

Germany

PrimePartners Wirtschaftskanzlei

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1 Overview

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

The Eurozone experienced stable growth in 2017, although it suffered from certain political and geopolitical uncertainties. Great Britain's vote to leave the European Union will lead to a disruption of the seamless relations between Great Britain and the European Union. However, both sides intend to reduce the economic consequences to a minimum. Several major terrorist attacks in 2017, e.g. in Belgium, France, Great Britain and Germany, reminded communities of the unresolved matter of the influence of the Arabic revolutions in the Middle East and North Africa, and the massive number of refugees still arriving in Europe with unclear status. The European Central Bank continued to stimulate the capital market and provides significant Euro liquidity. Europe's economy is in a good condition. In Germany, at least in certain regions, most inhabitants have the status of full employment, with an unemployment rate below 2 per cent; tax payments are at an all-time high and nationally there is a surplus in the public sector. Mergers and acquisitions (M&A) and private equity (PE) activities are close to the peak of 2017. The trend for 2018 remains strong. Although the overall amount of transactions in 2017 was lower than 2016, due to several high-value deals, the total value of the transactions doubled in 2017. The German Mittelstand maintains the acquisition target of foreign investors, although some larger targets came into the focus of investors. Restructuring transactions of all kinds as well as heavy industries, the health care sector, and the transportation and energy market (including wind parks and solar) are strong.

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

In Germany, numerous transportation and alternative energy projects also represent significant project financing:

- "Siemens" and "Alstom" intend to merge their train development divisions;
- the financing of the offshore wind parks "Nordsee One", "Nordergründe" and "Butendiek";
- the redevelopment of the campus of the Schleswig-Holstein university hospital;
- development of the autobahn A7; and
- purchase of the natural gas supply company, Thüringen-Sachsen, including the respective gas distribution systems.

2 Security

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

The establishment of securities and their priority depend on the type of asset and the type of the security requested. A general security agreement is achievable for assets of the same type and/or securities of the same type.

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

German law differentiates between security over real estate and security over movables and other equipment. Security over real estate can be established by land charge (sec. 1191 German Civil Code (*BGB*)) or mortgage (sec. 1113 *BGB*). Land charges and mortgages extend to accessories which are to be considered an economic unity with the real property according to secs. 97 and 98 *BGB*. Security over other equipment can be established by a security transfer or a pledge agreement.

Land charge

The creation of a land charge requires a notarised agreement by a German notary public between the owner of the land and the secured party about the encumbrance on the real estate and registration with the land registry. Perfection of a land charge is effected by registration with the land registry or, if a land charge certificate has been issued, by transfer of the land charge certificate. Under German law, the first-to-file rule applies, thus the chronological order of land charges – pursuant to the filing date – over the same real property determines their priority; namely, if an earlier land charge is already registered with the land registry, such land charge takes precedence over subsequent land charges. With regard to the security agreement by which the owner of the real estate and the creditor agree that the land charge shall secure a certain claim of the creditor, no formal requirements apply; however, for verification purposes, written agreements are recommended.

Mortgage

Like a land charge, a mortgage is perfected by notarised agreement by a German notary public between the owner of the real estate and the creditor, stipulating the encumbrance of the land and registration of all essential circumstances (e.g., underlying claim, interest and creditor) with the land registry. Its priority is established according to the first-to-file rule.

Security transfer

It is characteristic of a security transfer that the party granting security usually remains in possession of the transferred assets and is therefore still in a position to use the assets economically, even though it is no longer the legal owner of the asset because of the transfer of ownership. Because of the tax on the transfer of real estate, in practice this security is executed in relation to movable assets only.

A security transfer of movables requires an agreement on the transfer of ownership of the asset for a certain period of time, usually until the secured claim is completely satisfied. With respect to such transfers, the principle of certainty has to be observed; namely, a third party must be able to determine which specific assets are transferred as security. Transfer of ownership usually requires transfer of possession; to make it possible for the debtor to keep using the assets, however, this transfer of possession is often replaced by a separate agreement by which the debtor is entitled to hold possession on behalf of the secured party. Further, the debtor and the creditor have to agree on what claims of the creditor shall be secured and the process of foreclosure, if the creditor's claim is not satisfied. There are no formal requirements for security transfer agreements, but for certainty and verification reasons a written agreement is highly recommended.

