

Market
Intelligence

PROJECT FINANCE 2022

Global interview panel led by Milbank

LEXOLOGY

Getting the Deal Through





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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

Cover photo: [shutterstock.com/g/
chombosan](https://www.shutterstock.com/g/chombosan)

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ISBN: 978-1-83862-949-6



Printed and distributed
by Encompass Print
Solutions

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Global Trends

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A snapshot of 2021

The year 2021 saw the covid-19 pandemic entering its second year with many people still working from home and trying to adjust to the new norm. While the presence of covid-19 continued to be felt in all aspects of both home and work life in 2021, as evidenced in the infrastructure space by the decrease in deal value and volume, we did witness some resilience in the project finance market with many significant project finance deals across a range of sectors nevertheless managing to close in 2021, including the US\$22.6 billion Area 1 Mozambique liquefied natural gas (LNG) liquefaction terminal project and the US\$3.9 billion Vineyard Offshore Wind Project. Most day-to-day business continued to be conducted virtually, but deal implementation and execution generally progressed at a quicker and more efficient pace than was the case in 2020 as participants became more accustomed to inhabiting a project finance virtual world. There was also a marked difference in levels of activity and the ability to get deals done in the US (domestic) market and Western Europe as compared with more developing economies (in the Middle East, Africa and Asia) where travel restrictions put the brakes on diligence and government interaction or momentum to push forward projects.

In terms of number of deals, renewable projects, in particular those in the offshore wind sector in Europe and the US, continued to grab the headlines, although 2021, like 2020, also witnessed some big-ticket oil and gas projects (under development for a number of years) finally achieving financial close. Surprisingly, project finance in the Middle East and North Africa (MENA) region saw an increase in terms of overall deal value (but not numbers) in 2021; perhaps the major reason being the Aramco oil pipeline infrastructure assets sale and the Abu Dhabi National Oil Company (ADNOC)'s Gas Pipelines Acquisition Bond Refinancing (as described in more detail in the Oil and gas section below).

So what were the trends that we saw in the project finance market over 2021?

Power

The year 2021 did not see any let-up in the pace of the transition from conventional power to renewables as corporates and financial institutions continued to seek to distance themselves from CO₂-producing projects and diversify their energy portfolios. The US was the torch bearer in 2021, as exemplified in particular by offshore wind (such as the US\$3.9 billion Vineyard Offshore Wind Project (800MW)). Although the offshore wind market in the US remains at a nascent stage with currently only three operating offshore wind projects to date, prospects for new offshore wind projects are encouraging, witnessed by the aforementioned Vineyard project, which is expected to be operational in 2023 and, more significantly, the announcement of certain renewable initiatives (including in the form of grants and financing



Aled Davies



Anthony Scott



Dan Miyagishi

“2021 did not see any let-up in the pace of the transition from conventional power to renewables.”

programmes) by the Biden administration and the passing of certain legislation such as the Infrastructure Investment and Jobs Act. The terms of such grants and financing programmes are, however, still to be developed but a number of new schemes are under the planning or implementation stage.

Asia too saw some activity. In addition to Taiwan, which successfully closed a number of deals in 2020, other countries in Asia with favourable wind resources have come up with innovative plans to explore offshore wind as a key renewable power source. The wind power sector in Vietnam is still in its early stages, but 3,000km of coastline and high wind speeds, coupled with the recent revisions to the feed-in tariff and power purchase agreement template, on paper at least demonstrate opportunities. The 144MW Lotus Onshore Wind Power Project, funded partially by the Asian Development Bank, achieved first drawdown in August 2021 and is currently the largest wind power project in Vietnam to be project-financed by international lenders. However, since some of the planned projects are significant in size and ambitious, it remains to be seen how forthcoming government support will be to assist with the swift implementation of such projects. The wave of offshore wind projects in Japan has begun to materialise based on the offshore wind promotion law that came into effect in April 2019. For example, following Marubeni's first large-scale offshore wind project in Japan (the 140MW Akita Noshiro wind farms), a Mitsubishi Corporation-led consortium announced in December 2021 the development of a new offshore wind power generation project off the coast of Yurihonjo City, Akita Prefecture with an expected total installed capacity of 819MW. Korea's initiative to develop 12GW of offshore wind capacity with renewables forming at least 20 per cent of its energy mix by 2030, saw Macquarie's Green Investment Group and TotalEnergies close on the US\$4.9 billion Ulsan/Jindo 900MW offshore wind portfolio in January 2021.

Project finance in Europe in 2021 continued to be dominated by renewables with multibillion-dollar offshore wind projects reaching financial close: the US\$2.5 billion Courseulles-Sur-Mer (450MW) in France, the US\$2.4 billion Codling OffShore Wind Farm (1,500MW) in Ireland and the 257MW Arcadis Ost1 in Germany. The continuing ability of sponsor groups to close financings for such projects amidst covid-19 demonstrates the continuing appetite of banks for green loans, especially if the risks are mitigated by multilateral cover from the likes of the European Investment Bank. A number of floating offshore wind projects are now being awarded and we can anticipate this will be a continuing trend in Western Europe.

In addition to the US offshore wind market gradually taking off, the US was again very much at the forefront of the renewables sector in 2021 in terms of solar and onshore wind deals. The US renewable market appears to have continued to remain largely unaffected by the pandemic. Intersect Power's 310MW and 453MWh



battery storage Athos III Project in Riverside County, California and 415MW Radian solar project in Brown County, Texas are good examples of the booming renewables market in the US in 2021. The drivers behind much of the renewables activity in the US continue to be private equity, pension and other infrastructure funds as well as tax equity investors in the market trading assets periodically and developing innovative financing schemes to back their activities.

The MENA region also witnessed several significant independent power projects and independent water projects (IWPs), including Sudair solar, one of the world's largest single-contracted solar photovoltaics (PVs) and the largest in Saudi Arabia, which achieved financial close in August 2021, and the Yanbu 4 IWP, a first of its kind IWP that includes a water transmission pipeline, which reached financial close earlier in the year. In line with global trends, Saudi Arabia is aiming to achieve efficient energy production so as to contribute to the reduction of greenhouse gas emissions in the energy sector, and the Sudair solar project is one example of how it is trying to achieve this goal.

Waste to energy (WtE) projects were also part of the energy mix in the MENA region in 2021, as exemplified by the Al Warsan 171MW biopower WtE project in

“Bright spots in the South East Asia power sector include a number of potential large-scale LNG to power projects that are still contemplated for the region.”

Dubai, which closed in June and received financing from the Japan Bank for International Cooperation and a group of commercial banks with Nippon Export Investment Insurance providing cover for the commercial bank debt. Al Warsan stands out for being the largest stand-alone WtE project in the world. Construction is expected to commence in 2023 and commercial operations in 2024.

In South East Asia, the action remained muted. The challenges of the covid-19 pandemic imposed travel restrictions, and governmental refocusing on priorities continued to hinder the implementation of transactions and the plans to bring new projects to market. Export credit agencies, commercial banks and Japanese trading houses continue to shun coal projects, which in turn contributed to a reduced deal flow in South East Asia. Bright spots in the South East Asia power sector include a number of potential large-scale LNG to power projects that are still contemplated for the region (eg, in Bangladesh and Vietnam) and expected to be active in 2022 (circumstances permitting) and the commencement of construction on the 145MW

Cirata Floating Photovoltaic Power Plant in Indonesia. The latter, once completed, will be the country's and South East Asia's largest floating PV plant.

Energy storage and battery

The emerging trend of energy storage projects is likely to continue as energy from renewable sources gradually replaces energy produced from coal and other thermal power resulting in the increasing need for energy storage projects as a reliable source of power to counteract the intermittent nature of renewable energy generation and to add efficiencies to the actual operation of renewable projects.

In the US, where there are two major energy or battery storage markets (namely, California and Hawaii), we saw a greater increase in 2021 in deployment for lithium-ion energy storage compared with all previous years combined. Federal investment tax credits played a role in contributing to this trend by helping to provide steady renewable power at cost-effective prices. Some examples of market participants taking advantage of this benefit include Goldman Sachs Renewable Partner's Slate Project, Clearway Energy Group's Mililani I Project and Waiawa Solar Power in Hawaii, and the Daggett 3 Project in California.

In Europe, Semcorp Industries announced in December 2021 that its wholly owned subsidiary, Semcorp Energy UK, intended to build Europe's largest battery energy storage system to help the UK achieve its 'Net Zero' target (ie, 100 per cent reduction in greenhouse gas emissions in the UK by 2050). This would, along with Swedish battery developer Northvolt's Ett lithium-ion battery plant in northern Sweden, strengthen Europe's challenge to the current status quo of battery manufacturing being concentrated in Asia among a few large suppliers such as LG Chem and Panasonic.

Oil and gas

The biggest challenge that the industry faces relates to the willingness of financial institutions and investors to participate in the sector as part of the global ambition to achieve net zero carbon emissions combined with the energy transition movement. Similar to the stance towards coal, many banks and government financial institutions are reluctant to participate in the oil and gas sector, and the view towards LNG playing a key role in energy transition seems mixed. Having said that, the oil and gas sector (if one expands it to include LNG projects) boasts (albeit a deal that has been under development for a number of years) the biggest infrastructure deal in 2021, namely the US\$22.6 billion Area 1 Mozambique LNG liquefaction terminal project, which was completed by a consortium comprising, among others, TotalEnergies and Mitsui & Co. The first half of 2021 did, however, see activity in financing for existing oil and gas infrastructure, mainly due to M&A and capital market deals.

Some high-value deals did in fact reach financial close in 2021, including the US\$12.6 billion EIG Global Energy Partners' and Mubadala's acquisition of a 49 per cent interest in Saudi Aramco's subsidiary, Aramco Oil Pipelines Company. These deals reflect a continuation of the trend set in 2020 whereby oil and gas majors sell stakes in their infrastructure assets associated with their production assets to yield investors, thereby releasing capital to spend on new assets.

The year 2021 mirrored the prior year in that it was a busy one for the capital markets in terms of project financings or refinancings. Noteworthy examples in the oil and gas sector were Qatar Petroleum (QP)'s US\$12.5 billion bond facility, which was established to fund QP's growth plans (in particular, the North Field expansion projects) over the next few years, and ADNOC's US\$3.9 billion Gas Pipelines Acquisition Bond Refinancing. It is worth noting that investors worldwide are coming to rely increasingly on bond markets for corporate purposes to refinance existing indebtedness to secure better financing terms or to develop portfolios.

LNG

The LNG sector was relatively quiet in 2021 from the perspective of new project finance deal flow, and that applies to both the upstream and downstream ends of the business. To an extent, the upstream can be seen as having continued a period of consolidation that may have been initiated by prior lows in energy prices, a need to rationalise costs and points of oversupply in the LNG market. These challenges have been compounded by the difficulty in putting in place long-term contractual structures required for the project financing of capital-intensive projects in a broad energy market that is undergoing such fundamental changes that it may be difficult to predict with sufficient precision.

Some of the exact same factors, from pricing to relative merits in particulate and carbon reduction, have provided a corresponding impetus to downstream projects, with LNG import and LNG-to-power solutions inching forward in a number of South East Asian countries. Some of these were always likely to be slower burn given the key role being played by national and provincial governments in planning for such a massive infrastructure build-out, and the process does not appear to have been helped by the wave of Delta variant that prevented face-to-face meetings so critical to pushing deals through.

Extraneous factors are constantly shifting though and price lows turned quickly to price spikes (in LNG, at the end of 2021 and start of 2022 as Asian importers scrambled to cover a cold snap and supply constraints, and sought to fill storage levels sufficiently to avoid a repeat) as well as a more generally buoyant landscape in energy pricing as the globe has somewhat moved into a post-lockdown recovery. Upstream LNG liquefaction projects that may have been on hold appear now to be



gearing up. While the pricing may not be as attractive as it was for the downstream LNG import and regasification projects, many of the structural issues promoting LNG as a fuel source for power generation remain (varying from a need for gas supplies to replace dwindling domestic resources, to the needs to expand power generation generally to keep up with demand and to do so in a manner that satisfies particulate and carbon constraints).

We think the next phase for both upstream LNG production and downstream LNG regasification will be an exciting space to be involved in, as projects structure to overcome the uncertainties of the energy transition, as they accommodate the additional flexibility required to engage with far more heterogeneous downstream LNG importers (and the integrated arrangements with (often state owned) power utilities), and as they strive to present LNG as part of the solution to environmental concerns. Carbon-neutral cargoes became an increasingly common phenomenon in 2021, with several dozen traded, and we can expect this to be a key component as the sector adapts.

New guidance achieved in Glasgow on trading of carbon credits will likely prove useful in making carbon offsets more readily available to the sector, although the

“The effect of the covid-19 pandemic on deal value and volume in the transport sector lingered in 2021.”

winners are likely to be those projects that can also differentiate themselves with a compelling (sufficiently transparent) audit showing a genuine reduction or efficiencies in greenhouse gas emissions from well head to delivery.

In any case, geopolitical tensions may well continue to support LNG as a necessary energy source as buyers and their governments consider anew their security of supply.

Transport

The effect of the covid-19 pandemic on deal value and volume in the transport sector lingered in 2021, although we did witness some activity in the road sector towards the end of the year, as demonstrated by the closing of the biggest private-public partnership deal in the Asia-Pacific region in September 2021 – San Miguel Corporation’s US\$1.9 billion Pasig River Expressway. We also saw some activity in Latin America in 3Q 2022 by way of the US\$682 million Piracicaba-Panorama Toll Road Expansion (1273KM) in Brazil and the US\$752 million Rio Magdalena 2 Highway (144KM) in Colombia. Key points of interest in the transport space in 2021 were the termination by the UK government of its private finance initiative

model and the revamp by the Welsh government of its Welsh Mutual Investment Model. Transport-related M&A activity remained at a stable level throughout 2021. Alstom, for example, acquired Bombardier Transportation for US\$7.1 billion in a bid to tap into the North European and Chinese markets. Another project that bucked the trend of the otherwise depressed level of transportation sector activity in 2021 was the New Istanbul Airport Refinancing, which enabled airport operator IGA to refinance its €5.8 billion existing loans to achieve lower financing costs.

Mining

While certain sectors, such as renewables and infrastructure finance, demonstrated their resilience in 2021 notwithstanding that the covid-19 pandemic had already entered its second year, the mining sector has yet to recover to pre-pandemic levels in terms of transaction volume and value. In early 2020, when economies worldwide began shutting down, mine site operations came to a halt across the world, supply chains were disrupted and global demand for metals, notably from China, declined.

There was some glimmer of hope in 2021, however, as certain mining operations that had previously been in shutdown mode resumed operations. One such example was Ambatovy, a large-tonnage nickel and cobalt mining enterprise located in Madagascar, notable for being the largest ever foreign investment in Madagascar and one of the largest in sub-Saharan Africa, which resumed operations in March 2021. Ambatovy produces high-grade nickel and cobalt briquettes that are used, among other things, in EV batteries.

While much of the mine finance activity in 2021 focused on restructurings or other fundraising activity aimed at ensuring that mining companies could weather the pandemic storm, some mining activities in 2021 began to show signs of recovery from the pandemic thanks to the strong rebound in metal prices following the price falls induced by the global pandemic in the first quarter of 2020. One example of this renewed optimism in the mining sector was the achievement of financial close on the US\$3.7 billion Malmyzh Copper-Gold Porphyry Mine and Ore Processing Plant in Russia.

In terms of metal prices, many returned to pre-pandemic levels in 2021 with the prices of gold and copper continuing their upward trend in 2021. In the case of the price of copper, which is generally regarded as a barometer for the global economy, it recorded an all-time high of US\$10,512 per metric ton in May 2021, marking a 130 per cent growth since March 2020. In the case of the price of gold, it skyrocketed during the summer of 2020, briefly rising above US\$2,000 an ounce, and this bullish sentiment continued throughout 2021 due to concerns about whether the impact of the pandemic would abate in 2021. The hike in the price of copper in 2021 was driven primarily by high demand from China and peoples' optimistic projection

of the nascent global economic recovery backed by the rollouts of the covid-19 vaccines. Analysts are predicting that prices will stabilise with supplies starting to rise again in 2022. It is generally agreed, however, that price volatility will continue if the covid-19 pandemic and issues stemming from the supply chain remain a major factor in daily exchange movements.

As 2021 came to an end, the outlook for battery metals (eg, lithium, cobalt, zinc and graphite) became particularly optimistic. The market for such commodities is principally driven by the demand for batteries in EVs, energy storage and electronic devices – this commodity-specific demand reflects the current trend of the global energy transition and a general shift towards sustainability. Despite the short-term projected decline in global EV sales from pre-pandemic forecasts, and the disruption in battery manufacturing capacity, demand for battery metals is expected to rise exponentially in the future.

As noted earlier in this chapter, in the case of renewable energy, battery storage is now more frequently integrated with renewable energy projects as it allows energy generated on, for example, wind and solar farms to be stored prior to distribution. In addition to traditional renewable energy investors seeking to diversify their portfolios to include battery metals that will ultimately be used in renewable projects, as well as private equity funds and institutional investors seeking opportunities in battery metal projects by way of royalty or stream investments, major miners have also started seeking opportunities in the upstream battery metal space. For example, Rio Tinto Group agreed to acquire the Rincon Mining lithium project in Argentina for US\$825 million from Rincon Mining, a company owned by funds managed by the private equity group Sentient Equity Partners.

What can we expect in 2022?

With the rollout of the covid-19 vaccine, it seems that we may now have seen the worst of covid-19 in certain countries as each government takes its own unique measures to combat and move more towards living with the virus. Although we all hope for a covid-19 restriction-free 2022, including in the project finance space, this is subject to the lingering effect, and any unexpected further mutations of, the virus. However, even working on the premise that the effects of covid-19 will still be strongly felt in the latter half of 2022, we believe that project finance deals will continue to get done and hopefully with greater deal flow as compared to 2021 (notwithstanding rising costs of materials, labour and transportation) now that project finance participants are more accustomed to working and living with covid-19.

We do not see any signs of a reverse in the trend of the number of renewable projects and investment in clean technologies continuing to increase, especially in

the solar and offshore wind sectors. Project developers will, however, need to factor in rising costs of raw materials and hence construction costs due to the disruption to the global supply chain caused by covid-19. The prospects for the renewables sector in the US continue to be bright on account of the generous tax subsidies for offshore wind and the implementation of the Biden administration's Plan for a Clean Energy Revolution and Environmental Justice and Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future, which set out his administration's plans for addressing climate change and increasing the use of clean energy.

As noted above, covid-19 has significantly disrupted the metals and minerals space, but we expect the demand for battery metals to continue to grow, mostly driven by the energy transition (a prime example of which is the UK's Net Zero target). It is reasonable to expect that the metals market (especially battery metals) will therefore need to expand to meet demand and ensure that EV battery manufacturers can achieve security of supply, thereby offering opportunities for non-traditional players as well as the more traditional players along the metals value chain.

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Africa Overview

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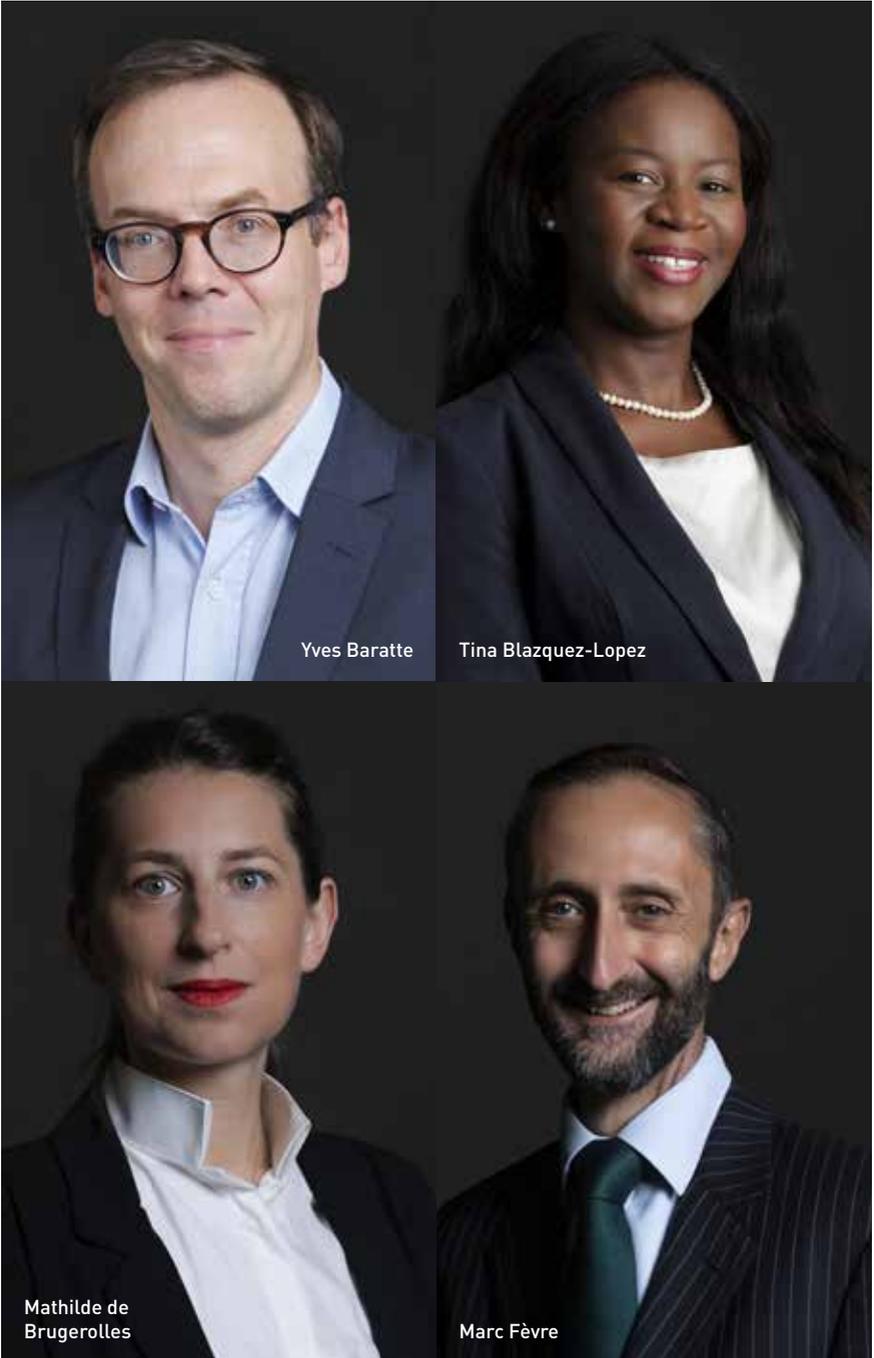
1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

YB: Notwithstanding the covid-19 pandemic, we note since 2019 vigorous activity in the African infrastructure sector in Francophone Africa, in particular in the transport sector, with progress in projects for the construction or rehabilitation of ports, airports and, to a lesser extent, railway infrastructure and also an increase in investments in the power sector (eg, the 44MW Singrobo hydropower plant in Ivory Coast, the Ouagadougou New International Airport PPP, the Tanger Med II Port Container Terminal 3). However, 2021 has also been a challenging year, and major delays have been recorded in the implementation of some projects, such as the deepwater port of Banana in Democratic Republic of Congo (DRC). A material, continuous change we have also noticed is the growing activity of infrastructure funds, with very substantial funds leverages and the creation of at least 10 new funds dedicated to infrastructure in Africa announced during the year.

The pace of development of renewable projects seems to have again further accelerated with the launch of new tender processes in the solar and wind sectors in a number of countries including Algeria (for the realisation of the project Solar 1,000MW), Tunisia (sixth call for tenders for the installation of solar power plants for a combined capacity of 70MW divided between 16 plants) and Burkina Faso (for four solar photovoltaic plants with a total capacity of 9MWp). Along these new tenders, we also note that a lot of off-grid projects have been implemented throughout the continent since 2019 and that 2021 was a significant year for these projects. Reputable actors in this field include NEoT Offgrid Africa, Meridiam, Greenlight Planet, Winch Energy Limited, Engie and EDF. The year 2021 has also been successful for the launch of various renewable energy projects such as:

- the concession agreement with China Gezhouba Group Company signed by Congo and Cameroon for the construction of a US\$700 million hydroelectric station on the Dja River with an estimated production capacity of 600MW;
- SNEL, the DRC's state-owned power utility, has signed power purchase agreements (PPAs) for two solar plants in the copperbelt region; and
- Brazzaville and Kinshasa signed an agreement on 6 December 2021 to carry out a major energy project between the two countries (the Energy Friendship Loop) with a first phase consisting in the reinforcement of the transmission capacity of the lines between the Congo Power Station in Pointe-Noire and the Inga hydroelectric power station in the DRC via Brazzaville.

On the other side, major projects such as Noor PV projects in Morocco have slowed down due to in-country issues with the national power company's management.



Yves Baratte

Tina Blazquez-Lopez

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Additionally, the Moroccan sustainable energy agency Masen refused to extend the call for applications for the Noor PV II programme, which provides for the construction of six photovoltaic parks totalling 400MW, as only nine candidates, including three foreign majors, came forward.

TBL: South Africa has also showed a renewed commitment to renewables as it recently selected 25 bidders in the fifth bid window under the Renewable Energy Independent Power Producer Procurement Programme. The projects consists of 25 projects – 12 solar and 13 wind – totalling close to 2,600MW of capacity. Financial close on the projects is expected over the next six months and commercial close within the next three years.

In terms of oil and gas, the sector has faced a rebound in the oil prices, which has contributed to rising inflation in a number of countries on the continent, notably Nigeria, Angola and Ethiopia. Governments on the continent have been struggling to ease the pain for citizens as resources have been stretched in light of the healthcare emergency caused by covid-19. We may see tax increases in some economies in 2022 to raise government revenue, which may fuel greater unrest. In Nigeria, the planned removal of fuel subsidies may cause some agitation. In Kenya, while inflation fell to a one-year low in December 2021, the upcoming elections will be closely contested. Fears of severe drought on the continent are growing, and disruptions in the supply are also causing great concern with respect to food insecurity in 2022.

In the oil and gas sector, we have seen a vast range of divestment deals from well-established oil companies wishing to sell their assets in Africa whether for opportunistic reasons, in particular as some of these companies decided to move their investments and business models to the benefit of energy transition (eg, TotalEnergies in Angola and Gabon), or due to some of their wells approaching the end of their economic life or being considered as less strategic (eg, ExxonMobil and Petronas in Chad and Cameroon or Eni in Congo-B). Therefore, contrary to the previous couple of years, we have seen an increase in activity in the oil and gas industry, and we anticipate that this should still be the case at least in 2022. In addition, a number of oil and gas projects in Africa are expected to start operations from 2021 to 2025 or in some cases restart such as Total's Mozambiquan LNG project in respect of which they announced a force majeure in Q4 of last year related to local insurgency issues.

Some of the key upcoming and ongoing projects include the Ghana Petroleum Hub, comprising four refineries, five petrochemical plants, industrial infrastructure and 10 million cubic metres of storage capacity. The US\$30 billion Tanzania LNG Liquefaction Plant, which is led by Shell, will also begin construction in 2023, and the Richards Bay Refinery, a joint investment between South Africa and Saudi

“2021 has been a busy year on the mining side despite the various coups that have been occurring on the continent over the past years.”

Arabia, is expected to be operational by 2028. The Nigerian-Morocco gas pipeline will also be a game changer. It will be approximately 5,600 kilometres long and an extension to the existing West African Gas Pipeline. It will be key to strengthening relationships between neighbouring countries as it will extend to Abidjan in Ivory Coast, Monrovia in Liberia, Freetown in Sierra Leone, Conakry in Guinea, Bissau in Guinea-Bissau, Banjul in The Gambia, Dakar in Senegal, Nouakchott in Mauritania, Tangiers in Morocco and Cádiz in Spain.

MB: As has been the case in the previous five years, 2021 has been a busy year on the mining side despite the various coups that have been occurring on the continent (eg, Mali, Chad, Guinea and Sudan). Although there has been a temporary fluctuation in prices of certain natural resources due to investors' concerns and low company quotations, there have been a lot of transactions in relation to nickel, copper, gold and rare earths. The year 2021 saw the launch of major mines and of great achievements (eg, Ivanhoe Mines and Zijin Mining launched the development of what is expected to become the world's second largest copper mine called Kamoa-Kakula in the DRC). AVZ Minerals has also signed a deal worth at least US\$240 million to



build the Manono lithium project also in the DRC, and Endeavour, a company active in gold mining in West Africa, has entered the top 10 global gold producers with the acquisition of Teranga Gold. Renewables co-located with mines have also proved to be popular.

MF: Notwithstanding the fact that 2021 has been a great year for the mining sector, it is undeniable that the combination of political challenges in some countries combined with the covid-19 pandemic has had an adverse impact on the sector, including delays in the implementation of some projects. This is due to various reasons such as logistical challenges due to the suspension of air and marine transport links or administrative difficulties due to the focus on covid-19. Similarly, large-scale power projects have not progressed significantly, though that trend predates the covid-19 pandemic.

