

Project Finance 2022

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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2008

Fifteenth edition

ISBN 978-1-83862-705-8

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Project Finance

2022

Contributing editor**Aled Davies**

Milbank LLP

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



London

July 2021

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This article was first published in August 2021

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CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

The types of collateral and security interests are as follows:

- *keun*-mortgage on real property;
- *keun*-mortgage on concession rights;
- *keun*-mortgage on factory assets;
- real estate mortgage trust;
- *yangdo-dambo* in relation to movables;
- *keun*-pledge over shares;
- *keun*-pledge over bank accounts;
- *keun*-pledge over insurances; and
- assignment of contractual rights (*yangdo-dambo*).

In a *keun*-mortgage any existing lien would have a significant impact on the value of the security interest over the same collateral. In practice, it is unlikely that any existing lien would remain undiscovered during a due diligence exercise on the project which would be complete prior to execution of the relevant finance agreements.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

***Keun*-mortgage on real property**

A *keun*-mortgage is registered with the relevant Registry Office of the Supreme Court of Korea.

***Keun*-mortgage on concession right**

In relation to a private investment project under the Act on Public-Private Partnerships in Infrastructure (the PPP Act), by way of execution of a concession agreement between the government and the concessionaire, the concessionaire completes construction of the facilities and transfers its ownership to the government, and the concessionaire is granted the concession right.

As the government retains the ownership, lenders cannot establish a mortgage on the relevant properties and this is an obstacle to obtaining successful project financing. To prevent this, the concessionaire is granted a concession right. The PPP Act treats the concession right as a real property right under the Civil Act, and the government maintains a register for the concession right granted, which is

equivalent to the Registry Office's keeping of the registry. The lenders are able to establish a *keun*-mortgage on the concession right and the *keun*-mortgage is registered with the government's register.

***Keun*-mortgage on factory assets**

Various assets, including real estate, movables, lease rights and intellectual property rights, among other rights, may be attached together as a collective 'factory asset', and a new ownership right can be initially established in relation to the factory asset (registration of the ownership right of the factory asset) and, thereafter, a *keun*-mortgage can be established on this ownership right. Various assets can be jointly mortgaged and, as such, creditors may find this convenient.

Power plants, terminals and waste management facilities are also recognised as factories and the concept of the factory asset may also be used in such projects. To preserve the ownership right, registration is required in advance with respect to a factory asset. In relation to a registration officer's acceptance of the application for registration for preservation of ownership right, a public notice that requests a person entitled to the movables constituting the factory asset or a creditor under attachment or injunction procedure such as provisional attachment to report its rights, must be published in the Official Gazette. The reporting period is generally between one and three months (two months on average). The public notice is required since a new ownership right (the ownership right over the factory asset) is being created by attaching various assets.

Once the ownership right over the factory asset is created, a *keun*-mortgage on the factory asset may be registered with the Registry Office of the Supreme Court of Korea.

Real estate mortgage trust

The ownership right is registered under the name of the trustee for the purpose of entrustment of the collateral.

The original trust agreement is filed with the registry and, as such, the lenders are listed in the registry as preferred security holders.

***Yangdo-dambo* in relation to movables**

A transfer of possession is required to establish a security (in the form of a pledge) with respect to a movable. However, no physical delivery is necessary if a *yangdo-dambo* is being established on a movable. For example, the *yangdo-dambo* method is used with respect to a movable property, such as a wind turbine, which is not recognised as a building. Accordingly, a *keun*-mortgage cannot be established over a wind turbine as it is not real property. However, the *yangdo-dambo* method is useful in this context as the borrower must continue to operate it and, accordingly, the lender cannot take its possession.

To establish a *yangdo-dambo* over a movable, the disclosure procedure known as a 'recognition method' must be used to notify the public that a *yangdo-dambo* has been established. In practice, this notice is printed, laminated and attached to the movable.

Keun-pledge in relation to the shares

Possession of the shares is transferred to the lenders. In practice, the security agent retains the share certificates.

The name of each pledgee (as opposed to the security agent) is recorded on the back of the share certificate.

The pledgee's name and address are recorded in the shareholders' registry maintained by the issuer of the shares.

The Act on Electronic Registration of Stocks, Bonds, Etc (the Electronic Registration Act) has been in effect since September 2019. Under the Electronic Registration Act, a *keun*-pledge can be created over electronically registered stock by registering the establishment of that *keun*-pledge and the pledgee's name in the pledgor's electronic registration account, pursuant to an application by the pledgor. While the Electronic Registration Act requires certain securities, including listed stock and the stock of Investment Companies (as defined under the Financial Investment Services and Capital Market Act), to be registered electronically, project companies that are established to develop a project seldom register their stock electronically in practice.

