

Project Finance

in 45 jurisdictions worldwide

2015

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Getting the Deal Through is delighted to publish the the fully revised and updated eighth edition of *Project Finance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 45 jurisdictions featured. New jurisdictions this year include include Canada, China, the Dominican Republic, Greece and India. This year the publication again includes quick reference tables, focusing on public-private partnerships in US states.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Phillip Fletcher of Milbank, Tweed, Hadley & McCloy LLP for his continued assistance with this volume.

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Luxembourg

Denis Van den Bulke and Laurence Jacques

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Creating collateral security packages

1 What types of collateral are available?

Security interests available under Luxembourg law can be divided into two main categories:

- securities over immoveable assets, which include:
 - mortgage over land, building and vessels: the creation of this type of security is made by public deed, passed before a Luxembourg notary (ie, an independent public officer appointed by the Grand-Duchy). The mortgage does not give possession of the property but creates a right in rem and in the case of default of the mortgagor, it entitles its beneficiary to be paid out of the proceeds of the sale of the property; and
- securities over moveable assets, which include:
 - securities over financial instruments (pledge over shares, receivables, claims, bank accounts, debt instruments, assignment of title by way of security), which are governed by the Law of 5 August 2005 on Financial Collateral (the Financial Collateral Law) implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements;
 - pledge over goods or tangible assets that are not financial instruments;
 - pledge over business assets, which is a general security over a Luxembourg company's intangible assets (eg, clientele, business model, trademarks, patents, lease rights, etc and up to 50 per cent of the inventory of the company);
 - preservation of title on tangible assets; and
 - retention right under a sale contract or warehouse contract.

Luxembourg law also provides for specific guarantees such as personal, independent or joint guarantees or even partial assignment of salary in favour of a creditor. In addition, personal security interests such as the first demand guarantee and the suretyship are also frequently used in banking transactions.

Luxembourg law does not offer the possibility to create fixed and floating charges, which crystallise at the discretion of the chargor. It is, however, frequent in international transactions that a Luxembourg company grants a fixed or floating charge governed by foreign law (for further information about enforceability, see question 4).

It is possible to grant a security on all future moveable assets of the debtor (not on future immoveable assets), but a 'blanket-lien' does not exist under Luxembourg law.

More generally, there is a strict principle under Luxembourg law that no new type of security can be contractually created unless it has been specifically set out by law.

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

Perfection requirements and priority depend on the type of asset subject to the security. Priority generally follows the principle *prior tempore, potior jure* (ie, who is prior in time, is preferred in right) entailing that a security interest will have priority over another one if perfected on a prior date.

Security interests over immoveable assets or mortgages must be granted by notarial deed and registered with the Land Registration and Estates Department and the mortgage registry office of the judicial district where the real estate is located.

Security interests over intangible business assets must be incorporated in a notarial deed passed before a Luxembourg notary or made by private contract and must also be registered with the local mortgage registration office. This type of security interest is infrequent because of its relatively high cost, low ranking and limited number of beneficiaries. Other constraints inhibit the use of this security: the beneficiary must be a credit institution and the credit institution must be approved as a pledgee by the Luxembourg government sitting in council, thereby increasing the duration of the process.

For other types of assets, perfection will generally occur by means of a notification to a third party (eg, pledge over claims), registration in private records (eg, pledge over shares) or delivery of certain assets (eg, pledge over goods).

The transfer of titles for security purpose is effective between the parties and becomes enforceable against third parties as from the entry into agreement by the parties. The perfection of the pledge over shares is achieved by either the physical delivery of bearer shares to the pledgee or to an agreeable third-party trustee, or in the case of registered shares, by a legend mentioning the existence of the pledge in the register of the issuer.

Mortgages must be notarised. Registration and renewal of registration of mortgages are subject to a duty right of 0.05 per cent. The transcription right is usually 1 per cent.

The Financial Collateral Law provides that pledges over financial instruments and over bank accounts can be held on behalf of the lenders by a security agent. Others securities must be granted to the creditor of the secured claim directly.

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

With respect to securities that require public registration for perfection, an adequate search in the concerned register will inform about existing securities over the assets (eg, a public research regarding mortgages can be made at the public mortgage registry office).

