

# Project finance in the Lao People's Democratic Republic: overview

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## MARKET OVERVIEW

### 1. What types of projects make use of project financing in your jurisdiction? What have been the most significant project finance deals in the past 12 months?

#### Types of projects

Project financing has become increasingly common in recent years in the Lao People's Democratic Republic (Lao PDR), primarily for power projects (hydropower and coal-fired power projects) and in the mining sector. Many project financings are "limited recourse" and others are hybrid, involving elements of limited recourse project financing coupled with sponsor guarantees.

Project financing is currently under consideration for the 414,332 km China-Lao railway project linking the Mohan-Borten China-Lao border gate with Vientiane.

#### Significant deals

The most significant project finance deals in the past 12 months are the:

- Nam Theun 1 600 Megawatt (MW) hydropower project (financial close pending).
- Nam Ou Phase II (cascades 1, 3,4 & 7)- 732 MW hydropower project.
- Xenamnoy 2/Xekatom 1 20 MW hydropower project Nam Ngum 2 615 MW hydropower project (refinancing).
- Don Sahong 240 MW hydropower project (financial close pending).

## REGULATORY FRAMEWORK

### 2. What regulatory framework governs project finance in your jurisdiction?

#### Regulatory framework

The Lao PDR legal system is a civil law system heavily influenced by Chinese and Vietnamese law and with a strong state role influenced by communist theory.

The Enterprise Law and the Investment Promotion Law are the main laws governing foreign investment in the Lao PDR. The Investment Promotion Law outlines the following:

- Promoted activities.
- Forms of permitted investment.
- Investment terms.
- Tax incentives.

- Rights and duties of investors.
- The investment licensing process.
- The Enterprise Law sets out corporate governance rules and constraints that will apply to all companies financed by foreign investment.

#### Regulatory authorities

The key government authorities impacting project finance include:

The Bank of Lao PDR for the required approval of any foreign sourced loans, hedging instruments, use of foreign currency and offshore bank accounts.

The Ministry of Electricity and Mines for negotiation and approval of the required concessions.

The Ministry of Planning and Investment for establishing the project company and final approval of the concessions.

The Ministry of Natural Resources and Environment for the approval of social and environmental impact assessments and mitigation plans, including resettlement plans, any required land leases and the required registration of land documents and land-related security documents.

The State Assets Management Department for the required registration of all non-land related projects, finance and security documents.

Permits and approvals for projects are also required from numerous other government ministries.

#### Material laws

Project finance transactions in the Lao PDR rely heavily on the following regulatory frameworks:

- Contract and Tort Law.
- Secured Transactions Law.
- Secured Transactions Decree.
- Law on Management of Foreign Currency.
- Foreign Exchange and Precious Metals Management Guideline.
- Electricity Law.
- Minerals Law.
- Water Resources Law.
- Environmental Protection Law.
- Land Law.

#### International treaties

The Lao PDR is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Hydropower projects on the mainstream of the



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Mekong River are subject to the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin among the Lao PDR, Vietnam, Cambodia, and Thailand (Mekong Agreement).

## REGULATORY CONSIDERATIONS

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### 3. Are government approvals required before financing a project? Are fees typically paid for such approval?

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The Lao PDR has adopted comprehensive capital controls and all foreign sourced loans require prior approval of the Bank of Lao PDR (*Law on Management of Foreign Currency*).

Non-land related project documents, finance documents, and security documents must be registered with the State Assets Management Department. Registration fees are required.

Land-related documents and land-related security documents must be both notarised and registered with the Ministry of Natural Resources and Environment. Notarisation and registration fees are required.

Privately-owned infrastructure projects and mining projects require the grant of a concession. The concession agreement for electric power and mining projects must be negotiated with the Ministry of Energy and Mines (MoNRE) and will cover the following:

- Land use rights.
- Environmental and social impact mitigation requirements.
- Taxes.
- Royalties.
- Various fees.
- Funding requirements.
- Restrictions on the use of foreign labour.
- Preferences for Lao contractors and suppliers.
- The concession agreement will be in the form of a Build-Operate-Transfer arrangement. At the end of the concession term, the project assets must be turned-over to the government, with no compensation for losses sustained due to the turnover.

