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Contributing editor
Aled Davies

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Aled Davies
Milbank LLP

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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United Kingdom

Mark Richards, Tom Eldridge and Alexander Hadrill

Bryan Cave Leighton Paisner LLP

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

There are four basic categories of security interest under English law. These are mortgages, charges, pledges and liens. Charges and mortgages are generally the most important categories of security interest in a project finance context. It should be noted that 'charge' is sometimes used colloquially as a generic reference to security interests under the laws of England and Wales.

Often a composite security agreement is used in England and Wales, commonly known as a 'debenture' when granted by a corporate chargor, and both present and future liabilities of a corporate chargor can be secured under a debenture (and security interests taken over both the chargor's present and future assets). For public policy reasons, it is generally considered impossible to take a charge over all the assets of an individual. A security agent or trustee is often the chargee (ie, the party with the benefit of the charge) in place of the lenders.

Mortgages and charges of land are subject to special rules, but these are outside the scope of this chapter.

Charges

A charge is also an encumbrance on an asset that does not transfer title to that asset, but rather appropriates the asset to the discharge of the relevant obligations.

A charge is a security interest over specified assets (or classes of assets) of the chargor as security for the performance of the particular obligations of the borrower that have been secured (usually repayment of the debt owed to the lender). Provided that, in the case of corporate third-party chargors, issues such as corporate benefit and transactions at an under value have been dealt with, charges and other forms of security may be granted by that third party.

There are two types of charge: 'fixed' and 'floating'.

A fixed charge attaches immediately to the specified assets (eg, key assets as described in the debenture). Fixed charges are generally preferable to floating charges as they confer greater priority in an insolvency scenario (further below). As the chargee is not taking possession of the property, it will want to both prevent the chargor from disposing of the assets subject to the charge, and to oblige the chargor to maintain the value of the assets and, potentially, insure – these obligations should be contained in the debenture or other finance documents.

A floating charge (capable of being granted by corporate chargors – such as companies and limited partnerships, but not, generally speaking, individuals) is a charge over a specified class of assets (often identified by a generic description). As with many other types of finance under English law, a floating charge often primarily serves a dual purpose: to provide a security interest over assets of the chargor that may inherently fluctuate (for example, stock); and to provide a catch-all 'backstop' security interest – for example, where the formalities of creating another security interest are not properly completed or the assets in question are not subject to a fixed charge. In a project finance context, a properly drafted floating charge over all (or substantially all) of the chargor's assets may also mean that the chargee is deemed a 'qualifying floating charge holder' and so can use the 'administrative receiver' procedure (further below).

In contrast to a fixed charge, a floating charge only attaches to the assets in question on crystallisation, when it becomes a fixed charge at the point of crystallisation. This may happen automatically by operation of law (for example, on the occurrence of certain insolvency-related events). However, accepted practice – including both for greater certainty and to expand the crystallisation events by agreement between the parties – is that a list of crystallisation events will be included in the debenture. These events often include, on the giving of notice by the chargee, the occurrence of specified – and prohibited – actions and of insolvency-related events.

Finally, it should be noted that 'control' is a key determinant in connection with charges and, regardless of whether a charge is described as fixed or floating in the debenture, if the chargee has insufficient control of a charged asset then it is likely that such charge may be redesignated by the courts to be a floating charge. It is possible that the risk of redesignation extends beyond security interests expressed to be charges and may affect other forms of security interest, however expressed.

Mortgages

A mortgage is a security interest (securing the performance of particular obligations), which involves the transfer of title in an asset (or, in the case of a legal mortgage over land – where a 'legal mortgage' is taken by way of a 'statutory charge by way of legal mortgage' and confers a legal interest without transferring legal title) on the condition (express or implied) that such title will be transferred back on the performance of the relevant obligations.

Mortgages can be either 'legal' or 'equitable', with a legal mortgage transferring legal title to the asset (subject to the completion of any formalities, noting the technicalities around mortgages of land detailed above), whereas an equitable mortgage transfers beneficial title in the asset. Equitable mortgages arise either where the formalities necessary to create a legal mortgage have not been complied with (and a legal interest has therefore not been transferred), the mortgage intends to create a legal mortgage at some point in the future or the asset that is being secured is only recognised in equity (ie, there is no ability to have legal title in the asset such as beneficial ownership of assets in a trust or future assets).

Generally, mortgages over 'choses in action' (rights over assets that can only be enforced by action (rather than possession) – such as book debts and contractual rights) are taken by way of assignment. Subject to the fulfilment of certain conditions, an assignment can be legal (allowing the chargee to sue the third party in the chargee's own name, without having to join the chargor in any action), or the assignment can be equitable where the conditions for a legal assignment are not fulfilled.

Pledges

A pledge is a form of security interest for a debt where the creditor takes possession of an asset (hence only where it is possible to take possession of an asset can that asset be pledged). For intangible assets (as opposed to tangible movable assets), these can be pledged if title to the asset can be transferred by delivery of a document of title. 'Constructive' delivery (for example, delivery of keys to a property where the asset is situated) may also validly give effect to a pledge.

Liens

A lien is generally a right to retain possession of another's asset until a debt owed to that person is discharged. The expression is also used to cover similar rights. Liens often arise by operation of law, and are normally not of material relevance in a project finance context.

Quasi-security

Whereas a security interest is a right granted over a chargor's assets to secure performance of obligations (and which may provide an enhanced position for the chargee in the event of the debtor's insolvency), 'quasi-security' is the collective term for financial actions that seek to improve the creditor's position (on debtor insolvency) without actually creating a security interest; that is, it looks to create an economic effect similar to granting of a security interest (it creates rights against a person, rather than an asset). Types of quasi-security include guarantees, comfort letters, finance leasing, standby credits, on-demand guarantees and bonds, set-off, netting and retention of title. Negative pledges are also generally viewed as quasi-security.

Security in project financing

Generally, security in project financing looks to secure all the assets of the SPV 'ProjectCo' – arguably 'defensive' security which looks to maintain the 'banked' project document structure, in comparison to the 'offensive' security provided by the share charge given by ProjectCo's SPV holding company (facilitating enforcement against the business as a going concern).

Direct agreements (while not security interests) also look to supplement security interests and protect the value of the project documents structure, by preventing key counterparties precipitously terminating their contracts (through the use of suspension or step-in structures). Direct agreements are particularly important where a key counterparty would be difficult to replace.

Collateral perfecting

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Perfection

Perfection occurs through registration and delivery of possession of the asset or notice depending on the type of security interest.

With very limited exceptions, charges (and mortgages) created by a company or limited liability partnership incorporated in the United Kingdom (regardless of the governing law of that charge) must be registered with the jurisdiction's registrar of companies, Companies House, within 21 days from the date of the creation of the security interest. Otherwise, the security interest will be void against a liquidator, administrator or creditor, and the debt secured by that charge becomes payable immediately. While registration is not technically mandatory, there are significant negative consequences to not registering a security interest. Registration involves providing Companies House with a completed registration form (usually an MR01), a certified copy of the relevant security document and a small registration fee. It is also possible to register charges and mortgages online (and the fee is reduced). (There was some relaxation of these timings during the covid-19 pandemic, but these have now expired.)

Security interests over some assets (such as land, intellectual property rights, ships and aircraft) are registrable in specialist registers (where registration fees apply), and priority is generally established by the order of such registration.

Where a security assignment occurs or a security interest is created over an equitable interest, the security interest needs to be perfected by providing the third party with notice.

While pledges are not strictly speaking registrable (though a cautious approach is recommended), pledges are perfected by delivery of the asset.

Priority

Subject to the provisions of insolvency law and certain other qualifications (including those often referred to as 'Legal Reservations' in loan facility agreements), the priority of security interests is broadly as follows.

Depending on the nature of the asset, security interests in an asset have priority in order of the date of their creation or the date of notice or the date of registration. (Special rules may apply to tacking and further advances.)

However:

- legal interests take priority over earlier equitable interests (including floating charges) if the later legal interest is created in good faith, without notice of the earlier equitable interest and value is provided in return for the interest; and
- fixed charges take priority over floating charges (even if the floating charge was created earlier, unless the floating charge contains a negative pledge).

Further, it should be noted that it is often the case that secured creditors will enter into intercreditor or priority agreements that may either reinforce or contractually amend the priority position regulating their respective security interests.

Security trusts

It is possible (and common) for a security agent or trustee to hold security interests on behalf of the project lenders (and often also themselves as security for their or other agents' fees). Subject to them having the capacity to act under their own constitutional documents, security agents and trustees do not have to hold any licence specifically to hold or enforce security.

Unlike many civil law jurisdictions, where trusts are not recognised and a parallel debt structure may be used to effect the security trust concept, the jurisdiction of England and Wales (a common law jurisdiction) recognises trusts and security trusts are broadly not complicated structures.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Liens are not registrable under the Companies Act 2006 and often arise by the operation of common law or statute, making it difficult to easily ascertain priority. A creditor could review the register of the company in question at Companies House or (if applicable) the relevant specialist asset register for evidence of any contractual lien that had been registered, but inherently this would not provide a definitive answer. However, by their nature, liens are not normally a significant aspect of taking security in a project finance context.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

In the United Kingdom, corporate bankruptcy is known as 'insolvency'. Outside of terminal insolvency proceedings (ie, liquidation or winding-up of the debtor), as a preliminary step to potentially enforcing its rights and to avoid unintentionally waiving a breach of any finance document, a project lender should explicitly reserve its ability to rely on and exercise its rights under any finance document (to the extent that there is no clear intention to compromise those rights) in all communications with the debtor or its professional advisers.

The rules on corporate insolvency are largely derived from the Insolvency Act 1986 (as amended) and the Insolvency Rules 2016, and, since June 2020, the Corporate Insolvency and Governance Act 2020. Corporate insolvency turns on the concept of an inability of the debtor to pay its debts (as determined by section 123 of the Insolvency Act 1986).

