



ICLG

The International Comparative Legal Guide to:

Project Finance 2016

5th Edition

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

Advokatfirma Ræder DA

Ali Budiardjo, Nugroho, Reksodiputro

Angola Legal Circle Advogados (ALC Advogados)

BM&O Abogados – Attorneys at Law

Boga & Associates

Brigard & Urrutia Abogados

Camilleri Preziosi

Clayton Utz

CMS Reich-Rohrwig Hainz

Cuatrecasas, Gonçalves Pereira

Hammarström Puhakka Partners

Henriques, Rocha & Associados,

Sociedade de Advogados, Lda

International Project Finance Association (IPFA)

Karimov and Partners Law Firm

Khan Corporate Law

Kyriakides Georgopoulos Law Firm

Mattos Filho, Veiga Filho, Marrey Jr. e

Quiroga Advogados

Milbank, Tweed, Hadley & McCloy LLP

Nagashima Ohno & Tsunematsu

Oraro & Company Advocates

Patton, Moreno & Asvat

Petrikić & Partneri AOD in cooperation with

CMS Reich-Rohrwig Hainz

Philippi, Prietocarrizosa & Uría

Ploum Lodder Princen

PrimePartners Wirtschaftskanzlei

QUIROZ SANTRONI Abogados Consultores

Rodríguez Dávalos Abogados

(Consultores en Energía RDA, S.C.)

Severgnini, Robiola, Grinberg & Tombeur

SJ Law, Advocates & Solicitors

Templars

The Legal Circle

Vieira de Almeida & Associados, Sociedade de

Advogados, RL

Walder Wyss Ltd.



Contributing Editor
John Dewar, Milbank, Tweed,
Hadley & McCloy LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Toni Hayward

Sub Editor
Nicholas Catlin

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
April 2016

Copyright © 2016
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-89-5
ISSN 2048-688X

Strategic Partners



General Chapters:

1	Why the World Needs Multi-Sourced Project Financings (and Project Finance Lawyers...) – John Dewar & Oliver Irwin, Milbank, Tweed, Hadley & McCloy LLP	1
2	Innovation is the Requirement for Project Finance Structures in 2016 – Geoff Haley, International Project Finance Association (IPFA)	7

Country Question and Answer Chapters:

3	Albania	Boga & Associates: Renata Leka & Besa Velaj (Tauzi)	9
4	Angola	Angola Legal Circle Advogados (ALC Advogados): Catarina Levy Osório & Irina Neves Ferreira	19
5	Argentina	Severgnini, Robiola, Grinberg & Tombeur: Carlos María Tombeur & Matías Grinberg	28
6	Australia	Clayton Utz: Bruce Cooper & Peter Staciwa	36
7	Bangladesh	The Legal Circle: Karishma Jahan & Anita Ghazi Rahman	47
8	Bolivia	BM&O Abogados – Attorneys at Law: Adrián Barrenechea B. & Camilo Moreno O.	56
9	Bosnia & Herzegovina	CMS Reich-Rohrwig Hainz: Zlatan Balta & Indir Osmic	65
10	Botswana	Khan Corporate Law: Shakila Khan	76
11	Brazil	Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Pablo Sorj & Filipe de Aguiar Vasconcelos Carneiro	84
12	Chile	Philippi, Prietocarrizosa & Uría: Marcelo Armas M. & Marcela Silva G.	94
13	Colombia	Brigard & Urrutia Abogados: Manuel Fernando Quinche & Juan Martín Estrada	102
14	Dominican Republic	QUIROZ SANTRONI Abogados Consultores: Hipólito García C.	111
15	England & Wales	Milbank, Tweed, Hadley & McCloy LLP: Clive Ransome & Munib Hussain	119
16	Finland	Hammarström Puhakka Partners: Andrew Cotton & Björn Nykvist	135
17	Germany	PrimePartners Wirtschaftskanzlei: Adi Seffer	143
18	Greece	Kyriakides Georgopoulos Law Firm: Elisabeth V. Eleftheriades & Ioanna I. Antonopoulou	151
19	India	SJ Law, Advocates & Solicitors: Samir Jagad & Trushil Vora	164
20	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Emir Nurmansyah & Freddy Karyadi	172
21	Japan	Nagashima Ohno & Tsunematsu: Masayuki Fukuda	186
22	Kenya	Oraro & Company Advocates: Pamella Ager & Juliet C. Mazera	192
23	Kosovo	Boga & Associates: Sokol Elmazaj & Delvina Nallbani	201
24	Malta	Camilleri Preziosi: Louis de Gabriele & Andrei Vella	209
25	Mexico	Rodríguez Dávalos Abogados (Consultores en Energía RDA, S.C.): Marco A. Sotomayor Melo & Helena Gutiérrez Moreno	216
26	Mozambique	Henriques, Rocha & Associados, Sociedade de Advogados, Lda: Paula Duarte Rocha & Ana Berta Mazuze	225
27	Netherlands	Ploum Lodder Princen: Tom Ensink & Alette Brehm	234
28	Nigeria	Templars: Oyeyemi Oke & Mayowa Olugunwa	242
29	Norway	Advokatfirma Ræder DA: Marit E. Kirkhusmo & Kyrre W. Kielland	249
30	Panama	Patton, Moreno & Asvat: Nadya Price & Ivette Martínez	259
31	Portugal	Vieira de Almeida & Associados, Sociedade de Advogados, RL: Teresa Empis Falcão & Ana Luís de Sousa	267
32	Serbia	Petrikić & Partneri AOD in cooperation with CMS Reich-Rohrwig Hainz: Milica Popović & Ksenija Boreta	277
33	Spain	Cuatrecasas, Gonçalves Pereira: Héctor Bros & Jaume Ribó	286
34	Switzerland	Walder Wyss Ltd.: Thomas Müller-Tschumi & Alexandre Both	297
35	USA	Milbank, Tweed, Hadley & McCloy LLP: Eric F. Silverman & Simone M. King	306
36	Uzbekistan	Karimov and Partners Law Firm: Bobir Karimov & Bekzod Abdurazzakov	318

