THE PROJECTS AND CONSTRUCTION REVIEW

EIGHTH EDITION

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THE LAWREVIEWS

Chapter 18

SOUTH AFRICA

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I INTRODUCTION

The first recorded project financing in South Africa related to a toll road concession. The South African National Roads Agency Limited (SANRAL) and Mozambique's National Directorate of Roads and Bridges (in their capacity as joint implementing authorities) awarded a 30-year concession to Trans African Concessions Proprietary Limited to build, operate, expand and maintain the 503km N4 toll road between Witbank (in South Africa) and Maputo (in Mozambique). The project financing was funded by, among others, South Africa's major commercial banks and the Development Bank of Southern Africa Limited, and reached financial close in 1997.

Since then project finance has been the long-term financing solution for capital-intensive projects in a number of sectors within the South African economy, including energy, mining, prisons, telecommunications, transport and water. Project finance has also been used in public-private partnership (PPP) structures to effectively fund social infrastructure, such as hospitals and government department office accommodation.

Multilateral agencies and development banks have participated in South African project finance transactions, albeit in varying degrees over the past 20 years. The funding mix for these projects has also included major South African life insurers, export credit agencies and, of late, private equity funds. With the Johannesburg Stock Exchange (JSE) issuing its project bond debt listing requirements during 2017 – on the back of its launch of the green bond listing requirement (discussed in Section VI) – the funding mix for project financing in South Africa may soon incorporate exchange-listed project bonds.

During 2017, developers, contractors and financiers of capital-intensive projects were challenged by policy uncertainty, poor fiscal decisions and weakened sovereign credit ratings. Contractors, like project developers, continued to experience pressure on their margins and a lack of liquidity.[2] Notwithstanding these challenges, several noteworthy infrastructure projects reached, or are very close to reaching, financial close in South Africa's transport and energy sectors.

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2 Although much healthier than it has been over the past few years, the construction sector is yet to return to its pre-2010 levels.

II THE YEAR IN REVIEW

Project finance continued to be a vital tool for financing capital-intensive projects in South Africa during the past year, notwithstanding the headwinds faced by contractors, developers and financiers of such projects.

South Africa's weak growth coupled with poor fiscal management and policy uncertainty triggered sovereign rating downgrades by both S&P and Fitch, resulting in South Africa's long-term foreign currency and local currency credit ratings being rated sub-investment grade by these agencies.[3] This, together with the decline in PPPs coming to market and government's apparent unwillingness to support private investment in long-term infrastructure projects – demonstrated by Eskom Holdings SOC Limited's (Eskom)[4] refusal to sign the power purchase agreements underpinning the funding of over 27 independent power producer (IPP) projects totalling 58.5 billion rand[5] – resulted in reduced competition among commercial lenders for longer-term infrastructure debt.

However, in 2017 several multilateral agencies and development banks made loan commitments or advances directly to state-owned entities to fund infrastructure projects. For instance, China Development Bank committed to lending US$1.5 billion to Eskom to finance its Medupi Power Plant, while African Development Bank (AfDB) made an advance of 3 billion rand to Eskom for its capital expenditure programme; the AfDB advance was made against the loan facilities in an aggregate amount of US$1.34 billion that AfDB arranged the previous year.[6] The South African government also funded (or committed to fund) several key infrastructure projects directly or through state-owned enterprises; the most noteworthy of these projects include the national road network expansion and upgrade, which SANRAL is either in the process of procuring or implementing and totals approximately 20 billion rand, and the proposed expansion of the Gautrain Rapid Rail Link by 150km, which will potentially result in local spend of up to 79 billion rand.[7]

II DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

South African project finance ownership structures largely mirror those used internationally. The key tenet of project financing within the South African context, similar to international project financings, remains limited recourse to the sponsors and shareholders and the apportionment of project risks among the project participants through various contractual

3 Moody's, on the other hand, affirmed South Africa's investment grade credit rating; however, it placed the country under review.

4 Eskom is a South African state-owned power utility. It is the offtaker, and key participant, under the government-led Renewable Energy Independent Power Producer Procurement Programme. Through this Programme, South Africa has become one of the top-five global destinations for renewable energy procurement, attracting capital commitments totalling 200 billion rand (approximately US$16.26 billion using the exchange rate as at 31 December 2017).

