
THE
PROJECTS AND
CONSTRUCTION
REVIEW

SECOND EDITION

EDITOR

JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

SECOND EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Projects and Construction Review, 2nd edition
(published in June 2012 – editor Júlio César Bueno).

For further information please email
Adam.Sargent@lbresearch.com

THE
PROJECTS AND
CONSTRUCTION
REVIEW

SECOND EDITION

Editor

JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Caroline Rawson

SUBEDITOR
Anna Andreoli

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2012 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2012, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-38-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ANDERSON MÔRI & TOMOTSUNE

ARAQUE REYNA SOSA VISO & ASOCIADOS

ARIAS & MUÑOZ

BASHAM, RINGE Y CORREA, SC

BECH-BRUUN

BOWMAN GILFILLAN

BRIGARD & URRUTIA

CLAYTON UTZ

CLIFFORD CHANCE

ESTUDIO BECCAR VARELA

ESTUDIO OLAECHEA

FRASER MILNER CASGRAIN LLP

FRILET SOCIÉTÉ D'AVOCATS

GALADARI & ASSOCIATES

GEORGE Z GEORGIU & ASSOCIATES LLC

GUYER & REGULES

J SAGAR ASSOCIATES

K&L GATES – STUDIO LEGALE ASSOCIATO

Acknowledgements

LIANG & PARTNERS LAW OFFICE

MCCULLOUGH ROBERTSON LAWYERS

MILBANK, TWEED, HADLEY & McCLOY LLP

MOLINA RÍOS ABOGADOS

PECKAR & ABRAMSON, PC

PINHEIRO NETO ADVOGADOS

SHIN & KIM

SNR DENTON

STIBBE

THIRTY NINE ESSEX STREET CHAMBERS

VIEIRA DE ALMEIDA & ASSOCIADOS, SOCIEDADE DE ADVOGADOS, RL

WALDER WYSS LTD

CONTENTS

Editor's Prefacevii
	<i>Júlio César Bueno</i>
Chapter 1	INTERNATIONAL PROJECT FINANCE..... 1
	<i>Phillip Fletcher and Andrew Pendleton</i>
Chapter 2	DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS.....13
	<i>Robert S Peckar</i>
Chapter 3	RELATIONSHIP CONTRACTING23
	<i>Doug Jones</i>
Chapter 4	ARGENTINA.....33
	<i>Pedro Nicholson</i>
Chapter 5	AUSTRALIA.....44
	<i>Matt Bradbury, Kristen Podagiel, Hayden Bentley, Tim Hanmore and James Arklay</i>
Chapter 6	BELGIUM.....57
	<i>Rony Vermeersch and Diederik De Block</i>
Chapter 7	BRAZIL.....69
	<i>Júlio César Bueno</i>
Chapter 8	CANADA91
	<i>John S Haythorne, Ron Stuber and Karen Martin</i>
Chapter 9	CHILE.....104
	<i>Victor Ríos Salas and Carlos Molina Zaldívar</i>

Chapter 10	COLOMBIA.....	116
	<i>Carlos Umaña Trujillo, César Rodríguez Parra, and Sebastián Ocampo Valencia</i>	
Chapter 11	COSTA RICA.....	128
	<i>Vicente Lines, Eduardo Zúñiga, and Rocío Pérez</i>	
Chapter 12	CYPRUS.....	140
	<i>George Z Georgiou, Georgios S Ioannou, Eleni Prodromou and Elena Socratous</i>	
Chapter 13	DENMARK.....	155
	<i>Torben Schøn</i>	
Chapter 14	FRANCE.....	169
	<i>Marc Frilet</i>	
Chapter 15	INDIA.....	183
	<i>Dina Wadia and Divyanshu Pandey</i>	
Chapter 16	ITALY.....	196
	<i>Francesco Sanna, Anna Amprimo and Carolina Teresa Arroyo</i>	
Chapter 17	JAPAN.....	211
	<i>Tetsuya Itoh, Reiji Takahashi and Tetsuro Motoyoshi</i>	
Chapter 18	KOREA.....	223
	<i>Michael Chang, Sang-Hyun Lee and Seung-Gyu Yang</i>	
Chapter 19	MEXICO.....	234
	<i>Juan Carlos Serra</i>	
Chapter 20	NETHERLANDS.....	251
	<i>Coen Thomas, Frédérique Jacobse and Zeeger de Jongh</i>	
Chapter 21	PERU.....	262
	<i>José Antonio Honda</i>	
Chapter 22	PORTUGAL.....	273
	<i>Manuel Protásio and Frederico Quintela</i>	

