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The International Comparative Legal Guide to: **Project Finance 2019**

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A practical cross-border insight into project finance

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General Chapters:

1	Why the World Needs Project Finance (and Project Finance Lawyers...) – John Dewar, Milbank LLP	1
2	Legal Issues of Cross-Border Project Finance Focusing on the Netherlands and Italy – Daphne Broerse & Matteo Trabacchin, IPFA	8
3	Common Structures and Market Trends in Holdco Financings in the US Power Industry – José A. Morán & Juan Carlos Gonzalez Novo, Baker McKenzie	13
4	Current Trends in LNG Development and Construction – Julia A. Czarniak & Gregory D. Howling, Skadden, Arps, Slate, Meagher & Flom LLP	16

Country Question and Answer Chapters:

5	Andorra	Cases & Lacambra: Miguel Cases & Marc Ambrós	22
6	Angola	Vieira de Almeida and RLA – Sociedade de Advogados, RL: Manuel Protásio & Vanusa Gomes	31
7	Brazil	Veirano Advogados: Ana Carolina Barretto & Amanda Leal Brasil	41
8	Canada	Cassels Brock & Blackwell LLP: Alison Manzer & Charles Newman	51
9	China	Global Law Office: Dr. Xin Zhang & Shuhui Luo	60
10	Colombia	Brigard Urrutia: Manuel Fernando Quinche & César Felipe Rodríguez	68
11	Denmark	Gorrissen Federspiel: Morten Nybom Bethe & Tina Herbing	78
12	Ecuador	Flor & Hurtado: Mario Flor & Daisy Ramirez	87
13	Egypt	Zaki Hashem & Partners: Sameh Kamal	96
14	England & Wales	Milbank LLP: John Dewar & Munib Hussain	104
15	France	Bignon Lebray: Sébastien Pinot & Serge Rastorgoueff	122
16	Germany	Kantenwein: Marcus van Bevern & Sven Ceranowski	135
17	Ghana	N. Dowuona & Company: Nana Ama Botchway & Akosua Achiaa Akobour Debrah	143
18	Greece	Sardelas Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	151
19	India	Cyril Amarchand Mangaldas: Santosh Janakiram & Subhalakshmi Naskar	159
20	Iran	Sabeti & Khatami: Behnam Khatami & Hooman Sabeti	168
21	Ireland	Arthur Cox: Matt Dunn & Charlotte Upton	177
22	Italy	Grimaldi Studio Legale: Riccardo Sallustio & Giuseppe Buono	189
23	Japan	Anderson Mōri & Tomotsune: Kunihiro Yokoi & Wataru Higuchi	199
24	Kenya	Oraro & Company Advocates: Pamela Ager & James K. Kituku	207
25	Malaysia	Rahmat Lim & Partners: Dzuhairi bin Jaafar Thani & Syed Rashid bin Rahim Alsree	218
26	Mozambique	Vieira de Almeida and Guilherme Daniel & Associados: Teresa Empis Falcão & Guilherme Daniel	230
27	Nigeria	Abuka & Partners: Patrick C. Abuka & Sunday Edward, Esq.	240
28	Portugal	Vieira de Almeida: Teresa Empis Falcão & Ana Luis de Sousa	250
29	Serbia	Zajednička advokatska kancelarija Marić & Mujezinović in cooperation with Kinstellar: Tijana Arsenijević & Branislav Marić	260
30	Singapore	Allen & Gledhill LLP: Kok Chee Wai & Kelvin Wong	269
31	South Africa	TGR Attorneys: Phologo Pheko	278
32	Spain	Cuatrecasas: Héctor Bros & Javier Vivas	290
33	Switzerland	Prager Dreifuss Ltd.: Daniel Hayek & Mark Meili	301
34	Taiwan	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Pauline Wang	309
35	USA	Milbank LLP: Daniel J. Michalchuk & Richard M. Hillman	318

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Andorra

Miguel Cases



Marc Ambrós



Cases & Lacambra

1 Overview

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

In the coming years, we anticipate a potential increase in the Andorran project finance market, in both the public and private sectors, and also under public and private schemes of collaboration; in particular, in respect of unique projects related to infrastructure for the tourism and energy industry.