Regarding priority, the security right that was perfected first – i.e., at an earlier date – has prior ranking. A security transfer of movables requires no registration; therefore, no fees or taxes are incurred. Real estate may also be transferred as security; however, the transfer of real estate incurs real estate transfer taxes of approximately 3 per cent of the land's value, and is therefore very seldom used as security.

Pledge

In order to perfect a pledge on movable assets, transfer of possession is required. The pledge of rights requires the notification of the relevant third party (e.g., bank, customer) of such pledge. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

Rights, for example receivables, are usually assigned by global assignment agreements pursuant to which the debtor assigns all existing and future claims in connection with customer relations or other claims to the creditor for security purposes. With regard to the assigned claims, the principle of certainty applies; namely, if the claims assigned are not determinable, the assignment is invalid and unenforceable. Further, claims already assigned to third parties are not assignable, as the priority principle on the date of assignment applies.

In general, no formal requirements exist to perfect such global assignments, but to avoid any uncertainty about which claims are assigned and for verification reasons, written agreements are common.

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

The pledge of rights requires a notification of the relevant third party (e.g., bank, customer) of such pledge. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

In the case of pledging shares in a German limited liability company (*GmbH*), a notarised pledge agreement is required by law; namely, it must be signed in front of a German notary public after having been read aloud and in its entirety to the parties. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

The fees of the notary public depend on the value of the land or shares and vary from 1 per cent to less than 0.3 per cent.

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

In case of land charges, mortgages and pledging shares in a *GmbH*, the respective agreements need to be notarised by a German notary public. This leads to notary fees, consisting of fees for registration and issuance of a land charge certificate, if applied for, as mentioned under questions 2.2 and 2.6 above. The creation of land charges and mortgages needs to be registered with the land registry.

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

Usually, under German law, government approvals are not required for project finance transactions. However, for project implementation, different types of approval exist (e.g., building permits, permissions under the Water Resources Act, Water Waste Act, Federal Mining Act, etc.). As the requirements for each permission vary, before the implementation of the project there should be a careful review of whether all necessary permissions already exist or may be obtained. A foreign investor would not be treated more strictly in obtaining a required permission, but the German Federal Ministry of Economics and Technology (*BMWi*) may restrict a foreign investment if public security is threatened.

3 Security Trustee

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

Under German law a corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party. To perfect such an arrangement, it needs to be established whether the security is non-accessory or accessory. In

the case of non-accessory securities, the security may be granted directly to the agent or trustee. In the case of accessory securities, the security is granted to all project lenders and the security trustee or agent as their representative.

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

The security agent is a common position in project finance agreements in Germany.

4 Enforcement of Security

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

The enforcement of security interests depends on the type of collateral granted. The following list briefly outlines the enforcement of the different securities:

Land charge, mortgage

A security enforcement of land charges and mortgages is usually realised through public auction or sequestration. The process of public auction and sequestration is governed by the German Act on Enforcement. Any foreclosure action has to be ordered by the court.

Security transfer

In the case of a security transfer, the process of realisation is usually agreed by the parties within the security agreement. As the debtor usually remains in possession of the transferred assets, the creditor often empowers the debtor to sell the assets and in return the debtor assigns the proceeds to the creditor.

Assignment of rights

The realisation of an assignment of rights is usually conducted through forfeiture of the assigned claim. The creditor may also decide to sell the assigned claim or rights if such sale is not disadvantageous. However, a sale of claims is usually inappropriate as the purchaser will probably not pay the nominal value of such claims.

Pledge

A pledge is realised through the sale of the assets or public auction, whichever is more profitable. As the cost of a sale is usually lower than the cost of a public auction, a sale is more common. If the proceeds of such sale exceed the security, the debtor is entitled to claim the excess amount.

Guarantee, surety

If the debtor is in default, the creditor is entitled to demand payment from the guarantor.

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

Under German law, no restrictions apply to foreign investors

or creditors in the event of foreclosure on the project and related companies.

