



Project Finance Report **2015**

Featuring contributions from

Asian Development Bank
Atsumi & Sakai
Collins Newman & Co
Hermawan Juniarto
Mayer Brown JSM
Olajide Oyewole
Philippines' PPP Center
Standard Bank
VELMA Law

Lead contributors

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INTERNATIONAL FINANCIAL LAW REVIEW

Nicholas Zervos, Janet Ndyetabura and Geoffrey Gasper, VELMA Law

1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

A law specifically to encourage and enable investment in projects involving both the public and private sectors was passed in 2010 (PPP Act), and enabling regulations were passed (in part) in 2011. All sectors are covered including, for example, agriculture, energy, health, ICT, sports and tourism. The procurement laws and regulations were also updated in 2011 and 2013 to reflect the PPP Act and regulations. Both solicited/competitive and unsolicited/non-competitive proposals are envisaged, although the precise nature and extent of competition required for unsolicited/non-competitive proposals is to be clarified under new PPP regulations, which are expected in early 2016. Local content requirements are an increasing area of development and, for instance, are set out in some detail in recent new legislation for oil and gas. It is probably fair to say that the government tends to prefer public ownership of assets, so limited recourse projects are being developed alongside on-balance-sheet government projects. It is also expected that new legislation will be passed soon, to clearly enable government guarantees of contractual obligations of public entities, particularly in the energy sector.

1.2 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

There are many international agencies operating in Tanzania, including export credit agencies (eg, African Export-Import Bank, Nordic Development Fund, and OPEC Fund for International Development), multilateral finance institutions (eg, International Finance Corporation, African Development Bank), and other finance agencies (eg, KfW, USAID, Canadian CIDA and Swedish SIDA). Most projects in Tanzania require and benefit from support from such agencies and it is unlikely that a project will be developed without support from such agencies at some stage, ranging from finance for an initial inception feasibility study, to funding for project capital costs to supplement commercial bank finance.

2. Security

2.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?

Collateral available in Tanzania includes mortgages over land, fixed charges over assets (including cash at bank), share charges and pledges, assignment by way of security, (including the benefit of contracts and receivables) liens and floating charges (together with security interests) and guarantees.

There are certain classes of assets which cannot be attached, which should be checked depending on the facts of the project security package (for instance land/buildings belonging to an agriculturalist and immediately appurtenant land).

2.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?

Generally, inter-creditor agreements are commonly used by local banks in Tanzania to subordinate debts and to adjust the ranking of secured creditors

by way of contractual agreement. The enforceability and operation of these inter-creditor agreements have not to our knowledge been challenged in the courts in Tanzania.

In the case of a company insolvency, preferential debts will be paid as a priority. Preferential debts include (i) specified taxes, (ii) specified government rents, and, (iii) specified wages or salaries.

Tanzanian law recognises that any arrangement entered into between a company about to be, or in the course of being wound up, and its creditors will be binding on the company if sanctioned by the shareholders and creditors, subject to the right of appeal to the court by any aggrieved creditor for the court to amend, vary or confirm the arrangement as it thinks just.

3. Perfection, priority and enforcement

3.1 How is a security interest in each type of collateral perfected and how is its priority established?

Generally, a security interest is perfected by registration at the Business Licensing Regulatory Authority (BRELA) within 42 days of the date of its creation, otherwise it will be void on the insolvency of the company against the liquidator or administrator, or any creditor of the company.

Mortgages must also be registered at the relevant land registry, and some documents should also be registered at the registry of documents.

The priority of security interests is generally determined by the date of the document, and the priority of mortgages is generally determined by the date of registration at the relevant land registry, in each case provided it is registered in time and there is not an agreement otherwise.

3.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

Nominal registration fees are payable for the registration of a security interest at BRELA, the land registry or the registry of documents. Security interests are also liable to nominal stamp duty.

3.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?

Yes, a corporate entity can act as a security agent or trustee on behalf of the project lenders, and this has been done in Tanzania. However, the enforceability and operation of such an arrangement has not to our knowledge been challenged in the courts in Tanzania.

