



ICLG

The International Comparative Legal Guide to:

Project Finance 2018

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A practical cross-border insight into project finance

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Taiwan

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

In Taiwan, project finance primarily applies to infrastructure projects developed by the private sector or through a public-private partnership. The major legislation that governs private participation in infrastructure projects is the Act for Promotion of Private Participation in Infrastructure Projects (the “PPP Act”), last amended in 2015. The PPP Act provides 14 categories of public works for private sector participation, including, among others: transportation facilities; sewerage treatment facilities; water supply, flood control and drainage facilities; hygienic and medical facilities; recreation/tourism facilities; power supply facilities; sports facilities; industrial, commercial, technical and agricultural facilities; and government office buildings.

A project company under the PPP Act may apply for mid- and long-term loans from domestic banks at preferential interest rates. Also, foreign banks may participate in the syndication of loans. In addition, there is further deregulation regarding the issuing of new shares and corporate bonds to facilitate the project company’s financing.

Among the 14 categories, transportation facilities have the lion’s share of the project finance projects. However, green energy has been the industry in focus for the government. In recent years, we have seen some small project financings for independent power plants and wind farms.

In 2016, the Equator Principles were adopted for the first time in Taiwan by a bank in their project finance for a wind farm.

In order to stimulate economic growth and drive industrial transformation, the Taiwanese government approved the Special Act for Forward-Looking Infrastructure in July 2017. The Forward-looking Infrastructure Development Program (2017–2024) will expand investments in major infrastructure (including railways, aquatic environments, green energy, digital technology, and urban and rural facilities). The government investment in this large-scale infrastructure programme will total NT\$882.49 billion (US\$28.56 billion), and is expected to spur public and private enterprise investment of NT\$1.78 trillion (US\$57.53 billion). In addition, the Ministry of Economic Affairs (“MOEA”)’s InvestTaiwan Service Center will provide every project with one-stop services by dedicated staff to help resolve problems to rally investments for Taiwan.

The Financial Supervisory Commission (“FSC”) amended the Enforcement Rules of the Financial Asset Securitization Act in

September 2016 and allows future creditor claims to be the assets that can be securitised in the case of a private participation in the construction and operation of a new infrastructure in accordance with the Act for Promotion of Private Participation in Infrastructure Projects. Therefore, the rights over income derived from the operation of the infrastructure project during its operation period, obtained by the private institution according to the concession agreement, can be securitised. The purpose of the amendment is to attract long-term private capital into infrastructure investment.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most significant project financing transaction in Taiwan in recent years is the Taiwan High Speed Rail project (a NT\$323.3 billion (US\$10.5 billion) multi-tranche syndicated loan) in 2000 which was restructured to NT\$381.06 billion (US\$12.7 billion) in 2009. Project financing was also adopted for other large-scale projects, such as: Taipei 101 Tower (NT\$35.3 billion (US\$1.2 billion)), which opened in 2004; Taipei Port Container Terminal (NT\$16 billion (US\$533 million)), which began operation in 2009; Kaohsiung Kuo Ming Container Terminal (NT\$16.2 billion (US\$540 million)), which began operation in 2011; and Taipei Dome Complex (NT\$15.4 billion (US\$513 million)), which consists of a main dome building used as a baseball ground and for other sporting and cultural activities (construction commenced in 2012 but was suspended in 2016) and shopping malls, cinemas and hotels nearby (construction of the nearby buildings has not yet commenced). For green energy which is also a hot topic in recent years in project financing, the significant project financings that are concluded include Formosa 1 Wind Power project (a NT\$2.5 billion (US\$83 million) syndicated loan) in 2016.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

As a general rule, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement where such specific asset, such as a floating charge, is not identified, is not enforceable under Taiwan law. In addition, different types of assets may be subject to different requirements, such as registration or filing with the competent authorities, on the perfection of the

security. Such requirements are discussed briefly in our answers to questions 2.2 to 2.5.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. In order to create a valid mortgage over the land, buildings and plants, the mortgagor and the mortgagee should enter into a written agreement, and a registration with the competent authority is required.