Keun-pledge in relation to a bank account

Establishment of a *keun*-pledge on the account is notified to the account bank and the account bank must provide its consent with a fixed date stamp.

The account passbook is retained by the lenders. In practice, the account passbook is held by the security agent.

Keun-pledge in relation to insurance

Establishment of a *keun*-pledge on the insurance is notified to the insurance company and the insurance company must provide its consent affixed with a fixed date stamp.

The insurance policy is retained by the lenders. In practice, the insurance policy is held by the security agent.

It is recorded in the insurance policy that a *keun*-pledge has been established on the insurance and the name of each pledgee (as opposed to the security agent) is also recorded.

Assignment of contractual right (*yangdo-dambo*)

Assignment of contractual right must be notified to the counterparty to the contract (eg, a construction company under an engineering, procurement and construction (EPC) contract or a government authority under a concession agreement) and the other party must provide consent affixed with a fixed date stamp.

The counterparty will consent to the lenders replacing the role of the borrower if a default is triggered and the lenders have enforced the assignment of contractual right. On an additional note, the consenting party may defer its exercise of termination right after an event of default has been triggered to allow the lenders to cure the default. In particular, if a cause of termination set forth in the relevant contract subject to the assignment of contractual right (eg, EPC contract) has been triggered, the consenting party may notify the security agent that a cause of termination has been triggered, but nevertheless refrain from terminating the contract for, say, three months, and allow the lenders a remedy period of three months. In this instance, the lenders will pledge that they will jointly undertake the project company's obligations.

With respect to the consent noted above, if the counterparty refuses to provide such consent despite the borrower making reasonable efforts to obtain consent (for example, if Korea Gas Corporation (KOGAS) is the off-taker under a gas purchase agreement for a liquified natural gas (LNG)-fired power plant, KOGAS often declines to provide such consent), if the underlying contract does not have any restriction on the granting of a security or assignment, in practice only notice of the creation of the assignment over contractual rights needs to be provided.

Formalities

A *keun*-mortgage that is established is registered in the register maintained by the Registry of the Supreme Court of Korea and the registration expense includes registration and licence tax, municipal education tax and the purchase of national housing bonds. Such expense is determined based on the maximum amount of the secured obligation. The registration expense cannot be deferred or reduced. However, national housing bonds are generally purchased and immediately sold off at a discount. If the maximum amount of the secured obligation is large, a real estate mortgage trust is often used. However, it should be noted that the trust scheme still incurs fees for the trustee, though it is generally cheaper than the costs involved in establishing a *keun*-mortgage. Generally speaking, lenders prefer a *keun*-mortgage over a trust scheme.

A *keun*-pledge created over electronically registered stock will be registered in the pledgor's electronic registration account.

Assignments of contractual rights (*yangdo-dambo*) and *keun*-pledges are not registered and do not incur any expenses.

How is its priority established?

A subordinated lender may have a subordinated security right (eg, a second priority *keun*-mortgage). A real estate mortgage trust may also have such subordinated security right (eg, a second priority beneficial interest). A second priority *keun*-pledge may be established in favour of a subordinated lender over the borrower's right to request the return of share certificates, deposit certificate (passbook) or insurance policy. In the case of *yangdo-dambo*, a second priority security right can be established so that a security manager treats a senior lender and a subordinated lender with a different level of priority.

Subordination by contract is a frequently used mechanism. If there is a senior loan and a subordinated loan, a separate intercreditor agreement may be executed or creditors make an agreement on common terms. This intercreditor agreement or agreement on common terms is honoured by a rehabilitation or bankruptcy court under the Debtor Rehabilitation and Bankruptcy Act.

One of the major issues relating to an intercreditor agreement is whether subordinated creditors would be permitted to participate in the decision-making process of creditors. The creditors' agreement also includes provisions relating to:

- the order of application of amounts repaid by borrower or proceeds from foreclosure or insurance;
- declaration of acceleration by a subordinated creditor; and
- conditions on amending a subordinated loan agreement, etc.

