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The cover features several large, dark green leaf-like shapes scattered across the background. These shapes are stylized and vary in size and orientation, creating a natural, organic feel. They are positioned behind the text, adding depth to the design.

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Project Finance

Second Edition

Lebanon

El Khoury & Partners Legal Counsel (EKP)

chambers.com

2019

Law and Practice

Contributed by El Khoury & Partners Legal Counsel (EKP)

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El Khoury & Partners Legal Counsel (EKP) has offices in Beirut, Dubai and Riyadh, and has been serving the Middle East for more than 15 years, combining best practice knowledge with deep expertise in local Middle East markets. EKP advises government procuring entities and project sponsors on limited or non-recourse financing projects, and is the go-to firm for PPP projects. The team can provide

support throughout a project's lifecycle, from the initial bid to operation and handover, offering expertise in executed projects spreads across various sectors, including city development, social infrastructure, healthcare, water and power, transportation, waste-to-energy and telecoms.

The firm would like to thank Lea Hani for her contribution to the guide.

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1. Project Finance Panorama

1.1 Recent Trends and Development

Despite the prominent role of the banking sector in the Lebanese economy, project finance is not yet well developed, mainly due to a lack of major infrastructure projects for the past 40 years. Furthermore, banks have been particularly attracted by investments in Lebanese sovereign bonds, which yield much more interest than long-term project financing. However, this situation is not expected to last.

Law No. 48 on Public-Private Partnerships was passed on 7/09/2017 and published in the Official Gazette on 14/09/2017. Its main objective is to promote private investment in public infrastructure projects that cannot be afforded by the state.

In April 2018, the Lebanese government presented the Capital Investment Plan (CIP) at the “Conférence économique pour le développement, par les réformes et avec les entreprises” (CEDRE), which aims to seek funding from international donors to, inter alia, refurbish and expand Lebanon’s eroded public infrastructure. The rationale behind the choice and allocation by the government of the 269 infrastructure projects is to “reduce inequality” by addressing structural deficiencies of poorer districts and mitigating the impacts of the Syrian crisis (as reported in the Lebanese Center for Policy Studies (LCPS) brief entitled “CEDRE Capital Investment Plan: Scrutinising the Allocation of Projects and Funds Across Regions”).

The plan received funding pledges of USD11.06 billion (including USD10.2 billion in loans, out of which USD9.9 billion is on concessional terms and USD0.86 billion is in grants and subsidised loans).

Due to this recent development, project finance is expected to develop in Lebanon.

1.2 Sponsors and Lenders

The government’s executive body for redevelopment is the Council for Development and Reconstruction (CDR). Foreign contributors are the council’s main financing sources, including The World Bank, the Arab Fund for Economic and Social Development (AFAED), the Kuwaiti Fund (KFAED), the European Union (EU), the European Investment Bank (EIB), the Islamic Development Bank, the Saudi Fund for Development (SFD) and the governments of Saudi Arabia, Italy and France.

Lebanon’s banking sector also provides financing to Lebanese and international companies carrying out projects in Lebanon. The process involves reviewing the project at hand, and carrying out commercial, financial and legal due diligence on the borrower and sponsor before structuring the facility.

Given the lack of public and government funding, Lebanese banks and contractors are trying to adapt to the current situation by moving from corporate and short-term financing to long-term project finance, and from typical EPC contracting to development and project sponsoring.

1.3 Public-Private Partnership Transactions

As previously mentioned, public-private partnerships (PPP) were introduced into the Lebanese legislation in 2017 pursuant to Law No. 48. Prior to the issuance of this law, Lebanon had engaged in several forms of public sector contracts, such as concessions (for example, Emirati operator GulfTainer was awarded a 25-year concession to develop and operate a new container terminal at the Port of Tripoli in Northern Lebanon), managements contracts (for example, French organisation Ondea was awarded a four-year management contract for the Tripoli Water Authority by the Ministry of Energy and Water and the Council for Development and Reconstruction), lease contracts (for example, the Lebanese Electricity Utility decided to lease power-generating ships from Karpowership, to help reduce severe electricity rationing in the country), and BOT (for example, LibanCell and FTML were awarded the BOT licence to build one of the two Global System for Mobile Communications (GSM) networks in the country, which significantly contributed to Lebanon’s GDP).

The new PPP Law allows Lebanon to adopt a legislative and institutional framework for PPP projects, which was previously missing; the authority of the Higher Council for Privatisation, which was initially responsible for privatisation projects, was additionally assigned PPPs and its name was accordingly changed to the High Council of Privatisation and PPP (HCPP). Once the HCPP decides to proceed with a specific project, the Law requires that the latter form a PPP Committee which will be assisted by a team of its own to prepare a study covering all aspects of the project, and will then send this study to the HCPP along with relevant recommendations.

Several PPP projects have recently been approved by the HCCP, such as the expansion of the Beirut Rafik Hariri Airport, the expansion of Khalde-Nahr Ibrahim Expressway, and Lebanon’s Cloud Data Center. Other PPP projects are being designed and/or procured, such as the Akkar Wind Farm, the Beirut Municipality Waste to Energy Project, an Independent Power Producer Project (IPP), and a Floating Storage Regasification Unit (FSRU) Project.

