

Ergun Publication Series: Global Legal Guides

GLOBAL PROJECT FINANCE GUIDE

2023



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Foreword

Over the past years, there has been a significant rise in the number of players in the global project finance markets, as lenders and sponsors from diverse regions across the globe have entered the fray, and such trend rendered the knowledge about the global practices of project finance more crucial than ever.

With this motivation, we are delighted to present the Global Project Finance Guide 2023, which includes a standardized questionnaire prepared by the editors and answered by highly experienced project finance lawyers worldwide.

The Guide aims to offer its readers a practical summary of the laws and practices governing project finance in several jurisdictions across the globe. It provides an overview of the legislation and international treaties governing the project finance and highlights the security interests, incentives and restrictions related to project finance in each jurisdiction. The Guide also addresses certain technical areas related to project finance, such as taxation, environment and insurance, sheds light on financing Public-Private Partnership (PPP) projects, and discusses issues related to jurisdiction, immunity waivers, trends and projections in the field of project finance.

We extend our appreciation to all the authors of this Guide, who were chosen for their acknowledged expertise in this field.

Dr. Çağdaş Evrim Ergün
Ankara, May 2023

KAZAKHSTAN

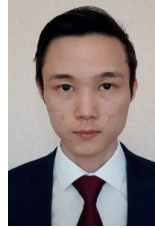
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A. Overview

1. What is the main legislation and international treaties governing the project financing in your jurisdiction?

The main legislation governing the project financing in the Republic of Kazakhstan (“**Kazakhstan**”) are:

- 1) the Constitution dated 30 August 1995;
- 2) the Civil Code (General Part) dated 27 December 1994 and the Civil Code (Special Part) dated 1 July 1999 No. 409-I (the “**Civil Code**”);
- 3) the Entrepreneurial Code dated 29 October 2015 No. 375-V (the “**Entrepreneurial Code**”);
- 4) the Law on Securities Market dated 2 July 2003 No. 461-II;
- 5) the Law on Project Financing and Securitization dated 20 February 2006 No. 126-III;

- 6) the Law on Public Private Partnership dated 31 October 2015 No. 379-V (the “**PPP Law**”);
- 7) the Law on Concessions dated 7 July 2006 No. 167-III (the “**Concessions Law**”); and
- 8) other legal acts.

The main international treaties governing the project financing in Kazakhstan are:

- 1) the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
- 2) the 1985 Seoul Convention on Establishing the Multilateral Investment Guarantee Agency;
- 3) the 1993 Ashgabat Agreement on Cooperation in the field of Investment Activity;
- 4) the 1997 Moscow Convention on Protection of Rights of Investor;

- 5) agreements on encouragement and mutual protection of investments with around 52 countries (USA, UK, Germany, France, Netherlands, Russia, etc.);
- 6) the 1994 Lisbon Energy Charter Treaty; and
- 7) other international treaties⁸.

2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?

Project finance in the strict sense of the term (i.e., where the financing structure is based on the performance of the project itself) has not yet developed and is not tested so far in Kazakhstan. So-called 'project finance' transactions that took place in Kazakhstan so far, in fact, were either conventional bank loans (mostly by international financial institutions like the European Bank for Reconstruction and Development (EBRD) or the International Finance Corporation (IFC)) that have somehow benefited from government guarantees, security packages, direct budgetary investments or net private investments.

Although the Kazakh law on Securitization was adopted in 2006 and later in 2012 it was transformed into the Kazakh law on Project Financing and Securitization (the ("**Law on Project Financing and Securitization**")), we are not aware of major projects being implemented under its framework.

The major projects implemented in Kazakhstan over the last 12 months include the following:

- 1) Construction of the plant for the production of polypropylene in the Atyrau region with a capacity of 500

thousand tons per year (entered the TOP-10 global producers of this product);

- 2) Construction of the first domestic plant for the production of tire products with a capacity of 3.5 million tires annually. It is expected that it will fully cover the needs of domestic automakers. Investments in the project amounted to 171 billion tenge;
- 3) Construction of a gas turbine plant with a capacity of 57 MW at the Aktobe CHPP, construction of 12 renewable energy projects for 385 MW, auctions held for the commissioning of flexible capacities for 1200 MW and the selection of renewable energy projects with a total capacity of 440 MW.

There are a number of major projects announced and/or being implemented in Kazakhstan.

B. Security Interest

3. What are the most commonly used security types in project financings in your jurisdiction?

Kazakh law provides for several methods of securing obligation. Obligations could be secured by penalty, pledge, surety, guarantee, deposit, withholding of the debtor's property, guarantee deposit, security deposit, and other methods stipulated by legislation or agreement⁹.

The most commonly used types of security in Kazakhstan are pledges and guarantees.

Though assignment is not strictly speaking a type of security under Kazakh law, it is quite often a part of a standard security package in international finance transactions.

Also, in a typical project finance deal creditors require so-called "step-in" rights

⁸ <https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan>

⁹ Article 292 of the Civil Code.

that enable them to appoint a nominee to undertake the project company rights together with the project company itself (with the project company remaining liable for all the obligations) or appoint a new obligor in the place of the project company to repay the amounts due to the lenders. These “step-in” rights enable the lenders to take over control of the project and implement the project by finding a long-term buyer, thus ensuring that the project continues generating revenues. It should be noted that Kazakh law does not recognise concept of “step-in rights”.

4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?

Holders of shares of a Kazakh joint-stock company (the “JSC”) and participatory interests of a Kazakh limited liability partnership (the “LLP”) have the right to pledge all or part of such shares or participatory interests respectively in favour of creditors (including foreign creditors). The major shortcoming of such a pledge is that the creditors would not be entitled to take possession of the shares but must instead seek to sell the shares through a public auction.

A pledge over shares of the JSC must be registered with the Central Securities Depository, which will make an entry regarding the pledge in the system of registers of security holders. Such pledge is only valid upon its registration.

Another form of commercial legal entity under Kazakh law is an LLP which has participatory interests as opposed to shares. A pledge over participatory interests of the LLP is, generally, can be registered with the “State Corporation “Government for Citizens” NJSC, unless the Central

Securities Depository is provided under the corporate documents of the LLP and in this case pledge over participatory interests must be registered with the Central Securities Depository.

Establishing and perfecting a share pledge shall be made in the same manner as most other types of pledges of movable property.

It should be noted that a purchaser of more than 50% of shares or participatory interests in a Kazakh company may be required to obtain approval of such purchase from the Competition Agency. If the purchase is subject to the antimonopoly approval (this will depend on the combined asset value or annual turnover of the purchaser and the Kazakh entity), then the purchaser will be required to apply for approval within 30 days after the public auction at which it acquired the shares or participatory interests. If the pledge provides for a transfer of voting rights in the event of default over more than 50% of shares or participatory interests, such transfer may be a subject of separate approval of the Competition Agency.

5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?

Under the Civil Code, a secured creditor cannot simply take possession of the collateral (except for cash and receivables). The creditor shall seek to sell the collateral through a public auction and recover the debt from the sale proceeds. The sale proceeds will be used first to cover expenses incurred in connection with the enforcement and sale (including any fines imposed on the debtor by a court marshal during the enforcement). After that, the proceeds will be used to repay the debts. The remainder, if any, will be returned to

the debtor. Enforcement may take up to 6 months from the moment of default to the sale of the pledged property. It may take longer if the pledgor contests the underlying default.

A pledge agreement may be enforced either through a court-supervised judicial procedure or through an out-of-court procedure. The relevant pledge agreement must specify the mode of enforcement (i.e., through the courts or without court involvement). We outline those in more details below.

Out-of-Court Enforcement. In the out-of-court enforcement procedure, the pledgee (its representative) will organize and carry out the enforcement procedure, including the sale of the collateral. For this, it will be necessary for the pledgee's representative to carry out a number of procedural steps, including preparing and registering a default notice, publishing an auction notice in mass media, and conducting the auction.

In case the auction fails for the reason of being attended by less than two bidders, the pledgee will have the option to either take possession of the collateral at its estimated value determined by a licensed appraiser or to conduct a new auction.

