Spain

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1 Overview

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

The Spanish economy has continued to show a robust growth pace in 2018, just above 2.5%. The country maintains a healthy flow of foreign investment, spreading across-the-board to all types of projects.

In 2018, a number of ever larger scale renewable projects have featured in the investment landscape. Good examples of these are Forestalia's 300 MW and 800 MW greenfield wind projects respectively known as Project Goya and Project Fenix, or Grupo Jorge's combined 100+ MW wind projects in Aragon.

Political instability have nevertheless frustrated most of the prospects on the infrastructure field, by paralysing some far-reaching governmental initiatives such as the Extraordinary Plan for Roads Investment (*Plan Extraordinario de Inversión en Carreteras*), a scheme of up to €5bn of PPP-based investments on highway and other high-capacity roads, including both construction and maintenance, which was expected to be on track in 2018 and which has instead collapsed (at least temporarily) in the midst of the political turmoil. Notwithstanding this, infrastructure-based funds and generally long-term institutional funds continue their landing in the country, not only on the equity side but increasingly as fresh debt providers.

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

In addition to the above-referred large scale wind renewable greenfield projects, in the area of transport, most of the new projects have been located in the northern regions, such as the €320m project financing of the N-636 Gerediaga–Elorrio road, in Vizcaya, or the €900m project financing of the hard-toll highways AP-1/AP-8 and GI-632, in Guipuzcoa, which included the €500m refinancing of the European Investment Bank tranche. Project finance structures have also been used to permit the acquisition of hard-toll highways, such as the privatised tunnels of Vallvidrera and Cadí, acquired by Abertis and BTG in 2012 and recently reshuffled to accommodate a new investor. Equally, other road based project refinancings include Autovía de Arlanzón (A-1) and Autovía de La Mancha (A-4), both closed in 2018. Aside from roads, a number of interesting and fairly innovative deals have been implemented for underground, tram and other railway-based infrastructure, such as the three concessions for the huge underground Line 9 of Barcelona (totalling more than €3bn in public-private partnership (PPP) schemes), the light rail systems of Malaga and Bilbao, and the financing of some of the civil engineering works behind the impressive high-speed rail network. Some of these projects have now been the object of major divestments by the original sponsors, with institutional infrastructure funds taking the bulk of the equity stakes.

Other significant deals have been closed in the context of the acquisition of various portfolios of car parking facilities (most notably, Parkia and Empark in 2016 and 2017, respectively), in some cases as a result of joint ventures with publicly controlled companies (e.g. the €200m financing of Bamsa) or in the context of tender processes sponsored by governmental entities, such as the railway management company Adif.

In the waste treatment business, the country has also seen interesting investments in waste treatment plants (e.g. the Ecoparks of Zabalgarbi or Zubieta), which in some cases have been at the mercy of unexpected political changes.

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?

Spanish law does not provide for a so-called "universal security" over the entire debtor's assets, nor does it generally admit the creation of a "floating" or "adjustable" lien or encumbrance (except for certain mortgages and pledges over cash-like instruments). Therefore, a specific security agreement is usually required in order to grant security over each type of asset.

Typically, the security package in a project finance transaction in Spain comprises a variety of security over assets, among which the most frequent are: a pledge over the shares of the project company; one or more pledges over bank accounts and receivables arising from project agreements (EPCs, operation and maintenance agreements; hedging agreements; insurance policies, etc.) and, eventually, actual or contingent security over the project's physical assets (whether by means of a pledge or a mortgage, depending on the type of asset).

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 property is taken as security by means of a real estate mortgage

(*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from any insurance policies covering such property; and (iii) the improvement works carried out on the property and natural accretions. Should the parties agree to it, such mortgage may also include movable items located permanently in the mortgaged property.

Security over machinery and equipment may be created by means of a chattel mortgage (*hipoteca de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

Further formalities for the abovementioned security involve the registration of such security with the corresponding Spanish registries: the Property Registry (*Registro de la Propiedad*) with regards to the mortgages; and the Chattel Registry (*Registro de Bienes Muebles*) with regards to the non-possessory pledge.

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

In Spain, security over receivables can be taken in two different ways:

(i) Through a possessory pledge: Although the use of this form of security for receivables is not expressly contemplated under the applicable law (the Spanish Civil Code), it has traditionally been admitted by case law and widely applied in practice. Under this pledge, the pledgor would be entitled to collect the receivables in the absence of a default, unless agreed otherwise. However, the obligation to notify the debtor about the creation of the pledge is, in the opinion of the majority of scholars and certain case law, a requisite for the effective transfer of possession under the relevant pledge (although some hold the opinion that such notification is not a perfection requirement but a precautionary measure to avoid the relevant debtor of the receivables being released from its payment obligation by paying the original creditor, i.e. the pledgor). As a matter of practice, it is sometimes agreed that notice to the relevant debtors shall only be given upon potential or effective default, or if certain covenants (e.g. financial ratios) are not met (on those occasions where it is important from a commercial perspective for the pledgor that its debtors are not aware of such pledge unless necessary).