Chapter 23	QATAR.....	285
	<i>Julian Pope, Safwan Moubaydeen and Julie Tuck</i>	
Chapter 24	SOUTH AFRICA.....	296
	<i>Anton Barnes-Webb, Rob Morson and Daryn Webb</i>	
Chapter 25	SPAIN.....	308
	<i>José Guardo and Alejandro León</i>	
Chapter 26	SWITZERLAND.....	321
	<i>Thomas Mueller-Tschumi and Francis Nordmann</i>	
Chapter 27	TAIWAN	332
	<i>Frank Kung and Chia-Yi Liu</i>	
Chapter 28	UNITED ARAB EMIRATES.....	343
	<i>Leonora Riesenburger</i>	
Chapter 29	UNITED KINGDOM	359
	<i>David Brynmor Thomas and Karim Ghaly</i>	
Chapter 30	UNITED STATES.....	371
	<i>Carolina Walther-Meade, Karen Wong and Christopher Chwang</i>	
Chapter 31	URUGUAY.....	391
	<i>Beatriz Spiess</i>	
Chapter 32	VENEZUELA.....	403
	<i>Pedro Ignacio Sosa Mendoza, Pedro Luis Planchart, Luis Alfredo Araque, Carolina Puppio González, Verónica Díaz Hernández and Rodrigo Moncho Stefani</i>	
Appendix 1	GLOSSARY OF TERMS	417
Appendix 2	ABOUT THE AUTHORS	419
Appendix 3	CONTRIBUTING LAW FIRMS' CONTACT DETAILS....	444

EDITOR'S PREFACE

Júlio César Bueno

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique moderne (Dalloz (Paris), 1976).

In this preface I would like to recognise the great contributions of Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers, to the area of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), UK (Phillip) and Australia (Doug) – they have equally influenced lawyers, bankers, owners, contractors, engineers, designers, lenders and public authorities in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package. I am very happy to have three chapters they have specifically prepared for the introductory part of this book, discussing new trends in project finance, dispute resolution and relationship contracts.

I also thank all the law firms and their members who graciously agreed to contribute their countries' chapters. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by these leading experts in 29 countries has shown us that in order to understand the world we must first comprehend what happens in our own communities; to further advance our understanding of the law, we must resist the modern view that all that matters is global and what is local is of no importance. New jurisdictions covered in this year's edition include: Australia, India, Korea, Qatar and Spain.

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP-IBA), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL) and the Forum Committee on the Construction Industry of the American Bar Association (ABA). We are also celebrating the recent creation of the Latin American Society of Construction Law and its chapter in Brazil. All of

these institutions and associations – ICP-IBA, ACCL, SCL and ABA – have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice. I would like to thank their leaders and members for their important support in the preparation of this book.

I hope you enjoy this second edition of *The Projects and Construction Review* and look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

July 2012

Chapter 18

KOREA

Michael Chang, Sang-Hyun Lee and Seung-Gyu Yang¹

I INTRODUCTION

In Korea, the development of infrastructure projects is implemented through (1) fully funded government entities; (2) PPP sharing funding between the government and private entities; and (3) fully funded private entities.