In the public sector, the main focus would be on infrastructure and energy projects; in particular, through the development of road infrastructure, a heliport and gas cogeneration and solar power plants.

In the private sector, the major trends relate to direct and indirect acquisitions of projects already under operation, in terms of both the financing of such acquisitions and the refinancing of the existing project debt.

This likely upward trend must be understood within the context of the potent and deep transformation process that the Principality of Andorra (“Andorra”) is currently undertaking at an economic (progressive opening towards and consolidation of foreign investment) and regulatory level (implementation of payment services, solvency and capital adequacy, corporate governance and remuneration policies as well as European Union legislation on market abuse).

In this respect, the traditional paradigm of Andorra as a close and protective jurisdiction is definitely veering towards a more open and internationally competitive jurisdiction, in which the development of alternative financing sources – and particularly project finance – is being called upon to play a key role in the strengthening of the local economy at all levels.

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

In the last decade, the Andorran Government has opened the Andorran economy to foreign investors and has also updated the principal regulations of the old-fashioned Andorran legal framework. This situation has helped to build up some infrastructure projects, such as the €159m *tunnel dels Dos Valires* and the €42m *tunnel de la Tapia*, both in operation since 2012.

In 2015, Fomento de Construcciones y Contratas, S.A. (FCC) and Bankia, S.A. sold their 50% of the share capital in the Spanish concessionaire company Globalvía Infraestructuras, S.A. at €420m to the Universities Superannuation Scheme (USS), OPTrust and PGGM funds. The deal included the stake of Globalvía in the

Andorran company Túnel d’Envalira, S.A., which holds the concession of the Andorran *tunnel d’Envalira* which connects Andorra with France.

In February 2017, the Andorran electricity company, FEDA, built the first gas cogeneration plant in Andorra, which is currently in operation, and another plant for the supply of energy to the *El Tarter* area is currently in its first building phase.

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?

In general, each security must be granted by means of its relevant agreement related to each type of asset.

The most common structure of guarantees in a project finance transaction in Andorra is the pledge over the shares of the project company (normally a Special Purpose Vehicle (SPV)), one or several pledges over the bank accounts of the project company, and receivables deriving from the project (e.g. operation and maintenance (O&M) agreements or insurance policies), normally with cash-sweep clauses.

Moreover, security over the essential project assets (e.g. certain types of specific machinery) is eventually used, normally by means of a pledge or mortgage, depending on the characteristics of such asset(s).

Under Andorran law, the creation of security interest does not require notarisation or any formal requirement, except in the case of real estate mortgages, which must be mandatorily constituted by public deed granted before an Andorran Public Notary. However, as a matter of best practice, it is recommended to formalise the granting of the security by means of a public deed, in order to increase the effectiveness of its enforceability against third parties.

However, under Andorran law, security does not provide equal rights to other common jurisdictions. Security in Andorra only grants the creditor a preferential position to receive his credit from a specific debtor’s asset, in respect of other ordinary creditors, in case of insolvency of the debtor.

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?

Security over real property may be taken through a real estate

mortgage (*hipoteca immobiliària*), and security over plants, machinery and equipment may be granted by means of a chattel mortgage (*hipoteca mobiliària*) or non-possessory pledge (*penyora sense desplaçament*).

The election of the type of guarantee will depend on the characteristics of the specific asset, as well as the legal requirements to be fulfilled.

In general terms, under Andorran law, real estate mortgages cover: (i) the plot of land and construction on it; (ii) natural accretions; (iii) improvement works carried out on the property; and (iv) the amount of any compensation related to the asset owed to the mortgagee.

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?

Yes – under Andorran law, it is possible for security to be taken over receivables by means of a non-possessory pledge (*penyora sense desplaçament*), as long as the receivables cannot be possessed. However, notification would prevent set-off risks.