(ii) Through a non-possessory pledge (*prenda sin desplazamiento de la posesión*): Under this form of pledge, no notification to the relevant debtor would be required (unless such debtor is a public authority), on the basis that the filing of such pledge with the relevant Chattel Registry would give it the necessary publicity *vis-à-vis* third parties. As with the possessory pledge, unless otherwise agreed, this form of security would not prevent the pledgor from collecting the receivables in the absence of enforcement. Nevertheless, it is to be taken into account that this type of pledge is not granted over those receivables which are represented by securities or considered financial instruments.

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

The pledge over bank accounts is simply a pledge over the receivables arising in favour of the holder of a bank account *vis-à-vis* the bank, which should typically correspond or be equal to the account balance.

The formal requirements which apply are identical to those of any other possessory pledge over receivables. The creation of the pledge does not imply, unless otherwise agreed by the parties, the freezing of the account.

On a different note, in the event of pledges over bank accounts securing cash settlements of financial instruments (such as netting-based financial agreements), it may be possible to subject the pledge to a specific regime regulated under Royal Decree 5/2005. The pledge created under this regime would not require notarisation.

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

Yes, it is certainly possible, and it is one of the most common and frequent types of security in Spanish project finance transactions.

If the shares to be pledged belong to a private limited company (*sociedad limitada*), and taking into account that quota units (*participaciones*) are not represented by issued certificates (contrary to shares (*acciones*) of public limited companies (*sociedad anónima*)), possession is transferred by means of the entry into a notarial deed of pledge and, eventually, registration of the pledge in the Registry Book of Shareholders (*Libro Registro de Socios*) of the relevant pledged company.

When the shares belong to a public limited company (*sociedad anónima*), transfer of possession is achieved as follows: (i) if the share certificates (*títulos múltiples* or *resguardos provisionales*) have been issued, by endorsing the relevant title certificate and registering the pledge in the Registry Book of Shares (*Libro Registro de Acciones*); or (ii) if no share certificates have been issued, by means of the registration of the pledge in the Registry Book of Shares.

In both cases, it is also advisable (and market standard practice) for the pledgee to request and obtain a certificate issued by the company's secretary representing that the pledge has been registered in the Registry Book of Shareholders or the Registry Book of Shares (as applicable), which will also comply with the requirement of notifying the pledge to the company whose shares are being pledged.

When the pledged company's shares are represented by means of book entries (*anotaciones en cuenta*), the pledge must be registered in the relevant account, becoming enforceable against third parties once registered in the book entry register. In the case of shares traded on a Spanish secondary market, the book entry register will be held by a central clearing house. On request, the entity responsible for the book entry register will issue a certificate stating that the pledge has been entered.

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)?

For possessory pledges to be opposable before third parties, a notarised agreement (*póliza notarial*) or, as the case may be, a deed (*escritura pública*) must be entered into. This is due to the fact that it is presumed that these public documents verify the date and the terms and conditions of the pledge (other than pledges under Royal Decree 5/2005; see question 2.4 above).

Some other types of security are subject to compulsory notarisation and registration on public registries (particularly mortgages and

non-possessory pledges, as mentioned in question 2.2 above), which has certain implications in terms of cost, mainly due to: (i) registration fees, which vary in accordance with the amount of the secured liability (approximately 0.02% of the secured liability); and (ii) stamp duty of 0.5% to 1.5% of the secured liability (principal, interest and any related costs), depending on the region where the collateral is located.

Notarial fees are calculated on the basis of fixed criteria, which provide a means to calculate the amount of their fees and which vary in accordance with the amount of the secured liability (approximately 0.03% of the secured liability), although in transactions with an aggregate value over six million euros (€6,000,000), such fees may be reduced if negotiated with the notary.

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?

For security documents that need to be filed within a public registry, the expected elapsed time from the date the documents are notarised to the actual registration by the public registry is usually from two (2) to six (6) weeks. Nevertheless, on occasions public registries consider that necessary amendments need to be made to the relevant security document in order to comply with registration criteria, which may delay registration and increase the previously mentioned term. As to registry fees, see question 2.6 above.

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.?

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved.

3 Security Trustee

3.1 Regardless of whether your jurisdiction 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?

Spanish law does not recognise trusts as a legal concept. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for a Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which holds the security in its own name and on behalf of the other lenders.

It is possible for a security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney in favour of the security agent. Such power of attorney must expressly authorise the security agent to carry out the enforcement proceedings on behalf of the lenders.

This system nevertheless has two issues: (i) from a practical perspective, Spanish banks are reluctant to grant powers of attorney to other banks, and prefer to appear themselves throughout the enforcement proceedings; and (ii) from a legal perspective, authors and case law are inconsistent regarding the role of an agent acting on behalf of a syndicate of lenders upon enforcement.

3.2 If a security trust is not recognised in your jurisdiction, 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?

The structure of "parallel debt" between lenders and a special purpose vehicle (SPV) is not specifically recognised under Spanish law. Should this structure be adopted in a transaction where the secured obligations are governed by Spanish law, there is a risk that it would be considered to be a fiduciary relationship unsupported by a real credit of the agent against the project company. If the secured obligation is governed by foreign law, there should be no problem for the Spanish security to secure such parallel debt, to the extent the same is valid and enforceable under the applicable law. Notwithstanding this, there are clearly insufficient judicial precedents to assure that this will always be validated by the courts.