Structural subordination is a frequently used M&A financing transaction in Korea, although it is not used often in project financing transactions. In most Korean project financing transactions, the borrower is the project company, and does not comprise numerous entities. That said, a structural subordination is possible for project financing and can be enforced by a court. For instance, if a lender provided a loan to a parent company and another lender provided a loan to a subsidiary of the parent company, a creditor of the subsidiary would have priority over any of its shareholders (ie, the parent company) with respect to the operating income of the subsidiary. Therefore, the parent company would be subordinated to the creditor of the subsidiary with respect to the operating income of the subsidiary, meaning that the rights of the lender of the parent company would be structurally subordinated to those of the lender of the subsidiary.

One of the principles underlining the Civil Act is that of 'subordinate nature'. According to this principle, a security right may only exist subject to the existence of the relevant secured obligations, and a creditor must be the secured party; any creation of a security right in favour of a third party that is not a creditor is invalid. Accordingly, it is not permissible to create a security right in favour of an agent or trustee that is not a lender.

While security agents are always involved in project finance transactions in Korea, the security agent does not become a secured party because of the above principles, and secured parties are always the same as the lenders. For example, for the creation of a *keun*-mortgage, if there are 10 lenders, all of the 10 lenders must be registered as creditors and secured parties in the *keun*-mortgage register. The security agent conducts only administrative tasks, etc, relating to security management, execution of security and the distribution of the proceeds acquired through the enforcement of security.

For a real estate mortgage trust, the ownership of the mortgaged property will be transferred to the trustee for the purpose of establishing the security interest, and a lender will become a beneficiary of the mortgage trust. In the mortgage register, the trustee will be described as the owner of the mortgaged property and a lender will not be described as a creditor or a secured party in the register, although it will be specified as a preferred beneficiary as the trust ledger for the mortgage trust is described together in the register. Importantly, as the real estate mortgage trust is not registered as a right granted by way of security but as a transfer of ownership, the 'principle of subordinate nature' is irrelevant. However, because the trust ledger for a mortgage trust must be specified in the mortgage register, registration of a modification is required each time a preferred beneficiary is changed, meaning that it is difficult to enjoy the benefit of parallel debts. This is another reason why in practice lenders prefer a traditional *keun*-mortgage over a real estate mortgage trust.

In the event:

- a security agent becomes a creditor owing to an assignment of receivables by a lender to the security agent and a security right is established in favour of the security agent;
- an acceleration event occurs; and
- the security agent enforces the security right and distributes the proceeds to the lenders, benefits similar to that of a parallel debt structure can be enjoyed.

In such instance, the lenders would only have rights to receivables against the security agent without any security rights. Accordingly, lenders rarely adopt the aforementioned parallel debt structure through the creation of rights to receivables against a security agent.

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

There are liens that exist under law that may have priority (eg, worker's lien or lien for unpaid employee severances, etc). These are similar to those found in many jurisdictions. The following is subject to these liens.

In the case of a security that requires registration such as a *keun*-mortgage and a real estate mortgage trust, the list of security interests created on the secured asset is specified in the security register.

As a share, a *keun*-pledge is created by delivering share certificates, and the creditor is able to confirm that there is no other senior *keun*-pledge over the pledged shares by receiving and reviewing the relevant share certificates. That confirmation can be made more conveniently by reviewing the relevant electronic registration account in respect of a *keun*-pledge created over electronically registered stock.

In the case of a *keun*-pledge of insurance, the list of *keun*-pledge interests created over the insurance policies is specified on the relevant insurance policy in practice, meaning that the establishment of any other senior *keun*-pledge over the relevant insurance policy can be confirmed by reviewing it.

In the case of a *yangdo-dambo* in relation to movables, the practice is to publish the establishment of a security interest by the disclosure procedure known as a 'recognition method', although it is not as binding as registration.

Keun-pledge interests over deposits and *yangdo-dambo* over agreements are not separately disclosed. However, as noted above, in completing the perfection steps, although any existing lien would have a significant impact on the value of the security interest over the same collateral, in practice, it is unlikely that any existing lien would remain undiscovered during a due diligence exercise on the project, which would be complete prior to execution of the relevant finance agreements.

Enforcing collateral rights

4 | Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

If a default under a loan agreement has been triggered, a lender may enforce its security interest. The lender may apply to the court for a voluntary auction based on the security documents and the process may take one to six months depending upon the bidder's status and bidding price. There is no need to obtain a court's judgment or order as the application for a voluntary auction to the court is based on the security documents. However, in practice, application for a voluntary auction to the court is uncommon. A lender generally forecloses or appropriates the relevant asset. In other words, the lender will acquire or sell the assets to a third party.