If the pledge agreement provides for out-of-court pledge enforcement procedure, the lenders will be able to enforce the pledge by selling the collateral without the need to pay the court fee or any other State fee. However, if the local borrower refuses to cooperate with the lenders in selling the collateral or otherwise obstructs the enforcement of the pledge, the lenders will have no other recourse but to apply to a Kazakhstani court seeking judicial enforcement of the pledge. In such case, it will be necessary for the lenders to pay a court fee in the amount of 3% of the value of the collateral (if the lenders are successful in their litigation, the court

would require the customer to reimburse the lenders for the paid court fee).

Enforcement may take up to 6 months from the moment of default to the sale of the pledged property. It may take longer if the pledgor contests the underlying default. The enforcement costs should be in a range of several thousand U.S. dollars (without taking into account the court fee). The law, however, provides that expenses incurred by the pledgee are recoverable from the sale proceeds, and the court fees are to be reimbursed by the pledgor.

Judicial Enforcement. If the lender enforces the pledge through a court-supervised procedure, it will be necessary for the lender to pay a court fee in the amount of 3% of the value of the collateral. If the lender is successful in its court action seeking pledge enforcement, the court will order the customer to reimburse the lenders for the court fees paid by the lender in commencing the court action.

In case of enforcement through judicial action, the court marshal is obliged under the law to conduct the auction and sell the collateral within four months after he received the relevant court order. This term may be extended in certain circumstances.

6. Can security interest be established over future assets, rights and receivables of the borrower?

Yes, security interest be established over future assets, rights and receivables of the borrower. With limited exceptions, the law does not limit the types of property that can be pledged. After-acquired assets may be pledged, as well as goods in turnover, such as inventories, raw materials, semi-finished goods, and finished products.

It is possible for a company to pledge its monetary claims under a contract (e.g., insurance agreement or off-take agreements) provided that such claims are

assignable. Where rights to receivables are pledged, the enforcement will be carried out by way of assignment of the relevant rights to the pledgee (i.e., without the public auction as it is with most other types of collateral).

7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?

Final liquidation of a Kazakh legal entity upon bankruptcy involves a disposal of the debtor's assets and distribution of the proceeds to creditors in the payment order established in the Law on Rehabilitation and Bankruptcy.

A pledge would effectively be terminated in the event of bankruptcy of the pledgor. Creditors secured by a pledge become creditors of the second priority and unsecured creditors become creditors of the fifth (last) priority and their claims are satisfied only after settlement of all other claims.¹⁰

In order to become creditors of the second priority secured creditors must submit their claims to an interim manager within one month period from the day of announcement on receiving claims from creditors, otherwise they will become creditors of the fifth (last) priority.

Note that creditors having security other than a pledge governed by Kazakh law would be considered unsecured creditors in insolvency proceedings.

Technical insolvency (i.e., not associated with initiation of insolvency proceedings in the manner set out by Kazakh law) does not affect the steps to be taken by the lenders to enforce their security interest.

8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?

While the concept of so-called 'co-pledgees' has been, arguably, recently introduced in legislation of the Republic of Kazakhstan in Article 305-1 of the Civil Code, in absence of court practice it is still fair to say that Kazakhstan does not recognise trusts and accordingly, security must be granted to the actual creditor, i.e., the creditor which advances the loan. Accordingly, as a matter of Kazakhstan law, a security trustee (who is not the actual creditor) cannot hold security and act as a pledgee on behalf of the creditors. Thus, if loan participation is transferred, any pledge or mortgage for that loan must be re-registered in the name of the new creditor.

Accordingly, it is uncertain whether any security arrangement whereby a security trustee acts as a holder of security on behalf of the creditors would be enforceable in Kazakhstan. Parallel debt structure seems to address above issue and shall be enforceable under Kazakh law. It shall be noted, however, that it has not been tested in the Kazakh courts and there is a theoretical risk that parallel debt structure may be challenged as sham transaction for the purposes of Kazakh law.

C. Incentives and Restrictions

9. What are the main incentives and exemptions for project financing in your jurisdiction?

There are no specific incentives and exemptions for project financing in Kazakhstan. However, some categories of projects may benefit from incentives and exemptions designed to encourage investments in certain industries.

For instance, so-called investment

¹⁰ Article 100 of the Kazakh Law on Rehabilitation and Bankruptcy dated 7 March 2014 No. 176-V (the "Law on Rehabilitation and Bankruptcy")

preferences are available to so-called investment projects, i.e., a complex of measures providing for investments in creation of new or expansion/renewal of existing production facilities⁵. To receive the benefits, the investor (which in most cases should be a Kazakhstani company, e.g., a local subsidiary of a foreign investor) shall sign an investment contract with the government.

In case of projects being implemented in the framework of the PPP Law or Concessions Law, an investor is entitled to get such measures of so-called 'state support' as state sureties for infrastructure bonds; state guarantees for loans, the proceeds of which are to be used for PPP/concession agreement purposes; transfer of the exclusive IP rights owned by the State; provision of so-called 'in-kind grants' (e.g., land, machinery); co-financing by the State; guaranteed offtake by the State of a certain amount of goods (works, services) to be produced by the PPP/concession facility, and/or some others¹¹.

Depending on the size of the project, an investor may get the following investment preferences: exemption from customs duties, exemption from import value-added tax (VAT) for certain specified products, state in-kind grants, i.e., assets; tax preferences in the form of corporate income tax and land tax exemptions, as well as a property tax exemption, stability of tax laws, stability of work permit laws; and/or some others.

10. Are there any incentives or exemptions specifically applicable to foreign investors?

Kazakhstan is a party to bilateral and multilateral investment treaties which provide for such commonly used protection of foreign investors as protection against

expropriation without compensation and against discrimination, national treatment or most-favoured nation treatment of foreign investors, guarantees of fair and equitable treatment, etc.

11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?

There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency. However, currency control and regulation requirements may apply: e.g., if the amount of a loan to be granted from a foreign legal entity to a local legal entity exceeds 500,000 US dollars, then corresponding loan agreement is subject to record registration with the National Bank of Kazakhstan.¹²

12. Are there any restrictions for foreign investments in your jurisdiction?

There are restrictions on foreign ownership and/or control in legal entities operating in certain industries in Kazakhstan, for example, a 20% limit in mass media companies, a 49% limit in airline companies, a 49% limit in telecommunication companies being intercity and/or international operators; restrictions on foreign companies' participation in banks and insurance companies, etc.

13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?

There are no specific requirements for project financings.

¹¹ Article 27 of the PPP Law, Article 14 of the Concessions Law

¹² Paragraph 9 of the Rules for Monitoring Currency Operations in Kazakhstan approved by Resolution of the Management Board of the National Bank of Kazakhstan dated 10 April 2019 No. 64.

Requirements may apply in case of seeking so-called investment preferences under the Commercial Code. There are following minimum investment requirements in relation to investment projects¹³:

- around 16 million US dollars for priority investment projects on construction of new manufacturing objects;
- around 40 million US dollars for priority investment projects on expansion and/or modernization of existing manufacturing objects;
- around 60 million US dollars for conclusion of an investment agreement;
- around 600 million US dollars over 8 years for conclusion of an investment obligations agreement.

14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.

Normally the following registration and filing requirements may arise in a project finance transaction being implemented in Kazakhstan:

- registration of rights to and encumbrances on real estate (e.g., lease of a land plot);
- registration of pledge to ensure its first ranking (in case of most types of movable property) or to ensure its validity (in case of immovable property and some types of movable property);
- record registration of loan agreements for the amount exceeding 500,000 US dollars if a loan is provided by a foreign legal entity to a local legal entity;

- apostillization or legalization of documents issued abroad should the relevant document be submitted to a local state body.

D. Insurance

15. Can local insurance policies be governed by a foreign law?

Property interests located on the territory of Kazakhstan and belonging to a legal entity or an individual resident of Kazakhstan may only be insured by a local insurance company or a local branch of foreign insurance (reinsurance) company.¹⁴

Agreements between local residents shall be governed by Kazakh law. Therefore, local insurance agreements between local insurers and local residents shall be governed by Kazakh law. Should a foreigner be seeking a local insurance policy from a local insurer, generally it could be governed by a foreign law assuming that all Kazakh law requirements are met¹⁵.

16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

A policy holder or a beneficiary under an insurance policy must have insurable interest in the insured property.¹⁶ Accordingly, where the lender has insurable interest in the insured property, the lender may be named as the beneficiary in the relevant insurance policy. However, where the lender does not have such interest, it may not be named as the beneficiary.

