

Ergun Publication Series: Global Legal Guides

GLOBAL PROJECT FINANCE GUIDE

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Disclaimer: *As a result of martial law currently in force in Ukraine (which is likely to be extended if the hostilities from Russia continue) and force majeure events being triggered in the jurisdiction, activity with Ukrainian clients may be subject to restrictions which are not addressed in these guidelines e.g., the National Bank of Ukraine has significantly limited cross-border FX payments (repayment of cross-border loans, performance of guaranty (suretyship) obligations, dividends repatriation and acceleration of loans are not permitted, etc.).*

A. Overview

1. What is the main legislation and international treaties governing the project financing in your jurisdiction?

Ukraine has a complex legal system, which includes an extensive range of laws and regulations governing investment activity. In addition to the general legal framework,

the key piece of legislation governing foreign investment is the Law of Ukraine "On the Foreign Investment Regime," which regulates the conditions for investment, the rights and obligations of foreign investors, and the procedure for investing in Ukraine.

It is important to note that there are other laws and regulations that apply to specific investment projects. For example, environmental and construction laws may be relevant to certain projects.

Apart from the domestic legal framework, Ukraine has also signed various international treaties and agreements that play a significant role in project financing in Ukraine. Ukraine has ratified the Convention on the Procedure for the Resolution of Investment Disputes between States and Foreign Persons in 2000, which is commonly known as the ICSID Convention. This Convention provides for the settlement of investment disputes between investors

and states through arbitration. It offers a neutral and transparent mechanism for resolving disputes that arise between foreign investors and the state of Ukraine.

Moreover, Ukraine has concluded over 70 bilateral investment agreements with other countries, which provide favorable conditions for foreign investors and govern the investment process between Ukraine and the signatory state. These agreements typically provide for the protection of investors' rights, including the protection of investments from expropriation, fair and equitable treatment of investors, and the free transfer of funds. The agreements also contain provisions for the resolution of investment disputes through arbitration.

2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?

The project finance market in Ukraine is relatively undeveloped but it has significantly grown and evolved over recent years. Restrictive exchange and capital controls make it challenging for the parties to implement traditional project finance structures. In addition, a high level of corruption adds an uncertainty over judicial independence and protection of creditor's rights. However, the Government is implementing major judicial reforms to tackle the corruption.

Against all the odds, quite a few breakthrough energy and renewables projects were supported by international financial institutions, development banks and private lenders through project finance before the outbreak of the war. The project finance was also driven by infrastructure and transportation projects but to a lesser degree.

The most notable renewables projects include:

- EUR 1,5 billion financing (a mixture of green bond and syndicate financing) for the construction of 800MW Zophia wind farm;
- EUR 372 mln non-recourse financing for the construction of the 250 MW Syvash wind farm near the Azov Sea;
- USD 150 mln limited recourse financing for the constructions of the first 98 MW phase of the 500 MW wind farm in Zaporizhia region;
- Over EUR 135 mln limited recourse financing for the development and construction of solar PV plants in the Central and South parts of Ukraine

In addition, other projects include the construction of a new runway at Boryspil International Airport in Kyiv and the construction of a new terminal at Lviv International Airport.

B. Security Interest

3. What are the most commonly used security types in project financings in your jurisdiction?

In Ukraine, the most commonly used security types in project financings include:

Mortgage: A mortgage is a common type of security interest in Ukraine, whereby a lender takes a security interest over the borrower's existing or future immovable property or assets (including, but not limited to, real estate under construction). Mortgages are typically used to secure loans for the financing of real estate projects. Unlike most of the other types of security interests, mortgages require notarization and state registration.

Pledge: A pledge is another common type of security interest in Ukraine, whereby a pledgor (e.g., borrower or a third party) pledges its movable assets (such as accounts receivables, inventory, or shares) to secure a loan.

Assignment of rights: By this type of security an obligor assigns its rights and interest (often, in project agreements) in favour of the lenders. Assignment of rights in project financing would normally be conditional on occurrence of a default. Assignment is also different from a novation which under Ukrainian laws is a substitution of an existing obligation with a new obligation between the same parties.

Suretyship: This is an agreement by which a surety undertakes to a creditor to perform the obligation of the principal debtor if it fails to perform the obligation. The suretyship is a secondary (ancillary) obligation and does not usually survive termination or cancellation of a principal obligation.