4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies?

Generally, there is no restriction of foreign ownership or management of companies established in Tanzania.

However, there are restrictions on foreign investment in certain sectors, such as mining (some types only), telecommunications and shipping, which require some local ownership. Restrictions to 60% foreign investor equity participation in Tanzanian companies listed on the Dar es Salaam stock exchange were lifted in September 2014; however, foreign investor participation in government securities is still subject to conditions.

Foreign ownership of title to land is not permitted unless the foreign-owned company has a certificate of incentives from the Tanzania Investment Centre, which has approved the project for investment purposes.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?

All title to land is usually held subject to the president's right to revoke the title for good cause and in the public interest. Land also can be compulsorily acquired by the president if the land is required for public purpose, which includes in connection with development of a port/harbour, or in connection with mining for minerals or oil; and the president can by order in the Gazette deem any work to be for public purpose.

Generally, for strategic/national security or other reasons, a government authority can block or unwind a transaction involving foreign investors after it has closed, subject to payment of compensation.

Under the Tanzania Investment Act (which enables determination of available investment opportunities in Tanzania and the modalities of accessing them) there is express protection against expropriation without fair adequate and prompt compensation, with a right of access to a court or arbitration to determine the compensation.

Under the standard mining development agreement, there is express provision for no nationalisation or compulsory acquisition without compensation in an amount and manner that is prompt, adequate and effective.

Generally, under the PPP legislation there is a requirement to fairly compensate the investor in the event that it suffers loss due to unforeseen events beyond its control, or if the contracting authority is in default under the PPP agreement. However, note there is an equivalent requirement for the investor to compensate the contracting authority for loss suffered if the project is terminated due to the failure of the investor to meet its obligations.

5. Documentation formalities and government approvals

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

The submission by parties to a foreign jurisdiction will be effective and enforceable if submission is non-exclusive. Recognition of a foreign jurisdiction may be refused where a dispute relates to a matter that is exclusively governed by Tanzanian law. Foreign judgments will be enforced if there is a reciprocal agreement between Tanzania and the foreign jurisdiction. The High Court may, however, set aside the registration and enforcement of a foreign judgment for a number of reasons, including if the enforcement of the judgment would be contrary to public policy.

As regards sovereign immunity, where the government of Tanzania is a party to a contract, it is deemed to have waived its immunity, and will be subject to all liabilities that arise in the contract, as if it were a private person. Any claim arising under the contract can be enforced against the government. However, enforcement is restricted to payment by the treasury department of amounts due, and no other form of execution or attachment may be used to enforce payment.

5.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?

Generally, parties have a right in a contract to choose which law will govern the contract.

If the contract is silent then *lex loci contractus* will determine that the governing law will be the law of the place where the contract was made.

5.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?

Tanzania law will recognise a foreign court judgment where there is a reciprocal enforcement of judgments agreement in place with that foreign country. In order for a foreign judgment to be recognised in Tanzania, the judgment must be filed, by way of an application to the High Court. The court will then recognise the foreign judgment, unless the judgment is challenged on the basis of jurisdiction or illegality.

Further, Tanzania has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, a foreign arbitral award is enforceable in Tanzania using the mechanism provided under the New York Convention.

Generally, according to the Arbitration Act cap 15, a foreign arbitration award is enforceable in the High Court of Tanzania. It is treated as binding for all purposes on the persons between whom it was made, and may be relied on by any of those persons by way of defence, set-off or otherwise, in any legal proceedings. In order for a foreign arbitration award to be enforceable, it must be final. A foreign arbitration award is not deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

For a foreign arbitral award to be enforceable it should fulfil the following conditions:

- it must have been made under an agreement for arbitration which was valid under the law by which it was governed;
- it must have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- it must have been made in conformity with the law governing the arbitration procedure;
- it must have become final in the country in which it was made;
- it must have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania; and,
- it must not be contrary to the public policy or the law of Tanzania.

