federal Legislature.

14. Is submission to a foreign jurisdiction and waiver of immunity effective and enforceable?

Contractual arrangements that provide for submission to the courts of a foreign jurisdiction are effective and enforceable in Pakistan. Further, an agreement to submit to the jurisdiction of a foreign court may stipulate that the parties shall submit to the non-exclusive jurisdiction of a foreign court or alternatively, that the parties shall exclusively submit to the jurisdiction of a foreign court. Both types of agreements are enforceable in the courts of Pakistan.

With respect to waivers of immunity by private, corporate entities or individuals pursuant to contractual arrangements, such waivers are considered to be valid and enforceable under the laws of Pakistan.

15. Please identify what you consider to be (a) the key current issues for project financing in your jurisdiction; and (b) any emerging trends or topics which should be considered or focused on by project financing stakeholders.

In 2022, the Federal Shariat Court passed a judgment (the "**FSC Judgment**") whereby *inter alia*, the term 'interest' in all laws of Pakistan has been directed to be deleted. It has been held that *inter alia*, "any increase on the due payment due to delay" shall constitute riba[30] and is therefore absolutely prohibited in all its forms and manifestations. Furthermore, the FSC Judgment specifically holds that charging of any amount in any manner over the principal amount of a loan or debt shall constitute 'riba' and, is therefore completely prohibited according to the injunctions of Islam. Notwithstanding the foregoing, in accordance with Article 203D(2)(b) of the Constitution, the FSC Judgment will not take effect prior to the expiry of the period within which an appeal therefrom may be preferred to the Shariat Appellate Bench of the Supreme Court of Pakistan or where an appeal has been so preferred, before the disposal thereof. Pursuant to Article 203F (1) of the Constitution, any party to any proceedings before the Federal Shariat Court that is aggrieved by its final decision in such proceedings may appeal the Federal Shariat Court's decision within sixty days of such decision; provided that an appeal on behalf of the Federation or a province may be preferred within six months of such decision.

In this regard, appeals have been filed against the FSC Judgment by commercial banks in Pakistan, which remain pending before the Shariat Appellate Bench of the Supreme Court of Pakistan.

In light of the foregoing, any provision(s) in contractual arrangements entered into by foreign financiers, relating to their right to receive interest, including interest on late payments or liquidated damages or any right, on the basis of which there is an increase in the principal payment, may be rendered void, unenforceable and illegal from the date that the FSC Judgment takes effect, and if so held by the Shariat Appellate Bench of the Supreme Court of Pakistan.

Separately, in 2020, the law on trusts devolved to the legislative purview of the provinces in Pakistan and is no longer a federal matter. This has resulted in the repeal of the Trusts Act, 1882 and the promulgation of the Provincial Trust Laws. Please see the discussion in the response to Question 7 above pertaining to trusts.

In relation to other practical restrictions faced in project finance transactions in Pakistan, while Pakistan encourages and promotes free trade in the region and offers and implements various incentives/benefits for foreign investment, certain barriers (primarily in the form of regulatory approvals and bureaucratic practices) still exist, which may prove to be laborious for investment by foreign entities. For example, in certain circumstances, the land acquisition process and subsequent creation of security thereupon can be a lengthy and time-consuming process depending upon the applicable law pursuant to which the land is acquired and the type of security to be created thereon; further, relevant approvals are not always forthcoming and liaising and coordinating with different departments of the relevant provincial government can be inefficient.

Another challenge faced in project financing may arise when issuing shares to non-residents, or when purchasing shares in a company incorporated in Pakistan; it would be in the interest of foreign investors to ensure that the shares of such company are registered on a repatriable basis with the SBP, to ensure that dividends from such shares and divestment proceeds can be remitted outside Pakistan. Whilst the process to apply for the requisite approval is fairly straightforward (such that it should be applied for within sixty days from the issue/transfer of shares to such foreign shareholders), the response from the SBP is not always immediate and may result in transactional delays.

Further, with the increase in power generation and on account of Pakistan's growing circular debt, the Government of Pakistan (through the power purchaser) has been unable to duly make payments to independent power producers in accordance with the power purchase agreement executed between such independent power producers and the power purchaser.

Moreover, Pakistani companies that have appointed foreign directors, officers and shareholders (individual and body corporate(s)) are required to furnish certain information to the SECP (for onwards submissions to the Ministry of Interior, Government of Pakistan) for security clearance. This includes the submission of an undertaking confirming that if such clearance is not received, such directors and/or officers shall resign/be replaced, and in the case of shareholders, that they will transfer their respective shares to any other person. Pakistan law also does not permit persons of Indian or Israeli origin to hold any office (including as directors or shareholders) in companies incorporated in Pakistan without the prior written approval of the Ministry of Interior, Government of Pakistan.