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

Yes – security can be taken over cash deposited in bank accounts. Such security will normally be taken over a non-possessory pledge of receivables (*penyora sense desplaçament*), the possessory displacement being performed by means of notification to the bank in case of enforcement of the pledge. Usually, in addition to the granting of security over cash deposited in bank accounts, cash sweeps are established.

When security is taken over financial instruments, the use of a financial collateral arrangement is recommended, since this type of guarantee is expressly regulated in Act 8/2013 of 9 May 2013 on the organisational requirements and operating conditions of entities operating in the Andorran financial system, investor protection, market abuse and financial securities agreements (*Llei 8/2013, del 9 de maig sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els acords de garantia financera*), recently amended for total alignment with Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

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 – it is possible to take security over the shares of a company incorporated in Andorra. In fact, it is a customary measure of guarantee in project finance transactions performed in Andorra. However, the restriction set out in question 4.2 below should be taken into account.

The procedure to create security over shares requires two consecutive steps: (i) the granting of a deed of pledge before a Public Notary; and (ii) the registration of the pledge in the Registry Book of Shareholders (*Llibre Registre de Socis*) of the company.

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)?

There is no registration or stamp duty in Andorra related to security. Only notarisation fees apply.

Such fees are published by means of the Decree of 3 May 2000 and vary in accordance with the nature and economic interest of the transaction.

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?

The notification or consent required in relation to security may take a significant amount of time, although the granting of such consent may vary depending on the recipient.

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.?

Generally, Andorran law does not foresee a specific requirement for the granting of security over real property, plant, machinery and equipment. However, special consents may be mandatory in very specific cases, depending on certain criteria (e.g. the location of the asset, its legal nature or connection to the performance of a public activity).

However, please note that it could be necessary to obtain foreign investment authorisation in order to acquire the secured assets after an enforcement proceeding, as detailed in question 4.2 below.

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?

Under Andorran law, there is no recognition of the concept of “trust” as Andorra has not ratified the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

Lenders usually appoint an agent for the Andorran security, which holds the security in its own name and acts on behalf of the rest of the lenders. Frequently, the agent is granted with powers of attorney in order to enforce claims and issue enforcement proceedings on behalf of the lenders and the rest of the secured intervening parties.

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?

The structures of joint and several creditor status, “parallel debt”

between lenders and a SPV or a security agent are not known under Andorran law and there are no judicial precedents thereof.

Nonetheless, recourse to parallel debt provisions, as well as a parallel debt security package, would be recognised under Andorran law.

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?

Yes – the characteristics of the enforcement may vary significantly, depending on the nature of the enforced security and the enforcement proceedings carried out at the discretion of the lenders.

In essence, there are two main procedures to enforce securities in the context of project finance: (i) judicial; or (ii) notarial proceedings. Overall, the former is carried out by a declaratory civil proceeding in order to reach a judgment, and afterwards such judgment has to be enforced, the latter being less costly and time-consuming, although both parties have to agree to carry out the notarial enforcement proceeding.

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

In the event of foreclosure, the Foreign Investment Act 10/2012 (*Llei 10/2012 d'inversió estrangera al Principat d'Andorra*) establishes a restriction, as foreign investors or creditors would need to obtain a prior foreign investment authorisation granted by the Andorran Government in order to acquire the ownership of real estate in Andorra or more than a 10% stake in the relevant Andorran company.

However, please note that the Foreign Investment Act specifically prohibits foreign legal persons from investing in real estate properties in Andorra with the sole purpose of commercialising them.

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?

In general, bankruptcy proceedings in respect of the project company do not affect the ability of a project lender to enforce its rights as a secured party over the security, as long as the security is sufficient to cover the project loan.

In respect of preferential treatment of creditors, the claims of secured creditors will be considered “privileged claims” inasmuch as they are guaranteed by means of a security, up to the value of such guarantee or security. Any amount exceeding the value of the guarantee or security in this way will be considered an “ordinary claim”.