The environmental and social aspects of a project, including the resettlement of project affected persons, are heavily regulated by MoNRE.

All projects require several permits and approvals from various ministries. Any exemptions from laws or regulations will generally require approval from the National Assembly or Assembly Standing Committee (for laws and executive decrees) or the Prime Minister (for ordinary decrees).

Whether a power project can be financed depends to a large extent on the off-taker. This may be Electricite du Laos (EDL), a state-owned company, or, if the output is to be exported, the Electricity Generating Authority of Thailand (EGAT) or Vietnam Electricity (EVN). Due to the weak financial condition of EDL and EVN, many lenders will insist on government guarantees for EDL and EVN power purchase agreements.

In addition, political risk insurance is usually required by foreign lenders for Lao PDR projects.

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### 4. Is there any requirement to file or register project documents with a regulatory authority or other government body?

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Under the Document Registration Decree and related regulations, all contracts must be registered with either the State Assets Management Department (SAMD) (for non-land related contracts) or the Ministry of Energy and Mines (MoNRE) (for land-related contracts) to ensure enforceability in the Lao PDR.

The perfection of security interests over movable assets (including share pledges) requires the registration of the security documents with the SAMD. The perfection of security interests over immovable assets requires both notarisation and registration of the security documents with MoNRE. Security documents relating to movable assets (including share pledges) must be re-registered with the SAMD every four years and nine months, effective as of 20 June 2012.

Registration fees, notarisation fees, and nominal stamp duty are payable.

While generally not mandatory (other than in the case of land leases, equipment leases, and security documents related to immovable assets), contracts can also be notarised by the Notary Office, which will provide a guarantee that the notarised document is a true and correct copy or original.

A concession agreement may require the Government to review certain project documents (such as power purchase agreements and Engineering, Procurement and Construction (EPC) contracts).

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### 5. Do any specific laws exist in relation to state ownership or state repatriation of assets?

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#### State ownership

The Minerals Law provides the government with the right to elect to participate in the equity of all mining projects. The equity must be paid for out of future project dividends.

The Electricity Law does not mandate government equity participation in electric power projects. However, in practice, as part of concession agreement negotiations, the Government can require an equity stake in a project. The Government will generally pay par value for an equity stake but will often require sponsor assistance in obtaining an equity loan. In an electric power project, the Government will typically not take a direct equity stake but will designate one of several state companies or their subsidiaries as the shareholder.

#### State repatriation of assets

The Investment Promotion Law, the Property Law, and the Land Law all contain provisions allowing the state to expropriate or nationalise assets generally for state needs. Compensation must be paid; however, it is not well defined in the legislation.

## STRUCTURING THE FINANCING

### Main parties

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### 6. Who are the main parties in a project finance transaction?

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For power projects, the typical parties in a project finance matter are like those involved in other jurisdictions, including:

- The project company.
- Shareholders/sponsors.
- Government agencies and ministries.

- Construction contractors.
- Operation and maintenance contractors.
- Off-takers.
- Advisers and financing parties (including commercial and development banks, multilateral agencies, and international financial institutions).

### Types of financing

#### 7. How are projects financed? What sources of funding are typically available?

In the electric power and mining sectors, concessionary projects have proven successful in securing financing from international financial organisations, development and export banks, international bank syndicates and regional banks.

Limited recourse project financing has been obtained for some Lao PDR electric power and mining projects. However, the credit standing of the off-taker is of key importance. Chinese lenders have typically only provided a hybrid form of project financing combining elements of limited recourse project financing with sponsor guarantees.

Certain Lao PDR mining projects have been able to raise debt via offshore bond offerings.

#### 8. What are the advantages and disadvantages of using project financing to structure a construction or infrastructure project?

##### Advantages

From a sponsor perspective, project finance limits lenders' recourse to the power project and therefore reduces the sponsors' own risks.

##### Disadvantages

The time and cost necessary to comply with Lao PDR laws and regulations can be significant. In addition, uncertainty remains regarding the enforcement procedures over off-taker payment guarantees, secured collateral, the likelihood and reliability of court intervention, and foreign currency repayment restrictions.