5 Approximately US$4.76 billion using the exchange rate as at 31 December 2017.

6 The newly founded New Development Bank – created by the BRICS group of countries in 2014 – also committed to lend US$1.5 billion to South Africa for infrastructure projects.

7 Approximately US$6.42 billion using the exchange rate as at 31 December 2017.

arrangements that revolve around the project company (a special purpose vehicle (SPV) that is insolvency remote). One key exception relates to the security structures used in South Africa, which is discussed in subsection ii.

ii Documentation

Typically, the documentation used in South African project finance transactions is the same as that used in international project financing. Most publicly procured infrastructure projects are anchored on a concession or a PPP agreement issued by a government department or agency with responsibility for the institutional function outsourced to the concessionaire (in the case of a concession) or private party (in the case of a PPP agreement).[8] In relation to the IPP projects under the government-led Renewable Energy Independent Power Producer Procurement Programme (REIPPPP), electricity supply is procured in terms of a power purchase agreement (PPA). The offtaker's payment commitments under the PPA are supported by the National Treasury in terms of a separate implementation agreement. Government guarantees, put-and-call structures and special tax arrangements for the project financing generally do not feature in the transaction documents (i.e., the finance documents and the project documents).

The SPV in the project finance transaction further enters into construction and operation and maintenance (O&M) contracts; within the context of PPP agreements, these project documents almost always take the form of a construction subcontract and an operations subcontract, through which the private party's project deliverables under the PPP agreement are subcontracted by the private party to the relevant subcontractors. Other key project documents typically include offtake agreements (i.e., the PPA in the case of IPP projects or the PPP agreement in the case of PPPs), key input supply agreements (e.g., coal, limestone and water supply agreements for coal-fired IPP projects), real estate agreements, IP and licence agreements, the shareholder and equity funding agreements, and finance documents (inclusive of supporting security agreements).

The finance documents usually comprise a common terms agreement or facility agreement (or both), hedging documentation, an intercreditor agreement, security documentation (discussed in Section V) and direct agreements relating to key project documents, including (without limitation) the real estate, key supply and offtake contracts. Credit enhancement agreements, such as limited shareholder corporate guarantees, O&M contractor guarantees, and engineering, procurement and construction (EPC) contractor parent guarantees, are often required by lenders to bolster the project's security package.

iii Delivery methods and standard forms

South African construction contracts embrace a wide spectrum of delivery methods from design-build to EPC contracts and the variants in between. With regard to construction services, engineering-procurement-construction-management and alliance contracting are used in South African construction projects, although the former tends to be favoured over the latter.

A construction contract in South Africa could take the form of either a bespoke or standard-form contract. The Construction Industry Development Board (CIDB), a South

8 PPPs, within the South African context, also apply to the use of state property for commercial purposes. The use of concessions has been limited in recent years.

African statutory body mandated to promote the delivery capability of the country's construction industry, compels state-owned entities to use standard forms when procuring construction services. The approved CIDB standard form contracts are the International Federation of Consulting Engineers (FIDIC), the New Engineering Contract (NEC), the Joint Building Contracts Committee (JBCC) and the General Conditions of Contract for Construction Works (GCC). While the former two standard contracts (FIDIC and NEC) are international standard-form contracts, the latter two are South African-developed forms. The JBCC standard forms have been developed by the JBCC, a non-profit company with its representatives comprising, among others, building developers, professional consultants, and general and specialist contractors. The JBCC standard forms comprise the building agreement and minor works agreement, and is recommended for use in owner-designed building works. The GCC has been developed by the South African Institution of Civil Engineering, and is recommended for use in civil construction works.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risk

The risks inherent to project financing transactions and construction contracts in South Africa largely mirror the risks commonly encountered in similar transactions and contracts in developed markets. They generally fit in the following broad categories:

a construction risk;
b operational risk;
c supply risk;
d offtake risk;
e repayment risk;
f political risk;
g currency risk;
h authorisation risk; and
i dispute resolution risk.