In terms of non-terminal insolvency proceedings (ie, self-help or rescue mechanisms, though these procedures often eventually transition to liquidation), a number of mechanisms are available, of which three key procedures in a project finance context are administration, administrative receivership and receivership. Administration is a procedure whereby the primary objective is to save the debtor as a going concern. If that is not possible, the secondary objective is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration). The final objective, if neither primary nor secondary objectives can be achieved, is to realise property to make a distribution to one or more secured or preferential creditors.

When a company goes into administration, it benefits from a statutory moratorium on creditor action. Appointment of an administrator may be by application to the court or (more likely) by the company, the directors of the company or a qualifying floating charge holder using the 'out of court' route. The project lender may, therefore, have the ability to recover monies owing through the debtor being placed into administration.

Administrative receivership is potentially a more beneficial avenue for recovery for a secured project lender holding a qualifying floating charge than administration because it may be a quicker, less expensive process, while the administrative receiver's role is to realise assets to repay the lender or to repay the secured debt of the charge holder. While not generally available where the floating charge was created after 15 September 2003, there is a 'project finance' exception to this rule (subject to the project in question fulfilling the necessary criteria). The charge holder can appoint an administrative receiver, who can run the business or dispose of assets (or the business itself) to satisfy the secured debt. Contrasting the objectives of administration and administrative receivership, the latter may arguably be more beneficial to a project lender (though it will depend on the exact circumstances).

Subject to the completion of certain formalities (including the observance of notice or standstill periods), the ability of a chargee to appoint a receiver may arise at common law or under statute when the debt secured becomes due (ie, the power of sale arises). It is, however, often preferable (and accepted practice, including to avoid the standstill periods) that the receiver is appointed under the terms of the debenture. The receiver can then sell debtor assets to satisfy the debt, but does not run the business.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Administration involves a moratorium that prevents a project lender from enforcing its rights over collateral without the consent of the administrator or the permission of the court. An administrator can only sell any assets over which the project lender has a fixed charge with the prior approval of the fixed charge holder or of the court, though it can dispose of assets subject to a floating charge without the consent of the holder of that charge. While initially non-terminal, in practice a company in administration may eventually be placed into terminal bankruptcy proceedings – liquidation.

For (compulsory) liquidations there is also an automatic stay (subject to the leave of the court), which prevents a project lender enforcing its rights over collateral through court proceedings, though it does not prevent a project lender from appointing a receiver or administrative receiver (if it has the right to do so).

In both administration and liquidation, the proceeds from the disposal of assets will be distributed to creditors in the order of their priority (and subject to the terms of any subordination or intercreditor agreement).

Debts with preferential status include contributions to occupational and state pension schemes, certain employee claims for unpaid wages and salary, holiday pay and monies owed to or deposits protected under the Financial Services Compensation Scheme. The amount available to the preferential creditors is, however, recovered from the disposal of assets not subject to a fixed charge (and after satisfaction of the expenses of the administration or liquidation). On the basis that a project lender will usually seek to recover debts under fixed charges in the first instance, these preferential creditors may not have an impact on the project lender's recovery.

In addition to the expenses of the administration or liquidation and preferential creditors, there is also a statutory prescribed part (up to a maximum of £800,000) that is deducted from floating charge realisations and paid to unsecured creditors instead of the holder of the floating charge.

By default, entities incorporated in England and Wales are not excluded from or immune to bankruptcy proceedings, though their insolvency risk may be altered by the extent of any parent company or government support in a project finance context. However, various infrastructure sectors, such as rail, energy and water, have amended insolvency procedures (the detail of which is outside the scope of this chapter, but they broadly provide for varied procedures with the intention of ensuring the continuity of supply of essential services).

Other than liquidation, as detailed above, administration, administrative receivership (subject to certain criteria) and receivership may all provide routes to recovery of secured debts. The exact procedures required to recover secured debts using any of these methods will depend on the relevant statute, common law and the terms of the debenture (including to what extent the terms of the debenture exclude or amend the common law positions).

The Corporate Insolvency and Governance Act 2020 makes both permanent changes to UK insolvency law and temporary covid-19-related measures. The permanent changes broadly (noting certain provisions have varying territorial applicability in the United Kingdom, in particular regarding Northern Ireland) include:

- A new moratorium on enforcement action: this is a freestanding moratorium, namely it is not tied to a particular insolvency process, and is a short-term mechanism designed to facilitate the rescue of the company, for example, by implementing a company voluntary arrangement (CVA) or restructuring plan (the moratorium is not, itself, an insolvency process). Initially, the moratorium lasts for 20 business days, extendable without creditor consent by another 20 business days and further extendable for up to a year in total with creditor consent, where a company voluntary arrangement (CVA) proposal is outstanding, until that proposal is disposed of or by court order. The company must continue to pay all debts incurred while the moratorium is in force as well as certain 'pre-moratorium debts' including the cost of goods and services, employees and rent incurred during the moratorium, together with all amounts falling due under loans agreements and other financial services contracts (such as financial leasing, hedging and guarantees). This means there may well be significant ongoing liquidity requirements for the company, potentially restricting the viability of this option. It should also be noted that this moratorium is not available to certain companies, including, in this context, project companies in PPP transactions or companies that had or were expected to incur (under the relevant agreement) a debt of at least £10 million under a capital market instrument (ie, bonds).
- A restructuring plan mechanism to supplement the existing scheme of arrangement and CVA mechanisms. However, in contrast to a scheme of arrangement, the restructuring plan allows for cross-class cram down (ie, court sanction of the restructuring plan despite there being a dissenting class) and contains the ability, in certain circumstances, to exclude classes of creditor with no genuine economic interest.
- A restriction on insolvency termination provisions ('ipso facto' clauses). This prevents a counterparty to ProjectCo terminating a contract for goods or services (or both) with an insolvent company or doing 'any other thing' (eg, amending payment terms) as a result of ProjectCo's insolvency (careful consideration should be undertaken in respect of any supply made by ProjectCo (eg, under an offtake agreement). This restriction does not apply to financial services contracts (including guarantees, hedging, commodities contracts etc.).

The permanent changes are arguably intended to redress a perceived imbalance between creditor and debtor positions when compared with other jurisdictions (generally UK jurisdictions are viewed as 'creditor-friendly'), arguably 'represent[ing] a major change to UK insolvency law and, in some ways, represents a shift toward a business rescue culture more in line with US insolvency (chapter 11)' (New business support measures: Corporate Insolvency and Governance Act 2020, House of Commons Library, March 2021).

Temporary (covid-19-related) measures (which have the potential to be extended) include:

- suspension of director's liability for wrongful trading (retrospectively from 1 March 2020), but not other directors' duties (expired 30 September 2020, then revived 26 November 2020 to 30 June 2021);
- prevention of petitions being issued on or after 27 April 2020 for the winding up of a company on the grounds that it failed to satisfy a statutory demand issued during a specified period (relating to covid-19), retrospectively from 1 March 2020 (anticipated to expire 30 September 2021);
- prevention of petitions being issued on or after 27 April 2020 for the winding up of a company, unless the creditor has reasonable grounds to believe that the inability to pay is not the result of covid-19 or the company would be unable to pay its debts even if covid-19 had not had a financial effect on the company (anticipated to expire 30 September 2021);
- a relaxation of filing and registration requirements (including in respect of charges) (expired 5 April 2021); and
- a relaxation of requirements relating to the annual general meeting of a company (expired 30 March 2021).

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 | What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

While banks and other financial institutions generally charge commercial fees for foreign exchange transactions, subject to any applicable political sanctions regimes (including US and UK sanctions regimes) there are no statutory restrictions, fees, taxes or other charges on foreign currency exchange. Foreign currency exchange contracts (eg, currency hedging) are generally an exempt supply for value-added tax (VAT) purposes provided that there is consideration in the contract, but this is a relatively complex area of tax law and consideration should currently be made of the *Republic National Bank of NY*, *First National Bank of Chicago* and *Wilson Pension Trustees Ltd* tribunal cases and decisions.

Investment returns

7 | What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

While banks and other financial institutions may charge commercial fees for remittances, subject to any applicable political sanctions regimes (including US and UK regimes), there are no restrictions, controls or other fees on the remittance of investment returns or on loan payments.

On the taxation of cross-border remittances of investor returns, withholding taxes (currently with a rate of 20 per cent) may apply to debt interest payments to parties in other jurisdictions, though the application and rate of any withholding tax will depend on whether there is a double taxation treaty with the other jurisdiction. It should be noted that withholding tax does not apply in a number of scenarios, mainly (subject to certain conditions) interest paid to or by a 'bank' (a wide definition including many UK banks, European banks permanently established in the United Kingdom and foreign banks operating in the United Kingdom with permission to accept deposits). Any withholding would generally be addressed through gross-up provisions in the relevant loan facility agreement.

No withholding tax applies to distribution payments from companies incorporated in the United Kingdom.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There is no obligation on entities incorporated in England and Wales to repatriate foreign earnings, and no obligation to convert to local currency or any other specific restriction if the project company does choose to repatriate foreign earnings.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Subject to any applicable political sanctions regimes (including US and UK regimes), entities incorporated in England and Wales are able to establish and maintain foreign currency accounts in other jurisdictions and locally.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

While there are no blanket restrictions, fees or taxes on foreign investment in or ownership of a project in the United Kingdom (ie, UK and non-UK owned companies are treated equally), there are nuances and additional requirements within industry-specific legislation or regulations that apply to companies under (or proposed to become under) foreign ownership.