The financial statements, registered with the trade and companies registry, of a Luxembourg company may provide general information as to security interests that have been granted over its assets. Charges over registered shares will be recorded in the shareholder registers, which are not available to the public. Information regarding bankruptcy judgments may be found on the Luxembourg Bar website and on the Luxembourg Trade and Companies Registry.

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

Luxembourg is recognised by the IFC/World Bank as the best place in the world to enforce contracts. (The enforcing contracts topic assesses the efficiency of the judicial system by following the evolution of a commercial sale dispute over the quality of goods and tracking the time, cost and number of procedures involved from the moment the plaintiff files the lawsuit until payment is received. The most recent round of data collection was completed in June 2012.) The judicial system is quite efficient with low cost and limited procedural complexity involved in resolving a lawsuit. Further, the Financial Collateral Law has considerably eased the enforcement process of collateral over securities and financial instruments and brought additional protection for their beneficiaries.

An enforcement of a land charge and mortgage is usually perfected through a public auction of the charged property. Before enforcing the mortgage, the creditor must summon the debtor to pay and evidence the failure of the debtor to discharge the mortgage debt. This process is made first by a summons to pay, then by way of attachment before the courts, which, after hearings, assess the merits of the case and authorise (or not) the mortgagee to proceed to the sale of the property by public auction. The notarial deed granting a first rank mortgage right can, however, stipulate that the enforcement of the security can be made without recourse to courts, 30 days after the date of the summons. The auction is conducted under the control of a public notary and the adjudication price corresponds to the highest bid. The proceeds from the public auction are paid to the mortgagee after payment of the auction and notarial fees and other preferred creditors by law.

Pledges over financial instruments and bank account pledges can be enforced without prior court approval. Pledged financial instruments can be appropriated by the pledgee if it is expressly set out in the pledge agreement and if this agreement sets out the valuation method. Other methods of enforcement include the assignment of the pledged assets by private sale in a commercially reasonable manner, sale over a stock exchange or public auction. The beneficiary of the security may also obtain a judgment allowing him or her to retain the pledged assets as payment up to the amount of his or her claim, in accordance with an expert valuation or proceed with netting (compensation) in accordance with the relevant provisions of the Financial Collateral Law. Finally, listed financial instruments can be sold on the stock exchange or regulated market where they are listed, or appropriated at their market value.

The beneficiary of a pledge over receivables can collect the receivables if the pledge has been notified to the debtors.

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

As a matter of principle, rights granted by a Luxembourg company during the 'hardening period' (ie, the period starting as from the day on which a Luxembourg company has become insolvent (this date is usually set by the Luxembourg courts up to six months prior to the insolvency judgment)) or in the 10 days preceding this 'hardening period' may be declared invalid if they constitute the preferential satisfaction of one creditor's right over another.

The following transactions can be declared null and void pursuant to proceedings instituted at the initiative of the bankruptcy receiver if they were undertaken during this period:

- a disposal of assets without consideration or for a value that is not at arm's length;
- any payment (whether in cash, assignment, sale or set-off) for a debt not due for payment;
- payment of debts due for payment by any means other than in cash or bill of exchange; and
- mortgages or pledges granted to secure pre-existing debt (except for pledges granted over financial instruments that are not affected by the insolvency of the debtor and may be enforced notwithstanding the filing of the petition for bankruptcy or other collective proceeding, whether occurring in Luxembourg or abroad).

In addition, any payment for accrued debt or any transactions against money made after the company has become insolvent and prior to the bankruptcy judgment may be cancelled if the beneficiary of the payment or the contracting party had knowledge of the insolvency of such company.

Mortgages and other rights of priority validly acquired during the hardening period and the 10 days preceding such period can be declared void if they were not registered within 15 days of their execution with the relevant Luxembourg authorities.

Eventually, any instruments or payments made fraudulently and without regard to the creditors' rights are void without prejudice to the date they were made.

As mentioned above, securities granted pursuant to the Financial Collateral Law remain unaffected by an insolvency situation; as a consequence the 'hardening period' principle does not apply to security interests granted pursuant to that law.

By law, specific creditors may have rights superseding the rights to payment of secured creditors. These rights include:

- those relating to the fees and costs of the bankruptcy receiver appointed by court, as well as any legal costs;
- the rights of employees to payment of their compensation;
- the Luxembourg tax authorities claims; and
- those of the Luxembourg social security institutions.