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 other preferential creditors' rights with respect to the security that could affect the secured lender rights, as such preferential creditors will only have preference over the rest of the ordinary claims on the insolvency estate but not in respect of the secured assets.

The clawback regime under the Insolvency Decree of 4 October 1969 determines that the insolvency judge will be able to declare the following acts unenforceable against the insolvent estate: (i) all acts of disposal made on a gratuitous basis and all agreements on which the debtor's obligations (project finance company) are notably superior to the obligations of the other party; (ii) all payments due for reason of outstanding debts on the cessation-of-payments day; and (iii) any mortgage of pledge granted after the cessation-of-payments day, over the debtor assets, for reason of outstanding debts prior to the cessation of payments.

In addition to these, the insolvency judge is entitled to declare as unenforceable against the insolvent estate the gratuitous acts stated above which occurred during the six months prior to the date of cessation of payments.

Furthermore, the judge can set the cessation-of-payments date up to 18 months preceding this declaration.

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

Banking entities are subject to special administrative measures which apply before the opening of an ordinary bankruptcy proceeding, established by Act 8/2015 on Urgent Measures to Implement Banking Restructuring and Resolution Mechanisms (*Llei 8/2015 de mesures urgents per implantar mecanismes de reestructuració i resolució d'entitats bancàries*), which sets a similar regime to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

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?

Yes – it is possible to carry out-of-court foreclosure proceedings before a Public Notary if such enforcement proceeding and its terms and conditions have previously been agreed between the parties.

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?

The Insolvency Decree establishes a judicial proceeding (*Arranjament*) prior to the declaration of bankruptcy, allowing the project company to negotiate with its creditors in order to achieve a restructuring of its debts or cramdown of dissenting creditors that permits it to comply again with its payment obligations.

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.

Under the Insolvency Decree, directors may incur personal liability if they continue to trade whilst the company is facing financial difficulties. The bankruptcy effects will be extended to the directors of the entity in consideration of the continuation of a financially deficient activity such as an act of bad faith, inexcusable negligence or serious breach of commercial uses and practices.

6 Foreign Investment and Ownership Restrictions

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

The Andorran Foreign Investment Act sets out the restrictions, controls and limits related to the foreign ownership of a project company. Thus, prior to investing in a real estate asset or in a stake higher than 10% in a share capital or acquiring voting rights of an Andorran company, foreign investors have to obtain the relevant foreign investment authorisation before the Andorran Government. The amount, destination and sort of investment (e.g. investment in real estate assets) must be notified as a mandatory requirement to obtain the authorisation.

Nevertheless, the obligation to obtain the foreign investment authorisation does not impose any restriction on the remittance of income coming from an investment outside Andorra. In addition, exchange control rules are widely liberalised and, thus, there are no restrictions on the transferral of currencies from a registered bank account located in Andorra to any country, and *vice versa*.

Under the Andorran anti-money laundering and counter-terrorism legislation (*Llei 14/2017 de prevenció i lluita contra el blanqueig de diners o valors i el finançament del terrorisme*), an Andorran or foreign entity which formalises a transaction before a Public Notary by granting a public deed shall identify its ultimate beneficial owner, which is any individual (either a natural or legal person) owning 25% or more of the social capital of the entity and its identity must be kept in the ultimate beneficial owner registry "*Registre de Beneficiaris Efectius*".

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

There are no bilateral investment treaties entered into by Andorra that would provide protection from the Andorran foreign investment restrictions. However, by means of a most-favoured-nation clause Andorra has access to the treaties entered into by its neighbouring countries.

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

The regime governing the nationalisation or expropriation of project finance companies and/or assets is set by the Act of Expropriation, dated 3 September 1993, making no distinction between Andorran and foreign companies or assets, as long as the expropriation of private property responds to the satisfaction of a public utility or social interest.

The requirements, procedure and guarantees to the expropriated entity are thoroughly and strictly regulated, due to the fact that the expropriation procedure is deemed an aggression against private property, which is only justified on the basis of serving the general and public interest.