A foreign arbitration award cannot generally be enforceable if the court is satisfied that:

- the award has been annulled in the country in which it was made;
- the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented; or,
- the award does not deal with all the questions referred to, or contains decisions on matters beyond the scope of the agreement for arbitration. If the award does not deal with all questions referred to, the High Court of Tanzania may, if it thinks fit, either postpone the enforcement of the award, or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

The party seeking to enforce a foreign award must produce the following:

- the original award or a copy of it, duly authenticated in the manner required by the law of the country in which it was made;
- evidence proving that the award has become final;
- such evidence as may be necessary to prove that the award is a foreign award and that the conditions for enforceability are satisfied; and,
- authentication of all documents by the Tanzania embassy in a country where it was made or, if there is no Tanzanian embassy, any embassy of a country that is a member of the British Commonwealth.

6. Bankruptcy proceedings and enforcement

6.1 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 collateral/security?

Winding up proceedings will affect a lender's right to enforce any security interest. Any attachment or execution against a company's assets after the commencement of winding up proceedings by the court will be void. Any disposal of the company's property, including things in action, any transfer of shares or any alteration in the status of the shareholders of the company without the court's consent will also be void.

6.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?

A project lender may take enforcement steps, such as dealing with any assets charged to the lender, by giving reasonable notice of the sale to the borrower, or completing the blank share transfer forms and proceeding with the transfer where shares have been charged.

The lender can similarly take possession of any land it has a security interest over after service of a notice of default on the borrower, and either lease the land or sell it 30 days after the date of the notice.

6.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

A receiver may be appointed without court proceedings, subject to the terms of appointment set out in the relevant security interest. An administrative receiver appointed under the security interest also has the power to seize and dispose of any property subject to that interest.

7. Foreign exchange, remittances and repatriation

7.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Generally, there are no major restrictions on remittances of investment returns or loan payments to parties in other jurisdictions, but there are certain foreign currency exchange restrictions for payments in Tanzanian shillings to or for the credit of a person resident outside Tanzania.

Withholding tax applies to interest, except there is no withholding tax on interest paid to a registered financial institution or on interest paid to a non-resident bank by a strategic investor.

Withholding tax applies on dividend payments.

Payments relating to repatriation of capital and income to foreign shareholders in respect of direct investments is allowed. However, financial institutions making payments are required to demand audited accounts and tax clearance certification from the Tanzania Revenue Authority confirming up to date payment of taxes.

Foreign exchange laws require that interest rates in loan agreements reflect the prevailing market conditions for the relevant currency of borrowing and that the repayment period is tied to the ability of the project to generate enough funds to service the loans in a progressive manner. The loan agreements should not include conditions requiring opening of foreign currency accounts with banks not registered in Tanzania, unless Bank of Tanzania consent has been obtained.

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

Generally, there is no restriction on a project company to establish and maintain an onshore foreign currency account in Tanzania, since any person may hold any amount of foreign currency and may open and maintain a foreign currency account with a bank which is an authorised dealer in Tanzania.

However a company can only establish an offshore foreign currency account in another jurisdiction with approval from the Bank of Tanzania. The bank monitors offshore foreign currency accounts to ensure that they are not used to facilitate unauthorised outward capital transfers.

8. Public private partnerships

8.1 Is there a public private partnership act or similar statute authorising PPPs and are both greenfield and brownfield projects permitted?

PPPs are authorised under the Public Private Partnership Act 2010 (PPP Act) and the regulations 2011.

Sectors that have been identified for implementation in partnership with the private sector include agriculture, industry and manufacturing, exploration and mining, energy, ICT, health and education, trading and marketing, and natural resources and tourism.

The Public Procurement Act 2011 and regulations 2013 also apply to PPPs in respect of the procurement of both solicited and unsolicited proposals between the public sector and private parties under the PPP Act.

The PPP laws do not differentiate between greenfield and brownfield projects, but the provision of assets by the government can include existing assets of the relevant contracting authority or new assets to be acquired for the purpose of entering into a PPP agreement.

8.2 May a concessionaire grant a security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Yes, a concessionaire may grant a security interest over the project assets to its lenders. Consent of the relevant government department or contracting authority will be required in most cases where a security interest is granted over a concession agreement or licence.