As for machinery and equipment, the security to be created may be a pledge or a chattel mortgage. The machinery and equipment on which a chattel mortgage can be created are subject to the list promulgated by the authority. Both security interests (pledge and chattel mortgage) give the security interest holder first priority over the machinery and equipment. To create a pledge, the pledgor and the pledgee have to enter into a written agreement and the pledgor should deliver the possession of the machinery and equipment to the pledgee, but registration with the competent authority is not required. To create a chattel mortgage, the mortgagor need not deliver the possession thereof to the mortgagee; however, registration with the competent authority would be necessary in order for the mortgagee to claim the chattel mortgage against a *bona fide* third party.

For projects subject to the PPP Act, approval of the authority in charge of the PPP project is required before project assets are encumbered for the purpose of project finance.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

To create a pledge over receivables, the pledgee and the pledgor must enter into a written agreement and, with the pledgee's consent, the pledgor (or charger) is free to collect the receivables in the absence of a default. In addition, the receivables must be identifiable according to the content of the pledge agreement. Further, the debtor should be notified of the creation of the pledge in order for the pledgee to be able to claim the pledge against the debtor. The pledgor should provide the pledgee with documentary evidence of the receivables. Usually, the pledgor and the pledgee will, in the pledge agreement, require the debtor to remit the outstanding receivables to a bank account designated by the pledgee in the event that the debtor is informed of the pledgor's default.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. To create a pledge over cash deposits, the pledgee and the pledgor must enter into a written agreement. The pledge shall not become effective against the account bank taking the cash deposits unless the account bank is notified of the creation of the pledge. Nevertheless, please note that the concept of a floating charge is not recognised under Taiwan law. In other words, the pledge covers only the cash in the bank account when such pledge is created and notified to the account bank. The pledge will not cover the cash deposited in the bank account after the account bank is notified of the pledge. To deal with this issue, the pledgor, in practice, will be required to periodically confirm with the account bank the amount of cash in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes. According to the Company Act, a company should issue shares in certificated form if its issued capital reaches a certain amount specified by the competent authority. Currently, the threshold amount is NT\$500 million. In addition, a public company may issue shares in scripless form. To create a pledge over shares in certificated forms, a written agreement is required. The certificates of the pledged shares shall be duly endorsed and delivered by the pledgor to the pledgee. Furthermore, the company issuing the shares shall be notified of the creation of a pledge in order to register such pledge on the shareholders' roster. The creation of a pledge is valid between the pledgee and the pledgor when the certificates of the shares have been endorsed and delivered to the pledgee. However, the creation of the pledge cannot be claimed against the company unless the company is notified of the creation of the pledge.

To create a pledge over listed shares which are traded and transferred through the book-entry system of Taiwan Depository and Clearing Corporation ("TDCC"), the pledgor and the pledgee have to sign a form prescribed by the TDCC and have the pledge registered with the TDCC.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

No notarisation or stamp duty is required for the creation of security over different types of assets. Whether registration is required depends on the type of assets provided as security (please see the answers to questions 2.2 to 2.5).

The registration fee for creating a chattel mortgage over a movable asset is NT\$900. The registration fee for creating a mortgage over real property is equivalent to 1/1,000 of the total amount secured by the mortgage.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Regarding the registration fee, please refer to our answer to question 2.6. The authority in charge of the registration will only conduct a formality review and it is not expected that the registration will take a significant amount of time.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

In addition to the requirement of registration for certain types of security interests as mentioned above, generally the creation of the security interests does not require a regulatory or similar consent, unless the individual or private entity has made any contractual commitment with the government agencies. In Taiwan, facilities of public utilities such as pipelines are usually owned by the state or state-owned enterprises, and thus the chance of them being provided as security are remote.

A project company under the PPP Act shall not transfer, lease out, or create any encumbrance on, the concession rights obtained

under the concession agreement, nor shall it make such concession rights an object for enforcement in a civil action, unless otherwise declared by the authority in charge of the PPP project that such an act is necessary in accordance with relevant provisions under the PPP Act. According to a ruling issued by the competent authority in charge of the PPP Act, the concession rights refer to the rights to build and operate the infrastructure.

However, a project company may, with the prior consent of the authority in charge of the PPP project, transfer, lease out, or create any encumbrance on, any operating asset and/or equipment obtained from the building and/or the operation of infrastructure.