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Mexico

Rodríguez Dávalos Abogados
(Consultores en Energía RDA, S.C.)

Marco A. Sotomayor Melo



Helena Gutiérrez Moreno



1 Overview

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

Project finance is a very common source of financing in Mexico, especially for projects in which the offtake agreements are entered into with governmental companies (or entities) such as the Federal Electricity Commission (*CFE*) or *Petróleos Mexicanos (Pemex)*. Due to reforms approved recently, the most popular and relevant sectors in recent years have been the energy sector (hydrocarbons and electricity) and telecoms, which have created a lot of expectation among investors. There is a significant trend related to the bidding processes of mature oil fields for E&P, power plants, and pipelines.

We expect that the infrastructure sector will grow exponentially, since the Mexican government is encouraging the participation of the private sector due to the reforms and the laws enacted.

The financing structure is usually provided by the retail banks (mostly from the U.S., Europe, and Japan), national development banks, and from time to time the Export Credit Agencies. Due to the enacted reforms there are many new types of financing sources for infrastructure in Mexico, such as Infrastructure Education Bonds ("*Bonos de Infraestructura Educativa*"), *Fibra "E"* (a Mexican hybrid between the Real Estate Investment Trust and the Master Limited Partnerships), and Investment Project Certificates ("*Certificados de Proyectos de Inversión*"), among others.

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

Several projects have been developed in Mexico in recent years. The energy and road sectors are the most active; we can say that the most relevant project in infrastructure developed through a project finance scheme was that of Ramones Phase II, which consisted in the construction and development of more than 500km of gas pipeline over from the North to the Centre of Mexico City and represented over 2.5 billion dollars.

As for Mexico, we expect to see a lot of activity in the project financing field, due to the reforms recently undertaken across sectors such as telecoms and energy. These reforms will drive a lot of project financing activity and will likely start having a more tangible impact; those two sectors are expected to show a significant increase in activity in 2016 and subsequent years.

Additionally, the Mexican government has shown a big commitment in developing renewable energy projects, and thus will open foreign

investment to companies from countries where these energy sources are already developed.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The type of agreement required depends on the nature of the specific asset that is given as security for the transaction and the regulation that affects such asset. Real property includes land, construction attached thereto, any other property attached to the land that cannot be separated without deteriorating the land, and all rights thereto. Personal property includes assets that can be transported, rights and obligations not considered real property, and shares and interests over companies. A mortgage agreement is the traditional type of security used to secure real property and a pledge agreement is used to secure personal property. In addition, the Banking Institutions Law provides for a special type of mortgage known as an industrial mortgage (*hipoteca industrial*), which can only be created in favour of credit institutions and may include all assets related to the business unit. The procedures to incorporate such securities are described in detail in the next questions in this section.

