
THE
PROJECTS AND
CONSTRUCTION
REVIEW

THIRD EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in *The Projects and Construction Review*, 3rd edition
(published in July 2013 – editor Júlio César Bueno).

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

THE
PROJECTS AND
CONSTRUCTION
REVIEW

Third Edition

Editor
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

www.TheLawReviews.co.uk

PUBLISHER

Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS

Adam Sargent, Nick Barette

MARKETING MANAGERS

Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT

Lucy Brewer

PRODUCTION COORDINATOR

Lydia Gerges

HEAD OF EDITORIAL PRODUCTION

Adam Myers

PRODUCTION EDITOR

Jo Morley

SUBEDITOR

Charlotte Stretch

EDITOR-IN-CHIEF

Callum Campbell

MANAGING DIRECTOR

Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2013 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2013, be advised that this is a developing area.

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

ISBN 978-1-907606-71-7

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

ACKNOWLEDGEMENTS

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

ALLEN & OVERY LLP

ANDERSON MÔRI & TOMOTSUNE

ARAQUEREYNA

BASHAM, RINGE Y CORREA, SC

BOWMAN GILFILLAN

BRIGARD & URRUTIA

CLAYTON UTZ

CLIFFORD CHANCE

DENTONS

EISENBERGER & HERZOG RECHTSANWALTS GMBH

ESTUDIO BECCAR VARELA

ESTUDIO OLAECHEA

FRESHFIELDS BRUCKHAUS DERINGER LLP

FRILET SOCIÉTÉ D'AVOCATS

GALADARI ADVOCATES & LEGAL CONSULTANTS

GEORGE Z GEORGIU & ASSOCIATES LLC

GUYER & REGULES

HILL INTERNATIONAL, INC

J SAGAR ASSOCIATES
K&L GATES
LLS LUNGERICH LENZ SCHUHMACHER
MAPLES AND CALDER
McCULLOUGH ROBERTSON LAWYERS
MILBANK, TWEED, HADLEY & McCLOY LLP
MOLINA RÍOS ABOGADOS
PECKAR & ABRAMSON, PC
PINHEIRO NETO ADVOGADOS
PLESNER LAW FIRM
ROSCHIER, ATTORNEYS LTD
ROYAL INSTITUTION OF CHARTERED SURVEYORS
SHIN & KIM
STIBBE
THIRTY NINE ESSEX STREET CHAMBERS
VIEIRA DE ALMEIDA & ASSOCIADOS,
SOCIEDADE DE ADVOGADOS RL
WALDER WYSS LTD
ZHONG LUN LAW FIRM

CONTENTS

Editor's Preface	vii
<i>Júlio César Bueno</i>	
Chapter 1 INTERNATIONAL PROJECT FINANCE	1
<i>Phillip Fletcher and Andrew Pendleton</i>	
Chapter 2 DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS	13
<i>Robert S Peckar</i>	
Chapter 3 RELATIONSHIP CONTRACTING	24
<i>Doug Jones</i>	
Chapter 4 A GUIDE TO ALTERNATE PROJECT DELIVERY SYSTEMS	34
<i>Maurice Masucci, Frank Giunta and David Price</i>	
Chapter 5 STANDARDS FOR THE MEASUREMENT OF LAND AND BUILDINGS	49
<i>Alexander Aronsohn, Ben Elder and Marcia Ferrari</i>	
Chapter 6 ARGENTINA	65
<i>Pedro Nicholson</i>	
Chapter 7 AUSTRALIA	76
<i>Matt Bradbury, Kristen Podagiel, Hayden Bentley, Tim Hanmore, Liam Davis, Meg de Groot and James Arklay</i>	
Chapter 8 AUSTRIA	91
<i>Alric A Ofenheimer and Michael Strenitz</i>	