Any transfer, lease, or creation of any encumbrance in violation of any of the preceding two paragraphs shall be null and void.

It is worth noting that, according to the interpretation of the Ministry of Economic Affairs, a foreign company having no branch office in Taiwan is not allowed to be registered as a security interest holder. In local practice, the competent authorities will not permit such a foreign company to be registered as a mortgagee of real property or a chattel mortgagee of a movable asset.

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

As general practice for a syndicated loan, syndicated banks will appoint an agent bank to act for and on behalf of the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. In addition, there will be a clause in the syndicated loan agreement to the effect that the syndicated banks' claims against the borrower under the syndicated loan agreement are joint and several. Given this, the agent bank may claim the whole amount of the loan from the borrower and enforce the security and apply the proceeds from the security to the claims of all the lenders.

Nevertheless, under Taiwanese law, it is questionable whether or not a third party, who is not a creditor/lender, could validly hold the collateral as a trustee or a security agent for other creditors/lenders. Pursuant to the Civil Code, a mortgage/pledge would not be validly created in favour of the creditor/mortgagee/pledgee if there is no underlying credit owned by the mortgagee/pledgee against the debtor.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As advised in question 3.1 above, in practice, if the lenders' claims against the borrowers are joint and several, one of the lenders may be appointed as the agent bank by syndicated banks to act for and on behalf of all the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?

A secured creditor may exercise its rights over security through compulsory enforcement despite the ongoing bankruptcy proceeding or liquidation. The standard steps for initiating compulsory enforcement are: (1) filing a petition with the court for a writ of execution; (2) court officials seizing the security; and (3) the court holding an auction for the sale of the security and distributing the proceeds to the secured creditor. Unless other creditors have priority over the underlying security, the proceeds should be paid to the secured creditor first.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

The restrictions explained in question 4.1 above also apply to foreign investors and creditors in the event of foreclosure on the project company's operating assets or machinery or concession right.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

If the project company enters a bankruptcy proceeding, the security owned by the project company will become a part of the bankruptcy estate and all enforcement actions against the project company will be stayed and all unsecured creditors must follow the bankruptcy proceeding. A secured project lender has a preferential right to claim proceeds from the sale of the underlying security through the bankruptcy proceeding while it still retains the right to initiate a compulsory enforcement action during the bankruptcy proceeding. In addition, if the sale proceeds (from court auction through compulsory enforcement proceedings) are insufficient to repay the claims in full, it may participate in the bankruptcy proceeding to get additional distribution *pari passu* with the unsecured creditors.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

There are no preference periods with respect to the security. The bankruptcy administrator may, within six months of the bankruptcy adjudication, apply to the court for the invalidation of the following acts of the debtor: (1) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (2) repayment of the debts not yet due. In addition, the bankruptcy shall, within two years after declaration of the bankruptcy proceeding, file with the court to rescind the transaction which the bankrupt conducted with or without consideration before the bankruptcy proceeding if such transaction is deemed detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code.

As for preferential creditors' rights, below are certain examples:

- (i) land value incremental tax, land value tax and house tax levied on the sale of the real property which will rank prior to the mortgagee and the unsecured creditors;
- (ii) labour wages due and payable by the employer but overdue for a period of up to six months which will rank prior to unsecured creditors; and
- (iii) fees and debts incurred for the benefit of the bankruptcy estate which will rank prior to unsecured creditors.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The following may apply for bankruptcy adjudication: (1) natural persons; (2) juristic persons; and (3) partnerships and any other incorporated association with a representative or an administrator. An unincorporated association without a representative or administrator is excluded from a bankruptcy proceeding, and there is no special legislation applicable to such entity.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor and the project company may sign an agreement whereby the ownership of the mortgaged or pledged security will be transferred to the mortgagee or pledgee automatically when the project company defaults. However, in the case of a mortgaged security, such agreement to transfer cannot be enforced against a *bona fide* third party, unless the mortgage is registered with the competent authorities.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Taiwanese law provides for a reorganisation proceeding which is slightly similar to the "chapter 11 proceedings" used in the US if a company is in financial difficulties, ceases its business or is likely to cease operations but is able to be re-established. The company or its shareholder(s) or creditors meeting the qualification requirements provided under the Company Act may apply to the court for a reorganisation proceeding. A reorganisation plan, which normally contains a restructuring of the company's debts, will be prepared by the reorganisation administrators and should be agreed by the secured creditors' meeting, unsecured creditors' meeting and shareholders' meeting and then approved by the court. The shareholders' meeting will not have a voting right if the company does not have any net assets. The reorganisation plan approved by the court is binding on the company and all its creditors and shareholders.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