Most project financings in Mexico use the figure of the guaranty trust (*fideicomiso de garantía*) to secure the repayment of the debt by transferring title of the assets to the trust's estate. Under Mexican law, only certain entities are authorised to act as trustees. In project financing, the trustees are credit institutions. The main duties of the trustee are to maintain title of the assets and manage such assets pursuant to the provisions of the trust agreement. One of the advantages of the guaranty trust is the easy extrajudicial foreclosure proceeding that can be agreed by the parties. Also, it is important to mention that assets transferred to the trust are not considered part of the debtor's estate in the event of a bankruptcy proceeding. To create a guaranty trust, the trustor transfers the title of the assets to the trustee, for the exclusive purpose of using such assets for the specific purpose for which the trust was created. The instrument through which a guaranty trust is created must be formalised in a public deed by a Notary Public and, when real property is included in the trust, it must be filed and registered in the Public Registry of Property of the State where such property is located. Finally, security agreements over personal property must be registered on the Movable Guaranties Registry (*Registro Único de Garantías Mobiliarias*).

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. As mentioned above, real property may be secured through the creation of a mortgage or by transferring the property to a guaranty trust. The mortgage gives the creditor the right to be paid the value of the mortgaged property. The mortgage includes the improvements made by the owner to the mortgaged property and all personal property permanently attached to the mortgaged property. The owner of the real property may create mortgages, either through a unilateral act or declaration or by entering into an agreement with the creditor. In both cases, the mortgage should be formalised in a public deed before a Notary Public, and registered in the Public Registry of Property of the State where the property is located in order to be effective before third parties. Additionally, industrial mortgages must be registered on the Movable Guaranties Registry with respect to the personal property included in such mortgage.

Personal property such as machinery and equipment not attached permanently to the land may be secured through a pledge agreement. Mexican law contemplates two types of pledges – the traditional pledge and the non-possessory pledge. In the traditional pledge the possession of the assets is transferred to the creditor; non-possessory pledge assets allow the pledger to maintain the possession of the assets and to use them in the ordinary course of business. It is always recommended to formalise all types of pledges through public deed granted by a Notary Public, due to the existence of a certain controversy in several States related to the classification of ratified documents as either public or private documents, which may impair the use of the executive judicial proceeding in the event of foreclosure. Both types of pledge must be registered in the Movable Guaranties Registry to be effective against third parties and in order to gain priority over unregistered liens and over liens registered thereafter.

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

Receivables can be taken as a security in the form of a pledge without transferring possession. Such form of security would allow the pledger to collect the receivables in the absence of a default. The procedure to create this type of pledge is described in the response to question 2.2 above.

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

Yes, this can be achieved either through the creation of a pledge – usually a non-possessory pledge – or by transferring the rights of the holder of the bank account to the trustee on behalf of a guaranty trust. Most of the time, trusts are used for this purpose. Also, it is common for the trustee of a guaranty trust securing project financing to open bank accounts which become part of the trust estate to receive all proceeds from the operation of the project. This allows control of how these proceeds are used and allows the creditors to be paid from the pledged cash derived from the collateral to guarantee the financing.

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

Yes, shares are considered personal property; therefore creditors may take security over them through the creation of a pledge or a guaranty trust. Depending on the type of entity, shares may or may not be in certificated form. Corporate authorisations may be required depending on the bylaws of the company or the type of entity. The procedure to create a guaranty trust has been described in the answer to question 2.1 and the procedure to create the pledge is contemplated in the answer to question 2.2 above. Also, depending on the nature of the company and in accordance with its laws, an endorsement of the shares and the registration of the security on the company's registry book may be required. In either case the corporate voting rights and decision-making derived from the shares may be withheld by the owner of the shares, granting only economic rights to the creditors.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Since the services of the Notary Public are governed by State laws, the notarisation fees depend on the State where the securities are being formalised. Generally, for the formalisation of a security agreement the fees are calculated based on the value of the secured obligations, however most of the time such fees are subject to negotiation. As for registration fees, since State laws also govern transactions over real property, the fees vary considerably depending on the State where the real property is located. Still, most commonly, fees are also linked to the value of the secured obligations. Some registries cap the maximum amount. There are no fees charged for the registration of securities over personal property, such as shares and receivables, in the Movable Guaranties Registry (*Registro Único de Garantías Mobiliarias*), which is carried out electronically.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The expenses for registration could become significant when a project involves valuable, or a great amount of, real property and the applicable State laws do not cap the maximum amount to be charged as registration fees. The registration of securities for personal property in the Movable Guaranties Registry (*Registro Único de Garantías Mobiliarias*) is considered automatically made when it is filed electronically. Usually a Notary Public makes such filing. The Public Registries of Property may take a considerable amount of time to register securities over real property. Even though the applicable laws set a maximum period of time for registration, it usually depends on the workload of the particular Public Registry of the State where the property is located.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Yes, it depends if the project involves activities that are regulated; for example, for energy projects, regulatory consents to create securities over real property and other assets are required.