Chapter 9	BELGIUM.....	104
	<i>Rony Vermeersch and Diederik De Block</i>	
Chapter 10	BRAZIL.....	116
	<i>Júlio César Bueno</i>	
Chapter 11	CANADA.....	137
	<i>John S Haythorne, Ron Stuber and Karen Martin</i>	
Chapter 12	CHILE.....	150
	<i>Victor Ríos and Carlos Molina</i>	
Chapter 13	CHINA.....	162
	<i>Zhu Maoyuan and Zhang Jiong</i>	
Chapter 14	COLOMBIA.....	176
	<i>Carlos Umaña, María Luisa Porto and César Rodríguez</i>	
Chapter 15	CYPRUS.....	188
	<i>George Z Georgiou, Georgios S Ioannou, Eleni Prodromou and Elena Socratous</i>	
Chapter 16	DENMARK.....	204
	<i>Peter Wengler-Jørgensen</i>	
Chapter 17	FINLAND.....	217
	<i>Jyrki Prusila, Toni Siimes and Ilkka Puikkonen</i>	
Chapter 18	FRANCE.....	228
	<i>Marc Frilet</i>	
Chapter 19	GERMANY.....	242
	<i>Rouven F Bodenheimer and Claus H Lenz</i>	
Chapter 20	INDIA.....	253
	<i>Dina Wadia and Divyanshu Pandey</i>	

Chapter 21	IRELAND.....267 <i>Conor Owens, Mary Dunne and Michael Kennedy</i>
Chapter 22	ITALY278 <i>Francesco Sanna, Anna Amprimo and Carolina Teresa Arroyo</i>
Chapter 23	JAPAN294 <i>Tetsuya Itoh, Reiji Takahashi and Tetsuro Motoyoshi</i>
Chapter 24	KOREA.....306 <i>Michael Chang, Sang-Hyun Lee and Seung-Gyu Yang</i>
Chapter 25	MEXICO317 <i>Juan Carlos Serra and Fernando Ortiz Jurado</i>
Chapter 26	NETHERLANDS335 <i>Frédérique Jacobse, Zeeger de Jongh and Werner Runge</i>
Chapter 27	PERU347 <i>José Antonio Honda</i>
Chapter 28	PORTUGAL.....359 <i>Manuel Protásio and Frederico Quintela</i>
Chapter 29	QATAR.....371 <i>Julian Pope, Safwan Moubaydeen, Julie Tuck and Matthew Walker</i>
Chapter 30	RUSSIA.....383 <i>Fedor Teselkin and Kirill Nikiforov</i>
Chapter 31	SOUTH AFRICA.....398 <i>Anton Barnes-Webb, Rob Morson, Lido Fontana and Daryn Webb</i>
Chapter 32	SPAIN410 <i>José Guardo and Alejandro León</i>

Chapter 33	SWITZERLAND	424
	<i>Thomas Mueller-Tschumi and Francis Nordmann</i>	
Chapter 34	UNITED ARAB EMIRATES.....	435
	<i>Leonora Riesenburg</i>	
Chapter 35	UNITED KINGDOM.....	449
	<i>David Brynmor Thomas and Karim Ghaly</i>	
Chapter 36	UNITED STATES	461
	<i>Carolina Walther-Meade, Karen Wong and Henry Scott</i>	
Chapter 37	URUGUAY	482
	<i>Beatriz Spiess</i>	
Chapter 38	VENEZUELA.....	494
	<i>Pedro Ignacio Sosa Mendoza, Pedro Luis Planchart, Luis Alfredo Araque, Verónica Díaz Hernández, Rodrigo Moncho Stefani and Nizar El Fakih</i>	
Appendix 1	GLOSSARY OF TERMS.....	507
Appendix 2	ABOUT THE AUTHORS.....	509
Appendix 3	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...	539

EDITOR'S PREFACE

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

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). All of these institutions and associations dedicated themselves to promote an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitask group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table. That is why I am very happy to present you two new featured articles – this time from non-lawyers – specifically prepared for the introductory part of this book. Frank Giunta, Maurice Masucci and David Price, senior representatives from Hill International, propose to us 'A Guide to Alternate Project Delivery Systems' and Alexander Aronsohn, Ben Elder and Marcia Ferrari, senior representatives from the Royal Institution of Chartered Surveyors (RICS) demonstrate some innovative approaches to spatially enabling land administration and management.

These two new articles combine precisely with the variety already produced for the past editions by Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers of the area of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), the United Kingdom (Phillip) and Australia (Doug) – they have equally influenced the main players in project financing in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package.

I am also glad to say that we have contributions from six new jurisdictions in this year's edition: Austria, China, Finland, Germany, Ireland and Russia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 33 countries has shown us that in order to understand the world we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms that graciously agreed to participate.