In addition to time spent understanding the South African nuances to the above-referenced risks,[9] foreign entrants to the South African project finance market spend significant time getting to grips with the authorisation risks in publicly procured infrastructure projects. Within the context of these projects, the focus is often on the risk that the procurement award decision could be rendered invalid, and the risk that black economic empowerment (BEE) obligations upon which the award is made conditional could be breached and the resultant contract cancelled.

A significant proportion of the public procurement process is opaque to bidders, and because of this legal counsel are generally reluctant to opine on the validity and enforceability of the procurement award decision for the benefit of the lenders. This risk is increasingly being mitigated by the procuring entities making available to the successful bidder (and its

9 By way of example, in relation to the currency risk, South Africa has a detailed and well-documented exchange control policy that regulates the export of currency. Accordingly, the repatriation of foreign investments and income deriving from such investments (such as dividends and royalties) are subject to approval of the South African Reserve Bank.

legal counsel) documentation on the procurement process required for a meaningful legal due diligence investigation into the procurement process, and the related opinion on the validity and enforceability of the procurement award decision.

BEE is a socio-economic programme endorsed by the Constitution of South Africa. It is designed to redress the inequalities of apartheid through transformative measures that enhance participation by black people (and certain other designated groups of South Africans) in the South African economy. Transformative measures within the context of publicly procured infrastructure projects may include a requirement that bidders commit to, *inter alia*, black ownership and management targets in the SPV or key contractors during the implementation of the project. While the principles underpinning BEE are similar in some respects to local content and development commitments in other markets, BEE is a more complex and involved programme requiring specialist expertise when structuring procurement bids and resultant contracts with state procuring entities.

ii Limitation of liability

The SPV in a project finance transaction is generally incorporated as a limited liability company. Accordingly, with a few exceptions, claims against the SPV do not attach to its shareholders. The lenders restrict the SPV's activities through ring-fenced provisions, which are incorporated into its constitutive documents. The ring-fenced provisions limit the principal business of the SPV to the implementation of the project, and may further prohibit it from incurring additional indebtedness, granting loans and guarantees and imposing encumbrances over any of its assets outside the finance documents.

Contractors generally do not accept open-ended liability under their construction contracts. They require that their liability for damages under these contracts be subject to a total liability limit, and that sub-limits apply to different types of damages they may incur (e.g., delay and performance damages). Consistent with the FIDIC standard form contract, liability for third-party indemnities and intellectual property infringement claims fall outside these caps. Contractors limit their liability further by excluding indirect, special and consequential damages.[10]

Construction contracts, like PPAs, PPP agreements and concession contracts, generally excuse the affected party from performing its respective obligations under the contract where its performance is adversely impacted by *force majeure* events. *Force majeure* provisions are generally enforceable under South African law.

iii Political risks

Under the REIPPPP template implementation agreement, a government default includes expropriation or nationalisation of a material part of the power station or shares of the SPV, while the template PPA defines *force majeure* as including war, civil war, armed conflicts or terrorism. The occurrence of these political risks result in compensation for the SPV. Similar protections are provided for under the standardised agreement.

10 Special damages are those damages resulting from a breach of contract, which are ordinarily considered in law as being too remote to be recoverable, unless the parties actually contemplated that such damages could result from a breach of the contract.

Political risk cover can also be obtained from commercial insurers (such as Lloyds and AfriExim), export credit agencies from whom goods and services are sourced for the project concerned, and the World Bank's Multilateral Investment Guarantee Agency (MIGA). MIGA cover has not been widely used in South African project financings.

The right to property is a fundamental right enshrined in the South African Constitution. The Constitution provides that no persons (which would include both South African citizens and foreigners) may only be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. Laws may only provide for expropriation for a public purpose or in the public interest, and expropriation must be subject to compensation, the amount of which is to decided or approved by a court.

V SECURITY AND COLLATERAL

Whenever a project is funded by multiple lenders and the security package includes immovable property, it becomes necessary to establish a security company (security SPV) independent of the SPV (borrower). The security SPV holds the security on behalf of the secured lenders. The Deeds Registry Act 1937 prohibits a borrower from granting a mortgage or notarial bond in support of obligations it owes to more than one creditor through a single mortgage bond, if such obligations arise from different causes. The security SPV issues a guarantee to each of the lenders for the SPV's obligations to the lenders under the finance documents. In turn, the SPV grants the security SPV an indemnity for its obligations to the lenders under the guarantee. The SPV secures its obligations to the security SPV under the indemnity by having the security issued in the name of the security SPV. The latter is owned by a specially created owner trust, which is obliged to grant a pledge and cession of its shares in the security SPV to the lenders.