7 Government Approvals/Restrictions

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

Overall, the public administration/agencies with authority over projects are determined by the specific sort of project. The main authorities involved are the different town halls (*Comuns*) of the administrative units ("Parishes" – *Parròquies*) into which Andorra is divided. According to the Andorran Constitution and the Qualified Act On Demarcation of Competences of the *Comuns*, dated 4 November 1993, these entities have competence over the management and governance, in general terms, of goods in both the public and private domains, as well as patrimonial goods that may have been acquired and may intervene in energetic projects of national interest. In addition, this competence is projected over the use and exploitation of natural resources.

This general formula includes energy projects, inasmuch as they use natural resources which are located or generated in the territory under the jurisdiction of a specific *Comú*.

Additionally, the Andorran Government may play a significant role depending on the location and size of the project, especially if the project determines a financing need from the *Comuns*, as these entities are financed from the Central Government by means of Qualified Act 18/2017 of 20 October on Transfers to the *Comuns*.

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?

Certain regulated sectors (e.g. telecommunications or energy) may be subject to the fulfilment of certain specialities and requirements imposed by the Andorran Government, the territorial entities (*Comuns*) or specific regulatory authorities.

The guarantees normally granted as a security package in a project finance operation (i.e. mortgages and pledges) are notarised. Please note that Andorra does not have a property register, such functions being equivalently performed by the Chamber of Notaries (*Cambra de Notaris*).

In addition, please bear in mind the requirements of foreign investment authorisation referred to in question 6.1 above.

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)?

Ownership of land or natural resources itself does not require a licence; however, performing a project or exploitation over such land or natural resources may require the prior obtainment of certain authorisations or licences granted by national (e.g. the Environmental Impact Assessment ("*Avaluació d'Impacte Ambiental*") Licence) or local public administrations, depending in particular on the size and relevance of the project.

The treatment between foreign and Andorran entities does not differ and, overall, foreign entities can hold licences and be granted authorisations on the same terms as Andorran entities.

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

There are certain taxes related to the processing of hydrocarbons (oil and natural gas) in order to use them as fuel, and the exploitation of electricity generation projects is subject to a burden tax. Thus, the obtainment, importation and refining of hydrocarbons and the production of electricity within Andorra are, respectively, subject to a special tax on hydrocarbons and the general indirect tax of 4.5%.

These special taxes would not be paid by the project company, as the payment would rely on the final consumer of the electricity or the hydrocarbon. Please note that importation of both electricity and certain types of hydrocarbons is exempt from taxation, due to the limited capacity of the Andorran public infrastructure to cover the energetic demand (electricity is imported from Spain and France).

The income obtained by a project company incorporated in and under the laws of Andorra from the sales of the extraction or exploitation are subject to company income tax at the rate of 10%.

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

There are no currency, exchange control or other regulatory restrictions that limit the availability or transfer of funds for the project company. Please refer to question 6.1 above.

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?

There are no restrictions on the repatriation of investment returns.

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

Yes, project companies are allowed to establish and maintain onshore foreign currency accounts held in local entities and/or offshore accounts in other jurisdictions.

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?

According to the Andorran Corporate Act 20/2007, there are certain limitations on the payment of dividends to a parent company, as follows: (i) there is a requirement to offset losses from previous years in order to build up 10% of the profits to the statutory reserve until it reaches an amount equal or higher than 20% of the share capital; (ii) dividends may only be distributed if the mandatory reserves foreseen legally or in the by-laws are covered, as well as the research and development costs being covered; and (iii) a restricted reserve equivalent to goodwill must be funded, at least in the amount of 10% of the profits.

In terms of the contractual covenants normally imposed on the project company in project financing agreements, the distribution of dividends is normally restricted. Additionally, there are other typical financial and corporate restrictions imposed on the project company, such as: (i) the prohibition of performing structural modifications (e.g. mergers); (ii) the fulfilment of certain financial ratios (e.g. debt service coverage ratio); and (iii) the operation of the specific facility during a stipulated period of years.