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?

The timing and value of enforcement will depend very much on the type of security enforced and the enforcement proceedings chosen by lenders.

Enforcement of collateral security is typically carried out through a public auction, either in the context of judicial or notarial proceedings. For notarial enforcements, see question 5.4 below.

The rights derived from the relevant security may be judicially enforced either through declaratory civil proceedings or through summary proceedings. The latter action is faster and more effective, while the former is costly and time-consuming. However, to start summary proceedings, certain requirements must be met. In particular, the lender will be required to: (i) specify the agreement giving rise to the claim and the final due amount, with a full break-down of each concept; (ii) provide a notarial deed (or notarised agreement) where a Notary Public confirms that calculations have been made in accordance with the terms and conditions of the relevant agreement; and (iii) present a copy of the notarial request (*requerimiento notarial*) for payment addressed to the debtor.

In order to proceed: (i) to the enforcement of a pledge, the court will request the deposit of the pledged assets; or (ii) to the enforcement of a mortgage, the court will give notice of the foreclosure to any other mortgage creditor. Once the above actions have been carried out, the court will publish a date for auction. The debtor will only be able to oppose enforcement under limited circumstances, such as prior extinction of the pledge, full payment of the secured obligation or existence of a material error on the calculation of the due amounts.

The time schedule for the actual recovery of amounts through enforcement will depend on each case, since there is no time limit for the court to complete the proceedings.

The enforcement of pledges over receivables may also be achieved through set-off.

Restrictions on enforcement of security regarding regulatory consents are very specific, usually related to energy transactions, and will ultimately depend on the kind of project and the assets on which security is enforced.

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

Generally, there is no distinction between domestic and foreign entities when it comes to foreclosing.

5 Bankruptcy and Restructuring 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?

As a general rule, as from the declaration of insolvency of the project company, secured lenders will be prevented from enforcing their security until the earlier of the following: a composition of creditors is approved; or at least one year has elapsed since the declaration of insolvency, provided that during this period no liquidation proceedings have been commenced.

Exceptionally, the above standstill period will not apply if the insolvency judge determines that the assets which constitute the object of security are not devoted to the business activity of the insolvent company, do not constitute a productive unit of such company or, eventually, such asset is not necessary for the continuation of the business operations.

At any time during the standstill period, the insolvency administrator may decide to satisfy immediately any due amounts to the secured lenders, in order to avoid the relevant security being enforced.

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?

Any claims of secured creditors will be qualified as "privileged claims" up to the value of the collateral on which they fall; any excess being qualified as an "ordinary claim" or, in the case of interest claims, a "subordinated claim". As a general rule, no third parties may benefit from the value of the secured assets insofar as the secured creditor has not been paid (whether by enforcement of the relevant security or at the request of the insolvency administrator – see question 5.1 above). In connection with this, secured creditors will not be affected by the contents of the creditors' composition agreement unless they agree otherwise.

It may be possible to challenge security created "to the detriment of the insolvency estate" within the two years preceding the declaration of insolvency, even in the absence of fraudulent intent. In particular, there is a presumption of prejudice to the insolvency estate in the event: (i) that the security was granted for pre-existing debts or for new debt incurred to cancel pre-existing, unsecured debt; or (ii) of any prepayments or other acts of early cancellation of secured payment obligations.

Refinancing agreements achieved before the date of insolvency which meet certain requirements (substantial increase in the available credit, extension of the maturity date, general enhancement of the financing obligations of the relevant debtor) and which result in a general improvement of the prospects of the debtor in the short and medium term shall not be challengeable during the two-year clawback period, provided that: (i) the refinancing agreement is entered into with creditors representing at least 60% of debtor's liabilities as of the date of the agreement; (ii) the terms of the agreement allow the future viability of the company; and (iii) the refinancing agreement is formalised as a notarial deed. Irrespective of the above, if a refinancing agreement meets all the following requirements it shall also not be challengeable during the two-year clawback period if: (a) it increases the ratio of assets over liabilities; (b) the current assets exceed the current liabilities; (c) the value of security does not exceed 90% of the existing debt for such creditors, nor the percentage of the existing debt covered by security prior to the refinancing agreement; (d) the applicable interest rate has not increased by more than 33% over the prior applicable interest rate; and (e) the refinancing agreement is formalised as a notarial deed.

If the refinancing agreement: (i) has been ratified by creditors which represent at least 51% of the debtor's financial liabilities; and (ii) substantially increases the available credit, extends the maturity date, or enhances the financing obligations of the relevant debtor, such agreement may be sanctioned by the insolvency judge, in which case it may also bind dissident lenders (subject to such refinancing agreement having been entered into by certain reinforced majorities, ranging from a minimum threshold of 60% to 80%, depending on whether or not the particular dissident lenders are secured and the scope of the cramdown).

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

Governmental entities of any type (whether territorially based – such as national, regional or municipal authorities – or those of a functional nature) will not be subject to the Insolvency Act. However, companies directly or indirectly controlled by governmental entities will also be subject to general bankruptcy laws.