3 Security Trustee

- 3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

Yes, Mexican law does recognise the appointment of a security agent. An agreement between the creditors and the agent is required, whereby all parties should agree the terms of such agency and how the proceeds obtained should be distributed.

- 3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The concept of a security trust is recognised in Mexico.

4 Enforcement of Security

- 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?**

Depending on the type of security, the applicable laws offer different extrajudicial proceedings for the enforcement of a security.

In a guaranty trust, the parties agree on the extrajudicial procedure offered by the General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*) to sell the property transferred to such trust, without the intervention of the courts. This is one of the reasons why the use of a guaranty trust is deemed more practical and efficient.

For a traditional pledge, unless the debtor agrees to transfer the ownership of the pledged assets, a judicial proceeding is required. For a pledge without transferring the possession of the assets, the applicable laws also allow the parties to agree on an extrajudicial procedure, which would not involve the intervention of the courts. However, if the debtor refuses to deliver the possession of the pledged property or to the payment, or the requirements set for such extrajudicial procedure are not covered, then judicial foreclosure is required.

Finally, regulatory consents may be required depending on the activities carried out by the project company.

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

The only restriction would be if the title over the assets is transferred to the foreign investors or creditors. In this case, the Mexican Foreign Investment Law (*Ley de Inversión Extranjera*) imposes restrictions depending on the regulated activity.

5 Bankruptcy and Restructuring Proceedings

- 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

The project lender may be affected from the moment a claim of bankruptcy of the project company is admitted. From such moment the judge may order as a protective remedy the stay of foreclosure proceedings. Pursuant to the Mexican Business Reorganization Law (*Ley de Concursos Mercantiles*), the insolvency proceeding contemplates two stages: a conciliatory stage, whose main objective is to reach an agreement among the recognised creditors to preserve the company; and the bankruptcy stage, which involves the sale of the project company and its assets to repay the recognised creditors. The judicial resolution declaring bankruptcy will contain the order to stay all foreclosure proceedings during the conciliation stage. If an agreement is reached among the recognised creditors, secured parties that did not participate in the agreement may start or continue with their respective foreclosure proceedings, unless such agreement provides for the payment of the indebtedness to the secured lender.

Additionally, during the first 30 days of the bankruptcy stage, the liquidator (*síndico*) has the ability to avoid separate foreclosure proceedings over secured assets that are associated with the ordinary course of business of the project company when he considers the sale of the project company as a whole to be more valuable. In such event the liquidator will carry out an appraisal over the secured assets. If the appraisal indicates a value higher than the corresponding indebtedness, the liquidator will pay the secured lender the amount of the indebtedness; if it turns out to be lower, he will pay the appraisal value and the secured lender will become a common creditor for such amount.

- 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

Yes. Tax claims and certain labour claims have priority over secured creditors, as well as litigation expenses for the defence of the collateral, and preservation and maintenance expenses.

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

Government entities that are not incorporated as business companies are excluded from bankruptcy proceedings. Likewise, insurance, reinsurance and bond companies will be governed by the proceedings set forth in their applicable laws.

- 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?**

There are certain securities such as the guaranty trust and the pledge without transferring possession, as described in the answer to question 4.1, that would allow extrajudicial proceedings to be agreed on.

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

No, only the insolvency proceedings set forth in the Mexican Business Reorganisation Law. Such law allows a debtor that has been deemed to have “widely breached its obligations”, as defined therein, together with its creditors representing at least the majority of its indebtedness, to present a restructuring plan. An ordinary insolvency proceeding would follow; however, the agreed plan would only be enforceable if it were judicially approved.

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

Directors could be subject to civil and/or criminal liability.

6 Foreign Investment and Ownership Restrictions

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

Once again, it depends on the activities performed by the project company. Activities such as the exploration and extraction of oil and other hydrocarbons and electricity are reserved to the Mexican State. However, as a consequence of the Energy Reform, the Mexican State, through its competent agencies, may execute hydrocarbon exploration and extraction contracts with private entities, with no limit on participation of foreign investment, to perform these activities with the limitations described in question 7.3 below.

Activities such as ground transportation and development banks are reserved exclusively to Mexicans or Mexican companies, excluding foreign participation. Also there is a list of economic activities in which foreign investment may form certain percentages; for example, companies dedicated to domestic air transportation or specialised air transportation can only have foreign participation of up to 25%, and companies dedicated to broadcasting can only have foreign investment participation of up to 49%.

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

No, there are no bilateral investment treaties.

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

The Expropriation Law (*Ley de Expropiación*), the Law of Acquisition, Leases, and Services for the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*) and the General Law of National Assets (*Ley General de Bienes Nacionales*). No forms of investment are protected from expropriation.