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?

Yes – there are material environmental, health and safety laws whose application and content will essentially depend on the location, nature and characteristics of the specific project. Moreover, the authorisations to initiate a project (especially in projects which are notable for their size and capacity of affecting the environment) will have to be granted by the relevant authority (normally, the specific *Comú*), taking into account the environmental impact on the territory.

The Environmental Impact Assessment (“*Avaluació d’Impacte Ambiental*”) Licence must be obtained for development projects that might have substantial effects on the environment (e.g. mining or tunnel excavation); it is issued by the Andorran Government after an analysis by the competent ministry via a regulated administrative procedure and acts as a condition precedent for the execution of the project(s).

In addition, before the execution of any private or public project that may impact the environment, an environmental impact assessment needs to be performed prior to the granting of the specific authorisation by the competent administration.

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

There is not a specific framework for procurement by project companies. However, in public projects, the administration could establish specific requirements.

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?

Insurance activity is a reserved activity under the Andorran Insurance and Reinsurance Act (*Llei 12/2017 d’ordenació i supervisió d’assegurances i reassurances del Principat d’Andorra*).

Thus, only licensed insurance/reinsurance companies in Andorra may provide insurance over project assets located in Andorra.

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

Yes – although a case-by-case analysis is highly recommended.

9 Foreign Employee Restrictions

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

Yes – there are restrictions on foreign workers being employed by a project company. In particular, prior to the hiring of such foreign workers, the project company has to confirm before the Andorran employment department that no qualified Andorran workers are eligible for the specific position(s).

In order to validly work and reside in Andorra for a short period, foreign workers must obtain permission for stays of over 30 days in cases where they are working for a foreign company, during the time that the work for the foreign company in Andorra lasts and without limitation regarding the nationality or the professional level of the applicant (e.g. worker, technician, engineer or executive).

If foreign workers intend to stay for a longer period in Andorra, they will need to obtain a residence and working authorisation in advance, which is granted for one year by the Andorran Government. This type of permit is normally used for workers that come to Andorra to carry out professional activities in the country.

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?

The Customs Agreement between the Principality of Andorra and the European Economic Community establishes a preferential regime for goods imported from or originating in the EU in comparison with third countries. Specifically, the objective scope of the Customs Agreement covers: (i) goods produced in the EU or in Andorra, including those obtained wholly or in part from products which come from third countries and which are in free circulation in the EU or Andorra; and (ii) goods which come from third countries and are in free circulation in the EU or in Andorra. Hence, customs duties will be applicable to imported project equipment coming from non-EU countries, in the terms established by EU agreements with these countries or applicable regulations that may be in place.

Please note that, currently, Andorra is an observer member of the World Trade Organization (WTO) and there are no regulations in place which confer on the government any powers to impose anti-dumping measures in line with WTO principles.

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

The import duties depend on the characteristics of the goods, with exceptions available in each case; for example, for products coming from non-EU countries, such as imported equipment or machinery, depending on the nature and characteristics of the products.

Thus, we recommend that a case-by-case analysis is performed.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Under Andorran law, the verification of a *force majeure* situation exonerates any party from liability with respect to a legal relationship, although parties to a specific contract may, as in the vast majority of neighbouring jurisdictions, waive the application of this regime and accept liability arising from it.

The normal scenario is that most project financing agreements, and ancillary contracts to these (e.g. O&M contracts), establish the verification of *force majeure* as an event of default. In the case that a *force majeure* is discussed before a court, an Andorran judge will recognise its validity.

From the point of view of the lenders, a liability exclusion is normally established in project finance agreements if this affects their ability to provide the financing for the project facility under a *force majeure* scenario.

In the case of concession contracts with public authorities, and similarly to the situation in Spain, the verification of a *force majeure* normally entails compensation from the specific public administration to the concessionaire, which may take the form of an improvement of either the economic or temporal terms of the public concession.

In addition to the mechanics of a *force majeure* event (which will be regulated in the terms established by the project finance agreement – normally a turnkey contract), in the case that the project company suffers a prejudicial effect due to unforeseen circumstances, it would also be possible to invoke the *rebus sic stantibus* clause if foreseen in the relevant contract (lenders may also benefit from this clause).

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?

Qualified Act 9/2005 of 21 February of the Criminal Code (*Llei 9/2005 qualificada del codi penal*) punishes corruption and traffic-of-influence bribery performed by a public authority or by a private subject. Among the diverse ways in which this crime may be performed, bribery of a public authority determines the imposition of a qualified sanction.

In respect of the crime of corruption, this is defined by the Andorran Criminal Code as a demand by or an offer made to a public authority or civil servant, for its own benefit or for the benefit of a third person, for a handout or remuneration of any sort, in order to dictate or perform an act contrary to the duties and obligations inherent to its condition as a public official (active side), as well as the offering or demanding of the aforementioned remunerations to delay the performance of an act (passive side).

The penalties imposed for the perpetration or omission of these conducts include: (i) a prison sentence (from one to four or two to five years, depending on the nature and gravity of the felony); (ii) criminal penalties (e.g. from two to five times the profit obtained); and (iii) ineligibility for public office for a period of between three and six years.

With regard to influence peddling, the Andorran Criminal Code establishes that any person who, through his personal relationship, exerts influence over a public authority or civil servant with the aim of achieving a resolution dictated by the latter which benefits him or a third person either directly or indirectly shall be punished with imprisonment and a fine of one to two times the benefit intended or obtained. Additionally, the public authority or civil servant may be punished with ineligibility for public office for three years and the person who influences this authority may be punished, at the court's initiative, with prohibition from contracting with a public authority for a three-year period.

13 Applicable Law

13.1 What law typically governs project agreements?

Generally, project agreements are few and governed by Andorran law unless the relevant parties elect the application of a foreign law. According to Andorran law, the choice of foreign law is valid and legally binding.

An Andorran court would apply such law provided that the contents of the relevant provisions of the chosen laws may be duly proved before the Andorran court without contravening the Andorran Constitution or the Andorran principles of public policy. However, please see question 18.1 below.

13.2 What law typically governs financing agreements?

Financing agreements are typically governed by Andorran law.

13.3 What matters are typically governed by domestic law?

All security documents related to assets located in Andorra (i.e. mortgages or pledges) and personal guarantees granted by Andorran entities (e.g. bonds or first demand guarantees) are typically governed, and we would recommend that they be governed, by Andorran law.

As in most of the neighbouring jurisdictions, the contractual relationship between the public authorities and the concessionaire is mandatorily regulated by Andorran 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 Andorran case law and the applicable Andorran law (*dret comú*), submission to a foreign jurisdiction by the parties to a project finance agreement would be valid, binding and enforceable in Andorra.

There are many judicial precedents that support this view. Moreover, in the case that a claim is presented before the Andorran courts, they should decline their competence in favour of the elected jurisdiction if an express submission clause had been agreed by the parties.

15 International Arbitration

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

Yes – the Andorran courts will recognise submission by the parties in a project finance agreement to international arbitration and arbitral awards, as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Arbitration Convention), which applies to the recognition and enforcement of foreign arbitral awards and the referral to arbitration by a court, has been in force in Andorra since September 2015.

Andorra currently has an arbitration regime for commercial disputes. Furthermore, the Andorran Arbitration Court Act 13/2018 (*Llei 13/2018, del 31 de maig, del Tribunal d'Arbitratge del Principat d'Andorra*), enacted in mid-2018, set the foundation for the functioning of the Andorran Arbitration Court (*Tribunal Arbitral del Principat d'Andorra*), which is currently setting up internal procedures/organisation to start its arbitration activity, probably before the end of the year.

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

Yes – the New York Arbitration Convention entered into force in Andorra in September 2015.