By contrast, we have seen a real focus of investors on off-grid energy solutions, notably mini-grids, across all regions of sub-Saharan Africa, as discussed further in the next section. Solar has also been particularly active and we have started to see solar plus battery storage projects in sub-Saharan Africa as well. One other

trend to note is increased focus on commercial and industrial energy projects and corporate PPAs (as opposed to utility connected projects), with a major change in the past year being the liberalisation of wheeling rules in South Africa. All of these trends illustrate a move away from large-scale projects that take years to scaleable projects and businesses using technologies that can be implemented at a local level but also easily built out regionally.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

YB: The value of closed M&A deals reached US\$7.35 billion in North Africa and US\$50.8 billion in sub-Saharan Africa according to Ecofin Agency. However, this record performance hides some weaknesses. So far, 176 transactions have been concluded this year, against 322 for the whole of 2020. This may suggest that the deals in 2021 were bid deals and have driven up values rather than an overall dynamic. Also, most of the transactions were done in the third quarter for sub-Saharan Africa and both the third and the fourth quarters for North Africa. Another aspect is that some of the deals were deal cancellations. The value of M&A in Africa is expected to continue to grow. A total of 332 deals have been announced so far, with a record value of US\$72.55 billion, according to information provided by Capital IQ.

We understand that the sectors in which there has been the largest volume of deals have been the materials, financial, energy and power, high-technology and telecommunications sectors.

In terms of what's going on in the mining sector, although the Republic of Guinea and the DRC seem to have continued to be busy, there has been an increase in transactions in Mali, Gabon and Ivory Coast. Gabon was a country really active in the oil and mining sectors, but over the past five years we noticed a decline in the interest of foreign investors notably due to unprecedented taxation issues. The year 2021 has definitely shown a rebound interest for Gabon notably in the mining sector, which should still be the case in 2022. We have also noted a wide range of transactions in Mali in the gold sector. In recent years, Ivory Coast has built a reputation as one of the major players in the African mining industry, particularly in the gold sector where its national production has increased sixfold in less than 10 years.

TBL: In the energy sector, the increase in the financing of energy has been confirmed in 2021 with, for example, the 35MW Kinguele Aval Hydro Power Plant Independent power project (IPP), the 82MW Ngoulmendjim Hydro Power Plant IPP in Gabon, the Guinea-Mali Interconnector (225kV) and the Djermaya Solar PV Plant Phase I.

“We have seen an increase in the development of mini-grid projects on the continent.”

More importantly we note that in 2021 various countries in particular set up ambitious investment programmes for their renewable energy sector (eg, Cameroon, Guinea, Kenya, Mozambique and Tunisia) to attract foreign investors and to handle their future in relation to power sufficiency. During the fifth edition of the African Power Market Place organised by the African Development Bank, several countries presented their priorities.

For example, Cameroon has created an agency for the management of the public electricity transmission system, the National Electricity Transport Company. It aims to support its energy policy and attract investments of approximately US\$10.6 billion to achieve its energy goals. Guinea aims to use hydropower and solar energy exclusively and wants to become a hub for electricity trade in West Africa, thanks to the various interconnection projects under way. Guinea’s objective is to export electricity to the subregion, in accordance with the plan launched by the West African Power Pool to make the national company, Electricité de Guinée, the transmission system operator for Zone 5 in the West Africa region, which includes Sierra Leone and Liberia. Kenya highlighted the urgency of rebalancing the risks associated with power purchase agreements that have resulted in tariff hikes for

consumers. The country should accelerate reforms and develop models to expand access to electricity.

According to the government of Mozambique, sectoral reforms and major regional infrastructure (transport interconnections between Tanzania and Zambia, Angola and Namibia, and Mozambique and Malawi) are essential. In the north of the continent, the Tunisian Solar Plan has become a key element of the country's revival. Thus, the government launched this plan in 2017, with a target of 3.8 gigawatts of installed renewable energy capacity by 2030. This would increase the country's energy capacity tenfold at an estimated annual cost of around US\$400 million.

MB: We have also seen an increase in the development of mini-grid projects on the continent. These projects allow for greater rural connectivity and, as larger IPPs can take time to get off the ground, small developers are showing an increased interest in decentralised generation and distribution through mini-grids. InfraCo Africa, for example, is working with a number of renewable energy developers to provide sustainable local solutions. Mid 2021, InfraCo Africa signed a joint shareholders' agreement and committed US\$8 million to scale up the Rural Village Energy Solutions, multi-sector Kudura mini-grid project in Kenya. The project benefits from grant funding from Agence Française de Développement's Green Mini Grid facility Kenya, UKAid and EU Africa's Infrastructure Trust Fund, and also secured US\$235,000 of grant funding from PIDG Technical Assistance to facilitate capacity building initiatives. It is expected that the mini grids will be installed by Q1 2022 and fully commissioned by Q3 2022. InfraCo Africa and PowerGen are also developing a mini-grid project in Sierra Leone. Lion's Head Global Partners Facility for Energy Inclusion (FEI) also received a further US\$24 million subscription by KFW in 2021. The FEI is intended to support mini-grids and captive power projects and small-scale IPPs delivering power to the grid. Priority is given to projects in sub-Saharan Africa with low access to electricity.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

YB: There have not been major changes in this respect in 2021 and, as in 2020 and 2019, this really depends on the industry sectors. In the power sector, the continuous growth of renewable projects has maintained opportunities for a much larger spectrum of project sizes, allowing the coexistence of small developers and larger developers. In most of the sectors (eg, power, renewables, mining, oil and gas) we observe the increase intervention of junior companies and start-ups alongside major companies.



Development financial institutions (DFIs) alone cannot fill in the gap and therefore private equity and non-bank investors will surely extend their contributions into the region.

TBL: As lenders, in addition to the infrastructure funds that act on the equity and debt sides, development finance institutions still play a fundamental role, which should not reduce in 2022. The African Development Bank (AfDB) and the Trade Development Bank continued to play a significant role in debt provision for infrastructure projects. The Sustainable Energy Fund for Africa, which is managed by the AfDB, approved a US\$1 million grant to facilitate Botswana’s transition to clean energy. In November 2021, the AfDB also approved a new five-year strategy, Water Strategy for 2021–2025: Towards a Water-Secure Africa, which aims to increase water security in Africa, and to foster its sustainable, green and inclusive socio-economic growth and development. Of great significance last year was also the extension by the AfDB of the mandate of the African Legal Support Facility (ALSF) from 2022 to 2036. The ALSF, hosted by the AfDB, supports African governments with legal advice and technical assistance in their dealings with international investors.

African Export-Import Bank (Afreximbank) has been very visible in the market. In January 2022 it announced the closing of a landmark 10-year, dual-tranche facility of €200 million and US\$166 million for the government of Uganda, structured using its innovative specialised finance solution, introduced to facilitate access to long-term finance by African sovereigns and other eligible entities. The deal was first of its kind to be implemented by an African Multilateral Financial Institution. Afrximbank also signed a number of key agreements at the Intra-African Trade Fair 2021. Afrximbank signed a US\$50 million term loan facility with Geometric Power Limited in relation to the Aba Integrated Power Project in Nigeria. It also agreed to a US\$10 million facility to Fidelity Bank to enable it to finance trade and trade-related transactions across the continent and to issue a line of credit to Senegal's Banque National de Developpement Economique as part of efforts to promote factoring across Africa. Afrximbank also signed a memorandum of understanding with Bestaf Exploration and Production Ltd, for US\$1 billion to be used for the development of assets including the gas in oil mining leases 86 and 88 through a financial and technical service agreement with the Nigerian National Petroleum Corporation.

MF: The growth in solar and mini-grids has seen a mix of large-scale project sponsors that have the scale to implement regional platforms, such as Engie, as well as more specialised developers such as Crossboundary Energy and new platforms such as Milile Energy. DFI-backed investors such as InfraCo Africa have also been very active across a range of sectors from energy to accommodation and transport. In terms of lenders, Africa Finance Corporation (AFC) has also been extremely active in the market. The AFC raised US\$400 million in a new syndicated loan to support the post pandemic recovery through critical infrastructure. The AFC also established an independent asset management division, AFC Capital Partners, which launched the Infrastructure Climate Resilient Fund. The aim is to raise US\$500 million in the next 12 months and US\$2 billion over the next three years to fund infrastructure projects across the continent and that will make the continent more resilient to the impact of climate change. The AFC also announced the sale of a 44 per cent stake in Cape Verde's largest IPP and renewable energy producer, Cabeolica, SA to AP Moller Capital. We have also seen increasing activity by the European Investment Bank, which has continued to invest indirectly through funds such as Meridiam but also is increasing its direct lending to projects in the region.

MB: In the mining and infrastructure sectors, the two most active categories of players remain, in addition to traditional mining and infrastructure companies, whether major or junior, Chinese investors, particularly in the DRC and in Djibouti.

Direct investment in Africa from China amounted to US\$2.07 billion in the first seven months of the year. We also note that Africa becomes a market focus for other countries such as the United Kingdom, Germany, Turkey and Israel. Turkey is more and more present in Africa (both eastern and western) in various sectors: cultural, construction and infrastructures, defence, shipping, etc. We saw, however, in 2021 clear signals of a slowdown of Chinese appetite for African projects, with a more careful approach taken.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

YB: The most common and well-known challenges for the implementation of projects in Africa have always been the political risks, the lack of sophisticated legislation in certain areas (eg, in the real estate sectors and the energy sector), issues in obtaining ownership over land and the frequent lengthiness of negotiations. This remained generally true in 2021.

Considering the increased political instability in the Francophone Africa region combined with the increased appetite for minerals in particular due to the worldwide need of minerals for energy transition purposes, we would also tend to consider that the following risks may increase in 2022:

- In western African countries, it is usual that mining conventions provide for legal stability during the lifetime of the mining conventions. This legal stability, in particular in relation to taxation of the mining projects, is granted to secure the investors and protect them against unpredictable changes of the legislation during the implementation of their projects, which may significantly increase their costs and their returns on investments. It is not impossible that the stability, particularly fiscal, granted to operators in conventions negotiated under the rule of deposed presidents will be called into question. More generally, we anticipate that stabilisation clauses will have reduced scope and duration in the future irrespective of the political stability.
- A related consequence will also be the potential risk of subsequent governments questioning the various approvals, mining titles and mining conventions that may have been granted and executed by these transitional governments with operators, and therefore there will be a risk of increased arbitration procedures due to withdrawal of titles or requests for renegotiations of mining conventions.
- Risk of expropriation seems very low and in any case not higher than usual.
- Risk of withdrawal of mining titles previously granted seems also very low.

“A significant challenge on the continent is the issue of a credible offtake.”

- Another potential trend is the reinforcement of local content measures imposed on companies to satisfy local populations and a higher importance placed on environmental, social and governance issue (ESG)-related matters.

TBL: Another significant challenge on the continent is the issue of a credible offtake. Sub-Saharan Africa has a small share of global investment in infrastructure due to the low creditworthiness of some countries, their institutions and weak financial markets. This often means that investors seek credit support from the relevant government in the form of sovereign guarantees or put and call options, which many African governments are now pushing back against due to concerns about their balance sheet and accountancy treatment. Stable and secure offtake arrangements are key to a project’s revenue stream and go to the heart of bankability. Designing and implementing an objective and transparent procurement process is also crucial to the success of a project. Particular attention should also be given to ESG considerations and to ensure that these meet international standards.

MF: Most countries are trying to diversify their economies and renewables and mini-grids are now a key economic sector. Although many countries have historically developed legislative and regulatory regimes for oil and gas and mining, this is not always the case for smaller-scale renewables projects or in relation to the renewables and mini-grids sectors. Sponsors and international organisations may face a lack of sophistication of the administration and public companies they are negotiating with or difficulties in the tendering processes. The regime for developing off-grid power networks in a vertically integrated power market where the state-owned utility has a monopoly can be unclear, as are the rules for off-site corporate power purchase agreements.

MB: In the oil and gas sector one major challenge could be the slowdown of financing for the exploitation of fossil fuels at a time when several African countries are preparing to exploit their significant gas resources. Indeed, the major trend being the energy transition, it is possible that the raising of funds for fossil fuels are more complicated and/or more expensive.

Finally, the dependence of African countries on China's lending and Chinese banks over the past 20 years, which has made China the largest source of finance on the continent, could show in the coming years. There are various reasons for this: some jurisdictions have or will soon reach the limit of their borrowing capacities and there is a higher risk of default for some countries. As a consequence, it is very likely that the most present Chinese banks will strengthen their lending terms, which will add additional burden to the relevant countries.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

YB: The Central African Economic and Monetary Community (CEMAC) was established to create an economic and monetary union among its member states (ie, Cameroon, Chad, Equatorial Guinea, Gabon, the Central African Republic and the DRC) and as a result Regulation No. 02/18/CEMAC/UMAC/CM on exchange control (the CEMAC Regulation) was adopted. In June 2019, a number of directives (instructions) were issued by the Bank of Central African States (BEAC) whose directives have in particular increased the role of the BEAC in the declaration and authorisation of financial transactions, the control of the compliance with foreign exchange regulations and the interpretation of the CEMAC Regulation.

Representatives of mining and oil operators from Gabon, Congo-Brazzaville and Cameroon have expressed their concerns to the Governor of the BEAC in particular



regarding the BEAC's new rules that oblige miners and oil companies operating in a CEMAC state to repatriate funds. After several years of negotiations, it was decided in late 2021 that the new foreign exchange regulations, which came into force on 1 March 2019 in the CEMAC zone, will finally be applicable to mining and oil companies from 2022. As of 1 January 2022, oil and mining companies operating in the CEMAC countries are finally subject to the requirements of the foreign exchange regulations. However, the Central Bank of West African States has authorised mining companies to transfer only 35 per cent of the foreign currency in their possession to it, compared with 70 per cent for other economic sectors in the CEMAC zone. Unlike other economic actors such as banks, from now on mining and oil operators will have the right to hold foreign currency accounts both in the CEMAC zone and abroad. In addition, we understand that a regulation on the unseizability of these accounts is being examined.

TBL: Similarly, although oil and mining companies are also subject to the obligation to repatriate foreign currency generated by their activities into accounts opened in the CEMAC zone, companies in the exploration phase and those benefiting from

“In most of the sectors, we observe the increased intervention of junior companies and start-ups alongside major companies.”

reserve base lending financing are exempt from this measure. In addition, they will benefit from a 'lighter system' of declaration and domiciliation of imports and exports of goods and services, as well as a period of up to three years to repatriate to the escrow account opened at the central bank all funds dedicated to the rehabilitation of exploited extractive sites.

Among the concessions made by the central bank to oil and mining companies in connection with the application of the new exchange regulations, there is also the possibility of transferring the income of expatriate workers abroad from onshore accounts (opened in the CEMAC zone) in foreign currency, on the one hand, and on the other hand, the possibility of paying subcontractors operating in the CEMAC zone in foreign currency.

MB: According to the International Monetary Fund, tax exemptions are too high in Gabon. They constitute a major problem for the mobilisation of non-oil revenues, governance and transparency. Consequently, we understand that Gabon has established a list of tax measures to be taken to reduce exemptions by 2023. In addition, the country has decided to put an end to VAT exemptions for the construction sector,

to gradually increase the VAT rate on certain sectors (eg, cement), the abolition of VAT exemptions outside the legal framework and the establishment of the rates provided for by the CEMAC. Last but not the least, Gabon has also taken the decision to revise the list of duty-free imported products (eg, agriculture, wood industry, cement): the progressive application of a reduced rate instead of a total exemption on basic necessities, the abolition of the tax exemption regime for state public contracts and the gradual increase in the single reduced customs rate (18 per cent in 2023). We are of the view that this shift in the Gabonese taxation system may be mirrored by other African countries willing to increase their revenues and to reduce revenue losses.

MF: Local content requirements continue to be emphasised by government tendering projects. If done well, this can help build out a local supply chain and lead to wider economic growth. These requirements need to be well thought out and tied into other national economic development initiatives. On the DFI side, ESG are playing ever more important roles, especially where DFIs are financing projects. Again, if this is more than a compliance exercise and leads to best practice being implemented, it should be very positive. Of course, there remains a debate in the energy sector between those arguing for African countries to develop the cheapest sources of energy irrespective of carbon content and those seeing an opportunity to 'leapfrog' past fossil fuel technologies and develop a clean sector early on.

6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

YB: In most of the sectors (eg, power, renewables, mining, oil and gas), we observe the increased intervention of junior companies and start-ups alongside major companies. According to the Ecofin database, hundreds of exploration licences are held by junior companies in most mining jurisdictions on the continent. They are mostly listed on the ASX or alternative markets (TSX-V in Toronto or the AIM market of the London Stock Exchange).

In the mining sector, we observe that several countries have changed their strategy in relation to the negotiations of mining conventions. While over the past 20 years the project companies holding mining titles were leading the negotiations and were able to include a vast range of exemptions and guarantees, the states are now providing for template mining conventions whose content is getting harder and harder to modify. Additionally, while issuing revised mining legislation, the states have included provisions indicating that mining conventions cannot derogate from

the mining codes. Stabilisation clauses remain a key clause under each mining convention but their scope and duration have been limited.

The major goal of the mining conventions being to establish a clear allocation of profits between the project companies and the states, another trend in the coming years could be the introduction of production-sharing agreements in the mining sector. Since the reform of its mining legislation in 2019 Gabon has introduced production sharing contracts in the mining sector to both increase the revenue of the state and to reduce other taxes previously imposed on companies. In early 2020, the SOGUIPAMI in Guinea indicated that it was willing to favour the entering into these contracts for the mining sector.

TBL: For Africa-based projects, there continues to be a real focus on innovative development finance structures involving true blending of commercial and concessional finance. Instruments can include debt, equity, guarantee and insurance products, risk-sharing facilities or a performance-based incentive structure. This also allows for better coordination of development finance institutions and the entry of new project participants including insurance companies, pension funds, mezzanine lenders and private equity as project sponsors try to bridge the financing gap. Hybrid debt structures and models using multiple debt tranches, some of which are only available in the future and subject to certain conditions, are also being used. Recently, APG, the largest pension fund in the Netherlands, announced that it would try a new co-investment structure. APG announced that it plans to invest US\$750 million in a new private credit fund focused on emerging markets, which is being organised by the Amsterdam-based fund management group ILX. The aim is to use the funds collected from pension funds to co-invest alongside multilateral development banks and other development finance institutions in projects linked to the sustainable development goals. If successful, the structure will catalyse more funds into emerging markets more efficiently.

MB: Tax and exchange control matters have been a bigger focus for investors than before. We can note that now the investors and in particular investments funds that are providing debt or equity finance for the purpose of the implementation of projects in Africa have a small- or medium-term vision of their return on investment and that as a result the difficulties that can arise in relation to both taxation and funds flows abroad are much more anticipated and are the subject of in-depth analysis when building their financial model. This is clearly one of the factors that has pushed the oil and mining companies to negotiate particular conditions applicable to these sectors with the CEMAC in the frame of the amended exchange control regulations.



7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

YB: What we anticipate the most is that 2022 and the years to come will still be full of opportunities in the mining sector in the region and that it will be the booster of significant opportunities for the infrastructure and energy sectors.

The mining sector is vital for lots of African economies and is a key partner to fill the gap in the infrastructures of most African countries. Additionally, Africa's development will be achieved in particular through electrification and the improvement of its road, port and rail infrastructures. The lack of infrastructures can partly be filled thanks to the presence of mining projects and to the financial resources generated. Moreover, the development of infrastructures is more and more achieved hand in hand with the mining companies in particular, as those companies often meet difficulties in the implementation of their projects due to the absence of infrastructures, and such companies often fill the need on their own by constructing roads, port and rail infrastructures, for example.

“There is an increasing demand for rare earth metals that are used in high-tech manufacturing, in electric and hybrid cars.”

Energy transition is a windfall for the mining sector and Africa. Several minerals are necessary to meet the energy transition goals. Most of them are present in the African subsoil. If the trend having begun in recent years continues, Africa, one of the main sources of strategic raw materials for the manufacture of electric vehicles batteries (graphite, lithium, cobalt, etc), will once again be at the forefront. As regards lithium, Africa's 'known' reserves are concentrated in four countries: the DRC, Mali, Zimbabwe and Namibia. To date the continent has been underexplored but we understand that in terms of the diversity of projects, quality and size of resources, the DRC and Mali are the largest potential African lithium producers.

The DRC, one of the world's least developed countries, holds almost half of the world's cobalt resources and accounts for 60 per cent of global production. South Africa and Zambia have also some deposits. To date most of the cobalt production from DRC is going to China. In 2020, 70 per cent of the country's cobalt production was provided by five companies: KCC (Glencore), Tenke Fungurume Mining (TFM, owned by CMOC), Metalkol (ERG), Somidez (CNMC) and STL (Gécamines). Given the resources of the DRC it is very likely that there is room for competitors to find new deposits in the country.

Copper prices are also increasing as according to numerous analysts and in particular Goldman Sachs there cannot be an energy transition without copper. According to specialists, the African Copperbelt, straddling the DRC and Zambia, is likely to be the main region in the world – along with South America – to benefit from renewed investor interest.

Nickel is subject to a strong increase in demand in the context of the energy transition. Electric vehicle batteries still account for only 5 per cent of the world's nickel consumption but have a 'growing' impact on demand for the metal notably as a replacement for cobalt, which is more expensive. If this metal is not massively present in Africa and dominated by a South East Asia production, it should be noted that South Africa and Madagascar are producers of nickel.

There is an increasing demand for rare earth metals that are used in high-tech manufacturing, in electric and hybrid cars (to make batteries and engine components lighter), photovoltaic panels and wind turbines, smartphone chips, laptop screens, stadium scoreboards, robotics, aeronautics and medical lasers. While China is responsible for most of the world's rare earth production, Africa also has huge reserves of these strategic metals, which until recently have been little exploited. Burundi, via Rainbow Rare Earth company, is the leading producer of rare earths in Africa and other countries have significant resources such as Malawi, Gabon, Mali, Mauritania, Madagascar and South Africa.

However, the race for the supply of those metals to meet the demand and reach the energy transition target may also have flaws and may create tensions



at the international level if the producing countries cannot meet the requirements of the buyers in due course. In addition, this race may create environmental and social disasters if the appropriate measures from the local governments and the companies are not implemented and complied with. Additionally, resources-based conflicts already occurred in the past, and the rare earth metal race could crystallise local frustrations in the region. Finally, there is a risk that African countries decide to include the rare earth metals into a list of strategic substances and therefore to impose a significant tax on such metals.

MB: After years impacted by the curse of blood diamonds and the recent flow in demand due to the covid-19 pandemic, the diamond sector seems to be getting better, with both Chinese and American consumer demand picking up. This boom should be confirmed especially in historically producing countries such as Angola, South Africa, Botswana and the Central African Republic. However, other countries may be appealing for players such as Alrosa, which acquired projects in Zimbabwe and the DRC.

West Africa is now the third-richest area for gold on the planet, after Australia and Canada. Three countries are now among the top 20 global gold producers. Ghana has become the continent's leading producer, with 147 tonnes extracted in 2019, ahead of Mali (73 tonnes) and Burkina Faso (64 tonnes). According to the Fraser Institute, Mali is the second best African destination for mining investment (or was before the recent political instability), just ahead of Ghana. However, the continent remains underexplored, which explains why many players are becoming more inclined to explore the subsoil such as Barrick Gold, lamgold and Endeavour Mining.

In Nigeria, oil accounts for the majority of government revenue and the mining sector is still underrepresented, despite the country's huge mineral reserves, notably iron and coal. The country has also some gold and, with the rush to the West African gold sector in recent years, several junior mining companies are active in exploration (eg, Thor Explorations).

MF: In the power sector we anticipate continued activity in particular as countries are now taking their power future seriously and trying to join forces within the region. As an example, Ivory Coast will sell electricity to Guinea and Sierra Leone from 2022 and called for the development of a regional electricity market in West Africa. The purchase contract concluded between the Ivorian Minister of Energy and the Director General of Energy of Guinea provides for 'the delivery by Ivory Coast of 21 megawatts (MW) in 2022 to Guinea and 31MW in 2023 to Sierra Leone, over a period of three years'. Ivory Coast, which has been experiencing strong economic growth for the past eight years, exported 11 per cent of its electricity production in 2020 via its network of 5,000 kilometres of high-voltage lines to six neighbouring countries: Ghana, Togo, Benin, Burkina Faso, Mali and Liberia. Sierra Leone and Guinea have been added to the list following the commissioning of an electricity interconnection line between Ivory Coast and these two countries.

TBL: The African Continental Free Trade Area (AfCFTA), officially commenced in January 2021 and has huge potential to spur economic growth and development on the continent and to mitigate some of the covid-19-induced growth contractions, poverty and inequality trends. The AfCFTA aims to create a single market for goods and services on the continent and to foster greater economic integration of Africa. Intra-African trade is currently low at approximately 14.4 per cent of total African exports and according to the UNCTAD's Economic Development in Africa Report 2021 published on 8 December, the continent's current untapped export potential amounts to approximately US\$21.9 billion and an additional US\$9.2 billion of export potential can be realised through partial tariff liberalisation under the AfCFTA over the next five years. To unlock this potential and to achieve this, a number of barriers

including intra-African non-tariff barriers, infrastructure and technology gaps need to be addressed. The AfCFTA also provides an opportunity to address extreme poverty, gender imbalance and to effectively mobilise a growing young population and so it is important that key ongoing negotiations under the agreement succeed.

2022 will also see Africa host the COP27 climate change summit in Egypt. This is likely to see African countries further push their agenda around energy transition, adaptation, climate finance deforestation and desertification. Different countries will clearly pursue different paths to net zero and we are likely to see the development of more small-scale projects such as mini-grids and energy storage solutions. Given the significant resources on the continent, gas is likely to remain a transition fuel in 2022 and beyond, and countries such as South Africa and Namibia may receive the required financing to develop their green hydrogen potential.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

Developing a project in Africa remains quite specific. You certainly need a counsel with the right sector and project financing expertise but you also need a counsel with genuine African experience. The specific challenges of developing an African infrastructure project are likely to include dealing with counterparties who are not always familiar with the requirements of international project financing (local partners, local counsel, local offtakers, local governments) even if the level of sophistication is progressing rapidly, or facing unexpected legal changes, such as a last-minute new electricity law that was passed in Cameroon a few years ago just some days before the financial close of the first two IPPs in the country.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

The choice of co-investors, lenders and advisers is critical to a successful project in Africa as well as the understanding of the environment and the ability to focus on what really matters. More than anywhere else, it is possible to spend months or years focusing on details and losing sight of what really matters for you as an investor, while closing the transaction within a reasonable timetable is generally something that matters much more to you than marginal improvements of the project that can be only achieved at great time expense. The increased involvement of infrastructure funds in African projects as well as certain developers who have realised that the ability to close projects quickly is a key differentiating factor is helping to move away from the thinking that closing a project in Africa has to take years.



Benelux Overview

David Shearer is a partner in Simmons & Simmons' energy, natural resources and infrastructure group in Amsterdam. He advises on a wide range of corporate matters, with a particular focus on cross-border M&A, joint ventures and project development and financing.

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Louis-Maël Cogis is head of the Luxembourg office of Simmons & Simmons. He acts for financial institutions and international investment banks in international banking and capital markets work.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

DS: Despite the covid-19 Delta variant wave mid-year, 2021 was again a relatively active year for the project finance sector in the Benelux, with deal flow in the Netherlands and Belgium remaining consistent with previous years. This continues the trend we have seen develop over the past couple of years, clearly reaffirming the stability and maturity of the Benelux project finance market. The types of projects that closed in 2021 were, as in previous years, dominated by renewables (eg, photovoltaic solar, on- and offshore wind, energy storage, EV charging infrastructure, biomass, biofuels and hydrogen), but also included telecoms (eg, data centres and mobile), transport (eg, roads and ports), social and defence (eg, schools and prisons) and power (eg, transmission and distribution).

IvD: The Benelux project finance market continues to attract a mix of national and international lenders, public financing institutions (eg, the European Investment Bank), debt funds and institutional investors. The involvement of institutional investors and credit funds continues to be strong.

Some noteworthy debt trends have also continued.

- There is an increasing number of lenders prepared to take large tickets (eg, in the offshore wind and solar energy market) in addition to being involved in more than one deal per year and being willing to take increasing construction risk.
- At present, the more traditional domestic or European institutional investors are often lending alongside institutional investors coming from North America and East Asia that have been looking for opportunities in the Dutch market. In addition, the traditional large Dutch domestic banks have also been increasingly active in transactions that are sustainability or renewables linked as part of their revised strategies.
- The number of refinancings at different stages of development has been steady, which is supported by factors such as:
 - margins being perceived to be low, and the European Central Bank's benchmark rates also remain historically low, which still makes debt cheap;
 - financing structures being relatively stable in terms of ratios and covenants;
 - renewables project costs continuing to come down, with more competition across all the various phases of projects from the development phase to the operational phase; and
 - in the offshore wind market, there is generally a better understanding of the construction risks, which makes for a reduction in the risk premium element.



DS: As in previous years, there is a continuing decline in the extent to which projects need to rely on government subsidies and market participants are able to access a variety of types of funding, in addition to project financings (eg, crowd-funding arrangements).

LM: One additional element to note is the increasing use of equity bridge financing when structuring the financing of infrastructure funds. Those financings, although not directly connected to the underlying investments, have a significant impact on the ability of the various players to react quickly to various project finance opportunities. This is an increasing trend, in particular in Luxembourg where a lot of the funds focused on infrastructure are established.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

DS: In the Benelux we have seen transactions close mainly in the renewables sector, whereby photovoltaic solar, on- and offshore wind and energy storage were the most active subsectors. The subsector that continues to receive the most attention internationally is the Dutch offshore wind industry: both during the initial tender phase as well as for M&A deals both before and after parks are operational.

CM: Belgium continues to have an active public-private partnership (PPP) sector with a number of prison financings closing such as the Leopoldsborg prison PPP, roads transactions such as the R4, schools, fibre and biomass transactions with further PPPs in procurement such as the Wissenhage Bus depot PPP.

IVD: Two noteworthy examples of large project finance transactions in the Benelux are:

- the 752MW offshore wind farm project Borssele 1&2, co-financed by Ørsted and Norges Bank Investment Management (NBIM); and
- the €900 million R4 West East road project, for which Besix Group was selected as preferred bidder.