If a company is in financial difficulties and its assets are insufficient to repay its debts, directors are obligated to apply for reorganisation proceedings (if the company is still able to re-established) or bankruptcy proceedings instantly. Failure to do so would make directors subject to an administrative fine of NT\$20,000 to NT\$100,000 and would possibly entail personal liability for failure to perform their fiduciary duty.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Foreign investors who wish to make direct investments in a Taiwanese private company, regardless of the industry, are required to obtain prior approval from the Investment Commission of the Ministry of Economic Affairs ("IC"). In addition, Taiwan maintains a list of industries in which foreign investment is prohibited or restricted up to certain percentage (the "Negative List"). For investors from the People's Republic of China ("PRC"), only those industries that are announced in the "Positive List" by the government are opened for PRC investments. PRC investors are prohibited from investing in the industries which are not in the Positive List.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

None of the bilateral or multinational investment treaties signed by Taiwan provides any exemption from the restrictions stated in question 6.1 above.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Generally speaking, the Taiwanese government may expropriate land in accordance with the Land Expropriation Act, under which the owners of the expropriated land are entitled to reasonable compensation. Pursuant to the Statute for Investment by Foreign Nationals, the government may expropriate or acquire an invested company for national security and defence reasons by paying a reasonable compensation, provided that the total foreign investment in such invested company is less than 45% of the total capital amount of the invested company. If the total foreign investment in an invested company has never accounted for less than 45% of its total capital amount, the invested company will be immune from expropriation for 20 years from its establishment.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Various central and local government authorities are authorised to implement projects under the PPP Act. The Department of Promotion of Private Participation under the Ministry of Finance is responsible for administering the PPP Act and overseeing projects in the typical project sectors.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

In general, Taiwanese laws do not require that specific financing or

project documents be registered or filed with government authorities for validity (or enforceability); nor do the laws require that such documents be in conformity with specific formalities.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Foreign entities may not own forest land, land with mineral deposits, water sources or other pieces of land with similar resources. Other than the above, a foreign entity with a branch in Taiwan may acquire pieces of land in Taiwan, provided that its home country grants reciprocity to Taiwanese nationals and entities.

The extraction of natural resources requires a licence under the Mining Act and the operation of pipelines (for water, electricity, gas, and so on) also requires a licence under the Act of Regulating Private Utilities. A project company incorporated in Taiwan and awarded the concession right pursuant to the PPP Act should generally be eligible for such licence.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Under the Mining Act, only Taiwanese nationals, whether natural or judicial persons, can own mineral rights to extract natural resources. A mineral rights holder needs to pay the government mineral royalties and mineral rights fees twice a year. Mineral royalties are calculated at 2% to 50% of the price for petroleum and natural gas, 2% to 20% for metallic minerals, and 2% to 10% for other minerals, while the amount of mineral rights fees depends on the kind of minerals and the terms of the concession. Tariffs may be imposed on the export of natural gas and petroleum, but there is no tariff for exporting natural gas and petroleum to a WTO member or a country which has a free trade agreement with Taiwan.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Taiwan has foreign exchange restrictions and controls. Generally speaking, a Taiwanese corporate entity or individual has an annual foreign exchange quota of US\$50 million (or its equivalent) or US\$5 million (or its equivalent), respectively, and may therefore remit sums of foreign currency within the quota into or out of Taiwan without prior approval from the Central Bank of the Republic of China (Taiwan) (“CBC”). The CBC has the sole discretion to grant or withhold its approval on a case-by-case basis if the Taiwanese corporate entity’s or individual’s quota would be exceeded for such conversion. No government fee or tax is payable purely on foreign currency exchange transactions.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Any remittance and repatriation of funds to a party in another jurisdiction will be subject to foreign exchange control in Taiwan if it involves exchange settlements against New Taiwan dollars. For example, any remittance of over US\$1 million (or its equivalent) into or out of Taiwan by a company should be declared by the remitting company to the bank handling foreign exchange, with supporting documents.