In terms of emerging topics, Pakistan is in the process of implementing a competitive electricity marketplace as contemplated by NEPRA through the introduction of the competitive trading bilateral contracts market ("**CTBCM**"). To this effect, Section 23A and 23B of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 provide that a Market Operator (being CPPA-G pursuant to the market operator licence granted to it dated 31 May 2022) shall be responsible for *inter alia* the implementation of a commercial code, regulating the operations envisaged under such code, standards of practice and the business conduct of market participants and their representatives in accordance with the commercial code. Accordingly, a commercial code was promulgated by CPPA-G (and approved by NEPRA) as appended to the market operator licence granted to CPPA-G (the "**Commercial Code**").

Pursuant to the Commercial Code, a "Commercial Market Operation Date" has been stipulated, as being the date set by NEPRA for commencement of commercial operations of the CTBCM. The Commercial Market Operation Date shall commence once Sections 23A and 23B as aforesaid are brought into force; the aforementioned provisions were required to be in force as of 2 May 2023. In this regard, certain practical steps have been taken, such that a test run of all items set out in the Commercial Code in order to check the effectiveness and adequacy of the Commercial Code as well as the readiness of CPPA-G in implanting the competitive electricity market, has been carried out. Presently, despite the Commercial Market Operations Date having commenced, the quantum for payment of the transmission companies has not yet been determined, and hence the CTBCM has not been practically implemented. Notwithstanding the aforesaid, the relevant legislation has become effective and accordingly, applicable licences and enrolment as a market participant is mandatory if power generation, transmission and distribution companies intend to participate in the CTBCM.

Footnote(s):

[30] Riba is a concept in Islamic banking that refers to charged interest. It has also been referred to as usury, or the charging of unreasonably high-interest rates.

16. Please identify in your jurisdiction what key legislation or regulations have been implemented (or will / plan to be) for projects in connection with the energy transition?

Projects encouraging and involved in the energy transition are significant for Pakistan as each of such projects are anticipated to go a long way towards solving the energy crisis in Pakistan, promote employment generation, and allied developments resulting in commercial and other economic activities in the regions in Pakistan where such projects are being developed. Accordingly, Pakistan has implemented a comprehensive regulatory regime and established relevant authorities and statutory entities in connection with energy transition, such as the PPIB, a statutory organisation established under the Private Power and Infrastructure Board Act, 2012 to facilitate public sector power and related IPP infrastructure projects. Additionally, the Alternative Energy Development Board (created to facilitate the development and generation of alternative or renewable energy in order to achieve sustainable economic growth through diversified energy generation) was merged with PPIB on 31 May 2023 to establish a synergy in the power sector.

NEPRA has also been established pursuant to the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 to regulate the generation, transmission and distribution of electric power and matters connected therewith. NEPRA periodically determines tariffs for renewable energy projects, based on factors such as technology, project size, and location to provide financial incentives for renewable energy developers. Further, NEPRA has also introduced the National Electric Power Regulatory Authority (Alternative & Renewable Energy) Distributed Generation and Net Metering Regulations, 2015 to facilitate the integration of distributed renewable energy systems, allowing consumers to offset their electricity bills with excess electricity generated from renewable sources resulting in consumers in Pakistan installing solar panels in their residences to sell such excess electricity to the relevant distribution company. NEPRA has also approved tariffs for certain periods and categories of customers of the relevant electricity distribution company.

The Alternative & Renewable Energy Policy, 2019 was also notified by the Ministry of Energy (Power Division), Government of Pakistan on 2 October 2020 which *inter alia* superseded the Policy for Development of Renewable Energy for Power Generation of 2006 and set out the targets/objectives for alternative and renewable energy in Pakistan and covers alterative and renewable energy technology including but not limited to biogas, using organic material, energy from waste, ocean/tidal wave energy, solar (PV or thermal, or any technology that uses heat and/or light of the sun to make electricity), and wind. It also introduced incentives for projects for electricity generation using alternative and renewable energy technology such as (i) exemption from corporate income tax, (ii) exemption from import duties, (iii) repatriation of dividends and disinvestment proceeds (subject to registration with the SBP), (iv) permission for one hundred percent foreign equity, (v) permission in relation to foreign currency accounts, (vi) protection against changes in law, (vii) robust market-tested contractual framework, (viii) protection against expropriation, (ix) international dispute resolution, and (x) availability of project land by the relevant provinces in Pakistan.

Pakistan has also received considerable foreign investor interest, in particular, through the China-Pakistan Economic Corridor by entry into the CPEC Agreement, that has brought in significant project funding by Chinese banks and financial institutions in renewable energy projects.