Claims of foreign creditors are treated equally to those of local creditors but benefit generally from extended delay to raise their claims before the bankruptcy receiver.

Foreign exchange issues

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

There are no restrictions, controls, fees, specific taxes or other charges, except that banks may impose fees on currency exchanges or transactions and that currency exchange transactions remain subject to rules for the prevention of money laundering.

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

There is no restriction nor control on distribution of a Luxembourg company to its parent company. According to the type and nature of the remittance, some withholding tax may, however, apply.

Dividends paid to a non-resident company are subject to a 15 per cent withholding tax unless the rate is reduced or an exemption is provided under an existing tax treaty. No tax is withheld on dividends paid to a qualifying company under the EU Parent-Subsidiary Directive.

No withholding applies on interest or royalties payments. However, Luxembourg tax practices in respect of thin capitalisation rules may limit the deductibility of interest and impose a withholding tax on any interest payments breaching such capitalisation rules. The general rule requires that the ratio of equity/parent debt must not exceed 15/85, at market interest rate. The portion of excessive interest shall be disqualified as dividend, not deductible, and subject to the regular 15 per cent withholding tax rate on dividends. Equity includes share capital but also subordinated debt allowing, in practice, reduction of the impact of the thin capital ratio. Various financial techniques using the hybridisation of debt/equity or conversion features (preferred equity certificates, convertible or not) also allow for attenuation of the exposure to withholding tax.

Luxembourg does not levy branch remittance tax.

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

There is no legal compulsory obligation on Luxembourg companies to repatriate foreign earnings nor is there any restriction over their use.

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

Luxembourg companies can establish and maintain foreign currency accounts in Luxembourg and in other jurisdictions. It is possible and common practice to establish a Luxembourg account in a foreign currency or a multi-currencies account.

Foreign investment issues

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

Luxembourg is a wide open economy and the host of a large number of foreign investors. There is no discrimination between foreign and local investors: foreign companies are treated in the same way as Luxembourg-owned businesses. Luxembourg is also a member of the Benelux Union and the Belgo-Luxembourg Economic Union

(BLEU), which has signed bilateral investment agreements with almost 100 countries in order to promote and protect investments. These agreements guarantee to foreign investors fair and equitable treatment, refrain parties from any expropriatory or restrictive measure in respect of property, ensure freedom of transfers, and grant to them the protection of the clause of the most favoured nation. These agreements also include a comprehensive set of measures and protection in terms of capital in- and out-flows and dispute resolution, in particular allowing the recourse to the International Centre for the Settlement of Investment Disputes (CIRDI) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965.

EU merger control applies in the acquisition, overtake or merger of business and may put limitations on joint ventures having an EU dimension. In addition, the Alternative Investment Fund Managers Directive 2011/61/EU implemented in Luxembourg on 10 July 2013 may impose other constraints on joint ventures qualifying for the AIFMD purposes.

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

Insurance policies over Luxembourg assets can be freely provided by foreign insurance companies subject to the Luxembourg national prudential rules of the sector and the EU laws. An insurance company approved in another EU country may conduct business in Luxembourg under the freedom to provide services, and cover risks or make commitments for which it has obtained approval in its home country, provided, however, that the competent authority of its home country has supplied the legally required documents and information to the Luxembourg Insurance Supervision Authority.

Agencies and branches of undertakings having their registered office in a third country may obtain authorisation to provide insurance services from the Insurance Supervision Authority. Such an authorisation is not requested where the policyholder subscribes the contract on his or her own initiative (ie, if he or she solicited its conclusion without having been contacted beforehand by either the insurance company or any other party mandated by it). A third-country insurance company that is a signatory to the General Agreement on Trade in Services (GATS) will be exempted from obtaining the authorisation for those operations performed in the Grand-Duchy of Luxembourg for certain categories of risks (sea trade, aviation, space vehicles, and insurance of goods during international transit).

The Grand Ducal Regulation of 29 June 1995 provides that insurance companies having their registered office in an EEA country, but which is not a member of the EU, are subject to the same obligations and benefit from the same rights as insurance companies having their registered office in an EU member state, other than Luxembourg.

Taxes and fees are those that apply from time to time in Luxembourg. This results from the CEA Codification of European Insurance Directives, which states that, irrespective of the law governing the contract, insurance contracts are subject to indirect taxes and para-fiscal charges on insurance premiums in the state in which the risk is situated (see articles 9NL and 50L).