As to tax treatment, the remittance of dividends to foreign shareholders is subject to withholding tax at 20% or lower if there is a tax treaty between Taiwan and that jurisdiction, while the remittance of loan payments is not taxable except for interest, which is subject to a 20% withholding tax or a lower tax treaty rate.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

A project company may open and maintain a foreign currency account as long as it provides all the documents required by the bank for opening an account. Taiwanese law does not prohibit a Taiwanese company from opening an offshore account in another jurisdiction.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Under the Company Act, a company should not pay dividends unless and until its losses have been covered, a legal reserve has been set aside, and there are surplus earnings left. If a company pays dividends in violation of the above requirements, creditors of the company may request nullification of the dividend distribution and demand compensation for losses incurred, and the statutory representative of the company will be sentenced to up to one year’s imprisonment. If the dividends are paid to a foreign parent company, they will be subject to withholding tax as explained in question 7.6 above.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Taiwan has various environmental, health and safety laws and related administrative regulations. The impact that they may have on a project financing depends on the nature and the contractual terms of the project. If a project involves substantial environmental issues or may create hazardous worksites or substances with a risk of significant liabilities (e.g., soil and groundwater pollution and clean-up), the lenders may be cautious about providing project finance or may demand the inclusion of repayment acceleration clauses in the loan agreement. The Environmental Protection Administration under the Executive Yuan is currently the highest governmental authority supervising all environment-related matters, and the local environmental protection bureau would oversee projects located in its jurisdiction.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

As long as over 50% of a company is owned by the private sector and not characterised as a state-owned enterprise, its procurement should not be subject to any special legal/statutory framework such as the Government Procurement Act. According to the PPP Act, where the government or any government-owned enterprise makes any equity investment in, or makes any donation to, a project company, the total equity investment or donation from the government and such government-owned enterprise shall not exceed 20% of the total capital or the total assets of the project company. If a project company enters into an investment contract

with the competent government authorities under the PPP Act, its procurement may be subject to the special requirements under the investment contract.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Foreign insurance companies may not sell insurance policies in Taiwan unless they obtain a licence to do so from the FSC. In addition, insurance companies must submit the terms and conditions of their insurance policies to the FSC for approval before selling them in the market. Once licensed and approved, they will not be subject to any special restrictions or controls on their sale of insurance policies over project assets. If the insurance premium on the project assets is paid by a Taiwanese company or the Taiwan branches of a foreign company, such Taiwanese entity may have to bear the tax withholding obligation.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

A foreign company may be named as a payee or receive an insurance payment through a pledge of the insurance policy in Taiwan only after it has been recognised and has set up a branch in Taiwan in accordance with the Company Act.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The hiring of foreign workers is subject to certain restrictions under the Employment Services Act. A permit from the competent labour authorities is required in order to hire technicians, engineers or executives. Application procedures and government administrative measures are provided under the Employment Services Act and the regulations promulgated by the Council of Labour Affairs.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Certain equipment and components used by construction contractors such as cranes, cables and wires are subject to inspection during import clearance procedures for public safety reasons. The government authorities in charge of inspecting such imports and labour safety are the Bureau of Standards, Metrology and Inspection and the Council of Labour Affairs. In general, importation of goods for sale or other commercial use is subject to import duties and a 5% sale tax; the importation of certain commodities such as tyres, vehicles, gasoline and machineries is subject to commodity tax. The PPP Act provides: (i) an import duty exemption for certain qualified equipment used by construction contractors; and (ii) a deferred (until one year after commercial operations) instalment payment of import duty on operating equipment to be used by a project company.