5 Bankruptcy and Restructuring Proceedings

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

Pursuant to the German Insolvency Code, insolvency proceedings may be opened over the assets of individuals and legal entities. Insolvency proceedings over the assets of a company are opened in the case of over-indebtedness or illiquidity, if insolvency proceedings are initiated either by the company itself or one of its debtors. Insolvency proceedings are opened by court order and an insolvency administrator is appointed, who then is the only one who has the power of disposal over the company's assets. Often a preliminary administrator is appointed who has limited power and operates the company and its assets jointly with the company's management. The insolvency administrator is in charge of seizing the business assets and has to enforce clawback rights. After insolvency proceedings are opened, the creditors have to file their claims with the insolvency court.

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

Under German law, different clawback rights exist if the debtor has transferred assets within three months preceding the opening of insolvency proceedings, provided that such transfer was intended to harm its creditors. In the case of fraudulent transfer (transfer with the intention to harm the creditors), all transfers in the 10 years preceding the opening of insolvency proceedings may be challenged.

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

Public agencies may not be the subject of insolvency proceedings.

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

German law provides fast-track procedures and injunctions to seize assets in cases of urgency.

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

German law provides the possibility for insolvency protection proceedings under a company's own administration (slightly similar to the "chapter 11 proceedings" used in the US) if it is threatened with insolvency or over-indebtedness. The court appoints a trustee for the company's assets while the company and its board of creditors are granted three months to implement an insolvency plan. The court may only deviate from unanimous decisions of the board

of creditors if the insolvency plan is obviously futile. Dissenting creditors trying to fight the implementation of the insolvency plan have to show credibly that they are subject to worse conditions under the plan. The insolvency plan may contain a debt-for-equity swap by way of remedial action. Such debt-for-equity swap provides certain advantages for the acquirer, in the form of limited liabilities compared to the regular acquisition of shares.

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

In the case of insolvency or over-indebtedness, directors are obligated to apply for insolvency proceedings instantly, or in any case, no later than within three weeks. Failure to do so is a criminal offence, and directors are personally liable for any damages caused by the delayed application. In cases of obvious infringement of such obligation, e.g., obvious over indebtedness or manoeuvres intended to cause damage to certain creditors or to benefit other creditors, such action may not be insured by directors' and officers' liability (D&O) insurance.

6 Foreign Investment and Ownership Restrictions

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

Under German law, there are no general restrictions on foreign investment in, or ownership of, project and related companies. However, it should be noted that in 2009, the German Foreign Trade and Payments Act and the Foreign Trade and Payments Regulations were amended. The law enables the German Federal Ministry of Economics and Technology (*BMWi*) to examine and possibly prohibit acquisitions by foreign investors (from outside the European Union), who wish to acquire directly or indirectly 25 per cent or more of the voting rights in a German company, if this is essential to safeguard the public policy or public security of the Federal Republic of Germany. The law is not limited to specific sectors and enterprises; its aim is not to abandon the country's open investment strategy but to ensure that, in individual cases, the *BMWi* has measures at its own disposal to examine foreign investments.

The law does not provide for the registration of foreign investments. Thus, a foreign investor would not be obliged to register the envisaged investment. However, in order to verify if an acquisition would be deemed to be against public policy or public security, the investor may request a legally binding certificate of non-objection prior to the envisaged acquisition. Such application needs only to outline the basic elements of the acquisition, the investor and its field of business. If the *BMWi* does not start an investigation of the acquisition within one month of receipt of the investor's written request for a certificate of non-objection, it will be deemed to have been issued. For tax reasons, there are no disadvantages in foreign investments, as they trigger the same taxes as domestic investments.

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

The prohibition or restriction is only possible in exceptional cases, because it may only be restricted or prohibited if it is a threat to public policy or public security, as established by articles 52 and 65 of the Treaty on the Functioning of the European Union and according to

case law of the European Court of Justice. Therefore, the existence of a concrete and serious threat to the fundamental interests of society is required. Within three months of the signature of a purchase agreement, the *BMWi* may initiate the examination of foreign investments. In this case, the investor would be obliged to submit all necessary information in connection with the acquisition. After the receipt of the information, the *BMWi* has to decide within two months whether the examined acquisition should be subject to certain conditions or prohibited. If the *BMWi* takes no action within this period, the acquisition may no longer be prohibited or made subject to any conditions.