Typically, the SPV is required to issue to the security SPV the following security within the context of a project financing:

a mortgage bonds over the immovable assets of the SPV registered with the Deed Registry with competent jurisdiction;[11]

b notarial bonds over the SPV's movable property registered with the Deed Registry with competent jurisdiction. South African law provides for special notarial bonds over specified movable assets of the debtor, and general notarial bonds over all other movable assets of the debtor;

c a pledge and cession over the shares in the SPV and any rights applicable to them (including shareholder claims);

d a cession in security over all the SPV's rights, including its rights under project documents and authorisations and its rights to revenue, debtor and other claims, intellectual property rights, bank accounts and insurance proceeds; and

e a deed of hypothecation of patents, trademarks and designs registered with the Commission of Intellectual Property and Companies. Such security is generally not required as the SPV seldom has intellectual property rights to encumber.

There are no formalities prescribed for a cession in security. In relation to a pledge and cession over shares, while the contract generally provides for the share certificates to be delivered with a transfer form to evidence the security, this is not formally required in relation to

11 In South Africa, mortgages can also be registered over long-term leases of real estate.

certificated shares; the pledge and security cession agreement suffices. However, in relation to uncertificated shares (which includes all shares listed on a securities exchange), in addition to the pledge and security cession agreement the securities account of the SPV must be appropriately notated in terms of the Securities Services Act 2004. Where the security over movable and immovable assets must be registered (as noted above), the security only constitutes real security once registered; the title to the asset remains with the SPV, subject to the lenders' security interest.

Credit support is often required of the project sponsors (primarily in relation to their equity commitments), the product offtakers (to mitigate credit risk relating to their supply commitments) and the parent companies of the EPC and O&M contractors (to mitigate against performance risk under the EPC and O&M contracts). Such credit support generally takes the form of a corporate guarantee or a suretyship, but, depending on lenders' requirements, could also take the form of on-demand bank guarantees, or letters of credit. Suretyships and guarantees do not give any preference to the creditor on insolvency of the grantor of the instrument.

Project finance structures in South Africa incorporate step-in rights; these rights are generally housed in direct agreements and are for the benefit of the lenders. Step-in rights allow the lenders to step into the shoes of the SPV under the relevant project documents whenever the SPV's counterparty has the right to terminate the relevant project document, thereby allowing the lenders to cure the SPV default and avert termination of the relevant project document.

VI BONDS AND INSURANCE

Construction contracts forming part of the project documentation typically provide for the contractor to procure the issuance of performance bonds to settle claims against the contractor for project delays and performance shortcomings. These bonds are generally issued by banks in the form of on-demand guarantees.

As regards project bonds, in 2017 the JSE launched its green bond segment, as well as its project bond segment. The green bond segment provides an opportunity for companies and other institutions to raise debt finance that would be ring-fenced for use in low carbon initiatives designed to mitigate the effects of climate risk. Projects that may be funded by green bonds include projects that facilitate energy efficiency in buildings and water management initiatives like water meter installations and replacements, water pressure management, and the upgrade of reservoirs. Project bonds can be used by project developers to fund infrastructure projects; by its definition in the JSE listing requirements, project bonds must be financed '[B]y the cash flows of a ring-fenced development project (for example infrastructure or renewable energy projects)'.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

A creditor holding security in the form of a mortgage bond or a general notarial bond must apply to court for an order authorising the sheriff of the High Court to attach the debtor's assets subject to such bond. The creditor perfects its security interest over those debtor assets upon the sheriff attaching such assets. Thereafter, the secured creditor may sell such assets through a private or public sale and use the proceeds of this sale to discharge the creditor's claim and settle related costs. Where the creditor holds security in the form of a pledge, cession in security or a special notarial bond, a court order is not required for perfection of the security. The secured creditor may sell the secured assets and apply the proceeds of the sale to discharge the creditors claim without a court order. A court order is also not required where the debtor and the secured creditor agree that the sale of the secured assets need not go through the judicial execution process. Such an agreement is only recognised in law in relation to movable assets pledged and delivered to the secured creditor, and where such assets are in the possession of the secured creditor at the time it enforces its rights.