10.2 If so, what import duties are payable and are exceptions available?

Products are classified in accordance with the Customs' Classification of Commodities of the R.O.C. Code ("CCC Codes") with corresponding import duty rates. The CCC Codes are published on the website of the Directorate General of Customs. To encourage the development of certain industries, the importation of some equipment and key parts required by such industries may enjoy zero import duty. Exemptions from import duties are generally provided under Article 49 of the Customs Act. See also the import duty exemption explained in question 10.1 above.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Force majeure exclusions are common in project contracts. Taiwanese law generally respects party autonomy, thus a *force majeure* clause is usually enforceable. Under the Taiwan Civil Code, an obligor is generally not held liable for non-performance if the non-performance is through no fault of the obligor.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Bribing a public official in exchange for certain favours constitutes a criminal offence in Taiwan. According to the Statute of Punishment for Corruption, a person may be sentenced to one to seven years' imprisonment and fined up to NT\$3 million if he offers a bribe or other unjust enrichment to a government official in return for his breach of duty; or up to three years' imprisonment and/or a NT\$500,000 fine for bribing a government official in return for a favour which does not entail a breach of the government official's duty.

In a government procurement project, if the bidder (or supplier or contractor) gives public officials a commission, kickbacks, a brokerage fee, or any other unjust benefits to win a procurement contract, the bid bond may be confiscated, and the contract may be terminated or rescinded. Furthermore, the bidder may be barred from bidding for government procurement projects for one year.

13 Applicable Law

13.1 What law typically governs project agreements?

With regard to the PPP projects, the PPP Act shall prevail. Unless otherwise specified in the PPP Act, the rights and obligations between the authority in charge and the project company shall be governed by the concession agreement and for matters not specified in the concession agreement, the relevant provisions under the Civil Code shall apply.

In Taiwan, parties to a contract are generally free to choose the governing law of the contract. In practice, it is common for the

parties to choose Taiwanese law as the governing law for projects in Taiwan; in particular, the government counterpart to an investment agreement under the PPP Act is not likely to accept a foreign law as the governing law. However, for EPC contracts involving international contractors, we have seen contracts governed by New York law or English law.

13.2 What law typically governs financing agreements?

Most infrastructure projects in Taiwan are locally financed. Thus, Taiwanese law typically governs financing agreements.

13.3 What matters are typically governed by domestic law?

Investment agreements, off-take agreements, financing agreements, project insurance policies and land acquisition agreements are typically governed by domestic law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Under Taiwanese law, parties may agree to submit their disputes to a foreign court or an arbitral tribunal located outside of Taiwan, even if one of the parties is a government agency. Taiwanese courts generally honour such an agreement on the basis of party autonomy in the absence of any of the following circumstances:

- (a) it will be unfair for the subject matter to be adjudicated by the chosen jurisdiction;
- (b) the consent of a party to submit to the chosen jurisdiction is obtained by fraud, duress or other unlawful means;
- (c) the parties are not on an equal footing when they enter into the submission to jurisdiction agreement;
- (d) it will be inappropriate or inconvenient for the chosen jurisdiction to adjudicate the subject matter; and
- (e) the country of the chosen jurisdiction does not recognise and enforce judgments of the Taiwanese courts on a reciprocal basis.

The principle of sovereign immunity does not apply to projects in Taiwan.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Taiwanese courts recognise arbitration agreements requiring submission of disputes to arbitration institutions or *ad hoc* arbitration outside of Taiwan. The arbitral awards rendered under such arbitration agreements are generally recognised and enforceable unless any of the grounds for denial of recognition or enforcement prescribed under the Arbitration Act applies.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Taiwan is not a party to the New York Convention. However,

provisions similar to Article 5 of the New York Convention are provided under the Arbitration Act. For example, Taiwanese courts may dismiss a petition for the recognition and enforcement of a foreign arbitral award on certain grounds, including that the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan, or the dispute is not arbitrable under Taiwanese law, or there is no reciprocity of recognition of arbitral awards.

15.3 Are any types of disputes not arbitrable under local law?

Under the Arbitration Act, disputes that can be resolved through arbitration are limited to "those which may be settled in accordance with the law". A good example of a matter that may not be settled or arbitrated is a dispute over the validity of intellectual property rights, because it can only be decided by the Intellectual Property Office or the Intellectual Property Court.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Some types of disputes are subject to mandatory arbitration under Taiwanese law, e.g., a dispute between the Stock Exchange Corporation and a securities firm, no matter whether there is an arbitration agreement between them. In addition, in a dispute over a government procurement contract for construction works or technical services, if the government agency refuses to accept mediation suggestions or resolutions proposed by the Public Construction Commission under the Executive Yuan, and the contractor files for arbitration, the dispute must be resolved by arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Political risk protections such as direct agreements with the central government or political risk guarantees are rare in Taiwan because the legal framework and political regime are relatively stable, and the government generally does not feel the need to offer such protections. In some exceptional cases, the government has agreed to buy back the project assets to facilitate project finance.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest paid to foreign lenders is subject to withholding tax as explained in question 7.6 above. However, exemption may be available for interest derived from: (1) loans given by a foreign government or financial institution for economic development; (2) financing facilities offered to its own branch or other Taiwanese financial institutions by a foreign financial institution; (3) loans extended by foreign institutions to legal entities within Taiwan for