“In the Benelux we have seen transactions close mainly in the renewables sector whereby photovoltaic solar, on- and offshore wind and energy storage were the most active subsectors.”



3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

IVD: As mentioned above, a relatively balanced mix of national and international sponsors, lenders, public financing institutions (eg, the European Investment Bank), debt funds and institutional investors remained active in the project finance market.

DS: The project sponsors most visible in the Benelux market during 2021 included TenneT (power: transmission and distribution), KPN with APG (telecoms: mobile), Besix Group (transport: roads), Proximus (telecoms: mobile), EdgeConnex (telecoms: data centres) and Ørsted with NBIM (renewables: offshore wind) and ArcelorMittal (renewables: biomass, biofuels).

IVD: Projects in the Benelux attract a wide range of national and international lenders, including Rabobank, SMBC, NIBC Bank, ING Group, KfW, DZ Bank, Santander, Belfius Bank and ABN AMRO Bank.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

DS: Although the Dutch government and market is stable, there has been political uncertainty in relation to the action the government needs to take in light of its climate change responsibilities, with the government suffering the defeat of its policies in court on several occasions, most notably on nitrogen emission matters. The permitting process for large projects can also be lengthy. Projects (especially solar due to the NIMBY factor) may be delayed as a result of urban planning and environmental permits being challenged.

CM: What remains a point of interest is the plurality of tendering authorities in the Belgian market, with some being guaranteed by the federal government, some by regional governments and others not guaranteed by any government body. For lenders that are new to the Belgian market, coming to grips with authority counterparty risk might take time, despite this being one of the most important factors in their credit appraisals. Also a number of projects have been announced and then scrapped or retendered, whereas others are delayed for a range of reasons, thus adding to costs.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

DS: In December 2021, the new Dutch government put forward a proposal for a new 10-year €35 billion climate fund, in addition to the existing subsidies scheme for renewable energy. The proposed fund has a €15 billion budget for the development of 'advanced energy carriers', which is expected to include green hydrogen. In the collation agreement, the new government also committed €5 billion to the construction two new nuclear power plants.

CM: The previous federal government of Belgium has set a goal of a full nuclear power phase-out by 2025 (if feasibly taking the demand for electricity usage into account), to be attained by, among other means, doubling the number of offshore wind farms. By the end of 2020, a law was accepted that provides for the incremental phase-out of all seven reactors by 2025. A backup-plan that aims to extend the lifespan of the two most recent reactors is still on the table and subject to further debate.

“The stability and maturity of the Dutch project and project finance market, despite its competitiveness, attracts the interest of increasing numbers of international players.”

The phasing out of nuclear led the Belgian government to run a capacity auction that will underpin a new wave of combined cycle gas turbine (CCGT) plants in Belgium, with Engie announcing an ambition to add 3GW of CCGT generation power and RWE acquiring the Dils site from Advanced Power on which they are on record of having ambitions to develop a 920MW plant. The auction results were published by Elia on 31 October 2021 and will inevitably underpin new development in generation capacity in Belgium that in many cases will be project financed.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

IVD: As mentioned, we have seen a balanced mix of different types of lenders, investors (including institutional lenders and credit funds that are looking to deploy their funds in the project finance market) and sponsors, and we are of the opinion that this trend will continue and develop further in the future. The stability and maturity of the Dutch project and project finance market, despite their competitiveness, attract the interest of increasing numbers of international players, and Belgium is also seeing an increase in non-European investors from North America as well as East Asia, both on the sponsor and lender side.

LC: We have also seen that project participants in complex or large-scale projects are increasingly looking to combine different forms of financing and financing structures. As a consequence, projects have been completed through a combination of equity financing, private finance (including global change: crowdfunding financings) and balance sheet financing.

- 7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

DS: Dutch market participants are showing a lot of interest in clean energy and renewable energy projects, including EV charging, carbon capture and storage (CCS) and green hydrogen. We are also seeing an increase in the number of large-scale data centre projects in the Netherlands.

The Dutch government recently granted a consortium, that includes oil majors Shell and ExxonMobil, a €2 billion subsidy for a CCS project in the Port of Rotterdam, which is set to become one of the largest CCS projects in the world. Shell has also recently announced that it wants to build the largest green hydrogen plant in the world near Rotterdam, on the Tweede Maasvlakte.

CM: In Belgium, the Flemish Schools of Tomorrow project will continue with the fourth cluster, having been relaunched for tendering towards the end of the year. The roads sector has produced some substantial transactions with the launch of the €3.2 billion ring road PPP, the R4 and the RO XA201, with the Spartacus tram project also due to return to the market.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

Clients should be looking for in-depth knowledge and experience of PPPs and project finance, local regional knowledge and strong negotiation skills.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

A project must be solid from a planning and regulatory point of view, to limit the possibilities of a project being delayed or derailed. Further, in the case of complex or large-scale projects, today's project finance market requires sponsors to combine different forms of financing and financing structures (eg, a combination of equity financing, private finance (including crowd-funding financings), external debt and balance sheet financing).

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

Last year, Simmons & Simmons advised DZ Bank in relation to the long-term project financing of an innovative 15.7MWp floating solar project located in the Netherlands. The project was developed by GroenLeven BV and BayWa AG and has already been sold to a Luxemburg-based infrastructure fund managed by re:cap global investors ag.

The long-term financing was partially designed to refinance a construction financing between DZ Bank and GroenLeven BV, on which Simmons & Simmons also advised DZ Bank. The financing structure also comprised a crowd-funding element, which is a feature that we see increasingly in solar farm projects in the Netherlands.

This is the sixth project financing deal in the Netherlands that Simmons & Simmons advised DZ Bank on.



Brazil

Karin Yamauti Hatanaka at TozziniFreire has extensive experience in project finance transactions across various infrastructure sectors, such as energy, natural resources, logistics and sanitation, assisting companies, sponsors, banks and multilaterals. Her track record also involves drafting and negotiating infrastructure contracts (EPC, energy purchase and sale agreements, supply), capital markets transactions, analysis of bidding documents, concession contracts, among others.

With experience in capital markets and banking and finance since 1996, Alexei Bonamin has expertise in public offerings, international issues, structured finance, project finance, securitisation, syndicated loans, agribusiness finance, derivatives, impact investing, green finance, social finance, sustainable finance, crowdfunding, endowments, securities regulation, financial compliance, financial investigation, financial enforcement and financial leniency agreements.

Partner in the capital markets and banking and finance practice groups, as well as one of the coordinators of TozziniFreire's Japan desk, Antonio Felix de Araujo Cintra has extensive experience in capital market operations, national and international financings, securitizations, project finance, and foreign investment.

Leonardo Miranda has vast expertise in corporate and regulatory matters, as well as in the structuring of financing and project contracts, such as concession or production sharing contracts, associative contracts (JOAs, etc), PPAs, EPCs, fuel supply and equipment contracts and O&M contracts.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

Project finance has a long and established history in Brazil, starting with toll road concessions and oil and energy projects in the 1990s. Back in those days, most of the concessions were financed by a combination of funding from the Brazilian National Development Bank (BNDES), multilaterals (Inter-American Development Bank (IDB) and International Finance Corporation (IFC) being the most active) and commercial banks, either as B-lenders or as hedge or completion guarantee providers. As the years went by, BNDES took a more central role, offering subsidised interest rates and long tenors, and projects have largely come to depend on BNDES financing. The most common structure would comprise a bridge loan from BNDES, guaranteed by letters of credit issued by commercial banks, followed by a long-term loan also granted by BNDES, guaranteed, at least until completion, by letters of credit from commercial banks or a corporate guarantee from the sponsors. The loan would be further enhanced by sponsor support agreements or equity support agreements to cover increases in construction costs. BNDES gradually moved on to blended finance, with a portion of the debt covered by debt capital markets instruments, the infrastructure debentures.

There has been a push from government to reposition BNDES from the main supplier of financing to the provider of structuring of projects. BNDES has been participating, as a consultant to federal, state and municipal governments, in the structuring of concessions and public-private partnerships (PPPs), such as the sanitation concessions of Alagoas and Amapá, the Port Concession of Espírito Santo and several toll road concessions.

BNDES still plays an important part in the financing of large transactions – for instance, the billion dollar projects of the liquefied natural gas powered thermoelectric power plant Gás Natural Acú, the Piracicaba Panorama Toll Road and Linha 6 São Paulo Subway relied largely on BNDES financing. Nonetheless, BNDES is now willing to accept structures in which they share project risk with commercial banks. In the most recent case of Linha 6, roughly half of the financing does not count with any completion guarantees, and relied solely on the quality of the engineering, procurement and construction (EPC) contract and EPC contractor and associated performance bond. In the Piracicaba Panorama financing, BNDES accepted the gradual release of bank completion guarantees, as the construction milestones were achieved.

Debt capital markets also retain a key role in lending to infrastructure, fuelled by tax incentives and exemptions provided by the infrastructure debentures law.



Karin Yamauti Hatanaka



Alexei Bonamin



Antonio Felix de Araujo Cintra



Leonardo Miranda

Some sophisticated financings involved issuance of reais-denominated international bonds in back-to-back structures with debentures issued in Brazil.

- 2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

Although the covid-19 pandemic has postponed some of the auctions, 2021 was a prolific year in terms of deal activity and new concessions and PPPs, with new billion-dollar concessions, such as Dutra Toll Road – the toll road connecting São Paulo to Rio de Janeiro; the sanitation projects of Rio de Janeiro and Alagoas; concession of 5G telecom spectrum; as well as many other PPPs and concessions at all levels of the Federation (federal, state and municipal). Financing projects closed in 2021 worthy of mention are mostly related to projects auctioned prior to the pandemic, such as Piracicaba Panorama Highway, a São Paulo State Concession Toll Road, sponsored by Pátria, financed by BNDES with completion guarantees provided by commercial banks in the form of letters of credit. The novel feature of this financing was the gradual release of the completion guarantees, in accordance with certain milestones (partial completion events). Other relevant financing closed in 2021 is related to the public lighting PPP of the City of Rio de Janeiro, operated by Smart Luz, which involved the issuance of international notes and local infrastructure debentures, acquired by a Smart Luz vehicle, which used the proceeds to acquire debentures issued by the concessionaire. The transaction was guaranteed by US International Development Finance Corporation.

The energy sector, which has demonstrated resilience over the years – even in times of worst economic and political crises – remains a crucial sector, with important auctions in transmission and generation. One novel feature of 2021 was the ‘capacity reserve auction’, in which power plants with low intermittence (such as thermoelectric power plants and some hydroelectric power plants) were able to sell capacity into the market. The capacity reserve costs are borne by all consumers and seek to provide reliability to the system. Most of the winning bids came from the gas-fired power plants – many new projects for thermoelectric gas-fired power plants are being implemented and contracted on an emergency basis, as a result of the energy crisis experienced in Brazil in recent years (a historic drought has been deemed as the main culprit in the energy shortage, as Brazil relies heavily on hydroelectric energy). Worthy of mention is the Gás Natural Açu power plant, a 1.6MW thermoelectric gas-fired power plant developed in the port of Açu, financed by BNDES.

**“Debt capital markets also
retain a key role in lending
to infrastructure.”**



In 2021, the energy market drivers have been geared towards energy transition, with solar projects (both centralised and distributed generation) and wind projects being contracted and financed. Cost-predictability and decarbonisation, including ESG drivers, also led some industries (mining, manufacturing, telecoms and sanitation) to contract energy in the free market, or self-produce energy. New to the market was the development of power purchase agreements (PPAs) in dollars. As the regulation permits dollar-denominated contracts in very few exceptions, sophisticated structuring was required to give the lenders the legal freedom to finance generators. Atlas and AES pioneered such structures, with PPAs entered into with multinational groups.

In contrast to recent years, when dealmaking was heavily impacted by the economic crisis and Lava Jato, a time in which lenders and sponsors' efforts were wasted in finding solutions for troubled assets by replacing shareholders and submitting projects for rebidding and restructuring, in 2021, players were able to concentrate their efforts mainly on new projects and concessions. One notable exception is the financing of Linha 6 São Paulo Subway Line. The Linha 6 concession, originally owned by Odebrecht, Queiroz Galvão and UTC, has been closed to

termination by forfeiture, and its construction works have been paralysed for a number of years. Linha 6 has been acquired by Acciona and has recently obtained a financing by BNDES, partially guaranteed by commercial banks. In a departure from the usual structures, BNDES has accepted to take on part of the project and completion risk.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

BNDES is still a key player in infrastructure financing, being a staple in most of the biggest transactions. Although its rates are now closer to market rates with the long-term rate that replaces the long-term interest rate, BNDES is usually able to offer long tenors that are not attainable by commercial banks. In a departure from usual practice, BNDES is also willing to accept partial completion risk.

Banco do Nordeste (BNB), the official bank for the northeast region, is a staple in many projects in their influence area, offering unbeatable rates using its subsidised regional funds. It is a feature in many wind and power projects and transmission lines located in the northeast region. BNB usually takes completion guarantees from letters of credit from commercial banks.

The main commercial banks operating in Brazil are very active in infrastructure, both as advisers and lenders – usual suspects are Itaú, Santander, Bradesco, BTG, Banco do Brasil and Caixa Econômica Federal (the latter two being official government banks). International banks, such as Citi, Goldman Sachs, Bank of America, JPMorgan, SMBC, MUFG also participate in infrastructure, especially when there is an international finance or international sponsors involved.

Debt capital markets are also a common feature in many of the infrastructure projects financed in Brazil, mostly for distribution among qualified investors (pursuant to CVM Instruction No. 476). Some of those transactions have been funded.

Export credit agencies (ECAs) have continuously increased their participation in the infrastructure projects in Brazil, providing guarantees to both loans and debt capital markets instruments. The multilaterals IDB and IFC continue to support the Brazilian infrastructure, both structuring projects and participating in the financing.

On the sponsors' side, in the past couple of years we have seen the diminishing role of the main construction companies, the usual sponsors for projects since the 1990s. Some traditional sponsors remain as important participants in infrastructure – on toll roads, CCR, EcoRodovias and Pátria have been the biggest contenders for the major toll roads in the past couple of years. The largest toll road projects have failed to attract new international investors – the most recent example being Dutra Toll Road, in which only CCR and EcoRodovias participated.

“In projects structured as PPPs, where all or a portion of the revenues come from the public entity ... sponsors are usually challenged to devise structures where default risk by the public entity is mitigated.”

Water and sanitation projects have attracted the interest of a new set of investors, with involvement in other utilities – Equatorial and Cymi, known for projects in the energy sector, branched out and have been awarded projects in the sanitation sector.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

The Brazilian political and macroeconomic scenario, more often than not, presents challenges for infrastructure players. The year 2022 comes with additional challenges of its own. The covid-19 pandemic and its impacts are still a threat, and the disruption to the logistics and supply chains, as well as the possibility of an increase in inflation present challenges for determining the Capital Expenditure (Capex). In addition, 2022 is an election year for the offices of president and state governors – a decrease in new infrastructure concessions and PPPs is generally expected notably from mid-year onwards. The impacts of covid-19 and election year present sponsors with difficulties in anticipating demand and foreign exchange fluctuations related thereto affect the timing of entry into Brazil.

Another challenge comes from the fact that revenues from infrastructure are usually reais denominated, with very few exceptions. This, coupled with the fact that long-term hedge protection is costly, restricts the access of companies to the dollar-denominated debt market. The currency mismatch issue has been addressed by recent legislation (the New Framework for Foreign Exchange Market enacted in December 2021), which allows infrastructure companies to enter into contracts in foreign currency with exporters. Tariffs to end users (eg, toll road tariffs or sanitation tariffs) or contracts with non-exporters are not included, but the change is certainly welcome and partially tackles this long-standing issue in Brazilian project finance. The new legislation comes into force in December 2022.

In projects structured as PPPs, where all or a portion of the revenues come from the public entity (as opposed to tariffs or private offtaker), sponsors are usually challenged to devise structures where default risk by the public entity is mitigated. A successful example of mitigation of this risk can be found in the PPPs of public lighting, which are remunerated by the municipality. The municipality pays for the works for the replacement of bulbs with LEDs and the operation of the public lighting system with funds from a constitutional Contribution to Public Lighting Services (COSIP), collected with the electric energy bill issued to consumers. Most of the PPPs for public lighting have been structured in a way that the funds from the COSIP are segregated in secured accounts, taken into custody with depository



banks and directed for payment of the public lighting provider, thus mitigating the risk of default by the municipality.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

As previously discussed, the New Framework for Foreign Exchange Market, enacted in December 2021, will permit infrastructure companies to enter into offtake contracts in foreign currency. This will allow for an increase in dollar-denominated debt, backed by the portion of company revenue that is linked to dollars. International sponsors also may be more willing to tag their investment to a dollar-generating project. The new legislation enters into force in December 2022.

Another piece of important legislation enacted in late 2021 has been the New Legal Framework for Railways. The new law creates the possibility to implement railways under a private regime. This means that any interested party can request to the government an authorisation to implement a railway at its own risk and cost

– as long as the railway does not conflict with national policy or other railways, the authorisation should be granted. This is expected to provide a boost in railway investments in Brazil.

Novel features in the structuring of concession contracts are also expected to increase investor appetite. As an example, the new concession for the toll road connecting Minas Gerais to Espírito Santo – known as the Highway of Death in Brazil – will include a mechanism to share with the government the risks of increases in construction costs. Future concessions may also include provisions for the sharing of demand risk between government and concessionaire.

6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

There is a shift in the nature of sponsors in projects, from the construction company-dominated scene from the 1990s to 2010s – and more so from Lava Jato onwards – to a mix of operators and international and local funds.

The restrictions on certain funds to provide corporate guarantees has also propelled the need to develop non-recourse project finance structures.

Additionally, the phasing out of construction companies has diminished the use of related-party EPC contractors. Lenders are relying more upon the quality of the EPC contract, creditworthiness of EPC contractor and EPC performance bonds, and less on sponsor guarantees on sponsor support during the construction phase.

ECAs have also been a feature in many of the recent finance transactions, providing guarantees when there is a connection with the sponsor or supplier to the country or region of origin of the ECA.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

Even though 2022 is an election year in Brazil (president and state governors), the governments are announcing ambitious pipelines, perhaps fuelled by hopes of re-election or election. Highlights announced for 2022 include the clusters of airports including the two ‘crown jewels’ – Santos Dumont and Congonhas, the airports with busy shuttle flights connecting São Paulo to Rio de Janeiro; state and federal toll roads and the novel concessions of ports (where the operation of the port will be passed on to a private party). The new framework for railways should also create new investments in this sector.

On the financing side, as the projects auctioned in 2021 start to be financed, we expect the trend of an increase in reliance on EPC contracts and guarantees to be maintained in lieu of the more traditional sponsor support and guarantees. In December 2022, when the new law permitting dollar-denominated contracts comes into force, we expect an increase in foreign-denominated loans and debt.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

A seasoned professional with knowledge of the market would certainly provide shortcuts crucial in time-sensitive complex project financings. Additionally, complex financings present legal challenges that surpass the limits of the financing. Engaging a full-service firm capable of delivering top-notch advice in all areas of law considerably improves the process.

A pro-deal attitude is also key. Negotiation of a financing is not a tug of war. The best deals are not the ones in which the client gets more, but the ones in which a fair and equitable composition is reached, risks are efficiently allocated, and the parties preserve a good long-term working relationship.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

Clients should be mindful of risks related to their project revenues. Most concessions allocate demand risks to the concessionaire, with very few exceptions to that rule. Where offtake contracts are in place, the creditworthiness of the counterparty and related guarantees are key. In projects where the revenue comes from a governmental entity, structures that guarantee that the funds will not be withheld are highly advisable.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

Complex deals require a tailor-made approach and each one has its own features of key interest. As an example, we have worked on international financings guaranteed by ECAs – a structure was devised so that the ECA would be subrogated in the project guarantees in the case of default and payment of the guarantee. In addition, in PPPs, our focus has been on mitigating the risk of default by counterparties (such as flow of funds to specific accounts). Other deals with blended finance – capital markets and banks – have required a careful analysis of covenants and quora for waivers.



Germany

Dr Dietrich F R Stiller at SZA Schilling, Zutt & Anschutz advises lenders, borrowers, sponsors and investors in the areas of banking and capital markets, privatisation, PPPs and cross-border investment law, including domestic and international project finance and BOT structures as well as in export finance, corporate finance, refinancing of distressed enterprises and regulatory matters.

Since his first project finance transaction in 1995, the E-Plus financing, he has been involved in numerous domestic and cross-border high-profile project and project finance transactions, including Manila airport, the German aspects of NordStream, wind parks and other types of renewables, conventional power plants, construction of industrial facilities, traffic infrastructure, healthcare and other industries in many different jurisdictions.

Dietrich speaks German, English, Bahasa Indonesia and Korean.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

Project finance has a long history in Germany, and significant infrastructure projects would not have been realised without this form of finance.

Generally, the federal structure of the country is sometimes viewed as a factor adding more complexity to domestic project finance transactions. However, this hurdle is not high and requires merely proper legal advice on legal rules below the federal level. This is something that Germany has in common with many other federal countries.

While a significant share of project finance transactions relates to infrastructure developments, there is a clear split between projects in the private sector and classic public-private partnerships (PPPs). Germany has no PPP law of general application; hence most PPPs are subject to general public procurement laws and other relevant legislation. There is, however, sectoral legislation on PPPs in the area of the private financing of highways. Despite the decentralised political system, where the public entity participating in a PPP may not only be the federal republic or a federal state, but also a municipality or another public entity (eg, in the case of PPPs in the healthcare or school sector), all such public players are offered access to relevant information and expertise (eg, by Partnerschaft Deutschland, an exclusively publicly held corporation advising public entities on PPPs). The activities of Partnerschaft Deutschland in 2020 also contributed to the fight against the covid-19 pandemic. One landmark project in this area is the support for the HPI Schul-Cloud. Although said project was already launched in 2016, many years before the outbreak of the pandemic, digital learning became an indispensable element of public education. But not only in the educational sector, also in all other fields of public administration is digitalisation now a major focus.

Not all PPPs are financed in the form of project finance, but project finance is well established as a leading form of finance for highway projects and other large-scale infrastructure projects in many sectors including the healthcare sector.

Although PPPs play a positive contribution to the maintenance and expansion of existing infrastructure as well as to the building of new infrastructure, PPPs are not always popular in the public opinion, due to some failed projects as well as due to some particularities of the German market (eg, it is not easy to convince a community to pay toll for a particular bridge or tunnel if all other roads are free of toll).

Another challenge is the complexity of project finance transactions. In times of continuously low interest rates and cheap money, there is more competition to other classic forms of finance.



Dietrich F R Stiller

An area that has attracted considerable project finance in relation to domestic projects is the development of alternative energy sources. In particular, since the decision of the federal government in 2011 to accelerate the phase-out of nuclear energy by 2022, clean and renewable energy projects enjoy a high priority in Germany. A phase-out of coal production will further increase the demand for alternative energy projects. However, the further expansion of onshore wind energy projects has significantly slowed down due to a lack of appropriate spaces and legal actions by local residents against such projects. Furthermore, the transfer of energy from offshore wind parks in the north to industrial and private consumers of energy in the south requires a considerable expansion of the grid.

As far as cross-border projects are concerned, German financial institutions continue to play an important role as arrangers and lenders. The relevant projects frequently involve German sponsors, German exporters or otherwise German access to natural resources, frequently supported by the German government, represented by Euler Hermes as mandatary, in its capacity as an export credit agency (ECA). As already in recent years, existing sanctions, the aggravation of sanctions risk and trade wars continue to be challenges to legitimate projects.

The general trend to 'green finance' has an increasing impact on project finance as the demand for investment opportunities in green projects increases. However, standards to be applied in this respect are not always clear and are still subject to further standardisation. Albeit green bonds are more in the focus of the public and of relevant standardisation activities, it is foreseeable that the Action Plan 'Financing Sustainable Growth' and its implementation by the EU (eg, the new Guidelines on non-financial reporting: Supplement on reporting climate-related information, together with the Sustainable Development Goals adopted by the United Nations and supported, inter alia, by the UN Development Programme as well as emerging policies and guidelines in this field) will have an increasing influence not only on future project finance transactions, but also on the refinancing of existing projects. On 14 January 2020, the European Commission presented the European Green Deal Investment Plan, also referred to as Sustainable Europe Investment Plan. This plan aims to mobilise at least €1 trillion of sustainable investments over the next decade. Its goal is to establish a framework to facilitate public and private investments needed for the transition to a climate-neutral, green, competitive and inclusive economy.

As most projects suitable for project finance are long term, legal and political stability as well as restrictions imposed by sanctions have a visible impact on the geographical distribution of eligible projects. Further, the impact of covid-19 on the deal pipeline causes project delays. And changing markets do have an impact not only on the technical implementation of projects, but also on the relevant financial models and on risk allocation.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

Due to the continuing shift from conventional to renewable energy sources in Germany, the energy sector remains particularly active in terms of project finance. Considerable investments into the public infrastructure remain necessary to renew and expand infrastructure facilities. This relates to highways, transmission of energy and digitalisation. Finally, project finance continues to play an important role for social infrastructure including healthcare and education.

Recent prominent transactions include the expansion of the A10 federal motorway and the A24 federal motorway between the Pankow motorway junction and the Neuruppin junction with subsequent operation and maintenance for 30 years (2018–2048), which has a project volume of around €1.4 billion. The financing of the project as well as the maintenance and operation of the project section will be

“The energy sector remains particularly active in terms of project finance.”

carried out by the consortium around the internationally experienced construction companies BAM and HABAU within the framework of a PPP. The main construction phase began in 2018 August and is scheduled to last until 2023.

Another landmark project is the widening, operation and maintenance of the A3 federal motorway Biebelried – Fürth/Erlangen by a PPP based on the availability model (V-Model) with A3 Nordbayern GmbH & Co KG as project company and a project volume of around €2.4 billion, approximately €1.2 billion of which are financed by a syndicate of lenders including leading private financial institutions as well as the EIB, and with KfW IPEX-Bank as facility agent.

Furthermore, leading German financial institutions including, inter alia, DZ BANK AG, BayernLB, KfW IPEX-Bank or LBBW continued to finance a large number of renewable projects in Turkey as well as in many other jurisdictions.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

Although project finance transactions have a limited share in the German domestic market, project finance is an indispensable tool for appropriate projects. Low interest rates and redundant liquidity in the market continue to affect the demand for project finance. This, as well as the complexity of project finance structures, and the fact that not every institution can afford the cost of building up and maintaining the required expertise in-house supports a concentration of the relevant market on a number of specialist key players. Finally, existing sanctions, the aggravation of sanctions risk as well as global trade wars and military conflicts have an impact on the project finance market for sponsors, exporters and lenders as well as on the other relevant stakeholders.

Medium-size projects usually involve one sponsor or a small group of sponsors including at least one knowledge investor from the relevant area of industry. This key sponsor may form a syndicate with other sponsors that are equally involved in the implementation of the project such as the EPC contractor or other parties. Sponsors' groups for large and mega projects normally consist of several joint venture partners originating from the relevant industry, however, these may also comprise finance investors such as private equity or pension funds. In general, the participation of finance investors tends to increase once a project successfully enters the operation phase.

As to lenders, medium-size transactions are usually financed by one single German financial institution, or in the form of a club deal. Here the state-owned KfW Group, the state-owned Landesbanken and a number of experienced domestic and international finance institutions play a predominant role. Large transactions and



mega transactions, however, tend to require a syndicate of lenders that provides the senior lending. Furthermore, in the case of complex mega deals, classic project finance may be combined, in particular in the case of cross-border transactions, with ECA facilities, and/or untied loan facilities. Each of these facilities may be granted by different syndicates of lenders and interlinked by an inter-creditor agreement. In addition thereto, multilaterals play an important role in cross-border transactions. Further, it should be noted that once a project has successfully passed the construction and start-up phase, the borrower and the sponsors may seek to refinance project loans by project bonds that generally have a less complex structure to generate a refinancing at lower costs.

There is a respectable number of domestic and foreign financial institutions in Germany with rich experience in the area of project finance, including, inter alia, KfW Group, Deutsche Bank, Commerzbank, UniCredit, ING, DZ BANK, LBBW, BayernLB, European Investment Bank and others. In the case of facilities covered by guarantees issued by the German government (export guarantees, untied loan guarantees or investment guarantees for equity-like loans), the role of the agent is usually taken either by a German financial institution or by an experienced foreign

“The development of the sanctions landscape also has a significant impact on project finance in view of the long tenures of project finance arrangements.”

bank with a strong presence in the German market. Finally, in the case of development finance projects abroad with a strong German element, German development finance institutions such as DEG, sometimes in a syndicate with foreign development finance institutions such as FMO or others, play a leading role, together with the relevant multilaterals.

On the sponsor side, the key players depend on the relevant industry sectors and include the leading market players in the oil and gas, renewables, highway and healthcare sector, or other areas of infrastructure such as airports or harbours.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

Each transaction is unique and faces different challenges, depending on its nature. In project finance transactions that include M&A elements, the further expansion of the powers of the government to block takeovers by foreign investors causes challenges to inbound transactions. Even though Germany remains, in principle, open to foreign investment, the German Foreign Trade Ordinance provides certain tools for the government to block transactions. These blocking rights were greatly strengthened on 29 December 2018, when the scope of significant infrastructure was broadened and the threshold for acquisitions that may be blocked was lowered in certain areas from 25 per cent to 10 per cent of the voting rights by non-EU investors in a German company. Furthermore, on 19 March 2019, the EU adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, which applies from 11 October 2020. In Germany, a further strengthening of the rights of the government to intervene was implemented via several amendments of the Foreign Trade Act and the Foreign Trade Ordinance. This has a significant impact not only on M&A transactions, but also on projects in general and on project finance in the relevant sectors.