1.4 Structuring the Deal

A key aspect for lenders in project finance is the ability of the project company to repay its debt within the agreed timeframes. Without such ability, the project may become non-bankable. The criteria used by the lenders to assess the bankability of a project include the stability of project revenues, the ability of shareholders to provide collateral security and the ratio between the cash resources generated by the project

and the total amounts required to service debt. For an equity investor, a project must be bankable and provide an acceptable/reasonable return on the investment risk.

A major concern for lenders in Lebanon is the downgrade of Lebanon's credit rating from B- to CCC by one of the major credit rating agencies and the potential downgrade by another one. The possible adverse impact of such downgrade on the rating of Lebanese banks is yet to be assessed.

Another concern shared by sponsors and lenders will be the impact of such downgrade on the creditworthiness of the Lebanese government, which may become a bankability issue in projects involving a payment mechanism based on unitary charge flowing from the government.

With the lack of PPP expertise in Lebanon, it is key for the government to appoint qualified advisers and to prepare thorough and reliable feasibility studies covering the technical, economical, legal and financial aspects of the project in order to design a proper risk allocation matrix that would attract project sponsors and lenders while preserving value for money for the government.

The PPP law expressly mentions securitisation as a funding means; a securitisation law was issued on 9 December 2005.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

Under Lebanese law, guarantees may be personal or in rem. Under a personal guarantee, all the assets of a guarantor secure the relevant obligation, while under an in rem guarantee specific assets are segregated to secure an obligation.

Personal guarantees usually take the form of a surety bond, by virtue of which an individual or a legal entity undertakes to perform/repay the obligation of a debtor if the creditor fails to do so (Article 1059 of the Lebanese Code of Obligations and Contracts).

In rem guarantees vary depending on the type of asset that is being granted as security – specifically, movable assets (eg, shares and equipment) and immovable assets (eg, land and buildings). While certain assets such as aircraft and ships are movable, they can be subject to the regulations that apply to immovable assets (in terms of registration).

Usually, in rem guarantees take the form of pledges related to movable assets and credit rights, alongside mortgages, which are related to immovable assets.

Mortgages over real estate located in Lebanon must be governed by Lebanese law. Pledge agreements must be governed by the laws of the country of the person/entity in possession

of the assets. Accordingly, if the pledged assets are in the possession of a Lebanese company, the relevant agreement must be governed by Lebanese law.

In light of this, four types of collateral may be used:

- a mortgage over real estate grants the creditor a retention right on the property of the debtor, until the settlement of the debt. In the event of default, the property becomes a security that gives the creditor priority on collecting its proceeds in repayment of the debt he is owed;
- a guarantee over real estate provides the creditor with a right over property in order to secure the repayment of a debt. Once registered, the guarantee follows the property and is redeemed only when the full amount of the loan is settled. The default of the debtor leads to the seizure of the property and its sale to repay the debt;
- a pledge taken over movable property grants the creditor the right to withhold a movable property (tangible or intangible) of the debtor until the settlement of the debt; and
- the assignment of insurance rights or payouts in order to ensure the creditor is paid first in case of default of the debtor.

In this context, reference should be made to Article 860, paragraph 1, of the Lebanese Code of Civil Procedures (LCCP), which stipulates that the assets of the state and public legal bodies cannot be seized.

In other words, the Lebanese legislation provides for clear exceptions relating to the prohibition on mortgaging state-owned property, which rules out the first two security means when state-owned property is involved.

2.2 Charges or Interest over All Present and Future Assets of a Company

A security interest may only be laid over present assets; future assets may not be subject to a security, according to Article 130 of the Property Ownership Act stipulated by Decision No. 3339 in 1930, given that the value of any security interest is based on the valuation of the present asset. Fungible assets may be interchanged under a security interest laid thereon so the pledged value remains unchanged.

Each asset given as security in a Lebanese company must be duly individualised in the relevant security agreement. In this sense, the floating charge concept is not generally accepted in Lebanon.

2.3 Registering Collateral Security Interests

The clearing and settlement of securities market transactions are carried out through the Central Bank Central Securities Depositories (CB-CSD) for Government securities, denominated in LBP, and through MIDCLEAR for corporate securities. MIDCLEAR was appointed as a CSD pursuant

ant to Law No. 139 of 1999 and as a Central Registrar for Lebanese banks' shares, pursuant to Law No. 308 of 2001. MIDCLEAR is a Lebanese joint stock company, established and governed mainly by the provisions of the Lebanese Commercial Code. The Central Bank holds a minimum of 75% of the company's capital, as specified in its Articles of Incorporation. The remaining portion is currently held by local and foreign banks, local and foreign financial institutions, foreign central securities depository, and clearing houses and issuers.