Finally, a sad note about the recent passing of Dr Kris R Nielsen, PhD, JD, PMP, MRICS, MJSCE, this past 16 February. I had the honour of working with Dr Nielsen in Brazil and it was a remarkable and unique experience to learn how to deal with projects with a global and strategic perspective on risk management and best practices. Dr Nielsen spent his entire career working towards bettering the construction industry and worked tirelessly to promote the areas of law and engineering with a view to their joint futures. He co-edited and authored an important book entitled *Managing Gigaprojects – From Those That Have Been There Done That*, published by ASCE Press in October 2012, which is already considered a classic and a great reference for those working in the field. In the words of his beloved wife Dr Patricia Galloway: 'Dr Nielsen was a global leader in helping contractors and owners to define what makes a successful project. He helped them examine their operations and how to address subjects like risk management, execution, project controls, value engineering, corporate strategy, construction law, dispute resolution, project sustainability, etc. While on assignments, he worked with his clients to help select younger members of their organisation, i.e., to mentor in how to achieve project success. Dr Nielsen derived great satisfaction in knowing there was a growing cadre of people who were learning and then practising their new-found skills while striving for project success.'¹

I dedicate this third edition of *The Projects and Construction Review* to Dr Nielsen. He will be greatly missed.

I look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

July 2013

1 www.pegasus-global.com/personnel/.

Chapter 33

SWITZERLAND

Thomas Mueller-Tschumi and Francis Nordmann¹

I INTRODUCTION

Supported by low interest rates and immigration, construction activity in Switzerland remains at a high level; this applies to both the residential and commercial building sectors. The number of major construction projects in particular has increased steadily over recent years. As regards public sector investments, transport-related projects are the growth drivers. It is expected that population growth and rising mobility will keep the demand high for infrastructure and transport-related construction and will pose financing problems for the public sector.

The 2010 Neumatt Burgdorf project ('the Burgdorf Project') was Switzerland's first PPP project to be carried out based on international project finance standards. The project encompasses the demolition of old buildings at the site, as well as the planning, financing, construction and operation of administrative premises and a prison (with 110 beds) and successfully started operations in 2012. The Burgdorf Project is a pilot project and it is expected that other public bodies will initiate projects of their own in future.

In March 2012, Swiss voters accepted the 'Secondary Home Initiative'. As a result, the Swiss constitution has been amended to introduce a new constitutional provision that essentially prevents the construction of new holiday homes in tourist regions where the number of holiday homes exceeds 20 per cent of the total housing; the Federal Council enacted an ordinance that entered into force on 1 January 2013.

¹ Thomas Mueller-Tschumi and Francis Nordmann are partners at Walder Wyss Ltd.

II DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In Switzerland, transactional structures of project financing commonly follow international standards. Typically, the infrastructure is built and operated by a project company. Such a project company is established in the form of an SPV. In relation to the legal form of the SPV, a Swiss company (*Aktiengesellschaft*) is the preferred option, however, a Swiss company with limited liability (GmbH) is also viable. If a foreign SPV is used, such SPV is usually domiciled in a country having entered into a double taxation treaty with Switzerland in order to avoid withholding tax and to facilitate an exit by means of a share deal.

To a large extent, the construction of the project is financed by lenders. For this purpose the project company enters into a credit agreement with a syndicate of banks. The shares of the project company are owned by the project sponsor. Several sponsors enter into a shareholders' agreement governing their rights and duties as shareholders. The project sponsors provide the equity needed for the balance of the finance in the form of share capital, contribution to the general reserves of the project company and subordinated debt.

The project company has no employees at its own, but will generally outsource its constructional and operational duties to subcontractors, ideally to a general contractor in order to avoid interface issues.

ii Documentation

Again, documentation in Swiss project finance transactions is consistent with international standards. In major projects, in particular if syndication of the loan is intended, the credit agreement is based on the standard form issued by the Loan Market Association ('LMA'). For smaller projects, Swiss banks usually provide shorter standard forms of their own.

Project finance requires the mitigation of the completion risk. As a result, the project company usually mandates a total or a general contractor, which takes sole responsibility for the proper delivery of all construction work on a turnkey basis for a fixed price on the basis of a construction contract. The design and planning work is either included in the contract (total contractor) or is performed by a general planner.