7 Government Approvals/Restrictions

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

There are several federal government agencies that are usually involved in most types of projects, such as (i) the Ministry of Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*), which evaluates the environmental risks of the project and grants authorisation for the construction and operation of the project, and (ii) the Federal Antitrust Commission (*Comisión Federal de Competencia Económica*), whose main objective is to eliminate and prevent anticompetitive business practices. Additional authorisations are required from the State and/or local authorities regarding the construction of the project, and also some environmental authorisation may be required by the State environmental agencies.

Regarding particular sectors:

- a. Energy projects are overseen by the Ministry of Energy (*Secretaría de Energía*), which awards assignments and permits related to oil treatment and refining and processing of natural gas, as well as agreements for the exploration and extraction of radioactive minerals. Among other duties, the Energy Regulatory Commission (*Comisión Reguladora de Energía*) determines the tariffs for the provision and sale of electricity, approves the terms and conditions for the rendering of transportation, storage, and distribution services for petroliferous hydrocarbons and petrochemicals by pipelines, and grants permits and authorisation required for regulated energy activities, including electricity. The National Commission of Hydrocarbons (*Comisión Nacional de Hidrocarburos*) is the entity that carries out the bidding process for the oil fields and is entitled to execute exploration and extraction contracts for hydrocarbons with State companies or private parties. The National Centre for the Control of Natural Gas (*Centro Nacional de Control del Gas Natural*) administrates and operates the National Integrated Transportation and Storage System of Natural Gas. Finally, it is worth mentioning that in the hydrocarbons sector, environmental matters are handled not by the Ministry of Environment and Natural Resources, but by the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sector (*Agencia Nacional de Seguridad Industrial y Protección al Medio Ambiente del Sector Hidrocarburos*), which is also in charge of regulating the industrial and operational safety of hydrocarbons projects.
- b. Mining activities, excluding hydrocarbons, are regulated by the Ministry of Economy (*Secretaría de Economía*), which grants concessions for the exploration and exploitation of minerals.
- c. The performance of regulated activities within the transportation and communications sector are overseen by the Ministry of Communication and Transportation (*Secretaría de Comunicaciones y Transportes*), and its agencies grant concessions and permits to provide services in such sectors, except for concessions related to telecommunications and broadcasting which are granted by the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*), an autonomous entity.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

The filing or registration of the financing or project documents

will depend on the regulation of the specific sector. All Mexican securities must comply with the requirements described in the preceding questions.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

As a general rule, ownership of land does not require any authorisation by Constitutional right, however certain regulations provided by the Foreign Investment Law (*Ley de Inversión Extranjera*) shall be complied with if foreign investment constitutes part of the ownership. Additionally, there are certain restrictions applicable to agrarian land under the special *ejido* regime.

Natural resources located above ground level such as forests are deemed owned by the owner of the land over which the same are located, however their exploitation is subject to authorisation by the Ministry of Environment and Natural Resources (*SEMARNAT*). Underground natural resources are owned by the Mexican State. Water and mineral exploitation is available only through a concession. The use of water and its exploitation requires a concession granted by the National Water Commission (*Comisión Nacional del Agua*) and the exploitation of minerals requires a concession granted by the Ministry of Economy (*Secretaría de Economía*). Concessions for the exploration and extraction of oil and other hydrocarbons are not permitted. However, the Mexican State, through a bidding process carried out by the National Hydrocarbon Commission (*Comisión Nacional de Hidrocarburos*), may grant contracts with productive State-owned companies or private entities for the exploration and extraction of hydrocarbons.

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

In addition to the regular taxes imposed by the applicable tax laws, there are special fees and royalties that are required to be paid depending on the type of natural resources.

For minerals, there are semi-annual fees that are calculated based on the surface area of the concession; annual royalties shall be paid based on the income due from the sale of the minerals. There is a special mining tax over the income due from the sales, subtracting applicable deductions, and an extraordinary mining fee over income due from the sale of gold, silver and platinum.

For the exploitation of water resources, there is a special water tax that is calculated by applying certain rates depending on the availability of water in the area.

For hydrocarbons, the Hydrocarbons Revenue Law sets a special regime for hydrocarbon exploration and extraction contracts, which varies slightly depending on the type of contract executed with the National Hydrocarbons Commission.

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

There are no legal restrictions to foreign currency exchange in Mexico. However, large foreign exchange transactions are monitored by the Mexican Central Bank.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions; usually withholding tax applies, and from time to time gross-up provisions may apply too.

Please be advised that the amount of the withholding tax is in accordance with the nationality of the party and it depends if the country in which the party was incorporated has entered into a Double Taxation Treaty with Mexico.