In the case of outbound transactions, existing foreign sanctions as well as domestic sanctions (including EU sanctions), together with the general risk of a further aggravation of sanctions, or sometimes even specific sanctions threats announced by foreign governments, tend to block legitimate transactions because of the uncertainties involved. At the same time, the scope of the German blocking legislation was significantly narrowed, which now makes it easier for domestic players to submit to foreign sanctions, but creates other challenges because the former blocking rules provided a limited protection against certain aspects of foreign sanctions. At the same time, uncertainties regarding the actual scope of the EU Blocking Regulation remain unresolved. The development of the sanctions



landscape also has a significant impact on project finance in view of the long tenures of project finance arrangements.

Global trade wars and military conflicts have a clear impact on project planning and structuring as they add an additional level of complexity and uncertainty and threaten the long-term sustainability of projects by, for example, jeopardising existing supply chains. These uncertainties have the potential to delay legitimate projects, or to lead to entirely different project and finance structures.

Finally, KYC processes with project parties from third jurisdictions may be quite time consuming. Also, in the case of project finance transactions that involve trade finance elements governed by the OECD Consensus, restrictions regarding the financing of local costs may lead to competitive advantages of parties not bound by the OECD Consensus. Against this background, a liberalisation of the outdated rules for the finance of local costs will be an important stimulus for the relevant markets.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

While the legal environment in Germany remains stable, there has been an expectation that the withdrawal of the United Kingdom from the European Union (Brexit) will bring more finance activities, including project finance, to the continent and that Frankfurt as the financial centre of Germany shall see a further increase of relevant market activities. Although the movement of financial institutions to Frankfurt was not as strong as expected during the first year after Brexit, a considerable number of financial institutions nevertheless already moved to Frankfurt, or strengthened its existing presence in Frankfurt. Other locations that benefitted from similar relocations are Dublin, Amsterdam, Luxembourg or Paris. This trend, from which Frankfurt benefits most, may become stronger in the future when the effects of covid-19 decrease.

However, Brexit also leads to more complex regulatory requirements. The EU-UK Trade and Cooperation Agreement, which entered into force provisionally on 1 January 2021, is a great achievement that mitigates the consequences of Brexit, but nevertheless a lot of legal uncertainty remains and it will require sufficient time until the framework for the future relation becomes clear in all relevant aspects. In this context it should be noted that the Brexit causes complex issues under treaties with third countries, which may have an impact on the structure of existing and future projects and their financial sustainability (eg, if goods of UK origin are no longer considered for the determination of EU origin, which in turn may be relevant for tariffs and ultimately for supply chains).

In relation to projects eligible for support by German government guarantees for so-called untied loans, it should be noted that the scope of eligible financings was significantly expanded.

The payment system established by the European Union to enable European companies to trade with Iran may in the future have a certain impact on project finance transactions, but it is unlikely that said tool might facilitate syndicated project finance with Iran in the near future as its scope of application is very limited (eg, to the supply of pharmaceutical products). At least until now a positive impact on trade opportunities cannot be denied, but it was much smaller than expected.

The newly established Regional Comprehensive Economic Partnership in the Asia-Pacific region and the African Continental Free Trade Area present new opportunities for German players in the project development and finance sector. The same applies with regard to the Comprehensive Agreement on Investment, which was agreed in principle on 30 December 2020 between China and the EU,

“Brexit will most likely continue to strengthen the role of financial centres within the European Union.”

but remains to be finalised, approved by the European Parliament and ratified by all parties, and in view of the recent developments it remains uncertain whether and when this goal can be achieved.

Finally, EU’s commitments under the UN 2030 agenda and sustainable development goals and the Paris climate agreement may lead to a potential estimated investment gap of €180 billion per year for ‘green’ projects and a necessity for a legal framework for related ‘sustainable finance’. The implementation of the related action plan will have a clear impact not only on green bonds, but also on green projects in general and on project finance.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

As project finance, because of its complexity, involves higher transaction costs than other forms of finance, it remains a predominant form of finance for large-scale and mega-projects, but is not necessarily suitable for smaller transactions. In

addition thereto, we observe that projects based on mature technologies with a high degree of standardisation have easier access to project finance, even in the case of lower volumes, than entirely new technologies with a higher risk profile. As already explained above, the limited number of transactions in this area of finance supports a concentration of the relevant market on a number of specialised key players, bearing in mind that due to its complexity not every institution can afford the costs of building up and maintaining the required expertise in-house.

While we notice a strong interest of insurance companies to get involved in the finance of infrastructure projects, it appears that this relates more to classic forms of finance, including equity investments, but not to non- or limited-recourse project finance structures.

As interest rates remain very low, access to funds for the financing of projects is generally not a problem. However, in certain areas the availability of 'bankable' projects remains an issue. Many projects hence require satisfactory payment guarantees to become bankable. Furthermore, in the case of cross-border projects, the role of ECAs and/or multilaterals remains an important element of viable finance structures.

Another important tool that supports project finance structures are bilateral investment treaties (BITs). Here, however, recent years showed that important BITs were terminated, and their replacement by new treaties remains difficult and time-consuming because the competence to enter into new BITs is no longer with the German government.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

The withdrawal of the United Kingdom from the European Union (Brexit) will most likely continue to strengthen the role of financial centres within the European Union, and in particular the role of Frankfurt, and therefore also bring new opportunities for the German and European market.

The EU-UK Trade and Cooperation Agreement, which entered into force provisionally on 1 January 2021, is a great relief. However, remaining uncertainties of the future relationship between the UK and the EU add further complexities. In addition thereto, the already complicated landscape of international sanctions becomes even more complex as European and UK sanction regimes drift apart, and syndicates of lenders as well as borrowers and other obligors need to comply with one additional sanctions regime. This leads to additional compliance work and uncertainties for the long-term structuring of cross-border projects.

As regards opportunities for future projects, in addition to the classic industry sectors with a high demand for project finance such as oil and gas, renewables, traffic infrastructure and healthcare, the Belt and Road Initiative may trigger significant development along the relevant trade routes and hence has the potential to create a demand for additional projects and related project finance, for the benefit of all relevant market players including German investors, exporters and lenders, provided that these positive effects will not be destroyed by political developments. Furthermore, the significant developments in the renewables sector will contribute to a further expansion of business opportunities and project finance for renewables and other green projects. Equally, sustainable development goals and related standardisation of the criteria for green projects and green financing will have a significant impact on the further development of this market. While it can be observed that nuclear power is getting more support on a global and EU level, it is unlikely that nuclear power will become again an accepted alternative source of energy in Germany within this decade, although nothing is impossible in the long term.

Covid-19 remains a challenge for projects under multiple aspects, including delays, uncertainties of the market and risk allocation. Nevertheless, the increased public debt in almost all jurisdictions will lead to much higher demands for public-private partnerships and related sustainable long-term finance, including project finance.

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What three things should a client consider when choosing counsel for a complex project financing?

Quality, experience and the ability to collaborate with local counsel in all relevant jurisdictions as well as with other experts including, without limitation, financial advisers, social and environmental experts, insurance advisers, technical advisers and many more. Projects are complex and each project is different. The challenges of getting the deal through in a sustainable and time-efficient manner require a solid combination of legal knowledge, commercial understanding and a pragmatic, focused and solution-driven approach.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

This depends on the relevant area of industry. Almost all projects have in common that there may be x factors that are difficult to anticipate or control at the inception of the project. Projects are typically long term. This requires sufficient flexibility in the project structure to respond even to the unexpected. Risks should, in an ideal world, always be allocated to such party, which is in the best position to control the same, but sometimes regulatory requirements or public procurement rules may create a legal or contractual environment that requires flexible solutions for an appropriate risk allocation. In the case of PPPs, the interest of all relevant stakeholders should be properly addressed, as projects should remain stable even in the case of a change of administration.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

All transactions relevant in this context were cross-border and all of them had in common that the political environment drastically changed during the relevant period. Normally, when a deal is structured, a lot of attention is paid to proper tax structuring. No doubt, this is and always will remain one of the key issues for a sustainable structure. However, the stakeholders should pay equal attention to investment protection issues, such as the availability of a bilateral investment treaty or equivalent structures. Where these protections are in place, the sheer presence of these tools may help to avoid litigation and arbitration and assist the parties in finding proper solutions if the unexpected occurs.



Greece

Gregorios Michailopoulos is the founder and managing partner of Michailopoulos & Associates. He possesses substantial experience in providing legal advice and counselling on project finance, public procurement and business law matters.

Greg has consulted and represented an extensive number of multinational and local business operators active in several business sectors, as well as public entities and organisations. Greg's litigation experience spans the whole spectrum and jurisdiction of Greek courts and extends to the Court of Justice of the European Union.

Greg is the author of a series of books, and he is often invited as an instructor in scientific workshops and seminars in the field of project finance, public-private partnerships (PPPs) and public procurement law.

Marios Markatos is an associate lawyer at Michailopoulos & Associates. He specialises in public law and has a strong academic background and practical experience in project finance and public procurement.

His wide-ranging expertise makes our law firm a valuable partner for the preparation, financing, and implementation of large-scale projects in Greece. His track record includes the structuring, authorisation and financing of major real estate, tourism and energy projects. Marios has played a key role in the preparation of a €32 million concession award procedure for the expansion and exploitation of a mountain resort, consisting of a ski centre and other touristic and athletic facilities.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

The sovereign debt crisis and economic recession over the past decade in Greece resulted in insufficient levels of private capital in the market. As a consequence, the majority of the deal activity in the project finance sector has been driven by government policy and foreign investment initiatives. Under these circumstances Greece has mobilised funds from the European Union (EU) jointly with state funds aiming at supporting the private sector and fostering growth and development. According to the budget allocation of the European Structural and Investment Funds for the period 2014–2020, which applies until the end of 2023, €26 billion are expected to be channelled into the Greek economy. Furthermore, Greece has benefited from the European Fund for Strategic Investment (EFSI 2.0), which generated a significant amount of development funds for the country.

In terms of market trends, project activity in recent years has mainly related to privatisations. The closing of the transaction of the iconic ‘Hellinikon project’ (Europe’s greatest urban regeneration project of an area of 2 million sqm), the signing of a 40-year concession of Marina Alimou (one of the largest marinas in the eastern Mediterranean), the selection of a preferred investor of the Egnatia Road concession and the Public Gas Corporation infrastructure transaction represented major privatisation deals, with a huge impact on the national economy.

Lastly, as far as upcoming developments are concerned, the recently introduced National Recovery and Resilience Plan (NRRP) Greece 2.0, which has been designed to make the best use of €17.8 billion in grants and €12.7 billion in loans that have been allocated to Greece under the Recovery and Resilience Facility (RRF), is going to be of major importance. The four main pillars of the NRRP, namely (1) green transition, (2) digital transformation, (3) employment, skills and social cohesion and (4) private investment and transformation of the economy, set the tone for project activity in the coming years.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

As explained above, the majority of projects taking place in Greece were dependent on government policy and foreign investments, as the infamous economic crisis severely affected local investors and lenders.

Nowadays the above situation is changing. The construction of a new subway (metro) line in Athens, was hailed by the Prime Minister as the ‘biggest public project



in Greece'. The contract between Attiko Metro SA and the J&P Avax SA – Ghella SpA – Alstom Transport SA group of companies for the construction of Athens metro Line 4, has a total budget of €1.6 billion.

Among the project finance investments that are currently in the construction phase, the 'Hellinikon project', the largest development project in Greek history, undoubtedly stands out. The investment plan includes the conversion of a huge property (bigger than Monaco in size) on the site of the former Athens international airport into a complex including a marina, luxury residences, public parks, sporting facilities, exclusive shops and a casino. The total project value exceeds €8 billion. During the construction phase, the project is forecast to contribute 2 per cent to the country's economy and create 85,000 jobs. In addition, 10,000 jobs will be created on a permanent basis. Tax revenues for the state will exceed €14 billion over a 25-year period, while there will also be many intangible benefits.

The concession of the exclusive right to own, use, administer, operate and exploit the 'Marina of Alimos' (largest marina of Greece) for a 40-year period represents a remarkable project with a total value for the whole concession period up to €177 million. Besides modernising existing port infrastructure and ship-laying

or maintenance services, the investment plan also includes the regeneration of the marina's land area through the construction of building facilities as well as the creation of recreational areas, boardwalks and park areas complete with dining areas, shops, hotel facilities, offices and playgrounds.

In addition, over recent years the renewable energy sources market has become a significant pillar of the Greek economy. Currently, in this field Greece is turning towards solar energy. In this respect, the oil company Hellenic Petroleum obtained €75 million in funding to build the country's largest renewable energy project. The funding is coming from the European Bank for Reconstruction and Development (EBRD) for a project that will reach 204MW and will be executed with a construction of a power plant in northern Greece.

Moreover, the sector of tourism attracted, even during the covid-19 era, an important number of local and foreign investors that are mostly involved in a plethora of small-scale projects, such as the construction of new hotel facilities and resorts. It is worth noting that the construction, expansion and upgrade of resorts to a higher luxury level is highly promoted and subsidised from state resources by virtue of the Development Law. Investment plans that involve alternative means of tourism will also be subsidised, while the level of the funding support provided by the state will reach a maximum of €10 million per investment plan.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

The financial crisis and the pandemic have resulted in significant constraints in project financing, affecting the ability of the systemic banks to provide loans and debt financing. Specifically, the four largest banks (Alpha Bank, Eurobank, National Bank of Greece and Piraeus Bank) have been facing the issue of management of non-performing loans, the latter representing a significant burden.

Under these circumstances, the state had to interfere and provide financial liquidity to enterprises. In view of the above, €2.78 billion have been allocated, through financial instruments managed by the Hellenic Development Bank, to businesses during the health crisis. Specifically, the funds were granted through Entrepreneurship Fund II and the COVID-19 Guarantee Fund, which are largely co-financed by EU and state funds.

Regarding co-financed projects, the Greek government's fund of funds, EquiFund, has been launched, with the goal of providing SMEs private equity and venture capital. Created by the Hellenic Republic in cooperation with the European Investment Fund (EIF), EquiFund is co-financed by EU and national funds, but also includes funding from the EIF and the European Investment Bank (EIB) through the EFSI. Strategic

“The financial crisis and the pandemic have resulted in significant constraints in project financing.”

partners such as the Onassis Foundation and the National Bank of Greece have also committed to supporting EquiFund. The EquiFund investment platform with a total capital of over €300 million offers financial opportunities for innovative business ideas.

At the same time, the Infrastructure Fund of Funds (InfraFoF) aims at offering favourable financing terms in the private and public sector for the implementation of small and medium-sized projects, with emphasis on energy, environment and urban development. The funds of InfraFoF are allocated as follows: €200 million derive from the European Structural and Investment Funds under EPAnEK, €200 million from the Greek state (Public Investment Programme) and €50 million from recovered resources of the JESSICA initiative, which operated during the 2007–2013 Programming Period. The Fund is managed by the EIB and three interim financial institutions, which were selected through a competitive bidding procedure and will provide the investment loans.

As far as the private sector is concerned, project sponsors and debt finance providers, are usually development banks, infrastructure funds, large corporate and private equity funds.



4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

In the aftermath of the financial assistance programmes, Greece adopted a series of key reforms in crucial sectors of the economy. The financial environment has become more business-friendly and attractive for foreign investments. A new economy with fewer barriers to entry and state interventionism, while offering an abundance of opportunities, is in the making.

However, certain obstacles that an investor might face while conducting business in Greece remain. The national investment legislative and regulatory framework is characterised by overregulation, dispersed legal texts, diverse ministerial decisions, controversial provisions and legal gaps. The environmental and town planning legislation is a characteristic example of the above situation, as, even though novel provisions that aim at solving existing issues are introduced, it is often noticed that investment plans are significantly slowed down by the adherence of the public administration to outdated and contradictory provisions that have not been literally repealed.

In addition, the laggardly administration of justice has proved to significantly affect and slow down the implementation of investment plans, as tax law, licensing and land permits, forced expropriation and contract execution issues are often brought before the competent Greek courts, the latter being unable, in some cases, to deliver a ruling within a fairly reasonable time frame.

Moreover, the project execution phase is also challenging for investors and project participants in general. The majority of the projects that are funded by state and/or EU funds are executed with recourse to procurement processes, the latter being characterised by strict deadlines, a plethora of exclusion and tender dismissal grounds and complex and unclear documentation requirements. In view of the above, our firm's specialisation and extensive experience in procurement processes, PPPs and in the management of EU and state funding, provides our clients with a competitive advantage in the execution of such projects. Our profound understanding of the commercial realities and the modus operandi of the public authorities renders us excellent communicators of the legal complexities related to any project finance structure. Our team provides end-to-end legal services covering any aspect related to the development, financing, construction, operation and maintenance of major infrastructure and industrial projects.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

The NRRP Greece 2.0, which is designed to absorb €30.5 billion, aspires to lead the country's economy, institutions and society into a new era; to spark a paradigm shift towards a more extroverted, competitive and green economic model, matched with a more efficient, less bureaucratic, digitalised state and a more growth-friendly tax system. In line with the above strategic goals, the introduction of new legislation in the above areas is only a matter of time.

With respect to green transition, the NRRP's main aims include the reform of urban planning with the introduction of urban plans that offer prompt and trustworthy information on land use for almost the four-fifths of the country, and the installation and operation of publicly accessible charging infrastructure for electric vehicles, reforms that are able to make the access of investors to land information easier, and foster investments on electromobility.

As far as digital transformation is concerned, the NRRP calls for legislative interventions regarding the digitisation of key archives in various sectors (justice, urban planning agencies) and the interconnection and interoperability of registries,

systems and services for data exchange in the public sector, initiatives that will protect investors from a load of administrative burdens that currently exist.

In addition, the NRRP introduces reforms that aim to increase competitiveness and to improve the business environment as well as Greece's ranking in the Ease of Doing Business and other competitiveness indexes. The reforms also include the introduction of incentives to encourage micro, small and medium-sized enterprises to increase economies of scale through mergers, conversions, acquisitions and cooperation schemes and platforms. The investments promoted will be in the private sector and their selection will be made exclusively by commercial banks or European Institutions (EIB, EBRD), without the involvement of the government. There will be five eligible economic priorities: green transition, digital transformation, the promotion of exports, financing research and development (innovation), as well as promoting economies of scale. Loans will offer a maximum of 50 per cent co-financing, with third-party financing covering the rest.

Lastly, according to the new regional aid map for Greece – which was approved for the period 2022–2027 in the context of the revised Regional Aid Guidelines, regions covering 82.34 per cent of the population of Greece will be eligible for regional investment aid. It is noteworthy that 12 regions of the country are now eligible for aid of a maximum intensity that ranges between 30 per cent and 50 per cent, percentages that are considerably higher in comparison with the previous period (2014–2020).

6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

As explained earlier, the limited financial capacity of the Greek commercial banks and the burden of non-performing loans did not allow them to provide systematic and extensive financing to projects. Since the implementation of the Hercules Asset Protection Scheme in 2018, the government extended first-loss guarantees on senior tranches of notes backed by pools of non-performing exposures that are securitised by Greek banks. By leveraging Hercules and the increase in investor interest in distressed assets linked to Greek bad debt, Greek banks have reduced legacy assets by more than €30 billion in the past three years.

The reliance of project finance to government funding and the liquidity issues that the country's commercial banks faced have both led to a quite limited pool of project participants being involved in projects that take place in Greece. In this context, the role of the EBRD was important, as the EBRD offered direct financing in the form of loans, equity and guarantees. Currently, the investment portfolio of EBRD in Greece amounts to €2.3 billion. At the same time, the role of the EIB is equally important.

“Greek banks have reduced legacy assets by more than €30 billion in the past three years.”

For instance, in June the EIB announced its commitment to provide €400 million, in cooperation with the Hellenic Development Bank for business investment financing. In addition, in April 2021, the EIB agreed to help manage up to €5 billion as part of Greece’s implementation of the NRRP, known as Greece 2.0. Specifically, the EIB’s technical, financial and environmental experts will identify high-impact projects, priority sectors and effective financial structures to ensure best use of new European grant and loan support for Greece to mitigate the social and economic impact of the coronavirus pandemic.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

Undoubtedly, the major influx of funds (€30.5 billion) that will reach the Greek economy through the RRF is going to affect the investment trends over the coming years. In terms of infrastructure, the construction of the Central Greece Highway (main road, service roads or connecting roads and supplementary works) of a total length of 70km of the northern section of the E65 Motorway, stands out. The

motorway, which will be funded with €452 million, will improve connectivity between Southern Greece, Thessaly and Western Macedonia, the Western Balkans and the rest of Europe (through the port of Igoumenitsa) and will form part of the Trans-European Transport Network. The construction of the Cretan Northern Highway, which will connect the four major cities of Crete (Chania, Rethymno, Heraklion and Agios Nikolaos) represents an equally important project, which will be funded with €427 million.

In addition, €260 million of RRF funds will be invested for the development of tourism, aiming at the extension of the tourism season in Greece and the promotion of alternative forms of tourism, but also the contribution to economic resilience, sustainable growth and social and territorial cohesion.

Moreover, PPP schemes will be promoted through the NRRP, as an investment of €200 million in the national irrigation network will take place by means of a public-private partnership, as well as an investment of €24 million regarding the digital transformation of the Hellenic Railways Organisation.

Lastly, the energy sector is expected to be subject to major growth as the interest of private, local and foreign investors is high, while energy-related projects envisaged by the NRRP, such as the electricity interconnection of the Greek islands and the upgrading of the country's electricity network, will reduce energy costs, leading to new investments and jobs in the energy-intensive sectors of the economy.

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What three things should a client consider when choosing counsel for a complex project financing?

Given the crucial role of government and state funding for the realisation of investment projects in Greece, the legal counsel needs to have proven experience in supporting co-funded projects, knowledge of the relevant legislative framework and public procurement procedures, but also awareness of the modus operandi of the public upper and lower administration. Therefore, a legal adviser with the above qualities is indispensable for the timely execution of a project, as his or her know-how can significantly reduce the administrative burden, by avoiding bureaucratic obstacles that slow down project execution.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

Our experience has indicated that the smooth implementation of a project can be materialised if the project planning has been realistic and bankable, with calculated risks, after a thorough cost-benefit analysis. Furthermore, understanding local market practices and customs is a key factor.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

In our capacity as the legal adviser of the Special Secretariat-General for the Management of the European Social Fund Programmes of the Greek Ministry of Development and Investment, we are responsible for ensuring the smooth disbursement of an amount of €3.3. billion to the Greek economy, by advising on complex public finance issues and supporting, from a legal point of view, the preparation, award and execution of a series of contracts.



Middle East Overview

Tina Blazquez-Lopez is head of energy and infrastructure for the Middle East and Africa, and is based in Simmons & Simmons' Dubai office. She has spent over 15 years advising governments, lenders, sponsors, borrowers and equity investors on the acquisition, development and financing of complex projects throughout the world with a focus on emerging markets. Many of her transactions have been 'first in kind' or have been named 'Deal of the Year' by leading industry journals. Tina is also a fluent Spanish speaker.

Leonie Sellers is a dual-qualified senior associate in Simmons & Simmons' Dubai office. With a particular focus on energy and infrastructure, Leonie has advised clients both domestically and internationally in various industries, including developers, contractors and employers.

James Coleman is a partner in the corporate and commercial team based in Dubai. He specialises in public and private M&A, joint ventures, corporate reorganisations, investment fund establishment and financial regulation. James has been based in the Middle East and North Africa (MENA) region for over 10 years. He is fluent in English and German.

Tikesha Keylock is a UK-qualified corporate associate who has worked in the MENA region for three years, focusing primarily on transactional mandates. She has a particular focus on projects M&A, in the natural resources, renewable energy and infrastructure sectors and advises international consortiums, private equity sponsors and governments on their development, acquisitions and disposals of energy and infrastructure assets.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

TBL: Project spending in the MENA region in 2021 was sluggish and only marginally up from spending in 2020. Covid-19 is still having an impact on project spending and the hope is that 2022 will bring us closer to 2019 spending levels. The Kingdom of Saudi Arabia's (KSA) is the leading market in the region followed by Qatar and Egypt. Towards the end of 2021 Saudi Aramco awarded subsurface and engineering, procurement and construction (EPC) contracts worth US\$10 billion in connection with the Jafurah unconventional gas field, which spurred the market. Jafurah is significant to Saudi Arabia's goal of producing half of its electricity from gas and half from renewables as the Kingdom works towards a 2060 net-zero target.

Both renewable and clean energy development remain key trends in the Middle East. Through the KSA Vision 2030, the KSA continues to work towards an initial target of 9.5GW of renewable energy by 2030, with the UAE targeting a 50 per cent increase of clean energy contribution by 2050 and an overall reduction of its carbon footprint of power generation by 70 per cent through its Energy Strategy 2050. We have also seen other countries following suit with the implementation of ambitious and progressive clean energy focused strategies. Notable in Qatar was the rebranding in late 2021 of its state-owned oil and gas company from Qatar Petroleum to Qatar Energy. The move was intended to signal a broader strategy including a focus on energy efficiency and environmentally friendly technology, such as capturing and storing carbon dioxide.

JC: Despite an increase in oil prices and, hence, oil revenues in 2021, we have seen governments in the MENA region continue to remain committed to diversifying their energy sources, including to use new technologies and to lower the cost of renewables. The completion of the Dhofar wind farm in Oman, the first utility-scale wind farm in the Gulf Cooperation Council (GCC), has increased confidence among developers, governments and financiers. It was the first industrial-scale wind farm in the Middle East, and therefore an important milestone in the use and development of this technology. The Abu Dhabi-based Al Dhafra Solar PV IPP, which reached financial close in June 2021, is currently said to be the world's largest single-site solar power plant, using approximately 3.5 million solar panels. The plant will also mitigate 2.4 million tonnes of carbon dioxide annually and recorded the world's lowest tariff of US\$0.0135/kWh.

In line with the UAE's support of the UN Sustainable Development Goals, there has been a further commitment announced by it, to help provide sub-Saharan Africa with clean and affordable energy, and in January 2022, the Etihad 7 initiative



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was announced at the Abu Dhabi Sustainability Week 2022, through which the UAE will fund the supply of clean electricity to 100 million people by 2035.

TK: Further, and in line with the megacity developments announced in 2019, we have seen the KSA continue to take steps to attract foreign interest in the region. The relaxation of guardianship rules and visa regulation will arguably make the KSA a more attractive proposition for international investors, with major development projects such as the Amaala project, for which the Saudi Arabian Investment Fund is reported as intending to raise up to 10 billion riyals in green financing, in 2022. There has also been increased appetite by regional developers in North Africa, with countries such as Morocco continuing to announce large-scale sustainable energy projects, presenting continued opportunities for Middle East-based investors and developers that share an approach to innovation and technology progression.

LS: The US\$50 million UAE-Caribbean Renewable Energy Fund, fully financed by Abu Dhabi Fund for Development established in 2017 under the UAE's Foreign Aid Policy to assist small island developing states to achieve their national priorities was also active throughout 2021, with the award of the EPC for its pilot hurricane-resistant clean energy project in Dominica. Masdar is leading the design and implementation of the project to build a 5MW/2.5 MWh battery energy storage system. The fund is fully financed by Abu Dhabi Fund for Development.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

TBL: While sectors such as aviation and tourism remain deeply impacted by covid-19, other key areas in the UAE such as Dubai's real estate and Abu Dhabi's oil and gas projects sectors are steadily returning to growth. The construction, transport and power sectors continue to remain the most active in the Middle East, with the UAE and Saudi Arabia taking great strides in this sector.

With a reported US\$860 billion worth of active projects ongoing in 2021, Dubai continues to drive growth in the construction and infrastructure sectors with projects such as Emirates Water and Electricity Company's Water Treatment & Transmission Facility project in Mirfa (which is expected to commence commercial operation in 2024) and Abu Dhabi-based Emirates Water & Electricity Company, in partnership with Abu Dhabi Waste Management Centre's 150MW Waste to Energy Plant in Al Dhafra, releasing requests for expressions of interest in 2021. The

“Key areas in the UAE such as Dubai’s real estate and Abu Dhabi’s oil and gas projects sectors are steadily returning to growth.”

multibillion-dollar Hail & Ghasha sour gas programme in Abu Dhabi will also be a significant regional project.

JC: While traditional construction sectors continue to be the most active, the breadth of sectors in which projects requiring financing are being developed is widening to encompass nuclear projects, desalination plants, aerospace developments and social infrastructure such as hospitals and schools.

The Shuqaiq 3 desalination plant in Saudi Arabia, with a value of over US\$600 million, will be one of the largest reverse osmosis desalination plants in the world. The project is being developed under a 25-year build-own-operate contract model and at the end of 2021 entered the final testing and commissioning stages. Lenders include MUFG, SMBC, Samba Financial Group, Credit Agricole Corporate and Investment Bank, the National Commercial Bank and the Norinchukin Bank.

LS: The UAE government has also, in consultation with the International Atomic Energy Agency, developed a civil nuclear power programme. The UAE’s first nuclear project, Barakah, which is projected to produce up to 25 per cent of the UAE’s



electricity requirements while preventing the release of up to 21 million tonnes of carbon emissions every year, reportedly commenced commercial operations in July 2021. By 2030, 12 per cent of Dubai's electricity supply capacity is forecast to be nuclear.