Enforcing collateral rights following bankruptcy

5 | How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In the event that a bankruptcy procedure or a rehabilitation procedure has been commenced, a lender may not directly exercise its rights and should file its outstanding claim to the bankruptcy court or the rehabilitation court and comply with the court's procedure. However, any secured claims and status of claims with senior priority under an inter-creditor arrangement is recognised by the court.

Any expenses related to the implementation of a bankruptcy or rehabilitation procedure, fees for the receiver or bankruptcy administrator, certain taxes, wages, severance pay and compensation for industrial accidents are given preferential treatment by the court.

A foreign person or entity will have identical rights to those of a domestic person or entity in a bankruptcy procedure.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 | What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

If a foreign person or entity acquires 10 per cent or more of the shares or equity in a domestic project company by investing 100 million won or greater, such foreign person or entity must comply with the relevant foreign investment reporting and registration requirements under the Foreign Investment Promotions Act (FIPA). Separately, if a domestic project company loans any amount from or provides any collateral to an offshore lender, the project company must comply with the reporting requirements in respect of the relevant foreign exchange transaction.

If a domestic person or entity acquires 10 per cent or more of the shares or equity in a foreign project company (or acquires less than 10 per cent of the shares or equity in a foreign project company but enters into a construction or equipment building agreement or sends an executive on secondment to the foreign project company), such domestic person or entity must comply with the relevant reporting requirements under the Foreign Exchange Transaction Law. Separately, if a domestic parent company guarantees its foreign subsidiary project company's loan or provides collateral to a lender in respect of the loan, the domestic parent company must comply with the reporting requirements in respect of such foreign exchange transaction.

Currency exchange fees may differ depending on the relevant foreign exchange bank's policy.

Investment returns

- 7** | What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

The FIPA guarantees remittance of income, proceeds, principal, interest, fees and consideration by foreign investors to foreign countries as long as it is in accordance with the investment agreement between the parties and the report filed with the Ministry of Trade, Industry and Energy by the foreign investor for its foreign direct investment. For remittance, prior verification by a foreign exchange bank is required.

Foreign direct investment made pursuant to the FIPA is not subject to possible suspension of foreign exchange transactions that may be taken by the Ministry of Economy and Finance pursuant to the Foreign Exchange Transactions Law in case of wars, natural calamities, conflict of arms or critical and sudden changes in domestic or international economic circumstances. Foreign investors and foreign-invested companies are treated equally as Korean citizens or Korean companies with respect to their business operations.

Foreign earnings

- 8** | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

In principle, foreign earnings generated from any dividend payout or liquidation of a foreign project company must be repatriated. If, however, the residual assets or funds are used for capital transactions recognised under the Regulations on Foreign Exchange Transactions, the domestic project company may operate such assets or funds overseas without having them returned to Korea after completing the reporting of the relevant capital transactions. Any returned amount is not required to be in Korean won.

- 9** | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies can establish:

- local foreign currency accounts with local foreign exchange banks and deposit foreign currency subject to completion of the relevant foreign exchange reporting requirements; and
- foreign currency accounts offshore subject to completion of the relevant foreign currency transaction reporting requirements with the designated foreign exchange banks or the Bank of Korea.

FOREIGN INVESTMENT ISSUES

Investment restrictions

- 10** | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There is no fee or tax imposed on foreign investment.

There are no special treaties only applicable to project finance. However, if a free trade treaty has been executed between Korea and a specific country (eg, Chile, Peru, the United States and the member states of the EU), a large project must involve an international bidding process and the bidding must be implemented in a fair manner to the international bid participants.

Insurance restrictions

- 11** | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Under the Insurance Business Act, an insurance business licence must first be obtained to sell insurance policies in Korea and, as such, a foreign insurer without a Korean insurance business licence cannot sell insurance policies in Korea. Generally, the process used is where a Korean insurance company that has obtained an insurance business licence in Korea sells insurance products to the project company and the Korean insurance company buys reinsurance from a foreign insurance company. In fact, Korean insurance companies sell insurance products in Korea by using the terms of the insurance policies of foreign insurance companies as they are.

There is no discrimination per se in relation to a foreign lender being paid with insurance proceeds. There is no restriction on overseas remittance of insurance proceeds. However, this may be subject to a prior foreign exchange report being filed with the relevant authorities.