The main functions of MIDCLEAR include the following:

- the safekeeping of securities for participants;
- the immobilisation of physical securities;
- real-time book-entry, clearing and settlement of transactions;
- the collection, distribution and accounting of dividends and interest payments;
- the maintenance of shareholders' registers; and
- registering and safeguarding all banks' shares.

The pledging of securities in some cases is subject to Basic Circular 7776 dated 21/02/2001. The participant representing the pledger delivers the original copy of the pledge agreement to MIDCLEAR, which then confirms that the pledge was executed. MIDCLEAR does not release the pledged shares without prior written approval of the beneficiary of such pledged shares. Securities deposited at CB-CSD are treated as tangible and can be transferred or pledged by bookkeeping entry without the physical delivery of the securities.

The Central Bank provides lending facilities to banks and financial institutions through Repo (Repurchase Agreements) on Government securities. Annex 6 of the Capital Market Authority - Business Conduct Regulation includes a requirement from the custodians to provide periodic statements to investors on pledged securities, which include the following:

- details of any securities that have been pledged as collateral for or charged to secure borrowings on behalf of the portfolio, and the identity of the institution or the person the securities are pledged to; and
- the total amount of any commission or other payments made in respect of such borrowings during the period.

2.4 Granting a Valid Security Interest

Each item of collateral needs to be individually identified in the security document in order to establish a valid security interest over it. The registration application requires the listing of the borrower's name, the loan amount or maximum secured amount, the repayment date, the interest and interest payment date, and other matters that may be affected by the mortgage, including the description of collateral.

Under Lebanese law, the validity and enforceability of a security interest (in rem guarantee) depends mainly on the obligation giving rise to the guarantee; the mentioning of the required contractual elements; and the organisation of the required formal acts by the parties to the security agreement.

The Lebanese Code of Obligations and Contracts sets out the necessary elements in order for a transaction including security agreements to be considered valid and enforceable: the capacity of the parties; the possible, legal, determined (or capable of being determined) object; and that the transaction must be created pursuant to its proper legal form. Lastly, in order for a security interest to be enforceable towards third parties, it must be registered with the appropriate Lebanese registries (see 2.7 **Releasing Forms of Security**).

2.5 Restrictions on the Grant of Security or Guarantees

No further restrictions exist other than the ones stated in 2.1 **Assets Available as Collateral to Lenders**.

2.6 Absence of Other Liens

Lenders and financing parties typically require lien searches prior to the funding of projects, to ensure that their security interest is properly perfected and that the pledged property is free of adverse claims or interests.

Real estate liens are maintained at the Directorate of Land Registration and Cadastre, which keeps record of lands and properties throughout the country, including ownership, plot specifications, buildings and facilities, and any outstanding disputes. All land or real estate purchases, sales, leases and inheritances, as well as insurance applications, must be registered at one of the Directorate's offices. Besides registering properties, the Directorate's offices answer queries concerning property ownership, where anyone can enquire about any real estate and apply for a copy of its ownership deeds, known as "a real estate certificate".

Specific registries also exist for certain types of movable personal property – eg, vehicles are registered at the Traffic, Trucks and Vehicles Management Authority.

Apart from the foregoing registers, Lebanon does not have a central register, so it is difficult in practice to conduct a search and receive an official and reliable answer.

2.7 Releasing Forms of Security

The creditor needs to execute a formal agreement/written release with the debtor in order to perfect a security interest.

Additional requirements apply for specific kinds of security interests. For example, pledges of shares should be registered at the Commercial Register, and security interests over certain movable property (eg, boats, vehicles, etc) must be

registered at special registers specifically established for each type of asset.

Mortgages and guarantees over real estate must be registered at the Real Estate Register. It is worth mentioning that any pre-existing lien on movable or immovable property will give its owner a priority over the lien of the creditor, who will have a right of preference over any owner of a succeeding lien.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

In order to enforce a security, the project lender will have to submit a petition before the execution department, along with the instrument – object of execution, requesting the simultaneous notification of the debtor and seizure of the asset serving as collateral. He will also have to pay the execution department an execution fee.

The execution judge will either approve the request of the project lender or decide to notify the debtor and give him a certain period of time (usually ten days from the date of notification) to settle his debt or submit an objection to the project lender's petition.

If the debtor submits an objection before the execution judge, the foreclosure will be suspended until the execution judge issues his decision regarding said objection. It should be noted that the debtor could request to be granted an additional period of time for the settlement of his debt, provided that it does not exceed six months (such request will not affect the right of the creditor to take conservative measures in order to ensure the protection of his rights).

If the debtor fails to settle his debt within the given time period, the execution department will seize the asset, sell it at a public auction and hand the project lender the amount due to him from the debtor.

If the debtor fails to pay his debt or submits an objection to the execution department outside the above-mentioned time period, the execution judge will order the seizure of the security and its sale in a public auction.

3.2 Foreign Law

Please see **9.1 Project Agreements**.

