

Lender Issues - Taking Security/Step-in Rights/Government Support

Full Description

Taking Security

- Is it possible to take security over the project assets and/ or the land on which they are built?
- Is it possible to take security/ a pledge over shares? If so, do potential liabilities attached to those shares pass with the security?
- Is it possible to take security over the cash flows / contractual rights (including future rights as they crystallize) / bank accounts of the project?
- Which creditors get priority in the case of insolvency?
- Is it possible to enforce security when insolvency is imminent? Are there clear procedures for appointment of liquidators? Is it possible to intervene prior to liquidation and appoint administrators to try to maintain and improve business as a going concern? What will happen to project assets on insolvency (will they automatically vest back with the State?)? Can the State step in and take over project prior to actual insolvency (as is the case in England and Wales in water, power and rail sectors)? For more on these issues, go to [Insolvency](#).
- Is it possible to register a security interest in a registry and is such a registered interest likely to be upheld by a relevant court?
- How easy is it to enforce security in a particular country –
 - are there competing interests/ laws giving protection to borrowers/ that might prevent the secured creditor from enforcing interest?
 - can security be enforced in the host country in relation to a judgment made in a third party jurisdiction?
- Is it possible to transfer the business of an insolvent entity to a new entity?
- If there are to be multiple lenders, are trust structures available to enable a trustee to hold the security on trust for the various lenders, or does each security interest need to be registered/ formalized by a notary? If they are available, does the law impose any particular constraint or limitation on the structure?

- Are agency arrangements available under the law? Does the law impose any particular constraint or limitation?

The World Bank has coordinated the effort to articulate a set of assessment standards regarding insolvency and creditor rights ("ICR") regimes for the purposes of the World Bank/IMF Initiative on Standards and Codes. This as well as other relevant information on creditors' rights and insolvency can be found on the [World Bank Global Insolvency Law Database](#) under Principles and Guidelines.

Step-in Rights for Lenders / Direct Agreements

Step-in rights are rights given to lenders in project financed arrangements to "step in" to the project company's position in the contract to take control of the infrastructure project where the project company is not performing. There may be prohibitions in the law on lenders having step-in rights. This will be an impediment to attracting private sector finance and will need to be addressed by the government.

Direct Agreements are entered into by the lenders with key sub-contractors to enable them to step into and continue the contractual relationships in the event that a party to that sub-contract wishes to terminate or extract itself from the contract or it steps into the main project agreement. Is it possible under the law of the host country to enter into and enforce such arrangements? Is it possible for the party stepping in to limit its liabilities (for instance, to accept only liabilities incurred as of the date of step-in)? Even if it is possible to enter into direct agreements, are there limits on the ability of the lenders as third parties to receive warranties from the contractors?

Government Economic Assistance/Guarantees

It may be necessary for the infrastructure project to be viable that some sort of economic assistance or guarantee be provided by the government, particularly where the central government is not a party to the key project agreements.

- Does the law make it clear which public authorities may provide financial or economic support to the implementation of a project – e.g. is it possible to obtain a state guarantee or counter-indemnity for a project?
- Are there restrictions in the law (or in international treaties) as to the extent that the government can provide financing, subsidies or other benefits to the project ("state aid")? What are the implications of the government breaching such provisions - penalties on the government, the government being required to withdraw its support, etc.?

Some international financial institutions such as the World Bank (IBRD/ IDA) will require guarantees/ counterindemnities from government before they provide funding for a project.

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