Guarantees: A guarantee, as opposed to a suretyship, is considered a financial service pursuant to the laws of Ukraine and it can be issued by financial institutions such as banks and credit unions. Guarantee is usually independent of the secured obligation and can survive its termination or cancellation.

Liens: Liens are another type of security interest in Ukraine, whereby a creditor has the right to retain possession of a debtor's property until the debt is paid. Liens are commonly used in the context of secured transactions, such as for the purchase of goods or equipment.

It is worth noting that the security types used in project financings in Ukraine may vary depending on the nature and complexity of the project, as well as the preferences of the lenders and borrowers involved.

4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?

Yes, the shares of a company can be pledged as security to the benefit of lenders. The procedure for establishing and perfecting a share pledge is regulated by the Civil Code of Ukraine, the Law of Ukraine "On Pledges", the Law of Ukraine "On capital markets and organized commodity markets" and the Law of Ukraine "On protection of creditors' rights and registration of encumbrances". The most common types of shares are the stock in the joint stock companies and the shares in limited liability companies.

A pledge of shares must be made in writing and signed by the parties. The pledge agreement must include a description of the pledged shares, the main terms of the principal obligation, and usually contains the rights and obligations of the parties.

Notarization and state registration of a share pledge is not mandatory, but in many cases are advisable, particularly, to ensure the first priority of the pledge over security interests or other creditors. Note that if the securities (stock) in a joint stock company are subject to pledge such agreement shall usually involve a depository institution and perfection (as well as enforcement) would include making respective entries in the depository system.

5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?

Under Ukrainian law, private sale is a recognized method for the enforcement of a share pledge. If the borrower defaults on the principal obligation, the lender may enforce the share pledge by selling the pledged shares privately or through a public auction. The specific method for enforcing a share pledge will depend on the terms of the pledge agreement, the type of collateral and the lender's preference.

Note that in Ukraine stock in a joint stock company exists in electronic form only. Share certificates in a paper form are not usually issued and are rarely required in security transactions. Title to stock is evidenced by a statement from the depository system and a depository institution plays an important role in the process of enforcement of such security interests.

It should be noted that in practice, the enforcement of a share pledge can be a complex process, especially if there are disputes or litigation involved. It is recommended that parties seek legal advice and follow the appropriate procedures for the enforcement of a share pledge.

6. Can security interest be established over future assets, rights and receivables of the borrower?

Yes, security interest can be established over future assets, rights, and receivables of the borrower in Ukraine. The Civil Code of Ukraine provides for the possibility of creating security over future assets, including future property rights and claims (receivables).

In order to create a pledge over future assets, it is necessary to specify the subject matter of the pledge in the pledge agreement in sufficient detail to ensure its identification in the future. Note that no full equivalent of an English law 'debenture' is available in Ukraine, meaning that each collateral must be identified in every security instrument quite thoroughly. It is also possible to secure the claims which the lender will hold in the future.

In general, the creation of security over future assets and receivables requires careful drafting of the pledge agreement to ensure that the security interest is enforceable and that the pledged assets or receivables can be identified in the future.

7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?

That would depend on the type of security interest that has been established.

If the security interest is a mortgage or a pledge, the lender can either take possession of the collateral or sell it in accordance with the procedures established by the agreement and the law. The law provides for specific procedures and timelines for taking possession and sale of the pledged assets. Note that during insolvency proceedings the claims of a creditor secured by pledge or mortgage can only be satisfied out of the value of respective collateral. Once the insolvency proceedings commence the collateral can only be sold within the supervision of respective court dealing with the case.

In all other cases, for example when security interest is constituted pursuant to a suretyship or guarantee, respective creditor's claims will be considered together with all other (unsecured) creditors and, in case of their satisfaction, such creditor will receive a payment directly from the debtor.

If the borrower enters into a composition process, the lender may be required to participate in the process and negotiate with other creditors to reach a compromise agreement. If a compromise agreement is reached, the lender will receive a share of the proceeds from the sale of the borrower's assets. If a compromise agreement cannot be reached, the lender may be entitled to file a claim in the bankruptcy proceedings.

In any case, the lender must follow the procedures established by the law to enforce its security interest.

8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?