TK: On the renewables side, notable was the signing of a cooperation agreement between ACWA Power and Natixis Corporate and Investment Banking (Natixis CIB) in December 2021 to finance new projects, explore opportunities and develop new projects in the region, including in renewable and clean energy. The objective is that Natixis CIB will finance up to approximately US\$2 billion over two years for ACWA Power's future project pipeline.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

TBL: Projects in the region are typically financed by syndicates of regional and international financiers, using a combination of sophisticated instruments including

bonds, Islamic bonds, loans, syndicated loans, Islamic loans and initial public offerings.

Global political instability has prompted a more risk-averse approach to the region by international lenders and sponsors. However, regional financiers continue to actively support project development throughout the jurisdiction. Standard Chartered Bank is a key player in the market and was part of a consortium that raised approximately US\$275 million to finance the construction and maintenance of the MWac Ibri-2 IPP in Oman. The mandated lead banks included Asian Infrastructure Investment Bank (AIIB), Bank Muscat, Riyad Bank, Siemens Bank and Warba Bank. This deal was the first renewable energy financing in the GCC region by AIIB, the Beijing-headquartered international multilateral development bank.

JC: The recent collapse of Arabtec, which was contracted to work of Dubai's Expo 2020, will no doubt place additional strain on the real estate sector and local banks operating in that space. Dubai's Mashreqbank is the most exposed bank, with an approximately US\$96.11 million loan. Banks have been generally reluctant to extend fresh credit to contractors considering the global downturn. Large UAE developers will likely also be impacted.

Government-backed infrastructure funds remain the most prevalent source of financing. For example, Masdar delivered the Dhofar wind project in Oman, and funding for the project was provided by the Abu Dhabi Fund for Development, the UAE's leading national entity for development aid. The Oman Infrastructure Fund has also announced the establishment of its Rakiza Fund, which has a focus on core infrastructure and brownfield developments in Oman. The KSA's Public Investment Fund is also reported as having budgeted up to 1 trillion riyals (US\$266.57 billion) to invest in the domestic economy by 2025.

LS: Sponsors such as ACWA Power, Mubadala and Masdar remain active, with many of the government-related entities, such as the Abu Dhabi National Oil Company, the Abu Dhabi Water and Electricity Authority, and the Dubai Electricity and Water Authority, continuing to dominate the local sponsors or UAE-headquartered joint ventures list.

The post-flotation valuation of Saudi Aramco at US\$2 trillion is also noteworthy as the plans for the deployment of fresh capital in the KSA in 2020 are unveiled by Saudi Aramco. The listing in 2019 has spurred more initial public offerings in KSA, which has plans to deepen its capital markets under several reforms aimed at reducing its reliance on oil.

“The legal and regulatory framework in general continues to develop in the region, promoting foreign investment and local small and medium-sized enterprises.”

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

TBL: The legal and regulatory framework in general continues to develop in the region, promoting foreign investment and local small and medium-sized enterprises, with many government authorities continuing to build on the progress of 2021 in respect of online and digital services and cross-government coordination in an effort that will continue to streamline the permitting and approval process to help support businesses. However, economic commentators continue to report the need for more robust investor protection schemes and a transparency rule, as well as stricter information disclosure requirements.

From a practical standpoint, construction risks remain a key concern in the region, which, in some instances, lead to high-value disputes and negatively impact project timelines. Late amendments to the scope of work (ie, contract variations) of ongoing projects lead to cost overrun and project delays, and the relevant national and municipal bodies often offer different approaches to, and standards of, procurement procedures, which can further lead to cost overrun and contract variations.

Continued payment delays as faced by contractors, as well as diminished access to funding, have also placed extreme pressure on margins and, in some cases, led to financial distress.

JC: In a recovering market, slow decision-making is also impacting project awards and the rate at which projects are coming to market. The uncertainty caused by covid-19 means that the decision-making process can be much longer than usual. The year 2021 has also seen a rise in the cost of raw materials caused by the pandemic. This is impacting project timetables. Increased market competition, localisation rules and an increased focus on where companies have their headquarters and procure key equipment and staff can also create challenges.

LS: On the renewables side, regulatory reform is required to merge renewable energy, primarily PV solar power, into power grids. Policy adjustments and new regulations will also be required to integrate new technologies, such as battery storage for electric vehicles, to ensure the stability of the grid.

TK: Political tensions also remain a reality. Further to the withdrawal of the United States from the Joint Comprehensive Plan of Action (JCPOA) and the reimposition of US sanctions in 2019, tensions rose in 2020 as Iran reportedly exceeded the stipulated limitations on its nuclear programme. President Biden has pledged to return the United States to the JCPOA if Iran resumes compliance. While negotiations are reported as at early 2022 to indicate convergence between the US and Iran, it remains to be seen whether ongoing projects in Iran, including Kermanshah-Khosravi railway in western Iran, Shiraz-Bushehr railway, Tehran-Qom-Isfahan railway and the Tehran-Hamedan-Sanandaj railway, which are awaiting international financing, will be negatively affected. The UAE capital of Abu Dhabi was also struck by two blasts that left three people dead and six injured on 17 January 2022.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

TBL: Traditionally, a foremost barrier to market entry in the UAE has been the restrictions on foreign direct investment. As previously prescribed by the UAE Commercial Companies Law (Federal Law No. 2 of 2015), restrictions were historically applicable to limit a foreign shareholder to holding a maximum of 49 per cent of the shares in a company incorporated onshore (that is, not within one of the many free zones in the UAE) (the FDI Restriction).

However, Federal Decree promulgating Law No. 26 of 2020 was passed in December 2020 (the Decree), repealing the FDI Restriction. Moving forward, the threshold required for local ownership will be determined by the Cabinet, as advised by a committee to be formed pursuant to the Decree, comprising members of various governmental departments (the Committee). The Committee will have the discretion to determine the activities that are considered to have a 'strategic impact' and thus are not permissible for foreign investors to be entitled to hold up to 100 per cent of the legal interest in such companies.

JC: In 2021, the UAE government issued a list of activities that are deemed as having a 'strategic impact' on the UAE economy under Cabinet Decision No. 55 of 2021 on the Determination of the List of Strategic Impact Activities. The strategic impact activities include security and defence, banks, exchange houses and finance companies, insurance, currency printing, communications, Haj and Omra services, Quran centres and services related to fish traps. Generally, therefore, project-related activities are not, as a starting point, considered as strategic impact activities.

The Committees in each Emirate have been tasked with issuing a list of business activities of non-strategic importance applicable to their respective Emirate (the Positive List).

The Abu Dhabi and Dubai Department of Economic Development published its Positive List in May and June 2021 respectively, which include, among others, the following project-related activities: onshore and offshore oil and gas fields and facilities services, oil and gas field facilities building contracting, civil works of energy generation construction stations and civil works of energy generation construction stations.

This development is likely to open the gateway for full foreign ownership in construction companies in the UAE.

LS: There are some key changes under way in the landscape of foreign investment and public-private partnerships (PPP), with a broad trend of reforms across the region, in both the oil exporting and importing countries, to modernise legislation and enhance the business environment. Increased scope for participation and improved protections make it more likely that foreign investors might participate in PPP projects, which are also being facilitated by several dedicated laws. Egypt, Jordan and Kuwait started the trend, followed by Abu Dhabi, Dubai and Lebanon. A new PPP Law No. 12 of 2020 was published on 31 May 2020 in Qatar and, in August 2021, Saudi Arabia adopted the Private Sector Participation Law, creating a better framework for both foreign and domestic investors in privatisation programmes and PPPs in the Kingdom. Although Oman introduced its long-awaited PPP laws in



2019, the Public Authority for Privatisation and Partnership (PAPP) was effectively dissolved in August 2020 as part of a wider government restructuring. This has caused some uncertainty in the market as bidders and investors consider the future of planned projects and ongoing tenders. PAPP was understood to have a healthy pipeline of projects in the education, healthcare, logistics and utilities sectors, and it will be important to ensure that confidence in the Oman PPP market is not undermined.

TK: In March 2021, the Saudi Arabian Council of Ministers, by way of the Council of Ministers Resolution 436, dated 3 August 1441, AH approved a new private sector participation law (PSP Law) that introduces changes to the regulatory framework governing PPPs and projects can be undertaken in Saudi Arabia to encourage further participation of the private sector in public sector contracts. The law provides for a comprehensive framework governing the relationship between governmental authorities in Saudi Arabia and the private sector collaborating to undertake infrastructure and other public services projects. The PSP Law creates an even playing field between foreign investors and Saudi investors by setting the same standards,

rules and procedures with respect to the tendering process. It was announced on 7 January 2022, the National Centre for Privatisation and PPP introduced a new set of rules that will govern how such PPP agreements are agreed and concluded. It is expected that the PSP Implementing Regulations to be issued by the National Centre for Privatisation will include provisions with the aim of generating further competition in the tendering process for ensuring protection of public interests.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

TBL: The structuring of projects in the region generally means that the procuring government entity will also take the majority share of the project company. Liquidated damages, decennial liability and a robust security package comprising either a parent company guarantee or bond as performance security is typical and, due to the manner in which projects are competitively tendered in the region, it is usual to see bidders accept maximum risk transfer to submit competitive bids.

The procurer will typically pass off all construction risk, including interface, force majeure, site contamination risk and permitting requirements, to the developer. At the operational level, the backing-off of risk by developers through the use of subcontracting is also common.

JC: The use of sovereign guarantees often assists lenders with getting comfortable with the risk profile. However, as major infrastructure projects in the region are procured based on well-tested precedent legal documentation, project risk allocation does not often negatively impact the bankability of projects, such that no multinational lenders will participate. This means that we are likely to see less use of the sovereign guarantee as a way of allocating risk in PPPs, for example. The use of other instruments, such as insurance, may in some cases offer a more efficient way to manage project risk. The sovereign guarantee is no longer a 'one size-fits-all' solution.

- 7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

TBL: Despite potentially bearish sentiment from foreign investors as a result of forecasted economic downturn following the twin impacts of fluctuating oil prices and covid-19 on the regional economies, there are still some very promising signs. The UAE led the way with its vaccination programme and as a travel hub with ambitious

plans to diversify the economy with strategically important projects to align with the national vision, project spending is expected to return in 2022 and beyond.

On 31 January 2022, the UAE Ministry of Finance announced that a federal-level corporate tax of 9 per cent on taxable income above 375,000 dirhams will be introduced starting on or from 1 June 2023. The tax will apply to all businesses and commercial activities in the UAE, other than businesses in the free zones, provided that they comply with all regulatory requirements, businesses relating to the extraction of natural resources and salaries, among other limited exemptions. The implications are likely to be felt for relevant companies that have been operating in a relative no tax environment.

Furthermore, as governments are now more cautious about the over-reliance on oil revenues to develop their economies, the use of PPPs to deliver public services will grow and the market will see more private-sector involvement in infrastructure projects. This will spur innovation and the need to reduce waste.

JC: Innovation is key to the region's success, and this is being promoted right through the economies in almost all sectors and services. New technologies are being developed to undertake a number of tasks from payment services and crypto to healthcare services. For example, as part of the Expo 2020 Dubai's Global Best Practice Programme, the UAE announced in July 2021 projects for safe hand-washing in rural Ghana and delivery essential healthcare via offline mobile phone apps across remote communities.

Expo 2020 has been a success for the UAE as it took place during the 50th anniversary of the country's formation. More importantly, it boasts to be one of the most sustainable world expos ever. Sustainability will continue to be of increased importance to the UAE and in the region as a whole as countries move towards ambitious renewable energy targets and more sustainable development practices.

LS: Gas will play a key role in the region's energy transition as well as hydrogen. The development of new hydrogen projects in the region such as the electrolysis facility to produce green hydrogen for the transport industry by a consortium consisting of Masdar, Siemens Energy, the Abu Dhabi Department of Energy, Etihad Airways, Lufthansa, Marubeni Corporation and the Abu Dhabi-based Khalifa University is exciting. Siemens Energy and DEWA are also developing the first solar-driven electrolysis hydrogen facility in the Middle East. As the world looks for more sustainable solutions, there will also be investments made in the exportation of hydrogen, which is currently challenging.

With the UAE to host COP 28 in 2023, all eyes will be on the sustainability endeavours of the region in the forthcoming year. H Sheikh Abdullah bin Zayed Al Nahyan,

Minister of Foreign Affairs and International Cooperation, publicly announced in late 2021 that the UAE will 'commit as a nation to supporting the entire international community in accelerating our combined efforts to overcome the very real threat of climate change'.

TK: The Al-Ula Accord was also signed on 5 January 2021, ending the three-year rift between Qatar, the UAE, Saudi Arabia, Bahrain and Egypt. The end of the Qatar blockade will be good for both the jobs market and the wider business climate in the region. We anticipate increased investment between the UAE and Qatar, particularly the UAE construction industry, which has recently put many projects on hold. The UAE has also opened its doors to Israel, promoting further trade opportunities, which were solidified by a visit by the Israeli president to the UAE in January 2022. During the visit, Isaac Herzog called for other countries to join the Abraham Accords. Furthermore, in parallel with the opening of Expo 2020 (in October 2021), the UAE has moved to relax a number of Islamic laws for personal freedom. These relaxations are designed to attract foreigners as well as to make the environment more conducive for business.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

An in-depth knowledge and experience of PPPs and project finance, local regional knowledge and strong negotiation skills.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

An understanding of local law and an appreciation of local culture is really important when structuring and executing projects in the UAE, so it is important to choose counsel on this basis. Given Simmons & Simmons has over 20 years' experience in the UAE, Qatar and Saudi Arabia, in addition to multi-language capabilities, we are well placed to assist our clients in this regard.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

- Advising a Southern African mining company on its hive-out and disposal of 50 per cent stake of its precious metals smelting and refinery business. Acquisition financed by off-take prepay.
- Advising a US-based, oil, gas and utilities company on its disposal of a minority interest in a UAE power plant, to UAE based energy company.
- Advised Qatar-based Umm Al Houl Power QPSC (UHP) on the US\$389 million expansion of one of the largest and most eco-friendly power and desalination plants in the Middle East.
- Advising on the financing work for Mitsubishi Corporation (Diamond Generating) on their bid for a solar photovoltaic project in Qatar.
- Advising an infrastructure fund on its proposed investment in a submarine cable.



Mozambique

Zara Jamal has been a partner at Abreu Advogados since 2016 and at JLA Advogados, Abreu Advogados' associate firm in Mozambique, since 2014. Zara works primarily on the implementation of international businesses and project finance transactions in Mozambique, focusing particularly on the banking, insurance, real estate, agriculture and energy sectors. Her practice centres particularly on the areas of banking, finance, corporate and regulatory law.

Ana Sofia Batista has been a partner at Abreu Advogados since 2007, with vast experience in project finance. As a lawyer, she has been involved in many M&A transactions. Ana Sofia Batista has more than 20 years of experience and co-heads the firm's corporate and M&A practice. She has been involved in several investment projects mainly in Mozambique, providing legal advice and support in the local law matters.

Isabel Pinheiro Torres is a senior associate lawyer and has been at Abreu Advogados since 2010 working primarily in the area of finance and banking law. She focuses particularly on financing operations and regulatory matters including processes for authorisation of regulated entities before the supervisory entities. She assisted several clients in project transactions in Mozambique, including in the LNPG and electricity sectors.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

Despite the global economic deceleration caused by the pandemic, the appetite for the investment in project finance still remains quite active in Mozambique, with particular focus in the sectors of LNG, energy, infrastructure and agriculture.

In 2021, Vale Mozambique announced its divestment in the coal mining business in Mozambique and entered into negotiation with several bidders for the sale of its assets, including the Moatize Coal Mine and Logistic Corridor of Nacala. The transaction agreements included the sale and purchase agreement of one of Vale holding companies and a royalty agreement that assures certain production conditions and coal price to Vale up to 10 years further to the acquisition. In late 2021, it was announced that the winning bidder was Vulcan Minerals, a subsidiary of Jindal Group, which is present in Mozambique in the coal mining sector at Chirodzi.

The year 2021 was also marked by the financial close of the Mozambique LNG project in the Rovuma Basin, which amounts to almost US\$15 billion of financing, of the approximately US\$24 billion of total project costs. Mozambique LNG is the country's first onshore LNG development. The project includes the development of the Golfinho and Atum fields, located within Offshore Area 1, and the construction of a two-train liquefaction plant with a capacity of 12.9 metric tonnes per year (MTPA). Offshore Area 1 contains more than 60 trillion cubic feet of gas resources, from which 18 trillion cubic feet will be developed. The project is backed by long-term offtake agreements and almost 90 per cent of the production is already sold to LNG buyers in Asia, the Middle East and Europe. Additionally, the project is expected to have a domestic gas component for domestic consumption to help fuel future economic development.

Total later suspended its operations on site due to the insurgency in northern Mozambique. Developments are expected for 2022 on this project.

The Coral Sul Floating Liquefied Natural Gas (FLNG) Project is also under implementation by the Area 4 concessionaires in the Rovuma Basin offshore Mozambique, with a floating LNG vessel with capacity of 3.4 million tonnes of LNG/year, with a US\$7 billion investment estimation. The vessel arrived at the basin in November 2021 and production is expected to start in 2022.

The energy sector is expected to experience a boost in the near future, further to the approval of the regulation on the access to energy outside the network (Offgrid Regulation), which is expected to result in the universal access to energy until 2030. The Offgrid Regulation sets forth a simplified legal framework applicable to projects to be implemented in areas that are not served by the National Energy Network, including mini-networks with a limited capacity and energetic services



Zara Jamal



Ana Sofia Batista



Isabel Pinheiro Torres

“The energy sector is expected to experience a boost in the near future.”

such as solar home systems for domestic or production use. This new regulation is expected to leverage the private sector.

The year 2021 was also marked by the closing of the Mozambique's first solar-plus storage for the 19MWp/2MW-7MWh Cuamba. Globeleq renewables development body owned by the UK and Norwegian governments entered into an agreement for a US\$36 million, 19MWp solar project in Mozambique that also features 2MW/7 MWh of energy storage. The project will benefit from a US\$7 million grant from the Private Infrastructure Development Group, which is funded by the International Finance Corp private-sector arm of the World Bank alongside the governments of the UK, the Netherlands, Switzerland, Australia, Sweden and Germany. The project is expected to be implemented in the course of this year.

In the infrastructures sector, new legislation was approved within the port and maritime sectors, by the incorporation of the Maritime Institute as the supervisory entity for the rail and ports sectors and a redefinition of jurisdiction areas and redefined jurisdiction areas in Mocímboa da Praia, Ilha de Moçambique and Lumbo, Quelimane, Inhambane, Maputo and Matola.

The management of the ports in Mozambique was carried by CFM but currently the ports are subject to concessions and CFM has been replaced as the port operator by the concessionaires, with few exceptions. In early 2021, Mitsui agreed to sell its stake in Nacala Corridor rail and port projects in Mozambique, together with Moatize coal mine, to Vale, the operator of the projects, for US\$1 each.

On the agriculture sector, the African Development Fund approved a US\$47.09 million grant for the first phase of Mozambique's Pemba-Lichinga Integrated Development Corridor, a Special Agro-Industrial Processing Zone, which is expected to improve agricultural productivity and agribusiness development in the area of Niassa.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

Besides infrastructure and agriculture, the most prominent transactions have been in oil and gas, mining and energy. Regarding the most significant and larger-scale project finance transactions implemented in Mozambique, we would highlight:

- the Nacala Corridor Railway and Port Project (the Nacala Project);
- the Coral South Floating LNG Project (the Coral Project);
- the Moatize–Macuse Railway and Port Project (the Moatize Railway and Port Project);
- the Metoro Solar Power Plant Project (the Metoro Project);



- Cuamba solar-plus storage; and
- the Mozambique Area 1 LNG Project.

The Nacala Project was signed in November 2017 by and between the Japanese Mizuho Bank, Ltd alongside the Japan Bank for International Cooperation, the African Development Bank and nine other private financial institutions and the four special purpose vehicles established both in Mozambique and Malawi by Vale SA and Mitsui & Co, Ltd. The project ticket was of approximately US\$3 billion and it connects the Moatize coal mine developed by Vale and Mitsui in the northern Mozambican province of Tete to the port of Nacala through Malawi, aiming to enable rail and ship transport of produced coal up to a volume of 18MTPA. As mentioned above, Mitsui transferred to Vale its stake in the project and Vale also announced its divestment in this project.

The Coral Project was the first to reach final investment decision for the development of the gas resources discovered in the Rovuma basin. The almost US\$5 billion financing of the Coral South FLNG project in offshore Mozambique, developed by Eni and its partners, closed in May 2017 and the floating platform was launched into

“The most prominent sponsors frequently derive from the United States, China, Italy, South Africa, France, Japan and India.”

sea in January 2020. The Institute of National Petroleum of Mozambique informed of the arrival of the vessel in the Rovuma Basin on 3 January 2022, and production is expected to start this year.

The Moatize Railway and Port Project was awarded to Thai Mocambique Logistica, a joint venture between a Thailand-based and Italian–Thai development company, with a 60 per cent share, the local state-owned ports and railway company Portos e Caminhos de Ferro de Mocambique with a 20 per cent share and a local private sector consortium Zambezi Integrated Development Corridor with a 20 per cent share. The project, which was to originally connect Moatize and Macuse and run for 500km, was amended in November 2017 to extend the railway a further 120km west from Moatize to Chitima. The Macuse port will be designed to accommodate ships of up to 80,000 tonnes and annual exports are expected to start at 25MTPA, eventually increasing to 100MTPA. In November 2021, Ethos Asset Management Inc, USA announced a deal in Mozambique with Thai Mocambique Logistica, SA to finance the building of the Macuse port and rail infrastructure in the sum of US\$400 million.

The Metoro Project consists of the largest solar plant in the country and was set up by Neoen, which owns 75 per cent of the plant, with the remaining 25 per cent being owned by Electricidade de Mozambique. The total cost of the plant is estimated to be US\$56 million. The company has been able to obtain US\$40 million from the French Development Agency through its subsidiary Proparco. The Metoro solar power plant will have a capacity of 41MW and will be installed on an area of 70 hectares. It will provide electricity in the provinces of Cabo Delgado and Nampula. Efacec, a Portuguese group experienced in the installation of solar power plants, was awarded the engineering, procurement and construction contract for the plant.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

Mozambique is extremely reliant upon external investors to develop and carry out projects across various sectors. As such, the most prominent sponsors frequently derive from the United States, China, Italy, South Africa, France, Japan and India.

Also, considering Mozambique's high economic, political and social risk status and the lack of capacity and liquidity of the government and domestic banks, export credit agencies (ECAs), development finance institutions and multilateral banks continue to play an important role in this matter. The likes of the African Development Bank, the International Finance Corporation, the German Investment and Development Corporation, Proparco and the Dutch Development Bank are committed and involved in supporting investments in the private sector and bolstering investors' confidence by backing some initiatives.

Several international commercial banks are also very experienced in debt financing transactions in Mozambique and, despite going against the risk-averse mindset of Mozambican banks – which are used to following a more traditional commercial banking business model and relying upon the creditworthiness of the borrower and its sponsor – these transactions often include a domestic bank capable of taking on more administrative tasks and helping to get projects off the ground. This is done by assuming the role of onshore security agent, given that the assets located in Mozambican territory must be mandatorily governed by Mozambican law.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

Although there are macroeconomic policies in place to stimulate and improve the overall business environment, and also a strong political will for attracting large-scale investments, Mozambique still faces some challenges.



A fragile political situation, safety issues, high levels of corruption, an overtasked and unskilled judiciary system, and bureaucratic and inefficient public institutions are frequently pointed out as justification for the slow pace in implementing projects on the ground. Bureaucracy was strengthened during 2021 due to the pandemic and its effects in multiple services. However, experience has shown us that the notion of time in developed and underdeveloped countries is slightly different!

Nonetheless, Mozambique is still perceived as having a high potential for investment due to its favourable geographic location, with its long coastline and proximity to southern African markets, young and growing population and huge mineral and energy resources.

The government has also launched some initiatives and legal reforms to help improve and foster foreign investment in the country. For example, the government has developed an e-government strategy that includes an electronic government network, government portal and e-government communication infrastructure. Also, broad legal reforms are expected. Namely, a new Commercial Code is anticipated, which will set forth less bureaucratic procedures for setting up businesses. Reforms to the investment law, labour law, electricity law and land law are also imminent,

alongside a more innovative regulatory framework directly related to local content, which will promote and foster the involvement of national entrepreneurship in the economic development of the country.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

As mentioned in question 4, the government is undertaking some broad legislative reforms in various areas. From these, we can highlight the land law reform, which is currently under discussion. As the land in Mozambique is state-owned, which poses limitations to its transfer and encumbrance, it cannot be granted as collateral for project financing.

This fact has compromised and even deterred some investments, as lenders are not able to take strong security during a construction stage. Although an effective change to the land ownership principle is not anticipated, the new law may provide some solutions that could eventually provide reassurance to investors in this respect.

As there is clearly political will to retain and attract new investors, a reform to the investment law and other sectoral areas, namely related to the oil and gas, energy and infrastructure, is also under way.

We would also highlight that in 2021, a new authority – Central Registry for Security over Movables – became operational and is responsible for the registration and confirmation of all security rights granted over movable assets. This measure is expected to improve transparency, and publicity on the securities will hopefully facilitate and promote access to financing by granting a higher level of comfort to lenders intervening in project finance in Mozambique for securing their credits.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

The majority of projects implemented in Mozambique still follow a more traditional format of project financing.

As mentioned, large-scale projects are very reliant on ECAs, multilateral lending agencies or development banks as a major source of debt. In these cases, ring-fenced or limited recourse financing is accepted and understood by project participants. In practice, given the political risk associated with Mozambique (as in other African countries), the complexity of the transaction structures and the fact

that there is limited security over public assets underlying the public infrastructure, ring-fenced financing is not pure.

In terms of medium and small-scale projects, these are often funded through syndicated commercial loans in conventional debt financing transactions. More recently, we have noticed that domestic investors are keen on finding alternative sources of financing, thus we believe that this appetite may be helping to boost different and more structured forms of financing.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

After almost two years of pandemic, the slow economic recovery will most likely impact the availability of funds and capital for emerging markets, so the growth of brand new investments in Mozambique might also be slow.

Despite this, we point out that emerging economies such as Mozambique have a long history and track record of resilience and fighting spirit. This particular feature might give them the ability to turn around the global crisis and strengthen the political and legislative support to the current investment, developing new market opportunities (on energy and natural resources) and whetting the appetite of foreign investors, in particular in the energy sector.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

Trustworthiness, technical skills and local presence. Ideally, the counsel should have an international background and consolidated local knowledge, experience and pragmatic views. International firms with a local presence in Mozambique can offer high-standard legal services adapted to market practice and provide regular updates and support on the ground. Having a pragmatic approach is essential so that we can put ourselves in the client's shoes. Finally, a strong command of English as a working language is also fundamental, all together a cocktail for a successful delivery of services.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

One of the most important factors would be to understand local practice and culture. It is fundamental to grasp the concept that investments in Africa should be long-term and patient endeavours. Furthermore, these emerging economies are more volatile to market conditions and external factors. Thus, projects should be resilient and flexible in order to endure and thrive on the long run.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

The Mozambique LNG deal is the pioneer in Mozambique but this project has overcome and resisted a number of challenges both of political and economic nature, since we began our assistance in 2015, with major developments expected in the long term. We would also point out our assistance to one of the bidders for the Vale coal mining business in Mozambique. Over the past 15 years, Vale has worked in partnership with the Mozambique and Malawi governments in the implementation of the Moatize mine and the 912km of the Nacala Logistics Corridor to serve coal transportation, in addition to the revitalisation of general cargo operations and passengers transportation. These investments represent a relevant legacy to the countries and are an important vector for local development and an opportunity for major players in this field.



Serbia

Senior partner at BDK Advokati, Dragoljub Cibulić is an expert in greenfield real estate, energy and infrastructure projects. He has a rich legal background and an ability to provide clients with a combined expertise on project development, financing and regulatory aspects. He has led BDK's team advising IFIs led by IFC on the lending to the first two public-private partnership (PPP) projects in Serbia – the Belgrade airport concession and the Belgrade waste-to-energy project in Vinča.

The Legal 500 regards Dragoljub as a leading individual in Serbia for projects, energy, real estate and construction practice areas. *Chambers and Partners* ranks Dragoljub as Band 1 Serbian lawyer for projects, infrastructure and energy. *IFLR1000* recognises him as a highly regarded lawyer in both Serbia and Montenegro.

Dragoljub Sretenović is a partner in the finance practice group. He contributes nine years of experience. Dragoljub advises banks and corporate borrowers on acquisition, project and working capital financing. Dragoljub is also experienced in matters related to insurance, banking regulations and distressed debt. Most recently, he advised JPMorgan and UK Export Finance on the €430 million financing for the construction of Morava Corridor motorway.

He has received rising star recognition for banking and finance and projects and energy practice areas by *The Legal 500* 2021 edition.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

The Serbian project finance sector has evolved exponentially in the past couple of years, fuelled by a number of high-profile and successful transactions. Debt and equity investors' appetites are growing but so are their expectations of the local regulatory and business environment. This level of interest and the sophistication of new commercial demands indicate that the market is entering a more mature phase. The deals are steadily growing in size, complexity and variety. The international financial institutions were the first lenders to test the waters and show that typical project finance structures can work locally. Now the rising number of entrants has started to create greater competition for the projects.

One of the drivers of this trend is the general macroeconomic stability of the country, which is reporting solid numbers in GDP, FDI, foreign exchange reserves, and other relevant categories. This, coupled with the facts that, at least for the time being, money is still cheap and good investment opportunities are scarce globally, make Serbia an interesting place to look for the desired returns.

Covid-19 has not significantly suppressed the economic and project financing growth; to the contrary, some of the most significant projects, such as the construction of a waste-to-energy facility in Vinča, a suburb in Belgrade, reached financial close during the first wave of pandemic. The initial shock and uncertainty brought some new operational and structural challenges, but these were overcome, in big part thanks to the experience and steady hands and nerves of the participants. After all, given that project finance techniques are used in deals with maturity of 10, 20 or more years, it is natural that external factors will not always be favourable. But if a project had strong fundamentals from the outset and those have not changed, it is far more reasonable to provide stronger support at critical times than to pull the rug out from under it.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

The energy sector, in particular the renewables, has had a special role in the development of the local project financing market. Serbia has committed to generating more than a quarter of its energy consumption from the renewable sources. In support of this objective, certain economic incentives were introduced, including feed-in tariffs guaranteeing generators the sale of their electricity above market price. This effectively removed the sponsors' market risk in exchange for accepting

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the risks associated to a suboptimal and at that time untested legal environment. The pioneering projects have stood the test of time, reached operational phase a while ago, and some of them have been refinanced or are in the process of sale to strategic investors. A new set of regulatory benefits for the renewables has been introduced recently, but we are yet to see its effect on the bankability of new projects. Still on the topic of energy, the ongoing Gastrans natural gas pipeline project is expected to break local records for the total value and the size of financing.

Another area that generates capital-heavy projects is public infrastructure. The public-private partnerships honeymoon continues. The first major local success of the model was the financing of the Belgrade Airport concession in which BDK acted for the lenders, EBRD, IFC, Proparco, DEG and the participant commercial banks. The total project cost is close to €1 billion and it paved the way for industry to accelerate its next moves. The Vinča waste-to-energy facility, which we mentioned earlier, is another success story for the model showing that sophisticated, multi-party structures can be delivered in partnerships with local authorities. This project has the total investment size estimated at approximately €350 million and has been widely heralded for its positive environmental impact.

There is still a plenty of need for infrastructure investment around the country (eg, construction of public parking lots, energy services or waste treatment services). Although, in the past few years, the Republic of Serbia has not been shy about bankrolling some of the public infrastructure projects directly, a portion of the budget funds had to be reallocated to battle the effects of pandemic so new PPPs will be sought to fill in the financing gap. We may also expect the government to try to free up capital by converting ongoing publicly funded financed projects to PPPs. Under one model, the private partner could take over the operation and maintenance of the project asset, and collect revenue from it (eg, highway tolls) and assume the debt incurred by the public sector entity in the earlier phase of the project.

Investments in commercial real estate have also boomed. These projects usually come in smaller ticket sizes, but some sponsors have managed to amass impressive portfolios over the years. For example, a group of 11 premium office buildings constructed by Warsaw-listed Globe Trade Centre has been recently sold to Hungarian Indotek Group for a price of about €270 million. Industry reports show no signs that the demand for this type of premises will wane any time soon.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

In terms of geography, one of the distinct characteristics of the Serbian market compared to the rest of the region is that foreign debt and equity capital comes from many different sources: the EU, the United States, China, Russia, the Middle East, etc. Politically, Serbia has been performing delicate east–west balancing act for years, and this strategy has so far reflected positively on the economy.

Serbia is a candidate for EU accession, and most of the trading and other investment activities are performed with the member states. Chinese financial institutions have also been very active and now employ typical project finance structures more often than in the early days of the Belt and Road Initiative. Some interesting interplays have started to develop, such as the projects funded by the Western banks and guaranteed by the China’s export credit guarantee agency. This shows that financial institutions from these jurisdictions will not always necessarily compete but may also complement each other.

Russia is traditionally close and has taken a specifically large stake in some sectors, such as the oil and gas energy infrastructure and market. On this topic, Serbia is on the way to become a shareholder of the formerly Moscow-based International Investment Bank. This is expected to generate a new deal pipeline, although one should be careful with expectations. Similar initiatives, such as the

“Until recently, with a few exceptions, domestic banks rarely participated in multi-hundred million financings arranged by foreign lenders.”

opening of the first European office of the US International Development Finance Corporation in Belgrade have not yet yielded expected results.

The role of the international financial institutions, the EBRD and IFC, continues to be crucial for the industry. Although they pursue market-based financial returns, these institutions often agree to back projects meeting their objectives and policy requirements, which otherwise would not be financed solely by commercial banks. National development financial institutions, such as Proparco, DEG and OeEB, are also present in the market as single lenders or participants in multi-lender facilities.

Until recently, with a few exceptions, domestic banks rarely participated in multi-hundred million financings arranged by foreign lenders, other than as account banks, onshore security agents or providers of local currency working capital or VAT facilities. However, there are indications that foreign lenders will soon face greater competition for deals in Serbia from the biggest local banks. Most notably, the Serbian subsidiary of UniCredit became the sole lender to the Alibunar wind farm providing the funds for refinancing the project costs. Also, bearing in mind the ongoing process of consolidation across the industry, more banks are expected to reach the size and capacity to take a more relevant role in these projects. The



process is not entirely mirrored on the equity side, where most of the capital in the major projects still comes from foreign sponsors.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

Despite gradual improvements, the Serbian law rules on capital controls still cause headaches for deal participants. The law is nominally liberal in that it allows the debt and equity investors to invest and repatriate their capital generally freely. However, routine cross-border legal and economic transactions may be restricted; non-residents may be prevented from exercising their set-off rights, residents may be prohibited from transferring some of their receivables to non-residents, foreign non-EU lenders may be unable to receive prepayment of a loan before a certain time, to cite just a few examples. Not all restrictions are explicitly set in law; certain procedures that were intended to assist the government and central bank in keeping track of the balance of payment (in other words, for statistics) effectively impose obligations on parties in cross-border transactions, sometimes in a way that is

essentially prohibitory. While we cannot reasonably expect all those restrictions to be lifted before Serbia joins the EU, surely there are limitations that could still be relaxed or removed outright today without any harm to policy objectives.

The laws on granting and enforcing security still have loopholes, including some that a newbie lender from a more developed market may find difficult to understand, let alone factor in its risk analysis. To give another example, Serbian law pledge over bank accounts is useless if the project company goes bankrupt. It is also flawed outside bankruptcy because it can generally only cover the balance in the account at the time when the pledge is created. This requires the parties to enter into complex maintenance arrangements, which in turn create administrative and monitoring nuisances. Previous attempts to fix these shortcomings have not met the expectations of the industry actors but we see no reason why these could not be managed soon.

On the other hand, foreign sponsors and lenders have much to gain from the Serbian government's continued efforts to attract direct investments, especially those that stand out in terms of their size, reputation of the investor, or other actual or perceived impact on the local economy. Serbia offers a wide range of incentives, including investment grants, reduced or waived employment taxes, the supply of subsidised land or buildings, etc. In addition to this, Serbia has a great number of bilateral investment treaties and some of them offer, among other standard provisions for the treaties of this type, a complete waiver of customs and VAT costs, waiver of procurement procedures, expedited administrative procedures, including expropriation of land required for strategic projects, and other forms of government support.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

Serbia recently launched its first-ever €1 billion green bond on the international market. The proceeds of the issuance are intended to be used for further support of the renewable energy production, investments in eco-friendly transport infrastructure, construction of drinking water treatment and sewage treatment facilities, waste collection and management infrastructure and for other environmental purposes. The state budget for 2022 provides that the government may grant up to €800 million of loans for the construction of solar plants and up to €500 of loans for the construction of wind farms. We expect this framework to produce a steady stream of ESG projects in which the private investors can collaborate with the public sector.

In parallel, as mentioned, the government has introduced a new set of incentives for renewable energy production. The feed-in tariffs used in the first phase of market development have been retained only for smaller projects. In other cases, from now on, there will be a system of feed-in premiums (ie, a mechanism consisting of payment of premium for renewable energy production on top of the electricity market price). The amount of premium is determined in the auction process, but it is also influenced by the authorities, which set the maximum premium in December for auctions taking place in the next year. The local stakeholders on the development and financing side were not very satisfied with the maximum premium determined for 2022 and we are yet to see how things will iron out. The past couple of years were relatively quiet in terms of originating new deals since the previous set of incentives had been exhausted, so it would now be a good time to revamp.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

As it is the case with most frontier markets, Serbia has a relatively shallow market depth consisting of a handful of banks with limited ability to fund large projects. The accelerating trend of consolidation in the market signals that a number of domestic banks could emerge with stronger capital base and the expertise to participate in or even arrange high-value deals.

Recently, the government has been pushing a strategy aimed at developing the domestic debt market, which is almost non-existent, and diversifying the financing sources. This is an ambitious initiative, and we will probably have to wait some time for the results to be apparent. The recent partnership between the Greek and Serbian stock exchanges raises chances of success. Pension and insurance funds have many constraints in investing their capital and have never been directly involved in infrastructure financings.

Until these things change, Serbia will remain largely dependent on foreigners for inflows. As mentioned, project financing market in particular has so far relied on the multilateral development financial institutions (DFIs) for support and long-tenor debt funds. In their activities, the DFIs pursue development and commercial objectives. They invest when a commercial bank may be reluctant, but can be very tough negotiators at times, even in projects with global heavy weights on equity side. In general, Serbia is a very lender-friendly market. The leverage ratios of the project companies rarely exceed 70 per cent, and sponsors are very often required to provide additional forms of support, especially during the construction phase. The market is currently fragmented and there were only a few cases of developers with

“Serbia has a relatively shallow market depth consisting of a handful of banks with limited ability to fund large projects.”

a richer local track record including multiple financings, so relationship lending is not common.

Foreign export credit agencies are becoming increasingly important and have added further liquidity fuel in the form of guarantees to their nation’s sellers of goods and services purchased by Serbian buyers. Sinosure, China’s main state-owned export and credit insurance company has already been involved in a number of transactions and is reportedly interested to participate in future transport and energy infrastructure projects in Serbia. At the end of 2021, the Republic of Serbia agreed a €430 million loan from JPMorgan Chase Bank, NA, London Branch that is guaranteed by the UK Export Finance. The proceeds of the loan will be used for the construction of a motorway in Serbia, and it is the first export credit deal concluded by UKEF for projects in Serbia.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

We see a sharp increase of investors' interest in projects outside of the capital. Although the Serbian economy is highly concentrated around Belgrade, there have been a number of successful foreign direct investments in a few other cities and their prospects are growing. With the revival of the industry comes the need for investment in roads, power grids, water treatment and management systems, sludge disposal, etc. The entire parts of the country have similar issues and infrastructural needs, and this creates an opportunity for equity and debt investors to 'commodify' projects based on the same approach, documentation, lenders' support, and so on. In part, these prospects will be driven by the government's strategy (eg, there have already been indications that some small-scale PPP projects could be bundled into one contract increasing their bankability).

The increased demand for electricity and decarbonisation of the energy mix in favour of renewables will eventually have to trigger heavy investments in electrical grids and infrastructure. Some projects intended to manage the future challenges posed by intermittent energy supply are already in the short-term plans. The Serbian Ministry of Mining and Energy has announced an ambitious investment plan to boost the country's energy capacity. Among other things, it provides for the construction of two pumped storage hydropower plants, Bistrica and Djerdap 3.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

First is experience. It takes a lot of resources to close a project financing transaction, so the counsel must be capable to manage and assist efficiently. No-one wants to lose time on re-inventing the wheel. Second, the counsel should be able to read the situation well and know when it makes sense to dig in, and when to be diplomatic. Arguing about hypothetical scenarios and legal theories is often a waste of time. Finally, the counsel must always be honest with the client and with other deal participants, not only for ethical reasons, but because of future deals and relationships.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

Each project is unique, but most of the first-time investors will have mixed experience with the local regulatory environment. The good news is that most of the problems can be solved with good planning. For example, parties may want to spend a bit more than their average time on drafting and negotiating financing term sheets for the project because this is a good opportunity for them to discuss the regulatory risks and limitations and see how these can be fairly allocated. Clients understandably want to avoid learning about a major issue in a late phase of negotiating their transaction documents.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

The Vinča waste-to-energy facility project is probably one of the most complex legal works that has ever been conducted in the market. Even for project financing standards, it involved a lot of parties: multiple sponsors, lenders, public bodies, contractors, etc. Adding to the mix was the start of the pandemic, prompting lawyers to file documentation for security registration via mail, put in extra hours while adapting to working at home, and occasionally a sprint to the office, often narrowly escaping violating curfew. Despite this, the lenders whom we advised were able to close the financing, which was tremendously important for the market and community.



Taiwan

Hsin-Lan Hsu's major practice areas at Lee and Li are banking, capital market, merger and acquisition, investment, asset management and corporate and she specialises in securities, banking, financial, M&A and corporate and data protection-related laws and regulations. For further details describing Hsin-Lan's practice, visit <http://www.leeandli.com/EN/Professions/300/45.htm>.

Sarah Wu has been recognised by *Chambers and Partners Global* as one of the World's Leading Lawyers for Business (2007–2012) as an experienced banking and finance attorney, specialised in project finance deals involving international clients. She has advised in numerous project finance cases, including Fong-Der gas-fired power plant and Chiahui gas-fired power plant. For further details, visit <http://www.leeandli.com/EN/Professions/300/160.htm>.

Odin Hsu advises various financial institutions on drafting and review of relevant transaction documents, regulatory compliance issues and applications and permits for relevant business. For further details, visit <http://www.leeandli.com/EN/Professions/500/191.htm>.

Andrea Chen's practice focuses on the financial services sector, with a wide range of cross-border finance experience particularly in project finance for renewables projects, acquisition finance and bilateral and syndicated lending. In the energy and infrastructure sectors, Andrea has extensive expertise in the regulatory aspects of renewable and conventional energy projects, with a focus on financing of onshore and offshore wind projects.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

Green energy projects have been a hot topic of project finance in recent years in Taiwan. Among the ongoing solar projects and onshore and offshore wind farm projects, the landmark case was the Formosa 1 Offshore Wind Power Project (F1), the first offshore wind farm project in Taiwan, which closed in 2018, followed by the subsequent milestone projects including Formosa 2 Offshore Wind Power Project (F2), which closed in 2019, Yunlin Offshore Windfarm Project (Yunlin), which also closed in 2019, Changfang and Xidao offshore wind farm projects, which closed in February 2020, Greater Changhua projects, which closed in November 2021, and Zhong Neng offshore wind farm project, which reached financial close in December 2021. In addition, since solar plants have been the major source of green energy and its target output set by the government accounts for nearly 70 per cent of that of the green energy in Taiwan, various project financing for solar plants is also blossoming in the market. Our firm has actively participated in various offshore wind farm projects and solar projects, acting as the Taiwan (ROC) counsel to the sponsors and borrowers as well as the lenders, advising on various issues in relation to the foreign investment, government permits and authorisation, project due diligence, financing structure, foreign exchange, hedging and the creation of security interest under local laws, and reviewing and commenting on the relevant project and finance documents.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

In Taiwan, there is no general or industry-specific law designed for project finance, and the general body of commercial law is applicable. Through the various project financing engagements in recent years either for onshore or offshore wind farm projects, solar plants or otherwise, there seems to be a steady practice that the relevant participants normally follow the international practice of project finance.

In the past decade, project finance was not frequently seen in local syndicated loan markets, most of which were applied to infrastructure projects developed by the private sector or through a public-private partnership. The major legislation that governs private participation in infrastructure projects is the Act for Promotion of Private Participation in Infrastructure Projects (the PPP Act), last amended in 2018. The PPP Act provides 14 categories of public works for private sector participation, including, among others, transportation facilities, sewerage treatment facilities,



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water supply, flood control and drainage facilities, hygienic and medical facilities, recreation and tourism facilities, power supply facilities, sports facilities, industrial, commercial, technical and agricultural facilities, and government office buildings.

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

Among the above-mentioned 14 categories, transportation facilities have the lion's share of the project finance projects. The most high-profile project financing transaction was the Taiwan High Speed Rail project (a NT\$323.3 billion multi-tranche syndicated loan) in 2000, which was restructured to NT\$381.06 billion in 2009. Project financing was also adopted for other large-scale projects, such as:

- Taipei 101 Tower (NT\$35.3 billion), which opened in 2004;
- Taipei Port Container Terminal (NT\$16 billion), which began operation in 2009;
- Kaohsiung Kuo Min Container Terminal (NT\$16.2 billion), which began operation in 2011; and
- Taipei Dome Complex (NT\$15.4 billion), which consists of a main dome building used as a baseball ground and for other sporting and cultural activities (construction commenced in 2012 but was suspended in 2016) and shopping malls, cinemas and hotels nearby.

Beyond these, project financing was also adopted for some other construction projects for a waste incineration plant, power plant and so forth.

However, green energy has been the industry focus in recent years. The relevant amendments to Taiwan's Electricity Act and Renewable Energy Development Act have stimulated the project sponsors' interest in Taiwan's green energy industry. See question 5 for further details in this regard. Since project finance in relation to green energy has been the main focus of project finance in Taiwan recently, we will depict the current situation in the green energy industry in the questions below.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

In terms of the recent dynamic development of offshore wind farm projects, internationally renowned developers (eg, WPD, CIP, Swancor, Macquarie, Ørsted and Northland Power) have all been active as project sponsors in Taiwan. China Steel Corporation has also joined the market since its participation as the major shareholder in Zhong Neng.

“To accelerate investment in renewable energy technologies, Taiwan law also offers the ‘feed-in tariff’ policy mechanism. This also acts as an incentive for foreign investors to develop green energy in Taiwan.”



With respect to banks, in the past, as project finance features non-recourse or limited-recourse, which goes against the risk-averse mindset of Taiwanese banks, which are used to following commercial banking business models and relying heavily upon the creditworthiness of the borrower and its sponsor, most Taiwanese banks do not actively participate in project finance. Compared to international banks, local banks are generally less active in project financing, and state-run banks are even more conservative about funding large-scale projects, especially after the high-profile loan fraud involving Ching Fu Shipbuilding Co in 2017.

However, Zhong Neng offshore wind farm project financing has been a landmark case as it is the first offshore windfarm project financing led by local banks (especially state-owned banks) and participated by mostly local banks. While, by and large, most of the project financing was arranged or funded by foreign banks (including but not limited to Mizuho Bank, MUFG CACIB and DBS, through its Taipei branch or otherwise), large local banks (such as CTBC Bank, Taipei Fubon Bank, Cathay United Bank, E.SUN Bank and SinoPac Bank) have also been very active in the participation of project finance relating to renewable energy.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

In recent offshore wind farm projects in Taiwan, the lenders usually require step-in rights via assignment or direct agreement to the power purchase agreement or other major project documents. The relevant counterparty's consent will be required for entering into either an assignment or a direct agreement. In the event that the counterparty to a project contract is a Taiwanese government or state-run entity, this would be a problem as these types of entities would tend to be reluctant to grant such step-in rights. So far the Taipower Company has agreed on the pledge arrangements made over the rights under the power purchase agreement and limited step-in rights in some offshore wind farm projects.

In addition, some local governments or certain associations might ask for 'tributes' or 'compensation' from developers if the project would negatively impact the local residents or otherwise. This might also create uncertainty in the negotiation and planning of the projects.

In terms of solar energy projects (including those under the newly implemented structure of fish farm or electricity symbiosis plant), the major difficulty would be the environmental issues to be resolved among the relevant stakeholders, including the farmers, developers, environmentalists, etc, and the foreseeability in the changes to regulations that might impact the investment decision from the developers. Take land use, for example, due to the concerns from the agricultural authority of Taiwan, the relevant regulation was amended in July 2020 such that any land parcel, if intended to be used for solar power plants is under two hectares, would now be prohibited from changing the land use. Such amendment would complicate the obtaining of land for solar power plants.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

The drive behind the rise of project finance relating to green energy has been article 95 of the Electricity Act, passed by the Taiwanese government on 26 January 2017, which stipulated that all nuclear power plant operations in Taiwan should be ceased by 2025. This has stimulated the demand for alternative energy sources in the Taiwanese market. In addition, to accelerate investment in renewable energy technologies, Taiwan law also offers the 'feed-in tariff' policy mechanism. This also acts as an incentive for foreign investors to develop green energy in Taiwan. Article 95 of the Electricity Act was removed from the Electricity Act on 2 December 2018

due to the results of the referendum held in 2018, which showed that the majority of Taiwan citizens are in favour of deleting such rule.

However, despite such change to the Electricity Act, Taiwan's legislature further amended the Renewable Energy Development Act in May 2019, the gist of which appeared to stimulate investors' interest in continuing the development of green energy in Taiwan. The Taiwanese government is focused on achieving the 20 per cent renewable energy consumption target in 2020. This target has been incorporated into the amended Renewable Energy Development Act by setting out the aim for the total amount of electricity generated by renewable energy power generation facility by 2025 to be at least 27 million kilowatts. Aside from this change, according to the amended Renewable Energy Development Act, for the distribution of the generated electricity, the investors' choices are no longer restricted to either selling such electricity entirely on the free market (wheeling) or to the Taiwanese electricity retailing utility enterprise (ie, Taiwan Power Company) wholesale. Under the amended rules, the investors may interchange between the two channels for the distribution of the generated electricity, offering project sponsors a certain level of freedom or variation to the handling of the generated electricity. In addition, another important change under the amended Renewable Energy Act is that new construction, expansion or reconstruction of public construction or public buildings established by Taiwanese government institutions, public schools and state-run enterprises are required to install a renewable energy power generation facility as a priority. Since the preferential policies under Taiwan law offered for renewable energy are still in place, it seems that such interest has not entirely diminished, as green energy project sponsors continue to invest in Taiwan. We are still approached by lenders aiming to participate in relevant project finance.

Additionally, the political party endorsing the latest amendment of the Renewable Energy Development Act continues to control the legislature and the Presidency after the election held in Taiwan on 11 January 2020, and the third round of grid allocation had just been announced by the authority in late 2019. Foreseeably, there will be more and more offshore wind farms projects in order to reach the goal of accumulating 10GW in 2026–2035, and correspondingly, the need for project financing would therefore increase.

- 6 | What trends have you been seeing in terms of range of project participants?
 | What factors have influenced negotiations on commercial terms and risk
 | allocation? Are there any particularly innovative features?

Although the market of Taiwan's renewable energy project finance is still in the earlier stages in terms of development, secondary markets in the finance debt

“Secondary markets in the finance debt market should be a matter of course.”

market should be a matter of course. As commonly seen in large-scale financing, the conditions of a lender transferring its participation would usually be subject to a ‘white list’ agreed by the obligors that sets out all the acceptable lenders. Credit rating requirements would also be imposed upon such new lenders.

In the Taiwanese market, export credit agencies are heavily relied on as a major source of debt financing, as 60–70 per cent of the facilities are covered by export credit agencies. The dominant players in the Taiwanese market are international financial advisers and banks, adopting the international norms and practice in transactions.

Aside from banks, insurance companies’ and global institutional investors’ participation are worth noting in project financing. A case in point should be the announcement by Ørsted in late December 2020 that it had signed agreements with a consortium comprising global institutional investor Caisse de dépôt et placement du Québec (CDPQ) and Taiwanese private equity fund Cathay PE, which acquired a 50 per cent ownership share in Ørsted’s 605MW Greater Changhua 1 Offshore Wind Farm in November 2021. The reason behind this trend is due to the lending limit. For the banks currently active in providing debt finance to renewable energy



project sponsors, the respective maximum dollar amounts that such banks are legally permitted to lend to their respective borrowers are all almost exceeded; these banks are therefore unable to further participate in the later renewable energy projects. Project sponsors, therefore, would have to seek other sources of funding. Recently, banks in Taiwan would issue green bonds as the project sponsors' alternative sources of funding. See further explanation in question 7.

While large local banks in Taiwan and foreign banks are open-minded about project finance with good finance model and technical advice, most of the local banks (notably state-run banks) take a conventional view toward the financing model and still turn to the creditworthiness of the sponsors or value of collateral made available to the lenders. As project finance features non-recourse or limited-recourse, no special considerations come from the project sponsors. In some structures, the project sponsors do not invest in the special purpose company (SPC) established specifically for the investment in Taiwan's renewable energy directly, and a separate holding company (the Holdco) will be incorporated to hold the SPC directly. Usually, the financial institutions' utmost concern is how to ensure that the holdco and sponsors will inject funds (by equity or shareholder loan) into the SPC in

the construction phase as they committed. In this regard, the financial institutions may require a corporate guarantee or a letter of support from the sponsors' financially sound parent or a bank guarantee to cover the funding risks of the sponsors.

Moreover, regarding the bankability issue in Taiwan, for finance documents and security documents, the Asia Pacific Loan Market Association form is regularly used in financing deals in Taiwan. The governing law of the finance documents is not an issue under Taiwan law as Taiwan courts normally respect the governing law chosen by the parties. In addition to Taiwan law, some projects choose English law as the governing law for the finance documents.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

After the United Nations (UN) Climate Change Conference in Glasgow (COP26), environment, social and governance (ESG) undoubtedly is the hottest topic not only in the world but also in Taiwan's project finance market. Cooperating with several public sectors, associations in the financial sector and non-profit organisations in Taiwan, the Financial Supervisory Committee of Taiwan (FSC) issued and promulgated the Green Finance Action Plan 2.0 to achieve the objectives, such as guiding the funds to be injected into green and sustainable industries by establishing a framework for facilitating the effective operation of relevant financial markets and guiding the financial institutions to pay attention to ESG issues and manage the climate change risks. In 2016, the FSC stipulated and introduced the Program to Encourage Lending by Domestic Banks to Enterprises in Key Innovative Industries to encourage domestic banks to actively extend loans to seven innovative industries (including green energy technology) under the precondition of conducting proper risk control, and providing rewards to banks for participating in the Program. As mentioned, there has been a rise in global institutional investors' participation in project financing. The reason behind this trend is due to the fact that banks and insurance companies currently active in providing debt finance to or investing in renewable energy project sponsors have almost reached their respective limits. Project sponsors, therefore, would have to seek other sources of funding. For instance, green bonds and sustainability bonds are the project sponsors' alternative sources of funding.

In addition, complying with international standards such as Principles for Responsible Investment and the Equator Principles, lenders gradually incorporated ESG concepts into their internal policies. Sustainable and responsible lending in ESG-related industries (eg, solar photovoltaic and wind power generation) has become prevalent. This trend also corresponds to the policy promoted by the

governing political party, the Democratic Progressive Party. We anticipate that the policy for electricity generation from green energy will remain in place and even dominate, and that project financings will continue to be of keen interest to the relevant market players.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

The counsel must have adequate experience in the relevant project financing. Moreover, since this is a relevant new field in Taiwan, the standard norm for project finance relating to renewable energy has yet to be established. Therefore, it is important for the project sponsor to choose a counsel who has sufficient resources to liaise with the Taiwanese government and be able to hold negotiations with the government. Lastly, the counsel must be familiar with the local laws and regulations.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

In Taiwan, various permits and approvals must be obtained from the Taiwanese government to successfully implement a green energy project. Therefore, it is important for the project sponsors to have a team and outside counsel that are capable of managing the timeline for the applications for such permits and approvals, so that such permits and approvals could be obtained in a timely manner to avoid any delays in such projects.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

Our firm participated in various offshore wind farm projects, in which we acted as the Taiwan counsel to the sponsor/borrower as well as the lenders. Most of the deals involve not only complicated financing structure but also foreign exchange and hedging issues with multiple parties, the local law issues required to be addressed by solid legal advice and seamless communication with the government authorities, which are features of key interest to the relevant participants.



Turkey

Sait Eryilmaz is a partner at CIFTCI Attorney Partnership and heads the Turkish banking and finance practice at the firm. He specialises in banking and finance transactions, with a particular focus on project finance and structured finance.

In recent years, Sait has held a key position at the forefront of Turkish infrastructure and energy transactions, taking part in many notable projects including public-private partnerships (PPPs). He has been acting for banks, export credit agencies, Islamic and conventional financial institutions, sponsors and other transaction parties in domestic and international project financings, including PPPs, infrastructure, transportation (roads, railways and airports) energy projects, oil and gas, and privatisations.

Sait holds extensive experience in finance including restructurings, syndicated financings, project financings, Islamic financings, securitisations and other structured financings alongside representing issuers and underwriters in both debt and equity offerings, including Eurobond, sukuk and covered bond offerings in and outside Turkey.

Ali Can Altıparmak specialises in banking and finance. He has worked on a number of project financing, syndicated lending and restructuring deals. He also assists with cross-border M&A transactions as well as day-to-day regulatory matters.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

Turkey has been pursuing an ambitious public-private partnership and privatisation agenda and has carried out impressive project financing deals with increasing investment volumes since the early 2000s. Turkey continues to be a leader in its region with landmark transportation, energy, healthcare and infrastructure projects, with particularly large deal sizes in motorway, integrated health centre and airport projects. There is no doubt that 2020 did not see as many new projects as the country is used to, due to macroeconomic uncertainties arising from the covid-19 pandemic, but 2021 was a year of recovery making up the difference.

The Turkish government continues to take promising steps towards kicking off its long-awaited mega PPP projects, such as introducing the first tender regarding preliminary works for Canal Istanbul in 2020 and a second tender regarding Canal Istanbul's railways and electromechanical works in 2021. The Canal Istanbul project was initially announced by the President of the Republic of Turkey back in 2011 with a goal of maintaining security in the Bosphorus and creating an artificial canal for international maritime traffic in the European side of Istanbul. Similar sovereign-backed mega projects on the agenda include capital-intensive endeavours such as the Grand Istanbul Tunnel Project, the Izmir Bay Crossing Bridge Project and the ongoing country-wide high-speed railway expansion and modernisation project.

On the active government-backed projects' side, past years have proven that compared to other similar projects, these investments are structurally more resilient to most external shocks brought about by covid-19 and the associated hurdles, thanks to various types of sovereign support tailored to cater to the specific needs of each project, such as minimum revenue guarantees, availability and service payments, foreign currency exchange rate adjustment and debt assumption. The Turkish government generally continued to honour its undertakings despite the global economic uncertainties, while also adopting a flexible and accommodating approach to maintain bankable contractual schemes and minimise the impact of covid-19 on investors – all of which helped keep both local project developers and foreign players interested in the Turkish PPP market in spite of ongoing macroeconomic uncertainties and turbulence.

Apart from projects that benefit from direct sovereign support, the Turkish government also recently introduced new pieces of legislation to diversify the funding options available for investors. For instance, project financing funds were introduced in the Turkish capital markets to provide long-term financing to projects in sectors such as infrastructure, public services, energy, industrials or high tech. With project bond issuances under the new legislation, Turkish sponsors could



explore alternative financing techniques with more suitable terms. These new tools are also expected to be used for refinancing, securitisation or repackaging of existing conventional bank loans in the Turkish project finance market, while also allowing tapping into liquidity from a wider base of institutional investors, such as pension funds and insurance companies.

Last year was also another successful year for Turkish conglomerates' project development endeavours outside Turkey. The 2021 edition of the Top 250 International Contractors List published by Engineering News Record (ENR) included 40 Turkish companies, accounting for almost a fifth of the list. According to ENR's data, Turkish construction companies' total revenue from overseas projects in 2021 amounted to US\$18.29 billion as they maintained their global market share of 4.4 per cent. Despite all the macroeconomic uncertainties and the volatility in the local currency, Turkey was successful in maintaining its high-level ranking after China and the US as the third country with the most companies in the list.

Turkish contractors have a long-standing presence in the Middle East, Central and Eastern European countries, Africa and Central Asian countries such as Russia, Turkmenistan and Kazakhstan. After successfully completing landmark projects

across emerging markets over the years, many Turkish players have received praise from their competitors in the global arena for their ability to adapt and overcome economically or politically challenging situations. In the past several years, leveraging their strong position, and also in a bid to hedge their market risks, many Turkish contractors scaled up their expansion strategy from 'regional' to 'global' with a view to diversifying their portfolios, particularly in Europe and the Americas.

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

According to the Presidency of Strategy and Budget's data, approximately US\$74.5 billion was cumulatively invested in Turkish PPP projects until 2021. While most projects carried out under the PPP model were in the field of energy, mega transportation projects were leading in terms of deal size, such as the Istanbul Grand Airport Project, which is expected to become one of the world's largest international passenger airports when completed and the largest infrastructure project Turkey has ever undertaken.

Infrastructure and energy projects continued to be at the forefront of the Turkish project financing market in 2021 as well. According to the Banks Association of Turkey's data for first half of 2021, the sectoral breakdown of Turkish banks' project financing portfolio comprised 43 per cent energy, 33 per cent infrastructure and 11 per cent real estate, with the other 13 per cent comprising various other sectors.

To give a snapshot of the energy market, Turkey's demand for energy keeps rising and it has an impressive national energy strategy to match this, which has resulted in a number of financing opportunities and challenges. Turkey has also set an ambitious target to reach net-zero carbon emissions by 2053, which is an objectively clear signal that the renewable energy sector will continue to grow, likely at a faster pace than before. Public financing actors have traditionally been more inclined to invest in capital intensive portfolios with higher risks, also creating a trend in an effort to efficiently manage the national energy supply and the balance between traditional sources of energy and renewables. Most large-scale energy projects in Turkey have, so far, been carried out under privatisation schemes, and specific incentive regimes for green energy have also been a key driver of investments. International financial institutions, commercial banks and other debt finance providers also played a crucial role, since their behaviour in the lending market directly links to expansion of certain types of energy in the country, such as their remarkable contribution in boosting renewable investments in parallel with the global rise of green project financing.

“Turkey’s demand for energy keeps rising and it has an impressive national energy strategy to match this.”

On the infrastructure side, Turkish build-operate-transfer motorway projects continued to attract significant attention from global equity and debt players in 2019 and 2020. One of the most significant PPP deals in the project finance market was the US\$750 million financing of the Aydın-Denizli Motorway procured by the General Directorate of Highways of Turkey under the build-operate-transfer model. The deal was signed towards the end of 2021, benefiting from debt assumption by the Turkish Treasury and involved multinational lenders. Another significant deal was the US\$450 million restructuring of Gama Energy, involving many stakeholders and lenders.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

Seven Turkish companies that ranked among the top 100 in Engineering News Record’s 2021 edition of Top 250 International Contractors List (Rönesans, Limak, Tekfen, Yapı Merkezi, ANT Yapı Endüstri, ENKA and Onur Taahhüt), alongside other very active players in Turkey such as Cengiz, TAV, IC İçtaş, Kolin and Kalyon,



dominated the local projects market in terms of deal size in 2021. Despite the negligible decrease in the top 100 list compared to the previous year, Turkey ranks third after China and the USA in terms of the total number of contractors who made it to the top 250 list.

Turkey also witnessed a promising diversification in its international investor base for projects in 2021, thanks to various types of incentives and sovereign support that are available to investors of Turkish projects, such as minimum revenue guarantees, minimum demand guarantees, availability and service payments, foreign currency exchange rate adjustment, debt assumption, tax reductions, customs duty exemptions, social security premium support or land allocation. The incentives and support schemes, based on the region, sector, amount, duration and type of investments, which has contributed to Turkey's position as a preferred market for international equity and debt investors involved in development or large-scale projects.

Led by Chinese conglomerates' increasing appetite for investing in Turkey, in line with the Belt and Road Initiative, Asia-Pacific-based global players expanded their presence in Turkey throughout 2020, particularly in the fields of transportation and infrastructure investments. As to energy projects, global giants like

Gazprom, Rosatom, BP and SOCAR continued their strong presence in Turkey with landmark projects that often benefit from strong political support from the Turkish government.

In addition, 2021 also witnessed a dramatic increase in green energy projects, with multinational investors and funds eyeing renewable opportunities in Turkey with a view to expanding their sustainable investment portfolios. This is also in line with the ever-growing appetite for sustainable financing across markets. Local conglomerates also expanded their green investment efforts, with a view to leveraging the decreasing renewable energy costs and the incentives from various regulatory bodies, such as the introduction of guidelines on environmental, social and corporate governance principles for public companies by the Capital Markets Board of Turkey.

In 2021, local state-owned banks (such as Ziraatbank, Halkbank and Vakıfbank) and prominent Turkish private banks (such as Garanti BBVA, İş Bankası, Yapı Kredi, Akbank, Denizbank and QNB Finansbank) have been the most active lenders for project finance deals in Turkey. Turkish Treasury worked to mitigate termination risks by supporting the financing of eligible projects by providing a debt assumption undertaking to offshore debt finance providers. A significant improvement was introduced to this regime by the end of 2019, with Turkish lawmakers lifting the 85 per cent cap that previously applied in cases where termination arose due to the appointed company's fault, and allowing the sovereign party to assume 100 per cent of principal and interest independently from the underlying cause for termination of the relevant concession agreement.

Turkey has announced that it allocated US\$4.5 billion of its central 2022 budget for debt assumption undertakings to be given by the Turkish Treasury and, according to the Ministry of Treasury, as of 2022, seven active mega projects that have been financed primarily by foreign financial institutions have benefitted from such debt assumption.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

The covid-19 pandemic has resulted in a plethora of risks for the global economy, and the project financing market of Turkey was unfortunately not an exception. Although government-backed projects benefiting from demand or revenue guarantees have proved to be relatively more resilient to covid-19, slowdown in overall economic activity resulted in weaker business and consumer confidence across the globe, including in Turkey. It has therefore been a challenging year for projects in industries that were hit hardest by the pandemic, such as shopping mall projects

“Turkey has announced that it allocated US\$4.5 billion of its central 2022 budget for debt assumption undertakings to be given by the Turkish Treasury.”

and airport projects, which suffered the hardest blows from curfews and international travel restrictions. Despite the initial crisis yielding its position to ancillary burdens and recovery, the economy hasn't been able to fully shake off effects of the global decelerated financial course.

In parallel with the financial consequences of covid-19, Turkey's economy has also become more susceptible to risks associated with its geopolitical position and the risks arising from the significant downfall in its hard currency reserves. The Turkish lira has depreciated rapidly and hit an all-time low in 2021, in parallel with back-to-back decreases in the policy rates by the Central Bank. Right after breaking its all-time low record, the introduction of various government schemes such as the new FX-indexed deposit legislation have been put in place to ensure recovery in value for the Turkish lira.

The currency volatility risk – and the accompanying hedging strategy where applicable – has therefore been one of the key considerations of investors in respect of their new and ongoing investments in Turkey in 2021. Some sectors do offer attractive investment models that structurally minimise the local currency and consumer demand risk – such as minimum demand guarantees coupled with foreign currency exchange rate adjustment under motorway PPPs or availability payments in health-care PPPs. Still, the sharp weakening of the Turkish currency caused a build-up of the debt and borrowing costs for a notable number of projects that do not directly benefit from government-guaranteed cash flow such as standard residential real estate development projects, which visibly had an adverse effect on the bankability of those investments. In parallel with these developments, the prices of hedging with credit default swaps (an instrument to hedge the risk of default) against a default by a Turkish issuer continue to see record highs according to recent market data, which invites most market players to explore liability management methods to various extents.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

The Turkish government continues to showcase its commitment to support the development of large-scale capital-intensive projects in diverse fields through various means. In terms of new legislation, a significant amendment was introduced on 20 March 2021 to the Law on the Realisation of Certain Investments and Services within the Framework of the Build-Operate-Transfer Model. The amendment allows the Ministry of Transportation and Infrastructure and its affiliated entities to become additional parties to debt assumption agreements for certain eligible projects.



This new feature intends to enable the financiers to rely on the sovereign credit of the Republic of Turkey rather than the credit of its public administrations, thus improving the bankability of build-operate-transfer projects that are not eligible for debt assumption by the Turkish Treasury. On that note, the Ministry of Transportation and Infrastructure will be exempt from certain provisions of the Public Finance and Debt Management Law, which authorises the Turkish Treasury as the only entity to incur debt and undertake financial obligations in the name of the Republic of Turkey vis-à-vis external financiers. This would also mean that the relevant projects would be eligible for debt assumption, irrespective of their total investment amounts, and debt assumption by the Ministry of Transportation would not be subject to the annual debt assumption undertaking limits determined under the annual central administration budget law.

The Capital Market Law of Turkey was also amended on 20 February 2020 – the amendment allows investment institutions to establish special purpose project financing funds to provide long-term financing to projects that entail high capital costs in sectors such as infrastructure, public services, energy, industrials or high tech. Other important novelties brought by the amendment include significant

improvements to the legal framework applicable to project bond issuances in Turkish capital markets and Turkish securitisation and debt funds, such as the introduction of a statutory regime concerning security agents acting in these sorts of transactions, which are expected to enable a wider investor base to provide financing directly to Turkish projects.

Currently, a substantial portion of infrastructure financing in Turkey is procured from domestic and international banks, including multilateral development banks. Against the backdrop of the credit crunch, local banks may appear to be less willing to provide financing for projects at low costs, increasing the country's dependence on offshore liquidity and financing sources. The novelties introduced by the February 2020 amendment to the Capital Market Law aim to lessen Turkey's dependence on external financing and enable project developers to reach a wider investor base. Project financing funds are also expected to be used for refinancing, securitisation or repackaging of the existing conventional bank loans in the Turkish PPP market.

Market players may need to adapt to different sets of rules and standards in parallel with the implementation of the February 2020 amendments. While the issuers would have a wider range of options to fund their projects through multi-sourced financing structures, they would also require familiarisation with increased financial reporting, rating and the mandatory public disclosure requirements introduced under secondary legislation by the Capital Markets Board in the historically bank loan dominated Turkish project financing market that is used to operating on a confidential basis. Furthermore, the level of sovereign support for these new financing structures would also play a vital role in the early-stage development of the local markets.

Following the February 2020 amendments, The Turkish Capital Markets Board published the Communiqué on Project Bonds on 17 July 2021, regulating project-based securities and project finance funds, enabling market players to have a greater understanding of the new legislation. In parallel with project bonds, the Communiqué on the Issuance of Asset Secured Capital Market Instruments, dated 26 January 2022 introduced the concept of 'security agent' for the first time and provided a layer of protection to investors by enabling the security agent to preserve and manage the security interests independently.

In particular, it would be interesting to see whether the communiqués have provided the sufficient level of clarity and comfort to incentivise the investors of PPP projects to prefer local issuance opportunities under the new project bond regime, or if the Turkish government will establish a centralised projects fund to achieve off-balance sheet financing of its capital project costs such as guaranteed revenues, like its peers.

In addition, in line with the publicly announced economic programmes of the Turkish government that focus on carrying out infrastructure PPP projects with a fresh, unified and efficient legal framework, there is also an expectation in the market for a unified PPP framework legislation to be rolled out in the near term, as the country's existing legislation does not offer a single legal framework applicable to every kind of PPP project – currently, these are carried out under differing procedures of the relevant contracting entities instead.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

A substantial portion of infrastructure financing in Turkey has customarily been procured from domestic and international financial institutions, including state and privately owned local banks, international commercial and investment banks, and multilateral development banks. Local development banks have also played an important role in Turkish projects in the recent years. For instance, the Development and Investment Bank of Turkey launched a specific fund in November 2020 with a view to promoting corporates operating in strategic sectors and investments that require intensive technology. Another active local development bank was Türkiye Sınai Kalkınma Bankası, which supported many renewable energy projects in the past decade and tapped the international bond market in January 2021 by issuing its third sustainable bond amounting to US\$350 million with a maturity of five years to collect funds to further invest in sustainable and ESG-compliant projects.

As is the case in any other jurisdiction, risk allocation is always crucial in ensuring sufficiency of project cash flow throughout the term of the loan, so as to derive a margin over operating costs and debt service, enabling a return on equity. Due to the complex nature of project financing, cash flow may be fragile due to a variety of risk factors such as construction, environment, operation, market and politics. Large-scale project financing transactions in Turkey still heavily rely on the availability of sovereign or sponsor credit support in various forms, which constitutes a key part of lenders' bankability assessments. Banks and financial institutions would conventionally approach the commercial terms and risk allocation structure for a Turkish project based on key factors such as whether a sponsor or sovereign recourse mechanism is involved, whether there is a revenue or demand guarantee or feed-in tariff, who takes the currency risk and in certain cases and to what extent the financing structure allows debt trading or securitisation in secondary markets.

“Risk allocation is always crucial in ensuring sufficiency of project cash flow throughout the term of the loan.”

With new project bond legislation aiming to diversify the local investor base and various governmental incentives seeking to attract foreign equity and debt investors to mega PPP projects, Turkey’s base of project investors is expected to broaden and grow.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

Turkey’s medium-term economic and investment programmes include many plans for continuing the investments in large-scale infrastructure projects including motorway, railway and airport projects expected to be carried out in partnership with local and foreign private investors under a range of PPP, privatisation or concession models. Although current political calendars do not foresee new tenders for health-care PPP projects in the near term, active projects continue to attract attention from equity and debt investors around the world.

Due to the covid-19 pandemic, the project financing market in Turkey was primarily occupied with debt restructuring and refinancing transactions in 2020,

with some tenders for large-scale projects having to be postponed. However, 2021 seemed to be a gateway for returning to Turkey's dynamic PPP market, but on different terms. As the sustainability concerns driven by covid-19 and the climate crisis has gained momentum on a global scale, social infrastructure projects such as solid and water waste disposal PPPs and innovative green energy projects are expected to continue to attract attention from investors in the near term in line with the global trend of incentivising sustainable finance solutions, along with many other mega projects such as Canal Istanbul, reflecting the country's ambitious PPP targets.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

The three things a client should look for when selecting legal counsel for a complex project financing transaction are worldwide experience with a strong local presence, familiarity with all parties involved (including contracting authorities, sponsor teams, lenders and sovereign actors) and transactional and market experience.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

In our experience, the allocation and structural mitigation of risks associated with the volatility of local currency and project cash flow are among the most important factors for a client to consider and address to be able to successfully implement a project in Turkey.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

One of the most noteworthy PPP deals that we worked on in 2021 was the secured syndicated project financing of the Aydın–Denizli Motorway Project procured by the General Directorate of Highways of Turkey under the build-operate-transfer model. The financing involved cross-border elements and benefited from sovereign support by the Turkish Treasury in the form of a debt assumption undertaking. When completed, the 163 km motorway project will enable easier transportation of industrial and agricultural goods to the Izmir Port and facilitate access to important tourism centres in the region such as Pamukkale, Ephesus, Didim and Kuşadası.



United Kingdom

Munib Hussain is a special counsel in the global project, energy and infrastructure finance group at Milbank LLP. He has significant expertise in advising lenders, sponsors and sovereigns on international projects, energy and infrastructure financings in the oil and gas, power and mining sectors, and in particular specialises in multi-sourced financings and restructurings involving ECAs, multilaterals, commercial and Islamic banks. Munib is also a member of the firm's Islamic Finance Business Unit.

Bader Thabti is an associate in the London office of Milbank LLP in the global project, energy and infrastructure finance group. Bader focuses on the development and financing of power projects (conventional, renewables and waste-to-energy), oil and gas projects and infrastructure assets across Europe, the Middle East and Africa. He has further experience advising on the acquisition, disposal and trading of a broad range of energy and infrastructure assets. Bader is also a member of the firm's Islamic Finance Business Unit.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

The UK is a key hub from where international project financings are structured, negotiated and documented, despite the underlying project being located elsewhere. In fact, the international English-law finance market far exceeds the domestic UK project finance market in both volume and size (and often, complexity) of deals. Cross-border financings have continued to be a key feature for us in 2021 despite Brexit and covid-19. Recent cross-border project finance deals that we have been working on include:

- the US\$736 million acquisition financing of Norwegian-headquartered solar panel maker REC Solar Holdings by Reliance New Energy Solar Ltd, a wholly owned subsidiary of Indian conglomerate Reliance Industries Limited;
- the US\$1.8 billion financing for Mubadala Capital's Acquisition of the Landulpho Alves Refinery;
- advising Carlyle and EIG in connection with GasLog Ltd's refinancing through a note purchase financing;
- the completion of phase 2 in relation to the original US\$5.2 billion Petro Rabigh Refining and Petrochemicals Financing Project in Saudi Arabia;
- the US\$1.6 billion debt financing for Swedish battery manufacturer Northvolt;
- BlackRock and KKR's US\$4 billion acquisition of Abu Dhabi National Oil Company's oil pipelines;
- the debt and equity restructuring of Turkcell İletişim Hizmetleri AŞ, Turkey's leading integrated telecoms and technology company;
- up to €665.6 million financing for Athens International Airport SA in relation to its 20-year concession extension; and
- the US\$400 million financing for the 252MW Lekela West Bakr Wind Project located on the Gulf of Suez in Egypt.

We have certainly seen an upward trend in renewable projects, but also refinancings, reprofiling and restructuring of existing project financings. Often, these have been necessary to tough market conditions, with covid-19 and, in the case of oil and gas projects, the depressed oil price in 2020. The recent 2021 cold weather across Europe has led to significant improvement to oil and gas prices. We continue to see infrastructure funds and asset managers enter the project finance market, sometimes looking beyond brownfield projects and now with a developing appetite for investing in assets beyond Europe, focusing on the emerging markets, the Middle East in particular.



- 2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

In recent years, the UK has become one of the world's top destinations for foreign investment in renewable energy and, in particular, offshore wind; in the period between 2016 and 2019, the country attracted more foreign investment in greenfield renewable energy projects than any other country in Europe. According to EY's 'Renewable Energy Country Attractiveness Index' for 2021, the UK is ranked as the fifth most attractive country in terms of renewable energy investment and deployment opportunities, just below the US, China, India and France.

In the face of the challenges arising from the climate change crisis, governments are allocating considerable fiscal and government support towards the energy transition and a greener, more sustainable economy:

- quadruple the UK's offshore wind energy capacity and supporting supply chain to turn the UK into the 'Saudi Arabia of Wind' – this endeavour will require a major overhaul of the UK's wind infrastructure, supply chain and jobs and

“One particular bright spot in the UK’s renewable energy sector is offshore wind.”

estimates have placed the potential cost of this to be approximately £50 billion, of which £30 billion could potentially come from the private sector;

- develop 5GW of low carbon hydrogen production capacity in the UK by 2030 and establish a £240 million Net Zero Hydrogen Fund;
- invest up to £215 million (which could potentially be matched by £300 million of private sector matched-funding) into small modular nuclear reactors to develop a domestic smaller-scale power plant technology design that could potentially be built in factories and then assembled on-site;
- commit up to £170 million for a research and development programme on advanced modular nuclear reactors;
- invest £1 billion to support the electrification of vehicles in the UK, including the development of electric vehicle battery gigafactories in the UK;
- invest £1.3 billion to accelerate the roll out of charging infrastructure in the UK that will be required to support the nation’s electric vehicular fleet;
- spend tens of billions of pounds in upgrading the UK’s rail network and city public transport;

- extend various schemes and grants that encourage the improvement of the energy efficiency of homes and buildings;
- establish four industrial carbon capture, usage and storage (CCUS) clusters in the UK, which could potentially include the development of a project to store captured carbon underneath the seabed of the North Sea; and
- raise the UK's expenditure on research and development into new green energy and CCUS technology to 2.4 per cent of GDP by 2027.

One particular bright spot in the UK's renewable energy sector is offshore wind. Blessed with a long coastline, abundant wind speeds and access to the North Sea, and know-how from offshore oil and gas projects, the UK generates more electricity from offshore wind than any other country in the world. Coupled with falling costs (which has fallen by two-thirds in the past five years), technological improvements and growing political support for such projects, industry experts have claimed that there is 'no shortage of capital or investor appetite in offshore wind' in the UK. It is, therefore, unsurprising that recent years have seen a flurry of M&A and fresh financing and refinancing from foreign firms in the offshore wind energy sector. Significant deals include:

- BayWa r.e.'s acquisition of High Constellation Wind Farm in Scotland from Blue Energy in February 2021;
- RWE's acquisition of a controlling stake in British offshore wind farm Rampion from British energy supplier E.On in March 2021;
- Iberdrola's additional £6 billion investment in ScottishPower's East Anglia wind farm hub;
- Eni's acquisition of a 20 per cent stake in the Dogger Bank C UK offshore wind project from Equinor and SSE Renewables; and
- EDP's announcement of an additional £2.2 billion investment in Moray West offshore wind farm.

Domestic energy companies have also been active in this sector:

- In November 2021, SSE entered into an agreement with Eni for the sale of a 10 per cent stake in Dogger Bank C for £70 million.
- Also in November 2021, Greencoat UK Wind entered into an agreement to acquire a 25 per cent stake in Burbo Bank Extension offshore wind farm from AIP Asset Management.

Multinational corporations, domestic businesses and public institutions have been enthusiastic about these developments and have supported the sector with corporate power purchase agreements (PPAs) to purchase energy from renewable

sources, so as to reduce their global carbon emissions. In November 2021, SSE Renewables and Equinor announced the conclusion of various PPAs with sponsor offtakers including Danske Commodities and SSE Energy Supply Limited as well as external offtakers Centrica Energy Marketing and Trading and Shell Energy Europe Limited in relation to Dogger Bank Wind Farm in the North Sea, subject to it reaching financial close. In December 2021, NSG UK Enterprises Ltd, an entity forming part of the NSG Group (one of the world's largest manufacturers of glass) signed a 10-year PPA with EDP Renewables for 51 per cent of energy generated by a wind farm, reaffirming the Group's commitment to sustainability. Similarly, in 2021, ScottishPower Renewables completed the construction of a new wind farm in the Scottish Highlands that was built as part of a PPA and developed to power Tesco's stores and operations across the UK.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

High winds and strong waves underscore the UK's renewable energy potential. Coupled with government incentives, the UK has become an increasingly attractive place for foreign investment in recent years and in the past year, the appetite of project sponsors and banks in the UK renewable project finance market has remained healthy, despite the risks of covid-19 and Brexit.

Commercial lending has been the preferred source of funding and we have seen activity from a balance of local, regional and international banks. The UK's HSBC and RBS ranked in the leading renewable project finance lead arrangers league tables in terms of the value of contracts in 2020 by IJGlobal, and NatWest and Lloyds Bank have made appearances lending in notable deals. International commercial banks active in this sector include BNP Paribas, Credit Agricole, Société Générale, SMBC and MUFG; and export credit agencies have included Norway's GIEK, Sweden's EKN and Denmark's EKF.

On the sponsor side, we have seen a variety of companies involved in renewable project financing, and international developers have made big waves in the market this past year – Norway's Equinor recently concluded the financing of the 2.4GW Dogger Bank offshore wind farm portfolio at a cost of US\$10.7 billion, Italy's oil and gas major, Eni acquired a £405 million 20 per cent stake in the £6 billion, 3.6GW Dogger Bank offshore wind farm project, while German energy giant RWE took a final investment decision to construct its biggest UK offshore wind farm Sofia, at a cost of £3 billion.

With the announcement of the UK government's 'green industrial revolution', which will see a range of green incentives (as discussed above), the pace of domestic



and foreign investment in the UK's renewable project finance market is unlikely to slow down.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

The two issues of covid-19 and post-Brexit trade jitters in the past two years have dampened the outlook of the broader UK economy and introduced material uncertainty as to the implementation and commercial feasibility of current and future projects in the UK.

For example, the construction of pre-operational projects was severely delayed by the UK's first government-imposed lockdown, which began on 23 March 2020 and continued through to July of that year. During that period, construction work across the UK largely came to a standstill, as such work did not qualify as 'essential services' that were allowed to continue during the lockdown (construction work was, however, permitted to continue during subsequent lockdowns, provided that certain health and safety guidelines were met). Construction work was later impacted by

restrictions on cross-border trade and disruptions to supply chains that were a result of lockdowns practised in other countries. To provide a sense of the severity of covid-19's impact on projects in the UK, the completion of the 3.2GW Hinkley Point C nuclear power station in southwest England, which is being developed by EDF, is likely to be delayed by six months to June 2026 due to covid-19 restrictions, and EDF has estimated that such a delay will result in an increase in overall project costs by about £1 billion to a range of £22 to 23 billion.

Investment across the projects sector, including the renewable energy sector, also slowed down significantly during the first half of 2020, as firms looked to shore up their balance sheets and conserve their capital in the face of economic uncertainties. However, investment largely recovered in the second half of 2020 and through to 2021 as public spending gradually began returning to normal.

Covid-19 also led to the UK government incurring severe budget deficits as a result of its spending to combat the pandemic. This has led to doubts as to whether government funding would be available to support planned or ongoing public infrastructure projects and whether such projects were going to be delayed or scrapped altogether. However, towards the latter part of the year, the UK government took the decision to carry on with some of these expensive projects, as doing otherwise would, in the words of the minister for the HS2 project, Andrew Stephenson MP, have a 'chilling impact' on the UK construction sector and inward investment and send a 'terrible message' in response to the pandemic. For example, the UK's £106 billion HS2 high-speed railway project connecting London to northern UK cities, estimated to cost up to £106 billion, finally began construction work in September 2020; in December 2020, the UK government provided a last-minute £825 million loan to London's transportation authority to enable it to continue construction on the Crossrail project in London, which had been experiencing construction delays due to covid-19. However, projects that were still in the consultancy or early stages, such as the Crossrail 2 project, were not spared and work on such projects has been put on pause for the foreseeable future.

In a similar vein, there has also been some uncertainty as to the funding for future projects in the UK post-Brexit, as previous projects had been reliant on the European Union as a source of funding – since the UK's accession to the trading bloc in 1973, the country has borrowed more than €118 billion from the European Investment Bank (EIB) (though not exclusively just for infrastructure projects); in addition, the nascent UK renewable energy sector has been a beneficiary of EU investment from the EIB, the Connecting Europe Facility and the European Structural and Investment Fund.

As expected, the UK saw a quick decline in EU lending after the 2016 Brexit referendum. In 2015, the EIB lent €7.8 billion to 47 projects in the UK and in 2016,

“The result of the UK leaving the EU has led to some important legal uncertainties that could affect projects in the UK.”

it lent €7 billion to 54 projects. However, in 2017, this dropped to €1.8 billion to 12 projects, and in 2018, this was halved again to €0.9 billion for 10 projects – a nearly 90 per cent fall in four years. The EIB has also made several warnings that funding for the UK renewable energy sector could be impacted as a result of Brexit; to qualify for funding, new projects in the UK will need to demonstrate that they will further the EU’s policies. To meet this challenge, the UK Treasury has committed to underwriting funding that would have otherwise come from the EU. In addition, the UK government launched the UK Infrastructure Bank on 17 June 2021, as a domestic replacement for the EIB, aimed at addressing financial challenges left by EIB no longer funding UK infrastructure projects.

The result of the UK leaving the EU has also led to some important legal uncertainties that could affect projects in the UK. Despite the UK and the EU agreeing to the Trade and Cooperation Agreement on 30 December 2020 to govern post-Brexit trade relations, it is unclear how the UK will introduce its own domestic subsidy control regime, and how closely the new UK state aid authority and the courts will follow the EU jurisprudence in relation to EU state aid rules. In addition, it is unclear as to whether the commercial viability of projects in the UK would be materially



impacted as a result of tariffs for services and construction materials and parts that originate from the EU. This is despite the introduction of zero tariffs on goods moving between the UK and EU since it applies only to goods that meet the relevant rules of origin, but there is inevitably much uncertainty and complexity surrounding the application of such rules in practice. Finally, there has also been a concern that English law-governed contracts and English law judgments may not be effectively enforced in EU states as prior to the UK leaving the EU.