A facility manager enters into an operating and maintenance agreement with the project company. In order to mitigate all operational risks, such agreement is usually concluded as a general contractor agreement. In addition to the operating and maintenance agreement, the parties may enter into service-level agreements.

In PPP projects, in many cases a governmental concession is required. Such concession is granted either in form of a unilateral decree or a contract governed by public law. Further, as the case may be, the project company enters into agreements with (equipment) suppliers and purchasers.

Other typical ancillary contracts include interest hedge agreements, insurance contracts, direct agreements (between the project contractors and the lenders) and appointment of independent experts.

iii Delivery methods and standard forms

In a Swiss domestic set-up, parties often use the standard form for general contractor issued by the Swiss Engineers and Architects Association ('SIA'), which has also prepared various general conditions of which SIA Rule 118 (General Conditions for constructive works) is widely used. Such general conditions only apply if specifically agreed by the parties. As an exception, the Swiss Supreme Court has ruled that two Swiss construction companies were deemed to have tacitly accepted the SIA standards (judgment of 3 December 2007; 4A 393/2007).

As regards public procurement, the KBOB (the coordination conference of the responsible federal and cantonal clients and owners) provides a standard form for general and total contractor agreement. KBOB contracts are nowadays used more often for private projects, too.

In the international context, the most frequently used standard forms are the various sets of conditions issued by the Geneva-based FIDIC.

III RISK ALLOCATION AND MANAGEMENT

i Management of risk

The management of risks is essential in the context of project finance and requires a tailor-made analysis of each project to identify and assess these risks and determine who should bear them. In general, the parties will have to deal with different types of risk.

Completion risk is the risk that the project will not be completed in time or at all. In the case of cash-flow related lending (as is the case in project finance), completion in due time is crucial, as interest continues to accrue and may not be covered by the projected cash flow. Usually, the completion risk is mitigated from the project company to the total contractor who must accept contractual penalties and provide a completion guarantee. In addition, the lenders may insist on additional guarantees by the sponsors.

There can be a risk that governmental permits for a project will not be granted or will be granted only subject to costly conditions; usually, the obtaining of all substantial permits is a condition precedent to drawdown under the credit agreement.

Lenders are generally not prepared to take any environmental risks. With respect to existing contamination of the site, environmental risks may be passed over the total or general contractor (who will of course price in such risk) if it has been assessed in environmental due diligence. Future environmental risks are usually transferred to the operator and must be insured.

The risks related to the operation and the maintenance of the project are usually transferred to the facility manager, which must secure the proper fulfilment of its duties by providing performance guarantees.

ii Limitation of liability

Pursuant to the general provisions of the Swiss Code of Obligations, a party is liable for any damages resulting from non-performance, unless it demonstrates that it has no responsibility for the non-performance. Negligence is sufficient to trigger liability; a concurrent fault of the injured party does not limit the non-performing party's liability, but may result in reduced damages.

Under Swiss law, the parties may agree upon a limitation of the contractor's liability (e.g., stipulation of a cap). However, liability for gross negligence and wilful intent cannot be contractually excluded or capped.

As a general principle, liability of the contractor is limited in the event of force majeure. However, the parties usually include some language to specify the scope of force majeure and the consequences related to it (extension of time lines, compensation of the contractor for additional costs).

In its relationship with the owner, the contractor is solely liable for the performance of the contract and thus for the work of the subcontractors. If instructions given by the owner risk causing delay or defects, or increase the costs of the work, it is incumbent upon the contractor to immediately and specifically point out such risk to the owner; the contractor may be liable for any consequences by failing to do so.

No third-party contractual claims are possible against the contractor; if indirect damages are not contractually excluded, the contractor may face a claim from the owner trying to recover any damages it was obliged to pay due to third-party damages.

iii Political risks

Switzerland is known for its political stability. Hence, mitigation of political risk is not a main issue in construction or financing contracts. Certain political risks such as war and strike are usually included in the force majeure provisions. However, due to the numerous participation rights provided for by the Swiss political system, a project might be substantially delayed or even halted. Such risk can even arise at a late stage of the project. As a result, early binding decisions regarding politically relevant issues are crucial.