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

All nationals of EU member states or from countries treated similarly are entitled to free circulation within the EU, and accordingly in Luxembourg, with the right to work and live anywhere in the EU. The formalities to be complied with will depend on whether or not

the stay exceeds three months. For a stay of less than three months, EU nationals do not have to comply with any formalities. They simply have to hold a valid national identity card or passport. For a stay of more than three months, EU nationals must hold a valid national identity card or passport and:

- make a declaration of arrival within eight days of arrival in Luxembourg, at the offices of the authorities of the commune where they intend to take up residence; and
- fill in a registration certificate for EU nationals at the latest three months after their arrival.

Any non-EU national who wishes to set up residence in Luxembourg in order to carry out a salaried activity must:

- before entering into the country, submit an application for a temporary residence certificate to the Immigration Directorate of the Ministry of Foreign Affairs, be in possession of a valid passport and request a visa type D after having obtained the temporary residence certificate; and
- after entering into the country, make a declaration of arrival in their new commune of residence, undergo a medical check and submit an application for a residence permit for third-country national salaried workers.

13 What restrictions exist on the importation of project equipment?

Any business importing goods into Luxembourg must declare its imports to the customs authorities, as well as the value of the goods, where applicable. Within the European Union, no import duty is due. However, special rules exist for VAT and excise duties. When ordering goods from a supplier established outside the European Union (EU), import duties, VAT and excise duties may apply.

The legal basis for the collection of customs duties results largely from the European customs legislation. Since 1921, Belgium and Luxembourg manage certain excise duties in their bilateral Belgo-Luxembourg Economic Union. Luxembourg is also a member of the World Trade Organization, which ensures individual countries' commitments to lower customs tariffs and other trade barriers.

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

No regulation exists in respect of nationalisation of project companies and assets. Nationalisation of industrial or economic interests, when it took place (eg, with Dexia-Bil), was made in a punctual and opportune manner with a view to safeguarding the economic activity and avoiding any dramatic consequences for the local employment. The Luxembourg state has no vocation to operate corporations of the industrial or commercial sector and has no intent to do so.

Expropriation of land may be implemented on a case-by-case basis but only pursuant to a consultative process with the concerned population and for the public good. Should considerations of public or national interest or security necessitate an expropriation, this measure is taken exceptionally. In any event, the measures are taken in accordance with legal procedures, must be neither discriminatory nor contrary to a specific commitment and be accompanied by provisions for the payment of an adequate compensation at fair market value.

Fiscal treatment of foreign investment

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

Luxembourg does not provide particular tax incentives or a preferential regime to foreign investors or creditors but rather offers a global tax system with the following tax features:

- a wide range of investment vehicles providing tax neutrality depending on the needs and constraints of investors such as Soparfis, securitisation companies, special investment funds (SIFs) and lastly special limited partnership, which was introduced by the Law of 12 July 2013 implementing the AIF Directive;
- an effective and pragmatic participation exemption regime (admission of preferential subscription rights and call options);
- the absence of withholding tax on interest payments (unless the EU Savings Directive applies) and royalties, and also on liquidation proceeds;
- an attractive IP tax regime (80 per cent exemption on qualifying income and gains);
- generous thin capitalisation rules;
- no controlled foreign company (CFC) rules;
- an extensive international double tax treaty network; and
- a timely tax clearance system to confirm tax treatment of transactions.

There are no registration, stamp or other taxes or duties of any kind payable in Luxembourg in connection with the signature and performance of loan, mortgages or other security documents. However, if such documents were to be exhibited before a Luxembourg court or a Luxembourg public authority, registration thereof may be ordered, in which case, subject to certain exceptions, an ad valorem registration duty on the amount of the underlying obligations would be payable and a translation of the document in French or German may need to be produced.

Government authorities

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

Various industries have been privatised or liberalised under the influence of the European Union's liberalisation and free market policy, which has allowed the private sector to become involved in public utilities.

The Ministry of Sustainable Development and Infrastructure or its specialised departments governs most of the typical project sectors. In terms of transport, the Ministry of Sustainable Development and Infrastructure ensures that resources are correctly utilised and controlled, and provides regulation in relation to the various kinds of transport.