The Civil Code of Ukraine does not provide for a distinct concept of a security trustee, however in the recent years steps have been taken to approximate Ukrainian legislation to the commonly spread legal practices in this regard. The concept of 'trust ownership' has been introduced, however, court precedents enforcing it remains quite scarce.

A parallel debt structure can be used as an alternative mechanism to a security trustee. In this structure, the borrower creates a parallel debt to the lenders that is equal to the amount of the debt owed to them. The parallel debt is secured by the same collateral as the original debt and is treated as a separate debt owed to the lenders. This structure allows the lenders to take enforcement actions on their own behalf without the need for a security trustee.

More often in project financings in Ukraine the lenders act as co-pledgees within the same mortgage or pledge agreement; further relations between them in case of enforcement should then be governed by a separate intercreditor agreement (usually governed by foreign law).

C. Incentives and Restrictions

9. What are the main incentives and exemptions for project financing in your jurisdiction?

Ukraine offers various incentives and exemptions to support investment projects with significant investments. Some of these incentives are provided under the Law of Ukraine "On State Support for Investment Projects with Significant Investments in Ukraine" and related regulations. Investment projects that meet the criteria established by the Law can benefit from the following incentives:

- **Stable legislation guarantees:** Investment projects can receive state guarantees on stable legislation for 15 years and compensation for losses caused by state bodies.
- **State support:** Investment projects can receive state support of up to 30% of the amount of significant investments in the form of exemptions and other benefits.
- **Tax incentives:** Investment projects can benefit from a corporate income tax exemption for five years from the moment of filing the application (except for projects in the sphere of extraction for further processing and/or enrichment of minerals). They can also be exempted from land tax and receive reduced rates of rent payments for land of state and communal property.
- **Customs and Value Added Tax ("VAT") exemptions:** Investment projects can benefit from exemptions from customs duties and VAT payments for the import of new equipment and components, subject to certain conditions.
- **Infrastructure support:** Investment projects can benefit from the construction of related infrastructure (such as highways, communication lines, and utilities) necessary for the realization of the project.
- **Land use rights:** Investment projects can benefit from a simplified procedure for granting the right to use (lease) of land plots of state or communal property with the pre-emptive right for acquisition of such a land plot to the property after the expiration of a special investment agreement.

Network connection assistance: If an investment project requires connection to the networks of heat, gas, water and electricity supply, utilities, etc., the state

may assist the investor with significant investments in the process of such connection within the framework of a special investment agreement.

It is important to note that the availability and applicability of these incentives and exemptions may vary depending on the specific project and circumstances, and investors should consult with legal and financial advisors to determine the most advantageous financing structure and incentives for their project.

10. Are there any incentives or exemptions specifically applicable to foreign investors?

Please refer to the answer to question 9.

11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?

Legal entities that are residents of Ukraine may receive loans from non-residents in foreign currency, including revolving financial assistance, under contracts. The loan agreement should be serviced only through one authorized bank, which is indicated in the extract from the National Bank of Ukraine's automated information system "Loan agreements with non-residents."

Before conducting foreign exchange transactions under the agreement through this bank, the legal entity should contact the bank chosen by them if the National Bank is informed about the agreement for the first time or to change the resident bank in which the account for money settlements (payments) under the agreement is opened, as well as to make changes to the information about the agreement contained in the Information System.

In terms of shareholder loans, Ukrainian law allows for the provision of such loans

by foreign shareholders, subject to certain restrictions. For example, the amount of the loan cannot exceed the amount of the shareholder's equity investment in the borrower, and the loan must be provided on an arm's length basis.

Overall, while it is possible to borrow bank loans and shareholder loans from abroad and/or in a foreign currency in Ukraine, there are restrictions and requirements that must be followed in order to do so.

12. Are there any restrictions for foreign investments in your jurisdiction?

Foreign investments in Ukraine are generally allowed and welcome. However, there are certain restrictions and limitations that apply to certain types of activities and industries, including strategic industries, such as defense, aerospace, and telecommunications.

On top of that, investments in objects whose creation and use do not meet the requirements of sanitary and hygienic, radiation, environmental, architectural and other standards established by the legislation of Ukraine, as well as violates the rights and interests of citizens, legal entities, and the state that is protected by law, are prohibited

In addition, foreign investors may face certain restrictions related to land ownership, natural resources, and other areas. For example, foreign natural persons are generally not allowed to acquire agricultural land in Ukraine, and foreign legal entities are required to obtain a special permit to acquire ownership or use rights over agricultural land.