A creditor is prevented from enforcing its claims against a debtor after business rescue proceedings against that debtor have commenced. Business rescue proceedings are regulated by the Companies Act 2008, and are akin to proceedings under Chapter 11 of the US Bankruptcy Code. Such proceedings are designed to rehabilitate the financially distressed debtor through temporary supervision of the debtor. Business rescue proceedings can be initiated by the board of the relevant company filing a board resolution with the High Court, or through the High Court granting an order to this effect against a creditor or shareholder's application to the High Court. Once a debtor in placed into business rescue, it is obliged to appoint a business rescue practitioner, which is authorised to suspend any of the debtor's obligation during the period of the business rescue. The business rescue practitioner is also empowered to apply to the High Court to cancel any terms of a contract, which in the circumstances are unjust or unreasonable.

A creditor is prohibited from realising any security it holds over movable or immovable property once insolvency proceedings against the debtor have commenced. The creditor is obliged to hand over such property to the liquidator for realisation. There are a few exceptions to this rule set out in the Insolvency Act 1936. For instance, where the creditor is a secured creditor, the creditor can sell the secured movable property it holds, and pay the proceeds realised to the liquidator; however, the liquidator is only obliged to use the proceeds of the sold movable property to settle the secured creditor's claim if such claim is proved and admitted against the debtor's estate. In addition to secured creditors, the Insolvency Act recognises preference and concurrent creditors. The preference creditor, like the concurrent creditor, does not hold security to support its claims; however, the Insolvency Act grants to the preference creditor priority in payment of its claims over those of the concurrent creditor. The concurrent creditor is only paid after both the secured and preference creditors have been paid. Not all creditors holding security are secured creditors. Where the creditor has not taken possession of the debtor's assets or if the creditor has a general notarial bond which is yet to be perfected (as outlined above), the creditor has a preference claim that will only be settled after the claims of other secured and preference creditors are settled. As noted above, suretyships and guarantees do not give any preference to the creditor on insolvency of the grantor of the instrument – the guarantor is a concurrent creditor.

The Insolvency Act provides for the setting aside of certain transactions that the insolvent debtor entered into prior to or after the liquidation, as well as clawback rights in favour of the debtor's insolvent estate. Where an insolvent debtor disposed of assets without value (e.g., if it made a donation), the High Court can set aside the transaction if immediately after the disposal the debtor's liabilities exceeded its assets (the 'insolvency trigger'). The insolvency trigger could have occurred either within two years of the liquidation or more than two years before the liquidation; however, in relation to the former, no insolvency trigger results if the person claiming under or benefiting from the disposition proves that immediately after the disposition, the assets of the debtor exceeded its liabilities. The High Court can also set aside a disposition of property made at least six months prior to the debtor's liquidation if that disposition had the effect of preferring one of the debtor's creditors over another and resulting in an insolvency trigger, unless the person in whose favour the disposition is made proves that the disposition was made in the ordinary course of business, and that it was not intended to prefer one creditor above another. The courts may set aside the improper disposition transactions described above, and authorise the liquidator to recover the assets disposed or the value thereof at the date of the disposition (whichever is higher). The Insolvency Act also provides for the setting aside of collusive transactions entered into between the insolvent debtor and any other person prior to the insolvency, where the debtor in collusion with the other person disposed of the debtor's assets in a manner that had the effect of prejudicing the debtor's creditors or preferring one of its creditors above another. Any person who is party to a collusive disposition is liable to make good any loss caused to the insolvent estate, and if such person is also a creditor it will also forfeit its claim against the insolvent estate.

