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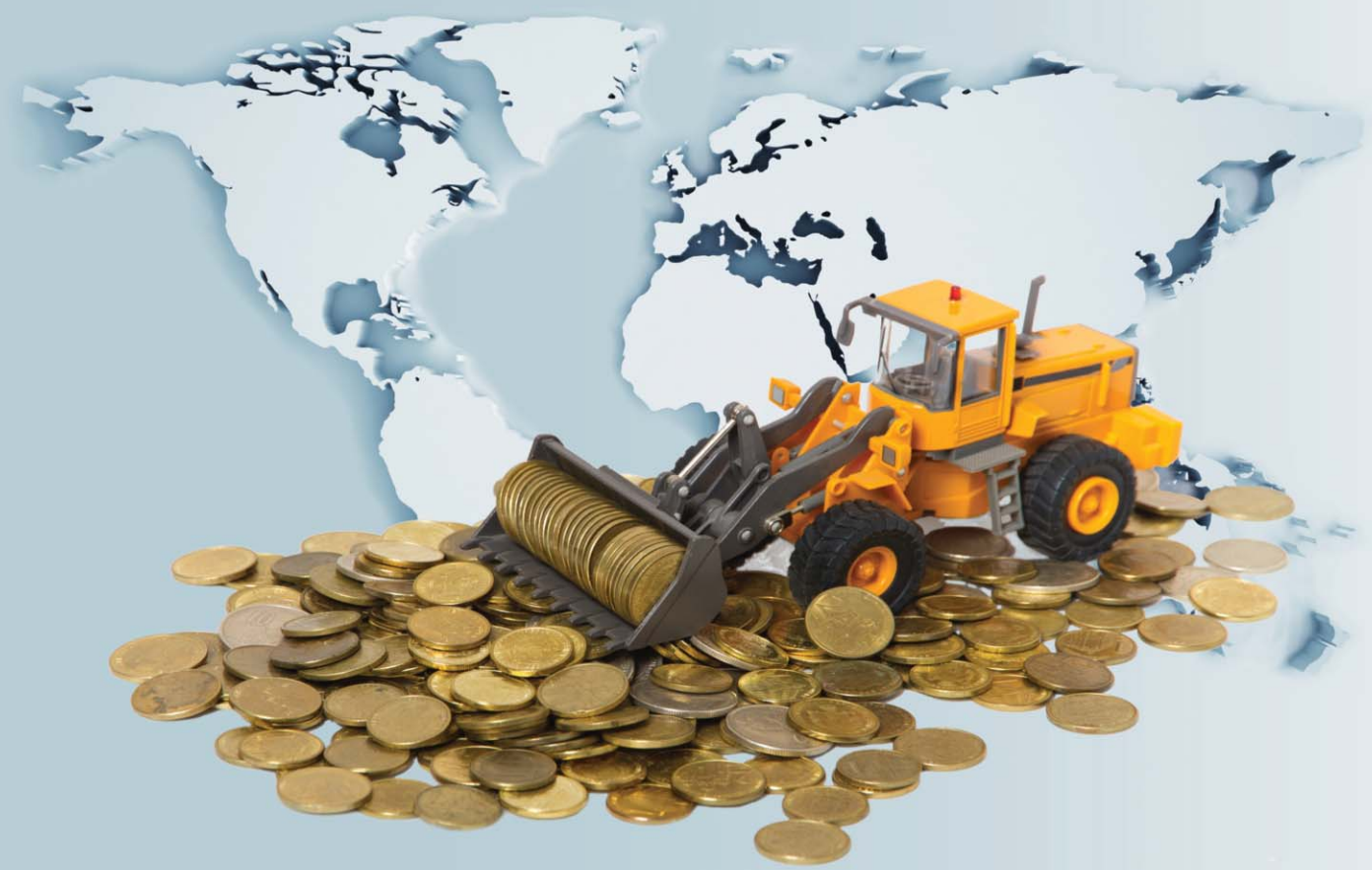
PROJECT FINANCE REPORT 2014