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

Yes, there are no restrictions on opening and maintaining onshore or offshore accounts.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

There are no restrictions on the payment of dividends whether the parent company is incorporated in Mexico or abroad; however, the General Law of Commercial Companies (*Ley General de Sociedades Mercantiles*) sets forth that 5% of the profits of each fiscal year must be separated to constitute the legal reserve account (*reserva legal*), until the amount of such account represents 20% of the equity (*capital social*) of the company.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The General Law on Environmental Balance and Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*) will impact upon a project financing. The Ministry of the Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*) is the federal governmental authority administering such law. Additionally, all States have local environmental laws that are applied by local environmental authorities.

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

The specific legal framework will depend on the nature of the project. The acquisition of goods and services by the Mexican Federal government is regulated by the Law of Public Acquisitions, Leases and Services (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*). Construction procurement for public works is governed by the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*).

For energy projects, the legal framework includes the Pemex Law (*Ley de Petróleos Mexicanos*), the Hydrocarbons Law (*Ley de Hidrocarburos*), the Law of the Federal Electricity Commission (*Ley de la Comisión Federal de Electricidad*) and the Law of the Electricity Industry (*Ley de la Industria Eléctrica*).

For telecommunication projects, the legal framework includes the Law of Telecommunications and Broadcasting (*Ley de Telecomunicaciones y Radiodifusión*).

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

In general, insurance provided against risks that may occur within Mexican territory may not be provided by a foreign insurance company (unless such company is duly registered before the National Commission on Insurance and Bonds). However, if it is confirmed that no domestic insurance company covers a specific risk, authorisation may be granted to insure against such specific risk with foreign insurance companies.

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

Yes, they are allowed.

9 Foreign Employee Restrictions

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

Pursuant to the Federal Labour Law (*Ley Federal del Trabajo*) at least 90% of a company's employees must be Mexican workers; however, executives such as directors and general managers are excluded from such provision. In addition, all technicians and professionals should be Mexican, except if there are no technicians or professionals available for a certain field, in which case the project company may temporarily employ foreign workers.

All foreign employees would be subject to the requirements set by the Mexican immigration regulations.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

There is a special regime in connection with imports. Importers should be registered before the Import Registry (*Padrón de Importadores*) of the Mexican Tax Revenue Service (*Servicios de Administración Tributaria*), which specifies the type of machinery and/or equipment to be imported (certain types of machinery may sometimes receive special treatment in terms of customs, such as duties to be paid). In addition, the origin of the imported machinery has to be taken into account, since Mexico is a party to several Free Trade Agreements and thus may have preferential duties.

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

There are three major taxes applicable to imports into Mexico:

- Value Added Tax: as a general rule a 16% rate applies.

- General Import Tax: its rate depends on the type of imported good.
- Customs Processing Fee: its rate depends on the type of imported good.

Notwithstanding the above, the competent tax authorities may apply certain anti-dumping provisions depending on the type of good.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Yes. *Force majeure* provisions are enforceable and may be negotiated by the parties. *Force majeure* provisions are very common in project financing agreements.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Article 109 of the Political Constitution of the United Mexican States sets forth, *inter alia*: that criminal acts undertaken by any public servant shall be prosecuted and punished pursuant to criminal law; that administrative penalties shall be applied to public servants in respect of acts or omissions affecting the legality, honesty, loyalty, impartiality and efficiency in the performance of the functions entrusted to them; and that the laws shall determine the cases and circumstances under which public servants shall be criminally prosecuted for unlawful enrichment during their tenure, when directly or indirectly they increase their assets in a substantial manner, and such situation cannot be justified.

A wide range of laws and regulations regulate the foregoing constitutional mandates. The main laws that regulate the activities and conduct of public servants are the Federal Law of Administrative Liabilities of Public Servants (*Ley Federal de Responsabilidades Administrativas de los Servidores Públicos*), the Federal Anti-Corruption in Public Contracts Law (*Ley Federal Anticorrupción en Contrataciones Públicas*) and the Federal Criminal Code (*Código Penal Federal*).

The above Laws and Codes contain provisions that apply to both public servants and private persons.

13 Applicable Law

13.1 What law typically governs project agreements?

Typically Mexican law governs project agreements, since the project will be developed in Mexico and in most cases will be derived from a concession or contract with Mexican governmental entities.

13.2 What law typically governs financing agreements?

It may vary from the type of project. However, typically it will depend on the lenders. If international lenders are involved, usually New York law governs financing agreements; however, some retail banks and Mexican development banks are starting to apply Mexican jurisdiction within financing agreements.

