

Project Finance 2020

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First published 2008

Thirteenth edition

ISBN 978-1-83862-144-5

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Project Finance 2020

Contributing editors**Alec Borisoff and Aled Davies**

Milbank LLP

Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Cyprus and Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alec Borisoff and Aled Davies of Milbank LLP, for their continued assistance with this volume.



London

July 2019

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This article was first published in August 2019

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Armenia

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CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Pursuant to Armenian law, any property, including property right (claim), except for property removed from circulation, may be collateral.

The types of collateral and security interests for the project finance may be the following:

- security deposit: a pledge where the collateral passes to the possession of the pledgee;
- pledge of rights: including the right of participation in the statutory (share) capital of an economic partnership or a company or in equity capital of a commercial cooperative, and the right of claim and other rights subject to alienation;
- pledge of monies: kept in bank deposit or at notary public;
- hard pledge;
- pledge of goods in circulation; and
- mortgage.

Collateral perfecting

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? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

The contract of pledge shall be concluded in writing. Depending on the type of secured property (such as immovable property rights: land use rights, forest use rights, and ownership rights of planted production forests, aircraft or seagoing vessel, and other cases provided by law) the contract of pledge shall be notary certified as well as subject to registration.

The right of pledge shall be extended to fruits, products and income received as a result of use of a pledged property in the cases provided for by contract.

For most personal property, perfection will usually be by way of registration on the Personal Property Security Register (PPSR).

The following documents are required for registration of a pledge on immovable property:

- a mortgage agreement, authenticated by a notary;
- the owner's certificate of title;
- a receipt showing payment of the state fee for the registration (approx US\$50);
- certificate of no liens or encumbrances regarding the property; and

- creditor or debtor's registered assembly meeting or resolution authorising the registration of the mortgage (if either is a corporate entity and the value of the property comprises more than 25 per cent of the net assets of the company).

The participant of the company has the right to pledge the share (a portion of it) thereof in the authorised capital of the company, if it is not prohibited by the company charter. The right to pledge the share of a participant of the company shall be registered as prescribed by Armenian law 'on the registration of secured rights to movable property'.

Assuring absence of liens

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

Liens over real estate property must be registered in the corresponding Real Estate Registry and, therefore, a creditor can obtain from the competent real estate registrar a certificate listing all liens affecting the relevant property.

In the case of movable property, a creditor can obtain from the Civil Registry Service a certificate of pledges without conveyance granted by an individual or legal entity.

Regarding the shares and intellectual property rights, research on securities can be undertaken at the PPSR.

Enforcing collateral rights

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?

According to Armenian law, for the purpose of satisfying his or her claim, a pledgee has the right to levy execution on the collateral and realise it without applying to court, including transferring the pledged property to the ownership of the pledgee or a third person mentioned by the pledgee for the corresponding amount of the principal obligation, if it is provided for by the contract of pledge; or there is a written agreement between the pledgee and the pledgor, and, when a consent or permission of a third person has been required for conclusion of the contract of pledge — also the written consent of the latter, without the court judgment on realisation of the pledged property.

In the absence of an agreement on execution without a court decision, the claims of the pledgee (creditor) shall be satisfied by a court judgment, at the expense of the pledged property. The collateral may be levied in execution only by a court judgment, when the collateral is recognised by law or secondary legislation as a property of significant historical, artistic or cultural value for the society.

In the case of non-fulfilment or improper fulfilment of an obligation secured by a pledge, the pledgee must notify the pledgor and the debtor (where the pledgor and the debtor are different entities) in writing and

in a proper manner on the execution levied on the collateral without recourse to court (notification of execution).

If the right of pledge is subject to registration (including state registration), the pledgee shall — before starting a process of levy of execution on the pledge, as well as in the case of termination or completion of the process of levy of execution on the pledge — be obliged to properly notify the pledgor and the registration body.