Accordingly, Kazakh legislation provides a pledgee with a priority right to receive insurance proceeds under an insurance contract relating to the pledged property.

¹³ Article 284, 295-2, 295-3 of the Kazakh Entrepreneurial Code dated 29 October 2015 No. 375-V

¹⁴ Article 5-1.1 of the Kazakh Law on Insurance Activity dated 18 December 2000 No. 126-II

¹⁵ Articles 1084 and 1112 of the Civil Code

¹⁶ Article 817 of the Civil Code

The pledgor will be entitled to the insurance proceeds only if the pledgee waives its priority rights to such insurance proceeds.¹⁷ Thus, where the insured property is pledged in favor of the lenders, the lenders will have priority right to the insurance proceeds in respect of such property.

E. Overview

17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?

There are no issues in relation to the insurance provisions under the project financing documentation. As stated in question 14, it is worth mentioning that local insurance companies or local branches of foreign insurance (reinsurance) companies are allowed to insure risks in Kazakhstan (foreign reinsurance is widely used in projects with foreign investors).

F. Financing of Public-Private Partnership (PPP) Projects

18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?

Yes, PPP is a permitted method of developing projects. Moreover, Kazakhstan has special PPP and Concessions Law and developed PPP legislation as well as political will to use the PPP tool to improve local infrastructure.

As of 1 August 2022, 1,357 PPP projects are being implemented in Kazakhstan which attracted more than 29 billion US dollars of investment. However, in practice most PPP projects are of small size, in the area of

education, healthcare and transportation. The Big Almaty Ring Road, also known as “BAKAD” by its local abbreviation, is the only project that is considered to be an internationally tendered long-term PPP that has reached financial close with the involvement of foreign banks.

19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?

Yes, direct agreements between the public authorities and the Lenders permissible are under the local law. However, they are not commonly seen in the Project Finance market in Kazakhstan as until recently they were available only for major PPP and concession projects.

Direct agreement with a lender of a private partner shall provide for the following conditions¹⁸:

- 1) obligation of a public partner to inform lenders of a private partner on material breach of obligations under a PPP agreement that could lead to default under a PPP agreement;
- 2) pledge of rights under a PPP agreement and (or) assignment of claims, or transfer of debt of a private partner shall be upon consent of a public partner;
- 3) right of creditors of a private partner to request replacement of a private partner in case of material breach of its obligations under a PPP agreement, which may lead to default under terms of a PPP agreement, as well as to nominate a new private partner;
- 4) procedure for replacement of a private partner;

¹⁷ Article 306.2 of the Civil Code

¹⁸ Article 47 of the PPP Law.

- 5) other conditions not contradicting the legislation of the Republic of Kazakhstan.

It should be mentioned that the Concession Law also stipulates the concept of direct agreement, but it is available only for the concession projects of special importance¹⁹.

20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.

The Concessions Law contemplates the following measures of state support for the concessionary to encourage private investments into the concession projects²⁰:

- (a) state sureties for infrastructure bonds issued and placed in accordance with the concession agreement on the Kazakh stock exchange;
- (b) state guarantees for loans, the proceeds of which are to be used for concession agreement purposes;
- (c) transfer of the exclusive IP rights owned by the state to the concessionary;
- (d) provision of 'in-kind grants' (e.g., land, machinery);
- (e) co-financing of concession projects by the state; and
- (f) guaranteed offtake by the state of a certain amount of goods (works, services) to be produced by the concession facility.

A concessionary may be granted one or several of the above measures of state support, however, if the concession facility is to remain private property when completed, rather than being transferred to state ownership, the concessionary

cannot expect state support in the form of state sureties for infrastructure bonds, state guarantees for loans and co-financing by the state²¹.

The Concessions Law also provides the total amount of obligations of the conessor related to²²:

- (a) the compensation of investment expenses of the concessionary;
- (b) state surety for infrastructure bonds;
- (c) state guarantees for loans;
- (d) transfer to the concessionary of exclusive rights for intellectual property that belongs to the state;
- (e) provision of 'in-kind' grants; and
- (f) co-financing of the concession project, shall not exceed the concessionary's total expenditures for construction or reconstruction of the concession facility or both, incurred under the relevant concession agreement.

The PPP Law provides measures of state support identical to the Concession Law, though, unlike the Concession Law, the list of these measures of the 'state support' in the PPP Law is not exhaustive²³. Another difference is that unlike the Concession Law, the PPP Law does not require the infrastructure bonds to be placed on the Kazakhstan stock exchange only (i.e., they may be placed abroad). The PPP Law also provides that the total amount of measures of state support and payments from the state budget for the purposes of financing (recovery of costs) in relation to creation and (or) reconstruction of the PPP facility, cannot exceed the total amount of expenditures for construction and (or) reconstruction of the PPP facility.

¹⁹ Article 26-2 of the Concession Law.

²⁰ Article 14 of the Concession Law.

²¹ Article 14.2 of the Concession Law.

²² Article 14.3 of the Concession Law.

²³ Article 27.2 of the PPP Law.

21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?

One of the main principles of the PPP is securing mutually beneficial balance of allocation of risks between public and private partners²⁴. As a general principle of the PPP Law, risk should be placed where it is best managed and such allocation shall be stipulated in the PPP agreement²⁵. Generally, political risk events usually are under the responsibility of the public party under the PPP agreements.

22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?

Both the PPP Law and the Concessions Law lack the 'stability clause' that is meant to protect the private party from possible changes in legislation. However, in both cases the private party may rely to certain extent on the general rule set out in Article 383 of the Civil Code which states that if, after the conclusion of the contract, the legislation establishes rules binding on the parties other than those that were in force at the time of the conclusion of the contract, the terms of the concluded contract shall remain in force unless the law establishes that its effect extends to relations arising from previously concluded contracts.

23. Is force majeure specifically regulated under the local legislation?

Yes, force majeure is specifically regulated under Kazakhstan legislation.

According to Kazakh law²⁶, an entity that

has not fulfilled or improperly fulfilled its obligations shall be liable if it does not prove that proper performance was impossible due to force majeure, which includes emergencies and unavoidable circumstances (natural disasters, military actions, etc). However, Kazakh law emphasizes that such conditions do not include, in particular, a shortage of the items, works, or services required for the execution on the market. The agreement may allow for additional consequences of force majeure. There is also no remedy for any party to the contract, as in case of force majeure both parties suffer losses.

Entrepreneurs who are unable to meet their contractual duties due to an emergency must demonstrate how the incident affected their ability to fulfill each obligation in order to establish force majeure. They may submit an application to the Foreign Trade Chamber to support the force majeure situation. According to the terms of international agreements and foreign trade contracts, the Foreign Trade Chamber certifies the force majeure.

It is also worth mentioning that the term of the PPP agreement may be extended by a court decision in the manner prescribed by the PPP agreement in cases such as delays or suspension of the public-private partnership project as a result of circumstances beyond the control of the parties to the PPP agreement²⁷.

24. What are the general environmental and social requirements in project financings?

The Environmental Code regulates environmental use and protection issues. Facilities that have the potential to have an impact on the environment or human

24 Article 3.2 of the PPP Law.

25 Article 14 of the PPP Law.

26 Article 359 of the Civil Code.

27 Article 48.3 of the PPP Law.

health must conduct an environmental impact assessment (“EIA”). A thorough process for carrying out an environmental impact assessment is provided by the Code. Depending on the classification of the enterprise, the Code specifies the kind and specifics of the environmental licenses needed. Chapter 7 of the Environmental Code contains a section on EIAs, the circumstances in which they must be performed, and the procedure for conducting the EIA.

The Equator principles and the environmental, social, and governance safeguards which may be crucial for bankability are not specifically regulated under Kazakh law. Moreover, some requirements of the Equator principles related to the resettlement do not conform to the Kazakhstani legislation.

The State environmental inspectors of the Ministry for Environment Protection or its local territorial departments are entitled to carry out regular, annual environmental inspections of companies that are required to have environmental permits. If a company commits no environmental violations during three consecutive years, state environmental inspections may be conducted once every three years. However, in cases of environmental accidents, health, safety and other emergency situations, State environmental inspectors are empowered to carry out extraordinary inspections.

G. Jurisdiction, Waiver of Immunity

25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

Even though the Concession Law does not specifically prohibit having a foreign law

as the governing law of the concession agreement, our interpretation of the law suggests that only Kazakh law can be governing law of the concession agreements.

The PPP Law explicitly confirms that if a private sector partner under a PPP agreement is a non-resident, the parties shall have discretion to choose the applicable law of the PPP agreement.²⁸

The state (represented by the government) takes part in relationships regulated by civil legislation on an equal basis with other participants and is liable for its undertakings with its own property. Therefore, if the government enters into commercial activity, it loses special treatment or sovereign immunity. The government, as a public person, waives its sovereign immunity.

The concept of waiver of rights is, generally, not recognised by Kazakh law, however, if the State enters, for instance, into an agreement governed by English law that provides for a waiver immunity and international arbitration, such a contractual arrangement shall be legal and enforceable from the Kazakh law perspective.

26. Can financing documents provide for arbitration clauses?

Yes, financing documents can provide arbitration clauses.

The PPP Law²⁹, as amended, extends the circumstances in which the parties to the PPP agreement may agree on Kazakhstan or international arbitration for dispute resolution purposes. In addition to the case where the private partner is a non-resident, the PPP Law allows for arbitration to be selected if at least one of the private partner’s shareholders holding 25% or more of voting shares is non-resident in

²⁸ Article 46.3 of the PPP Law.

²⁹ Article 57.2 of the PPP Law.

Kazakhstan. However, this provision applies only to PPP projects costing more than four million times MCI (approx. US \$30 million).

Only concession projects of special importance can benefit from an international arbitration clause in the concession agreement, even if all parties to it are residents of Kazakhstan, but at least one shareholder of the concessionary is a non-resident³⁰.

The Republic of Kazakhstan is not party to any multilateral or bilateral treaties with any Western jurisdiction or the United States for the mutual enforcement of court judgments. Consequently, should a judgment be obtained from a court in any Western jurisdiction or the United States, it is highly unlikely to be given direct effect in Kazakhstan courts.

H. Trends and Projections

27. What are the main current trends in project financings in your jurisdiction?

PPP projects in the field of education account for more than half (55%) of the total number of PPP contracts. In second and third place are the healthcare and utilities sectors, respectively. At the same time, the largest projects have been implemented in the field of transport and infrastructure.

It is expected that proper PPPs and project finance deals will finally take off in Kazakhstan in the near future, firstly because proper legislation on PPPs has been put in place, secondly, after decades of neglect, the government of Kazakhstan has finally not only declared, but seems to confirm its readiness to improve the investment climate and to attract private investments through PPPs (including into the housing and utilities sector)

and decided to invest at least part of the wealth from commodity exports in long-postponed infrastructure projects, thirdly, following the coronavirus outbreak, the need to attract private investment in Kazakhstan's healthcare system, agriculture, utilities, and other public infrastructure becomes even more acute. Such IFIs as EBRD, ADB and IFC provide technical assistance in the development of projects in the mentioned areas.

28. Are any significant development or change expected in the near future in the project finance market?

Kazakhstan should tap into the huge potential of participating in China's One Belt and One Road Initiative by promoting PPP best practice to ensure high quality at lower costs.

Activation of PPP in infrastructure, energy, transport is expected. In June 2022, President Tokayev announced an investment package worth 20 billion USD until 2025 aimed at enhancing the diversification of transit and transport routes, as well as the implementation of integrated logistics solutions. Among the proposed projects, are upgrades to the Middle Corridor, which would help connect Kazakhstan to the Black Sea via Azerbaijan and Georgia.

29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?

LIBOR is being replaced by such products as Sonia for British pounds, Tona for Japanese yen, Saron for Swiss francs, and others. In addition, interest rates may be calculated depending on the so-called base rate which is set out by the National Bank of Kazakhstan³¹.

30 Article 27.2 of the Concession Law.

31 16.75% as of March 2023.

KYRGYZSTAN

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A. Overview

1. What is the main legislation and international treaties governing the project financing in your jurisdiction?

The main legislation governing project financing in the Kyrgyz Republic includes:

Civil Code of the Kyrgyz Republic dated 8 May 1996 No. 15 (Part I);

Civil Code of the Kyrgyz Republic dated 5 January 1998 No. 1 (Part II);

Land Code of the Kyrgyz Republic dated 2 June 1999 No. 45;

The Law of the Kyrgyz Republic “On business partnerships and companies” dated 15 November 1996 No. 60;

The Law of the Kyrgyz Republic “On joint stock companies” dated 27 March 2003 No. 64;

The Law of the Kyrgyz Republic “On investments in the Kyrgyz Republic” dated 27 March 2003 No. 66;

The Law of the Kyrgyz Republic “On securities market” dated 24 July 2009 No. 251;

The Law of the Kyrgyz Republic “On public-private partnership” dated 11 August 2021 No. 98;

The Law of the Kyrgyz Republic “On Pledge” dated 12 March 2005 No. 49;

As for the international treaties, the following are relevant:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) dated 10 June 1958;

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) dated 18 March 1965;

In addition, The Kyrgyz Republic has entered into a number of bilateral treaties on mutual support, encouragement and protection of investment with the following countries:

The People's Republic of China (1995);
The Republic of Turkey (1996);
The Republic of Ukraine (1993);
The United States of America (1994);
The Republic of Armenia (1995);
The United Kingdom of Great Britain and Northern Ireland (1998);
The Republic of France (1997);
The Islamic Republic of Iran (2005);
The Republic of Azerbaijan (1997);
The Federal Republic of Germany (2006);
The Republic of Georgia (2016);
The Republic of India (2000);
The Republic of Kazakhstan (1997);
The Republic of Belarus (2001);
The People's Republic of Mongolia (1999);
The Swiss Confederation (2003);
The Republic of Tajikistan (2001);
The Kingdom of Sweden (2003);
The Republic of Moldova (2004);
The Republic of Finland (2004);
The Republic of Korea (2008);
The Republic of Latvia (2008);
The Republic of Lithuania (2009);
Denmark (2001);
Malaysia (1995);
The Islamic Republic of Pakistan (1996);
The Republic of Indonesia (1997);
The Republic of Uzbekistan (1997);
The United Arab Emirates (2014);
State of Qatar (2014);
State of Kuwait (2015);
The Republic of Austria (2016).

It is important to note that project financing in the Kyrgyz Republic may also be subject to various regulations issued by the National Bank of the Kyrgyz Republic and other regulatory bodies.

2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?

The project finance market in the Kyrgyz Republic is relatively small and still developing. However, there have been some notable project financings in the country such as

- Construction of Upper Naryn hydropower plant cascade (still ongoing. The project provides for the construction of four HPPs with total installed capacity of 237.7 MW. The total cost of the project – 727 650 000 US dollars;
- Building infrastructure of information system for fee collection. The project provides for the set-up of infrastructure of the information system for fee collection that includes 42 control points, 2 user service centers, one of which will be combined with the service center for freight traffic on public roads using global navigation technologies (GPS, GLONASS, Galileo etc.) The total cost of the project – 58 200 000 US dollars;

Overall, while the project finance market in the Kyrgyz Republic is still developing, there are opportunities for financing in the country, particularly in the energy sector.

B. Security Interest

3. What are the most commonly used security types in project financings in your jurisdiction?

The types of security that may be used can vary depending on the specific circumstances of the project and the preferences of the parties involved. Some common types of security that may be used in project financings include:

- **Mortgage:** This is a form of security that involves the transfer of a property interest to the lender, which serves as collateral for the loan. If the borrower defaults on the loan, the lender may foreclose on the property and sell it to recover its investment.
- **Pledge:** This is a form of security that involves the transfer of possession of a movable asset, such as shares in a company or equipment, to the lender as collateral for the loan. If the borrower defaults on the loan, the lender may sell the pledged asset to recover its investment.
- **Guarantee:** This is a form of security that involves a third party (such as a parent company or a government entity) providing a guarantee to the lender that the borrower will repay the loan. If the borrower defaults on the loan, the guarantor is obligated to repay the loan on the borrower's behalf.
- **Assignment of rights:** An assignment of rights is a transfer of contractual rights from one party to another. In project financings in the Kyrgyz Republic, an assignment of rights is commonly used to transfer the right to receive payments from the project to the lender, thereby providing additional security for the lender.

It is important to note that the use of security in project financings can be complex and may involve a combination of different types of security. The specific security types used in a project financing transaction in the Kyrgyz Republic will depend on the nature of the project and the lender's requirements. Lenders typically seek to obtain as much security as possible to protect their investment in the project.

4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific

requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?

Yes, the shares of the company can be pledged as security to the benefit of lenders.

There are specific requirements and procedures that must be followed for establishing or perfecting a share pledge in the Kyrgyz Republic.

Under the Kyrgyz legislation, a share pledge is established through a written agreement between the pledgor (the shareholder) and the pledgee (the creditor). The agreement must specify the number and type of shares being pledged, the amount of the secured debt, the duration of the pledge and other terms.

To perfect a share pledge, the pledge agreement must be registered with the Pledge Registration Department of the Ministry of Justice of the Kyrgyz Republic. The registration process involves paying state fee, submitting application and the original pledge agreement.

It's important to note that failure to register a share pledge with the authorized state body may result in the pledge being ineffective against third parties, so it's essential to follow the proper registration procedures to ensure the validity and enforceability of the pledge.

5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?

Yes, private sale is a recognized method for enforcing a share pledge in the Kyrgyz Republic. The pledgor and pledgee can agree on the terms of the private sale in the pledge agreement, or the sale can be conducted through a court-approved public auction.

In the event of default by the pledgor, the pledgee may enforce the pledge by selling the pledged shares. The pledgee must provide the pledgor with notice of the intended sale, including the time, place, and method of sale, as well as the minimum price for the sale, which must be equal to or greater than the outstanding debt secured by the pledge.

If the pledged shares are sold for more than the outstanding debt, the excess proceeds must be returned to the pledgor. If the pledged shares are sold for less than the outstanding debt, the pledgor remains liable for the remaining debt.

As for the endorsement types used for the share certificates, on the territory of the Kyrgyz Republic, all emissive securities are issued in form of book entry securities.

6. Can security interest be established over future assets, rights and receivables of the borrower?

Yes, security interests can be established over future assets, rights, and receivables of the borrower in the Kyrgyz Republic.

Under the Kyrgyz legislation, a security interest can be established over future assets and rights by way of a pledge agreement. The agreement must specify the future assets and rights to be pledged. Similarly, security interests can be established over future receivables through a pledge agreement.

It is important to note that the specific requirements and procedures for establishing security interests over future assets, rights, and receivables may vary depending on the type of asset or right in question and the specific terms of the pledge agreement.

7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?

Regarding the steps to be taken by lenders to enforce their security interest in the event of the borrower's insolvency, technical insolvency, or composition process in the Kyrgyz Republic, there may be some variation depending on the specific circumstances and the terms of the security agreement. However, the general steps that may be taken are:

- **Verify the security interest:** The lenders should review the security agreement and ensure that it has been properly executed and registered, if applicable, to determine the validity and enforceability of the security interest.
- **Assess the priority of the security interest:** If there are multiple security interests over the same asset or property, the lenders should assess the priority of their security interest relative to other security interests.
- **Notify the insolvency administrator:** The lenders should notify the insolvency administrator or receiver of their security interest and provide evidence of the security interest, such as a copy of the security agreement and proof of registration.
- **Participate in the insolvency proceedings:** The lenders should participate in the insolvency proceedings and file a claim for the outstanding debt secured by the security interest.

Enforce the security interest: If the borrower's assets are insufficient to satisfy the outstanding debt, the lenders may enforce their security interest by selling the pledged assets or property through a public auction or private sale, as permitted by Kyrgyz legislation.

8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?

The concept of a security trustee is not specifically provided for in the laws of the Kyrgyz Republic. However, lenders (pledgees) can appoint a pledge manager to represent the pledgee in exercising all of the pledgee's rights to the pledged property.

Information on the appointment or termination of the powers of the pledge manager shall be sent to the pledger and in case of a registered pledge shall be submitted to the local body of the authorized state body for registration of rights to immovable property, if the subject of the pledge is immovable property, if the subject of the pledge is movable property, the information shall be reflected in the pledge notice as provided by the Kyrgyz legislation.

In terms of the use of a parallel debt mechanism, this is not expressly provided for in the laws of the Kyrgyz Republic.

C. Incentives and Restrictions

9. What are the main incentives and exemptions for project financing in your jurisdiction?

The main incentives and exemptions for project financing in the Kyrgyz Republic include:

- **Tax incentives:** The Kyrgyz Republic offers a range of tax incentives to attract foreign investment, including exemptions or reductions in corporate income tax, property tax, and customs duties.
- **Investment protection:** The Kyrgyz Republic has signed bilateral investment treaties with a number of countries, which provide foreign investors with protection against expropriation and other forms of political risk. These agreements also

typically include provisions for the settlement of investment disputes through international arbitration.

- **Government guarantees:** The Kyrgyz Republic government may provide guarantees for project financing, which can reduce the perceived risk of the investment and lower the financing costs. These guarantees typically cover political risks such as expropriation, breach of contract by the government, and transfer restrictions.
- **Concessional financing:** The Kyrgyz Republic is eligible for concessional financing from international financial institutions such as the World Bank, Asian Development Bank, and European Bank for Reconstruction and Development. This financing is typically offered at lower interest rates and longer repayment periods than commercial financing.
- **Renewable energy incentives:** The Kyrgyz Republic has significant potential for renewable energy development, and offers a range of incentives for projects in this sector. These incentives include feed-in tariffs, tax exemptions, and simplified licensing procedures.
- **Infrastructure development:** The Kyrgyz Republic government is actively promoting infrastructure development, including transport, energy, and telecommunications. Projects in these sectors may be eligible for government support, including tax incentives and guarantees.

It is important to note that the specific incentives and exemptions available for project financing in the Kyrgyz Republic may vary depending on the sector, size, and location of the project.

10. Are there any incentives or exemptions specifically applicable to foreign investors?

There are several incentives and exemptions available specifically for foreign investors in the Kyrgyz Republic. Some of these incentives and exemptions include:

- National treatment of business activities, equal investment rights of domestic and foreign investors, no intervention into the business activities of investors, protection and restitution of infringed rights of investors in accordance with the laws of the Kyrgyz Republic;
- Export or repatriation of profit gained on investment, proceeds of investment activities in the Kyrgyz Republic, property, and information, out of the Kyrgyz Republic;
- Protection against expropriation (nationalization, requisition, or other equivalent measures, including action or omission on the part of authorized government bodies of the Kyrgyz Republic that has resulted in seizure of investor's funds or investor's deprivation of the possibility to use the results of their investment). In exceptional cases involving public interest, investments may be expropriated with concurrent state guarantees of appropriate coverage of damage incurred by the investor;
- The investor's right to freely use the income derived from their activities in the Kyrgyz Republic;
- The freedom to invest in any form into objects and activities not prohibited by the legislation of the Kyrgyz Republic, including the activities subject to licensing;
- Freedom of monetary transactions (free conversion of currency, unbound and unrestricted money transfers; should provisions restricting money transfers in foreign currency be introduced into the legislation of the Kyrgyz Republic, these provisions will not apply to foreign investors, with the exception of cases where investors engage in illegitimate activities (such as money laundering);
- The right to: establish legal entities of any organizational and legal form provided by the legislation of the Kyrgyz Republic; open branches and representative offices within the territory of the Kyrgyz Republic; select any organizational and managerial structure for the business entities, unless a different structure is explicitly required by law for the given organizational and legal form of a business entity; acquire property (except land plots), shares, other securities, including governmental securities; participate in privatization of state property, establish associations and other unions; hire local and foreign employees subject to the legislation of the Kyrgyz Republic; and engage in other investment activities not prohibited by legislation in the Kyrgyz Republic;
- Recognition by public authorities and officials of the Kyrgyz Republic of all intellectual property rights of foreign investors;
- In the event of amendments to the legislation on investments, or the tax legislation of the Kyrgyz Republic or the non-tax payments legislation, the investor and the investee who meet the statutory requirements have the right, during 10 years from the date of signing the stabilization agreement, to choose such conditions as may be most favourable to them for paying taxes including value added tax but excluding other indirect taxes, and

nontax payments (except fees and charges for public services) in the manner provided by the laws of the Kyrgyz Republic. The procedure and conditions for applying stabilization regime to tax and nontax legal relationships are established by the laws of the Kyrgyz Republic;

- Other guarantees specifically provided in bilateral and multilateral international treaties on the promotion and protection of investment, to which the Kyrgyz Republic is a party.