Additionally, certain types of companies (such as banks and other credit entities, financial services companies or insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by the Insolvency Act.

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?

Yes; out-of-court foreclosure, available for certain types of security, is typically carried out by a Notary Public and takes the form of a public auction. The terms and conditions of such auction are loosely regulated under Spanish law and hence, the guidelines and provisions by means of which such enforcement is carried out are usually agreed upon by the parties beforehand in the relevant security document. For any unregulated aspects, the Notary Public tends to follow equivalent provisions applicable to judicial enforcements. Should the auctioned assets not be acquired by a bidder after the first two auctions, lenders are given the option to acquire ownership over such assets. Nevertheless, in such case, the secured obligation is understood as paid or compensated, and

therefore lenders shall not be able to sue the security provider for any outstanding amounts under the secured obligations.

In the case of security granted over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may appropriate directly and immediately the secured assets, without conducting a public auction. Equally, certain regional laws (such as Catalan law) expressly permit private sales of the secured assets or, in the case of highly liquid security, appropriation by set-off.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Section 5*bis* of the Spanish Insolvency Act provides companies with a way to achieve restructuring of their debts without having to request a formal declaration of insolvency.

The directors of a company may submit to the relevant court a notification that the company has initiated negotiations in order to achieve the restructuring of its debt, which the company has three (3) months to achieve (and where during such period the insolvency of the company may not be requested by its creditors). If negotiations fail after such time, the company has a month to request a formal declaration of insolvency.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

In accordance with the Spanish Insolvency Act, the insolvency situation of a company may be considered by the court to be either "fortuitous" or alternatively, "guilty". The insolvency will necessarily be considered "guilty" in certain scenarios specifically described by the Spanish Insolvency Act, which mainly consist of situations where the directors of the insolvent company failed to carry out their obligations with the necessary diligence (i.e., amongst others, keeping separate accounting books, embezzling assets of the company, fraudulently detracting assets from the company or failing to request the declaration of insolvency within two months after the directors knew or should have known that the company was insolvent).

If the insolvency is considered to be "guilty", the consequences for the directors may include:

(i) prohibition to manage third parties' assets and to act on behalf of third parties for a period ranging from two (2) to fifteen (15) years;

(ii) the loss of any rights they may have as creditors of the insolvent company;

(iii) the obligation to return any funds or assets which they may have unduly obtained; and

(iv) eventually, the liability to refund all or part of the unpaid debts of the insolvent company.

6 Foreign Investment and Ownership Restrictions

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

With the exception of certain special sectors, such as air transport, broadcasting, telecoms or national defence, foreign investment is widely liberalised. However, non-resident investors must notify the Foreign Investment Registry of the amount, destination and form of investment, mainly for statistical purposes. The obligation to notify does not restrict the ability of the foreign investor to remit income coming from investment outside Spain.

Exchange controls are also liberalised, so that, as a general rule, currency is freely transferable through a registered bank account from Spain to any country and *vice versa*, although certain information must be provided periodically (monthly, quarterly or annually) depending on the amounts of foreign transactions carried out over a calendar year.

Recently enacted anti-money laundering regulations now provide that any company shall have a Spanish Tax Identification Number when entering into potentially taxable transactions (e.g. execution of notarial deeds with tax implications). The aforementioned identification does not have any impact on the residence for tax purposes of non-resident entities.

In addition, a Spanish or foreign entity entering into a notarial deed or other equivalent agreement shall identify its "real owner" (*titular real*), i.e. whether there is any individual ultimately owning 25% or more of the share capital of the foreign entity, and if there is not, the identities of the members of the board of directors.

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

This is not applicable. See question 6.1 above.

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

Expropriation of private property must be based on public utility or social interest. These concepts and the procedure for expropriation are strictly regulated, with very limited, if any, room for governmental discretion. No distinction is made between national and foreign ownership.

Generally, governmental authorities shall have no pre-emption rights for the sale of property, other than in the case of protected natural areas and certain regulated businesses.

7 Government Approvals/Restrictions

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

The agencies and departments with authority over a project greatly depend on the kind of project. In energy projects, the responsible authority would be the state's government to authorise any construction, transfer or modification of premises for the production, transport or distribution of energy when the project affects more than one region or the energy is transported or distributed outside the region where it is produced. Regional governments have competences regarding electricity generation and distribution inside their respective region and therefore depending on the size and location of the project, they may also have a role.

Another relevant agency in the energy sector is the National Markets and Competition Commission (CNMC), operating since

October 7, 2013, which includes within the same entity different supervisory responsibilities for each regulated sector (energy, postal, transportation, competition, etc.). Therefore, nowadays the scope of the CNMC spans all energy sectors (electric power, fuel, gas, etc.) and also acts as a consultant for the Spanish and regional government in all matters regarding energy sectors and is strongly involved in the applicable regulation.

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?

Generally, security instruments are notarised and, in the case of mortgages and certain forms of pledges over chattel property, filed at the relevant public registry, such registry typically being the property registry in the case of real estate and the chattel property registry in the case of machinery, IPRs, receivables and other forms of chattel property. See section 2 above.