The Administration of Water Management governs the treatment and use of water. Various Grand-Ducal and EU regulations apply.

The Administration of the Forest and Nature is the government body responsible for the protection of nature, natural resources, biodiversity and landscapes. It is part of the Department of Environment of the Ministry of Sustainable Development and Infrastructure.

The Luxembourg Regulatory Institute is responsible for the regulation of the following economic sectors:

- communications networks and electronic services (telecommunications);
- transmission and distribution of electrical energy;
- transport and distribution of natural gas;

- transport; and
- postal services.

Regulation of natural resources

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

In Luxembourg, the conservation of nature and natural resources is governed by national legislation and international law. The Luxembourg Law of 19 January 2004 distinguishes between protected areas of European interest including special areas of conservation and special protection areas, and protected areas of national interest including natural reserves and protected landscapes and protected areas of communal importance.

The ownership of the surface and the soil may be held by a private person or by the state, but the legal title on natural resources is always held by the state. Entities that discover the existence of natural resources may acquire a concession permit granted by the state. The owner may oppose the use of his or her land or the contemplated mode of operation, but the occupation can only be refused for major public interest considerations. If the occupation of the land lasts for more than three years, the owner is entitled to require the acquisition of the land by the operator.

Geothermal drilling permits define the development and operating conditions that are deemed necessary to protect the environment and ensure the safety of workers, the public and the environment in general. Geothermal drilling permit applications should be submitted to the Environment Agency.

Open-pit mining can take place without permission, but always under the supervision of the administration and in compliance with laws and regulations. Underground mining requires a permit, even for the owner of the land (Law of 12 June 1874, as amended by the Law of 26 July 1975).

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

A special tax applies to mining.

Fees calculated on the basis of the volume of production and charges calculated on the size of the surface are paid by the permit holder to the owner of the land. On a yearly basis, compensation for loss of use and other harmful effects must be paid to the owner and other beneficiaries of the surface.

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

There is no restriction on the export of natural resources. There are no custom duties on the export of goods inside or outside the EU. Exports are exempt from VAT.

However, if a company wants to export outside the EU, it must declare its exports electronically via the Customs and Excise Agency's Douane import-export system.

Luxembourg is member of the World Customs Organization (WCO), which has adopted a harmonised commodity coding system. The harmonised system assigns a six-figure code, known as the HS code, to each category of good. This code helps to identify the applicable fiscal and non-fiscal measures for each export.

Grand-Ducal regulations determine the goods whose export is subject to special rights. Special measures based on EU rules apply for assets whose use may be military.

Legal issues of general application

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

Under Luxembourg law, no government approvals are required for project finance transactions. However, a business permit may be required if the activity in Luxembourg goes beyond merely financing the project and entails carrying out commercial activities on Luxembourg territory. In that case, an authorisation must be sought from the Ministry of Small and Medium-Sized Businesses (Ministry of the Middle Classes, Tourism and Housing, Department of Middle Classes).

This permit is issued upon request and on proof of knowledge of business management, professional qualification and professional integrity. The authorisation is personal and granted in consideration of the manager's qualifications. Any change of manager requires a new business permit to be obtained.

Other approvals or authorisations may be required depending on the sector, the activity, the situation and the size of the project. For instance, a building permit is required for all construction, transformation or demolition works of buildings. The delivery procedure of building permits may vary as it is determined by the building regulations, which are specific to each commune. The building regulations, together with the general development plan (PAG) and, where applicable, the special development plan (PAP), are aimed at achieving a sustainable development of the territory.

Investors should carefully review which authorisations must be obtained according to the targeted investment of their project.

Refer to question 22 for further details on the exploitation of natural resources.

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

There are no substantial formalities regarding finance or project agreements in Luxembourg. English is commonly used as the language for drafting contracts. The principle is the freedom of contract subject to restrictions imposed by public policy or mandatory laws. No standard form is required for construction contracts. Some requirements such as written forms or other formalisms may be required to allow evidence of proof, enforcement process or binding effect on the parties. Contracts regarding collateralisation of securities must satisfy certain requirements to be fully enforceable in Luxembourg (in this respect, see question 2).

Incorporation of a Luxembourg company or modification of its articles of incorporation requires a public deed passed before a Luxembourg notary. The same principle applies to transfer of real estate, which is subject to a notarial deed. Duty taxes are levied on such transfer according to rate schedules fixed by governmental regulation.