- 5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

The UK government has accelerated its pivot away from fossil fuels, with its new initiatives including a 'Ten Point Plan', which targets both public and private sector investment in the hope of cultivating a green finance sector and directing funding towards innovation in renewables. At the core of the Plan is a Sovereign Green Bond issuance, with the first offering completed in September 2021, raising £10 billion of

funding for various green projects across the UK. A further £6 billion was raised in a second issuance in the following month, demonstrating significant investor appetite in the UK green environmental sector.

The UK remains the world's largest generator of offshore wind energy and the government intends to bolster capacity further through a reformatting of its contracts-for-difference procurement system, under which the UK's driving renewables sector will be ringfenced from biomass and other developing technologies. The new auction process is likely to increase accessibility and attract more international interest in the nation's offshore potential.

The UK government has embraced the 'green industrial revolution' with much enthusiasm, with a pledge of £12 billion in government investment committed to the offshore wind, carbon capture, green hydrogen and electric vehicles being the key sectors aimed at achieving the UK's 2050 'net zero' emissions target. With additional funding for carbon capture and new green hydrogen production facilities, the government's Plan represents significant signal to renewable energy and infrastructure developers, investors and financiers over the coming years. With additional government support, these sectors have drawn considerable interest from local and international players hoping to take advantage of the new green industrial revolution and the opportunities that come with it.

Covid-19 and Brexit have influenced the pace of the green energy transition within the UK; with electric vehicles (EVs) being a key area of focus given the drive to start the decade of the electrification of transportation. The government has set ambitious targets for phasing out of conventional vehicles and has committed to delivering the necessary regulatory and investment environment required to scale and deliver wide-scale EVs. The challenge for these plans, which also represent substantial investment opportunities for infrastructure funds and investors across the project financing spectrum, is that the delivery of a nationwide transition to EVs requires a large-scale EV-charging infrastructure and an increase in the availability of renewable energy. Similarly, this will require extensive investment in battery technology, battery storage infrastructure and, perhaps more importantly, the establishment of domestic battery manufacturing industrial base.

To meet the massive infrastructure investments required to introduce nationwide EV-charging infrastructure, the development of a domestic green hydrogen industry, and a car battery manufacturing industry, the UK government launched the UK Infrastructure Bank (UKIB) in June 2021. Two central policy objectives underpin the establishment of the UKIB including tackling climate change, in particular meeting the UK's net-zero emissions target by 2050, and providing support for regional and local economic growth. A total of £22 billion will be available for the furtherance of these twin objectives, with £12 billion of initial capital and £10 billion

“The divide between conventional project finance and the bond and leveraged finance markets continues to narrow.”

in subsequent government guarantees. While more detail on the composition, mandate and products that the UKIB will be offering have yet to be released, the development of the UKIB has been met with much enthusiasm from infrastructure developers and investors alike. An example of the UKIB's role in the energy transition and the post-EIB UK economy is the UKIB providing nearly £600 million to the initial seed assets of NextEnergy Capital Group's subsidy free solar fund. This highlights the expanded role that the UKIB will play in the government's goals to tack climate change and create a green economy that levels up the economic opportunities for the UK.

Clearly, the UKIB is intended to act as a focal point in rallying the much-needed private sector investment and participation in delivering the country's infrastructure needs and, crucially, in delivering the government's 'green industrial revolution'. The potential represented by the UKIB is immense, including serving in the role of opening new technologies by providing much-needed early-stage development capital and in providing loans and guarantees to attract private investments and initiatives. Nevertheless, there are several challenges that the UKIB will need to overcome, especially any state aid rules and lack of political support and capital that have historically stifled the Green Investment Bank and the British Business Bank.

- 6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

The UK market breaks (broadly speaking) into two quite distinct halves – a UK-oriented market where local (as in UK-sited) deals are structured and financed, and a much larger and more geographically diverse finance market where (for one reason or another) international finance is structured, negotiated and documented in the UK (in practice, London), but the underlying project is located elsewhere. The two markets are both relatively large in terms of capital, diversity of participants and debt requirements and flows, but the international English-law finance market far outstrips the domestic UK market in both volume and size of deals.

In the UK, the divide between conventional project finance and the bond and leveraged finance markets continues to narrow. The market saw a continuation of diversification of both sources and types of project-related debt. As with the project bonds market, the trend comes in part from the US, where a growing (from 2016 to date) prevalence of greater infrastructure and energy sponsor focus on Term Loan B structures – used as refinancing tools or sitting alongside conventional financings and/or less conventional financings (for example, inventory and receivables financings) – is spreading to the European market. Here, commentators are predicting

that such a Term Loan B market will see increased use of forward purchase agreements, cash sweeps and power hedges in transactions.

Multilaterals and export credit agencies have continued to participate in the market, and existing institutions (rebranded with additional products to help fill debt financing gaps) have continued to invest in the UK's energy and infrastructure sectors (especially in light of the UK's exit from the European Union, which has, seemingly, buoyed government commitment to investing in UK infrastructure, and the availability of funds for UK bilateral and multilateral institutions investing abroad – this is particularly the case in the government's treatment of UK Export Finance's (UKEF) Direct Lending Facility). The UKIB represents a much-welcomed addition to the diverse pool of capital available for investors to tap into in relation to the UK's infrastructure and energy markets. The launch of the UKIB is anticipated to make up for, and enhance upon, the withdrawal of the European Investment Bank from the UK project finance and infrastructure finance markets following Brexit, which has led to a drop in the long-term debt for emergent technologies and long-term investments in infrastructure and energy transactions.

In recent years, there has been a substantial increase in private placements, project bonds, loans and equity investments by institutional investors (such as pension funds, infrastructure funds, asset managers and insurance companies) in UK infrastructure assets, which, notwithstanding Brexit, remain a particularly attractive asset for investors hungry for stable, long-term yields. We have seen an increase in the appetite of these institutional investors for infrastructure and energy assets in the UK, a trend that is likely to continue for the foreseeable future. Moreover, with increased pressures to invest in ESG compliant assets, there is a push by UK pension funds – traditionally not active in holding infrastructure and energy investment – to increase their funding and participation in the financing and development of infrastructure and renewable energy projects both as a means of securing long-term stable returns and as a service that provides a vital community need. Indeed, in June 2021, Aegon, a multinational life insurance and pension company, moved over £5 billion of UK workplace default assets into ESG strategies, with the underlying ambition behind this decision to act being the achievement of net zero by 2050.

With the governments, drive to increase investment in domestic infrastructure and the development of a green industrial revolution, there will likely be an increase in pension funds and insurance companies participating in project financing of infrastructure and energy assets and diversifying their portfolio to include ESG related assets.

Given the tumultuous impact of covid-19, there have been a number of restructurings and debt reprofiling in the project finance and infrastructure sector where



we have seen, in relation to projects with strong sponsors, lenders seeking some recourse to the sponsors as part of that package, especially on over-leveraged projects. This has the potential to impact the structuring of new project financings where lenders are more alive to the risk of a global pandemic.

With multi-decade lows in oil and gas prices in 2020, upstream producers and downstream refiners of oil and gas products saw their profit margins squeezed and this has resulted in a wave of restructuring of projects in the oil and gas sector to allow such projects to service their debt and solve liquidity issues. In addition, some energy companies have sold their midstream assets (often, to asset management or infrastructure funds) to monetise their balance sheets and pay down high levels of debt. Closer to home, 2020 also saw the reverse-takeover of the heavily indebted Premier Oil plc, the independent oil producer in the North Sea, by private equity-backed rival Chrysaor, which resulted in the repayment of Premier Oil's creditors of US\$1.23 billion in cash.

Covid-19 has also resulted in the disruption of the operations and construction of many projects for myriad reasons, ranging from outbreaks of the virus on site, to the unavailability of spare parts due to the shutdown of a manufacturing plant on the

“With the UK’s drive towards a green industrial revolution, we expect to see increased activity and investments in the renewable energy and infrastructure industries.”

other side of the world, to the inability to charter international flights for specialist engineers. As such, government authorities, sponsors, lenders and contractors to projects have been keen on enforcing their force majeure rights under the relevant agreements while ensuring that their rights are preserved and denying other parties’ claims of force majeure. Meanwhile, parties involved in negotiations for pre-construction projects have been focused on ensuring that their rights across the chain of construction, finance and concession agreements remain watertight when it comes to potential force majeure claims.

7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

With the UK’s drive towards a green industrial revolution, we expect to see increased activity and investments in the renewable energy and infrastructure industries. We anticipate that there will be increased activity levels in the emerging technologies such as carbon capture, green hydrogen and floating solar and wind projects,

but this will not necessarily derail the current focus on increasing investments in renewable energy and infrastructure projects.

In 2021–2022, aside from ongoing restructuring and reprofiling of existing projects in challenging markets and sectors, we anticipate that the following areas will continue to be of keen interest for industry actors:

- Offshore wind – increased focus in the UK’s prized offshore wind industry will continue to grow and attract investment from a diverse pool of capital, with the drive to create strong domestic supply chains to service the industry being given increased focus by the government and players in the industry. We expect to see the emergence of floating offshore wind and floating solar projects as reliable technologies become viable bankable project financings, especially with investment from the UKIB and oil and gas companies as part of the energy transition.
- EV infrastructure – we will see large-scale infrastructure project financing aimed at the development of a nationwide EV charging infrastructure to enable the government to meet its 2050 net zero carbon targets and the transition to EVs following the cessation of sales of petrol and diesel cars.
- UK Infrastructure bank and infrastructure – the continued development of the UKIB (especially following the recent £600 million seed financing to NextEnergy’s subsidy free solar fund) is much anticipated and expected to expand in the coming years. The huge funding gap in the UK’s infrastructure and whether the UKIB will be able to galvanise private investments and government support to deliver the much-needed infrastructure assets, remains to be seen. Nevertheless, the UKIB will be an important addition to the UK’s infrastructure and energy investment pool.
- Brexit and international trade – following Brexit and the economic downturn triggered by covid-19, it is unclear as to whether the commercial viability of projects in the UK would be materially impacted as a result of tariffs for services and construction materials and parts that originate from the EU, which has influenced the drive to establish domestic supply chains for critical industries.
- English law – there has also been a concern that English law-governed contracts and English law judgments may not be as effectively enforced in EU states as prior to the UK leaving the EU; this will remain a concern in 2021 with wide-ranging implications for the viability of the UK as the centre of international project financings.
- Domestic supply content – the combination of Brexit, the challenges to global supply chains highlighted by covid-19, and the government’s desire for a green industrial revolution, will in certain circumstances lead to an increase in domestic content requirements for a large segment of the renewables industry

(especially offshore wind) and the emerging carbon-neutral technologies. The need for domestic content will have cost and logistics implications for developers and will create perhaps one of the drivers of the UKIB (ie, to finance projects with a higher domestic content and with proven local community benefits).

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

Choosing the right counsel is of critical importance in large complex financings. The key is to choose counsel:

- with the relevant sector and industry expertise, precedent knowledge and knowledge of the regulatory and economic landscape;
- proven ability to deliver on complex project financings, especially with a diverse pool of creditors (including ECAs, DFIs, bondholders, institutional investors and Islamic participants); and
- who understands that complex financings take time, effort and undertaking to negotiate and execute. Choose counsel whom you can get on with, trust and rely on!

What are the most important factors for a client to consider and address to successfully implement a project in your country?

Like in any jurisdiction, a well-structured project with appropriate allocation of risks is key. This ensures speed of execution. It is also important to appreciate that the UK has complex system of laws, with different regulations and laws applying depending on which part of the UK the project is located in. For example, a project located in Scotland will have to also comply with Scottish law.

What was the most noteworthy deal that you have worked on recently and what features were of key interest?

The US\$250 million green loan acquisition financing in connection with Reliance Industries Limited's (RIL) acquisition of Norway-headquartered REC Group from China National Bluestar (Group) Co Ltd certainly stood out.

The acquisition and related green financing were also in line with RIL's 'new energy vision' to become a global scale photovoltaic manufacturing competitor. The acquisition of REC will provide RIL with a ready global platform and the opportunity to expand and grow in key green energy markets globally. Furthermore, the green loan financing represents the first green financing entered into by RIL.



United States

Alec Borisoff is a partner in the New York office of Milbank and is a member of the firm's project, energy and infrastructure finance group. He was previously resident in the firm's Washington, DC office and from 2012–2017 headed the firm's Tokyo office.

Alec's experience includes the representation of project sponsors, financial institutions, export credit and multilateral development agencies and other project participants in a wide range of US and cross-border project and structured financings, investment transactions and restructurings, with a particular emphasis on mining, oil and gas, infrastructure and power-related financings. He has significant experience working on complex multi-sourced financings and workouts involving official credit agencies, having represented over 20 multilateral development banks, export credit agencies and other official lending institutions over the past few years.

1 | What have been the trends over the past year or so in terms of deal activity in the project finance sector in your jurisdiction?

At Milbank, the global project, energy and infrastructure finance group is particularly well situated to discern the trends affecting the project finance space in the US and comparatively against global markets. In a year that followed one of the most tumultuous years in memory, the project finance market continued to perform well. New covid-19 variants created some uncertainty; however, the relatively widespread vaccination rollout throughout the country greatly alleviated the health and economic burdens of the covid-19 pandemic. The market showed strong performance and total project finance loans in the United States for 2021 totalled US\$62.3 billion over 200 transactions, an increase of 11 per cent over 2020 according to Refinitiv. Power, as usual, led the charge, with oil and gas and transportation taking significant but smaller portions of total deal value. Renewables made up a large portion of the total number of deals closed despite ongoing supply chain issues driving up the cost of inputs. The first half of 2021 was strong, with investors taking advantage of cheap funding and a comparatively safe asset class.

As dealmakers grew comfortable with the work-from-home reality, momentum continued through the year. Heavy activity continued through year-end with significant activity in M&A, related acquisition financings, the USPP market and an influx of strong private equity sponsors (both domestic and foreign) training their eye on US-based assets, opening up additional capital for the sector. A number of large domestic transactions, such as the US\$2.61 billion Dominion Cove Point financing (described in greater detail below), closed through the year.

The widespread vaccination rollout, emergence of the Delta and Omicron variants and rising death toll in the US meant that covid-19 continued to dominate headlines through the year. Nonetheless, it was certainly not lonely in the headlines as other major events, such as the 6 January 2021 attack on the US Capitol, the widespread power outages in Texas and the Biden administration's rejoining of the Paris Climate Accords, also impacted the country's efforts to return to a more 'business-as-usual' environment. Similarly, at a time when infrastructure is seen as a safe bet for governments hoping to jumpstart economic growth and create jobs, the Biden administration appears to be embracing this prevailing orthodoxy through its Bipartisan Infrastructure Law and the array of capital projects it will enable, creating an expectation of further growth opportunity in the domestic power, infrastructure and energy space.



Alec Borisoff

2 | In terms of project finance transactions, which industry sectors have been the most active and what have been the most significant deals to close in your jurisdiction?

Renewables led the charge, charting in the largest portion of total loan value according to IJGlobal. As expected in 2021, significant pressure to decarbonise the US economy and continued reliance on federal and state tax incentives for wind and solar projects pushed developers to continue a spree of new project development, significant refinancings and the push to combine battery storage into the renewable project package. Milbank teamed-up with a syndicate of lenders to close a US\$804 million greenfield project financing for the Edwards & Sanborn Solar and Storage Facility developed by Terra-Gen, which is expected to be the world's largest integrated solar-powered battery storage, project upon completion. The tax equity market continued to be strong benefiting from the late 2020 extensions of the Investment Tax Credit (ITC) for an additional two years for solar and an extension of the PTC for wind for one year. Notably, a 30 per cent ITC was introduced for offshore wind projects with construction beginning before 2026. Furthermore,

“Natural gas has continued to be the conventional energy source of choice, with plenty of movement in the midstream and power sectors.”

several proposals to extend the use of tax credits to other more out-of-the-box green technologies were debated through 2021 and may come to fruition in 2022, including expanding the ITC to include energy storage projects and a choice between the production tax credit (PTC) and ITC for clean hydrogen projects, both proposals under the Biden administration's Build Back Better bill, which is yet to be approved by the US Senate. Political support for this bill stalled in 2021 with an evenly divided US Senate. However, the Biden administration has signalled its intention to keep pursuing these reforms. For now, sponsors and investors can still rely on guidance that the ITC applies to energy storage associated with otherwise eligible projects. Major conventional players such as LS Power are zeroing in on pumped storage hydroelectric facilities and electric vehicle charging platforms. Tax incentive structures previously used for wind and solar projects are being repurposed for 45Q carbon capture projects. While not a major market share at this stage, these precursors will be important for the future of renewables and energy transition developments and, with a climate-oriented party holding the White House, a Senate (albeit with a razor-thin margin) and a congressional majority, we can expect a policy preference for technology that enhances renewable and sustainable energy goals. Hydrogen-based fuel, in both the energy and transportation sectors is also being looked at closely, although not yet hitting stride. For example, SGH2 Energy Global is developing a hydrogen production facility in Lancaster CA, based on gasification of recycled plastic and paper, which promises to be more efficient than current electrolysis technology.

Natural gas has continued to be the conventional energy source of choice, with plenty of movement in the midstream and power sectors. Notable transactions include the US\$2.61 billion holdco financing for Dominion's Cove Point LNG export project in which Milbank represented the lenders and TransMontaigne's US\$1.15 billion refinancing in which Milbank also represented the lenders.

3 | Which project sponsors have been most active in driving activity? Which banks have been most active in providing debt finance?

While in the renewables space, major developers such as Clearway, Invenergy, Sunrun and others continue to play major roles in the US market, 2021 saw a continued push from major private equity firms, such as Carlyle, KKR, Apollo and Blackstone into realms historically reserved for a traditional PF shop. KKR made a US\$3.37 billion purchase of a 20 per cent non-controlling interest in Sempra Energy's new business platform, Sempra Infrastructure Partners, in connection with which Milbank advised the lenders. Private equity players are making exits too, with BlackRock selling the 240MW Big Sky wind farm to Dutch energy company

Vitol in May 2021. Freeport LNG Development led the IJGlobal league tables for 2021, with six major transactions for a total value of US\$6.9 billion, all related to its LNG facilities in Texas. Venture Global LNG followed in second, with multiple transactions relating to its Calcasieu Pass LNG and carbon capture and storage facility. On the renewables side, DE Shaw, Invenergy, NextEra and Clearway led the pack, each with more than US\$2 billion put to work. Notably, deal volume and quantity is fairly spread out among sponsors, particularly when the massive LNG liquefaction transactions and other 'one-and-done' blockbuster transactions are taken out of the picture – deal data tables show that 21 different sponsors invested more than US\$1 billion and 44 invested more than US\$500 million in 2021.

On the lender side, MUFG continues to have the strongest presence in the US market, both in terms of deal value (US\$5.5 billion) and number of transactions (72). Groupe BCPE, through its subsidiary Natixis, is a strong second, with a single mandated lead arranger title for significant projects such as the Vineyard Offshore Wind Farm and Traverse Wind Farm, followed by the usual players, SMBC, ING Group and Societe Generale in third through fifth respectively. Notably, Bluebell International, which had the second highest transactions total in 2020 and came in second in deal value did not rank in the top 100. A new entrant, Silicon Valley Bank, financed a large number of transactions exclusively in the renewables space, making the concept of a 'green boutique' a reality.

4 | What are the biggest challenges that your clients face when implementing projects in your jurisdiction?

While US residents might have a bit more trouble separating themselves from the news cycle, the reality is that despite the tumult in the US in 2021, investors still are able to invest safely and predictably in US assets. The US's tried and true system, despite high-profile back and forth policy decisions on certain socially relevant pipeline assets such as Keystone XL, is still a boon for investors seeking to ensure what their contract says is what plays out on the ground. Investors also have the benefit of a benchmark currency, repeat players obligated reputationally to 'play fair' and a slew of experienced advisers ready to assist with new ventures. The Biden administration continues to rebuild important relationships and a reputation for consistency. The underlying base of the US system remains strong and investors have not abandoned the market.

On the other hand, the fact is that the US market is mature and competition can be brutal. With the safety and predictability comes a mess of market participants with deep pockets and experience to back it up. As a result, we have noted that foreign sponsors will take bold steps to find a foothold, pushing out others that



previously would have had a sure chance of winning a bid. On the debt side, we have noted that Japanese and Korean investors are drawn to safe investments in the US due to the limited investment supply in their domestic markets, often teaming with experienced US players to convert opportunities.

The evolved US markets come with inherent added complexity over time as tweaks, caveats, and loopholes in policy and 'market' precedent are gradually introduced. With this complexity, newer entrants require expert advisers to guide them to the 'cutting edge' to maximise returns, while seasoned veterans expect that their advisers will be ready to play at their level and assist them with novel ideas.

5 | Are there any proposed legal or regulatory changes that may give rise to new opportunities in project development and finance? Do you believe these changes will open the market up to a broader range of participants?

As noted above, renewable energy and other green policy initiatives are going to be the major spectacle of 2022. With the executive and legislature controlled by the Democratic Party, we can expect to see continued movement towards green energy,

“Some initially predicted a greater degree of hostility from the Biden administration towards oil and gas development.”

though the extent to which is to be seen and will depend greatly upon whether the Biden administration is able to pass its Build Back Better bill.

Investors should watch for extensions and modifications to existing PTC and ITC tax credit structures, additional qualifying technologies, in the vein of the 45Q carbon capture facility eligibility, and other backstops such as Department of Energy guarantees. Biden’s proposals are ambitious but the razor-thin majority held by the Democrats in the Senate makes the passage of legislation difficult. State-administered renewable energy credit trading programmes will also be important to watch as investor-owned utilities attempt to comply with ever-expanding renewable portfolio standards.

The private sector seems keen to follow suit – for example, BP has stated that it intends to become a net zero company by 2050 (or sooner) and recently entered into a 50:50 partnership with Equinor to develop the Empire and Beacon offshore wind projects. It will be important to track how other major players, including BP’s peers in the oil and gas industry as well as other industries like the petrochemical and transportation industries, adapt to what appears to be a permanent shift.

Some initially predicted a greater degree of hostility from the Biden administration towards oil and gas development; however, 2021 saw the Biden administration outpace the Trump administration in issuing drilling permits on public lands. Nonetheless, the administration has also taken meaningful steps to shift away from fossil fuels, including a recent proposal to increase royalty rates and rents for drillers but stopped short of a ban on drilling. This perceived inconsistency is likely the product of an administration attempting to accelerate the growth of green energy in the country's energy mix while also recognising the value of oil and gas in the US economy.

6 | What trends have you been seeing in terms of range of project participants? What factors have influenced negotiations on commercial terms and risk allocation? Are there any particularly innovative features?

We have noted a significant uptick in foreign investment at all levels of the capital stack, as well as inroads by major domestic private equity (PE) players that previously focused on standard leveraged finance transactions. Companies and investors are generally looking for safe opportunities and calculated risks and the project finance structure provides a particularly streamlined management system catered to these needs. A number of Canadian funds are entering the US transportation market through targeted acquisitions – Milbank represented Caisse de dépôt et placement du Québec in connection with the acquisition of a 15 per cent interest in the Indiana Toll Road from IFM Investors (itself an Australian pension fund manager). Axiom Infrastructure acquired a 50 per cent interest in George Energy Partners, which has a long-term contract to operate the utility and energy system for George University, and Milbank represented the institutional investors financing the acquisition. As noted above, Milbank also assisted BlackRock its sale of the 240MW Big Sky wind farm to Dutch energy company Vitol.

The inroads made by PE firms and cross pollination of leveraged finance and project finance advisers have created opportunities for those able to wield a bit of influence or who can reference relevant comparisons effectively. The reputation of the project finance market as a strict but predictable funding source for sponsors has evolved ever so slightly, and sponsors are using the strength of the 'buyer's market' in the finance space to seek more control over operational decisions and reporting requirements where excessive lender oversight may have historically been viewed as onerous or likely to cause foot faults.



7 | What are the major changes in activity levels or new trends you anticipate over the next year or so?

We generally expect the market to continue to reflect the grit that defined 2021 in 2022, as investors react to an improving macroeconomic situation, increased stability in the domestic space and diminishing impact of the covid-19 pandemic. Despite a sense of optimism, several external challenges loom on the horizon. Growing inflation is driving up the cost of materials for renewable energy projects and the uncertainty around the US Federal Reserve's response is making certain market participants nervous. While infrastructure assets are perceived to be a natural hedge against inflation, other assets are exposed to interest rate risk and may be negatively impacted by higher interest rates. Similarly, we are yet to understand the full impact of poor diplomatic relations with China; however, we can already see adverse consequences of measures such as the Biden administration's extension of Trump-era tariffs on imported solar panels, which is driving up the cost of developing solar projects in the US. Other macroeconomic factors that cannot be controlled or predicted and that create challenges include the ongoing supply chain disruptions

caused by the covid-19 pandemic and Russia's invasion of Ukraine. Nevertheless, investors have proven that they can weather one of the most significant crises of modern times and it is unlikely that these concerns will have a material effect on deal flow in the near term. Sponsors engaged in carbon-heavy industries will need to make contingency plans for increased regulation, decreased incentives and potential competition from subsidised green alternatives. Participants in polluting industries should be aware of the impact their investments have on their reputation and bottom line if handled incorrectly and the power that a well-organised or merely inopportune and popular protest can have on the permitting process administered by an executive branch predisposed to align with a climate conscious viewpoint. Furthermore, as the focus on environmental, social and corporate governance (ESG) grows and the move towards standardised ESG reporting continues, participants in polluting industries will find themselves exposed to greater reputational risk.

While certain investors were willing to weather the uncertainty of the Trump administration in favour of reduced tax rates, rollback of emissions and pollution requirements and other promises to remove regulatory red tape, many have welcomed a period of increased stability, a lean towards technocratic policymaking and bold and ambitious clean energy and other necessary infrastructure policies that the previous administration was unable to deliver. While massive spending was approved during the height of covid in the form of the CARES act, many have noted that the funds appropriated were a lifeline to struggling municipalities and subdivisions and will not be allocated to capital projects. This has changed with the passage of the Bipartisan Infrastructure Law, which allocates US\$550 billion in new money for a variety of projects. A significant portion of this money will be provided directly to municipal governments who are subject to more in-depth value-for-money analyses to receive federal funding. Public-private partnership procurement methods are likely to be considered in a value-for-money analysis and this may lead to a great uptake of P3 projects, creating more opportunities for the private sector to play a role in overdue infrastructure projects in the US. Supply chains for advanced batteries for vehicles and energy storage will be strengthened, with the US Department of Energy recently announcing its intention to provide US\$2.91 billion to boost production of advanced batteries pursuant to the Bipartisan Infrastructure Law. The department intends to fund plants for battery materials production and refining, battery manufacturing and battery recycling. Similarly, the Federal Highway Administration (part of the US Department of Transport) will administer around US\$27 billion to repair approximately US\$15,000 highway bridges across the US.

The Build Back Better bill discussed above is one potential source of new opportunity through the expansion of tax credits that will enable more storage projects and green hydrogen projects. We also expect major leaps forward in

battery storage technology and other overdue investment in major capital projects. Consumer-facing 'clean' products will create the most buzz – electric vehicle (EV) developments, residential solar, 'smart home' products – but behind the scenes expect that steady progress will be made to progress utility scale storage options. We expect greater market activity throughout the advanced battery supply chain in the US, in part boosted by the Department of Energy's planned actions noted above, including manufacturing and production of critical minerals. These activities will be broad in and will see a wide range of investors involved, including foreign investors seeking to build battery manufacturing plants in the US and local startups such as Form Energy (backed by heavyweights such as Bill Gates and Jeff Bezos), which recently closed its US\$240 million Series D funding round and is expected to be developing and scaling up a new type of rechargeable battery made of iron, air and water (all cheaply and readily available). Meanwhile, Tesla recently announced it is making arrangements to source nickel from the Goro mine in New Caledonia that, if effective, will give it a significant advantage in the manufacture of batteries in the US. These are all less predictable developments in the market but will likely have a large impact on the energy transition markets in the US. Another factor to take into account when planning will be potential policy changes requiring government contractors to comply with minority and women owned business sourcing requirements and/or 'buy American' requirements, all of which are foreshadowed in the Biden climate order mentioned above.

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The Inside Track

What three things should a client consider when choosing counsel for a complex project financing?

By far the most important factor that a client should consider when selecting counsel is experience, not only in terms of specific industry knowledge but also in terms of bringing similar financings to a successful close. No two financings are exactly the same, so it's important that counsel is able to draw from a wide breadth of comparable experience to anticipate issues and to help focus finance participants on key issues without getting distracted with the 'noise' that may distract less experienced counsel. Similarly, ensuring that counsel has a good reputation for being practical – both in terms of solving bespoke deal issues as well as guiding project participants through well-reasoned and market-tested solutions – is the ultimate value-add in terms of minimising time and cost considerations.

What are the most important factors for a client to consider and address to successfully implement a project in your country?

Clients seeking to develop projects in the US must focus on several key factors that differentiate the US market from other markets around the world, all tied to the maturity and size of the US economy. Competition is fierce, as liquidity sources not just from the US but from around the world seek to compete for the relative stability offered by the US's legal and financial systems. Regulatory regimes, while changing course periodically with the shifting political winds, are also relatively stable, but additionally require significant guidance at the local, state and federal levels. And perhaps most importantly, markets in the US can shift quickly – prodded both by policy incentives as well as popular support. Twenty years ago, LNG import terminals were going to be the wave of the new energy future; 10 years ago the renewable power markets were starting to expand at an accelerating pace while not yet being completely considered mainstream; 15 years from now we may think of the combustion engine as a relic of history as nothing but EVs populate our streets. And through it all, having competent and experienced counsel providing timely guidance will remain one of the most important factors of all.

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