The infrastructure projects may be implemented pursuant to the Korea Public and Private Partnership Act on infrastructure ('the KPPP Act'). The KPPP Act lists 48 target sectors including roads, railways, ports, telecommunications, energy, environment, airports, and cultural facilities, and it provides, as procurement schemes, BTO, BTL, BOT, and BOO. For projects that are not implemented pursuant to the KPPP Act, the project company, depending on the characteristics of the project facilities, may either transfer the ownership of such facilities to the government and secure the right to use the facilities for a certain period of time (e.g., usually applicable to sports facilities, including baseball or soccer stadia), or directly own and operate the facilities (e.g., usually applicable to power plants and solar power plants).

In order to promote PPP projects, the Korean government has established the Public and Private Infrastructure Investment Management Center (PIMAC), as an affiliated unit of the Korea Development Institute. PIMAC provides general support in relation to PPP projects by reviewing the target businesses, analysing the project feasibility, reviewing and assessing project plans.

For the purposes of this paper, the major focus will be PPP projects governed by the KPPP Act.

¹ Michael Chang and Sang-Hyun Lee are partners and Seung-Gyu Yang is a senior associate at Shin & Kim.

II THE YEAR IN REVIEW

In the late 1990s, the Korean government supported PPP projects by adopting a minimum revenue guarantee ('MRG') system, which guaranteed a certain portion of projected operating revenue if the actual revenue fell short of the projected revenue prescribed in the concession agreement or implementation agreement executed with the competent authorities. Financial investors made their investment decision for PPP projects largely based on such MRG in the relevant concession agreement. However, in the face of mounting criticism of the MRG system as a result of escalating MRG subsidies by the government, the MRG system was abolished and replaced with the investment risk sharing scheme ('RSC'). RSC is designed to provide support for a certain portion of actual revenue falling short of the prescribed RSC amount which is based on the investment amount. The amounts provided under RSC are significantly lower than under MRG.

Since the abolishment of the MRG system for new PPP projects, we have seen financial investors taking a more detailed and cautious approach to the credit of sponsors along with the feasibility of the project in making its investment decisions. Sponsors are often required provide credit support or cash deficiency support.

With respect to PPP projects within the 'old' MRG system, we have seen the first major dispute relating to the construction and operation of a light rail transit system. It is also the first PPP project submitted to ICC arbitration. A dispute between the competent authority and the project company arose as the competent authority refused to acknowledge that the project company had completed construction. Some commentators believe that the competent authority took this stance given the likelihood the authority would be required to pay high compensation under the MRG system. The ICC, however, held that the competent authority should pay to the project company compensation for termination and damages as stipulated in the termination clause of the concession agreement of such project.

Effective from 11 June 2012, the new Act on Security Over Moveables and Receivables permits a creditor to create and perfect registrable security interests over moveables and receivables.

It is also noted that as a part of the changes to the Commercial Code that became effective from April 2012, various types of shares and corporate bonds are now permitted and issuance limits for corporate bonds have been abolished. These changes may lead to changes in the funding structure of project companies.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In PPP projects, as in most project finance transactions, a project company is established for the sole purpose of operating the project. The project company generally takes the form of a limited liability corporation, and sponsors who participate in the construction or management of the project, as well as financial investors whose sole objective is to invest in the project, directly acquire the shares and become shareholders of the project

company. Relevant project companies are required to maintain a certain level of equity to project cost ratio.

PPP projects are implemented largely by way of BTO or BTL. The facilities such as roads, bridges, subways, sewer treatment facilities, and ports that collect user fees from the facility users are operated in the form of BTO, and railway facilities and school facilities tend to be implemented in the form of BTL.

ii Documentation

In PPP projects, the competent authority that oversees the project and the project company agree on terms and conditions related to the project through a concession agreement or implementation agreement. PIMAC has developed a standard form of concession agreement.

As with other project finance transactions, project documents, finance documents and equity investment documents are entered into by the project company for the relevant PPP project. Project documents include construction relating contracts and operation relating contracts for the facilities, and, depending on the nature of individual projects, the construction relating contracts may include design contracts, construction contracts, and purchase contracts, and, may also include a turnkey EPC contract. The operation related contracts may include operation and managements contracts, maintenance contracts, usage contract for the relevant facilities, and purchase agreements and supply agreements with respect to materials and resources necessary for the operation.