Guest edited by Martin Kavanagh
and Brendan Quinn

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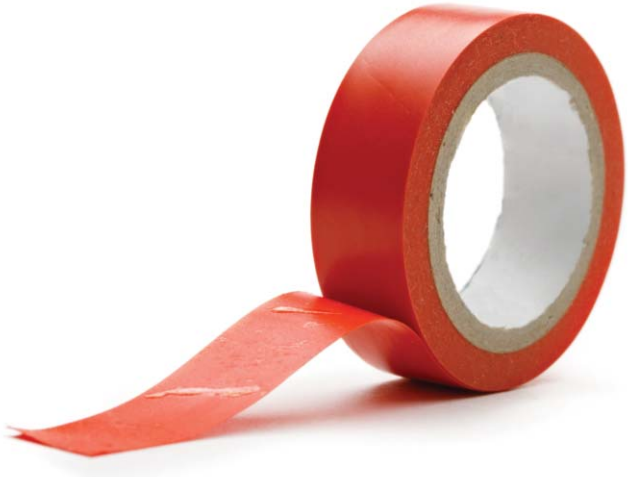

Survey responses

US

LATHAM
LATHAM&WATKINS
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Kelley Michael Gale, Amy Maloney and Victoria Salem, Latham & Watkins

Section 1 – Collateral/security

1.1 What types of collateral/security are available?
It is customary in a project financing of a project or portfolio of projects located within the US (a US project financing) that, on the date of financial closing, secured parties receive security interests in substantially all personal and real property of the owner of the financed project or portfolio of projects and its subsidiaries (including, for instance, accounts, equipment, inventory, intellectual property, contracts, capital stock and cash), as well as security interests in all of the equity interests in such owner and subsidiaries. Note, however, that there are frequently limited exclusions from the collateral (such as, contracts and permits that are not assignable by law and assets for which security interest perfection is unduly cumbersome or expensive relative to asset value).

Section 2 – Perfection and priority

2.1 How is a security interest in each type of collateral perfected and how is its priority established?
Perfection and priority of security interests in US project financings are primarily governed by, in the case of personal property, the Uniform Commercial Code (UCC) in effect in the relevant US state and, in the case of real property, the law of the jurisdiction where the real property is located.

For personal property, Article 9 of the UCC permits several methods of perfection depending on the type of property, such as:

- filing of UCC financing statements is available as a method of perfection for all personal property collateral that is subject to Article 9 of the UCC, other than deposit accounts, letter of credit rights and money. For most domestic debtors, financing statements are filed in the debtor's state of organisation and, for most non-US debtors, Washington, D.C.;
- possession is available as a method of perfection for certificated securities, instruments and tangible chattel paper (and also for goods and money, though uncommon) and is effected by the secured party taking physical possession of the collateral;
- control is the only permitted method of perfection for deposit accounts and letter of credit rights and the stronger method of perfection for securities accounts, commodity contracts, uncertificated securities and electronic chattel paper. It is typically effected by entering into an agreement that provides the secured party with control (for UCC purposes) over the collateral.

Perfection of security interests in certain types of personal property (for example, insurance) is not addressed in the UCC, and other personal property (such as goods covered by certificates of title or intellectual property) may require compliance with other laws.

Security interests in real property are perfected by recording a mortgage or deed of trust in proper form in the jurisdiction where the real property is located.

Absent a contractual inter-creditor arrangement to the contrary, the first to properly perfect a security interest generally has priority, with the caveat that certain security interests have priority by law irrespective of whether and when perfected (for instance, mechanics' liens). Note also that, for property for which there are multiple perfection options, a security interest perfected by possession or control generally has priority over a security interest perfected merely by filing, notwithstanding the timing of perfection.

2.2 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?
For personal property, parties in US project financings frequently engage a service company to search the UCC filings and tax and judgment liens for all relevant entities within all relevant jurisdictions (commonly referred to as a lien search). Lien searches are usually performed shortly before financial closing of a transaction and allow secured parties to identify, and direct the debtor to extinguish, intervening security interests on personal property as necessary.

For real property, parties frequently engage a title insurer to perform title searches that show all encumbrances on the relevant real property and issue a title insurance policy (insuring good title to the relevant real property, subject to agreed exceptions) for the benefit of the secured parties.

For intellectual property, parties frequently engage a service company to search the registries at the US Patent and Trademark Office and the US Copyright Office.

In addition, secured parties often rely on representations from the relevant entities that there are no security interests in the collateral other than as permitted.

2.3 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
The taxes and fees payable to perfect a security interest vary depending on the type and location of collateral. Fees are commonly payable upon the filing or recording of security documentation, and such fees are usually nominal.

2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?
A corporate entity, as agent or trustee for secured parties, may be the grantee of security interests in collateral and, if necessary, hold physical collateral. In this case, remedies and other actions taken against the collateral are exercised by this agent or trustee (or its designee) at the direction of secured parties holding a specified portion of the voting interests.