13.3 What matters are typically governed by domestic law?

Securities and the collateral agreements created over properties and assets located in Mexican territory are governed by Mexican laws. Agreements involving real estate are regulated by domestic law. Also, as previously stated, if the project involves a regulated activity, the operation of the same will be governed by Mexican law.

14 Jurisdiction and Waiver of Immunity**14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?**

Yes, there are provisions that establish waiver of immunity. As for submission to foreign jurisdiction, in order for it to be legally binding and enforceable according to Mexican law, all parties must explicitly submit to a certain jurisdiction, waiving the right to any other jurisdiction that may be applicable for any other reason.

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

Yes, submission to international arbitration is possible and arbitral awards are recognised by local courts. In accordance with applicable civil and commercial laws in Mexico, there are certain exceptions whereby the award may not be enforced by local courts, such as: (i) if due process was not properly served to all the parties; (ii) if the resolution contravenes Mexican public order; or (iii) if there is a lack of reciprocity between Mexico and the arbitration jurisdiction.

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

Mexico is a contracting State to the New York Convention of 1958. It is also a contracting State to the Inter-American Convention on International Commercial Arbitration.

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

Yes, labour disputes, antitrust disputes, tax issues, criminal matters and certain civil matters such as family disputes, are not allowed to be resolved through an arbitration process but only by a competent Mexican court, be it a local or federal court (as applicable).

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

No, arbitration provisions are never mandatory under Mexican law; they must be agreed to by the parties.

16 Change of Law / Political Risk**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

There are certain provisions that are usually contained in agreements in which the offtaker is a governmental entity (i.e. *Pemex* or *CFE*) that establishes an indemnification or a potential event of default in case of a change in the political situation.

Political risk guarantees are mostly applicable in Export Credit Agreements.

17 Tax**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Please refer to question 17.2; please be advised that the amount may vary between 4.9% to 35%.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are different withholding taxes that apply to the payment of dividends, interest, and other financial returns. The applicable withholding tax rate may vary depending on the jurisdiction of the lender and other particular issues, however the following are the general standard rates:

- 4.9% for interest paid to foreign lenders derived from publicly traded credit instruments, provided that Mexico has a double taxation treaty with the corresponding jurisdiction.
- 10% for interest paid to foreign financial entities and banks, provided that they file certain information with the Mexican tax authorities. This tax rate also applies to foreign lenders in a jurisdiction that does not have a double taxation treaty with Mexico for interest derived from credit instruments carried out through financial brokerage firms or banks.
- 15% for interest paid to reinsurers.
- 21% for interest paid to foreign credit institutions other than those specified above.
- 35% for interest paid to other entities.

It is worth mentioning that the entity that is responsible for withholding and paying the corresponding tax is the borrower.

18 Other Matters**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

The following items should be taken into account:

- The type of project company to be incorporated. The most relevant of these are:

- (i) Stock corporation (*sociedad anónima*). This is the most commonly used corporation in Mexico; its statutory governance rules are not flexible.
 - (ii) Investment promotion stock corporation (*sociedad anónima promotora de inversión*). This is a form of corporate entity that offers substantial flexibility with tailor-made provisions agreed by their investors.
 - (iii) Limited-liability company (*sociedad de responsabilidad limitada*). This is a form of company that does not have flexibility for investors, however it has some tax advantages.
- Offtakers: the most common off-taker in Mexico is the governmental entity for high-tenor contracts.
 - Development banks: the most important development banks in Mexico (*Banobras*, *Nacional Financiera* and *Banco Nacional de Comercio Exterior*) are always eager to finance projects through project financing schemes.
 - Rights of way: for the development of a project it is necessary to know how the rights of way will be acquired within Mexican territory, and there is a special rights of way regime applicable to the hydrocarbons industry that includes a regulated acquisition procedure and notifications and filings made before both the executive branch and judicial authorities.

Based on our experience, the Mexican jurisdiction is more flexible compared with the New York jurisdiction.

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

There are no legal impositions, however sometimes the consent of the lender or the collateral agent may be required. By way of a quick overview of the regulatory requirements for the issuance of capital markets:

1. The project company may issue its bonds directly or through a trust.
2. The most common bonds issued directly by the project company are the Cebures, which can be offered in the international (through global distribution network (GDN) schemes) or domestic market.
3. The most common bonds issued through a trust are *Certificados Bursátiles Fiduciarios de Desarrollo* or CKD and *Certificados Bursátiles Fiduciarios Inmobiliarios (Fibras)*.

4. The National Securities Registry is the entity maintained by the National Bank and Securities Commission. The Commission issues all the internal regulations that apply to securities matters; in addition to the main regulatory law, being the General Securities Law.