In addition to the current regime controlling foreign direct investment (FDI) (a merger control regime capturing FDI transactions, rather than specifically addressing FDI) there is legislation such as the Civil Contingencies Act 2004 (allowing the government to impose emergency regulations in the event of an actual or threatened emergency) and (on a sector-specific basis, permitting government intervention in a variety of national security and public health scenarios) the Industry Act 1975, the Energy Act 1976, the Water Industry Act 1991, the Communication Act 2003 and the Energy Act 2013, but these are generally not aimed at foreign ownership (with the exception of the Industry Act 1975, where the government has a power to intervene in the transfer of control of manufacturing firms to foreign owners (or prospective owners) where the same would be contrary to the interests of the United Kingdom – though we are not aware of this power ever having been used). The government also retains 'golden shares' in a very small number of companies (generally in the defence, transport and energy sectors). However, the detail of these measures is outside the scope of this chapter.

Under the merger control rules in the Enterprise Act 2002, the Competition and Markets Authority has jurisdiction to review a transaction where the target company has either:

- an annual UK turnover of £70 million or more (or £1 million or more in a range of 'sensitive' sectors – such as military/dual use, computer processing units, quantum technology, AI, cryptographic authentication technology and advanced materials); or
- where the merger creates or enhances a combined share of 25 per cent or more of sales or purchases of goods or services of a particular description in the United Kingdom (or in a substantial part of it) ('a relevant merger situation').

Where a relevant merger situation exists, the Secretary of State has the power under section 42 of the Enterprise Act 2002 to intervene.

Further, foreign entities should be aware of changes to the United Kingdom's investment regime that are anticipated to take effect during the course of 2021 (pursuant to future statutory instruments) as a result of the National Security and Investment Act 2021 (NSIA) achieving royal assent. NSIA proposes to replace the national security intervention aspect of the current regime under Part 3 of the Enterprise Act 2002 (further legislation – expected later in 2021 – is required for the substantive provisions of NSIA to take effect, leaving the Enterprise Act 2002 to address the other public interest aspects it currently addresses – media plurality, financial stability and the domestic capability to combat public health emergencies – in respect of merger control from a non-FDI specific perspective).

NSIA proposes to introduce a new regime (with retroactive effect to 12 November 2020) for reviewing and intervening in commercial transactions (including in the infrastructure sector) that potentially raise national security concerns, allowing the Department of Business, Energy and Industrial Strategy (BEIS) Secretary of State to 'call in' a broad range of transactions (acquisitions of control over qualifying entities (including UK companies and non-UK companies operating in the United Kingdom) or assets ('trigger events')) to undertake a national security assessment, whether or not such transactions have been notified to the BEIS Secretary of State. The BEIS Secretary of State can call in a transaction for review until six months after becoming aware of the transaction provided the call-in occurs within five years of the completion of the transaction (though the five-year time limit does not apply to transactions that are subject to the mandatory notification and pre-approval regime).

Trigger event transactions in 17 (very broad) key or sensitive sectors are subject to a mandatory notification and pre-approval regime (including, without limitation, where an interest of more than 25 per cent in the ownership or control or voting rights of the target is proposed or acquired – this is a very broad range of transactions, including the acquisition of 'material influence' with the potential for unintended consequences). Any transaction within the scope of the mandatory notification and pre-approval regime that is completed without the requisite government approval is void and of no legal effect (though NSIA does contain a power for the BEIS Secretary of State to retrospectively validate such transactions in certain circumstances). NSIA also creates a voluntary notification system to encourage parties to refer a trigger event that they consider may raise national security concerns (parties may undertake voluntary notification to obtain 'closure' in the context of the five-year call-in period).

NSIA is of broad and significant effect, including that it contains no definition of 'national security' – it is understood that a forthcoming statutory statement of policy intent will cover how the BEIS Secretary of State anticipates that he or she will exercise the call-in power (a draft statement from March 2021 contained little specific detail on this point, though it does highlight that the statement does not limit the call-in powers under NSIA). It has significant potential consequences for relevant transactions, with the BEIS Secretary of State having the power to make a remedial order (including prohibiting the transaction) where, on the balance of probabilities, he or she is satisfied that a risk to national security arises or would arise, and reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating that risk. It should also be borne in mind that civil and criminal offences can apply to the acquirer transactions subject to the mandatory notification and pre-approval regime that do not comply with the regime (ie, complete the transaction without requisite approval) – non-compliance with orders made by the BEIS Secretary of State can result in fines of the greater of £10 million or 5 per cent of global turnover and up to five years' imprisonment.

While the scrutiny powers under NSIA are intentionally widely drafted, they may have unintended consequences, including in respect of (secured) project financings. Although risk analyses are standard practice in considering the enforcement of share security (or other rights of control, such as voting rights), and considerations of potential shareholder liability (liability that may 'pierce the corporate veil' such as environmental and pensions liability), the government has made it clear that loans are not exempt from scrutiny and the acquisition of ownership or control through enforcement of security can constitute a reviewable trigger event. Trade bodies have looked for 'safe harbours' for debt investments, and although it acknowledges that debt investment causing national security concerns will be a 'rare circumstance', the government is unlikely to make any such concessions (including because convertible or secured debt can facilitate control or ownership). The potential unintended consequence, setting aside the mandatory regime in respect of security enforcement in key or sensitive sectors, is that prudent security agents may refuse to act in any security enforcement outside of key or sensitive sectors without prior clearance, a level of administrative activity that the government may not be anticipating for the new body within BEIS intending to administer NSIA – absent the government providing clear 'tramlines' for how it intends to exercise its call-in powers, NSIA has the potential to create significant uncertainty for business.

Insurance restrictions

11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Effecting or carrying out insurance contracts (or both) as principal in the United Kingdom are regulated activities under articles 10(1) and (2) of the Financial Services and Markets Act 2000 (Regulated Activity). Provided that non-UK insurance companies issuing insurance policies relating to project assets in the United Kingdom are not deemed to be carrying out a regulated activity, there are no corresponding restrictions, fees or taxes.

There are a number of considerations for determining whether an insurance contract has been effected or carried out in the United Kingdom. For example, 'effecting an insurance contract' is construed widely and not only includes the underwriting process or entry into the insurance contract, but the term also captures the negotiation process, confirmation of cover and the issuing of the insurance policy. The term 'carrying out an insurance contract' is also interpreted widely to encompass activities undertaken in relation to an insurance contract that has been entered into, including but not limited to, the handling of claims, settlement of claims and collection of premiums.

If an insurance contract is deemed to be effected or carried out in the United Kingdom, a non-UK insurance company would require authorisation from the UK Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), and the insurance policy would need to be compliant with the FCA or PRA rules and regulations. A typical scenario where this would occur is when a non-UK insurance company acts through an agent in the United Kingdom. One exception to the above is where a non-UK insurance company is domiciled in the EEA, in which case it would be governed by its own home state regulator. Under this exception, while EEA-domiciled insurance companies would still be bound by the principle of the 'general good' (ie, some FCA or PRA rules and regulations would still apply to them so as not to prejudice the application of the FCA or PRA customer protection rules), these companies can carry out a Regulated Activity by establishing a foreign branch in the United Kingdom or by 'passporting' their services into the United Kingdom without the need for FCA or PRA authorisation.

Continued 'passporting' through a temporary permissions regime (TPR) enables relevant firms and funds that passport into the United Kingdom to continue operating in the United Kingdom after the pre-Brexit completion passporting regime fell away at the end of the Brexit transition period. The TPR also allows inbound firms to continue operating in the United Kingdom within the scope of their current permissions for a limited period after the end of the Brexit transition period (this regime is anticipated to last for a maximum of three years from Brexit being completed, solely for firms that completed passporting prior to the Brexit transition period ending), while seeking full UK authorisation as necessary. Any TPR rights cannot be extended to additional regulated activities, for which full UK authorisation must be sought. There is an alternative 'Financial Services Contracts Regime' for those firms that did not opt into TPRs, but the detail of this regime is outside the scope of this chapter.

The TPRs also allow investment funds with a passport to continue temporarily marketing in the United Kingdom. The stated aim of the TPR is to 'allow firms that wish to continue carrying out business in the UK in the longer term to operate in the UK for a limited period after the passporting regime ends while they seek authorisation from UK regulators'.

Worker restrictions

12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The free movement of EEA nationals to the United Kingdom ended on 31 December 2020. Existing EEA nationals residing in the United Kingdom had until 30 June 2021 to apply for immigration status under the EU Settlement Scheme to remain in the United Kingdom legally after that time.

A new points-based system (PBS) came into operation on 1 January 2021 which applies to all non-British citizens. Under the PBA, all non-British citizens seeking work must meet a specific set of requirements for which they will score points, with visas then awarded to those who gain enough points. It should be noted that Irish citizens are exempt from the PBS and, in accordance with the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, there will be no change to Irish citizens' rights to freely enter, live and work in the United Kingdom without requiring permission.

The most relevant route under the PBS in a project finance context is likely to be the 'Skilled Worker' route. To qualify under this route, a migrant must demonstrate that:

- they have a job offer from a Home Office licensed sponsor;
- the role must be at the required skill level – RQF level 3 (equivalent to A level) or above;
- they speak English to the required standard; and
- they will be paid at least £25,600 a year (or the going rate for the role, if higher).

A total of 70 points is needed to qualify under this route. However, unlike under its predecessor route (Tier 2), the points available for the minimum salary requirement are 'tradeable'. Therefore, even if a role does not meet the minimum salary requirements for sponsorship (and so does not qualify for the 20 points on offer for salary), an applicant can make up the points deficit with other characteristics, such as if they are a 'new entrant' to the labour market, the role is a shortage occupation or if they hold a PhD that is relevant to the role.

Unlike the previous Tier 2, there is no limit on the number of Skilled Worker visas that can be issued by sponsors each year. It is also possible for migrants to switch into the Skilled Worker route from most visa categories within the United Kingdom (other than visitor or some other short-term categories).