With respect to financing, loans from financial institutions are the most typical form and, the amount of loans is determined based on various factors, such as construction costs, reserves, and interests during the construction period. Also, a loan agreement for working capital facilities is entered into in advance in consideration of a possibility of insufficient funds during the operational period, and other financing agreements for security are entered into to secure the obligations under such loans.

In Korea, it is highly unusual for the project company to issue bonds to finance projects. This was due to the Commercial Code (prior to its latest amendment), limiting the total corporate bonds to be no more than four times the current net assets in the final balance sheet. This limitation coupled with the practical difficulty of issuing a secured bond limited the use of project bonds as a source of financing. While the amended Commercial Code as of 15 April 2012 eliminates the limit on corporate bonds, the difficulty of issuing a secured debenture will remain as an obstacle to bonds being a popular means of financing.

In addition, while PPP projects in Korea are generally non or limited recourse, sponsors are sometimes required to provide cash deficiency support by way of equity or subordinated loans for, *inter alia*, cost overruns.

iii Delivery methods and standard forms

For construction projects, DBB methods that award separate contracts for design and construction, and EPC methods that comprehensively arrange for engineering, procurement and construction are widely used. In PPP projects, the project company decides on which method it wishes to use – DBB or EPC methods.

The standard contracts used for construction projects include the standard form of contract made by government for government project and the private construction standard agreement, which is often modified and revised for each individual project, but there is no single unified form of standardised construction contract such as FIDIC, AIA, NEC3 and JCT.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

There are various risks in project finance transactions, including partial or total destruction of the facilities under construction or operation, suspension of construction or operation, insolvency or bankruptcy of sponsors and change of law. These risk factors may lead to the project company's failure to implement the project, thereby causing its failure to timely repay the principal and interest of the project loan and perform relevant obligations owed to the lenders. As such, these risks are allocated and distributed to the parties involved.

In PPP projects, the concession agreement executed with the competent authority will classify the risks into (1) risks attributable to the government; (2) risks attributable to the project company; and (3) force majeure risks, and sets out how each type of risk is to be dealt with. As the construction and operation risks associated with the project facilities are allocated between the project company and the competent authority under the relevant concession agreement, the project documents and the finance documents allocate some of these risks to the construction company, O&M contractor and the financiers.

Insurance is also readily available and a compulsory requirement under the concession agreement and the finance documents. Risks associated with financing of the project are addressed through the normal interest rate and foreign exchange hedging programmes.

One form of protection that a project company has from a force majeure event that makes it impossible to construct or operate and manage the facilities, is that the project company, pursuant to the concession agreement, may request the competent authority to purchase the facilities at a price determined by a pre-agreed method upon occurrence of such event.

ii Limitation of liability

Under Korean law, the parties may, by contract, agree to limit liability and also pre-determine a fixed amount of liquidated damages to the extent it does not violate public policy. As for loss of business opportunities and other incidental and consequential damages, such damages can only be indemnified (unless otherwise contractually agreed) to the extent they are foreseeable.

Under the concession agreement, the project company is obligated to pay liquidated damages with respect to any construction delay by multiplying the time of delay by a certain percentage of the total project expense. This risk is allocated to the construction contractor on a back-to-back basis under the construction contract.

For PPP projects, there is usually no particular limitation of liability applicable to the project company or other parties to the project contracts.

iii Political risks

The concession agreement distinguishes political force majeure from other force majeure, and generally defines these political force majeure events to include war, invasion, upheaval, riot, terrorism, national or society-wide strikes, limit on currency exchange or remittance abroad or other comparable causes. If such political force majeure event occurs during the construction period, the construction period may be extended or a certain portion of any increased project expense not covered by insurance may be compensated at a certain rate. During the operational period, additional costs incurred may be compensated to the extent not covered by insurance. With respect to a termination of a project contract, the compensation for termination is prescribed by the competent authority at a predetermined rate.