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

The Andorran Arbitration Act 47/2014 (*Llei 47/2014 d'arbitratge del Principat d'Andorra*) excludes labour and consumer arbitration proceedings, while stating that all free disposal subjects can be subject to arbitration.

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

Considering the response to the previous question, submission to arbitration as a conflict resolution process is only possible if the parties involved in a controversy expressly agree to it, either in the agreement or in a separate document. The submission of the parties to an arbitration proceeding must be made in writing and signed by them, in order to verify their unequivocal will to submit their controversy to 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?

To the best of our knowledge, political risk provisions are not common in Andorra, given the political stability of Andorra and the lower political risk of project finance, in line with the adjacent jurisdictions, as these are direct agreements with public administrations.

In the current climate of serious concern about the political situation, with potential future changes in the government (national elections will take place in March/April 2019) or in governmental policies which could substantially affect projected investment, the main options would be either to obtain a specific governmental resolution from the competent administration providing support to the project or to wait for clarification of the political framework.

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?

Under Andorran law, there is no deduction or withholding tax upon payment of interests on loans made to either domestic or foreign lenders. On the other hand, under Andorran law, the proceeds of a claim under a guarantee and the proceeds of enforcing security are not subject to withholding tax if they are made to a domestic lender. However, they are subject to withholding tax at 10% if they are made to a foreign lender, unless a lower rate applies under a tax treaty (with treaty rates ranging between 5% and 10%).

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?

The main incentive for foreign investors or creditors are the lower level of taxation and the possibility to benefit from certain tax exemptions (e.g. corporate tax at 10%), in addition to a solid legal framework. In particular, there are substantial advantages for those countries with which Andorra has signed a tax treaty (Spain, France, Luxembourg, Liechtenstein, Malta, the United Arab Emirates and Portugal).

In essence, under Andorran law, there are no relevant additional taxes on foreign investments, other than those that would apply to an Andorran investor.

Although Andorra is not part of the EU, a customs agreement with the EU is currently in force, allowing the free transit of industrial products without customs duties being imposed.

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?

Yes – please note that Andorra is not integrated within the EU nor the EEA. In this light, lending is a reserved activity that can only be performed by Andorran-licensed entities, as long as there is no passport to provide lending services on a cross-border basis into Andorra.

Therefore, in practice, there is no secondary market for foreign financial entities to buy tickets for local project finance. However, international project finance transactions with an Andorran leg, where security has been granted but the disbursement of the loan had been made abroad, are likely to be seen in the short term and in the forthcoming years, due to the limited lending capacity of local players.

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.

Currently, Andorra lacks comprehensive capital markets legislation that would enable the issuance of bonds or similar capital markets instruments. Despite this, a favourable view towards capital markets transactions has emerged in the last five years, which crystallised in the first covered bonds transaction carried out in Andorra (during the last quarter of 2017) as an English and Andorran law governed structured (contractual) covered bonds issuance.

Considering the above, there are specific limitations on the issuance of capital markets instruments, which determine the use of foreign vehicles (acting as issuers) to benefit from international standards in this matter.

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 Islamic finance instruments *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* are not recognised under the laws of Andorra.

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?

There is no case law in Andorra which has been pronounced in regard to the application of *Shari'ah* law, nor in relation to the governing law of a contract or a dispute.

In our view, it is not probable that Andorran courts will accept the application of *Shari'ah*, except where the law generally governing a contract is the law of a country whose legislation recognises and is based on *Shari'ah*.

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?

Yes – there is a risk that the inclusion of interest payment obligations in a loan agreement construed in accordance with *Shari'ah* could affect its validity and enforceability.

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The Firm's and the Banking and Finance department's lawyers are qualified in Andorra but also in other EU jurisdictions, and so are well-prepared to advise their clients on EU legislation that is progressively being adopted in the jurisdiction.

The Firm has broad experience in acquisition finance, project finance and refinancing in Andorra.

The Banking and Finance department has a broad range of clients, including local and foreign banks, the Andorran Government and the Andorran authorities, and regularly advises institutions on their inbound financial transactions towards that jurisdiction.

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