No stamp duty applies on transfer of shares. However, any transfer of shares for a private limited liability company must be disclosed to the Trade and Companies Registry.

Some contracts or other operations that need notarisation in Luxembourg (such as transfer of real estate, mortgage or pledge over business assets, incorporation of corporation, amendment to articles of incorporation) must be passed in one of the three official languages of Luxembourg (French, German or Luxembourgish). However, a copy in English can be provided. In some instances, the English version may prevail.

Contracts with public entities are subject to public bid restrictions, imposed by EU law and national laws. These rules impose a public tender process, governed by the public procurement rules (Law of 25 June 2009 on public procurement and its executive grand-ducal regulations).

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

Luxembourg is a member of the ICSID Convention. Under the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, Luxembourg is committed to recognise arbitration agreements and cannot refuse enforcement of arbitral awards made as a result of arbitration agreements for the reasons listed exhaustively in article V of the Convention.

In certain circumstances exhaustively listed in article 1251 of the Luxembourg Code of Civil Procedure (NCCP), and subject to the provisions of article V of the New York Convention, the President of the District Court may refuse the enforcement of the foreign award on the territory of the Grand-Duchy of Luxembourg. The enforcement order or its refusal by the President of the District Court may be appealed against before the court of appeal.

Luxembourg has also implemented the European Convention on International Commercial Arbitration of 21 April 1961.

For arbitral awards made in a country with which Luxembourg does not have an agreement, arbitral awards are recognised in Luxembourg through a procedure of exequatur before the President of the District Court. The judge may refuse the exequatur if:

- the sentence can still be disputed before arbitrators and if the arbitrators have not ordered provisional execution notwithstanding appeal;
- if the award or its enforcement is contrary to public order; or
- the dispute is not capable of settlement by arbitration if it is established that there are other grounds for revocation under article 1244 NCCP.

The Chamber of Commerce of the Grand-Duchy of Luxembourg has its own Arbitration Centre with its own arbitration rules. Under Luxembourg Law, arbitration is not possible on cases concerning the status and capacity of persons, marital relations, divorce and legal separation or incompetent representation. It is also noteworthy that Luxembourg jurisdictions cannot pronounce the annulment of the foreign award.

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

Most of the projects in Luxembourg are made by inbound foreign professional and institutional financing and banking investors. Agreements tend therefore to be governed by the law that is most familiar to the financing party, which is generally their domestic law (eg, their law of incorporation, UK, US or French law). However, to the extent they relate to Luxembourg securities, most of the contractual agreements relating to the 'security packages' are governed by Luxembourg law.

Luxembourg law is very liberal and expressly recognises the principle of freedom of contract, including the choice of law and election of forum. Freedom of contract is, however, limited by mandatory rules and rules of public policy.

The principle *jura novit curia* does not apply to foreign law. The judge does not raise automatically the conflict of laws rule, which is not mandatory in contractual matters, but will apply the rule when parties have not opted for a governing law. The parties invoking the foreign law must prove the content of the foreign law, which, for the Luxembourg courts, is a matter of fact.

Choice of law

The Luxembourg court will uphold the choice of law made by the parties. However, Luxembourg courts may exclude application of a provision of the law chosen by the parties if and to the extent that

the result of such application would be manifestly incompatible with fundamental notions of public policy of the Luxembourg forum or they are required to take into account overriding mandatory provisions of a law.

Effect should nevertheless be given to those mandatory rules of national, supranational and international law that, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.

Rules of choice of law for countries of the EU are determined by Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Where there has been no choice of law, the applicable law will be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party, required to effect the characteristic performance of the contract, has his or her habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract will be determined having regard to its centre of gravity.

In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account will be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

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

The submission of agreements and any potential disputes to the jurisdiction of foreign courts is generally effective and enforceable.

Enforceability of judgment

When the judgment has been rendered in a non-EU member state and if no international treaty applies, such a judgment will be recognised and enforced in Luxembourg after a review by the Luxembourg First Instance Court that the conditions set out in article 678 of the Luxembourg Code of Civil Procedure (NCCP) are fulfilled (ie, the usual conditions relating to public policy constraints, the observance by the court of the rights of defence, etc).

