The Projects and Construction Review

Ninth Edition

Editor
Júlio César Bueno

The LawReviews

THE PROJECTS AND CONSTRUCTION REVIEW

NINTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Fewkes

SUBEDITOR
Robbie Kelly

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-038-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

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

BECCAR VARELA

BRIGARD & URRUTIA

CLIFFORD CHANCE SLPU

COVINGTON & BURLING (PTY) LTD

DENTONS

DLA PIPER AUSTRALIA

GUYER & REGULES

HAMMAD & AL-MEHDAR LAW FIRM

LINKLATERS LLP

MCCULLOUGH ROBERTSON

MILBANK LLP

NADER, HAYAUX Y GOEBEL, SC

NAGASHIMA OHNO & TSUNEMATSU

N DOWUONA & COMPANY

OCAMPO MANALO VALDEZ & LIM

PECKAR & ABRAMSON PC

PINHEIRO NETO ADVOGADOS

STIBBE

WALDER WYSS LTD

CONTENTS

PREFACE

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 modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from new jurisdictions in this edition: Ghana and the Philippines. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors, and their law firms who graciously agreed to participate.

Finally, I dedicate this ninth edition of *The Projects and Construction Review* to a dear friend, the late John (Jack) Bernard Tieder, Jr, who died on 3 December 2017. Jack was the founding partner of Watt, Tieder, Hoffar & Fitzgerald LLP and the Global Construction and Infrastructure Law Alliance. He is much missed and I am most grateful for his friendship, and all his support and guidance during my path as a construction lawyer. He leaves behind a large extended family and many close friends and esteemed associates around the world.

Júlio César Bueno
Pinheiro Neto Advogados, São Paulo
June 2019

A dedication to Jack Tieder (1946-2017)
by Professor Doug Jones AO

Jack Tieder was one of the doyens of the International Construction Bar.

Graduating from John Hopkins University and Syracuse and American University School of Law in 1971, he commenced practice as lawyer with the firm of Lewis Mitchell & Moore where he progressed to the ranks of partnership. In 1978 he was a founding partner of the firm then called Watt Tieder Killian & Hoffar and was the senior partner of the firm now known as Watt Tieder Hoffar & Fitzgerald from March 1978 until his passing.

Over the course of his career he contributed to international construction projects practice through the establishment of project delivery and financing structures that ensured success for many major projects around the world. As counsel in court and arbitration he was formidable.

Jack though was more than an attorney. He was a contributor to legal education around the world and to the development of collegiate practice of construction law in the United States and elsewhere in the world. An example only was his foundation fellowship of the American College of Construction Lawyers.

I knew Jack for many years and his commitment in a variety of ways outside the law to the assistance of young people wanting to make their way in the law and to education of lawyers in parts of the world outside his home country was quite extraordinary. For many years he coached teams at the Willem C Vis Moot and regularly lectured in eastern Europe and Russia to local practitioners to bring to them an international perspective of the practice to which they aspired.

Jack was a runner of some note, who during his life maintained a fitness regime that was the envy of his friends. His expertise in, and love of, beer was legendary.

In recent times, Jack undertook a significant amount of work as an arbitrator and it has been my privilege to sit with him in that role. His experience of practice around the world equipped him well to decide disputes in the international construction context and his capacity for incisively cutting to the chase on the key issues in complex cases was awe-inspiring.

In a case recently concluded I worked with Jack in hearings during the period in which he was undergoing some quite significant medical procedures. His cheerful acceptance of what for many would be regarded as seriously debilitating effects of surgery and other treatment was inspiring to those of us who were working with him. His mind remained sharp until the end and in very recent times his dedication to the conclusion of issues in the case was remarkable, his work insightful and his judgement impeccable. Upon recent news of the return of his illness, he faced the position with courage and amazing good humour.

We have lost a giant of the construction law industry, who will remain a legend to all who knew him.

It has been our privilege to have Jack as a Fellow and mine to have him as a colleague and a friend.

He will be missed by all of us, but not nearly as much as by Rufus and the family. At this time all our thoughts and prayers are with Rufus and the children and grandchildren with whom doubtless the memories of Jack's personality and contribution to their lives will remain strong forever.