3.3 Judgments of Foreign Courts

According to Article 1009 of the Lebanese Code of Civil Procedure (LCCP), all judgments rendered in the name of a foreign sovereignty are deemed to constitute "foreign judgments", the enforcement of which in Lebanon is governed by Articles 1009 to 1022 LCCP, and by international treaties and conventions ratified by the Lebanese State – eg, the

1972 Judicial Convention between Lebanon and Italy on the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion, and the 1964 Convention Concerning the Enforcement of Judgments between Lebanon and Kuwait.

For a judgment to be enforced in Lebanon, it must first be granted an exequatur by the competent Lebanese court. Prior to securing the exequatur, a foreign judgment may be used before the Lebanese courts as evidence or as a basis for conservatory measures, such as marking the real estate records with a mention of the charge/security, legal guardianship, provisional seizures, etc.

According to the LCCP, certain conditions must be met for the enforcement of foreign judgments. Generally, foreign judgments that have not acquired the "authority of a final and irrevocable judgment" (*res judicata*) and enforceability in the issuing foreign country may not be enforced in Lebanon. Lebanese courts would grant exequatur to interim/temporary decisions and *ex parte* decisions that have become enforceable in the issuing foreign country.

Once the exequatur is obtained, the foreign judgment may be enforced in the same manner as a domestic judgment. The typical enforcement measure that the creditor would seek is the "executory seizure" of the debtor's assets, placing them under court custody and eventually selling them in public auction under the authority of the court.

Arbitration in Lebanon is mainly governed by the following:

- articles 726 to 821 of the LCCP (as amended notably by Law No. 440, dated 29 July 2002);
- the provisions of various arbitration-related conventions and treaties – eg, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards based on reciprocity, and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID); and
- bilateral investment treaties ratified by Lebanon comprising reciprocal arbitration-related provisions, including notably ICSID-type arbitrations.

Article 794 of the LCCP provides that an arbitral award has the "authority of an adjudged matter" from the date of its issuance, which means that it produces effects and may be used before the Lebanese courts, even prior to its actual enforcement. The enforcement of arbitration awards is a two-staged process: the exequatur of the award is obtained in *ex parte* proceedings, then the domestic, foreign or international arbitral award may be enforced following similar procedural rules as apply to domestic judgments.

3.4 A Foreign Lender's Ability to Enforce

The Lebanese Judicial Authority is the competent authority to hear cases related to real estate located in Lebanon. In the case of a mortgage (a temporary, conditional pledge of property to a creditor as security for repayment of a loan) established as security for a loan extended by a foreign lender, said lender will have to enforce its security in Lebanon.

It is important to note that foreign ownership in Lebanon is governed by Legislative Decree No. 11614 dated 4th of January 1969 and its subsequent amendments, notably Law No. 296/2001 (refer to **4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders**).

Enforcement might generally be affected by insolvency, bankruptcy, liquidation and other laws of general application relating to or affecting the rights of creditors under a loan or security agreement, such as the rules governing the seizure of state-owned property – Article 860, paragraph 1, of the LCCP stipulates that the assets of the state and public legal bodies cannot be seized.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

Under the regulations currently in force, including the relevant decisions and circulars of the Central Bank, there are no restrictions on foreign lenders granting loans. Most of the terms and conditions of a loan agreement (such as fees, commissions, interest rate, default rate, security, covenants, events of default, collateral, etc) may be freely negotiated and agreed between the parties, on the condition that they do not contradict the relevant rules regulating each element.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

In terms of restrictions on the granting of securities and guarantees to foreign lenders, reference should be made to Legislative Decree No. 11614 dated 4th of January 1969 related to foreign ownership in Lebanon, and its subsequent amendments, notably Law No. 296/2001.

The Law allows foreign ownership by any individual or entity of up to 3,000 sq m of land in the aggregate (including built property) across Lebanese territory, without prior permit or authorisation (please see **5.2 Licence Requirements** regarding the licensing requirements).

Real estate secured for the benefit of a foreigner must be sold for the benefit of that person by public auction, and whenever a foreign creditor claims ownership of real estate, it must be sold within two years.

4.3 Foreign Investment Regime

Many incentives are provided to foreign investors in Lebanon – eg, in Investment Law No. 360 of 2001 regulating the process of foreign investment in Lebanon, in Double Taxation Treaties (with Cyprus, France, Italy, Russia, Turkey, etc) and in Banking Secrecy and Foreign Currency regulations.

Several national and international institutions safeguard investments in Lebanon, such as the National Institution for Investment Guarantee (NIGC), the Inter-Arab Investment Guarantee Corporation (IAIGC), the Compagnie Française d'Assurance pour le Commerce Extérieur (COFACE), the European Investment Bank (EIB) and the Multilateral Investment Guarantee Agency (MIGA), as well as other secure investments against non-commercial risks.

The country's Investment Regulatory Framework may be summarised as follows:

- free market economy;
- absence of restrictions on the movement of capital, profits and dividends;
- liberal investment climates in the Middle East; and
- access to local courts and commercial arbitration for domestic and foreign investors.

Restrictions on foreign investment are very few. All economic sectors are open to foreign investments, except those related to weapons and media, and in some cases of real estate ownership (please see **4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders**) and activities related to national security. Foreigners also have the right to participate in public tenders without the need for a local partner, but will be required to establish a company in Lebanon to execute the project if/when awarded.