Once the required permits or concessions are granted (in particular the building permit), the owner may profit from a broad protection of its property rights on a constitutional level; Article 26 of the Swiss Constitution grants full compensation in case of expropriation. Moreover, having realised a building project based on a building permit, an owner is protected by means of the so-called principle of confidence: such building permit must not be revoked.

The protection of the property rights is granted irrespective of the nationality of the principal.

IV SECURITY AND COLLATERAL

In project finance structures, the Swiss standard security package is made up from a number of elements. Mortgages are the 'classic' security interest in real estate financing. However, properties in administrative use are subject to a specific legal regime. In Switzerland, such mortgages may be granted in the form of an actual mortgage or a mortgage note. The mortgage note is issued in bearer form or registered form. Generally, the mortgage note is the preferred security interest due to its nature as a tradable security that can itself be sold and pledged. As of 1 January 2012, mortgages may also be established by means of a registered mortgage certificate. Registered mortgage certificates are easily transferable instruments and may also be pledged. Mortgages are established by a notarised deed and registration in the land register.

Lenders must be aware that certain legal liens may arise that would rank ahead of any contractual security right over the real property. These legal liens may exist to secure any unpaid real estate capital gains tax, transfer tax or mechanics liens. As a result, contractual provisions must be included in the documentation to avoid the creation of any such security interest.

Receivables are normally assigned by way of global assignment. The assignment is non-accessory to the secured obligation. During the term of the agreement, the assignor must, on a regular basis, deliver to the assignee its lists of receivables showing the assigned receivables, as ongoing evidence of the claims assignment. Third-party debtors are often not notified of the assignment until the borrower's default. As long as third-party debtors are not aware of the assignment, they can validly fulfil their obligations by payment to the assignor. Global assignments are very often used.

Under Swiss law, future receivables can be assigned, but they would fall within the bankruptcy estate of the assignor if they come into existence after the opening of bankruptcy proceedings over the assignor. The assignment requires a written agreement between the assignor and the assignee, to clearly determining the claims that are allowed to be assigned, especially with regard to any global assignment of future claims.

If an SPV is involved, the standard security package also includes a pledge over the shares in favour of the lenders. There are no special registration requirements with respect to a share pledge; however, as a perfection formality, the share pledge requires a valid agreement and the physical transfer of the relevant shares to the pledgee. In addition, in the case of registered shares, the share certificate must be a duly endorsed share certificate (normally an endorsement in blank is provided in blank in order to facilitate the enforcement). In the case of registered shares, the pledge can be registered in the company's share ledger.

Generally, there are no limitations on granting such security to a foreign lender, provided that, pursuant to the articles of association of the company, the company does not require a majority of Swiss shareholders. Further, the share pledge might trigger the need for a Lex Koller permit (see Section IX.ii, *infra*).

Swiss law provides that the shareholder's voting and participation rights remain with the pledgor. Consequently, the features of a pledge agreement need to be examined in order to ensure the exercisability of the voting and participation rights.

A bank account can be pledged pursuant to a pledge agreement or assigned pursuant to a security assignment agreement to a domestic or foreign secured party.

Lenders must be aware that any rights the account bank might have over a bank account pursuant to its general terms and conditions (e.g., set-off rights or pledge rights) rank ahead of the security interest of the pledgee, unless waived by the account bank. Such waiver might be difficult to obtain in practice.

Bank accounts can be pledged by means of a written accounts pledge agreement. The account bank must be given notice to create and perfect the second-ranking security interest. The right to withdraw funds is not usually restricted as long as no default has occurred.

Swiss law does not specifically provide an instrument equivalent to the English-type floating charge. Moveable assets need to be physically transferred to the pledgor or a third-party pledgeholder in order to perfect the pledge. Therefore, the concept of a

floating charge over moveable assets that need to be available for the operations of the pledgor is not feasible.

Under Swiss law, subordination of debt is achieved contractually through an agreement between the debtor and the subordinated creditor in which the creditor's claims are subordinated to certain other claims.

Further, multiparty agreements with a more complex ranking system of subordinated debt are possible. The debtor and the creditor may agree that the creditor will rank as senior to any other creditor of the debtor, provided that such creditors agree to be ranked junior.