We refer to question 6.1 above for notification requirements to the Foreign Investment Registry or to the Bank of Spain, as the case may be.

Specially regulated sectors, such as energy or telecommunications, may require specific supervision from regulatory bodies. Equally, administrative concessions and mortgages upon such concessions need to be approved by the relevant concession granting entity and subsequently filed with the land registry.

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)?

Although the actual ownership of land or natural resources (other than water, mineral resources, natural gas and oil) does not require a licence, developing a business or project related to such land or resources may require certain permits or authorisations granted by authorities at national or regional level depending on the size and location of the project, which may be related to the nature of the industry or its environmental impact. Local licences (for example, for construction) may also be required.

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

Under Spanish law, there are several state taxes payable on the exploitation of electricity generation projects and on the processing of energy products (oil, gas, etc.) when those are used as fuel. Some of these taxes are harmonised with EU Directives and are called special taxes on electricity and on hydrocarbons.

Generally speaking, these special taxes are not actually paid by the project company but its payment (if all legal requirements are met) is suspended until the electricity or energy product reaches the final consumer, who will be the actual payer.

There is also a state tax on oil and gas extraction and exploitation based on the extension of land used for such purposes and the amount of years the project company will be authorised to operate on such land.

Moreover, since January 1, 2013, there is another state tax on electricity generation based on the production of electricity either on renewable or conventional electricity production installations which will be subject to a tax rate of 7%.

Additionally, there are other regional and local royalties payable on the extraction of natural resources based on the environmental impact the project may cause. Those royalties vary depending on the kind of natural resource and the region where the extraction takes place.

Finally, project companies in the extraction and exploitation of hydrocarbons sector will be subject to company income tax at a special rate of 30% (instead of the general tax rate which is 25%).

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

There are no currency, exchange control or other regulatory restrictions that limit the availability or transfer of funds for the project company to make any payments due, subject to the notification requirements provided in question 6.1 above.

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?

Other than withholding taxes (see section 17), there are no restrictions on the repatriation of investment returns or loan payments to non-resident parties, except for the obligation to notify the Foreign Investments Registry or, in the case of loans and other forms of debt financing, the Bank of Spain, as described in question 6.1 above.

Section 18 of the Spanish Corporate Income Tax Act provides for a general limitation on the tax deductibility of financial expenses. Net financial expenses exceeding 30% of the operating profits of a company – as defined by the Spanish tax legislation – are not tax-deductible.

For that purpose, net financial expenses are defined as the difference between the financial expenses (except those not deductible under article 15 g), h) and j) of the Spanish Corporate Income Tax Act) and the interest obtained.

In all cases, net financial expenses up to one million euros (€1,000,000) are tax-deductible. The net financial expenses which were not tax-deductible in a particular tax year can be carried forward with no time limitation. In the event that the financial expenses do not exceed the 30% threshold, the difference between such 30% and the percentage of the operating profit of a tax year can be added up to the limit of the subsequent five tax years.

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

Yes. However, bank accounts held by Spanish companies outside Spain and operations carried out through such accounts are subject to regular filings with the Bank of Spain.

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 your jurisdiction or abroad?

In addition to the withholding tax described in section 17 below, the following restrictions may apply:

(i) under Spanish corporate law, there are certain requirements regarding the payment of dividends, which are common to many other jurisdictions, such as the need to set off losses from previous years or to assign 10% of the profits to a statutory reserve until the reserve reaches 20% of the share capital, as well as other requirements intended to avoid the payment of dividends by a company that is not financially viable; and

(ii) from a contractual perspective, project financing agreements will typically restrict the distribution of dividends. Standard restrictions would include: (a) meeting certain financial covenants; (b) reaching a certain percentage of repayment of senior debt; (c) ensuring that the project has been operating for a number of years; and (d) cash sweep provisions.

Additionally, minority shareholders may be entitled to have their shares purchased by the project company if the shareholders decide not to distribute any dividends notwithstanding the fact that the company has operational profits.

Finally, under certain concessions or other administrative contracts, public authorities establish minimum percentages of equity throughout the project, which could also act as a restriction on the payment of dividends.

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?

There are certainly environmental, health and safety regulations potentially applicable to a project financing, which may vary substantially depending on the type of project and the region where the project is developed, since part of the legal competences in such aspects correspond to regional governments.

From an environmental point of view, before commencing any large-scale construction work potentially affecting the environment, it will likely be required to obtain the previous approval of the relevant regional environmental authority, by means of an environmental impact assessment issued by the project company, which the relevant authority will need to review and approve, usually subject to the fulfilling of certain regulations and measures aimed at assessing and subsequently mitigating the environmental risks associated with the project.

In conclusion, the federal nature of the Spanish administration and the complexity and dispersion of regulations make it necessary to carry out a case-by-case analysis.

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

As long as they do not use governmental funds or subsidies, there is no specific legal framework for procurement by privately-held project companies, except in the case of entities operating in regulated sectors such as energy or water.