Chapter 16

SOUTH AFRICA

Deon Govender and Kgabo Mashalane[1]

I INTRODUCTION

For more than 20 years, project finance has been the long-term financing solution for capital-intensive projects within a number of sectors of the South African economy. Project finance has been used in inter alia the energy, natural resources and mining, telecommunications, transportation and water sectors, and has further funded public-private partnership (PPP) projects delivering social infrastructure, such as hospitals.

Multilateral agencies and development banks have participated in South African project finance transactions alongside local and international commercial banks. The funding sources for these transactions have also included major South African life insurers, export credit agencies and, of late, private equity funds and exchange-listed project bonds.

During 2018, developers and financiers of capital-intensive projects remained challenged by policy uncertainty, a weak economy and the dearth of infrastructure projects coming to market. Contractors continued to experience pressure on their margins and a lack of liquidity. However, several noteworthy developments, including developments in relation to the government-led Renewable Energy Independent Power Producer Procurement Programme (REIPPP), have left many in the infrastructure development market hopeful of a recovering market in the year ahead.

II THE YEAR IN REVIEW

Through REIPPP, South Africa has become one of the top five global destinations for renewable energy procurement, attracting significant capital commitments. However, maintenance of this status proved challenging in the year under review.

Three years have passed since 27 independent power producers (IPPs) were appointed as preferred bidders under Bid Window 4 of REIPPP and these IPPs were no closer to signing their respective power purchase agreements (PPAs) with Eskom Holdings SOC Limited (Eskom), the state-owned electricity utility. Further, the Department of Energy's failure to update its Integrated Resources Plan (IRP) for an even longer period was threatening to dry up the country's renewable energy procurement pipeline. The updating of the IRP, which serves as the South African government's plan for new electricity generation capacity, is a key precondition for energy procurement under Bid Window 5 of REIPPP.

This, coupled with the fact that civil engineering was in the doldrums, did not bode well for contractors, developers and financiers of South African capital-intensive projects.

1 Deon Govender is of counsel and Kgabo Mashalane is an associate at Covington & Burling (Pty) Ltd.

Fortunately, however, this position started to change during the course of the year. In April 2018, Eskom signed PPAs with the aforementioned IPPs, committing to purchase 2300 megawatts of renewable energy from them. In July 2018, Saudi Arabia pledged to invest US$10 billion in South Africa's troubled energy sector. In August 2018, the Department of Energy published a revised draft IRP for public comment and the Minister of Energy promised to finalise the IRP by the end of 2018.

There were also noteworthy developments outside the energy sector. Coega Development Corporation, a state-owned enterprise charged with developing and operating the Coega Special Economic Zone (SEC) in the country's Eastern Cape province, attracted significant investment in the SEC, including a joint venture, valued at 11 billion rand,[2] between BAIC International and Industrial Development Corporation of South Africa, a state-owned corporation, for the establishment of an automotive assembly plant. In addition, several local multinational corporations pledged to invest more than 130 billion rand[3] in response to President Ramaphosa's calls for investment. A large proportion of these pledged investments will be directed towards infrastructure development in the natural resources and mining, automotive and telecommunications sectors.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

South African project finance ownership structures largely mirror those used in developed markets. A key tenet of South African project finance is limited recourse to the project sponsors and apportioning project risks among the project company's counterparties under the various project documents. As in developed markets, the project company is typically structured as a single-purpose insolvency remote special purpose vehicle (SPV). There are some noteworthy differences in relation to the security structures and agreements used in South African project financings; these are discussed in Section V.

ii Documentation

In the main, the documentation used to project finance private infrastructure developments mirror those used in developed markets; as indicated above, there are noteworthy differences in relation to South African security arrangements.

Most publicly procured infrastructure projects are anchored on a concession or a PPP agreement between a government institution responsible for the institutional function being outsourced and the relevant concessionaire (in the case of a concession agreement)[4] or private party (in the case of a PPP agreement).[5] REIPPP does not fit squarely within these public procurement categories. With regard to REIPPP, public procurement of electricity is undertaken by the Department of Energy; however, the IPPs appointed as preferred bidders enter into PPAs with Eskom for the supply and purchase of the procured electricity. Eskom's

2 Approximately US$750 million using the exchange rate as at 31 December 2018.

3 Approximately US$9 billion using the exchange rate as at 28 October 2018, the date of the announcement of the pledges.

4 The use of concessions has been limited in recent years.

5 Public-private partnerships, within the South African context, also apply to the use of state property for commercial purposes.

payment obligations under the relevant PPAs are underwritten by the National Treasury in terms of a separate implementation agreement. Put-and-call option agreements generally do not feature in South African public procurement.