Furthermore, foreign investors may face certain restrictions related to the registration and operation of their businesses in Ukraine, including licensing requirements and limitations on foreign

ownership in certain sectors. It is therefore advisable for foreign investors to seek legal advice before investing in Ukraine.

After the full-scale Russian invasion in Ukraine in 2022, investments from Russia and Belarus are no longer tolerated. As a result, any investment proposals from Russian or Belarusian companies are will be rejected by the Ukrainian authorities. This policy reflects the Ukrainian government's commitment to defend its sovereignty and territorial integrity, and to promote economic ties with countries that respect Ukraine's independence and territorial integrity.

13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?

There is no specific minimum equity requirement for project financings in Ukraine under the legislation. However, in practice, lenders may require a certain level of equity contribution from the borrower as a condition for providing financing. This equity contribution can vary depending on the size and risk profile of the project, as well as the overall financial strength of the borrower. The equity contribution is usually determined based on the project's capital expenditure, and may range from 10% to 30% of the total project cost. It is also common for lenders to require that the equity contribution be provided by the sponsor or a group of sponsors, rather than the borrower itself.

14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.

In Ukraine, there are certain registration and filing requirements that must be met in order for project finance documents to be valid and enforceable. These requirements

may vary depending on the type of document and the underlying asset or transaction.

For security interests, including pledges and mortgages, the relevant security documents must be registered with the State Register of Encumbrances on Property Rights. Failure to register may result in the invalidity of the security interest.

In addition, the registration of the security interest should be accompanied by payment of a state fee. The amount of the fee depends on the value of the collateral, and the fee must be paid within ten days of registration.

Other project finance documents, such as loan agreements, joint venture agreements or shareholder agreements, do not need to be registered or filed with any government authority. However, parties may choose to have these agreements notarized in order to provide greater certainty and evidentiary weight.

D. Insurance

15. Can local insurance policies be governed by a foreign law?

In general, local insurance policies must comply with the laws and regulations of the jurisdiction where they are issued.

In Ukraine, the statute provides that foreign law may be chosen to govern insurance contracts if the contract has a foreign element, such as the nationality or residence of one of the parties, the location of the subject matter insured, or the place of performance. However, the choice of foreign law cannot conflict with mandatory provisions of Ukrainian law, and local regulatory requirements for insurance policies must still be complied with.

16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

Assuming that the policy is issued by a local insurer (and reinsured by a foreign reinsurance company), there are no restrictions from insurance legislation standpoint for a local insurer to transfer an insurance indemnity in favour of a foreign designated beneficiary, provided that all supporting documents are presented to the insurer and the bank processing the payment. Depending on the type of policy and loss occurred the required documents might consist of: the insurance policy, certificates from state bodies confirming natural hazards, a loss adjuster's report, the insurer's decision to pay under the policy, the relevant lender's bank account details, etc. However, the currency control rules may prevent (currently they do prohibit) an insurer transferring indemnification abroad.

If the policy is not issued by a local insurer and reinsured by a foreign reinsurance company, the payment procedure shall be regulated by the FX rules applicable in the home jurisdiction of the insurer.

Note that, although security assignments are not expressly prohibited, local insurers are usually reluctant to enter into such agreements due to the fact that it is not clear that such security assignments are permitted under Ukrainian law.

17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?

Currency restrictions: following enactment of the martial law in Ukraine, Ukrainian entities and individuals are limited in their ability to purchase foreign currency and make cross-border payments outside of Ukraine. Ukrainian insurers are allowed, subject to applicable terms and limitations, to carry out payment of insurance premium under most reinsurance contracts concluded with non-resident reinsurers.

Payment of insurance indemnification abroad may be protracted. Please seek a specific advice.

As a matter of law, foreign licensed insurance companies are not allowed to perform insurance activities in Ukraine, except for (i) insuring and rendering brokerage services with respect to cargo and vessels property, and liability insurance under marine, aviation, and space coverage; (ii) reinsurance, and (iii) ancillary services relating to insurance (e.g., consulting). The following requirements apply to foreign insurers carrying out activities in Ukraine:

- they shall be from a country which is a World Trade Organization (WTO) member, is not Financial Action Task Force (FATF) blacklisted, and is a non-offshore zone;
- the Ukrainian regulator and the insurance regulator of such country where the foreign insurer is based must have entered into a treaty on data exchange and a treaty on preventing tax evasion and avoiding double taxation (a list of relevant agreements is available [here](#)); and
- such foreign insurer is under state supervision, has been properly licensed in its country and complies with the financial stability requirements of the Ukrainian regulator.

Foreign licensed insurance companies may operate in Ukraine following the registration of a permanent establishment in Ukraine and obtaining the relevant respective licence.

Insurance payments (payout or premium) originating from Ukraine are considered as Ukraine sourced income for non-residents of Ukraine; and accordingly such payments are subject to withholding tax.

Reinsurance obligations arise out of mandatory criteria and standards of capital

adequacy and the solvency and liquidity of the insurer. If the amount covered under the policy exceeds ten per cent (10%) of the amount of its paid-in authorised capital and reserves, the insurer is obliged to reinsure its liability. The insurer, following entering into a reinsurance agreement, remains fully responsible before a policyholder.

In practice, most of the local insurers reinsure their risks with international reinsurers due to the lack of insurance reserves.

E. Financing of Public-Private Partnership (PPP) Projects

18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?

Public-private partnership (“PPP”) is a long-term cooperation between the state and private companies, with the aim of creating, updating and further effective management of public facilities and socially significant services traditionally provided by the state.

Yes, PPP is a permitted method of developing projects in Ukraine. In fact, the Ukrainian government has been actively promoting PPP projects in various sectors, including transportation, energy, healthcare, and infrastructure.

The Ukraine PPP statutes establish the organizational and legal framework of the interaction of public partners with private partners and the basic principles of the public-private partnership on a contractual basis, while Resolution No. 384 regulates each step of the tender procedure. The Concession law regulates the implementation of concession projects. Furthermore, please note that Article 5 of the PPP Law states that PPPs may be concluded as concession agreements

Procurement procedures provide for three options:

- Competitive tendering;
- Competitive dialogue; or
- Direct negotiations

All three procedures for the selection of a private partner are available only for a concessionary PPP, while for a non-concessionary PPP only one procedure is used - a competitive tendering.

In the event of only one application in the bidding, the PPP contract may be concluded between the state partner with this applicant by agreeing with him on the essential terms of the contract, provided that such applicant meets the main qualification requirements for the participants of the competition, unless otherwise specified laws regulating relations that arise in the process of concluding public-private partnership contracts.

It is common practice when the procuring authority conducts a pre-bid conference where potential bidders can get additional information on PPP project.

The state partner controls the PPP contract implementation but cannot, however, interfere with the economic activities of the private partner or third parties.

Private partners shall provide the public partners with information on the contract performance as specified in the PPP contract, the public partner shall keep this information confidential.

Officers of the public partners monitor the PPP contract performance in accordance with their authority under the law and the PPP contract.

There is no explicit legislative provision stating that PPP implementation must be prioritized against other government investment priorities. At the same time, state targeted programs, the purpose of which is to promote the implementation

of state policy in priority areas of state development, in accordance with the Law of Ukraine “On State Targeted Programs”, can be implemented by use of the PPP mechanism.

Several PPP projects have been developed in Ukraine in recent years, including concession of seaports: Chernomorsk, Izmail Sea Port, Reni Port and others, concession of airports, construction of industrial parks, concession of railway stations, construction of highways and bridges, etc. Please review the full list here <https://pppagency.me.gov.ua/projects/>

19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?

Direct agreements between public authorities and lenders are generally permissible under law of Ukraine.

In Ukraine, direct agreements are commonly seen in project financings, including those involving public-private partnerships (PPPs).

The statute provides grounds for replacement of a private partner in PPP:

- if initiated by the state partner upon material breach of the PPP contract by the private partner;
- if initiated by the creditor (financier) upon foreclosure of security (the property rights of the private partner under the PPP contract); whether after an event of material default or on other grounds in the financing documents.

The replacement shall be made in accordance with the stipulated procedure.

20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.