However, as a matter of practice, it is relatively common that project companies wishing to subcontract large works (mainly construction and civil engineering) set out a procurement system resembling that applied by governmental entities, particularly with regard to the hiring principles (transparency, non-discrimination, concurrence and equal treatment). In some cases, notably infrastructure concession contracts, this contracting framework may be imposed by the concession granting authorities in order to ensure that part of the concession works are subcontracted to competitors of the concessionaire.

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?

Generally not, although in the case of concessions and other administrative contracts it might be necessary to complete a case-by-case analysis of the relevant concession terms.

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

Generally yes, although for the avoidance of any doubt it would be advisable to review the relevant insurance policy.

9 Foreign Employee Restrictions

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

Foreign workers (nationals outside of the European Union and Switzerland) generally need to obtain a work permit for stays of over ninety (90) days in Spain, irrespective of their professional level (worker, technician, engineer or executive).

The two main kinds of work permit are: (i) a work permit for transnational rendering of services, which is used by companies which transfer an employee who remains hired by a foreign company, hence subject to the social security and tax regulations of the foreign company and generally lasts for a maximum period of one year, which can be extended to an additional year; and (ii) a regular work permit, which allows the individual to work in Spain for a period between ninety (90) days to five (5) years, if the person in question is hired by a Spanish company.

Despite all the above, depending on the origin country, the application for a visa might also be required for stays shorter than ninety (90) days in order to allow the international worker access to the country and the possibility to render services.

In terms of Social Security, employees in the EU and Switzerland benefit from an EU regulation enabling employees to work throughout the different countries while maintaining their Social Security benefits in the country of origin. Similar regimes are foreseen for other countries through bilateral treaties (a treaty having been recently signed with the People's Republic of China). In addition, under settled case law, if certain requirements are met, bilateral treaties subscribed between EU Member States improving the current EU Regulation shall be applicable.

Finally, case law has also stated that EU Regulation will apply to non-EU Member State nationals who lawfully render services in the EU and transfer within the EU Regulation geographical scope.

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?

Customs duties may apply on imported project equipment from

outside the EU, as established by EU regulations and trade treaties between the EU and third countries. In addition, the European Commission has powers to impose anti-dumping measures in line with World Trade Organization (WTO) principles.

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

This will be determined by the common customs tariff uniformly applied by the EU Member States for imports which originate in third countries, and will depend on the nature of the imported equipment and its country of origin. As with anti-dumping measures, the duty, product and producers affected are established by a Council Regulation.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Article 1.105 of the Spanish Civil Code sets out as a general rule the absence of liability of any party for damages caused by a situation of *force majeure*. However, parties to an agreement may contractually waive the application of this general liability exclusion regime. Accordingly, most project financing agreements and other project contracts include as a specific event of default the occurrence of a *force majeure* event, which is usually defined in detail in the relevant contract. It is nevertheless unclear whether Spanish courts would recognise acceleration of a project facility on the grounds of *force majeure*, unless there is a substantial impact on the ability of the project company to meet its payment obligation under the relevant facility, or the viability of the construction or operation of the project is seriously in danger as a result of such *force majeure*.

Lenders are typically excluded from any contractual liability if they fail to provide the required funds due to *force majeure*. In the current economic turmoil, market disruption clauses are widely used.

In administrative contracts, such as concessions with public authorities, *force majeure* is a regulated term related to natural disasters or major alteration of public order, and is one of the circumstances which would entitle the concessionaire to benefit from an indemnity from the public authorities, in the event that the situation of *force majeure* renders the performance of the contract uneconomical for the concessionaire. Such indemnity may take different forms; typically, higher tariffs or longer concession terms. If the *force majeure* event impairs the continuation of the project, public authorities may choose to terminate the concession and indemnify the relevant concessionaire.

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?

The Spanish Criminal Code prohibits the bribery of national and foreign government officials. This is defined as the conduct of a private individual who offers or delivers a handout or remuneration of any kind to an authority, civil servant or person who participates in the exercise of public duties in order for the latter to perpetrate an act that is against the duties inherent to his or her office, or in order for him or her not to carry out such act, or to delay what he or she should carry out. The same prison sentences and fines are foreseen for the corrupt authority, officer or person. This is without prejudice to the additional punishment for the act perpetrated, omitted or delayed due to the remuneration or promise, if such act also constitutes a felony (which may imply criminal penalties of up to nine million euros (€9,000,000) or two to five times the profit obtained).

These penalties shall also be applicable when charges are brought against, or the acts concerned affect, officers of the European Union or civil servants who are nationals of another Member State of the Union.

The Criminal Code also prohibits influence-peddling, described as influencing a civil servant or authority by taking advantage of any situation arising from his personal relation with him/her or with another public officer or authority, to obtain a result that may directly or indirectly generate a financial benefit for him/her or for a third party, which shall be punished with imprisonment for six (6) months to two (2) years and a fine of one to two times the benefit intended or obtained.

Spanish jurisdiction would also apply to crimes committed abroad against the Spanish public administration. Perpetration of an act defined by law as a felony or misdemeanour shall entitle the victim to reparation for the damages and losses caused thereby.