When the judgment has been rendered in an EU member state, including Denmark (since 1 July 2007), Council Regulation (EC) No. 44/2001 of 22 December 2000, as subsequently amended, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EC) No. 44/2001) will apply. Similar provisions are provided by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 between the EU member states and three EFTA countries: Iceland, Norway and Switzerland. A judgment handed down by a court of competent jurisdiction of such EU member state must be recognised and may be enforced in Luxembourg without a review of the merits of the case, in accordance with the conditions set out in Regulation (EC) No. 44/2001.

Nevertheless, Luxembourg courts will check, within the strict limits imposed by the Regulation (EC) No. 44/2001, the regularity of the judgments with respect to:

- the international and national competence of the foreign jurisdiction;
- the application of the competent law; and
- the applied procedure.

In addition, Luxembourg courts will recognise the enforceability of the judgments upon the condition that:

- the judgment is enforceable in the foreign jurisdiction;
- the judgment is not contrary to public policy in Luxembourg;
- the defaulting defendant was served with the summons correctly and in good time for the defendant to arrange for his or her defence;
- the judgment is compatible with any judgments rendered in a dispute between the same parties in Luxembourg;
- the judgment does not conflict with a prior judgment rendered in a third country between the same parties for the same object and cause, to the extent such a judgment rendered in a third country is enforceable in Luxembourg; and
- the party applying for enforcement produces:
 - a copy of the judgment, meeting the conditions necessary for authenticity;
 - in the event of a judgment by default, the original or a certified true copy of the document establishing that the summons have been served on the defaulting party is duly produced;
 - all documents for the purpose of establishing that, in accordance with its originating law, the judgment is enforceable and has been served; and
 - a sworn-translation of the judgment in French or German made by a sworn-translator qualified in Luxembourg.

It should also be further noted that Regulation (EC) No. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims provides for the abolition of exequatur for judgments on uncontested claims.

A judgment that has been certified as a European enforcement order in another EU member state, except Denmark, will be recognised and enforced in Luxembourg without the need for a declaration of enforceability and without any possibility of opposing its recognition.

International jurisprudence seems to agree that immunity cannot be recognised to a foreign state (or an entity acting on its behalf) when it has contracted as a private person under the rules of private law, and did not state the nature of public authority, nor acted in the interest of public service.

The Luxembourg Law of 1 September 1988 on the responsibility of the state and public entities, specifically provides for their civil liability. Principles of contractual and tort liability remain applicable to governmental agencies failing to pay their contractors, and the judiciary courts have competence to rule on such claims. As a matter of principle, public entities may not withdraw from their contractual obligations, including payment obligations.

Case law traditionally maintains immunity from execution for public legal entities, such as the state and the municipalities. Immunity is only granted when the act giving rise to the dispute is an act of public authority or has been done in the interest of public service. A waiver of immunity in a private transaction may therefore be enforceable under certain conditions. Luxembourg courts have not yet faced any case of a Luxembourg public entity refusing to execute a judgment by claiming immunity. However, it seems likely that goods that do not affect the continuity of public service or the performance of the public entity's mission could be attached but under stringent conditions. In addition, with the law on financial collateral allowing to enforce the pledge, without resorting to courts for suing the pledgor, the immunity is unlikely to affect the perfection and realisation of the pledge.

Environmental, health and safety laws

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

A compilation of the legislation applicable in the field of the environment is available in the Environmental Code. It provides a full range of legislation on land development, air, waste, noise, water, energy, conservation, hazardous substances, etc.

The Ministry of Sustainable Development and Infrastructure, the Administration of Environment and the Administration of the Forest and Nature are the main bodies regulating those matters. The Inspectorate of Labour and Mines (ITM) is part of the Ministry of Labour and Employment and is responsible for enforcing legislation relating to working conditions and occupational safety and health.

Luxembourg legislation imposes on employers the obligation to take all the necessary steps to safeguard the safety and physical and psychological health of their workers, including preventing risk, providing information, offering training and setting up an organisation for carrying out action focused on employee health. They must also prepare a list of high-risk positions within the company.

Depending on the size of the workplace, they can make use of internal or external experts to provide a health and safety service, but ultimate responsibility remains with the employer. Part of the responsibility is to inform and consult with employees and their representatives.