Worker restrictions

- 12** | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

A foreign worker coming to Korea must obtain a residence visa under the Immigration Control Act. A foreign investor or foreign workers of an invested company (officer, senior manager, specialist, etc) may obtain a company investment visa. A company investment visa may be issued to specialised foreign workers who intend to work in management, administration, manufacturing, technology or R&D of a foreign-invested company. A foreigner may reside in Korea to the extent permitted under the relevant visa. A person who wishes to stay 91 or more days in Korea must be registered as a foreigner, which requires submission of an application for registration together with other requisite documents to the head of the Immigration Office or a branch having jurisdiction over the foreigner's residence within 90 days from his or her entry into Korea. Any change in the foreigner's registered information, visa status or period, workplace or residential location must also be reported under the Immigration Control Act.

Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

There is no special restriction related to the import of equipment.

Nationalisation laws

- 14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

In the absence of extreme circumstances (eg, war), there is no law that provides for any forcible nationalisation or expropriation of business facilities.

Obviously, if a concession agreement is terminated, the agreement may require the concessionaire to return its concession rights to the government.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

- 15 | 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?

Interest on foreign investment in a local company is exempt from individual income tax and corporate income tax pursuant to the Special Tax Treatment Control Law (the STTCL), provided that the foreign investment is 'foreign currency denominated bonds issued outside of Korea' under the STTCL. If not exempt under the STTCL, the rate of individual income tax rate or the corporate tax rate applicable to interest is currently 15.4 per cent (Korean won-denominated bond) or 22 per cent (loan), which is inclusive of local income tax. However, the withholding tax rate applicable to the interest (15.4 per cent or 22 per cent) may be reduced or exempted by an applicable tax treaty between Korea and the country of residence of the beneficial owner of the interest. To obtain a reduced tax rate or a tax exemption under the applicable tax treaty, a beneficial owner of interest should submit an application for entitlement to a preferential tax rate or an application for exemption to the party liable for the withholding.

GOVERNMENT AUTHORITIES

Relevant authorities

- 16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

In relation to project financing involving businesses relating to roads, bridges, tunnels, railways (including subways and light rails), harbours, airports, schools, boarding houses and sewage facilities, it is established practice to implement projects according to the PPP Act.

On the other hand, private capital raising for power plants (coal, LNG, combined heat and power, wind, solar, fuel cells, biomass, etc), oil terminals, LNG terminals and waste treatment facilities is not, in practice, conducted in accordance with the PPP Act. Instead, legislation applicable to a particular sector of business (the Electric Power Source Development Promotion Act, the Integrated Energy Supply Act, the Act on the Promotion of the Development, Use and Diffusion of New and

Renewable Energy, the Petroleum and Alternative Fuel Business Act, the Urban Gas Business Act, the Wastes Control Act, etc) is customarily observed for such businesses. In Korea, businesses subject to the PPP Act, in practice, are called PPP businesses, infra-businesses or SOC businesses, and businesses subject to specific legislation are referred to by reference to the specific type of business, such as power business, energy business or waste treatment business. Effectively, however, such terminologies are not definite and can be used interchangeably. The Private Investment Policy Department of the Ministry of Economy and Finance is the competent authority for the PPP Act and its Enforcement Decree. The Public and Private Infrastructure Investment Management Center of the Korea Development Institute supports PPP businesses conducted by the government (the Ministry of Land, Infrastructure and Transport, the Ministry of Oceans and Fisheries, etc) and municipalities by conducting research and advising on their projects.

The Basic Plans and Detailed Methods are, from a legal perspective, an internal document of the relevant government agency. However, in practice, they carry similar weight to the law.

The Ministry of Trade, Industry and Energy is responsible for power and energy projects, whereas the Ministry of Environment is responsible for waste treatment projects.

However, the government is not involved in setting the terms and conditions of project financing deals, nor is there a requirement to report project financing deals to the government or obtain its consent or approval.

For PPP projects, the government is able to affect the terms of project financing through the concession agreement it enters into with a concessionaire.

As for power, energy or waste treatment projects, the terms and conditions of the relevant project financing would be affected by the relevant permits and licences, the priority of funding, the power price, REC terms, the level of monopoly over gas revenues, etc.

REGULATION OF NATURAL RESOURCES

Titles

- 17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Under the Constitution and the Mining Industry Act, no individual may excavate and own any unexcavated minerals (including oil and natural gas) without first being granted a mining right from the government. As such, a private person or a corporation, regardless of nationality (including the rightful owner of the respective land where the minerals are located), is prohibited from excavating and owning the minerals in the absence of a mining right.