Typically, the SPV will enter into construction and operation and maintenance (O&M) contracts for the construction and operation of the facility. Other key project documents include offtake agreements (e.g., the PPA under REIPPP), key input supply agreements (e.g., coal, limestone and water supply agreements for coal-fired power stations), real estate agreements, intellectual property and licence agreements, shareholder and equity funding agreements, and finance documents.

The finance documents usually comprise either a common terms agreement or a 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 and O&M 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 many 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 a standard-form contract. The Construction Industry Development Board (CIDB), a South 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 first two of these (FIDIC and NEC) are international standard-form contracts, the last two (JBCC and GCC) are forms that have been developed in South Africa. The JBCC is a non-profit company with representatives comprising, among others, building developers, professional consultants, and general and specialist contractors. The JBCC standard forms comprise a building agreement and a minor works agreement, and are recommended for use with owner-designed building projects. The GCC standard form contract has been developed by the South African Institution of Civil Engineering and is recommended for use in civil construction projects.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risk

With some exceptions, the risks inherent in project financing transactions and construction contracts largely mirror the risks commonly encountered in similar transactions and contracts in developing markets. They generally fit into the following broad categories:

a construction risk;

b operational risk;

c supply risk;
d offtake risk;
e repayment or credit risk;
f political risk;
g currency risk;
h licensing and authorisations risk; and
i dispute resolution risk.

There are South African nuances to the above-referenced risks that require attention, particularly within the context of publicly procured infrastructure projects. For example, in relation to currency risk, South Africa has a detailed and well-documented exchange control policy that regulates the export of currency, and subjects the repatriation of foreign investments and income deriving from such investments (such as dividends and royalties) to approval by the South African Reserve Bank. With regard to the authorisation risk, it is important that the investor assess the risk that the procurement award could be declared invalid and unenforceable, as well as the risk that broad-based black economic empowerment (B-BBEE) obligations upon which the procurement 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 issue an opinion to lenders on the validity and enforceability of the procurement award. This risk is increasingly being mitigated by the procuring government institution making available to the successful bidder (and its legal counsel) documentation on the procurement process to facilitate meaningful investigation of the relevant procurement process.

B-BBEE is a socio-economic programme endorsed by the Constitution of the Republic 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 to the project during the implementation of the project. While the principles underpinning B-BBEE are similar in some respects to local content and development commitments in other markets, B-BBEE is a more complex and involved programme requiring specialist expertise when structuring procurement bids and the resultant contracts with the procuring government institutions.

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 an 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 other than those agreed in 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). Consistent with the FIDIC standard-form contract, liability for third-party indemnities and intellectual property infringement claims do not fall within these limits. Contractors limit their liability further by excluding indirect, special and consequential damages.[6]

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

iii Political risks

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

Political risk cover can also be obtained from commercial insurers (such as Lloyd's 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, which provides that no persons (both South African citizens and foreigners) may be deprived of property except in terms of the 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 decided or approved by a court. South Africa's expropriation laws are currently under review.

V SECURITY AND COLLATERAL

The Deeds Registry Act 1937 prohibits a borrower from granting a mortgage bond over immovable property in support of its obligations to more than one creditor through a single mortgage bond, if such obligations arise from different causes. To allow different categories of lenders to a project to benefit from security over the same immovable property, it is necessary to establish a security company (security SPV) independent of the SPV (borrower) and to register the mortgage bond over the property in the name of the security SPV. Typically in these circumstances, in addition to a mortgage bond over immovable property, all other security over project assets is issued to (and, where applicable, registered in the name of) the security SPV. The project lenders receive benefit to this security through guarantees issued by the security SPV in favour of each lender. The SPV in turn indemnifies the security SPV against losses it incurs under the various guarantees it has issued to the lenders.