If a company is overindebted, the board of directors must notify the relevant bankruptcy court, which, on notification, will start bankruptcy proceedings. The notification duty can be avoided if creditors subordinate their claims through a contractual agreement.

Principally, the lenders can reserve the right to 'step in' and take over the project company's position where the project company is not performing. Such a step-in right requires an agreement with the shareholders of the project company (purchase option), if the project company is to continue its business, or with the contractors (usually, by means of a direct agreement), if a new company will take over the project. Frequently, both forms of step-in rights are combined.

In the context of a PPP, there is a dispute as to whether the public procurement regulations restrict the ability to stipulate step-in rights.

V BONDS AND INSURANCE

i Performance guarantee and defects warranty

In construction contracts, the contractor (in the context of project finance – typically the general contractor) must provide a performance guarantee. Upon completion, the contractor must provide a warranty as regards the defects of the construction. Performance guarantee as well as the defects warranty is secured, generally either by a bank guarantee or by a surety.

By means of a bank guarantee, the guarantor bank undertakes to pay to the beneficiary, upon its first demand, any amount up to a defined maximum. This guarantee is irrevocable and unconditional and may be exercised if certain obligations are not fulfilled properly.

Swiss law also recognises the concept of surety. In a surety contract, the grantor fulfils the obligations of the principal obligor (borrower) if the latter is unable to do so. The main difference between this and the guarantee is that the grantor has available to it all legal defences available to the principal obligor, because the surety does not create an independent contractual claim (unlike the guarantee). The surety must be limited to a maximum amount and must be in writing to be valid. The grantor is only obliged to pay once the main obligor is in arrears in relation to its performance and either has been issued with payment reminders to no avail or is manifestly insolvent.

ii Insurance

Usually, an insurance adviser is appointed who will carry out the insurance due diligence and define the minimal standard of insurance coverage.

Typically, the contractor must take out insurance coverage for civil liability relating to damages resulting from the construction. Tender conditions may require that the bidders furnish proof of such insurance and maintain coverage throughout the project.

In addition, the project company as the owner of the site, must ensure sufficient insurance coverage for civil liability relating to damages resulting from the property.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In Switzerland, enforcement of security and bankruptcy proceedings adhere to the rules set out in the Debt Enforcement and Bankruptcy Act ('the DEBA'). To a certain extent, the parties can agree on specific enforcement mechanisms. However, pursuant to mandatory law, the collateral must not immediately fall into the property of the pledgee if its claims are not satisfied.

Under a Swiss standard security agreement, the lender may enforce the security (at its option) by private sale (including self-acquisition), by a (privately organised) public auction or by way of an official enforcement proceeding before any competent court or authority pursuant to the DEBA.

Although most security agreements allow lenders to enforce them by way of private sale on the occurrence of an event of default, it is recommended that enforcement is only commenced when the secured obligations are due and payable. Lenders are under an obligation to account for proceeds realised in enforcement and must repay any surplus to the borrower (after deduction of all costs, etc.).

With regard to mortgage notes, only a private sale would be possible, but not with regard to the underlying real property (such real property may only be subject to enforcement proceedings in the framework of the DEBA).

In the case of assets transferred by way of security, enforcement, in a strict sense, is not necessary, as ownership has already been transferred to the secured party. Enforcement in this context means that the obligation to return the transferred assets under the security agreement expires. This follows similar rules that apply to private enforcement (in particular, any surplus remaining after the application of the proceeds of the secured debts must be returned to the party that granted the security).

Under Swiss substantive law, future receivables, which have been assigned to the lenders but have come into existence only after the opening of bankruptcy proceedings against the borrower, fall into the borrower's estate and do not pass to the lenders. However, the security provided by mortgage notes includes all lease receivables that will come into existence from the commencement of enforcement proceedings or from the opening of bankruptcy proceedings against the borrower to the realisation (that is, sale) of the property.²

2 Article 806(1) of the Civil Code.

VII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Swiss authorities at federal, cantonal and communal level have various regulatory responsibilities relating to zoning and public construction law. Generally, zoning and building regulations are enacted by the cantons and implemented by communal building authorities. As a result, Switzerland has 26 different cantonal zoning and construction regimes. Any new or change to an existing building or construction requires a building permit.