After the notification of execution has been properly served to the pledgor and the debtor (where the pledgor and the debtor are different entities) and, where applicable, also to the registration body, the pledgee may take the collateral into his or her possession (where it is a movable property), as well as taking reasonable measures for preserving, providing maintenance for and ensuring the safety of the collateral.

The pledgee may realise the collateral through direct sales or public biddings on behalf of the pledgor, two months after serving the notification of execution to the debtor and pledgor (where the pledgor and the debtor are different entities) and, where applicable, also to the registration body, unless the pledgor and the pledgee have agreed on another procedure for realising the collateral. The pledgee must realise the collateral at a reasonable price existing at the market at the given moment.

Enforcing collateral rights following bankruptcy

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 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?

Bankruptcy in Armenia is under the jurisdiction of the Bankruptcy Court. If the Bankruptcy Court accepts a bankruptcy petition in respect of a debtor project company, the Court will appoint a bankruptcy administrator to settle such a company's debts, under the supervision of a bankruptcy judge. Except for assets that have been encumbered as collateral to secured creditors, all assets owned by the debtor project company are available to the receiver to satisfy the claims of unsecured creditors.

The rights of secured creditor are protected in the case of bankruptcy of the project company. There are two ways for secured creditor to execute its rights over its security:

- to apply to the Bankruptcy Court for its permission to sell the security assets outside the bankruptcy proceedings if there is a written agreement concluded between the pledgee and the pledgor to levy execution on the collateral and realise it without applying to court; or
- to file the claim with the court and be included in the list of creditors. In this case, the secured creditor may demand immediate satisfaction of the claims thereof from the proceeds generated from the sale of the pledged property.

Armenian law does not discriminate between foreign creditors' claims against a bankrupt project company and the claims of domestic creditors.

Not later than within one year after filing a bankruptcy claim, the administrator may apply to recover the following through judicial procedure:

- non-refundable (including non-cash) transfers of the debtor to persons affiliated to the debtor that were made during the five years preceding the declaration of the debtor as bankrupt;
- non-refundable transfers of the debtor to any third parties that were made during the three years preceding the filing of a bankruptcy application;
- any transfer (including non-cash) made during the 90 days preceding the filing of the bankruptcy application (within one year where the transfer was made to an affiliated person) to the creditor or for the obligation previously assumed in favour of the latter, at the moment at which the debtor is insolvent and the creditor has received essentially more than it would receive in a bankruptcy proceeding, in the case of liquidation of the debtor; and
- the damage caused to the debtor as a consequence of transactions, transfers and alienations of property during the three years preceding the declaration of the debtor as bankrupt, which results from the difference between the realisation value of the property, service, work and the market value thereof at the time of performance of the transaction, except for the cases when the transaction has been concluded on the basis of public auction.

According to the Armenian Law on bankruptcy, the following is considered to be affiliated with the debtor:

- a legal person that is principal, subsidiary or dependent with respect to the debtor as prescribed by Armenian legislation;
- the executive of the debtor, a member of the board of directors (observer board), a member of the collegial executive body of the debtor or the chief accountant (accountant), as well as the person relieved from one of the mentioned offices during the last year starting from the moment of submitting a bankruptcy application;
- the person holding more than 20 per cent of the statutory (share, equity) capital of the debtor; and
- the person or a member of a body that may give binding instructions to the debtor or predetermine the latter's decisions.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

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

According to Armenian law, residents and non-residents may transport, deliver or import currency valuables into the territory of Armenia and transport, deliver or export currency valuables from the territory of Armenia without any restriction and declaration, except for cases prescribed in the RA Law on Currency Regulation and Currency Control, article 5, part 2.

The Central Bank may, upon consent of the authorised body of the government, define by a regulatory legal act a procedure and conditions for transportation, delivery, import, export and declaration of currency valuables, with the aim to maintain the stability of the financial system, prevent economic risks, fight against circulation of proceeds of crime and terrorism financing, and to compile statistics.