A prospective employer will need to be a licensed sponsor if they want to recruit workers through the Skilled Worker route from outside the United Kingdom. The standard processing time for an application is usually eight weeks and will start when the application is received.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

The UK-EU Trade and Cooperation Agreement, entered into on 30 December 2020, secures zero tariffs and quotas on goods moving between the EU and United Kingdom, provided that those goods meet the rules of origin. Products can be said to originate in the EU or the United Kingdom if they are:

- wholly obtained in the EU or the United Kingdom;
- produced in the EU or the United Kingdom exclusively from materials originating in the relevant territory; or
- produced in the EU or the United Kingdom incorporating non-EU or non-UK materials, which satisfy the product-specific rules of origin (contained in Annex ORIG-2 of the TCA).

A summary of the TCA published by the UK government can be found at www.gov.uk/government/publications/summary-the-uks-new-relationship-with-the-eu.

The UK government is phasing in border controls for most goods over 2021. On 11 March 2021, it announced a timetable for introducing import border control processes, with full controls due to be effective from 1 January 2022. While tariffs are still payable where they are due, this payment may be deferred. The government's Border Operating Model gives a comprehensive overview of customs processes, both imports from and exports to the EU.

Trade between the United Kingdom and other countries is then either governed by WTO Rules or by bilateral trade agreements. The tariffs applied in the United Kingdom to goods originating in non-EU countries are governed by the UK Global Tariff. There are basic import registration processes for companies looking to import goods into the United Kingdom from outside the EU. Import licences are not needed for the majority of industrial goods, but imported goods must meet UK product standards (including as to health and safety), and their import may be prevented if products do not meet such standards.

One circumstance in which importers may face a barrier to entry is in the event of 'dumping'. Dumping is the practice of selling goods at an artificially low value (lower than normal market value in its domestic market) to damage the industries of EU companies.

The Trade Remedies Authority (TRA), launched on 1 June 2021, has taken on the role of the United Kingdom's domestic trade defence enforcement authority from the Trade Remedies Investigations Directorate (TRID). This role was originally performed by the European Commission and the TRID had been carrying out the function on an interim basis since the United Kingdom exited the EU. The TRA now has the power to investigate complaints made by businesses about dumping (among other issues) and can make recommendations to government ministers.

Imports from certain countries (including Russia, Iran, North Korea and Syria) are banned or restricted, while an importer that traded with sanctioned entities would be liable for penalties as a result of such trade (though the detail of sanctions regimes is outside the scope of this chapter).

Value-added tax (VAT) is generally payable at the standard rate (20 per cent of the value of the goods) on the import of goods into the United Kingdom. With effect from 1 January 2021, the UK government introduced 'proposed accounting' for import VAT on goods brought into the United Kingdom. This means that VAT-registered businesses in the United Kingdom importing goods to the United Kingdom can account for import VAT on their VAT return, rather than paying import VAT on or soon after the time that the goods arrive at the UK border. This relaxation applies to imports from the EU and non-EU countries. However, it should be noted that customs declarations and the payment of any other duties are still required.

Nationalisation laws

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

The United Kingdom is generally perceived to have minimal political risk and strong rule of law. On nationalisations, with the exceptions of a small number of rail companies (often interim nationalisations) and, in 2008 during the global financial crisis, the part nationalisation of some banks that might have collapsed otherwise (notably Northern Rock, the Royal Bank of Scotland and Lloyds) – all of which have subsequently been re-privatised or are in the process of such, there have been no material nationalisations since the 1970s.

Nationalisations of assets of significant value require a primary act of parliamentary legislation, which would provide a mechanism for compensating shareholders (though potentially not to market value levels).

We note that there have been a number of 'enforced nationalisations' in the UK rail sector in recent years where failing franchisees have 'handed back' the relevant franchise and that franchise is then run by the public sector. Inherently, though, the (previous) franchisee at the point of handing back its franchise views this as relinquishing a liability rather than the loss of an asset.

Excluding enforced nationalisations in the UK rail sector, and absent any further government bail-out – including related to the effects of covid-19 – nationalisations are unlikely to be on the UK government agenda in the short or medium term.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

There are currently no tax or other incentives that are provided preferentially to foreign investors or creditors.

There are, however, a number of incentives that foreign investors can benefit from, such as:

- the patent box and research and development tax relief, which provides tax relief for companies investing in research and development in the United Kingdom or who are earning profits from patented inventions to promote innovative services and products;
- business investment relief, which allows non-UK domiciled UK residents claiming remittance basis taxation who invest foreign income in a qualifying target company to avoid the payment of tax on foreign income that is invested; and
- the venture capital trust, the enterprise investment scheme and the seed enterprise investment scheme, all of which provide tax relief to investors interested in investing in qualifying small, early-stage and higher risk businesses;
- the rate relief for businesses moving into an enterprise zone (up to £55,000 per annum for five years); and

- 100 per cent capital allowances available for the first year for certain types of expenditure by businesses and companies based in certain enterprise zones.

The United Kingdom also has double tax treaties with over 100 countries, which ensures that economic activity is not taxed more than once.

Foreign businesses considering investing in the United Kingdom may find helpful HMRC's Inward Investment Support Service, which aims to give clarity and certainty to non-resident businesses about the tax consequences of significant investment in the United Kingdom. To qualify, the investment has to be 'significant' – a total of £30 million or more unless the investment is of particular importance to the national or regional economy.

Foreign investors investing in the United Kingdom will be subject to the same taxes as UK investors, which include stamp duty, stamp duty land tax and corporation tax.

GOVERNMENT AUTHORITIES

Relevant authorities

16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Most projects are likely to involve some form of development resulting in the need for planning permission, possible environmental permits and other sector-specific approvals. These are examined below after briefly covering two of the government's key agencies involved in infrastructure planning and development.

Key public agencies

The National Infrastructure Commission (NIC) is an executive agency of HM Treasury, established to provide impartial advice and make recommendations to the government on economic infrastructure.

The NIC is tasked with:

- setting out its assessment of long-term infrastructure needs and providing recommendations;
- carrying out studies into the United Kingdom's infrastructure challenges; and
- monitoring the government's progress in delivering projects and programmes recommended by the NIC.

The Infrastructure and Projects Authority (IPA) is the government's centre of expertise for infrastructure and major projects. The IPA works with the Cabinet Office and HM Treasury to support the successful delivery of all types of infrastructure and major projects.

Planning

Since 27 March 2012, the National Planning Policy Framework (NPPF) has governed planning policy in England. The NPPF sets out the government's planning policies for England and how they are expected to be applied, and must be taken into account in the preparation of local and neighbourhood plans.

The NPPF does not, however, apply to nationally significant infrastructure projects (NSIPs) or national waste. NSIPs are governed by the Planning Act 2008 and relevant national policy statements.

Major infrastructure projects in England are likely to be considered NSIPs and so will need a development consent order as well as planning permission from the relevant local authority. The Planning Inspectorate runs the NSIP application process. In Wales, developments will need consent from Welsh Ministers if considered to be a Development of National Significance under the Planning (Wales) Act 2015.

Comprehensive consultation requirements will need to be met for most projects, often involving the Environment Agency, Natural Resources Wales and Natural England (among others, depending on the nature of the project). This means the planning process can be lengthy and expensive compared with that of many other jurisdictions.

Environmental consents

The environmental regulator in England is the Environment Agency, while Natural Resources Wales (NRW) carries out the same function in Wales.

The Environment Agency and NRW both are responsible for reviewing and authorising projects where there are any environmental impacts. This is usually evidenced by the issue of an environmental permit. The Environment Agency and NRW will also enforce compliance with permits and relevant legislation.

Health and safety

The Health and Safety Executive fulfils important statutory functions, including providing the appropriate regulatory frameworks and assessing major hazard safety reports and inspecting certain establishments.

Sector-specific authorities

Oil and gas

All petroleum resources vest in the Crown under the Petroleum Act 1998. However, the government may, via the Oil and Gas Authority (OGA), grant exploration or extraction licences for both onshore and offshore resources (including fracking licences).

The Department for Business, Energy and Industrial Strategy (BEIS) is the competent authority for decommissioning. The OGA works with BEIS to assess decommissioning programmes on the basis of cost, future alternative use and collaboration.

Most offshore works will require consent from the Marine Management Organisation in England or the Welsh government in Wales.

The UK government has had no equity interest in offshore oil and gas production since 1986, following the sale of its oil and gas assets to British Gas.

Minerals extraction

Following the privatisation of the coal industry in 1994, the ownership of almost all coal now resides with the Coal Authority, which grants licences for coal exploration and extraction.

The Crown holds the rights to gold and silver (excluding a relatively small number of areas in Scotland). The mines of these metals are known as Mines Royal and the Crown Estate is responsible for granting lease options of Mines Royal.

Other minerals are privately owned, and, although there is no national licensing system for exploration and extraction, planning permission must be obtained from a mineral planning authority for their extraction.

Water treatment

Ofwat is the economic regulator in England and Wales and grants licences for water and sewerage undertakers. A company can also be granted an infrastructure provider project licence to carry out a large or complex water or wastewater infrastructure project that has been specified under legislation (such as the Thames Tideway project).

The provision of water and wastewater services in England and Wales was transferred from the state to the private sector in 1989 by the sale of the 10 regional water authorities (RWA). The potable water supply and sewage disposal functions of each RWA were transferred to new, privately owned companies.

Power generation and transmission

Regulation of power generation, supply, transmission and distribution is via a statutory licensing regime under the Electricity Act 1989. The electricity and gas regulator is the Office of Gas and Electricity Markets (Ofgem), an independent national regulatory body, recognised by EU Directives. The power generation, supply, transmission and distribution markets were privatised in 1990.

Ofgem also accredits power generation stations for the purposes of receiving various government subsidies, including the feed in tariff and the renewable heat incentive.

Transportation

Highways England operates, maintains and improves England's motorways and major A roads. Highways England works with the Department for Transport. Highways England is a government company formerly known as the Highways Agency.

Highways England does not manage all roads. Local roads in England are managed by the relevant local authority, London roads are managed by Transport for London and all Welsh roads are managed by the Welsh Assembly.

Network Rail owns and operates all railway infrastructure in England and Wales. Passenger services are divided into regional franchises and run by private companies. These companies bid for contracts to run individual franchises. Most contracts are awarded by the Department for Transport.

British Rail operations were privatised between 1994 and 1997. Ownership of the track and infrastructure passed to Railtrack (subsequently transferred to Network Rail), while passenger operations were franchised to individual private sector operators, though, pursuant to the Williams Rail Review, franchising is anticipated to end in the near future.

The Office of Rail and Road (ORR) is the independent statutory regulator that regulates the rail industry's health and safety performance. It holds Network Rail and High Speed 1 to account and is tasked with ensuring that the rail industry is competitive and fair. ORR monitors Highways England and has regulatory functions in relation to the Channel Tunnel. Network Rail is due to be absorbed into a new Great British Railways body that will maintain the infrastructure, set fares and service levels (taking revenue risk) and let passenger service contracts (rather than franchises) after an interim period of covid-19-related emergency recovery agreements (due to complete by the end of 2022).

The ORR is an independent statutory regulator, operating within a framework and accountable through Parliament and the courts.

Ports

The majority of port operations are administered by statutory harbour authorities, each governed by its own legislation.

For new harbours and ports, both a works order and marine licence are likely to be required. These will be processed by the Marine Management Organisation.

From 1 April 2018, Welsh ministers took over responsibility for port development policy for harbours wholly in Wales apart from major trust ports.

Telecommunications

Ofcom is the UK regulator of the telecommunications industry in the United Kingdom. This includes television, radio, video-on-demand, telephone lines, mobiles and postal services, plus the airwaves over which wireless devices operate. Ofcom is accountable to Parliament and sets and enforces regulatory rules for the sectors for which it is responsible. Ofcom also has power to enforce competition law in those sectors, alongside the Competition and Markets Authority.

Mobile network operators and satellite service providers will need a licence under section 8 of the Wireless Telegraphy Act 2006, unless the government has exempted the particular use from the need for a licence.

The Telecommunications Act 1984 abolished British Telecommunications' monopoly of running telecommunications systems and established a framework to safeguard the workings of competition.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Water

The Environment Agency controls how much, where and when water can be abstracted or impounded through their abstraction licensing regime. A number of parties (including, but not limited to, landowners and manufacturers) can apply to the Environment Agency for an abstraction licence, with different types of licences available depending on the type of abstraction or impounding proposed to be conducted. Whether a licence is granted or not depends on the amount of water available after the needs of the environment and existing abstractors are met and whether the abstraction is justified.

The Environment Agency also has the power to amend or revoke an existing licence where abstraction is damaging the environment. The duration of the licence is usually 12 years for a new licence with a presumption in favour of licence renewal. The Environment Agency also has the power to grant short duration licences where it thinks that there may be issues with water availability in the long term, and permits the trading of water rights. An abstraction licence is not required for certain limited abstraction activities.

An environmental permit is required from the Environmental Agency for discharge of liquid effluent or wastewater into surface water (such as lakes or coastal waters) or onto or into the ground. If the discharge of water is part of a waste, installation or mining operation then this can be conducted through an 'installation' or 'waste and mining' permit.

Natural Resources Wales is responsible for the management and use of water in Wales. Similar to the Environment Agency regime, a licence is required for water abstraction and impoundment.

Minerals

There is no national licensing system for the exploration and extraction of minerals. However, planning permission must be obtained prior to their extraction. The owner of the land will have the right of ownership to minerals found or extracted from its land (provided that these rights have not been excepted or reserved under a previous title transfer or by legislation).

United Kingdom onshore

Coal

The Coal Authority grants licences for coal exploration and extraction. The rights of ownership in almost all coal belong to the Coal Authority.

Gold and silver

Gold and silver are classed as 'Mines Royal'; therefore, rights of ownership in gold and silver vest in the Crown (in respect of deposits in the United Kingdom, excluding Scotland where certain deposits are specifically not vested in the Crown). Permission must be sought from the Crown Estate mineral agent for commercial exploration of these metals. If the Crown does not own the land in question then permission must be sought from the landowner. Planning permission is also required to mine the metals.

Oil and gas

Ownership of oil and gas located in the United Kingdom vests in the Crown in accordance with the Petroleum Act 1998, and oil and gas exploration and production in the United Kingdom (other than onshore in Northern Ireland) is regulated by the same act. A licence must be obtained from the Oil and Gas Authority for the exploration or production of oil and gas. The exploration licence grants the licensee the exclusive right to 'search and bore for and get' petroleum. The key distinctions between types of licences are onshore and offshore, for which there are separate exploration and production licences. The Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015 address the financial, technical and governance requirements for production licences. Any licence granted does not include rights of access; the licensee is therefore required to obtain the consent required for access and any planning permission necessary.

As of November 2019, the UK government has placed a moratorium on, and withdrawn its support for hydraulic fracturing ('fracking').

United Kingdom offshore

The seabed, beneath the seabed and beyond territorial waters (with a 12-mile limit) is known as the UK Continental Shelf (UKCS). These are the areas over which the UK sovereign exercises rights of exploration and exploitation of mineral resources. The Oil and Gas Authority grants licences in respect of oil and gas on the UKCS, and the Coal Authority grants permission to enter or drill through coal seams for coal bed methane and coal mine gas.

The rights of title to the natural resources are dependent on the owner of the land. The same rules will apply in relation to foreign investors; there are no rules that exclude foreign investors from holding title to these natural resources.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

In terms of taxation, profits made from the extraction of oil and gas in the United Kingdom or the UKCS attract tax, which currently comprises ring fence corporation tax (RFCT) of 30 per cent, a supplementary charge (SC) of 10 per cent and petroleum revenue tax (PRT) of zero per cent.

RFCT is calculated in the same way as corporation tax, which applies to all relevant companies. RFCT comprises a 'ring fence' around profits made from oil and gas extraction in the United Kingdom and the UKCS, preventing these taxable profits from being reduced by losses from other activities or excessively high-interest debt payments. In addition to RFCT, a company is charged an additional SC of 10 per cent on its ring-fenced profits. Finally, individual oil fields that received development consent before 16 March 1993 attracted PRT on their profits. However, this tax has now been permanently set to zero per cent (but has not been abolished). The marginal tax rate payable on oil and gas profits is 40 per cent. Various reliefs are available in respect of these taxes, such as the investment allowance, cluster allowance and onshore allowance, which apply to the SC, and the ring-fence expenditure supplement, which applies to RFCT among other available reliefs.

Businesses that exploit aggregates (sand, gravel and rock) in the United Kingdom will be subject to an aggregates levy. This will apply to aggregates that have either been dug from the ground, dredged from the sea in the UK waters or imported. A levy of £2 per tonne of taxable aggregate is payable, with less payable on smaller amounts (eg, £1 on half a tonne) each as of the date of drafting).

Companies that receive royalties for mineral extraction are charged corporation tax of 19 per cent (corporation tax is anticipated to increase from April 2023). Terminal loss relief may be applicable to reduce the tax payable on the royalties by offsetting the loss against the other gains or profits of the business in the same accounting period.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

Customs procedures and taxes generally apply to the export of natural resources from the United Kingdom.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Government approvals for a typical project finance transaction may include planning permission (generally within the remit of the local authority unless the project is an NSIP) and environmental approvals and permissions from various governmental agencies and bodies, including in respect of the extraction or abstraction of natural resources.

If the project finance transaction is public infrastructure being privately financed (eg, through the Mutual Investment Model), HM Treasury approvals are likely to be needed if the value of the financing transaction exceeds the delegated authorities of the public body procuring the infrastructure.

Registration of financing

21 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?

Subject to the need to register debentures at Companies House to ensure that the security interests are not void against a liquidator, administrator or creditor, and the debt secured by that charge does not become payable immediately (while not technically a requirement, failure to register accordingly has very serious practical consequences), there are as a matter of course no requirements to register or file any financing or project document, nor any other similar legal formality (outside the document's due execution), to ensure that it is valid and enforceable.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The English courts are supportive of arbitration and will generally seek to uphold contractual agreements to arbitrate. The United Kingdom is a party to the New York Convention and the Geneva Convention relating to recognition and enforcement of foreign arbitration awards. The United Kingdom has ratified the Washington Convention (ICSID) and has enacted the Arbitration (International Investment Disputes) Act 1966, which provides for the recognition and enforcement of ICSID awards. Most types of commercial disputes can be arbitrated. There are some very limited cases in which disputes are not arbitrable, including employment (where an employee has statutory rights to have his or her case heard before an employment tribunal), insolvency proceedings that are subject to the statutory regimes set out in the Insolvency Act 1986 and the Corporate Insolvency and Governance Act 2020 and criminal matters. There are no types of commercial disputes that are automatically subject to domestic arbitration. The Arbitration Act 1996 governs all arbitrations seated in England, Wales or Northern Ireland, both domestic and international.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

While not mandatory, both project and financing agreements are typically governed by the laws of England and Wales where the project is based in England or Wales. Where the project is based in Scotland or Northern Ireland, the real estate elements of the project (eg, leases) will be governed by the domestic law of that jurisdiction (though often the other project and finance documents may generally be governed by the laws of England and Wales). Real-estate-related security interests will also be governed by domestic laws of the relevant jurisdiction in which they are located.

There are some other statutory restrictions on governing law (including public policy requirements), primarily that the constitution of an entity incorporated in one of the jurisdictions in the United Kingdom must be governed by the law of that jurisdiction, and that both employment and insolvency-related matters will be governed by the domestic jurisdiction. English law is also often used for financing agreements (though not necessarily security agreements) for projects based outside the United Kingdom.

Submission to foreign jurisdiction

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

Submission to foreign jurisdiction

Submission to a foreign jurisdiction to settle disputes under a commercial contract is a valid choice under the laws of England and Wales, and the judgments of that foreign jurisdiction may be effective and enforceable subject to the relevant formalities. While the full detail of the relevant rules and legislation is outside the scope of this answer, we set out an overview below.