According to the KPPP Act, the competent authorities can revoke a project-related licence if it is necessary to address the changes in circumstances of infrastructure or to efficiently operate the infrastructure project for public interest. In such case, any loss suffered by the project company is to be compensated. In addition, the government may expropriate the project's facility for legitimate reasons by compensating the project company pursuant to the applicable law.

For political risks, security or guarantee by an export credit agency or multilateral agency such as the Multilateral Investment Guarantee Agency is not seen in Korean PPP projects.

V SECURITY AND COLLATERAL

According to Korean law, security and collateral can only be established and effected in a manner provided by the law. The security interests typically required for project finance are mortgages, pledges over shares or other securities issued or owned by the project company and pledges over the project company's moveables, deposit claims, insurance claims and other contractual rights. Also, 'yangdo-dambo', which creates security interests by transfer of legal title to real property, moveables, contractual rights and other claims, is recognised by the Civil Code as customary law, and approved by the courts. According to the KPPP Act, any mortgage over the operation and management rights given to the project company under the concession agreement is also permitted.

As noted above, effective from 11 June 2012, under the Act on Security Over Moveables and Receivables, security interests can be created and perfected over moveables and receivables (present and future) by registering such security interest with the relevant registry. This new Act will not affect security interests created by other means such as a pledge or yangdo-dambo. If security interests over moveables and the receivables have been perfected by registration under this new Act and by existing security method, priority will be determined chronologically.

In order to perfect security interests, mortgages over real property and operation and management rights should be registered with the relevant registry. Further, with respect to pledges over moveables and securities, possession of such secured property

needs to be transferred to the pledgee. In the case of shares, in addition to the transfer of possession, the name of the pledgee is required to be recorded in the shareholders' registry. For any pledge over rights against third parties, such security interests are to be perfected by affixing a fixed-date stamp on the notice informing the third party of the existence of the security interest, or affixing a fixed-date stamp to the acknowledgement and consent of the third party to the security interest.

With respect to security interests in a project financing context, as a general position, government step-in rights are not used by the government as the concession agreement only provides the ability for the government to terminate the concession agreement or select a replacement of the existing project company with another if the financiers request for such action in the case of an event of default continuing. Step-in rights exercised by financiers are effected through the exercise of their rights under the various security interests. Rarely is there a direct or tripartite agreement separately providing for specific step-in rights.

VI BONDS AND INSURANCE

It is typically required in PPP projects for the project company to be required to take out certain insurances to cover risks such as loss or harm to objects under construction, construction materials, the third party property or personal injury, economic loss due to construction delays, loss of profit caused by expected profit loss, damages to completed construction property, or loss of profit caused by impossibility of normal operation of the project facility.

For construction work or operation work, performance bonds issued by a bank or specialised insurance companies are a requirement under the concession agreement. Project companies are also typically required to submit a payment guarantee equivalent to 10 per cent of the total private project expense, or an insurance certificate with respect to the same.

In order to facilitate a smooth procurement of funding necessary for projects, the Infrastructure Guarantee Fund has been established under the KPPP Act. The operator of such fund provides guarantees for the payment of certain debt to financial institutions.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The Debtor Rehabilitation and Bankruptcy Act regulates bankruptcy and rehabilitation proceedings for individuals and corporations or entities. Through a bankruptcy proceeding, the debtor facing financial difficulties would suspend its operation, and liquidate and distribute its assets. Through a rehabilitation proceeding, the company's intention is to rehabilitate its business by reconciling the interests of its creditors, shareholders and other interested parties.