6 Special damages are those that result 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.

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

a mortgage bonds over the immovable property of the SPV registered with the Deed Registry with competent jurisdiction;[7]

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 property of a debtor, and general notarial bonds over all other movable property of a debtor;

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

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

e where applicable, a deed of hypothecation of patents, trademarks and designs registered with the Commission of Intellectual Property and Companies. This type of security is generally not required as an SPV seldom has intellectual property rights to encumber at the beginning of a project.

There are no formalities prescribed for a cession in security. In relation to a pledge and cession in security over shares, while the contract generally provides for the relevant share certificates to be delivered to the lenders' agent with a transfer form to evidence the security, this is not formally required in relation to certificated shares; the execution of the pledge and security cession agreement suffices for the purposes of creating the relevant security. However, in relation to uncertificated shares (including all shares listed on a securities exchange), in addition to the execution of the pledge and cession in security, the securities account of the SPV must be appropriately notated in terms of the Financial Markets Act 2012. If the security over movable and immovable assets needs to 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.

Project finance structures in South Africa incorporate step-in rights, which 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 where the SPV's counterparty has the right to terminate the relevant project document, thereby giving the lenders the opportunity to cure the SPV default and avert termination of the relevant project document.

VI BONDS AND INSURANCE

Credit support is often required of the project sponsors (primarily in relation to their equity commitments), the offtakers (to mitigate credit risk relating to their purchase commitments) and the parent companies of the EPC and O&M contractors (to mitigate against performance risk under the EPC and O&M contracts, respectively). This credit support generally takes the form of a corporate guarantee or a suretyship but, depending on the lenders' requirements,

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

could also take the form of on-demand bank guarantees, insurance policies or letters of credit. Suretyships and guarantees do not give any preference to a creditor on insolvency of the grantor of the instrument.

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 that bond. The creditor perfects its security interest over those debtor assets upon the sheriff attaching the assets. Thereafter, the secured creditor may sell the assets through a private or public sale and use the proceeds of the sale to discharge the creditor's claim and settle related costs. If a creditor holds security in the form of a pledge, cession in security or a special notarial bond, a court order is not required to perfect the relevant security; the secured creditor may sell the secured assets and apply the proceeds of the sale to discharge the creditor's claim without a court order. A court order is also not required if 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 recognised in law only 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. These 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 distressed 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 is placed into business rescue, it is obliged to appoint a business rescue practitioner, which is authorised to suspend any of the debtor's obligations to creditors 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 that, 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 the property to the liquidator for realisation. A few exceptions to this rule are set out in the Insolvency Act 1936. For instance, if 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 the 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 priority to the preference creditor for 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. If a creditor has not taken possession of a debtor's assets or if a creditor has a general notarial bond that 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 a 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 entered into by an insolvent debtor prior to, or after, the liquidation, as well as clawback rights in favour of the debtor's insolvent estate. If 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 the assets of the debtor exceeded its liabilities immediately after the disposition. The High Court can also set aside a disposition of property made at least six months prior to a 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 High Court 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, if 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 a party to a collusive disposition is liable to make good any loss caused to the insolvent estate, and if such a person is also a creditor, he or she will also forfeit his or her 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: if the assets secured by a special notarial bond or a 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

If a 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 NEMA requires a project developer to do the following:

a conduct either a basic assessment (for activities less likely to significantly affect the environment) or a scoping and EIA process (for activities likely to result in environmental degradation or higher levels of pollution). The latter processes involve a more thorough assessment of how the proposed development is likely to affect the environment than the former process;

b determine how the proposed development is likely to affect the environment and how the developer could reduce or mitigate against these effects;

c give the public an opportunity to comment on the proposed development, inclusive of the mitigation measures proposed to deal with the effects on the environment; and
d provide the government institution charged with making a decision on an application for environmental authorisation with key information to help it make a decision.

Other licences and permits required for infrastructure projects vary depending on the nature of the projects. Some of the other key environmental permits include:
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 licences 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 affect protected species and bio-prospecting; and
e permits 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 and will oblige the SPV to adhere to them in the implementation of the relevant project. Through the use of the pass-through principles, the SPV may oblige 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 within 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 South African courts with competent jurisdiction.

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.