Generally, the rights, obligations and controlling interests of a concessionaire in a PPP project cannot be transferred or assigned to a third party without prior written consent of the relevant contracting authority.

In the mining sector, under the Mining Development Agreement (MDA) with the government in relation to the special mining licence for large-scale mining, the investor is permitted to grant banks all security over its assets for loans incurred in pursuit of the development of the project.

In the petroleum sector, under the production sharing agreement (PSA) the contractor may not transfer its rights or obligations under the PSA, to any third party without the prior written consent of the Minister for Energy and Minerals.

In the power sector, transmission, generation and distribution licences granted to a concessionaire may not be assigned or transferred to another party without the approval of the regulator.

In the telecoms sector, a concessionaire may not transfer, pledge or otherwise dispose of its licence without the prior written consent of the Tanzania Communications Regulatory Authority (TCRA).

In addition, prior written approval of the Tanzania Investment Centre is also required, if the concessionaire creates a mortgage over any derivative title that it has over project land.

9. Insurance

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

Insurance policies generally are required to be placed with Tanzania insurers. Where a class of insurance policy cannot be provided by local insurers, it can be provided instead by foreign insurance companies, provided that the prior approval of the Commissioner of Insurance is obtained. Types of insurance provided by Tanzanian insurers over project assets include insurance over ships, aircraft, goods in transit, fire, damage to property, legal expenses, accidents, credit surety-ship, and motor vehicle insurance.

Withholding tax applies on some insurance premium payments.

9.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?

Reinsurance is not commonly seen in project finance transactions in this jurisdiction, although there are certain mandatory reinsurance cessions in insurance legislation.



Nicholas Zervos
 Founder partner, VELMA Law
 Dar es Salaam, Tanzania
 T: +255 752 66 77 66
 E: nzervos@velmalaw.com
 skype: nzervos.velmalaw
 W: www.velmalaw.com

About the author

Nicholas Zervos is a partner at VELMA Law and a senior commercial transactional lawyer with expertise in international corporate matters and project and structured finance, particularly in East Africa, the UK and central and eastern Europe.

Zervos has lived and worked as a lawyer in Dar es Salaam since November 2006. Before then he was a senior partner with a major firm in London (and Hong Kong), advising sponsors and banks on commercial and financing agreements for infrastructure projects in developed and emerging markets. His areas of specialism include commercial law, project finance, finance and corporate law. He has a law degree from the University of Nottingham, and is admitted to the English, Tanzanian and Hong Kong bars.

Zervos is a member of the Law Society of Tanganyika and the Law Society of England and Wales.



Janet Ndyetabura
 Associate, VELMA Law
 Dar es Salaam, Tanzania
 T: +255 755 48 15 54
 E: jndyetabura@velmalaw.com
 Skype: jndyetabura.velmalaw
 W: www.velmalaw.com

About the author

Janet Ndyetabura is an associate at VELMA Law, with expertise in corporate, company, land and commercial transactional law.

She has a degree from Tumaini University Iringa University College (2007) and graduated in November 2014 with a Masters degree (LLM) in Commercial and Corporate Law from the University of Dar es Salaam.

Ndyetabura is a member of Tanganyika Law Society and East Africa Law Society and has been working as a lawyer in Dar es Salaam since 2008.

She has experience advising investors on corporate and commercial transactional matters, matters in the energy, telecommunications, land and mining sectors.



Geoffrey Gasper
 Junior associate lawyer, VELMA Law
 Dar es Salaam, Tanzania
 T: +255 765 87 26 74
 E: ggasper@velmalaw.com
 skype: ggasper.velmalaw
 W: www.velmalaw.com

About the author

Geoffrey Gasper is a junior associate lawyer at VELMA Law in Dar es Salaam, with expertise in corporate, commercial, banking, energy and PPP law.

Gasper has a degree from Tumaini Makumira University, Arusha, Tanzania and has previously worked with an international corporate and investment bank on regulatory compliance, corporate and commercial matters, facility agreements and security documentations.