In addition, the Grand Ducal Decree of 27 June 2008 sets out minimal health and safety requirements on temporary or mobile construction sites.

The provisions relating to chemicals and dangerous products are described in the REACH (Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)) and the CLP (Regulation (EC) No. 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures (CLP)) regulations. The regulations are designed to ensure a high level of protection of human health and environment, including the promotion of alternative methods for assessment of dangerous substances, as well as the free circulation of substances on the EU market while enhancing competitiveness and innovation.

At a national level, skills, control devices, as well as measures and criminal or administrative penalties are governed by the Law of 16 December 2011 on registration, evaluation and authorisation of chemical substances and classification, labelling and packaging of chemicals.

Project companies

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

Project companies are mostly established as a special purpose vehicle (SPV) for a single project. Depending on the peculiarities of the project and constraints in terms of governance, tax and equity funding, they are usually organised as private limited liability companies, partnerships or unlimited liability companies. Some projects can also take the form of investment companies structured as investment funds with fixed or variable capital.

The use of a European company (*société européenne* – SE), a company governed by EU law, may also offer a corporate alternative to Luxembourg SPVs. The SE has its own legal framework and acts as a single economic operator throughout the entire European Union. The status of a European company allows for mergers and restructurings of European groups and thus avoids the legal and practical obstacles under the laws of the different EU countries. A European company therefore does not need to set up a complex network of

subsidiaries governed by the different national legislations, but can carry out its activities on EU territory through branches.

With Luxembourg being a world-leading financial centre, sources of financing are mainly provided by leading foreign financial institutions and private investors but also by investment funds offering structured solutions for public projects established within a public-private partnership. The sources of financing available to project companies include bank debt convertible bonds, equity and mezzanine loans.

Public-private partnership legislation

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

There is no such legislation under Luxembourg law. However, Luxembourg endeavours to develop collaboration between public research organisations and businesses. A range of support mechanisms has been designed to stimulate and sustain such collaborations in order to identify potential partners in Luxembourg, obtain financial support for collaborative projects, participate in platforms dedicated to common interests and develop synergies at European level.

The Ministry of the Economy and Foreign Trade provides financial aids and accreditations.

Luxembourg hosts the European PPP Expertise Centre (EPEC), a body annexed to the European Investment Bank (EIB) whose mission is to strengthen the ability of the public sector to engage in PPP transactions by helping public authorities to share experience, expertise, analysis and good practice.

PPP – limitations

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

There exists no specific limitation on PPP transactions. These contracts are covered by the public procurement rules set out in the Law of 25 June 2009 on public procurement and its executive Grand-Ducal regulations. Any PPP project must take into consideration constraints imposed by that law.

PPP – transactions

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

In Luxembourg, both the Ministry of the Economy and Foreign Trade and the Ministry of Higher Education and Research are committed to supporting and stimulating public-private partnerships (PPPs) through targeted state aids and support schemes. Luxinnovation – the National Agency for Innovation and Research – is responsible for promoting these funding measures towards the private sector and providing support to enterprises wishing to participate in PPPs. The National Research Fund (FNR) is responsible for promoting these funding measures towards the public sector.

Various projects have been supported by the Ministry of the Economy and Foreign Trade.

In May 2010, Goodyear's R&D arm began its work on a three-year project with the University of Luxembourg to conduct fundamental research into how the various components of tyres react under ABS braking conditions.

Circuit Foil is one of Luxembourg's most high-tech manufacturing companies, producing top-grade, ultra-fine copper sheets for circuit boards. Employing just 300 people, it relies on PPPs, with the Gabriel Lippmann Public Research Centre, to sustain its research efforts to keep it ahead of increasingly tough competition.

Others significant PPP projects concern green transports, HIV research and technology research in general. Recently, municipalities also resorted to PPP projects with the view to financing local sports infrastructure (stadiums, swimming pools, cultural centres, etc) in Luxembourg.

On 17 December 2013, the European Commission launched eight contractual PPPs of strategic importance for European industry. The partnerships will leverage more than €6 billion of investments to be allocated through calls for proposals under Horizon 2020, the new EU programme for research and innovation. Each euro of public funding is expected to trigger additional investments of between three and 10 euros to develop new technologies, products and services that will give European industry a leading position on world markets. These PPPs are likely to benefit to the Luxembourg industry in a number of ways.

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