Furthermore, there are specific limitations on capital shares in companies that are involved in the exploitation of a public utility (Code of Commerce), audiovisual media (Law No. 382/94), printing media and publishing (political) (Law of 14/9/1962), commercial agency (Legislative Decree No. 34/67), real estate ownership (Law executed by Decree No. 11614/69) or the banking sector (Code of Money and Credit).

4.4 Restrictions on Payments Abroad or Repatriation of Capital

There are no restrictions in Lebanon on the repatriation of foreign earnings. However, Law No. 44 of November 24, 2015 on Fighting Money Laundering and Terrorist Financing states that any money entering or exiting Lebanon, carried by a person or shipped in luggage or any other means, exceeding the amount of USD15,000 or its equivalent in other currencies, or by multiple installments if related to one operation, should be declared to Lebanese customs.

Furthermore, Article 12 of the Central Bank's Basic Circular No. 7818 of May 18, 2001 states that banks and other financial institutions are obliged to report any operation they suspect to be related to money laundering or terrorism financing to the Special Investigation Committee (SIC) at the Central Bank, irrespective of the amount of such operation. This is also in line with Law No. 318 of April 20, 2001 on Anti-Money Laundering.

4.5 Offshore Foreign Currency Accounts

In light of the regulations to combat money laundering and terrorism financing, project companies can freely maintain foreign currency accounts with banks within and outside Lebanon. No foreign exchange control exists; the foreign exchange market provides free currency convertibility and the free movement of capital. Banking secrecy will be maintained, and lifted in exceptional cases only.

Circular No. 514 (Decision No. 12978) of January 14, 2019 of the Central Bank was issued recently, stating that non-banking institutions (money transfer companies) receiving electronic money transfers from abroad must pay out the remittances in Lebanese pounds only.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

Notarising or registering project financing documentation is not a statutory obligation in Lebanese law, but may be requested by the lender for officialisation purposes. However, in terms of the registration of a security, some exceptions may exist for specific kinds of security interests, such as pledges of stocks, security interests over certain movable property, mortgages and guarantees over real estate, etc, which are usually notarised and registered with the appropriate authority/register for validity and/or to facilitate enforceability (please see **2.3 Registering Collateral Security Interests**).

Usually, approvals are needed for the underlying project rather than the project finance transaction per se, which should be granted by the relevant Lebanese ministries involved in the project at hand. For example, the approval of the Ministry of Public Health and the Ministry of Environment is needed before any project relating to the relevant sector can be initiated.

5.2 Licence Requirements

With reference to **4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders**, it is to be noted that the acquisition of real estate property over 3,000 sq m by foreigners will require permission/licence issued by virtue of a Decree from the Council of Ministers, which has complete

discretion in accepting or refusing the application for such licence. The Council's decisions concerning this matter are not subject to any form of appeal.

The applicant should complete the purchase of the real estate property and its registration in a time period not exceeding one year, subject to licence cancellation. Foreigners who are granted a licence to build a property are required to complete the project or building within a period of time not exceeding five years (renewals may be granted for the same period).

On the other hand, Article 89 of the Lebanese Constitution states that "no contract or concession for the exploitation of natural resources of the country, or a public utility service, and no monopoly, may be granted, except by virtue of a law and for a limited period of time".

However, certain usage of water resources is subject to prior authorisation from the authorities concerned, such as the Ministry of Water and Energy. The applicable laws related to water resources management covering the areas of administration, management, conservation and use of freshwater resources, water rights, waterworks and the water supply are mainly regulated by Water Law No. 77 of 2018 and Law No. 221 of 2000 on the Water sector organisation.

5.3 Agent and Trust Concepts

Trusts are not recognised by Lebanese law, per se, but similar structures are used in certain respects, such as in Law No. 520 of June 6, 1996 entitled "Development of the Financial Market and Fiduciary Contracts" authorising banks, financial institutions and other establishments licensed by the Central Bank to act as fiduciary agents. The transfer of assets to a fiduciary agent is a transfer of the assets' property to the fiduciary agent, who must hold the fiduciary assets "off balance sheet" – ie, distinctly from his personal assets. The investor can be the grantor or the beneficiary.

In this respect, reference should also be made to Asset Securitisation Law No. 705 of December 9, 2005. Securitisation is the financial process resulting from the assignment of assets by the originator to a legal entity established for this purpose according to the provisions of the abovementioned law, with or without the assistance of a financial intermediary.

5.4 Competing Security Interests

Please see **6.3 Priority of Creditors**.

5.5 Local Law Requirements

According to articles 2 and 9 of the PPP Law, the selected private party is required to establish a Lebanese joint-stock company to carry out the execution of the PPP project. The company will be exempted from the nationality restrictions relating to the board of directors (pursuant to the new amendments of the Code of Commerce – Law No. 126 dated 29/03/2019 stating that at least 1/3 of the board should be

Lebanese – Art. 144) and from the requirement to obtain a work permit for its chairman should he/she be non-Lebanese (already applicable with the new amendment – Art. 144).