13 Applicable Law

13.1 What law typically governs project agreements?

Typically, project documents are governed by Spanish law (particularly when project counterparties consist of Spanish entities), although the relevant parties can choose to apply a foreign law, in accordance with the provisions of Regulation (EC) No. 593/2008 of the Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I). The selection of a foreign law will be valid and legally binding in Spain, and a Spanish court would apply such law provided that the contents of the relevant provisions of the chosen laws may be duly proved before the Spanish court without contravening the principles of Spanish public policy.

13.2 What law typically governs financing agreements?

Financing agreements are also typically governed by Spanish law, although as a matter of practice, when the group of lenders is dominated by foreign banks or international institutions, English or New York law may be the preferred option. Again, a foreign law may be chosen by the parties to govern financing agreements in accordance with the provisions of the Rome I Regulation (see question 13.1 above).

Security documents must, however, comply with the "*lex rei sitae*" principle existing under Spanish law, which determines that the governing law of a security document must be the law of the jurisdiction where the asset is located. Specific fiction location rules may apply to non-tangible assets (for example, in the case of receivables, location will be determined by the place of payment or the nationality of the debtor) and, for registrable assets, the governing law will be that of the place of the public registry where the asset is filed.

13.3 What matters are typically governed by domestic law?

Generally, security documents relating to assets located in Spain, and personal guarantees granted by Spanish entities (particularly when the assets of the relevant Spanish guarantor are mainly located in Spain), are governed by domestic law.

In concession agreements and other PPP agreements, the contractual relationship between the concessionaire and the public authorities will always be subject to the Spanish administrative laws.

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?

Under Spanish law, waiver of immunity is legally valid and enforceable unless it relates to certain entities which are affected by special immunities, such as: (i) persons or entities under public law, and assets owned by such entities; (ii) autonomous organisations, semi-public entities or agencies; (iii) diplomatic and consular entities; and (iv) certain cooperatives. Further, the assets connected to a public service (such as the assets of an administrative concession) may also be subject to immunity even if they are operated by private entities.

Submission by the parties to a foreign jurisdiction is valid, binding and enforceable in Spain: (i) in the case of foreign courts covered by conventions, in accordance with the provisions of Council Regulation (EC) No. 593/2008 of 17 June 2008 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the applicable bilateral convention; and (ii) in the case of foreign courts not covered by Brussels/Lugano or bilateral conventions, in accordance with the domestic conflict of law regulations, which would reject the selection of foreign courts in cases where the exclusive jurisdiction of the Spanish courts under the Spanish Law of the Judiciary is violated.

15 International Arbitration

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

Yes, the express submission by the parties to international arbitration and arbitral awards contained in an agreement will be recognised by Spanish courts in accordance with the provisions of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), of the 1961 European Convention on International Commercial Arbitration (the "**Geneva Convention**") and of Spanish Law 60/2003 of 23 December 2003 on Arbitration (the "**Spanish Arbitration Law**").

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

Spain ratified the New York Convention in 1977. Also, Spain ratified the Geneva Convention in 1975.

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

The Spanish Arbitration Law does not list the matters which cannot be subject to arbitration. Instead, such law establishes that a dispute may be arbitrable "*if the parties may dispose of*" the subject matter of obligation. Examples of disputes which are not arbitrable will mainly be related to family law (e.g. parental authority, marital status, filiation) and matters in which the Public Prosecutor's Office has to intervene (e.g. criminal procedures).

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

Arbitration is only possible if the parties involved have expressly agreed to it in the relevant agreement or in a separate document. To solve a dispute through arbitration, the express will of the parties to submit their disputes to arbitration is legally required. Such will shall be verifiable in writing, contained in a document signed by the parties or in an exchange of communications (letter, fax, telex, telegram or other means) evidencing such express agreement.

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?

Political risk clauses are very unusual in Spanish project finance. In those cases where there are serious concerns regarding future changes in government policy which could affect the existing agreements between a project company and a public authority, the project company (or its lenders) would typically seek that the project be backed by a specific government resolution. Direct agreements with public authorities are very unusual.

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?

Generally speaking, interest paid by a Spanish borrower under a loan to a domestic lender (other than a financial institution) is subject to withholding tax at a 19% rate. Likewise, interest income paid to a non-EU tax resident is subject to withholding tax at a 19% rate, unless a lower rate applies under a tax treaty (treaty rates ranging between 5% and 15%). Interest payments to EU residents or EU permanent establishments (other than those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a regular company).

On the other hand, proceeds of a claim under a guarantee or the proceeds of enforcing security are generally subject to withholding tax as if such payments were made by the borrower.

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?

As a member of the European Union, Spain benefits from the free transit of goods within the EU, including exchange rate fluctuations and transaction costs. Therefore, Spain's EU membership represents an important part of its foreign policy.

Additionally, Spain has more than 75 income tax treaties currently in force, as well as a remarkable treaty network with Latin American countries which reduces or eliminates the Spanish taxes payable to residents of treaty countries.