Certain security not registered within a hardening period is invalid. The Insolvency Act provides that if a debtor is liquidated within six months of a special notarial bond or a mortgage bond being registered, the security is invalid. There is an exception to this general rule: where the assets secured by the special notarial bond or the mortgage bond had been secured for at least two months prior to the registration of the relevant bond, the security is valid.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Where the project involves land development, which is often the case with infrastructure projects, inevitably the developer must conduct an environmental impact assessment (EIA) and secure an environmental authorisation to undertake the proposed development in terms of the National Environment Management Act 1998 (NEMA). In a nutshell, the EIA process under the NEMA requires a project developer to do the following:

a conduct either the basic assessment (for activities less likely to have significant environmental impacts) or the scoping and EIA process (for activities likely to result in environmental degradation or higher levels of pollution), depending on the nature of the project activity involved. The latter entails a more thorough assessment of the environmental impacts of the proposed development;

b determine the environmental impacts of the proposed development and how it could reduce or mitigate against them;

c give the public an opportunity to comment on the proposed development, inclusive of the mitigation measures proposed to deal with the environmental impacts; and

d provide the government departments or agency charged with making a decision on the application for the environmental authorisation with key information that would assist it make such decision.

Interested and affected parties have the right to participate in the EIA process.

Other licences and permits required for infrastructure projects vary depending on the nature of the projects. Some of the other key environmental permits required for infrastructure developments are:

a atmospheric emissions licences under the National Environmental Management: Air Quality Act 2004;

b waste management licences under the National Environmental Management: Waste Act 2008;
c water use licence in respect of certain water use activities under the National Water Act 2008;
d biodiversity permits under the National Environmental Management: Biodiversity Act 2004 in respect of designated activities that may have an impact on protected species and bio-prospecting; and
e a permit for the undertaking of certain activities affecting heritage resources under the National Heritage Resources Act 10 1999.

ii Equator Principles

Most of South Africa's commercial banks have adopted the Equator Principles. Through the use of the pass-through principles, the SPV in a project finance transaction obliges other project participants, such as the O&M and EPC contractors, to comply with the Equator Principles (or certain aspects thereof) in the implementation of the relevant project.

iii Responsibility of financial institutions

There are divergent views in the market as to whether lenders could be held liable for their indirect contribution towards environmental pollution and degradation caused by the projects they funded. These views remain untested by the courts.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs have been part of the project finance landscape for over a decade, although fewer PPPs have come to market in the past few years. The more significant recent PPPs include the proposed expansion of the Gautrain Rapid Rail Link by 150km and the SANRAL toll roads forming part of its national road expansion programme, as mentioned in Section I.

Depending on the procuring institution, a PPP agreement could be entered into with a private party in terms of the municipal PPP or national PPP legislative framework. The latter deals with PPPs proposed for (or entered into with) national and provincial state departments and state-owned entities, while the former, which deals with PPPs entered into by municipalities and municipal-owned entities. The national PPP legislative framework (when compared with its municipal counterpart) is more comprehensive and involves protracted processes. The discussion that follows is based on South Africa's national PPP legislative framework.

PPPs at national level are primarily regulated by National Treasury Regulation 16 under the Public Finance Management Act 1999 (PFMA), and is administered by the PPP Unit within the National Treasury. This Regulation incorporates a PPP Manual and Standardised Provisions for the PPP agreement. The PPP Manual outlines, *inter alia*, how PPPs must be initiated, how transaction advisers should be appointed and how the various stages of the procurement process must be implemented. It further details the various National Treasury approvals required at the various milestones of the PPP development process, including the signing of the PPP agreement. The Standardised Provisions set out the provisions required in each PPP agreement, along with annotations as to what each provision seeks to achieve and under what circumstances deviations should be made.

The PPP procurement process entails the advertising of a request for qualification (RFQ) calling interested bidders to collect and download copies of the RFQ and attend a public briefing. This process is designed to introduce the project to the market and assess interest therein. Responses to the RFQ are evaluated and potential bidders are qualified to respond to the request for proposal (RFP). Bidders are given access to a data room through which they can access pertinent project information and documentation for their respective due diligence investigations. As part of their bid response, bidders must mark-up the draft PPP agreement included in the RFP. A preferred bidder is selected from the bidders and is invited to enter into negotiations relating to the PPP agreement; at times, two or more bidders may be required to provide their best and final offer before a preferred bidder is selected.