Broadly, in respect of proceedings commenced prior to 11 pm on 31 December 2020 (the end of the transition period), jurisdiction will be allocated and judgments will be enforceable under Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil commercial matters, known as the 'Recast Brussels Regulation'. In the case of Denmark, the regulation is applicable by separate agreement rather than it having direct effect. Iceland, Norway and Switzerland (ie, the European Free Trade Association members excluding Liechtenstein) reciprocally recognise the jurisdiction of other European states through the (similar but less developed) 2007 Lugano Convention. Many other countries (including Commonwealth countries) have reciprocal bilateral arrangements with the United Kingdom as to the recognition and enforcement of exclusive jurisdiction and judgments.

In respect of proceedings commenced after the end of the transition period, there are significant changes in the allocation of jurisdiction for disputes and in the recognition and enforcement of judgments. Courts in England & Wales will no longer apply the Recast Brussels Regulation, or 2007 Lugano Convention. There are unresolved issues over the application of the Hague Convention of the Choice of Courts Agreements 2005 (the Hague Convention) (particularly in respect of any exclusive choice of the jurisdiction of the English court which was entered into during the transition period).

It is no longer open to the English courts to decide on jurisdiction, or enforce judgments emanating from EU member states, using, as applicable, the Brussels Recast Regulation or the Lugano Convention. While the United Kingdom has applied to re-join the Lugano Convention 2007 (which exists between the EU and EFTA states) the agreement of the EU to do so has not been forthcoming at the time of writing, and indications from the EU Commission are that agreement should not be given. Having decided to leave the bloc, the United Kingdom 'is a third country without a special link to the internal market' disentitling the United Kingdom from the benefits of the Lugano Convention, which is described as a 'flanking measure for the EU's economic relations with the EFTA/EEA countries' (see https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf).

The UK courts will instead determine the appropriate jurisdiction for a matter on the basis of the Hague Convention on Choice of Court Agreements, or common law principles.

The English court will respect the submission by English parties to a foreign jurisdiction where the exclusive jurisdiction of a Contracting State to the Hague Convention has been validly chosen, the United Kingdom having acceded in its own right to the instrument from 1 January 2021. However, there is some potential disparity of treatment of a choice of jurisdiction of the English courts entered into prior to 31 December 2020 but relied on after that date. The EU Commission has indicated that EU27 courts may not recognise such a choice as one to which the Hague Convention may apply, on the basis that it is a choice made prior to the accession of the United Kingdom (as a separate Contracting State) to the Convention. The English courts may respect such a clause on the basis that the United Kingdom has enjoyed continuous status as a Contracting State first in its capacity as an EU member state and now as a Contracting State in its own right. We are not aware that the point has yet been tested in either a EU27 court or the English court.

It is a requirement of the Hague Convention that the choice of jurisdiction should be an 'exclusive' choice of court agreement. In the absence of any reciprocal declaration pursuant to A22 of the Convention, a non-exclusive jurisdiction clause will not constitute an effective choice for the purposes of the Hague Convention. It is unclear, but doubtful, whether an 'asymmetric clause' would be interpreted by the English courts as an exclusive clause for the purposes of the Hague Convention.

In that and other cases, if proceedings are issued in England in prima facie breach of a legitimate contractual choice of a foreign jurisdiction, the English court will apply common law principles to determine the most appropriate forum for the dispute. The court may be required to consider the appropriate jurisdiction if permission to serve proceedings out of England on a foreign party is required; or after service of proceedings if the defendant disputes the jurisdiction of the English court. At both points, any contractual choice of jurisdiction made by the parties will be one (potentially compelling) factor in determining whether England or another jurisdiction is the appropriate forum.

Waiver of immunity

The general rule at English law is that states (broadly sovereigns, executives and departments of the executive) are immune from legal action (including in respect of adjudication, interim actions and enforcement), as governed by the State Immunity Act 1978, subject to exceptions including the state submitting to the jurisdiction of the English courts. As such, an adequately drafted waiver of immunity clause would be effective and enforceable as a matter of English law (see further *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank plc and other* [2015] EWHC 55 (Ch)).

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Environmental matters in England and Wales are regulated by a complex mixture of increasingly stringent legislation and common law. Health and safety are often considered alongside environmental matters but are governed by separate laws and regulations.

While there are several relevant bodies to the regulation of environmental matters, the key regulators are the Environment Agency (for England) and Natural Resources Wales (for Wales). Other bodies that may be relevant depending on the project include:

- Natural England, which is responsible for biodiversity, wildlife and habitats;
- the Marine Management Organisation, which is responsible for marine activities; and
- local authorities, which can have a number of roles primarily relating to regulation of emissions, planning permissions and waste disposal.

The main environmental laws relevant to projects include the following:

- The contaminated land regime contained in Part 2A of the Environmental Protection Act 1990. Under this regime liability for remediation of any contamination (which includes investigation, mitigation and monitoring of contamination) sits primarily with those who caused or knowingly permitted the contamination. However, this liability can rest with landowners or occupiers, regardless of whether they are aware of the contamination if those who caused the contamination cannot be found.
- The environmental permitting regime which is set out in the Environmental Permitting (England and Wales) Regulations 2016. Under this regime, if certain activities are being undertaken, the party carrying them out must hold an environmental permit. There is a wide range of activities covered and they tend to be those activities that release emissions to land, air and water or that involve waste.

If a project causes contamination, pollution or a nuisance, a party (including a company) who has suffered loss as a result may be able to bring a civil claim in court under the common law of nuisance or negligence. The main aim of such an action is not the remediation of the issue but to compensate the party for its loss.

Any project involving waste (whether it is the production, collection, holding, storage and handling, processing, reuse or disposal) will be subject to statutory regulation.

If a project is an installation in an energy-intensive sector (such as manufacturing facilities, oil refiners and power stations) the UK Emissions Trading Scheme (UK ETS) may be applicable. The UK ETS has replaced UK participation in the EU Emissions Trading System (EU ETS) – although it should be noted that operators were required to comply with their EU ETS obligations relating to the 2020 scheme as recently as 30 April 2021.

The scheme is designed to increase the climate ambition of the United Kingdom's carbon pricing policy, while protecting the competitiveness of UK businesses. The United Kingdom played a role in developing the EU ETS, and the introduction of the UK scheme therefore provides continuity of emissions trading for UK businesses; it is expected therefore that many of the features and processes in the UK ETS will be familiar to operators.

Biodiversity, habitats and wildlife are also protected by legislation. If the site for a project is a designated site or if there are protected species on the site, there are likely to be significant limitations on the activities and developments that can be carried out on the site.

Breaches of the above laws can have a range of consequences, including:

- criminal liability and sanctions including fines or imprisonment;
- civil penalties under the specific regime, which can include fixed monetary penalties, discretionary requirements or stop notices;
- payment of damages as part of civil court actions; and
- requirement to carry out and cost of remediation.

Health and safety matters are extensively regulated through common law and statutory obligations with the basis of the statutory obligations set out in the Health and Safety at Work etc Act 1974. These obligations are regulated and enforced by the Health and Safety Executive.

The core obligation on employers is, as far as reasonably practicable, to ensure the health and safety of their employees and those affected by their activities. The qualification means that employers do not have to take measures to avoid or reduce risks affecting health and safety if they are technically impossible or if the time, effort and cost of implementing such actions is grossly disproportionate to the risk. Employers also have obligations in relation to the assessment, monitoring and auditing of the health and safety risks associated with its business and must appoint a competent person to implement the measures required to ensure compliance.

Breaches of the statutory health and safety obligations is a criminal offence by the company with a range of accompanying sanctions including:

- improvement notices requiring an issue to be remedied;
- prohibition notices requiring an activity to cease;
- individual liability for directors, company secretary or a manager if the offence was committed with their consent, neglect or connivance; and
- corporate manslaughter charges.

PROJECT COMPANIES

Principal business structures

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Typically a project company will be structured as a special purpose vehicle (SPV), often known as the ProjectCo, though the sponsors will hold equity in the ProjectCo's sole holding company (the HoldCo) for operational efficiency, limited liability and equity transfer reasons. Usually, the SPV is a limited liability company, but it may also be structured as a limited partnership (often for tax efficiency and transparency reasons). The ProjectCo may alternatively be a public limited company if it intends to raise bond finance (though this is often through the use of a separate SPV, often known as a FinCo or DebtCo). The ProjectCo will contract with the relevant authority or concessionaire via the project agreement or concession and will then subcontract the building and maintenance obligations to specialist subcontractors (often, but not always, parties related to the sponsors). The ProjectCo will aim to pass down liability for obligations to the relevant subcontractor, with the aim of minimising the residual liability remaining with the ProjectCo (and this residual liability may be addressed using insurance as applicable).

The principal sources of financing available to project companies are as follows:

- equity: both 'pure' equity and subordinated shareholder loans (often predominantly the latter by value). Equity will be passed down the corporate structure from sponsor(s) to the HoldCo to the ProjectCo. A project's leverage will be dependent on the industry

sector and the particular situation of that project, but leverage is typically between 75 per cent and 90 per cent for projects located in England and Wales;
- bank or institutional debt: while finance from institutional investors is becoming increasingly common, banks still play a significant role in financing projects;
- bond finance: some projects, especially those with long-term debt requirements or those with minimal or no construction risk may look to raise finance through public or private bond placements. This may also take place as a part of a 'bridge-to-bond' financing structure; and
- leasing: projects where the asset in question is primarily equipment rather than building-based often contain some lease financing.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

While PFI (the Private Finance Initiative) and its successor, PF2, the previous UK model(s) of PPP, had been a UK central government policy for over 25 years and state contracting entities (for example, NHS trusts, central government or local authorities) have had the power to enter into such arrangements under general existing legislative powers, there is no general PPP-enabling legislation in the United Kingdom. Unlike many other jurisdictions, there is no overarching PPP law under which such projects are mandated. PFI was the driving force behind PPP projects in England and Wales and was a policy implemented through the Cabinet Office and HM Treasury. However, there is legislation that assists with the bankability of UK PPP projects such as the Localism Act 2011, which extended powers to local government, and the National Health Service (Private Finance Act) 1997, which enabled NHS Trusts to enter into development finance agreements. Furthermore, the forms of contracts used by government entities to enter into PFI (and then PF2) contracts were made more consistent through the Standardisation of PFI Contracts suite of documentation that is now in its fourth incarnation (SOPC4) and formed the bedrock of bankable PFI and PF2 transactions in England and Wales.