The PPP Law distinguishes between the establishment and the operation phases of the project, and provides that the private partner may not transfer its shares owned in the PPP project company to third parties before the start of the operation phase, without the approval of the Council of Ministers.

If the public authority is a municipality or the municipalities union, the private partner will need the approval of one of these entities to transfer any shares it owns to third parties (Art. 9 of the 2017 Law).

The public authority may participate in the establishment of the project company and contribute to its capitalisation (contributions in kind are possible). Pursuant to the above-mentioned law, the project company is not subject to the supervision of the Lebanese Audit Court.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

Bankruptcy and reorganisation procedures of companies based in Lebanon (having Lebanese or foreign nationality) are regulated by the Lebanese Code of Commerce (Law No.304/1942), the Penal Code (Legislative Decree No. 340/1943) and the Code of Obligations and Contracts (Law of 1932).

Law No.304/1942 provides a mechanism to avoid bankruptcy regulated under court supervision, where the company suggests a payment scheme arrangement to the lenders. Article 459 states that any merchant (defined in Article 9 of the foregoing law as any individual whose profession is to engage in trade-related acts as well as companies whose object is commercial) judging himself unfit to meet his financial obligations either before or within ten days of suspension of payment may apply to the court of primary jurisdiction where he is domiciled, or may summon all his creditors to suggest a payment scheme arrangement.

Should this arrangement fail, post-bankruptcy solutions under the supervision of the court will apply. The foregoing law provides two phases for bankruptcy. A simple settlement is a judicial contract between the company and its lenders where bankruptcy procedures will not apply and the debt will be settled within specific deadlines (Art. 557 till Art. 583). If such settlement is not possible, all of the creditors' claims may be combined by forming a "creditors' union" (Art. 584 till Art. 599).

A scheme of arrangement may also be granted in return for total or partial relinquishment of the company's assets (Art.

600). However, if the insolvency operations are to be suspended due to a shortage of assets prior to the formation of the union or the approval of any arrangement, the court can decide to end the procedure, and each lender will have the right to individual proceedings (Art. 601 & Art. 602).

Lebanese law does not address out-of-court reorganisation procedures, due to the principal effect of the judgment of bankruptcy.

6.2 Impact of Insolvency Process

An insolvency petition may be filed by one or several creditors, and may also be filed by the bankrupt (the company) or the court itself (Art. 491 of Law No.304/1942). A bankruptcy court will examine a case only after it has determined that the debt is certain and due (Art. 495).

After a judgment of bankruptcy is rendered, the court will simultaneously determine the period for which payments have been suspended (which starts from the date of suspension of payment as determined by the court or within 20 days prior to this date – such period shall not exceed 18 months as of the date of the declaration of bankruptcy by the court), which is called the "suspect period", and appoint the receiver and the commissioner judge.

A "creditors' union" will be formed by force of law, composed of the following creditors with different types of debts:

- basic creditors with normal debts (irrespective of the source and nature of their debt); and
- creditors with general privileged rights on all the bankrupt's assets.

Creditors not included in the union (secured debts) are those with special privileged movable rights and mortgages on movables, as well as those with special privileged real estate rights and real estate mortgage rights.

A bankruptcy judgment will have the following impact:

- individual proceedings will only be suspended for basic and general privileged rights creditors, and not creditors with secured debts;
- interest rates will only stop running on the debts of basic and general privileged creditors, and not creditors with secured debts;
- deadlines of payments for postponed debts of the bankrupt will be dropped, whether the debt is secured or not; and
- if the bankrupt is the owner of real estate assets and in kind real estate rights, then the bankruptcy judgment will need to be registered in the Real Estate register. Said real estate (property) will be automatically backed up by a mandatory mortgage.

6.3 Priority of Creditors

The judicial reorganisation proceeding does not provide a specific order of payment to creditors. However, article 32 of Legislative Decree No. 147 of 1959 states that the treasury's debt enjoys a first-degree priority. The expenses and charges of the bankruptcy proceedings should also be paid whenever said proceedings are completed.

The special privileged real estate rights and the real estate mortgage rights, as well as the special privileged movable rights and mortgages on movable assets, enjoy priority over the treasury debt only if their registration at the competent authorities was proven to be done prior to the treasury's registration.

In regards to labour-related claims, article 48 of the Lebanese Labour Law expressly states that an employee's wages covering the last year of employment are considered to be prioritised debt and will be classified as such, subsequent to the treasury's debt, the judiciary's expenditures and mandatory mortgages. This principle applies in bankruptcy situations as well.

Obligations undertaken by insurance companies towards the insured and beneficiaries are guaranteed by a general privileged lien covering all movable and real estate assets of Lebanese insurance companies, and all movable and real estate assets of foreign companies in Lebanon. This general lien ranks next to the treasury claims and judicial taxes, and equally with obligations towards the beneficiaries of life insurance policies or indemnity for death or bodily injury that have priority over all other obligations.