In the bankruptcy proceedings, if either the creditor or the debtor submits a petition for bankruptcy, the court declares the debtor bankrupt based on the debtor's inability to duly pay debts or the excess of the debtor's indebtedness over its total assets, and the trustee will be appointed by the court to administer and liquidate the bankruptcy

estate. Under bankruptcy proceedings, the bankruptcy estate will be distributed to creditors in the order of priority of their claims as follows: (1) secured creditors (who have a right of separation as explained below); (2) creditors with estate claims (which includes claims for costs of judicial proceedings, tax claims, wage and severance claims, management expenses incurred in connection with management, liquidation and distribution of the bankruptcy estate, and other claims arising from administration of the bankruptcy estate); (3) creditors with other statutorily preferred claims; and (4) other creditors with unsecured claims.

Unlike rehabilitation proceedings, a secured creditor who has a lien, pledge, mortgage, chattel mortgage, bonds, intellectual property mortgage in the bankruptcy estate or leasehold rights is given the 'right of separation' with respect to the relevant estate, and such secured creditor is not bound by bankruptcy procedures, and may enforce its security interest outside the bankruptcy proceedings and have priority in any proceeds resulting from the enforcement of its security interest. However, if the proceeds from the enforcement of security are insufficient to satisfy the claims of the secured creditor, the remaining amount of the claims will be treated as an unsecured claim, the payment of which is subject to bankruptcy proceedings.

Unlike bankruptcy proceedings, secured claims in rehabilitation proceedings are not recognised and cannot be enforced outside the rehabilitation proceedings. In rehabilitation proceedings, creditors have the voting right to approve or disapprove the rehabilitation plan, and distribution to creditors is made in accordance with the approved rehabilitation plan.

If the debtor engages in any acts that may harm the interests of its bankruptcy creditor or rehabilitation creditor prior to the commencement of bankruptcy or rehabilitation proceedings, the trustee or the receiver can exercise the right to avoid such acts and recover the asset of the debtor's estate. Accordingly, the project company's acts of providing collateral, if deemed to harm the interests of other creditors, may be subject to avoidance claims.

In bankruptcy and rehabilitation proceedings, foreign individuals and corporations are treated the same as Korean nationals and corporations.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

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 environment impact assessment. The relevant government agency must consult with the Minister of Environment regarding the environment impact assessment before granting a license or approval with respect to the project. The Minister of Environment may also request for improvement or adjustment in the environment assessment or the project plan.

ii Equator Principles

No Korean financial institution has subscribed to the Equator Principles. In general, they are required to comply with the standard provided by the environment related laws and to obtain permits or licences required for the project under the applicable environment laws as covenants or conditions precedent to drawdown.

iii Responsibility of financial institutions

A financial institution as a lender may be liable if it commits a tortious act, and exercise of its right as a lender may be barred if it contravenes the good faith doctrine or abuse of rights. However, there have not been many cases where the financial institution was found liable as a lender or where its exercise of rights as a lender was barred. The discussion of a lender's liability is still under development in Korea, but the financial institution should be cautious not to abuse its rights as a lender which may be in violation of the antitrust law.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The KPPP Act and the KPPP Act Enforcement Decree are the principal law setting forth the legal framework for PPP projects. The PPP Basic Plan provides details of relevant process and methods set out in the KPPP Act. The KPPP Act provides eligible project types for PPP projects, selection procedures of a project company, exemptions from approval, permits or licences from competent governments, special treatment on the sales of land in project area owned by government, matters related to expropriation of land in the project area, granting operation rights, establishment and operation of the Infrastructure Guarantee Fund and other matters related to the government support.

Typically, there are two different procedures for selection of a project company depending on whether a government identifies 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 bidding process, receives and evaluates the project plan from the bidders, and selects a preferred bidder that ultimately becomes a concessionaire by executing a concession agreement. However, when a private company proposes a project plan to the government and the government deems such project plan as appropriate and in the absence of the government selecting another bidder (after soliciting further bids) such private company may become a concessionaire.

ii Public procurement

With respect to government-related contracts, there are laws governing contracts executed by a central government or local government. Each government agency may select the contracting party for its relevant project, and the selection of the contracting party is usually made through a general bid, a restricted competitive bid (that restricts the qualification of participants), a competitive bid (that appoints bidders), or a private contract.