PFI evolved into PF2 in 2012 primarily to counter criticism that PFI represented poor value for money for the taxpayer. The key changes in the standardised documentation and guidance included:
- reduction in the length of the tendering process;
- removal of soft facilities management (which produced a rich source of profits for PFI sponsors);
- public sector equity stakes in the PFI vehicles; and
- open book accounting and gain share mechanism for life cycle funding.

Although none of these changes represented legislative change, they did represent a marked change in government policy in its approach to new PFI projects. As mentioned above, the UK government has recently discontinued the use of the PF2 model for further projects and subsequently reiterated that the government 'will not reintroduce the private finance initiative model (PFI/PF2)' (as per the National Infrastructure Strategy published in November 2020), though the government does continue to seek to develop new infrastructure 'revenue support models', such as regulated asset base models and the Contracts for Difference model. With the Contracts for Difference model, the United Kingdom has a world-leading support mechanism for low-carbon energy generation and the government is currently looking to adapt the contracts in this model to support carbon capture use and storage technologies as the United Kingdom looks to meets its decarbonisation obligations and support PPPs and private investment in infrastructure.

PPP – LIMITATIONS

Legal limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

From a legal perspective, public bodies are broadly able to contract private sector participants (subject to certain formalities). At a macro-level, public sector procurement such as PPP transactions are generally subject (as at the date of writing) to procurement rules and processes. The previous OJEU notice procedure has been replaced by a 'Find a Tender' portal.

It should also be noted that there are specific procurement processes for the award of concession contracts (Concession Contracts Regulations 2016), utilities (Utilities Contracts Regulations 2016) and defence (Defence and Security Public Contracts Regulations 2016), each of which requires certain processes to be followed if the procurement meets the relevant value threshold (largely determined by the type of services being procured).

PPP transactions in the jurisdiction have historically taken a range of forms, but where the private sector was to provide finance (generally previously PFI transactions, and then subsequently taking an updated standardised form, PF2, though there are other models – notably the Welsh government's Mutual Investment Model), the finance procurement was overseen by HM Treasury where the value exceeds the relevant public body's delegated authority spending limits, and the project needed to follow HM Treasury's approvals processes. HM Treasury is responsible, along with the IPA, for approvals control for projects exceeding the relevant public body's delegated authority spending limits.

At a more micro-level, projects contracting with a local government entity should be aware that the capacity of local government bodies to contract is derived from statute, and these powers are narrowly interpreted. As a result, it is often necessary to obtain certificates pursuant to the Local Government Contract Act 1997 (LGCA certificates) from the relevant local government body certifying that the relevant actions are within its capacity (subject to very limited circumstances where a certificate can be challenged, meaning that the relevant contract will not be declared void as a result of being outside of the capacity of the local government body in question).

The actions of public bodies are reviewable (within a limited period of time) on the grounds of illegality (including that the public body acted outside of its proper capacity), irrationality or procedural unfairness. The risks posed by a judicial review process (for example, in relation to planning permissions) is often dealt with through conditions precedent.

The 2018 insolvency of Carillion, a key PFI contractor, and subsequent financial difficulties of other large PFI contractors such as Interserve has also heightened antipathy towards private finance in infrastructure. The Infrastructure Finance review itself states that the 'government is open to exploring new ways to use private finance in government projects, but the benefits brought by private finance must outweigh the additional cost to the taxpayer of using private capital, and the government will not consider proposals demonstrating the same characteristics as PFI or PF2'.

While private finance is still a possibility for UK infrastructure investment (and arguably a strong possibility given austerity and the lack of available government funding), the exact model or models that may be used remains to be seen (if one or more preferred models are forthcoming at all). Regulated asset base (RAB) models may well become more widely applied (including hybrid models such as that used on the Thames Tideway Tunnel project, where contingent financial support was available for low-probability, high-impact risks) and Contracts for Difference revenue support models, while the government may also seek to further utilise 'co-investment' models and other models where the public sector shared in any upside potential or where private sector returns were capped (potentially looking to competitively leverage the large pools of capital available for infrastructure investment); however, these models each have their limitations and cannot necessarily be used to fund investment in all types of required infrastructure. For example, a RAB model is difficult, though arguably not impossible, to apply to infrastructure such as hospitals, schools and prisons, including because this would see a public sector body having responsibility for regulating the returns where another (or other) public sector body or bodies were the customers under that model (notwithstanding any independent status of any regulator, there would be a significant risk of a conflict of interest in practice).

PPP – TRANSACTIONS

Significant transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

In the United Kingdom, there have been a very small number of greenfield 'new money' PPP (PFI/PF2) transactions in the previous six to seven years. Arguably, also, very few of these transactions are notable in terms of size, complexity or novelty. (Instead, investment has concentrated on offshore wind (and other low-carbon energy) investments with Contracts for Difference revenue support.) In contrast, the UK PPP and infrastructure debt financing market has been dominated by a large number of complex or large acquisition finance and refinancing transactions. At the time of writing, market conditions for debt continue to be very favourable for project sponsors (in terms of pricing, tenor and terms), enabling refinancing opportunities and contributing to often high-asset valuations, though we also note that the impact on the market of covid-19 has meant that interest rate and FX swaps markets are highly volatile and this volatility continues to have a (likely temporary) impact on the financial close of PPP transactions.

The UK market has witnessed insurance, pension and institutional fund debt investors advancing funds to a wide range of infrastructure projects to both investment and non-investment grade credits, and these funds are now often looking for capital growth or yield in new 'core plus' sectors such as data centres and fibre-optic cable and telecommunications businesses.

We note the continued use of HoldCo debt whereby debt is advanced typically above regulated operating companies or project companies to create leverage opportunities against junior debt and dividend cash flows (ie, UK High Speed Rail 1 acquisition and the Inter City Express PPP acquisition) in the context that many perceive infrastructure asset class as generally being conservatively leveraged. Indeed, we are seeing potential leverage opportunities being advanced to infrastructure equity funds, rather than at an asset level.

It is also worth noting debt raising on a deferred basis allowing sponsors to take advantage of current positive debt conditions (eg, Thames Tideway raising green bond finance to be issued in 2021/2022 for their construction financing requirements) from institutional investors.

We anticipate that there will be a significant growth in energy efficiency (such as heat networks) and electric vehicle charging infrastructure investment, driven in (large) part by climate change emissions reduction targets (including the drive towards 'net zero') and, with ambitious targets over the medium to long term, these may well need government support and progress using PPP models in due course.

UPDATE & TRENDS

Key developments of the past year

30 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

In the short-term, LIBOR transition is a 'hot topic' for project finance, with likely transition at the end of 2021 (for sterling LIBOR, noting certain US dollar LIBOR tenors are set to continue to be published until June 2023) and the pace is starting to pick up in respect of lenders and borrowers engaging and organising or documenting this transition in project finance debt documents. The relevant financial authorities have stated on a number of occasions that parties to financial transactions occurring on a LIBOR basis should not rely on the potential applicability of 'tough legacy contract' legislation to project finance transactions. The government has provided useful guidance to date (see *Discontinuation of London Interbank Offered Rate – applied to PFI Projects*, but while this guidance suggests that refinancing gains are unlikely to be triggered by LIBOR transition, further guidance would be beneficial as to confirmation that public authorities would not treat LIBOR transition as potentially increasing their liabilities on early termination.

In the 2019 budget, the Chancellor of the Exchequer announced that the PF2 infrastructure procurement model was being discontinued, and there are a very limited number of projects that could be procured through 'traditional' PFI and PF2-type PPP models. This position has been subsequently re-emphasised a number of times by the government, including through its key publication in November 2020 of its National Infrastructure Strategy.

The National Infrastructure Strategy has a small number of key stated aims, including:

- to 'level up' and 'strengthen the Union' (including directing infrastructure investment into the Midlands and North of England);
- meeting its net zero and climate change commitments; and
- support private investment.

The new UK infrastructure bank (based in Leeds in the North of England) is proposed to be a key institution to promote and finance these objectives (including by 'crowding in' private capital), with a total initial financial capacity of up to £22 billion (£5 billion of initial equity provided by HM Treasury; another £7 billion available through government debt facilities and subsuming the up to £10 billion existing guarantees facility of the UK Guarantee Scheme). £4 billion of the up to £12 billion of 'new money' is allocated to lending to local authorities (currently at gilts + 60 bps) for investment in high value or strategic projects, and the new bank will have a number of financial tools, including senior debt, hybrid products (such as mezzanine loans), equity investments and guarantees.

Further, in terms of local government borrowing for infrastructure, it is worth noting that while the cost of loans from the Public Works Loan Board (a key source of local government borrowing) has been cut, the rules for these loans changing means that borrowing must be for the purpose of capital spending (with a local government body intending to invest in assets primarily for yield over the term of its three-year capital plan being ineligible to borrow.

Despite clear previous political statements evidencing an intention to support significant investment into the UK's infrastructure, it remains highly uncertain as to whether that support will be forthcoming in practice – there are potentially dichotomous drivers at work in that the UK government has spent a vast sum of money on covid-19-related support for the economy and arguably may have little borrowing capacity available to it to invest in infrastructure, but in contrast to the financial austerity that followed the 2008 financial crash, the current Chancellor of the Exchequer, Rishi Sunak, may seek to adopt a more

Keynesian economic approach with the public sector investing in infrastructure to stimulate demand (while the benefit of low interest rates is available).