A foreigner may be issued with a mining right if any of the conditions below have been met under the Mining Industry Act:

- where the home jurisdiction of a foreigner allows the Korean national to have the right to mine, under the same conditions as the national of the foreigner's home jurisdiction;
- where Korea allows a foreigner to have the right to mine, and the home jurisdiction of the foreigner allows the Korean national to have the right to mine under the same condition as the national of the foreigner's home jurisdiction; or
- where the right to mine is permitted by a treaty or its equivalent.

Under the Mining Industry Act, the government of Korea has exclusive mining rights in relation to oil and natural gas and therefore no foreigner can be granted mining rights for oil and natural gas.

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

There are no royalties or taxes imposed on the extraction of minerals or other natural resources under the Mining Industry Act.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

There are no restrictions, fees or taxes imposed on the export of minerals or natural resources.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

There is no requirement to report project financing deals to the government or to obtain its consent or approval, nor is there a requirement to pay certain fees to the government.

For PPP projects, changes in investment ratios frequently occur along with refinancing at the end of the construction phase and the start of the operation phase. It is common for the concessionaire's shareholders to change at this point. In such cases, the government, the concessionaire, investors and lenders must agree on the terms and conditions of the overall restructuring. It is mandatory that the concession agreement with the government be amended to reflect the changes in the investment ratios, and often the government is perceived to be in a superior position in negotiation, as such amendment is subject to the government's approval. This is why, in practice, the process of obtaining the government's consent is similar to receiving its approval or a permit.

Registration of financing

21 | 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?

There is no such requirement, as the government is merely a party to the concession agreement and is not directly involved with project or finance agreements (to avoid being directly liable for the relevant project).

Arbitration awards

22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

In the event that an arbitral award is obtained from a foreign arbitral tribunal, it will be recognised by the Korean courts and enforceable against the Korean party in Korean courts without re-examination of the merits, provided that the recognition and enforcement of the award may be refused by a Korean court where (i) the award is governed by the New York Convention and does not satisfy the conditions for recognition and enforcement as set forth in article V, or (ii) the award is not governed by the New York Convention and does not satisfy the following conditions:

- such award was finally and conclusively given by an arbitral tribunal having valid jurisdiction in accordance with Korean laws or international treaties;
- the party against whom such award was rendered was served with process (other than by publication or a similar method) in sufficient time to enable such party to prepare its defence, in conformity with the laws of the arbitral tribunal rendered the award or responded to the proceeding without being served with process;
- recognition of such award is not contrary to the public policy of Korea; and
 - awards of the arbitral tribunal of Korea are accorded reciprocal treatment under the laws of the arbitral tribunal that rendered such award; or
 - awards of the arbitral tribunal of Korea in the country of the arbitral tribunal that rendered such award are not treated in a manner that is highly prejudicial to their recognition and their treatment is substantially the same as the treatment by the Korean court of such award in material respect.

Law governing agreements

23 | Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

For projects in Korea, the governing law for project agreements and the financing agreements is Korean law. There are instances where there may be an offshore financing component. The governing law of offshore financing is usually English law.

Submission to foreign jurisdiction

24 | Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Submission by the parties to the jurisdiction of the foreign court under a project contract or financing agreement is, as a matter of contract law, duly recognised and enforced by Korean courts, provided that submission to the jurisdiction of the foreign court by the Korean party is deemed to be valid and binding under the laws of the foreign jurisdiction.

Waiver of immunity is recognised and enforceable in Korea. In other words, a claim for immunity from the court's jurisdiction cannot be made.

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

25 | What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

With respect to environmental issues, the Environmental Impact Assessment Act requires government agencies to assess the environmental impact at the government development planning stage to reflect environmental issues in their project plans, and also requires any sponsor to conduct an environmental impact assessment. The relevant government agency must consult with the Minister of Environment regarding the environmental impact assessment before granting a licence or approval for the project. The Minister of Environment may also request improvements or adjustment to the environmental impact assessment or the project plan.

With respect to safety issues, industrial accident compensation insurance is required for all businesses or business sites as a general rule in accordance with the Industrial Accident Compensation Insurance Act, and under the industrial accident compensation insurance employers must pay an insurance premium to cover their employees. If an employee has suffered an injury, sickness, disability or dies, insurance proceeds

are paid out to such employee in the form of medical care expenses, shutdown benefits, disablement allowance or benefit to the surviving next of kin. The Ministry of Employment and Labour oversees the industrial accident compensation insurance scheme in Korea.