Korea became the signatory to the Government Procurement Agreement of WTO in 1994, and it is required to adopt the international bidding process when entering into a procurement agreement, the contract amount of which exceeds the standard amount announced by the Minister of Strategy and Finance.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The principle laws on foreign exchange transactions in Korea are the Foreign Exchange Transaction Act and the enforcement decree and rules thereto. According to the foregoing laws and rules, most large-scale investment related to a foreign national or foreign currencies (including loans, guarantees, bonds, issuance or offering of securities, acquisition of domestic real estate or the rights thereto) is subject to prior report requirements to the Ministry of Strategy and Finance (or, in certain cases, to a designated foreign exchange bank or the Bank of Korea). The Minister of Strategy and Finance may suspend or restrict foreign exchange transactions commenced without the relevant reports being made.

Under the Foreigner's Land Acquisition Act, a foreign national acquiring land is required to report to the relevant governmental agency.

In case a foreign national intends to invest by acquiring stocks of a Korean corporation or by providing loans of five-year or longer terms to the same corporation, such foreign national shall report to the Minister of Knowledge Economy prior to that investment in order to obtain the benefits provided under the Foreign Investment Promotion Act. The benefits of reporting such foreign investment includes guarantees of repatriation of amounts invested.

However, in certain industries foreign investment is prohibited or restricted. For example, foreign investment in nuclear plants and postal services is prohibited, and investment in power plants (other than nuclear plants), power transmission and supply, passenger service or freight transport, air transportation, communication services, etc. are only permitted if certain conditions are met or the investment falls below a certain investment ratio.

i Removal of profits and investment

If the Korean government deems that (1) it is inevitable due to certain emergency circumstances, such as natural calamities, war or grave and sudden changes in economic situations in or outside Korea; or (2) a serious difficulty in international balance of payments and international finance, or serious obstacles in implementing currency policies, exchange rate policies or other macroeconomic policies due to capital movement in and out of Korea have occurred or are likely to occur, the Ministry of Strategy and Finance may impose certain restrictions on foreign exchange transactions, such as employing a permit system for foreign exchange transactions, or requiring deposits of a certain portion acquired from the capital transaction. Thus, in case of emergency the remittance to other countries may be restricted.

However, foreign investment made pursuant to the Foreign Investment Promotion Act is not subject to the restrictions under Foreign Exchange Transaction Act, and thus,

repatriation of amounts invested is guaranteed thereunder, regardless of the Minister's decision to impose the above restrictions.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no special court or dispute resolution proceedings dealing with disputes arising from project financing or infrastructure projects.

ii Arbitration and ADR

Among various ADR methods for project finance transactions, arbitration is deemed to be the most widely used method in Korea. Korea is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘the New York Convention’), and also a signatory of the ICSID Convention and other prominent dispute resolution conventions.

International arbitration contractual provisions and awards are recognised as valid unless there has been any defect in the express intent of the parties. With respect to the enforcement of foreign arbitral award, arbitral award is binding as a judgment, and similar to a foreign judgment, enforcement of foreign arbitral award should also be approved by the court. The court will review an arbitral award that is subject to New York Convention pursuant to New York Convention, and for such arbitral award that is not subject to the New York Convention, the court will review it in accordance with approval procedure for foreign judgment prescribed by the Civil Procedure Act of Korea, and, therefore, there is a risk that the arbitral award may not be approved by the court in Korea.

The court would apply the following standards when reviewing whether or not to recognise the foreign judgment as a valid judgment and would enforce any final and conclusive civil judgment for a monetary claim obtained in a foreign court against the defendant, without re-examination of the merits of the case, in any action instituted by service of process as specified therein, provided that (1) such judgment was finally and conclusively given by a court having valid jurisdiction in accordance with the international jurisdiction principles under Korean law or applicable treaties; (2) the defendant was duly served with service of process (other than by publication or similar means) in sufficient time to enable the defendant to prepare its defence in conformity with the applicable laws, or responded to the action without being served with process; (3) recognition of such judgment is not contrary to the public policy of Korea; and (4) judgments of the courts of Korea are accorded reciprocal treatment in the jurisdiction of the court which had given such judgment.