Section 3 – Foreign investment and ownership restrictions

3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies?
The Exon-Florio Amendment to the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, gives the Committee on Foreign Investment in the United States (Cfius), a US federal interagency group, jurisdiction over transactions in which a foreign investor acquires control over a US business. More specifically, Cfius reviews such transactions for their impact on US national security and can recommend that the President of the US block or suspend any transaction that impairs US national security (or negotiate mitigation conditions with the parties to avoid that result).

Foreign investment in a US business may trigger a federal agency review based on the particular industry in which the target US business operates. For example, the US Department of Defense has established procedures to review and mitigate potential foreign ownership, control, and influence over US businesses that hold security clearances issued by the US government.

Similarly, the Communications Act of 1934, as amended, limits foreign ownership of certain Federal Communications Commission licensees and allows such commission to review whether foreign ownership of a particular licensee would serve the public interest.

As noted in 5.1, there are restrictions on foreign persons' ability to acquire rights in certain types of natural resources.

3.2 Do these restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies?
In many cases, yes. Cfius and other industry-specific federal and state agencies may review any transaction through which a foreign person has or could obtain control of a US business, including through foreclosure.

3.3 Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?
The US has concluded a number of bilateral and multilateral treaties, including agreements for the promotion and protection of investments and free trade agreements, which protect foreign investors and their investments in the US; for example, the North Atlantic Free Trade Agreement covers Canada, Mexico and the US, and the Dominican Republic-Central America Free Trade Agreement covers Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the US. These treaties contain specific standards on the admission and treatment of foreign investors and their investments, including non-discrimination, fair and equitable treatment, protection from expropriation without compensation and the right to arbitrate disputes with the host state of the investment.

Investment activities in the US do not generally require registration with a government authority to benefit under investment treaties.

Section 4 – Documentation formalities and government approvals

4.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
US federal and state courts generally consider the parties' agreement to submit a dispute to a foreign jurisdiction as the exclusive forum effective and enforceable, unless it is the result of overreaching or unfair use of unequal bargaining power, or if the foreign jurisdiction would be extremely inconvenient. Under the Foreign Sovereign Immunities Act, a waiver of sovereign immunity is generally effective and enforceable in the context of government project development contracts of a commercial nature.

4.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable? For instance, does collateral need to be notarised?
See, the discussion in 2.1 for example.

4.3 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority?
There is no overarching governmental body with authority over US project financings. Different industries are subject to varying levels of regulation by governmental bodies at the federal, state and local levels. For example, the development of a liquefied natural gas export facility in the US requires approvals from, *inter alia*, federal, state and local bodies with authority: (i) to approve facilities related to the interstate or foreign import, export or transmission of gas, oil and power; (ii) to approve exports of gas to foreign countries; (iii) over environmental, health and safety matters; and (iv) over building and zoning permits.

4.4 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?
A typical US project financing requires environmental permits at the federal, state and local levels. For certain projects, the National Environmental Policy Act requires the preparation of an environmental impact statement. State and local jurisdictions may have similar requirements for detailed environmental analysis as a condition to the issuance of permits.

Environmental permit fees are often *de minimis* application processing fees. However, costs of compliance with, and mitigation measures required by, environmental permits can be significant.

Section 5 – Natural resources

5.1 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?
In the US, title to oil, gas and minerals may be held by federal or state governments or directly by private parties. Surface and mineral estate title must be carefully reviewed, as mineral estate title may be separated from surface estate title.

There are limitations on the ability of foreign persons to acquire rights in natural resources depending on the type and location of the resource. For example, federal law prohibits direct foreign ownership of federal mineral leases.

5.2 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?
Federal leases of natural resources impose a fixed royalty on the resource extracted from each lease, which differs depending on resource type and location. State and private leases are generally more varied.

There are no broadly imposed federal taxes for the extraction of natural resources. However, specific taxes may exist for certain resources, such as coal. Natural resource operations are subject to applicable state and federal taxes (for example, taxes on business profits), in addition to severance taxes assessed by the applicable state for certain types of land.

5.3 What restrictions, fees or taxes exist on the export of natural resources?
Generally, US exports of natural resources require prior approval from the relevant government agencies. For example, exports of natural gas require approval from the Department of Energy, and such approval processes vary depending on the importing country's trade status.