19 Islamic Finance

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

It would be used in order to diversify the investor base, using assets located in Mexico as collateral. In Mexico there are no projects financed under such project financing arrangements.

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

It could be applicable, however there is no precedent in Mexico in which Islamic law has been applied in a project finance; nor is there a precedent for *sukuks* being used.

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

No, it could not.

Acknowledgment

The authors would like to thank Alonso Gómez del Campo for his assistance in preparing this chapter. Alonso Gómez del Campo is a Senior Associate at Rodríguez Dávalos Abogados specialising in project finance (Tel: +52 55 5202 0405, +52 55 5202 3772 / Email: agomezdelcampo@rdabogados.com.mx).

**Marco A. Sotomayor Melo**

Rodríguez Dávalos Abogados
(Consultores en Energía RDA, S.C.)
Monte Himalaya 450
Lomas de Chapultepec
México D.F. 11000
Mexico

Tel: +52 55 5202 0405
+52 55 5202 3772

Email: msotomayor@rdabogados.com.mx
URL: www.rdabogados.com.mx

As a Partner at RDA, Marco Sotomayor is head of the Project Financing Group and the Monterrey office. His practice focuses on project finance, financial and corporate mechanisms, foreign investment and strategic restructuring. His experience encompasses M&A, joint ventures, and secured transactions.

Representing the owners, "Los Ramones", Marco led the financing of a strategic 1,000km natural gas pipeline from the US border to central Mexico, financing all its phases – a more than 2 billion US dollar transaction. He participated in the bidding process for multiple services contracts in the Burgos Basin, leading the financing of 4 MSC blocks. He is the leading counsel for the financing of a 600MW merchant power plant in NW Mexico under the new regulation and the financing of 2 cogeneration and combined-cycle projects of 800MW. Mr. Sotomayor has participated in real estate acquisitions and the financial strategy for the securitisation of several world-class commercial buildings in Monterrey, NL and Mexico City. The real estate transactions exceed 1.2 billion dollars in assets. Mr. Sotomayor has participated in the structuring of secured transactions for the State of Nuevo León, Mexico.

**Helena Gutiérrez Moreno**

Rodríguez Dávalos Abogados
(Consultores en Energía RDA, S.C.)
Monte Himalaya 450
Lomas de Chapultepec
México D.F. 11000
Mexico

Tel: +52 55 5202 0405
+52 55 5202 3772

Email: hgutierrez@rdabogados.com.mx
URL: www.rdabogados.com.mx

As an Associate at Rodríguez Dávalos Abogados, Helena Gutiérrez Moreno focuses her practice on Corporate Law matters including Restructures, Mergers and Acquisitions, Joint Venture Transactions, Foreign Investment and Corporate Governance. She provides advisory services to investors and developers for the acquisition, development, operation and commercialisation of real estate, shopping centres and industrial parks. She has solid experience in corporate and real estate due diligences.

During her previous experience, she worked for BRFC / Sotomayor Abogados, Thompson & Knight S. de RL de C.V., and Santamarina y Steta S.C. She passed the examination of the New York State Bar.

Ms. Gutiérrez obtained her law degree from the Universidad de Monterrey and completed a Masters in Corporate Law at New York University School of Law. Furthermore, she obtained the Advanced Professional Certificate in Law and Business issued by New York University's Pollack Center for Law and Business.



Rodríguez Dávalos Abogados (RDA) is one of the fastest-growing law firms in Mexico. It is highly specialised in all aspects of energy and infrastructure. The unique position of the firm in the industry is backed up by 20 years of experience. RDA has executed a very high percentage of the strategic energy projects in Mexico on behalf of developers. It was leading counsel in "Los Ramones", particularly noteworthy for its strategic importance. RDA has structured and executed many first-of-a-kind projects, for example: the first cross-border privately owned liquefied petroleum gas (LPG) pipeline; the first natural gas operational "swap" between US and Mexico; the first three privately owned LPG pipelines; the negotiation and execution of the first interconnection agreement for the Pemex LP Gas pipeline; the execution of North American Energy Standards Board (NAESB) agreements for power generation companies, independent power producers (IPPs) and natural gas local distribution companies (LDCs) in Mexico; the only wet gas exportation pipeline to US; the first private petrochemical transportation pipeline; among many others.

The firm has accumulated much experience, affording it national and international regulatory and commercial expertise in the energy industry. RDA has skilled attorneys and consultants with experience practising not only in the Oil, Gas, and Power Industries, but also in Corporate Law, Mergers and Acquisitions, Banking, Finance, Foreign Investment, Procurement, Government Contracts and Public Works, Commercial Matters, Industrial Property and Rights of Way (ROW).

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk