



ICLG

The International Comparative Legal Guide to:

Project Finance 2012

A practical cross-border insight into project finance

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EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Project Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of project finance.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting project finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in project finance laws and regulations in 39 jurisdictions.

All chapters are written by leading project finance lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor John Dewar of Milbank, Tweed, Hadley & McCloy LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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1 Overview

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

The project finance market in Japan has developed hand-in-hand with Private Finance Initiatives (PFI). Since the enactment of the Act on Promotion of PFI (“PFI Act”) in 1999, hundreds of PFI projects have been implemented, totalling 4.7 trillion Japanese Yen by the end of 2009. In 2010, the Japanese cabinet declared its plan to increase the number of PFI projects, setting the goal of achieving an aggregate of 10 trillion Japanese Yen in PFI volume over the 11 years leading up to 2020. It could be said that the environment for project finance, including PFI, changed on March 11, 2011, as the Act on Special Measures concerning the Procurement of Renewable Electric Energy by Operators of Electric Utilities (“Feed-In Tariff Act for Renewable Energy”) and the amended PFI Act were approved by the Cabinet in the morning, and the devastating earthquake hit Japan in the afternoon on that day. Hopes are high that project finance, including PFI, will play an important role in the reconstruction of the tsunami-stricken area and the development of new sources of primarily renewable energy that can supplement nuclear power.

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

In 2005, the Japanese government announced its plan to utilise the PFI Act to design, build, manage and maintain the international flight area of Tokyo’s Haneda Airport. The plan consisted of three separate PFI projects: passenger terminal operation; the cargo terminal operation; and the airport apron operation, all of which opened in 2010 and are scheduled to operate for 30 years. This was the first use in Japan of PFI for a core national transportation infrastructure project.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is not possible to give asset security by means of a general security agreement. An agreement is required in relation to each

type of asset in order to create a security interest. Please refer to questions 2.2 through 2.5 below for the relevant procedures.

Please note that if all or part of the loan is a revolving loan, a “revolving” security interest will be created for each type of security interest (e.g., revolving mortgage, revolving pledge and revolving assignment security).

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Real estate – A mortgage is the usual method to create a security interest on real estate, and such mortgage is perfected by registering at the Legal Affairs Bureau.

Movables – For movables such as machinery and equipment, a security interest by way of assignment (*jouto-tanpo*) (“assignment security”) is the usual method to create a security interest. If it is for a cluster of movables located at a specific place, such as an inventory, a single assignment security is usually created over multiple movables. An assignment security over a movable is perfected by the actual or constructive delivery of such movable under the Civil Code (*minpou*), but the Act on Special Provisions, etc. of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims (“Special Registration Act”) offers the option to perfect by registering at the Legal Affairs Bureau.

Unless the pipeline in question becomes a part of real estate, it would be treated as a movable.

2.3 Can security be taken over receivables where the chargor is free to collect in the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security can be taken over receivables where the grantor is free to collect the receivables in the absence of a default. Such security can be taken by a pledge or an assignment security. These security interests are (i) created by agreement between the grantor and the grantee, and (ii) perfected by either (a) the method provided in Article 467 of the Civil Code, or (b) registration pursuant to the Special Registration Act. Under Article 467, the security interest is perfected (i) against the obligor of the receivable by (a) notifying the obligor of the receivable, or (b) obtaining consent from the obligor of the receivable, and (ii) against other third parties by having the notary public affix a date (*kakutei-hizuke*) onto the

document evidencing the notification or consent mentioned above. A security over receivables can be created and perfected without notifying the obligor of the receivables if it is by registration under the Special Registration Act.

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

A pledge on cash deposited in a fixed term deposit account can be created and perfected, but the validity thereof on an ordinary savings deposit account is debated. There is usually a contractual obligation to obtain a consent of the bank at which such deposit account is opened before creating a pledge. The perfection of a pledge over these accounts is done pursuant to Article 467 as described in question 2.3. The pledge can usually be enforced through a set-off.

2.5 Can security be taken over shares in companies incorporated in Japan? Are the shares in certificated form? Briefly, what is the procedure?

Security can be taken over shares in stock companies (*kabushiki-kaisha*) incorporated in Japan, and the usual method to create such security is by way of a pledge. If the articles of incorporation of the issuing company ("Charter") provide that share certificates are to be issued, a share pledge can be (i) created by (a) agreement between the pledgor and pledgee, and (b) delivery of the share certificates, and (ii) perfected by the continuous possession of share certificates by the pledgee. If the Charter does not provide that share certificates are to be issued, (i) an agreement between the pledgor and pledgee is all that is necessary to create the pledge, and (ii) the pledge is perfected by recording the pledge in the shareholder registry maintained by the company. If the Charter further provides that a transfer of the company's shares requires an approval of the issuing company, certain steps are followed to avoid the potential risk of not being able to obtain such approval upon enforcement. For shares to which the Act on Book-Entry Transfer of Company Bonds, Shares, etc., applies (e.g., listed shares), there is a separate set of procedures that needs to be followed.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Formal registration – Registration licence tax is (i) 0.4% of the secured claim when registering a mortgage over real estate, and (ii) 0.4% of the maximum amount of the revolving mortgage when registering a revolving mortgage over real estate.

Provisional registration – A provisional registration can be made in respect of both a mortgage and a revolving mortgage by paying 1,000 Japanese Yen per parcel of real estate as a registration licence tax. By payment of the registration licence tax, a provisional registration can be changed to a formal registration without losing the order of priority obtained at the time of the provisional registration.

Stamp Duty – Stamp duty for a credit agreement is between 200 and 600,000 Japanese Yen depending on the amount of the loan. Stamp duty is not required for security agreements, except for agreements regarding assignment security on receivables which require a stamp duty of 200 Japanese Yen.

Kakutei-hizuke – In order to have a date affixed on a document for

perfection under Article 467, a fee of 700 Japanese Yen per document needs to be paid to the notary public.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Most types of security interests typically used in project financings do not require filing, notification or registration involving a significant amount of time or expense, except for the registration licence tax for real estate mortgages described in question 2.6.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

Generally speaking, no regulatory consents are required with respect to the creation of security over real estate or movables.

3 Security Trustee

3.1 Regardless of whether Japan recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Security agent – Although a security agent is typically appointed in a Japanese project financing, its role is limited to performing administrative tasks on behalf of the lenders, and it cannot enforce the security on behalf of the lenders.

Security trustee – The 2007 amendment to the Trust Act verified that the creation of security interest by way of a security trust is valid. A trust bank usually acts as security trustee because a trust business licence is required in order to become a security trustee.

3.2 If a security trust is not recognised in Japan, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Each lender usually (i) has a separate security interest, or (ii) jointly holds with all the other lenders a single security interest, and each lender needs to enforce its claims and security interests itself pursuant to the procedure set forth in the security agreement. Whether a parallel debt arrangement is legally feasible under existing laws is under debate.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

A mortgage over real property and an assignment security over

movables can usually be enforced at the discretion of the lender either through court proceedings (e.g. public auction) or without the involvement of the court (e.g., a private sale or by acquiring the assets itself). If it is a pledge or an assignment security over receivables, the secured party can satisfy its claim by collecting from the obligor of the receivables directly. Please refer to question 2.4 for the enforcement of pledges over bank accounts.

If the collateral is a regulated asset, regulatory consents may be required at the time of enforcement as set forth in question 7.3.

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

There are no restrictions uniquely applicable to foreign investors or creditors, except for restrictions such as those referred to in questions 6.1 and 7.3 that may apply at the time of enforcement.

5 Bankruptcy Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

There are four types of insolvency court proceedings in Japan: (i) bankruptcy (*hasan*); (ii) civil rehabilitation (*minji-saisei*); (iii) corporate reorganisation (*kaisha-kousei*); and (iv) special liquidation (*tokubetsu-seisan*). Bankruptcy and special liquidation aim to liquidate the entity, whereas civil rehabilitation and corporate reorganisation aim to rehabilitate the entity.

The ability of a lender to enforce a pledge, a mortgage and an assignment security is not affected in a bankruptcy, civil rehabilitation or a special liquidation, as the secured party is able to exercise its rights as a “right of separate satisfaction” (*betsujo-ken*) without going through an insolvency court proceeding. However, in a corporate reorganisation, the secured party’s rights are restricted according to the corporate reorganisation plan and security interests cannot be enforced outside a corporate reorganisation court proceeding.

5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

Preference periods and clawback rights – There are clawback rights and preference periods in bankruptcy, civil rehabilitation and corporate reorganisation proceedings. Various acts, including provision of a security interest and repayment, may be subject to clawback rights. The requirements and burden of proof vary depending on the type of the act, the intent or knowledge of the parties, the adequacy of the consideration, the timing of the act, etc.

Tax debt and employees’ claims – Tax debts and employees’ claims receive preferential treatment under all four insolvency proceedings, but the degree of preferential treatment depends on the type of such debt or claim and the type of insolvency proceeding.

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

Special liquidation and corporate reorganisation are only applicable to a stock company formed under the Companies Act.

Bankruptcy is applicable to all private entities, both Japanese and foreign, but it is not applicable to national and local governments. There is a court precedent that has held that bankruptcy is also not applicable to public institutions.

Civil rehabilitation is applicable to all kinds of persons and entities, including governments and public institutions.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Please refer to question 5.1.

6 Foreign Investment and Ownership Restrictions

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

Under the Foreign Exchange and Foreign Trade Act (“FEFTA Act”), when a foreign investor acquires the shares or equity in a corporation, it is, in principle, only required to make a *post facto* report to the relevant Ministry.

However, if (i) such acquisition is with respect to certain industries, or (ii) the foreign investor is from a country with which Japan does not have a bilateral treaty (e.g., Iraq and North Korea), the foreign investor is required to file with the relevant Ministry 30 days (this period can be shortened to 5 days) prior to the contemplated investment. Many of the industries in which project finance is used fall into categories that require such advance filing. These industries include (i) certain national security related industries such as nuclear power and aircraft, (ii) certain industries affecting public order or public safety such as electricity, gas, telecommunications, water supply, public transportation and security service, and (iii) those that are specifically carved out from capital liberalisation such as agriculture, forestry, oil, leather, air transportation and shipping. The relevant Ministry has the discretion to halt or change these investments, but such discretion is exercised only on extremely rare occasions.

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

No, there are not.

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

Pursuant to the Constitution of Japan, which declares that “private property may be taken for public use upon just compensation therefor”, the Compulsory Purchase of Land Act (*tochi-shuuyouhou*) and other laws stipulate the requirements, procedures and compensation for loss regarding expropriation or use of land or other assets for public use. The operations for which land and other assets can be expropriated include pipelines, airports, electric facilities, gas facilities, water supply facilities, social welfare, medical and healthcare facilities, waste disposal facilities, and mineral exploitation.

7 Government Approvals/Restrictions

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

Below are examples of government agencies that may have authority over typical project sectors.

Cabinet Office – PFI.

Ministry of Internal Affairs and Communications – Local governmental matters (other than matters directly handled by local governments), and telecommunications.

Ministry of Economy, Trade and Industry – Power and energy, general industry regulations, and export/import control.

Ministry of Health, Labour and Welfare – Health, safety, and labour.

Ministry of Land, Infrastructure, Transport and Tourism – Construction, public works, infrastructure, public transportation, and land use.

Ministry of Agriculture, Forestry and Fisheries – Land use.

Ministry of the Environment – Environmental matters.

Ministry of Finance – Tax and export/import duties.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Apart from the registration or filings required under the PFI Act or those mentioned in section 2 and questions 6.1 and 7.3, in principle, none of the financing or project documents need to be registered or filed with any government authority or comply with legal formalities.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Land – Although the ownership of land usually does not require a licence, undertaking the business of ownership or operation of land for a project may be subject to various laws and regulations such as the Road Act (*douro-hou*), River Act (*kasen-hou*), Agricultural Land Act (*nouchi-hou*), National Land Use Planning Act (*kokudoriyou-keikaku-hou*), City Planning Act (*toshi-keikaku-hou*), Natural Parks Act (*shizen-kouen-hou*), Forest Act (*shinrin-hou*), Building Standards Act (*kenchiku-kijyun-hou*), Landslide etc. Prevention Act (*jisuberi-tou-boushi-hou*), Fire Defence Act (*shoubou-hou*), Basic Act for Environmental Pollution Control (*kougai-taisaku-kihon-hou*), Factory Location Law (*koujyou-ricchi-hou*) and Cultural Assets Preservation Act (*bunka-zai-hogo-hou*), as well as local laws and regulations, and licences, permissions, consents, etc., may be required, depending on the location and use of such land.