ii Public procurement

Section 217 of the Constitution provides that whenever the government contracts for goods and services it must do so in a manner that is fair, equitable, transparent, competitive and cost-effective. The PFMA and the Municipal Finance Management Act 2003 (MFMA) establish a framework for state procurement in line with Section 217. The latter deals with procurement by municipalities and municipal-owned entities, while the former deals with procurement by national and provincial government departments, as well as state-owned entities. Supply chain management regulations have been issued under both the PFMA and MFMA. These regulations are detailed and provide for varied tender processes, depending on the procuring institution and the procurement requirements. BEE is an important criterion for pre-qualification and tender awards (see Section IV.i). Tender awards constitute administrative action, which can be challenged on a review application to the High Court on grounds that such action was unlawful, irrational, unreasonable or procedurally unfair.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

South Africa's Exchange Control Regulations administered by the South African Reserve Bank (SARB) control inflows and outflows of capital. These regulations apply more to residents than non-residents; however, to ensure appropriate treatment of a non-resident investment, non-residents must apply for exchange control approval prior to making their investments in South Africa. For example, should the investment take the form of a shareholder loan to a South African subsidiary, the non-resident's repatriation of the loan proceeds (principal and interest) will be blocked in the absence of an exchange control approval secured from the SARB before the loan was made available.

Save for work permits for expatriate staff and officers and registration of the foreign company as an external branch (should it elect not to incorporate a South African subsidiary through which it implements the project), there are no special licensing or other requirements for foreign contractors. With the exception of the exchange control restrictions, there are no restrictions applying to foreign investors or creditors in the event of a foreclosure of an infrastructure project or the SPV.

The South African government, through its Department of Trade and Industry, has a range of investment incentives available to investors in different sectors of the economy.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific rules or requirements, and South Africa does not have a dedicated forum (court or otherwise), for project finance transactions or construction disputes. In the absence of a written agreement to the contrary, the default position is that disputes are dealt with by a court having jurisdiction (which, considering the value of such disputes, will almost always be a division of the High Court).

The choice of foreign law as the governing law for any of the project documents would generally be recognised by South African courts, unless the entry into and performance of such documents would be contrary to public policy and the Constitution.

ii Arbitration and ADR

Arbitration and other forms of alternative dispute resolution (ADR) are used to resolve disputes in South Africa. Arbitration is used within the context of project finance transactions, albeit to a limited extent relative to its use in resolving disputes under construction contracts. Adjudication is also used as a form of ADR within the context of construction contracts.

On 20 December 2017, the International Arbitration Act 2017 came into effect. This Act adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) (the Model Law), which makes the Model Law part of South African law and allows it to be used in international commercial disputes. The adoption of the Model Law provides consistency with international best practice, and this is expected to be well received by foreign investors and international businesses. The Act binds state departments and functionaries, and applies to any international commercial arbitration in terms of an arbitration agreement to which those public bodies are party. The International Arbitration Act further provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

South Africa is yet to accede to the International Centre for Settlement of Investment Disputes Convention, and considering the dispute resolution provisions of the Protection of Investment Act 2015, it is unlikely to do so in the near future. The Protection of Investment Act, which is yet to take effect, does not provide for compulsory international arbitration for the resolution of investor-state disputes involving the South African government; currently, international arbitration is used at the government's discretion.

XII OUTLOOK AND CONCLUSIONS

The year 2017 concluded with a change in the leadership of the country's ruling party. The new leader, Cyril Ramaphosa, has significant business experience and a deep appreciation of what is needed to create the appropriate business climate for foreign direct investment in the country. This has restored hope in the energy and infrastructure sector, and there is a renewed focus on the positive role infrastructure development and project finance can play in accelerating the growth of the South African economy.

Appendix 1

ABOUT THE AUTHORS

DEON GOVENDER

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Deon Govender focuses his practice on project development and corporate and project finance transactions across Africa, with a particular emphasis on southern Africa. His experience ranges from advising on the development and financing of renewable energy and thermal power projects and various other infrastructure assets in the transportation and telecommunications sectors. Deon's experience additionally includes advising on financing independent power producer projects under the South African government's Renewable Energy Independent Power Producer Procurement Programme.

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