5.4 Can private parties grant security over any such rights in natural resources, and in the event of enforcement of that security would the local granting body be bound by that security. Would change of control in the borrower (for example, upon exercise of share security) trigger a forfeit of those rights?
Private parties with direct rights to, or permits or leases to obtain, natural resources, may grant security interests therein. Perfection of a security interest in direct rights to natural resources is effected by filing an as-extracted collateral financing statement with the jurisdiction in which a mortgage or deed of trust would be filed. A permit or lease may include restrictions on direct transfers by, or upstream changes of control of, the permit or lease holder without the consent of the relevant issuing authority or lessor.

Section 6 – Bankruptcy proceedings

6.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
Chapters 7 and 11 of the US Bankruptcy Code (the Bankruptcy Code) govern liquidation and reorganisation proceedings, respectively. Immediately upon the commencement of a bankruptcy proceeding by a project company, the automatic stay goes into effect, which prevents creditors and other parties in interest from taking most contractual enforcement, collection and foreclosure actions against a debtor or its property.

Creditors are able to protect their interests in a debtor project company through the US bankruptcy process. A creditor may request relief from the automatic stay to take limited specific action against a debtor or its property during bankruptcy, subject to court approval. The Bankruptcy Code also provides for a right of secured creditors to obtain adequate protection from diminution in value of collateral due to the conduct of a debtor, depreciation, dissipation or otherwise.

Secured creditors should be aware that the Bankruptcy Code also permits a debtor, under certain circumstances, to grant a security interest that has priority over pre-bankruptcy secured creditors to lenders that provide financing to the debtor during bankruptcy.

Receivership is discussed in 6.5.

6.2 Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral/security?
The Bankruptcy Code allows the invalidation of any transfer under applicable non-bankruptcy law that is avoidable, to any creditor who, on the date of the filing, could have: (i) extended credit or obtained a security interest; or, (ii) been a bona fide purchaser for value of real property.

A debtor may avoid preferences, which are payments made on account of claims or the perfection of security interests with respect to previously unsecured claims that are made within 90 days (or up to one year, if to an insider) of the bankruptcy, while the debtor was insolvent and that enabled the creditor to receive more than it would have received if the creditor's sole recovery had been a distribution in a Chapter 7 bankruptcy.

A debtor may also avoid fraudulent transfers, which are transfers made within two years of the bankruptcy filing that are made with the actual intent to hinder, delay or defraud creditors, or where a debtor receives less than reasonably equivalent value for the transfer and the debtor is insolvent.

6.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
See 6.1 above.

6.4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?
Security documents in US project financings commonly provide that, upon the occurrence of an event (often an event of default under the financing documents), the secured parties (or their agent or trustee) may exercise remedies specified therein (for example, direct application of cash in accounts and foreclose on and sell collateral) and remedies available in law or in equity and under the UCC (coupled with the right to terminate outstanding financing commitments and accelerate outstanding indebtedness).

6.5 Does the jurisdiction recognise the concepts of trustees in bankruptcy, receivership, liquidators or similar persons?
The US bankruptcy system recognises trustees in bankruptcy, liquidators, receivership and other similar roles. A party in interest may request, or a bankruptcy court may direct, the appointment of a third party trustee to manage the debtor's bankruptcy proceedings, businesses and estate. Receivership is more common for US banks, which cannot file for Chapter 7 or Chapter 11 bankruptcy protection.

Section 7 – Foreign exchange, remittances and repatriation

7.1 What, if any, are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?
The US government generally levies no restrictions or taxes on foreign currency exchange.

7.2 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
A foreign investor may be subject to US federal withholding tax at a rate of 30% on dividends and interest, unless a lower income tax treaty rate applies. In the case of interest payments, the portfolio interest exemption may provide a complete exemption from US federal withholding tax on such interest payments to the foreign investor, provided that, *inter alia*, the foreign investor is not a bank making a loan in its ordinary course of business.

In addition, certain provisions of the US Internal Revenue Code of 1986, as amended (commonly known as Fatca) may impose a US federal withholding tax of 30% on withholdable payments to certain foreign financial institutions and non-financial foreign entities unless certain conditions are satisfied or exemptions are applicable. Under the US Department of the Treasury regulations and recent US Internal Revenue Service guidance, withholding under Fatca generally applies to: (i) payments of US-source interest and dividend income made on or after 1 July 2014; and (ii) gross proceeds from the disposition of assets producing US-source interest or dividend income on or after 1 January 2017. However, under grandfathering rules, withholding under Fatca generally will not apply to any payment under, or to gross proceeds from the disposition of, a debt obligation outstanding on 1 July 2014.