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

Article 14 of the German Constitution guarantees property rights. However, it also obliges the use of such property for the public good. Otherwise, expropriation is permitted, constitutional and lawful provided that reasonable compensation is paid. Specific German laws allowing expropriation are:

- the Federal Building Code;
- the Federal Highway Act;
- the Regional Highway Act;
- the Air Traffic Act;
- the Energy Act;
- the General Railway Act; and
- the Regional Water Act.

However, expropriation under the above-mentioned laws is only permitted if it is necessary for the public good.

7 Government Approvals/Restrictions

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

Generally, regional authorities are in charge of approvals and supervision, although in a few cases federal agencies are the responsible authorities.

Transport

Air traffic that is regulated by the Federal Air Traffic Act is supervised by the Federal Air Traffic Agency. Railways are mainly governed by the Federal Railway Act and supervised by the Federal Railway Authority. Public transport is regulated by the Federal Public Transportation Act and supervised by regional authorities. Shipping transport and ports are supervised by the Federal Water and Shipping Act.

Water treatment

The commercial use of water is mainly governed by the Water Resources Act, Waste Water Levy Act and the State Water Acts.

Chemicals

Pursuant to the Federal Chemicals Act, the registration of chemicals is handled by the Federal Environment Agency.

Energy

The energy market is regulated by the Federal Energy Act and supervised by the Federal Network Agency for electricity, gas, telecommunications, postal services and railways.

Minerals, oil and gas

The extraction of minerals is mainly governed by the Federal

Mining Act, pursuant to which regional authorities are usually in charge of the administrative procedures thereunder.

Finance

To conduct business in the banking sector, permission under the Federal Banking Act is required. The supervision of the banking and finance sector is carried out by the Federal Financial Supervisory Authority (*BaFin*).

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

Under German law, no substantial documentation formalities exist regarding finance or project agreements. In some cases formal requirements, such as a written form (e.g., surety, lease agreements), need to be observed in order to execute legally binding and enforceable agreements. For verification reasons, written agreements are highly recommended even if a written form is not required by law. If foreign investors are party to the agreement, bilingual documentation is recommended; namely, German and English. If the project company is a *GmbH*, please note that its incorporation, any transfer of shares, and any share pledge, need to be notarised, as mentioned above.

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

In general, under German law, the owner of land is also the owner of the natural resources therein. However, according to the Federal Mining Act, the resources listed therein do not belong to the landowner. Therefore, the right to extract these natural resources, for example, oil and gas, is assigned by the state. With respect to the commercial use of water, a permit pursuant to the Water Resources Act is required.

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

The royalties to be paid for the extraction of natural resources are governed by the Federal Mining Act and are assessed by the regional authorities. In general, no restrictions with respect to the export of natural resources exist. Export permissions are required only for goods listed in the Foreign Trade Act: specifically, dual-use goods; namely, goods that may be used for civil and military purposes.

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

In Germany, no significant controls, taxes or other charges exist with respect to foreign currency exchange. However, the rules regarding the prevention of money laundering need to be observed with respect to currency exchange transactions. Concerning fees in relation to foreign currency exchange, it should be noted that banks usually charge exchange or transaction fees.

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

Except for double taxation agreements, no specific regulations exist

regarding remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loan payments to parties from foreign jurisdictions. There are no restrictions on the distribution of profits of a German project company to shareholders in other jurisdictions. There are no legal obligations for German project companies to repatriate foreign earnings. Nor is there any restriction on their use. However, there might be contractual obligations on the project companies to do so.

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

Yes, foreign currency accounts may be established by German project companies abroad and in Germany as well. There are no legal restrictions. However, such accounts have to comply with German tax and money laundering rules.

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

Except for double taxation agreements, no specific regulations exist regarding remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loan payments to parties from foreign jurisdictions. There are no restrictions on the distribution of profits of a German project company to shareholders in other jurisdictions.

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

Different laws apply depending on the relevant project sector. There are various laws that govern the environmental aspects of a project; for example, the Water Resources Act, the Waste Act, the Federal Pollution Act, and so on. As regards health and safety, there exist numerous sector-specific laws. Basically, the employer is obliged to safeguard its employees from injury and to take all reasonable measures, taking into account the nature of the business.