Natural resources and pipelines – Under the Mining Act (*kougyou-hou*), the State has the power to grant the right to mine and acquire minerals that are yet to be mined. As for pipelines, a licence from the relevant Ministry is required to conduct business that involves pipelines for oil and gas (Petroleum Pipeline Business Act (*sekiyu-pipeline-jigyou-hou*) and Gas Business Act (*gas-jigyou-hou*)). In order to undertake the business of ownership or operation of natural resources and pipelines, various laws and regulations such as the

Mine Safety Act (*kouzan-hoan-hou*) and High Pressure Gas Safety Act (*kouatsu-gas-hoan-hou*) may apply on top of the various laws and regulations mentioned above for land, and licences, permissions, consents, etc. may be required.

Foreign Entity – Unless provided otherwise in the treaty concerned, mining rights can be held only by a Japanese person or a Japanese entity, but such Japanese entity can be controlled by a foreign person or entity. There is no such restriction with respect to land and pipelines, but foreign entities that undertake the business of ownership or operation of such assets would most often establish a subsidiary in Japan, and if required, the licence will be obtained by such Japanese entity.

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

Extraction – The holder of mining rights is required to pay local tax to the municipal government based on the price of minerals, and to the prefectural government based on the size of the mining area.

Export – There are minimal restrictions on exportation from Japan under the FEFT Act (e.g. a ban on the export of weapons).

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

There are generally no restrictions or controls on foreign currency exchange, but there are *post facto* filing requirements. Taxable income is increased or decreased by foreign exchange gains and losses, and corporate tax, etc. is taxed on the taxable income.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Dividends and interests paid to foreign entities by a Japanese entity are subject to Japanese withholding income tax at the rate of 20% (this may be reduced or exempted by treaty). Redemption of equity investments that exceed the capital of the issuer are treated as a dividend, and the return of capital is treated as a transfer of shares. Transfer of shares in a Japanese entity by a foreign entity is not taxed in Japan unless it falls under certain exceptions.

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

Yes, they can.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Japan or abroad?

Under the Companies Act, there is a ceiling on the amount of dividends that can be paid by a stock company to shareholders. The total book value of the dividend may not exceed the “distributable amount” as defined in the Act, which is calculated by adding and subtracting the items stipulated in the Act to and from the amount of surplus. This restriction does not differ depending on the parent’s country of incorporation.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The Basic Environmental Law (*kankyo-kihon-hou*) and other related laws and regulations, such as those relating to water and soil contamination, air pollution, waste and harmful substances, which are administered by the Ministry of the Environment, may have an impact on a project financing. Similarly, the Labour Standards Law (*roudou-kijyun-hou*) and the Labour, Safety, and Health Law (*roudou-anzen-eisei-hou*) and other related laws and regulations, which are administered by the Ministry of Health, Labour and Welfare, may have an impact upon a project financing.

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

No, there is not.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

A foreign insurer is only allowed to transact insurance business in Japan if it establishes a branch office in Japan and obtains a licence from the relevant Ministry. A foreign insurer without a branch office in Japan is basically not allowed to enter into an insurance contract pertaining to (i) any persons with an address or residence in Japan, (ii) any property located in Japan, or (iii) vessels or aircrafts with Japanese nationality unless (a) there is a special permission, or (b) the insurance contract falls within some exception such as reinsurance, international shipping, international cargo or overseas travellers' personal accident insurance.

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

Yes, they are.

9 Foreign Employee Restrictions

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

A working visa is required in order to perform paid work in Japan.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Restriction – There are minimal restrictions on importation into Japan under the FEFT Act. Importation from certain regions and importation of certain goods is restricted and requires approval from the relevant Ministry. Importation of project equipment or equipment used by construction contractors usually does not fall under this restricted category.

Consumption Tax – Almost every transaction for the import of foreign goods is subject to consumption tax at the rate of 4% and local consumption tax at the rate of 1%, making the total effective tax rate 5%.

Import Duty – In principle, products imported into Japan are subject to import duty. The rate varies depending on the item, the country from which it is imported, materials of goods, extent of processing, and usage. Generally speaking, items such as boilers, machinery, and mechanical appliances and electrical equipment are not subject to import duty.

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

Please refer to question 10.1.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

In principle, Japanese law would enforce the typical type of relief for *force majeure* provided in commercial contracts.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

There are various rules prohibiting corrupt business practices and bribery. For example, under the Penal Code (*kei-hou*), a public officer may be imprisoned for accepting a bribe and the amount of the bribe is confiscated. A person who bribes a public officer may be imprisoned or fined. There are also laws, ordinances and guidelines that aim to combat anti-social forces (e.g., mafias).