11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?

No. There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency.

12. Are there any restrictions for foreign investments in your jurisdiction?

Yes, there are restrictions on foreign investments in the Kyrgyz Republic. Below are some of the key restrictions on foreign investments in the Kyrgyz Republic:

Restrictions on foreign ownership: Certain sectors of the economy, such as media, broadcasting, and defense industries, may be subject to restrictions on foreign ownership.

Requirements for obtaining permits: Foreign investors may need to obtain permits or approvals from government authorities before making investments in certain sectors or industries. These requirements may vary depending on the nature and size of the investment.

Limits on land ownership: Foreign individuals and legal entities are not allowed to own land in the Kyrgyz Republic, except in limited circumstances

such as transfer into ownership in case of foreclosure of mortgage loan with the obligation of subsequent alienation of the land plot within two years from the date of origination of ownership of land or long-term leasehold rights.

It is important to note that the regulations and restrictions on foreign investments in the Kyrgyz Republic are subject to change, and may vary depending on the nature and size of the investment.

13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?

There is no specific minimum equity requirement for project financing in the Kyrgyz Republic under the legislation. However, the actual equity requirement may vary depending on the type, size, and risk profile of the project, as well as the requirements of the lenders or investors involved.

14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.

To be valid and enforceable in the Kyrgyz Republic, project finance documents may need to be registered or filed with various government authorities. The registration and filing requirements that are applicable will depend on the nature and structure of the project, as well as the type of document in question. Below are some of the common registration and filing requirements that may be applicable for project finance documents in the Kyrgyz Republic:

Registration of security documents: Security documents, such as mortgages or pledges, must be registered with the authorized state bodies. The registration

process involves filing an application and paying a registration fee. Once registered, the security document will be publicly recorded and enforceable against third parties.

Filing of corporate documents:
Project companies may need to file corporate documents, such as articles of incorporation or bylaws, with the authorized state bodies. This filing is required to establish the legal existence of the company and ensure that it is registered and in good standing.

Compliance with licensing requirements:
Certain projects, such as those in the energy or mining sectors, may require special permits or licenses from government agencies. Compliance with these licensing requirements may be a condition precedent to the validity and enforceability of project finance documents.

It is important to note that the specific registration and filing requirements applicable to project finance documents in the Kyrgyz Republic may vary depending on the type of project and the legal structure of the transaction.

D. Insurance

15. Can local insurance policies be governed by a foreign law?

The insurance activity is mainly regulated by the Law of the Kyrgyz Republic "On organization of insurance in the Kyrgyz Republic" dated 23 July 1998 No. 96 ("**Insurance law**") and fundamentals are provided in the Civil Code of the Kyrgyz Republic dated 8 May 1996 No.15. In accordance with Insurance law the insurance policy should be governed by Kyrgyz laws, including the terms and conditions of the policy and the rights and obligations of the insurer and the insured. It's worth noting that insurance activity is subject to licensing in the Kyrgyz Republic.

16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

Generally, the assignment of insurance and reinsurance proceeds under insurance or reinsurance policies to the benefit of the lenders is not prohibited under Insurance law. It's worth noting that this might be subject to certain restrictions and limitations. It's essential to review the terms and conditions of each insurance agreement.

17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?

In Kyrgyzstan there might be several potential complications, concerns or issues in relation to the insurance provisions under the project financing documentation. Firstly, their compliance to project financing documentation under legal regulatory framework set forth by Kyrgyzstani legislation. Secondly, one of the key concerns with insurance provisions in project financing is ensuring that the insurance coverage is adequate to protect the project and its participants from potential risks and losses. The project documents may require certain types and levels of insurance coverage, and the insurance policies should be carefully reviewed to ensure they meet these requirements. Thirdly, insurance provisions of project financing documentation should clearly state and include events of force majeure defined by Kyrgyzstani legislation. Overall, it is essential for parties to carefully review and consider the insurance provisions in project financing documentation for compliance with legislation.

E. Financing of Public-Private Partnership (PPP) Projects

18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?

In accordance with the legislation of the Kyrgyz Republic, **Public-Private Partnership ("PPP")** is a permitted method of developing projects. The PPP as a method of developing projects is regulated by the Law of the Kyrgyz Republic "On public-private partnership" dated 11 August 2021 No. 98.

The Kyrgyz Republic has been actively developing PPP projects. To date, there are 19 implemented PPP projects, 5 PPP projects at the competition stage, and 44 PPP projects are currently under preparation. Most PPP projects are developed in areas of transport, energy, social, and environment. Some of the prominent PPP projects developed in Kyrgyzstan are the following:

- Establishment of hemodialysis centers in Kyrgyz Republic;
- Electronic ticketing in public transport;
- Reconstruction of the cinema for children "Kyzyl Kyrgyzstan";
- Modernization of airports of the Kyrgyz Republic;
- Bishkek city public transportation improvement;
- Installation of CT scanners in public healthcare institutions.

19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?

In accordance with Kyrgyzstani legislation on PPP, direct agreements between the

public authorities and the Lenders are permissible only in case the amount of investment is more than 1 billion Kyrgyz soms (approximately 11 439 278 USD). The PPP project is awarded through direct negotiations provided that the investment meets the set investment amount and the qualification requirements.

20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.

The government of the Kyrgyz Republic has demonstrated commitment to supporting PPP projects. There are several government supports available in the Kyrgyz Republic:

- Provision of guarantee for the fulfillment of obligations by the state partner.
- Provision of guarantee of minimum profitability of the PPP project;
- Provisions by the tax legislation of the Kyrgyz Republic;
- Provisions of preferential rental rates for the use of property owned by the state and/or municipality;
- Provision of state or municipal preferences under the PPP agreement;
- Provision of assistance in obtaining permits and licenses.

Some of the government guarantees available in the Kyrgyz Republic:

- Non-interference by the state partner in the economic activity of the private partner;
- Protection of property of a private partner from nationalization or other equivalent measures;
- Rightly to freely own, use and dispose of investments made to the PPP project and the income and profits received from it;

- Right to carry out operations on the sale and purchase of cash and non-cash national and/or foreign currency on the territory of the Kyrgyz Republic;
- Right to review the terms or early terminations of the PPP agreement and receive compensation for damage caused due to the adoption of legal acts deteriorating conditions of project implementation.

21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?

The allocation of risk between partners is one of the most crucial ways to ensure the successful implementation of a PPP arrangement. Article 6 of the PPP law ensures principle of fair distribution of risks. In accordance with Article 14 of the PPP law, PPP agreement should include term on distribution of risks between the public and private partners.

The allocation of political risk in PPP agreements depends on the specific terms of the agreement, as well as the nature of the risk. Generally, political risks are shared between the public and private partners. In some cases, the public party may assume a greater share of the political risk, particularly in cases where the project involves a public service or infrastructure that is of critical importance to the government. On the other hand, in some cases, the private party may assume more political risk in exchange for greater potential rewards or as a condition of securing financing for the project. Therefore, the allocation of political risk in PPP agreements will depend on the specific circumstances of the project and the priorities and preferences of the public and private parties involved in PPP arrangements.

22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?

Yes, in accordance with Article 6 of the PPP Law any laws and by-laws adopted after the conclusion of PPP agreement and affecting PPP issues are not applicable to existing project agreements. An exemption of applicability is illustrated in cases when the initiative to apply amended legal provisions or newly adopted laws comes from the private partner. In this case, amendments to existing agreements shall be made in accordance with the procedure stipulated by the relevant PPP agreement.

23. Is force majeure specifically regulated under the local legislation?

Generally, force majeure is regulated by the civil legislation of the Kyrgyz Republic. Para. 3 of Article 356 of the Civil Code of the Kyrgyz Republic defines force majeure and provides a respective regulation for its applicability. Para. 3 of Article 356 of the Civil Code provides a basis for exemption from liability in cases of force majeure. In accordance with the above-mentioned legal provision force majeure is extraordinary and unavoidable circumstances under the given conditions. Such circumstances, however, do not include a breach of duty on the part of the debtor's counterparties, the unavailability of goods on the market needed for the fulfillment of obligations, or the debtor's lack of the necessary funds.