In mid-June 2020, the IPA published the 'National Infrastructure and Construction Procurement Pipeline 2020/21' in which are listed 340 procurement opportunities, in a bid to provide better pipeline clarity to the industry during the covid-19 crisis. The published procurement pipeline is worth a minimum of £29 billion and a maximum of £37 billion. It covers 340 individual procurements across 173 projects. However, there is no reference to any private sector financing models or private sector capital models within the procurement pipeline policy document (see further www.gov.uk/government/publications/national-infrastructure-and-construction-procurement-pipeline-202021).

From a PPP perspective, and outside sub-sectors such as low-carbon energy generation (where Contracts for Difference play a key role in revenue support and predictability, and such models are being adapted by the government in the nascent carbon capture, utilisation and storage (CCUS) sector) and regulated asset base models (eg, for the water and aviation industries), the continuing lack of both a preferred investment model (or models) is an ongoing challenge to those in the project and infrastructure finance sector (in particular in respect of private investment in transport or social infrastructure) who wish to deploy both equity and debt capital to assist in the development of new and expanded greenfield PPP projects.

There are two potential contracting structures that could evolve into valuable opportunities for private investment into public infrastructure:

- the Direct Procurement for Customers (DPC) model; and
- the Expansion of Regulated Asset Base (RAB) model

In the regulated sector, both water and the energy industry are under increased pressure to ensure best value for their customers. Both Ofwat as water regulator and Ofgem as the energy regulator are seeing to introduce greater competition in the procurement of large water and wastewater capital projects and onshore transmission assets, respectively. In the water sector, Ofwat is introducing the DPC model whereby water companies are required under their price review (the latest being PR19) to identify large water and wastewater infrastructure projects to be competitively tendered. Under this DPC model, the regulated water company (with the approval of Ofwat) will run a competitive tender to appoint a third party (referred to as the CAP – Competitively Appointed Provider) to undertake the design, build, finance, operate and maintenance (DBFOM) of the new project. Ofwat has introduced two alternative DPC models: first, the water company retains the licence for its network and contracts for the DBFOM project (known as the DPC SPV Model) and second, the DPC utility model, whereby the CAP is awarded a licence from Ofwat for the specific project (like the Thames Tideway Tunnel project).

The licensed water companies in England and Wales have identified over 15 potential DPC projects as part of the PR19 and business planning for the seventh asset management plan period (see further: www.ofwat.gov.uk/regulated-companies/markets/direct-procurement/direct-procurement-for-customers/).

In the energy sector, Ofgem has been developing similar models to DPC know as CATO (Competitively Appointed Transmission Owner) for the development of large onshore transmission assets. While the CATO process and consultation started its market engagement before Ofwat's DPC model, there have been delays in the roll-out of the CATO-based procurements due to legislative and regulatory delays. Ofgem is, in parallel, consulting on new models based on Ofgem's learnings from their own Offshore Transmission Owner programme. The Ofgem consultation is around its proposed Competition Proxy Model (CPM) and its own SPV model (the latter being similar to the Ofwat DPC SPV model) (see further: www.ofgem.gov.uk/publications-and-updates/update-extending-competition-transmission-and-impact-assessment).

Both the Ofwat and Ofgem models provide opportunities for the private sector to deploy private external financing in the delivery of large complex public infrastructure projects, so the market remains engaged to see how the marriage of complex engineering projects and programmes works with the discipline of third-party finance in a PPP type structure.

On the RAB model there are continuing discussions and consultation on the adaption and application of the model to new-build nuclear power stations. The Department for Business, Energy and Industrial Strategy published a response to its consultation on how a RAB model could be used for new nuclear projects on 14 December 2020. The consultation concluded, in broad terms, that the government should continue to explore the RAB option but also consider a range of other financing options. The work on negotiations for the proposed 3.2 GW Sizewell C Project will provide an opportunity for these options to be explored, along with the role of government finance in construction of these large projects (see further: www.gov.uk/government/consultations/regulated-asset-base-rab-model-for-nuclear).

Among other key sectors, digital infrastructure has proved extremely popular during the covid-19 crisis with record home working leading to greater reliance on broadband connectivity. This is mirrored in the market activity, as established and newly formed alt-net companies build out fibre-optic cabling projects. In addition, infrastructure investors have been attracted to the development data centres in established markets – Frankfurt, London, Amsterdam and Paris (known as FLAP), or indeed, Frankfurt, London, Amsterdam and Dublin, known as FLAD) and new secondary and tertiary markets. Public sector policy incentives promoting zero emission vehicles have also provided investor opportunities in electric vehicle charging infrastructure. While fibre-optic cabling and data centres (in particular) are private sector corporate investments, rather than assets likely to be subject to public-private partnerships, they exemplify the growing trend in infrastructure investment towards 'non-traditional' or 'core plus' assets, partly driven by the attraction of higher returns, but also by the lack of (domestic) opportunity or pipeline in private sector investment opportunities in more 'traditional' or 'core' infrastructure sectors such as schools, roads and healthcare, although the covid-19 crisis itself could lead to additional projects to expand healthcare infrastructure resilience.

With the covid-19 crisis having a significant impact on PPP infrastructure in the United Kingdom, there are growing calls for the economic recovery to be led by 'green infrastructure', including by renewable energy investment rather than fossil fuel-based technologies, as the United Kingdom legislates for its commitment to net zero by 2050.

We anticipate additional UK government commitments to offshore wind projects, CCUS infrastructure alongside gas generation plants and hydrogen production hub facilities. The government has published an updated comprehensive policy on the United Kingdom's energy system mix in December 2020, known as the Energy White Paper, which informs the direction of the United Kingdom's funding mechanics for energy generation and distribution for firm and renewable power sources and is informative for financiers and investors business planning for investment in the UK energy sector (see further: www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future).

A significant factor in the eventual speed of the transition from fossil fuel technologies will be the investment policies of lenders and equity investors in the infrastructure and PPP sector. For example, many pension funds and institutional investors have continually strengthened their environmental and social governance (ESG) policies, refocusing investment away from polluting and carbon-intensive industries and towards those that can evidence stronger ESG credentials. With this overarching drive towards climate change emissions reductions and sustainability, we anticipate significant growth in 'green' finance in infrastructure in the medium term. ESG-based financing terms are starting to make their way into project and infrastructure finance documents, and we anticipate that these mechanics will become standard as investors and consumers continue to apply pressure on financial institutions and governments to address climate risk.

Coronavirus

31 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The UK government has passed a number of pieces of emergency legislation and implemented a number of relief programmes and other initiatives in response to the covid-19 pandemic. On a macro-economic level, the UK government has implemented various state aid schemes, including (most relevantly here) a £50 billion umbrella scheme providing grants and loan guarantees to businesses.

Legislation of particular relevance to the infrastructure and PPP sectors are the Coronavirus Act 2020 and the Health Protection (Coronavirus, Restrictions) Regulations 2020, the latter of which mandate the closure of specified businesses and premises, including certain types of infrastructure and PPP assets. This may be of relevance to relief, excusing cause and change in law provisions in PPP agreements depending on the exact drafting of any relevant provisions. Where relevant, parties should also consider material adverse change provisions.

The UK government also amended the Corporate Insolvency and Governance Act 2020 to provide temporary reliefs in connection with covid-19, some of which currently continue in effect.

The UK government has also produced general procurement policy guidance notes (PPNs) and PPP-specific guidance (see www.gov.uk/government/publications/supporting-vital-service-provision-in-pfipf2-contracts-during-the-covid-19-emergency in respect of the latter; see also the subsequent FAQs produced by the government in June 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895595/2020-06-24_PFI_and_COVID-19_Frequently_Asked_Questions.pdf). The details of these guidance notes are outside the scope of this chapter, but broadly they look to protect the UK economy by promoting business continuity (potentially including covid-19-related deductions relief) and the avoidance of litigation. In particular, the guidance suggests that covid-19 will generally not be a force majeure event in UK PPP contracts (though the precise drafting of any relevant PPP contract should be reviewed in this context).

For further detailed discussions of the PPNs and PPP-specific guidance we recommend reviewing the following articles (which include recommendations as to advisable best practice, as applicable):

- 'Impact of COVID-19 on UK PFI/PF2 Contracts: A true Public-Private Partnership Response: Supplier Relief' (www.bclplaw.com/en-GB/insights/impact-of-covid-19-on-uk-pfipf2-contracts-a-true-public-private-partnership-response-supplier-relief.html);
- 'Play fair children! – UK Cabinet Office publishes contract management guidance entreating all parties to act "reasonably" in managing Covid-19 issues' (www.bclplaw.com/en-GB/insights/play-fair-children-uk-cabinet-office-publishes-contract-management-guidance-entreating-all-parties-to-act-reasonably-in-managing-covid-19-issues.html);
- 'Covid-19 UK – "Keep Calm and Carry On" – Financial lifeline offered for public sector suppliers to UK Government' (www.bclplaw.com/en-GB/insights/covid-19-uk-keep-calm-and-carry-on-financial-lifeline-offered-for-public-sector-suppliers-to-uk-government.html); and
- 'The Road to Recovery? Cabinet Office releases PPN 04/20 – Recovery and Transition from COVID-19' (www.bclplaw.com/en-GB/insights/the-road-to-recovery-cabinet-office-releases-ppn-0420-recovery-and-transition-from-covid-19.html).

BRYAN CAVE LEIGHTON PAISNER BCLP

Mark Richards
mark.richards@bclplaw.com

Tom Eldridge
tom.eldridge@bclplaw.com

Alexander Hadrill
alexander.hadrill@bclplaw.com

Governor's House
5 Laurence Pountney Hill
London, EC4R 0BR
United Kingdom
Tel: +44 20 3400 4603
www.bclplaw.com

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