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

A *GmbH* is the most favoured structure for project companies in Germany. To set up a *GmbH*, a notarised deed of incorporation is required. Further, under German law, the purchase of a shelf company is possible, which also needs to be notarised. The principal financing sources for German project companies are the facilities provided by banks. Other possible legal structures for project companies are limited partnerships and stock corporations.

8 Foreign Insurance

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

Foreign insurers not registered in an EU or EEA Member State may

also carry out insurance business in Germany. However, they have to be admitted in Germany. The authority for the issuance of such admission is the Federal Financial Supervisory Authority (*BaFin*). Insurers registered in an EU or EEA Member State and having a valid licence within an EU or EEA Member State, in contrast, may conduct their insurance business in Germany without further permission. This is known as the European passport or single-licence principle.

In order to be able to operate in Germany, however, the insurer has to go through a notification procedure with the *BaFin*.

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

Insurance policies over project assets can be payable to foreign (secured) creditors.

9 Foreign Employee Restrictions

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

There is a distinction between EU citizens and citizens of other countries. As EU citizens have the right of free movement and labour, they may establish themselves independently in Germany and work without a visa or permit. Non-EU citizens need to obtain a residence permit for work in order to start working in Germany. Specific transition rules may apply to certain countries which joined the European Union recently.

10 Equipment Import Restrictions

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

Under German law, no specific restrictions regarding the importation of project equipment exist. An import permit is required only for products in specific categories, from certain countries or certain goods listed in the import list of the Foreign Trade and Payments Act. Under the law against terrorism, further arrangements with certain individuals, groups and organisations are prohibited.

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

Customs duties (especially importation VAT, currently at 19 per cent) are only payable for goods imported from outside the European Union which are not just temporarily imported and re-exported after a few months.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Force majeure exclusions are generally available according to law. In some cases (e.g., the German Liability Act (*HaftPflG*)), liability for *force majeure* is already explicitly excluded by law. Thus, it should be checked in each case whether such *force majeure* exclusion is applicable for the intended project.

12 Corrupt Practices

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

Corrupt business practices and bribery are criminal offences according to sec. 299 *ff.* of the German Criminal Code (*StGB*), and are punishable by penalty, or imprisonment for up to five years in particularly serious cases. Corrupt business practices are prohibited under sec. 3 of the German Act Against Unfair Practices (*UWG*) and subject to damages according to sec. 9 *UWG*.

13 Applicable Law

13.1 What law typically governs project agreements?

Typically, German law applies; see question 13.3 below for details.

13.2 What law typically governs financing agreements?

Typically, German law applies; see question 13.3 below for details.

13.3 What matters are typically governed by domestic law?

The parties may freely choose the applicable law, provided that such choice is not intended to circumvent public order and is not in conflict with mandatory law. A choice of law will usually be accepted by a German court. In practice, usually the jurisdiction of the main centre of interest of the project will be agreed on; e.g., if the financing is provided by German banks, the facility agreements will be governed by German law. In the case of international projects, the facility agreements are often governed by English law. However, it needs to be pointed out that the security documentation regarding assets located in Germany has to be governed by German law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, submission to a foreign jurisdiction would be effective under German law. With regard to enforceability, a distinction needs to be made between orders from courts within the European Union and those from courts in other foreign countries. Orders from EU courts are directly enforceable in Germany. In other cases, enforceability depends on bilateral treaties.

15 International Arbitration

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

Germany is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, foreign arbitration agreements and arbitration awards

are recognised by German courts. However, the vast majority of commercial disputes are dealt with by national courts.

For the enforcement of such arbitration awards, a declaration of enforceability by a regional court is required.

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

Germany is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

Matters of public interest, such as the granting of permits by public authorities or criminal law matters, are not arbitrable.

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

Any type of arbitrable disputes may also be subject to foreign arbitration. However, certain types of disputes, in particular where public parties are involved, are not subject to arbitration but to ordinary court jurisdiction only.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Germany remains one of the most stable economies in the world. Because of its convenient statute-based system and the convenient enforceability of German law-based judgments worldwide, German law is therefore often chosen by parties to avoid uncertainties due to political risks and/or corruption in other jurisdictions.