It's worth noting that in accordance with provisions of the above-mentioned Article, the agreement may provide for other conditions of exemption from liability.

24. What are the general environmental and social requirements in project financings?

In accordance with Kyrgyz law, it's prohibited to finance and implement projects related to use of natural resources without a positive conclusion of the state's ecological expertise. Particularly, according to the Regulation on the procedure of environmental impact assessment in the Kyrgyz Republic projects should undergo the assessment process to consider the potential environmental impact of the project. Moreover, an environmental management plan should be designed to ensure that the project will be operated in an environmentally responsible manner. Regarding social requirements in project financing, there are general requirements to engage with local communities and stakeholders and ensure compliance with labor legislation of the Kyrgyz Republic.

F. Jurisdiction, Waiver of Immunity

25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

In accordance with the civil legislation of the Kyrgyz Republic, agreements can be governed by foreign law. The enforceability of a submission to a foreign law rather than Kyrgyz law should be clearly indicated or directly derived from the terms of the agreement. In accordance with Kyrgyz legislation, the freedom of parties to choose the governing law of their agreement is recognized. Waiver of immunity is generally recognized action which is subject to certain limitations under by legislation of the Kyrgyz Republic.

26. Can financing documents provide for arbitration clauses?

Yes, financing documents can include arbitration clauses in the Kyrgyz Republic. In accordance with Kyrgyzstani legislation, parties are free to agree to resolve any arising disputes through arbitration. The Kyrgyz Republic has adopted UNCITRAL

Model Law on International Commercial Arbitration and ratified ICSID Convention.

For instance, Article 19 of the PPP Law states that any disputes arising between parties to the PPP agreement in connection with the conclusion, performance, and termination of said agreement shall be resolved through negotiations in compliance with the provisions of the PPP agreement. In case the parties cannot resolve a dispute amicably, the dispute shall be considered either by the state courts of the Kyrgyz Republic or the international court/arbitrational tribunal if the PPP agreement provides for it. Thus, the PPP agreement provides for arbitration clauses.

In order to ensure the enforceability of an arbitration clause in a financing document in Kyrgyzstan, parties should consider the following:

1. An arbitration agreement should be in writing and signed by the parties. It can be in the form of a separate agreement or as a clause within the financing documents.
2. The arbitration agreement should clearly identify the disputes that are subject to arbitration and the rules and procedures that will govern the arbitration.
3. The arbitration agreement should specify the seat or legal place of arbitration, which is the jurisdiction in which the arbitration will take place. Parties may choose a foreign seat of arbitration, but this may affect the enforceability of the award in Kyrgyzstan.
4. Parties should ensure that the arbitration agreement complies with any mandatory provisions of Kyrgyz law and does not violate public policy.

G. Trends and Projections

27. What are the main current trends in project financings in your jurisdiction?

The Kyrgyz Republic is currently at the stage of developing its economy and project financing overall. Some of the main trends in project financing include the following:

- Public-Private Partnerships (PPPs): PPP projects became one of the most popular methods of project financing in the Kyrgyz Republic. Particularly, PPPs are mainly used in infrastructure, transport and energy sectors. It's worth noting that renewable energy is a separate block of PPP projects that is highly supported and developing in the Kyrgyz Republic. For instance, IFC and the government of the Kyrgyz Republic will cooperate in the development of a solar plant under the Scaling Solar Program.
- Mining: The mining sector is a key driver of the Kyrgyz economy, and project financing in this sector is focused on the development of new mines and the expansion of existing operations. As of today, there were several big projects in mining sector.
- Islamic finance: Project financing based on Islamic principles has been actively developing in the Kyrgyz Republic. There are several banks, microfinance companies that support and provide financing on Islamic principles.
- Microfinance: Microfinance has become an important source of funding for small and medium-sized enterprises (SMEs) in the Kyrgyz Republic, particularly in rural areas.

Considering above mentioned developments and focus sectors, project financing is rapidly developing in the Kyrgyz Republic. The government of the Kyrgyz Republic tries to implement reforms

and provide guarantees that will attract foreign investments into the country.

28. Are any significant development or change expected in the near future in the project finance market?

As mentioned earlier the project finance market is still developing in the Kyrgyz Republic. The government of the Kyrgyz Republic will likely to implement the following measures:

- Further support and development of PPP. The Kyrgyz government has expressed a strong commitment to developing PPP projects. Reviewing experience of our country PPP is a key mechanism for financing public infrastructure projects. It is expected that more PPP projects will be launched in the coming years and that the government will continue to implement legal and regulatory reforms to encourage private sector participation.
- Focus on renewable energy and mining sectors. As mentioned above, the Kyrgyz government actively participates in PPP projects focused on the renewable energy sector. The mining sector is a crucial area of development and our authorities will likely to implement new reforms to promote its development.
- The Kyrgyz government also stipulates on importance of digital transformation. In coming years there are expected more projects in digital infrastructure, e-commerce platforms and financial technologies.

29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?

During the LIBOR transition period, the RFR rates is commonly used in the Kyrgyz Republic. Alternative rates are Secured Overnight Financing Rate (SOFR) for USD and Sterling Overnight Index Average (SONIA) for GBP.

TAJIKISTAN

GRATA



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A. Overview

1. What is the main legislation and international treaties governing the project financing in your jurisdiction?

The most relevant act is the (i) Civil Code (Part 1, 2 and 3), (ii) Tax Code, (iii) Registration of Legal Entities and Individual Entrepreneurs Act, (iv) Public Private Partnership Act, (v) Limited Liability Companies Act, (vi) Joint Stock Companies Act.

Tajikistan has entered into a number of bilateral treaties related to investment protection. That said, international treaty applicability for the time being is left to be desired.

2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?

In Tajikistan, the market for project financing is continually growing but is still quite small.

Yet, there are a number of project funding options accessible to those who are interested; additional details may be found

at <http://ppp.tj/ppp-database/> and <http://www.eprocurement.gov.tj/en/searchanno>.

The majority of these financing options are tied to the infrastructure or energy industries.

B. Security Interest

3. What are the most commonly used security types in project financings in your jurisdiction?

Depending on the particulars of the project and the interests of the parties involved, different methods of security may be utilized. In project financings, common security types that might be employed include:

Mortgage: This type of security entails the sale of a property interest to the lender in exchange for loan collateral. The lender may foreclose on the property and sell it to recoup its investment if the borrower defaults on the loan.

Pledge: This type of security entails giving the lender possession of a moveable item, such as equipment or stock in a corporation, in exchange for a loan. The lender may sell the pledged asset to recoup its investment if the borrower fails on the loan.

Guarantee: This type of security entails a third party (like a parent business or a government body) assuring the lender that the borrower will pay back the loan. The guarantor is responsible for repaying the loan in the event that the borrower misses a payment.

Assignment of rights: A rights assignment is the transfer of a party's contractual rights to another party.

It is important to note that the use of security in project financings can be complicated and may require the blending of many types of protection. It will depend on the nature of the project and the lender's criteria as to which specific security types are employed in a project financing transaction. To preserve their investment in the project, lenders often attempt to get the highest level of security.

4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?

Shares can be pledged under an agreement. A written agreement between the pledgor and the pledgee is required under Tajik law. The number and kind of shares being pledged, the size of the secured debt, how long the pledge will last, and other terms must all be specified in the agreement.

The pledge agreement must be registered with the Ministry of Justice of Tajikistan for the share commitment to be perfected.

Getting a login and password and filling out the necessary information online is required for the registration procedure. If the pledge is not registered, it would not provide for priority over unregistered pledge.

5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?

Yes, private sale is a legitimate way to enforce a share agreement. The terms of the private sale can be agreed upon by the pledgor and pledgee in the pledge agreement.

The pledgee may enforce the pledge by selling the pledged shares in the event of the pledgor's default. The pledgee must notify the pledgor of the planned sale, including the date, location, and manner of sale as well as the minimum selling price, which must be equal to or higher than the total amount of the debt that is being pledged as security.

The surplus proceeds from the sale of the pledged shares must be given back to the pledgor if they exceed the amount of the outstanding obligation. The pledgor is still responsible for paying the balance of the obligation even if the shares are sold for less than the whole amount owed.