Projects potentially having an environmental impact require an EIA demonstrating what specific measures must be taken in order to ensure the compliance of the project with the environmental regulations.

ii Responsibility of financial institutions

If the control of the project company by the lenders is too tight, the financial institutions may qualify as shadow directors and, as a result, become liable for the activities of the borrower to a certain extent; therefore, structuring of the supervision of the project company in the credit agreement is crucial in order to avoid such lenders' liability.

Furthermore, lenders with subsidiaries, branches, offices or appointed representatives in Switzerland must comply with the Federal Law on the Prevention of Money Laundering and the Financing of Terrorism in the Finance Sector.

VIII PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

In Switzerland, neither the federal nor the cantonal legislator has provided a specific formal statutory and regulatory framework for PPP transactions. However, in 2009, the Federal Ordinance on the Public Budget of 6 April 2006³ was amended by inserting Article 52a, which states that PPP projects must be considered for the fulfilment of public tasks.

In general, there are no major regulatory obstacles to realising public infrastructure projects via PPP schemes. However, the PPP concession model for road infrastructure is not feasible in Switzerland as the Swiss Constitution prohibits the levying of any taxes on the use of national roads.

A general ban on negotiations imposed by the cantonal public procurement provisions does impede the procurement process for PPP projects. However, the Burgdorf Project has shown that a PPP process is feasible under total contractual competition, which contains rigid requirements concerning the anonymity of participants. As negotiations are allowed under federal procurement law, more flexibility in the PPP tendering process exists at a federal level.

3 SR 611.01.

Lenders may also have difficulties receiving the type of full security package that is commonly received in international project finance structures. In relation to real estate, it appears to be difficult for the private partner to obtain (full) ownership rights over any real estate.

Lenders must also be aware that a specific legal regime applies to assets in administrative use. While such assets may be privately owned, they must not be subject to mortgages.

ii Public procurement

The Confederation and each of the 26 cantons has its own procurement law. International treaties ratified by the Confederation provide, however, the legal framework for both federal and cantonal procurement legislation. In particular, Switzerland is a signatory state to the General Procurement Agreement dated 15 April 1994 ('the GPA') and such treaties provisions are adopted in the relevant legislation (basically for all public tender procedures, even beyond the scope of the GPA).

The relevant legislation explicitly provides for the fundamental principles of public procurement such as equal treatment, transparency and competition. Furthermore, the Confederation and all cantons have implemented challenge procedures according to Article XX of the GPA and the award is subject to appeal at an independent court (Federal Administrative Court and cantonal administrative courts, respectively). To a limited extent, such decisions may be appealed at the Supreme Court.

Generally, an application for review has no automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract. However, courts generally grant suspensive effect (typically, solely on request of the applicant).

IX FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Basically, Switzerland has not enacted major restrictions on the importation of project equipment nor are there relevant licensing or other requirements specifically for foreign investors.

Cross-border lending by a foreign lender to a borrower in Switzerland does not generally require authorisation from the Federal Financial Market Supervisory Authority ('FINMA') or from any other regulatory authority. However, a lender with a subsidiary, branch, office or appointed representative in Switzerland is subject to supervision in Switzerland under the Federal Law on Banks and Savings Institutions, and must possess a licence to engage in the business of banking from FINMA.

i Removal of profits and investment

Swiss law does not provide foreign exchange restrictions or substantial fees, taxes or charges on currency exchange. However, claims in foreign currency will be enforced in Switzerland only in Swiss currency.

There are no controls or laws in force that would prevent either the repatriation of proceeds realised in Switzerland, payments to a foreign lender under security agreements (including guarantees) or a loan agreement. However, interest payments by a Swiss debtor may be subject to the federal withholding tax of 35 per cent if the number of

creditors exceeds a certain limit. As a result, it is crucial to include specific tax language in the credit agreement in order to avoid withholding tax payments.

ii Lex Koller

In Switzerland the acquisition of real estate by persons abroad is restricted under the Federal Law of 16 December 1983 on the acquisition of real estate by persons abroad ('Lex Koller').

A transaction is subject to a Lex Koller permit if (1) the real estate is acquired by a person abroad (which term also includes a company domiciled in Switzerland, but dominated by foreign nationals), (2) the real estate involved is a property that is subject to the Lex Koller's permit requirement regime, namely residential real estate, and (3) the acquired right is deemed to be the acquisition of residential real estate in the sense of Lex Koller. These three conditions must be met cumulatively.