Depending on the nature of the procuring government institution, a PPP agreement could be subject to either the municipal PPP or the national PPP legislative framework. The latter deals with PPPs entered into with national and provincial state departments and state-owned entities, while the former regulates 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 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 various milestones of the PPP development process. The Standardised Provisions set out the clauses required in each PPP agreement, with annotations as to what each of the clauses seeks to achieve and under what circumstances deviations to these clauses are permissible. All institutions undertaking PPPs require approval from the National Treasury in all four phases of the PPP procurement process (i.e., the feasibility study, procurement, value for money and final PPP agreement phase). During the procurement process, the relevant PPPs are assessed for value for money, affordability and optimal risk transfer.

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.

There are various types of infrastructure development PPP projects based on the contractual arrangements involved, including:

a design, finance, build, operate and transfer;

b design, finance and operate; and

c design, build, operate and transfer.

ii Public procurement

Section 217 of the Constitution provides that whenever the South African 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, and state-owned entities. Supply chain management regulations have been issued under both the PFMA and the MFMA. These regulations are detailed and provide for tender processes distinct from those applicable to PPPs; these processes vary depending on the procuring institution and the procurement requirements. B-BBEE 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 competent high court on grounds that the action was unlawful, irrational, unreasonable or procedurally unfair.

iii PPP contingent liabilities

PPP contingent liabilities are liabilities that the South African government incurs in terms of a PPP agreement when that agreement is terminated. Under certain circumstances, a PPP agreement will provide that the procuring government institution is obliged to compensate the private party if the PPP agreement is terminated before its expiry date. There are various categories of PPP contingent liabilities, depending on whether the termination is the result of private-sector default, government default or force majeure – an event beyond either party's control.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

South Africa's Exchange Control Regulations are administered by the South African Reserve Bank (SARB) and 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 investments in South Africa. For example, should the foreign direct investment take the form of a shareholder loan to a South African subsidiary, a non-resident's repatriation of the loan proceeds (principal and interest) will be blocked in the absence of an exchange control approval secured from 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 outlined above, there are no restrictions that apply to foreign investors or creditors in the event of a foreclosure of an infrastructure project or an SPV.

A range of investment incentives are available to investors in different sectors of the economy via the South African government, through its Department of Trade and Industry.

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 with competent jurisdiction.

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 the documents would be contrary to public policy and the South African Constitution.

ii Arbitration and ADR

Arbitration and other forms of alternative dispute resolution (ADR) are used to resolve commercial disputes in South Africa, including disputes relating to project finance transactions. Adjudication is also used as a form of ADR within the context of construction contracts.

Through the International Arbitration Act 2017, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) (the Model Law) applies in South Africa to international commercial disputes. 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 a 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 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID 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

While there are signs of the South African economy improving, any improvement is conditional upon greater innovation and significant investment in the economy, particularly in infrastructure development. As South Africa continues its drive to attract more investment, it is probable that potential investors will require that the South African government shift (or soften) its position on a number of regulatory and policy issues that have historically challenged foreign direct investors, including expropriation of land, labour reforms, B-BBEE and investment protections. The need for investment could start altering South Africa's regulatory landscape.

Appendix 1

ABOUT THE AUTHORS

DEON GOVENDER

Covington & Burling (Pty) Ltd

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 to various other infrastructure assets in the transport 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.

KGABO MASHALANE

Covington & Burling (Pty) Ltd

Kgabo Mashalane is a South Africa-qualified lawyer in the anti-corruption and compliance practice, with experience in working on market entry considerations, research on anti-corruption and bribery in Senegal, Mauritania and Ghana. She has advised international clients on lobbying compliance laws in South Africa in interactions with members of government, parliament and other authorities. She also has experience in working on infrastructure and renewable energy projects and corporate transactions across Africa and the Middle East, having practised in the project finance and development practice at Covington. Kgabo's experience includes corporate transactions (including mergers and acquisitions) relating to international energy and infrastructure projects and advisory experience in the financing of transport in South Africa.

COVINGTON & BURLING (PTY) LTD

Rosebank Link
173 Oxford Road, 7th Floor
Johannesburg 2196
South Africa
Tel: +27 11 944 6900
dgovender@cov.com
kmashalane@cov.com
www.cov.com

Law
Business
Research

ISBN 978-1-83862-038-7