In Ukraine, there are various types of host government support available for project financing. Some of the commonly used types include:

- Treasury guarantees: The Ukrainian government may provide guarantees for debt raised by project companies, typically covering repayment of principal and interest.
- Fiscal incentives: The Ukrainian government may offer fiscal incentives in the form of tax breaks, exemptions or reductions for qualifying projects.
- Paying to a private partner the payments provided for in the agreement concluded under the public-private partnership, in particular the fee for operational readiness;
- Infrastructure development support: the Ukrainian government may provide infrastructure development support such as land grants, construction subsidies, supplying a private partner with goods (works, services) necessary for the public-private partnership implementation, acquiring by the state partner a certain amount of goods (works, services) produced (performed, provided) by the private partner pursuant to the agreement concluded under the PPP.

The availability of government support for project financing in Ukraine is subject to the relevant laws and regulations, and the terms and conditions of such support are typically negotiated on a case-by-case basis.

21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?

The allocation of political risk events between the public and private parties under PPP agreements in Ukraine may

vary and depend on the terms of each specific contract. In general, political risk events are typically addressed in the PPP agreement, and the allocation of risks may be negotiated and agreed between the parties. The risks may be allocated to the party best able to manage and mitigate the risk, or to the party that is better suited to bear the risk based on its expertise, access to financing, and risk appetite. In some cases, political risk events may be shared between the public and private parties, and in other cases, the risks may be covered by insurance or other risk management mechanisms.

Evidently, it is quite difficult to purchase new policies to cover military risks during active hostilities, even if the region (district of a separate oblast, for example) has not been the object of aggression. If you purchased a policy covering war risks before 22 February 2022, or such coverage is incorporated into existing one, then it is necessary to analyze in detail the relevant provisions. Specialised political/war risk insurance policies in a similar fashion contain a list of insurance events and a number of exclusions. That is, not every loss, even caused by warfare, is guaranteed to be reimbursed. For example, the policy may cover only the direct material damage, and does not cover the seizure of the enterprise, or other deprivation of use of the insured property.

In addition, the Ministry of Economy of Ukraine reports that the Government of Ukraine has agreed with the Multilateral Investment Guarantee Agency (“MIGA”) to insure investments despite hostilities. MIGA and the Government of Ukraine are ready to implement a pilot project worth USD 30 million.

22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?

In Ukraine, investors and lenders may be protected through a stabilization clause.

The Government guarantees the stability of the conditions for investment activities, observance of the rights and legitimate interests of its entities. Terms of contracts concluded between investment entities remain in force for the entire duration of these contracts, and in cases where after their conclusion by law (except for tax, customs, and currency legislation, as well as legislation on licensing of certain economic activity types) conditions that worsen the position of the entities or limit their rights are set up, if these entities have not agreed to change the contract term. The Government guarantees the protection of investments, as well as foreign investments, regardless of ownership. Investment protection is provided by the legislation of Ukraine, as well as international treaties of Ukraine. Investors, including foreign ones, are provided with equal treatment that excludes the application of discriminatory measures that could hinder the investment management, use, and liquidation, as well as the conditions and procedure for the export of invested valuables and investment results.

However, the availability of protection depends on industry of the investment. For example, the Government of Ukraine has taken various steps to ensure that the Ukrainian electricity market is attractive to foreign investors. The most important step is the stabilisation clause, which is an undertaking by the state to preserve the favourable legal framework for renewable energy and to refrain from introducing changes that would be disadvantageous to renewable energy producers, except where changes are required in the interests of defence, national security, tax regime, public order and environment protection.

However, the effectiveness of stabilization clauses in Ukraine has been the subject of

some debate, as the Ukrainian government has been known to challenge such clauses in the past. As such, investors and lenders need to carefully negotiate and draft stabilization clauses to ensure that they are enforceable and provide the desired level of protection.

23. Is force majeure specifically regulated under the local legislation?

Yes, force majeure is specifically regulated under Ukrainian legislation. The Civil Code of Ukraine defines force majeure as extraordinary and unavoidable circumstances that cannot be foreseen or prevented by reasonable measures. Examples of force majeure events are natural disasters, military actions, strikes, epidemics, and other events beyond the control of the parties.

Under Ukrainian law, force majeure events may excuse a party's non-performance of its contractual obligations, provided that such events render performance impossible. The affected party must notify the other party of the force majeure event as soon as possible, and must take reasonable steps to mitigate the impact of the event on its performance.

It should be noted that the occurrence of a force majeure event does not automatically terminate the contract, but may suspend its performance for the duration of the force majeure event. If the force majeure event continues for a prolonged period of time, the parties may be entitled to terminate the contract based on the provisions of the contract or on the grounds of material breach of contract.