6.4 Risk Areas for Lenders

Under Lebanese law, the transactions listed below shall be considered null towards the debtor's joint creditors if they are performed during the suspect period (see **6.2 Impact of Insolvency Process**):

- gratuitous transactions or donations, except the usual small gifts or the constitution of a *wakf* (mortmain property);
- any form of settlement of debts prior to their maturity date;
- the settlement of due monetary debts by means other than cash, money orders, bill of exchange, or bank drafts; and
- the establishment of a conventional or judicial mortgage, pledge over movable property or pledge to benefit from the goods of the debtor in order to guarantee the payment of a former debt.

The debts of secured creditors should be satisfied prior to the ones of unsecured creditors, following the settlement of expenses and charges of the bankruptcy proceedings and the debts of preferential creditors.

6.5 Entities Excluded from Bankruptcy Proceedings

The bankruptcy and insolvency regulations do not apply to government-owned entities, and civil and professional partnerships cannot be considered insolvent or bankrupt.

Banks are subject to a special law in cases of default (Law No. 2 dated 16/01/1967 – Special Regulations Covering Defaulting Banks and its amendments).

Licences granted to insurance companies can be withdrawn if it is proved that the company no longer meets the conditions based on which the licence has been granted, and if it becomes obvious in light of the statements and documents and following a cross-examination conducted by the Ministry of Economy and Trade through the supervisory commission that the rights of policyholders are likely to be lost or that the company is no longer able to meet its commitments.

Said licence cannot be withdrawn until the company concerned has been notified by means of a registered letter with acknowledgement of receipt, or through a notary public, and has been invited to submit its comments within 15 days of notification. The company can challenge any decision to withdraw the licence before the State Council within 30 days of the date of the publication of the withdrawal decision in the Official Gazette.

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

The insurance sector in Lebanon is regulated by Decree No. 9812 of 1968 (Insurance Law), and the Insurance Control Commission (ICC) within the Lebanese Ministry of Economy and Trade is the regulatory body and supervisory authority.

The Lebanese financial market had witnessed several successful co-operations, such as the Memorandum of Understanding (MoU) signed between the ICC and the Capital Market Authority (CMA) in 2017 to organise the supervisory work pertaining to the financial instruments included in insurance contracts. The association of insurance companies in Lebanon (ACAL) was also established to assist insurance companies in all matters related to their profession.

Generally, there are no specific restrictions, controls, fees and/or taxes on insurance policies over project assets in Lebanon. However, in practice, the following restrictions and controls almost always apply:

- project assets should be mortgaged to the lender;
- the value of the assets should be at least twice the insurance coverage (the amount landed);

- the insurance policy should be specifically issued to cover the project assets, while assigning the lenders as first beneficiaries; and
- fees and taxes vary from one insurance company to another, and notably in view of the commodities and expenses of the project itself and the amount of dividends they will receive from it. The higher these components are, the higher the fees and taxes will be.

7.2 Foreign Creditors

Insurance policies covering project assets may be paid to foreign lenders. However, in some cases, the situation will depend on the lender's options and whether or not the risk is shared.

If the risk is not shared, no third parties exist so there is no need for the project assets to be payable to project lenders. If the risk is shared between local and foreign lenders, then the project assets could be payable to foreign lenders.

8. Tax

8.1 Withholding Tax

In general, tax is charged on the total income or profits derived in Lebanon. Based on the income tax law and the principle of territoriality, the main premise for considering a profit to have been realised in Lebanon is whether it was generated through an effort or activity exerted in Lebanon.

Tax is levied on all natural and legal persons, resident in Lebanon or outside, on all profits that they generate in Lebanon.

Withholding tax on revenues earned by non-residents in Lebanon applies at a rate of:

- 2.25% on revenue from the sale of material and equipment; and
- 7.5% on revenue from the sale of services.

8.2 Other Taxes, Duties, Charges

In Lebanon, further taxes apply at the following rates:

- **VAT:** 11%. Unless specifically exempt, VAT is levied on all commercial transactions undertaken by business entities. The export of goods and services, and export-related services, international transport and some intermediate operations are zero-rated. Banking, financial services and insurance operations are exempt from VAT.
- **Built Property Tax:** an annual progressive tax, ranging between 4% and 14% of net rental proceeds. Net rental proceeds are defined as gross rental proceeds minus allowable deductible expenses, such as depreciation and management costs.
- **Stamp duty.** Two kinds of stamp duty are levied on contracts and agreements: a proportionate stamp duty of

0.4‰ (LPBP4 per LBP1,000) levied on all deeds and contracts (written or implied) mentioning specific payments or other sums of money (with the exception of penalty clauses), and a fixed stamp duty ranging from a minimum of LBP100 to a maximum of LBP2 million, which is applicable on documents in accordance with schedules appended to the stamp duty law.

- **Excise taxes:** applicable on certain beverages and spirits, tobacco products, gasoline and vehicles.
- **Real estate transfer tax:** 5.5% of the contract value.
- **Licence fee:** Decision No. 142/1 relating to imposing an annual lump sum licence fee was introduced in 2015. Exemptions are available for certain types of companies (holdings and offshore companies, institutions exempted from tax as per Article 5 of the income tax law).