In Armenian territory residents and non-residents may purchase and sell foreign currency without restrictions.

No specific taxes apply to foreign exchange transactions, although general taxes (eg, income tax) on commissions do apply.

Investment returns

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

There are no restrictions or controls on remittances of investment returns or loan payments to parties in other jurisdictions.

According to the Armenian tax code, dividends distributed by a resident company to a non-resident company without a permanent establishment in Armenia are subject to 10 per cent profits tax.

Foreign earnings

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

Project companies are not forced to repatriate foreign earnings and there are no restrictions on the use of foreign earnings. However, foreign earnings by an Armenian entity are, in principle, subject to Armenian tax, and bearing in mind any provisions of double tax treaties with other countries in the world must be observed.

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

According to Armenian law, the company is entitled to open bank accounts in dram or in foreign currency within and beyond the territory of Armenia.

FOREIGN INVESTMENT ISSUES

Investment restrictions

- 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?

According to Armenian law on foreign investments, the legal regime governing foreign investments and the methods of their implementation cannot be less favourable than the regime governing the property, property rights and investment activities of citizens, legal entities and unincorporated enterprises of Armenia. That means that no special taxes or fees exist on foreign investment.

At the same time, the law may define those areas of Armenia wherein the activities of foreign investors and enterprises with foreign investment are limited or prohibited due to requirements of national security.

Armenia has entered and ratified about 50 bilateral investment treaties that have provisions to promote the fair and equitable treatment of foreign investors.

Insurance restrictions

- 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?

Pursuant to Armenian legislation, foreign companies may carry out insurance activities through a public offer without establishing a branch

or subsidiary legal person within Armenian territory only if they are registered in states that are parties to agreements concluded within the framework of the World Trade Organization, to which Armenia has also acceded; moreover, they may only carry out insurance relating to the following risks:

- maritime transport, civil aviation, launch of spacecrafts, freight (including the accompanying and service personnel). Such insurance may extend to the property being transported, the carrier vehicle and the responsibility arising from the transport, all together, as well as each of them separately;
- international cargo transport; and
- reinsurance, retrocession and other services relating to reinsurance.

The insurance may be carried out by a foreign company within Armenian territory through insurance brokers, or without them and must follow laws and other regulatory legal acts of Armenia.

There are no special fees or taxes that exist for foreign insurance companies.

Worker restrictions

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

Foreigners shall have the right to freely manage their working skills, choose the type of profession and activities, and be engaged in economic activities not prohibited by the legislation, by complying with the restrictions prescribed by Armenian legislation. The principle of legal equality of the parties in employment relations, established by the Labour Code of Armenia, shall be guaranteed, irrespective of their sex, race, national origin, language, citizenship and other circumstances not related to the practical skills of the employee. However, employers shall be entitled to conclude an employment contract (contract on delivery of services) with a foreign worker and use his or her work based on the work permit issued for the foreign worker by the authorised body (Ministry of Labour and Social Affairs). When issuing a work permit for a foreign worker, the authorised body shall consider the needs and developments of the labour market. With a view of assessing the needs of the labour market, a time limit is established for the employer upon the decision of the government, during which the employer is obliged to fill the available vacancies with Armenian citizens. In the case of absence of candidates to be nominated by the authorised body within the time limit prescribed, who will meet the requirements of the employer, as well as in case of rejection by the employer of the nominated candidate, the employer may find a foreigner meeting these requirements and apply to the authorised body to issue a work permit for this specific foreigner for a certain time period, by submitting the necessary documents prescribed by the government decision. A foreigner shall have the right to carry out work-related activities in Armenia based on the work permit for a foreign worker issued to the employer by the authorised body.

Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

Generally, permission to import equipment to Armenia is not needed. However, restrictions apply on importing certain equipment to Armenia. Particularly, restrictions apply on importing live animals and animal products, plants, food, weapons and ammunition, alcohol, chemical products, pharmaceuticals and drugs, trade with endangered animals and plants, and counterfeited products that are imported unless authorised governmental body gives particular licence. The reasons for these restrictions are trade policies, environmental considerations,

consideration for the health and safety of humans and protection against the spreading of animal and plant diseases. For further information see www.petekamutner.am/Content.aspx?itn=csClGoodsImportExportProcedures.

Nationalisation laws

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

Pursuant to the Armenian Constitution, everyone shall have the right to possess, use and dispose of legally acquired property at his or her discretion; no one may be deprived of ownership except through judicial procedure, in the cases prescribed by law; and the right of ownership may be restricted only by law, for the purpose of protecting public interests or the basic rights and freedoms of others. According to Armenian law, foreign investments in Armenia are not subject to nationalisation. Foreign investment cannot be confiscated by state authorities. Confiscation as an exceptional measure is allowed only under conditions of state of emergency prescribed by Armenian legislation, by court order and with full compensation.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

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?

There are no tax incentives or other incentives for foreign investors. Foreign investors have the same tax obligations as Armenian investors. Any taxes that are payable in the investor's home country may be subject to double taxation treaties, which can be invoked to avoid double taxation.

GOVERNMENT AUTHORITIES

Relevant 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?

The Ministry of Energy, Infrastructures and Natural Resources is responsible for drafting state policy in the field of natural resources and energy.

The Ministry of Transport, Communication and Information Technologies is responsible for drafting state programmes on effective management and coordination of transport, communication, postal, internet, innovation, high and informational technologies, and digitalisation.

The Public Services Regulatory Commission of the Republic of Armenia is authorised to issue licences in the field of energy (including electricity, gas, heat supply), water supply, telecommunications (electronic communications), postal communication and railway.

REGULATION OF NATURAL RESOURCES

Titles

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?

According to the Constitution, the subsoil and water resources shall fall under the exclusive ownership of the state. Private local parties as well as foreign private parties may gain access to the natural resources and extract them based on a licence received from the relevant state body.

Royalties and taxes

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

Pursuant to Armenian legislation, there are special fees and taxes for extraction of natural resources as follows:

- environmental tax;
- local tax;
- natural resources utilisation payment, including royalties;
- state fee for obtaining a licence for extraction of natural resources;
- a fee for environmental rehabilitation fundraising (reclamation) for rehabilitating damaged land during mining operations; and
- a fee for monitoring.

The royalty base is the sales turnover of any product derived from the supplied concentrate, casting instead of concentrate or casting without concentrate formation, or as a result of processing waste of subsoil use, ore, concentrate, casting during the reporting period.

The royalty rate is calculated using the following formula:

$$R = 4 + (\text{profit before taxation}) \times 100 / (\text{revenue from the supply of concentrates} \times 8).$$

There is also a methodology for calculation and adjustment of revenue from the supply of concentrates, aimed at avoiding transfer pricing.

Rights holders must also pay general taxes, such as value added tax (VAT) (20 per cent), income tax (20 per cent) and so on (income tax of employees as a tax agent, local taxes) and some other taxes established by the Tax Code of Armenia.

Export restrictions

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

In principle, there are no general restrictions on the export of natural resources. However, specific regulation may apply to certain exports depending on the type of natural resource.

Generally, goods and natural resources are freely exportable subject to sector-specific restrictions. However, the export of certain resources may be specifically restricted or prohibited, such as, atomic energy minerals, and so on.

To export extracted minerals or from Armenia, one must first obtain a licence from the relevant authorities. There are also certain taxes, fees and royalties payable in respect of some exportation.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

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

No government approval is required for project finance transactions per se under Armenian law. The implementation of a project may, however, require different types of approval. For example, a building construction project will generally require a building permit and an electric transmission project will require a network concession. Typically, projects will also be required to obtain environmental approvals. Foreign investors seeking permission will be treated as domestic parties.