##### Corporate vehicles

#### 9. What corporate vehicles are typically used for financing projects? What are the considerations behind choosing these vehicles?

Sponsors must incorporate a Lao PDR limited company to undertake a project. Direct ownership of projects by foreign entities is not permitted under Lao PDR law.

If a project has a single shareholder, a "sole limited company" must be formed. The corporate governance rules for a "sole limited company" vary from those of a multi-shareholder "limited company".

##### Documentation

#### 10. What are the typical documents in a project finance transaction?

The typical project documents in a project finance transaction are:

- Concession agreements.

- Land lease agreements.
- Construction/EPC contracts.
- Operation and maintenance agreements.
- Insurance agreements.
- Shareholders' agreements.
- Power purchase agreements.
- Transmission wheeling agreements.
- Government undertaking/guarantee of Electricite du Laos (EDL) power purchase obligations.

The typical financing agreements in a project finance transaction are:

- Loan or facilities agreements.
- Inter-creditor agreements.
- Accounts agreements.
- Common terms agreements.
- Immovable assets security agreements.
- Movable assets security agreements.
- Share pledges.
- Equity contribution agreements.
- Subordination agreements.
- Hedging agreements.
- Direct agreements.
- Letters of credit.

### SECURITY

#### 11. What forms of security are available to protect investments? How are they created and perfected?

##### Forms of security

Security is available by law and by contract (*Secured Transactions Law; Secured Transactions Decree*). There are three forms of security under contract:

- Security over moveable assets (including shares).
- Security over immoveable assets.
- Security by another person or legal entity (namely, a guarantee).

Security by law consists of tax claims, wage claims, and "lien rights" (such as, claims of contractors and suppliers akin to a mechanic's lien).

Security over movable assets can extend to the gains of a project or activity, permission or right to conduct business operations and future returns, if they are reasonably certain to occur. Assets can also be deposited with another party (outside the scope of a pledge) under the terms of the Secured Transactions Law.

Immovable assets located in the Lao PDR can be secured by a "security contract over immovable property", like a mortgage.

Multiple securities over the same moveable asset are permitted, except for security interests provided via a pledge of "documents". Subject to any subordination agreement, seniority of security interests in the same collateral is determined by the date of registration as evidenced by the date stamp of the registry on the security document. In addition, security interests granted by law (for example, tax claims, wage claims and "lien rights") have priority over security interests under contract.

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Multiple liens over immovable property are permitted under the law. However, in practice this may not be possible as Ministry of Energy and Mines (MoNRE) has been un-cooperative in registering additional security interests for the same immovable property.

### Formalities

Security interests over movable assets (including share pledges) are perfected by registering the security document with the State Assets Management Department. A brief one-page Lao language summary of the security document contents is required.

Security interests over immovable assets are perfected by notarisation of the security document by the Notary Office or Notary Department and registration of the security document with MoNRE. A Lao language translation of the security document is required.

Registration fees, notarisation fees, and nominal stamp duty are payable in all cases.

Under the Secured Transactions Decree, security documents for moveable assets are valid for five years only and must be re-registered every four years and nine months. This re-registration requirement applies also to existing registered security documents.

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## 12. What mechanisms are available to protect security interests against competing interests?

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A security interest over any type of collateral is perfected when it is registered at the State Assets Management Department or, in the case of immovable assets, at the appropriate office or department of the Ministry of Energy and Mines, if both of the following conditions are met:

- The debtor and creditor have entered into a security agreement in which the characteristics and value of the secured assets is precisely defined.
- The debtor is the owner of the collateral or has authorisation to use the collateral as security.

In the case of immovable assets, the security agreement must be signed in the presence of three witnesses and notarised at the Notary Office or Department of Notary.

The stipulated fees for the notarisation and/or registration of the security agreement must be paid and the required stamp duties must be affixed. The notarisation process requires a Lao language translation. The registration process requires either a Lao language summary or a full translation.

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## 13. How is priority established?