It is an established rule of business customs and statutory law that a person is released from liability for breach of contract if he/she proves that a breach was caused due to accident or force majeure. Article 14-1 of Law of Ukraine 'On Chambers of Commerce and Industry of Ukraine' (dubbed by

Regulation on certification of force majeure by the Chambers of Commerce and Industry of Ukraine) provides for the list of such circumstances: war or threat of war, armed conflict or serious threat of such conflict, hostile attacks, blockades (including the closure of ducts), a ban on exports or imports, military embargoes, mobilization, armed forces actions, riots (including elements of hybrid aggression), acts of terrorism, sabotage, piracy, invasion, curfew, requisition (seizure), fire, explosion, flood, illegal actions of third parties (illegal seizure of an enterprise), quarantine, etc.

The list of statutory force majeure grounds coincides in many respects with the situations invoked by martial law or during other special periods (see the table).

Lack of funds, short supply of services or commodities, exchange rate volatility is generally not considered force majeure. Therefore, the behavior of the markets should greatly impress the judges before they allow any exception to this rule. In our opinion, theoretically, this may be an objective impossibility to make a payment as a result, if the bank does not work, in particular, due to the lack of electricity supply in the region, destruction of equipment, unauthorized interference with the operation of the bank's computer networks or the bank is closed in connection with the risk of physical seizure or destruction of branches - in case of blocking the relevant settlement by the enemy; legislative restriction of payments, in particular cross-border currency transfers - as currently introduced by the National Bank; bankruptcy of a systemically important bank or large clearing house member of an organized commodity market, such as electricity, fuel; The physical inability of a director or accountant to make a payment if they are under occupation or shelling without access to a client-bank system and unable to move to a safe place where there is an operating bank.

Certification of force majeure

The Chambers of Commerce and Industry of Ukraine (“CCI”) and its regional divisions are authorized to issue a certificate of force majeure, which is sufficient evidence under the Ukrainian law. A breaching party must apply to the CCI for a certificate and, establish, to the contemplation of the CCI expert, the causal link between the force majeure and non-performance of the contract.

With the extreme situation caused by the initiation of the war, the CCI has published on its website a general official letter certifying force majeure of Russia’s aggression against Ukraine – from 24 February 2022 until the end. Thus, the procedure for the martial law period had been simplified: a business no longer needs to apply to the CCI with a bundle of documents to certify force majeure on each contract. The only thing you must do is to establish the respective causal link with the non-performance of the agreement.

Moreover, the contract may contain a provision, if force majeure lasts more than a certain period (for example, 90, or 180 days), the contract may be terminated at the initiative of one of the parties.

24. What are the general environmental and social requirements in project financings?

In project financings, environmental and social requirements are often included in project financing agreements, and they aim to ensure that the project is developed and operated in a manner that is consistent with sustainable development principles.

There are no environmental requirements in private project financings as such, however the restrictions or obligations might be applicable to the operating project (e.g., plant or factory) itself.

The environmental and social requirements are those mostly dictated by lenders.

However, for PPP obligatory projects assessments conducted when identifying and preparing a PPP:

- Socio-economic analysis
- Fiscal affordability assessment
- Risks assessment
- Comparative assessment of PPP v. non-PPP procurement
- Financial viability assessment
- Environmental impact assessment
- Social impact assessment
- Market sounding for private sector interest
- Market sounding for technological solutions

The procuring authority entity does not provide or facilitate obtaining of the environmental permits, such as emission permit, permit for felling green areas etc.

Instead, the procuring authority, as the investor in the construction (site owner), must procure an environmental impact assessment as a prerequisite to commence the construction works.

Article 4 (2) of the Law on Concession puts a burden of the environmental impact assessment (EIA) on a concessionaire (private partner) after the concession contract has been signed.

This norm conflicts with Article 2 (3) of the Law of Ukraine on Environmental Impact Assessment, which stipulates that state authorities, local self-government bodies (i.e., public partner) are the subjects of the EIA whenever such public partner is a customer of the planned activity. Their role under the concession contract can be designated as a customer (procuree of the public service).

F. Jurisdiction, Waiver of Immunity

25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

As a matter of principle, Ukrainian law permits the parties to a contract to freely elect the law which shall govern their agreement, provided that (i) such agreement is an “international contract”, and (ii) such election is made in good faith, i.e., without the intention of avoiding application of any mandatory provisions of Ukrainian law which would have otherwise applied to such agreement.