This licence fee applies to local head offices, branches, outlets, and any place in which the taxpayer carries on its activity or receives customers. For income tax purposes, the lump sum licence fee is considered a non-deductible expense.

- **Custom duties:** customs rates are either determined as a percentage or paid as a lump sum per unit of imported products. The rates vary, as follows:
 - (a) 0% to 39% for goods;
 - (b) 55% to 100% on alcoholic beverages; and
 - (c) 100% on certain luxury goods.

The rates are determined based on a specific schedule created in conformity with the Harmonised System of Nomenclature. This conformity with the unified system allows Lebanon to maintain an "importer-friendly" environment for importers. The normal rates are applied if there is no preferential agreement. When the good or part of the good comes from a country with which Lebanon has a preferential customs treatment, preferential rates apply.

- **Withholding tax on interest:** the income, revenues and interest earned from accounts opened at Lebanese banks and from treasury bonds are subject to 5% WHT, which is non-refundable and cannot be carried forward. This WHT is considered as an advance payment on the current corporate income tax due.
- **Movable capital WHT:** 10% WHT is levied on income derived from movable capital generated in Lebanon. Taxable income is comprised of the following:
 - (a) distributed dividends, interest, and income from shares;
 - (b) directors' and shareholders' fees;
 - (c) distribution of reserves or profits; and
 - (d) interest from loans to corporations.

8.3 Limits to the Amount of Interest Charged

Legal interest was interpreted in the Ottoman Murabaha Law and the Lebanese Code of Obligations and Contracts (COC).

According to the Ottoman Murabaha Law, the following rules apply on interest:

- the legal interest is fixed at a rate of 9% for all kinds of lending (civil and commercial);
- whenever the parties to an agreement fix a higher rate, such rate should be decreased accordingly to reach the legal fixed interest;
- the amount of legal interest should not bypass the capital; and
- compound interest is only allowed in specific cases.

However, the COC amended the aforementioned rules, with Article 1109 of the COC stating that all rules that interfere with the provisions of the present code should be annulled.

Article 256 of the COC states that the interest should be calculated based on the legal interest rate but, given that it did not indicate a specific amount, referral is made to the rate specified in the Ottoman Law. On the other hand, the COC states that the parties can always agree to fix a higher interest rate if they agree to do so in writing (article 767 of the same law), or else the legal rate will prevail. Last but not least, article 768 had allowed for the application of compound interest in certain cases.

The only legal issue not tackled in the COC is that the amount of legal interest should not bypass the capital. Referral can be made to the Lebanese Penal Code (Art. 661-665), which has allowed such increase in the interest if the lending is made for commercial purposes, or else it would be considered an act of usury.

9. Applicable Law

9.1 Project Agreements

Parties usually agree that their agreements will be governed by Lebanese laws. However, according to the Lebanese Code of Obligations and Contracts, contractual freedom applies to all agreements in general. In other words, parties have the freedom to decide on the form, content and laws applicable

to their agreement, on the condition that they are in line with the public policy rules.

With regard to foreign dispute resolution fora, the arbitration bodies frequently cited in project agreements are as follows:

- the Lebanese Arbitration Centre established in 1995 at the Chamber of Commerce, Industry and Agriculture of Beirut – arbitration of local and international disputes may be performed at this centre, in accordance with either the rules of arbitration set out by the centre or any other rules agreed upon between the parties;
- CIArb Lebanon, which is the national branch of the Chartered Institute of Arbitrators (CIArb); and
- ICC Lebanon, which is the national committee for the International Chamber of Commerce of Paris (ICC).

9.2 Financing Agreements

Financing agreements signed between Lebanese borrowers and creditors are governed by Lebanese law. Financing agreements signed between Lebanese borrowers (ie, the concessionaire and/or project company) and foreign creditors are usually governed by foreign laws.

Payment guarantees associated with international loan agreements may also be governed by a foreign law – typically the same governing law of the loan agreement or the laws of the place of incorporation of the guarantee provider.

Security documents shall be governed by Lebanese law since the assets and/or rights subject to the security are located in Lebanon and/or the security provider (ie, the project company) is incorporated in Lebanon.

As previously mentioned (notably in **2.1 Assets Available as Collateral to Lenders**), mortgages over real estate located in Lebanon must be governed by Lebanese law. Pledge agreements must be governed by the laws of the country of the person/entity in possession of the assets. Accordingly, if the pledged assets are in possession of the project company (a Lebanese company), the relevant agreement must be governed by Lebanese law.

9.3 Domestic Laws

As mentioned in **9.1 Project Agreements**, all main project documents and financing agreements are usually governed by Lebanese law. Given that local financial institutions are still the main players in project finance transactions, most of the financing transactions closed in the country have been purely domestic.

In the participation of foreign lenders, international suppliers or construction companies, it is legally possible to have the main financing documents governed by non-Lebanese law.

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