Other restrictions are discussed in 8.2.

7.3 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?
The decision to repatriate foreign earnings is specific to each situation, such as the need for cash to service debt, withholding taxes and potential residual tax upon receipt of a repatriating dividend. US-based multinationals typically do not repatriate unless they can do so without residual US tax (which is dependent upon foreign tax credit calculations).

There is no requirement to convert repatriated funds to US dollars.

7.4 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?
While there is no prohibition on a US person's ability to hold foreign currency accounts locally or in other jurisdictions, where such accounts are located outside the US, such persons may be subject to the Internal Revenue Service requirement to file a Report of Foreign Bank and Financial Accounts. US persons, residents and entities with signing authority or other financial interests in foreign financial accounts holding more than a threshold amount must declare such accounts by 30 June each year.

7.5 What, if any, tax incentives or other incentives are provided preferentially to foreign investors or creditors? What, if any, taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?
Generally, there are no tax incentives provided preferentially to foreign investors. States may impose taxes on the filing or recording of security documentation.

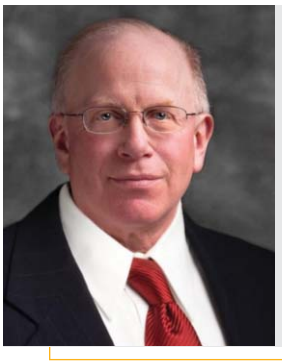
Section 8 – Other restrictions

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

US employers are required by the Immigration Reform and Control Act to verify and properly document each new employee's identity and legal right to work in a specific position and for that employer, regardless of such employee's immigration status. Employers are required to obtain, and thereafter maintain for a specified period of time, a valid form I-9 (establishing the employee's right to work in the US) for each new employee. Establishing a foreign national's legal right to work may include, *inter alia*, obtaining visas to cover his/her employment in the US. States and municipalities may also impose additional requirements on employers operating in those jurisdictions.

8.2 What restrictions exist on the importation of project equipment?

While there is no general licence requirement for US imports, all equipment and products entering the US must be declared to US Customs and Border Protection (CBP) and may be subject to customs duties and import fees. Certain categories of imported goods (such as certain defence articles) may be restricted or subject to additional duties or reporting requirements. In addition, the US Department of the Treasury's Office of Foreign Assets Control maintains a list of countries and entities for which there are importation restrictions (for instance, Cuba, Iran, Sudan and North Korea), known as the List of Specially Designated Nationals and Blocked Persons (available at http://sdnsearch.ofac.treas.gov/).



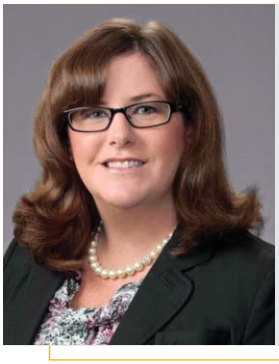
Kelley Michael Gale
Partner, Latham & Watkins

San Diego, US
T: +1 619 238 2825
E: kelley.gale@lw.com
W: www.lw.com

About the author

Kelley Michael Gale is a partner in the San Diego office of Latham & Watkins, and serves as global chair of the firm's project finance practice and co-chair for the firm's air quality and climate change practice. His practice centres on the representation of both private and public sector clients in the development, regulation and financing of renewable energy projects and capital-intensive infrastructure projects.

Gale also has extensive expertise in the development, redevelopment and financing of capital-intensive real estate projects.



Amy Maloney
Partner, Latham & Watkins

New York, US
T: +1 212 906 2994
E: amy.maloney@lw.com
W: www.lw.com

About the author

Amy Maloney is a partner in the New York office of Latham & Watkins, where she is a member of the project development and finance practice in the finance department.

Maloney represents commercial and investment banks, insurance companies, investment firms and other financial institutions, and sponsors and developers in connection with the development, construction, operation and financing of domestic and cross-border energy and infrastructure projects.

Victoria Salem
Associate, Latham & Watkins

London, UK
T: +44 20 7710 1050
E: victoria.salem@lw.com
W: www.lw.com

About the author

Victoria Salem is an associate in the London office of Latham & Watkins and a member of the firm's finance department.

Salem's practice focuses on the representation of sponsors, developers and borrowers, and commercial and investment banks, investment firms and other financial institutions in connection with the development, construction and financing of mining and metals and energy projects, and M&A involving mining and metals and energy assets.

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