The Ukrainian State and State entities generally do not enjoy sovereign immunity in Ukraine with respect to applications to have an arbitral award or foreign court judgment against them recognised in Ukraine. However, there are certain assets of the State which are unable to be enforced against, e.g., fixed assets of enterprises in which the Ukrainian State holds 25% stake or more and such immunity cannot be waived.

Under Ukrainian legislation, foreign States enjoy absolute jurisdictional immunity under Article 79 of the Law of Ukraine “On international private law”. Such immunity can be waived by the competent organs of the respective State.

Recent court practice has shown the willingness of the Ukrainian courts to change that approach in favour of functional immunity. In particular, the courts have applied the United Nations Convention on Jurisdictional Immunities as a rule of customary international law as in *Everest et al vs Russia* (Case No. 796/165/2018). The courts have also suggested that an agreement to arbitrate in a bilateral investment treaty can constitute a sufficient waiver of State immunity.

It is worth noting that the enforcement of submission to a foreign law and waiver of immunity provisions may be subject to the terms of any relevant bilateral or multilateral treaties to which Ukraine is a party.

26. Can financing documents provide for arbitration clauses?

Financing agreements in Ukraine are typically governed by Ukrainian law where the parties are Ukrainian. If the financing agreement involves a foreign party, it can be governed by the law chosen by the parties. In practice, English law will typically be chosen by the parties.

Ukrainian law will apply if it is chosen by the parties and where the rules of the Ukrainian private international law is so direct (in the absence of the parties’ choice). In that case, the parties’ agreement to refer their disputes to arbitration is effective and enforceable in accordance with Article II of the New York Convention.

Where there is no foreign element present in a relationship, including where all of the parties are Ukrainian, the parties are not free to choose a foreign law. Mandatory rules of Ukrainian law will apply irrespective of the parties’ choice of law.

G. Trends and Projections

27. What are the main current trends in project financings in your jurisdiction?

A full-scale Russia’s invasion of Ukraine has badly impacted the economy and led to suspension of infrastructure and energy projects, not to mention that a severe damage has been caused to social, energy and transportation infrastructure of Ukraine.

However, even during the wartime, we see that a number of social projects such as the construction of child hospitals or residential

properties for displaced are being financed by international financial institutions.

The war and high political violence risk remain to be the biggest obstacle for the international investors and financial institutions to finance the projects in Ukraine, even if the projects are located in the Western part of Ukraine and remain untouched by the war. Therefore, most of the construction or renovation projects are structured through the participation of sovereign which either acts as direct borrower or issues the sovereign guarantee in order to cover the political violence risk for the financiers and investors. We therefore anticipate that all projects during the war time will be driven or supported by the state until the war ends.

28. Are any significant development or change expected in the near future in the project finance market?

Thanks to Ukraine's success on the battlefield, we can observe a growing interest of international donors, international financial institutions, development banks and equity funds in the future recovery and reconstruction in Ukraine after the war is over.

For instance, BlackRock FMA will provide advisory support for the Ministry of Economy to design an investment framework with a goal of creating opportunities for both public and private investors to participate in the future reconstruction and recovery of the Ukrainian economy. It is expected that Black Rock will manage an up to US\$ 25 bln investment fund for reconstructing the Ukrainian infrastructure destroyed or damaged during the war.

On the other side, IFC has launched \$2 bln response package in financing and guarantees to support Ukrainian private sector. DFC, the U.S. development finance institution, has committed to provide

debt financing and credit risk coverage for Ukrainian private projects. It is also expected that the MIGA will allocate funding for political risk insurance for Ukraine-related projects in a broad range of sectors. In addition, the EBRD, the EIB and other development banks have committed to provide financing and support for Ukraine.

Given the foregoing, we trust that a massive financing for the Ukrainian energy, housing, healthcare and infrastructure projects will be unleashed by international financial institutions and donors once the war is over.

29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?

In order to depart from LIBOR and apply new benchmarks, the National Bank of Ukraine has advised that Ukrainian banks and non-banking financial institutions to refrain from concluding agreements and using financial instruments that reference LIBOR and switch instead to benchmarks that has been published on the official websites of central banks, including the Federal Reserve System, the European Central Bank, and international institutions.