In addition, the draft Bill on Punishment for Serious Accidents, etc. (the Serious Accidents Act) was passed in January 2021 and will be implemented in January 2022. According to the Serious Accidents Act, in the event of a major industrial accident or a major civil disaster, if the accident occurs because the employer and the manager in charge of management fail to fulfil their obligations to ensure health and safety, they may be subject to serious criminal punishment and may be liable for punitive damages. Due to the nature of the Serious Accidents Act, it is jointly managed by several related government ministries, such as the Ministry of Justice, the Ministry of Environment, the Ministry of Employment and Labor, the Ministry of Trade, Industry and Energy and the Fair Trade Commission.

PROJECT COMPANIES

Principal business structures

26 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Concessionaires are joint stock companies established under the Commercial Code. Under the Commercial Code, shareholders of joint stock companies have limited liability, and laws on procedures regarding formation, operations, corporate governance, dissolution and liquidation, bankruptcy and rehabilitation, etc., are clearly established. There is sufficient accumulation of relevant precedents, which means that parties have the advantage of managing legal relationships among themselves.

In Korea, unincorporated joint ventures are rarely used for project financing transactions.

Project financing vehicles (PFVs) – complete paper joint stock companies that do not have employees or full-time directors and which receive tax benefits pursuant to the Corporate Tax Act – are frequently used for project financing in real estate development projects. However, these types of PFVs are not used in PPP projects or power, energy or waste treatment projects, as the concessionaires involved in these projects are required to have full-time directors and employees.

Construction investors and operations investors invest by acquiring common shares. Generally, financial investors provide capital through a combination of acquiring preferred shares and providing mezzanine loans. Banks, insurance companies and pension funds provide senior loans as senior lenders and sometimes simultaneously participate in mezzanine lending. Depending on the situation, these financial institutions indirectly invest in funds as beneficiaries, and these funds are also senior lenders, mezzanine lenders and preferred shareholders. At times, concessionaires issue public company bonds, but such issues are not frequent as concessionaires are typically new entities and do not have sufficient credit rating to back up such bonds.

For large domestic projects, the Korea Development Bank often provides financing. However, the Korea Export-Import Bank and the Korea Trade Insurance Corporation do not provide financing for domestic projects. Foreign development banks, the export credit agencies and mandated lead arrangers rarely provide financing for domestic projects in Korea.

There are cases in which lenders of the concessionaire use structured financing by securitising their loans.

PPP financing is as described above. Private finance initiative financing is similar to build-transfer-lease (BTL) (mainly schools, school boarding houses, military residences, sewage facilities, etc) financing of PPP projects in Korea, and is the same as the above.

For build-transfer-operate PPP projects, ownership of infrastructure reverts to the government once construction is complete. Afterwards, the government grants the concessionaire concession rights. However, for BTL financing, ownership of infrastructure reverts to the government once construction is complete. In both schemes, ownership is transferred to the government. The difference, however, is that the concessionaire is first granted the management and operation right, and the concessionaire leases the relevant infrastructure to the government. After the government grants the concessionaire concession rights, the concessionaire leases the infrastructure to the government, which makes lease payments to the concessionaire. BTL financing is slightly different structurally in this regard.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

27 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The central PPP enabling legislation is as follows:

- the PPP Act;
- the Enforcement Decree on the Act on Public-Private Partnerships in Infrastructure;
- Basic Plans on Public-Private Partnerships (the Basic Plans); and
- Detailed Methods on Refinancing published by the Public Investment Management Centre of the Korea Development Institute (the Detailed Methods).

Under the PPP Act, 'infrastructure' means fundamental facilities that serve as the foundation of production, increase the efficiency of such facilities, and accommodate the convenience of users and the lives of the public.

Such infrastructure is divided into three categories. One is not obligated to be subject to the PPP Act when conducting an infrastructure business. However, the established customary practice when private capital is to be raised for a project involving roads, bridges, tunnels, railways, harbours, airports, schools, boarding houses and sewage works is to do so in accordance with the provisions of the PPP Act.

There is no industry-specific legislation with respect to each type of PPP project.

PPP – LIMITATIONS

Legal limitations

28 | What, if any, are the practical and legal limitations on PPP transactions?

There are no special limitations on the use of a PPP scheme by the government authority.