The Korea Commercial Arbitration Board² is currently a major arbitration institution, and is from time to time nominated to hear construction disputes.

During negotiation of a concession agreement, parties can agree whether to submit their claims to a court or arbitration. A mediation process provided under the

2 www.kcab.kr.

KPPP Act may be selected as a dispute resolution method in the relevant concession agreement, but it is not mandatory.

XII OUTLOOK AND CONCLUSIONS

In relation to the ongoing BTO projects with MRG, the failure to come up with accurate demand/traffic estimates led to the government having to make continuous payouts, which placed the government under enormous economic and political pressure. Within this context, projects that are subsidised with a MRG will continue to attract scrutiny from the government and the public. For BTO projects, RSC has replaced MRG, but it is seen to be inefficient to cover all investment risks faced by the financial investors. Such circumstances have led financial investors to be more conservative seeing investments in number and value being lower.

BTL projects, on the other hand, have shown remarkable growth. PPP projects are the most commonly used method for improvement of railway facilities, museums, medical centres, cultural centres, libraries, military facilities, dormitories, and multi-purpose school facilities. Despite the profits being lower than those historically enjoyed in BTO projects, it is expected that financial investors will continue to use BTL when investing given the stable revenues.

Appendix 2

ABOUT THE AUTHORS

MICHAEL CHANG

Shin & Kim

Michael is a partner at Shin & Kim whose principal areas of practice are banking and finance, infrastructure and M&A. Michael has broad ranging commercial law experience across a number of jurisdictions, including Australia, Singapore, Indonesia, Cambodia and Vietnam. He has acted for banks, infrastructure funds, strategic investors and governmental agencies in a wide range of sectors, including infrastructure, media, power, mining, property development, hotels and transport.

He began to practise in Melbourne with Arthur Robinson & Hedderwicks in 1996 (now known as Allens Arthur Robinson). Michael was seconded as a senior associate to Shin & Kim from 2002 to 2008, before returning to Allens Arthur Robinson's Singapore office. He returned to Shin & Kim in 2010 as a senior foreign attorney. During his time in Korea, he has advised numerous foreign clients in investments in Korea. His in-depth experience in different sectors and different aspects of Korean law allows him to provide commercial and integrated advice, whether it be to a strategic investor in the manufacturing or media sector or a financial investor in the infrastructure sector, Michael has depth of experience and expertise to assist in a client in reaching its commercial objectives in Korea.

SANG-HYUN LEE

Shin & Kim

Mr Sang-Hyun Lee is a partner at Shin & Kim. Mr Lee's practice focuses on banking and finance matters, with an emphasis on acquisition finance, project finance and establishment and operation of infrastructure funds.

Mr Lee has handled a great number of loan transactions, domestic IPO transactions and matters relating to the issuance of various types of securities in the Korean, US or Euro markets. In addition, Mr Lee has supervised financial institutions for regularly issues and on all aspects of M&A transactions and outbound investments.

SEUNG-GYU YANG

Shin & Kim

Mr Seung-Gyu Yang is a senior associate at Shin & Kim. Mr Yang's practice focuses on banking and finance matters, with an emphasis on project finance, infrastructure funds, asset management business and finance regulatory.

Mr Yang has handled a great number of loan transactions and project finance. In addition, Mr Yang has advised to financial institutions for regulatory issues.

SHIN & KIM

8th Floor, State Tower Namsan

100 Toegye-ro, Jung-gu

Seoul 100-052

Korea

Tel: +82 2 316 4653 / 4068 / 4048

Fax: +82 2 756 6226

mchang@shinkim.com

shlee@shinkim.com

sgyang@shinkim.com

www.shinkim.com