6. Can security interest be established over future assets, rights and receivables of the borrower?

Tajik law permits the inclusion of clauses establishing security interests over future assets, rights, and receivables.

7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?

Any claims in the event of insolvency must be made through an external manager. Additional measures and steps are decided upon and disclosed by an external management on a case-by-case basis and are not governed by laws.

8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?

Tajik law does not envision a security trustee. However, lenders (pledgees) have the option of designating a pledge manager to act on their behalf while exercising all of their rights to the pledged property.

Tajikistan legal system does not clearly permit the implementation of a parallel debt mechanism.

C. Incentives and Restrictions

9. What are the main incentives and exemptions for project financing in your jurisdiction?

Tax, customs and other benefits are provided to investors in the manner and on the terms established by laws, investment agreements, treaties and international legal acts recognized by Tajikistan.

It must be noted that specific incentives and exemptions will depend on the sector, size and project location.

That said, in some cases, obtaining such incentives can be challenging.

10. Are there any incentives or exemptions specifically applicable to foreign investors?

Please refer to the answer to question 9.

11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?

There are no limitations on taking out shareholder loans and bank loans from abroad or in a foreign currency.

12. Are there any restrictions for foreign investments in your jurisdiction?

With the exception of activities where

investment activities are restricted or forbidden due to the necessity to protect national interests, investors have the freedom to invest in objects and types of business activities. The law does go into more detail about this, and there is no information on public sources. Therefore, an investor must personally communicate with the state agencies about a specific investment project.

13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?

There is no minimum equity requirement.

14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.

Project finance documentation may need to be registered with or submitted to several government agencies in order to be enforceable and valid. The nature and structure of the project, as well as the type of document in question, will determine the registration and filing procedures that apply. Regrettably, because the laws are vague, it is necessary to discuss specifics with the state agencies for each individual project.

It must be noted that depending on the type of project and the legal structure of the transaction, different registration and filing procedures may apply to project finance documents.

D. Insurance

15. Can local insurance policies be governed by a foreign law?

The Civil Code gives the parties the choice to choose the applicable law, but because of the nature of the Insurance Activities Act, we infer that the policies must be governed by Tajik law despite the fact that the law is silent on the subject.

16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

In general, insurance law does not restrict the assignment of insurance and reinsurance proceeds under an insurance or reinsurance policies to the benefit of lenders. It's important to keep in mind that there can be limitations and restrictions on this. Reviewing the terms and conditions of any insurance contract is crucial.

17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?

We do not foresee any complications or issues. The parties must carefully review and consider the insurance provisions in project financing documents.

E. Financing of Public-Private Partnership (PPP) Projects

18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?

The PPP method is permitted and governed by the Private Public Partnership act.

There are numerous PPP projects, however, information about the completed projects is not published and is not available for third parties. PPP Authority's official website is available at <http://ppp.tj/homepageen>.

19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?

Direct agreements are permissible:

- if there is an urgent need for the continuous provision of services, as well as in the case when the implementation of the norms established by chapter 3 of the PPP Act is inappropriate, provided that the circumstances that

caused this urgent need could not be foreseen by the contracting authority, and these circumstances are not the result of slowness of the contracting authority;

- for a short term partnership project and when the expected initial investment amount does not exceed the specified amount;
 - when the partnership project affects issues of national defense or public safety;
 - if there is only one source capable of providing the required service, including the use of intellectual property, trade secrets or other exclusive rights that are owned or controlled by a certain person(s);
 - when pre-qualification tender documents or a request for proposals have been issued but no responses have been received, or when all proposals have failed to meet the evaluation criteria specified in the request for proposals, and if, in the opinion of the contracting authority, the issuance of new preliminary tender documents selection and a new request for proposals will not result in a contract being awarded within the required time frame;
 - in other cases where the PPP council approves such an exception for compelling reasons of national or public interest or in cases of recognition in the interests of a local public authority.
- 20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The PPP list can be found at <http://ppp.tj/ppp-database/>.

Some of the government guarantees:

- equality of investor rights;

- investor legal protection;
- right to use profits;
- investor's participation in the privatization of state property;
- investor's rights in case of expropriation and requisition;
- investor's right to export property and information abroad;
- additional guarantees and protection measures may be provided for investments, the total amount of which is the equivalent of \$5 mil in national currency.

21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?

One of the most important measures to guarantee the proper implementation of a PPP arrangement is the distribution of risk among parties. The PPP Act's Article 9 guarantees the principle of equitable risk distribution. A PPP agreement must include provisions for the division of risks between the public and private parties in accordance with Article 29 of the PPP Act.

The distribution of political risk in PPP agreements is based on both the nature of the risk and the agreement's specific conditions. Political risks are typically shared by public and private partners. In some circumstances, the public party may take on a larger portion of the political risk, especially when the project includes a public asset or function that is crucial to the government. On the other hand, in some circumstances, the private party may be required to take on greater political risk as a condition of receiving funding for the project or in exchange for bigger potential gains. As a result, how political risk is distributed in PPP agreements will vary depending on the project's unique conditions as well as the interests and preferences of the public and private parties involved.

22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?

PPP Act provides for that the agreement specifies the private partner's right to compensation in the event that, compared to the originally estimated costs, the costs of the private partner's performance under the agreement have significantly increased or the value of such performance has substantially decreased due to changes in legislation or other measures of state regulation directly related to the partnership project.

Likewise, the PPP Act provides for re-review (revision) of the agreement in the event of changes in law or regulation that are not directly applicable to the ongoing project, provided that economic, financial, legislative or regulatory changes:

- a. take place after the conclusion of the Agreement;
- b. are outside the control of the private partner;
- c. are of such a nature that the private partner is not able to reasonably assume and take them into account at the time of concluding the Agreement or avoid or overcome their consequences.

23. Is force majeure specifically regulated under the local legislation?

Generally, this issue is defined and regulated by a clause of an agreement. That said, paragraph 3 of article 356 of the Civil Code establishes a foundation for responsibility exclusion in the event of a force majeure. According to the aforementioned legal definition, force majeure refers to unusual and unavoidable events that happen under specified circumstances. These conditions

do not, however, include the debtor's counterparties breaching their duties, the lack of sufficient finances for the debtor to fulfill its obligations or the absence of necessary commodities from the market.

24. What are the general environmental and social requirements in project financings?

Tajik legislation states that it is forbidden to fund and carry out initiatives involving the utilization of natural resources without first receiving approval from the state's ecological experts. In particular, projects should go through the assessment procedure in accordance with the Environmental Impact Assessment Procedure to take potential environmental impacts into consideration.

There are general obligations to interact with local stakeholders and communities and to guarantee that labor laws are followed when it comes to social criteria for project finance.

F. Jurisdiction, Waiver of Immunity

25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

Yes, according to civil laws, foreign law, arbitration provisions are enforceable.

The generally accepted action of waiving immunity is subject to some restrictions under Tajik law.

26. Can financing documents provide for arbitration clauses?

Yes, according to civil laws, financing documents can provide an arbitration clause.

G. Trends and Projections

27. What are the main current trends in project financings in your jurisdiction?

Tajikistan's economy and overall project funding are currently in the process of development. The following are some of the major trends in project financing:

- **PPPs:** In Tajikistan, PPP initiatives have emerged as one of the most widely used forms of project finance. PPPs are particularly common in the infrastructure, transportation, and energy industries. Renewably sourced energy should be noted as a distinct category of PPP projects that is now being examined and elevated to the top of the priority list.
- **Mining:** The mining industry makes up a significant portion of the Tajik economy, however project financing in this industry is typically conducted on a one-on-one basis, discreetly, and with little access to information.

We anticipate further projects and favorable future changes to the investment climate because Tajikistan's government, and particularly its president, is a strong supporter of foreign investment.

28. Are any significant development or change expected in the near future in the project finance market?

As mentioned above, the project financing is actively developing and further development and implementation of PPP projects in Tajikistan remain an important item on the Government's agenda. Likewise, renewable energy is gaining traction and is most likely to be a crucial item on the agenda and will gain the most attention in the future.

29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?

During the LIBOR transition period, the Secured Overnight Financing Rate (SOFR) rates are commonly used in Tajikistan.