However, the PPP Act provides the eligible project types for a PPP project, and the selection of a project company shall be made by one of two procedures, depending on whether a government selects a PPP project or a private company proposes a project to the government. With respect to the former, the government makes a public announcement of a project plan and initiates a bidding process, receives and evaluates the project plan from the bidders, and selects a preferred bidder that is ultimately designated as a concessionaire by way of executing a concession agreement. However, when a private company proposes a draft project to the government and the government deems such a project appropriate, and, if the government does not select another bidder (after soliciting further bids), the private company may become a concessionaire.

PPP – TRANSACTIONS

Significant transactions

29 | What have been the most significant PPP transactions completed to date in your jurisdiction?

The following transactions have been completed:

- 5.6 trillion won project financing of Gangnueung Coal Fired Power Plant (1,040MW × 2 units);
- 4.8 trillion won project financing of Samcheok Power Plant (1,050MW × 2 units) to be built at the site of a retired coal mine;
- 2.22 trillion won project financing of Seoul Metropolitan Area Express Railway A Line, which connects Paju (Gyeonggi-do province), Seoul Station, Samsung-dong of Seoul and Dongtan (Gyeonggi-do province);
- 4.22 trillion won project financing of Airport Railroad Express, a public-private partnership project;
- 2.4 trillion won project financing of Seoul Ring Expressway Project, a public-private partnership project;
- build-transfer-lease project of Seoul National University of Science and Technology's on-campus residence halls;
- project financing of the construction of MICE-sports infrastructure in the Jamsil area led by the Korea International Trade Association;
- 5.624 trillion project financing of the Busan Circular Motorway (Mandeok-Centum);
- project financing of the Dongbuk Light Rail Transit; and
- project financing of phases 2-3 of the Port of Busan New Port.

UPDATE & TRENDS

Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

To overcome the economic crisis brought about by covid-19 and further plan a new future for Korea, the government announced the Korean New Deal Comprehensive Plan in July 2020. The Korean New Deal Comprehensive Plan is comprised of the Digital New Deal and the Green New Deal. It plans to create 1.9 million jobs by 2025 by investing 160 trillion won, including 114.1 trillion won of national expenditure. The main project of the Digital New Deal is the digitisation of SOC and the main project of the Green New Deal is the establishment of a foundation for the widespread use of new and renewable energy. The government is proposing various plans to revitalise the PPP business, centring on the Korean New Deal Comprehensive Plan.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Korean government has implemented the following policies to support businesses impacted by the covid-19 pandemic.

Financial support to companies

The government has increased financial support to companies (in particular, small to mid-sized companies) by expanding credit and guarantee support, purchasing corporate bonds through the Securities Market Stabilisation Fund and providing support for the issuance of P-CBOs in response to covid-19. In addition, the government is

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providing emergency operation funds to exporters, importers and companies that operate foreign businesses, which have been impacted by covid-19.

Performance of public contracts

The Ministry of Strategy and Finance, in its Guidelines for the Performance of Public Contracts During the covid-19 Pandemic, released on 12 February 2020 to public agencies, allows agencies to temporarily suspend construction or other contracted services if they determine that continuing such construction or services will place substantial difficulties on the parties resulting from confirmed or possible cases of covid-19, while extending the contract term and increasing the contract price accordingly. Even in the case that the relevant agency does not suspend services, if delays are directly or indirectly caused by covid-19, the agency is required to waive any liquidated damages for delay and proactively consider increasing the contract price.

National and local tax support

The National Tax Services, through its direct authority or based on applications by businesses, is providing tax support for taxpayers who have suffered damage due to covid-19, such as confirmed patients, those in quarantine, places where confirmed cases have occurred, workplaces near returning Korean residents, and small and medium-sized enterprises trading with China, including the extension of submission or payment deadlines and deferment (or suspension) of collection, disposition on defaults and tax investigations.

Employment maintenance support fund

The aim is to fund part of an employer's benefit payments to employees if the employer decides to maintain employees while suspending operations or having employees take a leave of absence, provided that the employer meets certain other requirements. The Ministry of Employment and Labor announced that from 26 April 2021, it will increase the employment maintenance subsidy support ratio until the end of June 2021 for business owners who take a leave of absence or leave of employment in accordance with the collective restriction and

prohibition order due to covid-19 and for business owners who operate a business at risk.

Interpretation of force majeure provisions

The Ministry of Land, Infrastructure and Transport announced on 28 February 2020 that covid-19 constitutes an event that causes substantial difficulty in the performance of standard public construction contracts due to force majeure caused by a pandemic. However, whether covid-19 constitutes a force majeure event should be determined based on the specific effect of covid-19 on each individual contract and other factors including the parties' efforts to mitigate the effects of covid-19.

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