Please also see our response to Question 15 above regarding CTBCM.

17. Please identify if there are any material tax considerations which need to be taken into account for a project financing in your jurisdiction, and if so, how such tax issues can be mitigated.

Customs duties and import taxes are payable on imported goods in Pakistan, therefore projects requiring the importation of equipment or materials may incur customs duties, which can impact project costs; however, for certain projects, reduced customs duty is payable, as provided for in the Customs Act, 1969, as an incentive to develop such projects.

Additionally, certain taxes under the ITO are applicable to power generation companies in Pakistan, such as, pursuant to Section 113 of the ITO resident companies are subject to minimum tax on income. Notwithstanding the aforesaid, Clause 11A, Part IV of the Second Schedule of the ITO provides that companies that qualify for an exemption under Clause 132 of Part I of the Second Schedule of the ITO in respect of receipts of sale of electricity are exempt from payment of minimum tax liability. Similarly, the Finance Act, 2021 introduced certain amendments to the ITO whereby Section 65F thereof now provides that subject to conditions, a one hundred percent tax credit is available to certain persons (which include persons engaged in coal mining projects in the province of Sindh supplying coal exclusively to power generation projects). Clause 132 of Part I of the Second Schedule of the ITO provides that profits and gains derived by a taxpayer from an electric power generation project set up in Pakistan on or after 1 July 1988 shall be exempt from income tax, subject to the conditions and to the extent specified in the ITO. In the event the foregoing conditions are not met such that a company would not qualify for the exemptions then it would be subject to taxation under applicable law. Please also see the discussion in relation to the Foreign Investment Act in Question 10.

With reference to stamp duty please see the discussion in Question 9 above.

18. What types of funding structures (e.g. debt, equity or alternative financing) are typical for project financing in your jurisdiction. For example, are project bond issuances, Islamic finance and – in the context of mining deals – streams or royalties, seen as attractive (and common) options for stakeholders?

In Pakistan, debt, equity, and alternative financing structures (including Islamic financing structures such as Musharaka and Ijara) are typically used in project financing transactions involving both local and foreign financiers. We have not come across mining deals where streams or royalties are seen as an attractive option for project financing.

19. Please explain if there are any regional development banks or export credit agencies, and if so, what is their role in project financing in your jurisdiction and beyond.

As Pakistan operates in the South Asian region, regional development financial institutions such as Asian Development Bank have been involved in financing various infrastructure and energy projects in the country. Further, it is common for foreign commercial banks and financial institutions to provide financing to local project companies that are seeking to construct, develop and operate energy projects in Pakistan. Accordingly, most project lending is carried out by such development banks and export credit agencies seeking to develop projects in Pakistan and/or a consortium of local banks and/or both. International development banks such as the International Finance Corporation which is specifically focused on supporting private sector development in Pakistan also play a crucial role in project financing in Pakistan through financing.

20. Please explain if there are any important insurance law principles or considerations in connection with any project financing in your jurisdiction.

Insurance business in Pakistan is regulated pursuant to the Insurance Ordinance, 2000 to ensure the protection of the interests of insurance policy holders and to promote the sound development of the insurance industry and for matters connected therewith and incidental thereto. As per Rule 48 of the Insurance Rules, 2017, read with Section 165 of the Insurance Ordinance, 2000, no person shall insure outside Pakistan any risk or part thereof in respect of any property or interest which is located in Pakistan at the time the insurance is affected. The implication of the specific wording of the statute is that in the case of an ambulatory chattel, which is physically located outside Pakistan at the time the insurance is affected, the insurance need not be affected with a Pakistani insurer. The Federal Government may grant an exemption to the aforesaid where (a) any risk cannot be insured suitably in Pakistan; or (b) there are reasons of exceptional nature for granting an exemption.

Additionally, Rule 18 of the Insurance Rules, 2017 provides that any reinsurance by a local insurer outside Pakistan requires approval from the SECP. Further, Section 10 of the FERA prohibits a person who has a right to receive any foreign exchange or to receive from any person resident outside Pakistan a payment in rupees from any act or omission that may result in the whole or part of that payment in foreign exchange to be delayed or cease to be receivable by them unless such person has obtained the general or special permission of the SBP. In the event the local insurer is required to reinsure outside Pakistan, authorisation from the SBP may be required to approve in advance, the payment of reinsurance proceeds directly to a non-resident loss payee in a claim scenario (i.e., SBP authorisation for the insurance cut-through clause or to a reinsurance assignment), on the basis of the aforesaid foreign exchange principle.

Moreover, an assignment of insurances and reinsurances by a local insurer would be required to be perfected by registration with the SECP in accordance with Pakistan law.

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