The main tax incentive is the Spanish international holding company (ETVE) regime, which nowadays is a well-established legal framework that has turned Spain into one of the most favourable jurisdictions within the EU to channel and manage international investments. ETVEs can benefit from an exemption on inbound and outbound dividends and capital gains, as long as certain requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, and can therefore benefit from tax treaties signed by Spain, as well as EU Directives.

Under Spanish law, there are no relevant taxes on foreign investments in addition to those that would apply to a Spanish investor.

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 your jurisdiction?

Most of the relevant issues have already been covered in the previous sections.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Until recently, companies bearing the legal form of a private limited company (*sociedad limitada*) were not legally entitled to issue, guarantee or secure bonds and other debt securities. Nevertheless, due to a reform brought about by the Financing Incentive Law (*Ley de Fomento de la Financiación*) in 2015, article 401 of the Companies Law (*Ley de Sociedades de Capital*) was amended in order to allow all companies to issue, guarantee and secure bonds and other debt securities (albeit certain restrictions and requirements).

The issue of bonds by private limited companies (*sociedad limitada*) is subject to certain quantitative limitations, as these kind of companies may not issue unsecured bonds for an amount equal to double its net equity (such quantitative limitation disappears when such issue is secured by an *in rem* or personal guarantee). With regards to public limited companies (*sociedades anónimas*), all quantitative restrictions have been removed.

In the context of certain PPP projects, the issue of bonds may be subject to prior consent by the relevant governmental authority, although the general regulations on concessions are permissive on the issue of bonds.

Capital market instruments may be structured as private or public placements (depending on the type of investors addressed, number of retail investors addressed, total issue amount, minimum amount of securities to be acquired per investor, and minimum unit par value of the securities). Private placements have no disclosure or supervision requirements with the Spanish Securities and Exchange Commission (to the extent that the relevant instruments are not intended to be listed in an official market). Nevertheless, except for private placements exclusively addressed to qualified investors, private placements require the intervention of an authorised financial entity in order promote the allocation of securities.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Istina'a, *Ijarah*, *Wakala* and *Murabaha* are not instruments expressly recognised under Spanish law. However, it is sometimes possible to structure project finance transactions in compliance with *Shari'ah* law using other instruments recognised under Spanish law which, although they do not have the same characteristics as the original Islamic instruments, are similar in nature; such as an EPC agreement for the *Istina'a*, an operating lease for the *Ijarah*, a mandate for the *Wakala* or the purchase of chattel property with deferred payment for the *Murabaha*.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

There is no relevant case law in Spain regarding the application of *Shari'ah* law as the governing law of a contract or dispute. However, it is unlikely that Spanish courts will accept its application, unless the governing law of the relevant agreement is set as the law of a country with legislation based on *Shari'ah* law (see also question 13.1 above).

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Under Spanish law, the inclusion of an interest payment obligation in a loan agreement is fully valid and therefore there is no risk of it affecting its validity and/or enforceability.

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Héctor Bros is a partner at Cuatrecasas, with broad experience in banking and finance. He has provided advice on multiple corporate and project financing transactions, asset financing, complex and innovative public-private partnership (PPP) and private finance initiative (PFI) structures for transportation and social infrastructure (prisons, hospitals, public buildings), other forms of structured finance and cross-border acquisition finance. He regularly assists a number of national and international banks and is a leading reference for top sponsors operating in the Iberian market.

Amongst other transactions, Héctor Bros advised lenders in the €2.5bn financing of Tranches I, II and IV of the Barcelona Metro Line 9, the €900m financing of the AP-1, AP-8 GI-632 hard-toll highways in the Basque Country, the €400m project debt restructuring of the Vallvidrera and Cadí tunnels and the €1.4bn regional infrastructure debt restructuring of the *Generalitat de Catalunya*, or the acquisition by several investment funds of the bank debt of the distressed Madrid toll roads. He has also participated in high-profile international project finance transactions, such as the $19bn Sadara petrochemical project in Saudi Arabia, where he advised the Spanish Corporate Internationalisation Fund (FIEM), and the €600m non-recourse financing to Abertis in connection with the acquisition of the Italian A-19 "Serenissima" toll road.

Héctor Bros has been recommended by several directories, including *Chambers Europe*, *Who's Who Legal*, *Best Lawyers* and *The Legal 500*, in Banking & Finance, Project Finance and Public Law.

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The firm's Finance Practice consists of over 60 lawyers based in Madrid, Barcelona, Lisbon, London, Mexico City and Bogotá, with expert knowledge and extensive experience in complex national and international financial transactions. The firm's lawyers work seamlessly from different locations, ensuring a wide coverage for their clients, wherever they are based. The team has extensive expertise advising sponsors and banks in all types of domestic and foreign, corporate and structured, financial and debt capital markets transactions. Among other aspects, such transactions consist of: structured and project finance facilities; refinancing, acquisition finance and other sorts of repackaging; synthetic and mortgage-backed securitisation; credit assignments; issuance of fixed-interest securities and other financial instruments; and consumer credits. We also deal with bankruptcy issues in order to efficiently ensure bankruptcy remoteness and an adequate security package structure, extending the scope of our advice to the restructuring of debt. In addition, we advise on matters and relevant issues related to equity requirements for credit institutions, as well as for other entities.