important economic construction projects approved by the Ministry of Finance; or (4) favourable-interest export loans or guarantees to legal entities within Taiwan from foreign government institutions or foreign financial institutions specialising in export lending or guarantee.

Proceeds from exercising a claim under a guarantee or proceeds from enforcing security will not be subject to withholding tax.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

While tax incentives were offered to foreign investors in the past, the current tax regime generally does not treat foreign and local investors and creditors differently, except that no withholding tax applies to the profits repatriated to a foreign company by its branch office in Taiwan and that certain interest income of a foreign company is exempt from withholding tax, as explained in question 17.1 above.

A foreign investor subscribing for shares issued by a qualified project company under the PPP Act and holding the shares for at least four years may enjoy tax credits of up to 20% of its investment amount. Such tax credits, which are also offered to domestic investors, may be applied against the withholding tax on the dividends expatriated by a project company to its foreign shareholders.

Under Taiwanese law, no tax is required to be paid in order for foreign investments, loans, mortgages or other security documents to take effect or to be successfully registered.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

The risk allocation under many project agreements with a government counterpart may not necessarily be in line with international practice and may be more protective of the government party. Thus, risk control or mitigation measures would be especially important.

Legal entities in which the PRC investors hold more than 30% shares or capital in total or which are controlled directly or indirectly by PRC natural or juristic persons are considered PRC investors. Their investments in Taiwan are limited to certain businesses and are subject to special approval from the IC.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

The issuance of corporate bonds by a project company in Taiwan is subject to the regulatory requirements and restrictions under the

Company Act and the Securities and Exchange Act, including the financial conditions, the limitation on the total issuance amount and the reporting to the competent authorities for effective registration of the issuance.

However, the criteria of the financial conditions and the limitation amount applicable to the issuance of corporate bonds by a Taiwan project company can be exempted to a certain extent if the Taiwan project company involved in an infrastructure project is a public company and the proceeds resulting from such bonds issuance will only be used for the infrastructure project concerned.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

The development of Islamic finance in Taiwan is still in its embryonic stage. To date, there are no known examples of Islamic projects that have been financed in the jurisdiction of Taiwan. However, under Taiwanese law, *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments may be used in the structuring of an Islamic project financing in Taiwan.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

Under the Law Governing the Application of Laws to Civil Matters Involving Foreign Elements, parties to a contract are free to select the governing law of their contract. We doubt that ordinary courts would acknowledge *Shari'ah* as governing law. No precedents have been seen so far.

To our knowledge, there has not been any notable case of dispute or jurisdiction so far. Furthermore, currently we do not see a trend in favour of Islamic financing in Taiwan.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

The inclusion of an interest payment obligation in a loan agreement will not affect its validity or enforceability in Taiwan. No case has been reported to date in which such provision has resulted in a validity issue or hindered its enforceability if Islamic law applies to the contract and the intention is to execute such provision in Taiwan.

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Hsin-Lan Hsu graduated from National Taiwan University (LL.B.). She served as a notary public at Keelung and Taipei District Courts for nearly two years. She then won a scholarship from the Ministry of Education to study International Economic Law in France, where she obtained a DEA at Paris I University.

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Lee and Li, Attorneys-at-Law is the largest law firm in Taiwan, and its services are performed by over 100 lawyers admitted in Taiwan, patent agents, patent attorneys, trademark attorneys, more than 100 technology experts, and specialists in other fields. With expertise covering all professional areas and building on the foundations laid down over decades, the firm has been steadfast in its commitment to the quality of services to clients and to the country, and is highly sought-after by clients and consistently recognised as the preeminent law firm in Taiwan.

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