13 Applicable Law

13.1 What law typically governs project agreements?

Japanese law typically governs project agreements.

13.2 What law typically governs financing agreements?

Japanese law typically governs financing agreements.

13.3 What matters are typically governed by domestic law?

Almost all matters are governed by Japanese law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Submission to Foreign Jurisdiction – The Code of Civil Procedure (*minji-soshou-hou*) provides that parties may agree to submit to a foreign jurisdiction, but there are exceptions: (i) the courts of Japan

have exclusive jurisdiction over certain proceedings such as those stipulated in the Companies Act and those related to registrations and intellectual property rights in Japan; and (ii) unless certain requirements are met, an agreement to submit to a foreign jurisdiction with regard to future disputes arising from a consumer contract or an employment relationship may be invalid.

Waiver of immunity – Japan signed and ratified the United Nations Convention on Jurisdictional Immunities of States and their Property. Although this treaty has not yet come into force, the Act on the Civil Jurisdiction with respect to a Foreign State, etc. was enacted in 2009 in light of such treaty. This Act provides that if a consent to submit to jurisdiction is given in the method specified in the Act, a foreign state is not immune from jurisdiction concerning the judicial proceeding. This Act also provides that a foreign state is not immune from jurisdiction with respect to judicial proceedings regarding commercial transactions and other matters specified in the Act. As to private parties, they can waive their immunity.

15 International Arbitration

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

Submission of disputes to international arbitration – Contractual provisions requiring submission of disputes to international arbitration are recognised by local courts. If a party breaches the arbitration agreement and brings an action to a local court, the action will be dismissed by the court if the other party proves the existence of the arbitration agreement.

Arbitral awards – The Arbitration Act provides that if an arbitral award given in a foreign country fulfils the same requirements for enforcement as an arbitral award given in Japan, such arbitral award shall have the same effects as a final and binding judgment in Japan. Since Japan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), such requirements are the same as those stipulated in such Convention.

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

Japan is a contracting state to the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

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

Certain proceedings that are subject to exclusive jurisdiction of the courts of Japan, as described in question 14.1, are not arbitrable under the laws of Japan. Contractual provisions requiring submission to international arbitration with respect to future disputes with employees or consumers are also invalid or can be invalidated.

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

No, there are not.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

There has been no strong call for political risk protections in Japan.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In the case of a foreign lender, the following will apply:

Interest payable on loans – Please refer to question 7.6.

Proceeds of a claim under a guarantee – The treatment of such proceeds is unclear, and it would depend on the terms of the agreement, but if the guaranteed obligation is with respect to a domestic business, the interest would be treated as domestic source income and would be subject to Japanese withholding income tax.

Proceeds of enforcing security – Assuming that it is a payment in substitution, the interest would be treated as domestic source income and would be subject to Japanese withholding income tax.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Incentives provided to foreign entities – Japanese withholding income tax may be reduced or exempted by tax treaties as referred to in question 7.6.

Taxes for the purpose of effectiveness or registration – Please refer to question 2.6.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Japan?

Consultation – In order to consider the relevant laws and regulations and the necessary licences, approvals, etc., consultation with governmental authorities would be required at roughly three levels, once the details of the project, including its location are determined: (i) the national government and ministries; (ii) the prefectural or city government; and (iii) the municipal government. Consultation with the neighbourhood may also be required.

Amended PFI Act – Under the amended PFI Act, the scope of facilities that can benefit from the Act has broadened and the means to reflect the views of private businesses have increased. Furthermore, the concept of “Concession Right” (*koukyou-shisetsu-tou-uneiken*), which is, in short, the right to engage in a business of collecting fees by operating a public facility owned by a public entity, has been newly created. A “Concession Right” can be not only transferred but also mortgaged.

Feed-In Tariff Law – Under the Feed-In Tariff Act for Renewable Energy, which was enacted in 2011, Japanese electric utility operators are obligated to purchase solar, wind, hydro, geothermal and biomass generated electricity for contractual terms and at prices to be fixed by the Minister of Economy, Trade and Industry.

Legal Reform – Due to the earthquake, tsunami and nuclear crisis in 2011, new laws are being enacted and existing laws are being amended. Some of the legal reforms, including those that relate to areas such as energy and electricity, are expected to affect project financing in Japan.



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Note

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