Registration of financing

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 is no need for registration of project documents other than the registration of security interests as described above. Government authorities will need to approve any contract where the government is a counterparty, or any licence granted by the government where taking security requires consent.

If the document needs to be filed with a governmental entity or submitted to the courts, it must be translated into Armenian. If the document is issued abroad by the state body, authentication through an apostille is needed.

Arbitration awards

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?

Armenia is a very arbitration-friendly country. Armenia fully recognises arbitration awards and arbitration agreements through its internal laws and other international treaties to which Armenia is a signatory state. The recognition and enforcement of international contractual provisions and awards are mainly governed by the Civil Procedure Code of Armenia.

Among others, Armenia is a party to the following international conventions:

- The Washington Convention on the Settlement of Investment Disputes between States and Nationals of the Other States, which entered into force in Armenia on 16 October 1992.
- The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in Armenia on 19 December 1997.

There are no disputes under Armenian law that would be subject to automatic domestic arbitration.

Law governing agreements

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

In general, Armenian law applies to project agreements if the assets are in national territory. However, parties may contractually agree on

the governing law of their agreements. Armenian law will mandatorily govern property, tax, customs, labour and environmental aspects.

Financing agreements that require registration under any registry in Armenia or compliance with certain formalities are regulated by local laws, but do not necessarily have to be subject to the local jurisdiction if the parties to the contract have chosen a different jurisdiction.

Submission to foreign jurisdiction

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

Submission to a foreign jurisdiction to settle disputes under a contract is a valid choice under the laws of Armenia. Judicial acts delivered by courts of foreign states are recognised in Armenia and the judicial acts requiring execution shall be executed in Armenia, where such recognition and execution is provided for by an international agreement entered by Armenia or based on reciprocity.

The judicial act shall be final as delivered by a judicial authority of another state, irrespective of its title. Where the recognition and execution of a foreign judicial act depend on reciprocity, the reciprocity shall be considered existing, unless otherwise proved.

State-owned private enterprises are free to subject themselves to foreign jurisdiction with respect to their private activities.

Waivers of sovereign immunity are also enforceable pursuant to the Civil Procedure Code of Armenia.

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

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

The Water Code, the Forest Code, the Subsoil Code, the Land Code, the Energy Law, the law on telecommunication, and the Civil Code are the main legal acts regulating the typical project sectors.

See question 16 for the regulatory bodies.

PROJECT COMPANIES

Principal business structures

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

Pursuant to the Civil Code of Armenia, business entities may be incorporated in the form of limited liability companies (LLCs), closed and open joint stock companies (JSCs), partnerships and cooperatives. Considering the characteristics of these entities, mostly companies are incorporated in the form of LLCs and JSCs, which presume limited liability of the participants. Similarly, in the case of mining activities the parties would choose between these structures.

The project companies are mainly financed from the headquarters of foreign entities conducting projects in Armenia and foreign private equity funds. International and regional development banks have also been interested in financing different projects in Armenia. Domestic banks have also been engaged in financing such projects. The public securities market in Armenia is not developed to the extent of enabling a significant role in the project financing.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

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

Armenia does not have a PPP law; however, PPPs are conducted under general investment and sector specific laws.

PPP – LIMITATIONS

Legal limitations

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

As a general rule, PPP projects are awarded through public bidding processes, and will pass cost-benefit analysis intended to prove that the mentioned contract is efficient to develop the relevant project.

PPP – TRANSACTIONS

Significant transactions

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

In 2016 Veolia won management and lease contract for all water and wastewater services in Armenia. Under this contract, Veolia is entrusted with managing drinking water production and distribution, and wastewater treatment facilities; and developing and improving the yield of the country's drinking water network for a period up to 15 years. International financial institutions, such as the European Bank for Reconstruction and Development, KFW Development Bank and the European Investment Bank, are contributing to this major project in Armenia by financing the US\$200 million investment required over the four years.



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