In simple terms, the realisation of commercially used premises is not subject to a Lex Koller permit, as is usually the case in the context of private sector project finance. With respect to PPPs, the analysis is more complex, since the Swiss Federal Tribunal ruled some years ago that certain administrative activities do not have commercial character and hence a Lex Koller permit is required. Such decision is, however, highly disputed among scholars. Nevertheless, it has to be considered in the structuring phase of a PPP.

Lex Koller provides that the purchaser must apply for a negative declaration (ruling) at the competent Lex Koller authority stating that no approval is required if there is a doubt whether such acquisition is subject to a Lex Koller permit. A transaction requiring a permit is invalid until a legally binding permit has been obtained.

Subject to certain conditions, financing of residential real estate may also be subject to the Lex Koller restrictions if, due to the financing terms, the purchaser/borrower becomes strongly dependent on the secured lender, granting excessive control rights to the lender and resulting in an ownership-like position of such lender. As a result, the project finance standard security package may raise Lex Koller questions.

X DISPUTE RESOLUTION

In Switzerland there are no state courts specialising in project finance or construction disputes. However, commercial contracts can generally be subject to arbitration.

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if a public entity is involved. However, the Swiss construction industry has established arbitration rules whereby disputes may be referred to specialised arbitral tribunals.

Switzerland is a major seat of international arbitration, even for infrastructure projects outside Switzerland. The most frequently used arbitration rules in Switzerland are the uniform arbitration rules of the Swiss Chambers of Commerce and those of the ICC. Enforcement of foreign arbitral awards in Switzerland is governed by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Recently, disputes boards have occasionally been established for larger infrastructure projects, but such instrument is, however, not widely used. Mediation

is also not yet commonly used, although recently industry associations have adopted mediation and arbitration rules.

XI OUTLOOK AND CONCLUSIONS

In Switzerland, the future demand for infrastructure and transport-related construction is expected to be high and will increase the need for structured finance. In addition, as from 2012, Switzerland has introduced a hospital financing system, known as the Diagnosis Related Groups (DRG) based system. This system also includes investment allowances in case-based tariffs. As a result, the cantons must cease providing government deficit guarantees and bargain loans to public hospitals. Project finance may become a valid solution to the provision and financing of infrastructure investment in this area.

Appendix 2

ABOUT THE AUTHORS

THOMAS MUELLER-TSCHUMI

Walder Wyss Ltd

Thomas Mueller-Tschumi was educated at Basle University (*lic iur* 1990, *Dr iur* 1996, *summa cum laude*). He gained working experience as a law clerk (District Court of Laufenburg, Administrative Court of the Canton of Argovie), a research and teaching assistant at the University of Basle and as a lawyer in an Argovie and a Basle law firm. He advises clients in the matters of PPP, real estate law (construction, planning, environment, infrastructure including real estate financing), public procurement, administrative law and privatisations. He joined Walder Wyss Ltd in 2006 and became a partner in 2012. Mr Mueller-Tschumi is lecturer in the administrative law master's programme of the University of Basle and member of the experts' panel of the Swiss PPP society.

FRANCIS NORDMANN

Walder Wyss Ltd

Francis Nordmann was educated at Zurich and Basle University (*lic oec publ* 1993, *lic iur* 1995, *Dr iur* 1996) and at the University of Melbourne (LLM 1999). He gained working experience as clerk at the civil court Basle, trainee in a Basle law firm and an associate in law firms in Zurich and London. He advises institutional and private investors as well as owners of real estate in all aspects of real estate law including real estate financing. Another focus is legal advice relating to financial services and all types of national and international corporate finance (including structured finance) and capital markets transactions. Mr Nordmann joined Walder Wyss Ltd in 2001 and became a partner in 2007. Mr Nordmann is recognised as leading real estate practitioner by *Chambers* and *PLC*, and is a member of RICS.

WALDER WYSS LTD

Seefeldstrasse 123

PO Box 1236

8034 Zurich

Switzerland

Tel: +41 44 498 98 98

Fax: +41 44 498 98 99

thomas.mueller-tschumi

@walderwyss.com

francis.nordmann@walderwyss.com

www.walderwyss.com