17 Tax

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

In general, there are no obligations to deduct or withhold tax from: (i) interest payments under a fixed interest-bearing loan, which is not secured by German real estate or by ships entered into the ship register; (ii) proceeds of a claim under a guarantee; or (iii) the proceeds of enforcing security.

However, if there is a profit from a loan, there is an obligation to withhold 26.375 per cent tax on these payments, provided the borrower does not qualify for benefits under an applicable tax treaty.

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

Foreign investors are treated like domestic investors, so that from

a tax point of view, no disadvantages result from investment. Depending on the type of investment, certain tax advantages may be applicable, as double taxation agreements exist with certain countries. Thus, it should be checked whether such agreements are applicable for the intended project.

18 Other Matters

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

There are no specific public bodies that regulate the project finance industry in Germany, and mandatory law is very limited in this regard. All relevant public law aspects of the project (permits, concessions, approvals, supervision, etc.) are handled by the public authorities competent for the applicable subject matter (e.g., renewable energy sector). Accordingly, a variety of laws and authorities may have to be considered/dealt with, and any kind of collateral can be limited by mandatory law (for instance, subsidiaries are limited in granting collateral for their parent companies).

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

A public placement of capital market instruments and/or admission to trading in a regulated market requires a prospectus based on the EU prospectus regime. There are a couple of market segments for bonds, and not all of them accept project companies. Further, if the parent company provides any kind of guarantee, it needs to fulfil certain disclosure requirements as well. If the bond comprises an equity kicker or similar instrument, it may require a resolution by the issuer's shareholders and, if there is a broad shareholder basis, shareholders' subscription rights are to be granted.

19 Islamic Finance

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

Istina'a, *Ijarah*, *Wakala* and *Murabaha* each have similar or corresponding legal institutions available under German law. Details of structuring may be different depending on the asset(s) involved:

Istina'a

Istina'a may be used for any manufacturing or processing projects, where the asset or project structure is manufactured/implemented over different stages/milestones. For each stage/milestone, a down-payment is agreed in advance. This provides ongoing liquidity to the manufacturer paid for the actual work finalised. It is similar to a service contract with down payments.

Ijarah

Ijarah is a leasing concept that can be used for assets and equipment, similar to regular leasing contracts. The bank/lease provider purchases the asset/piece of equipment and leases it to the user. The

leasing fee/rent is usually paid for management and maintenance over a fixed period of time.

Wakala

Powers of attorney may be given according to German law. Some powers may require a specific form under German law; for example, a notarial deed.

Murabaha

Murabaha is a fixed-income loan for the purchase of goods (real assets). The creditor purchases the goods and then sells them to the beneficiary for the purchase price plus an additional profit margin. Payment for the loan is not provided by interest (over time). The creditor is compensated by the profit margin paid by the beneficiary.

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

Shari'ah may be agreed by the parties as the governing law in an arbitration clause or arbitration agreement. We doubt that ordinary courts may acknowledge *Shari'ah* as governing law. No precedents have been seen so far.

As only very few cases of Islamic law-based financial products have been issued in Germany, we may not state any notable case of dispute or jurisdiction so far. Also, currently we do not see a trend in favour of Islamic financing in Germany.

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

The inclusion of an interest payment in a loan agreement is not permitted by Islamic law (*Shari'ah*). Under German law, such

provision does not cause any issues. No case has been reported to date in which such provision has resulted in a validity issue or hindered its enforceability if Islamic law applies to the contract and the intention is to execute such provision in Germany.



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At PrimePartners, Adi Seffer brings more than 20 years of experience in corporate & IT transactions and financings with national and international reach. He has advised his clients as lead counsel in more than 70 buy-outs, private, public or restructuring transactions and outsourcings. Trained in international law at the universities of Frankfurt, Munich and the London School of Economics and Barcelona, he started his career as a lawyer in 1990, becoming a partner in 1993 at a major national firm. From 2001 to 2005 he served as Head of Business & Finance and Technology at an international US firm. Since then he has continued his legal transactional advisory services with his entrepreneurial spirit and enthusiasm. Adi is one of the foremost certified specialists in International Business Law in Germany, a lecturer for acquisition finance and restructuring at the Frankfurt School of Banking & Finance, and an author and speaker on M&A, Finance and Restructuring topics.

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