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Perfection grants the secured party a first priority security interest over the collateral set out in the security agreement with priority over all unsecured claims, unregistered security interests, and subsequent registered security interests. Multiple securities can be granted over the same assets, except for securities provided via a pledge of "documents". Subject to any subordination agreement, the seniority of security interest is determined by the date of registration (as evidenced by the date stamp of the registry on the document). Security interests granted by law (for example, tax claims, wage claims and "lien rights" (akin to a "mechanic's lien")) have priority over security interests under contract. However, once the debtor enters insolvency proceedings under the Bankruptcy Law, the right of the secured creditor to transfer, assign, or foreclose on the secured asset is severely restricted.

In liquidation under either the Bankruptcy Law or the Enterprise Law, secured debts (in order of seniority) take priority over unsecured debts and distributions to preferred and common

shareholders. However, security created by operation of law such as tax claims, wage claims, and "lien rights" take precedence over the claims of secured contractual creditors.

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## 14. Can an agent or trustee hold security on behalf of a group of lenders?

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It is standard practice in large infrastructure financings for an onshore security agent to hold collateral as the secured party, on behalf of the project lenders. The onshore security agent is not required to hold any licence to hold or enforce the security.

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## 15. How can security interests be enforced? What steps can a lender take to enforce security?

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Advance written enforcement notice must be provided, before a security interest can be enforced (*Secured Transaction Decree*). In the case of immovable assets, a secured creditor must send a notice of default to a debtor requiring either vacation of the premises or other stated remedies to be completed within 60-days from the date of receipt of the notice. A copy of the notice must be provided to other creditors with security over the same asset, the government, and the owner of the immovable asset (if not the debtor), such as a lessor. The debtor must respond to the creditor within 15-days from the date of receipt of the notice of default.

In the case of moveable assets, a ten-day enforcement notice must be provided to the debtor, other creditors with security in the same asset, and via a notice published in the mass media.

In the case of a guarantee, a creditor must make prior demand to a debtor before enforcing the guarantee.

Self-help is not prohibited, provided that the secured creditor violates no laws in seizing the secured assets (*see Question 16*).

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## 16. Can a lender foreclose or appropriate against an asset?

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Self-help remedies are not prohibited, provided that no law is violated in the exercise of the self-help remedy. Foreclosure by way of public auction, sale by the creditor, or purchase by the creditor (on paying the debtor any excess in value over the outstanding principal and interest) are remedies authorised by the Secured Transactions Law, but are not exclusive remedies. No judicial sale is required. While Lao PDR law technically requires the use of the Lao kip in transactions, in practice many transactions are denominated or valued in foreign currency.

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## 17. How does the start of bankruptcy/insolvency proceedings affect a lender's ability to enforce its security?

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The Law on Bankruptcy applies to all insolvent enterprises (state or private companies located or conducting business in the Lao PDR). There are no extra-judicial processes authorised for the seizure of insolvent business assets. On commencement of bankruptcy proceedings, no assets of a company (including secured assets) can be sold or transferred, without approval of the courts and the Asset Supervision Committee.

Secured creditors enjoy no special voting or other rights over unsecured creditors during bankruptcy proceedings. In addition, a rehabilitation plan can be approved by the vote of creditors, representing at least two-thirds of the total debt and proposed to the court over the objections of the secured creditors. If no rehabilitation plan is approved by the court, the bankrupt company will be liquidated under the supervision of a liquidation committee

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appointed by the court. If the court determines the debtor to be "bankrupt", the security interests of the secured creditors will be converted into liquidated claims for money only, which will be paid out of the liquidation proceeds in accordance with the distribution priorities in the Law on Bankruptcy.

The Liquidation Committee can claw back pre-filing transfers resulting from "illegal contracts", including the discounted sale of assets, security granted for antecedent debts, and the transfer of assets to relatives, friends and insiders. There is no cut-off date limiting the claw back rights.

The shareholders of a company can also elect to dissolve and liquidate the company outside of bankruptcy proceedings under procedures set out in the Enterprise Law. In this case, the liquidator is appointed by either the shareholders or the court.

In liquidation under either the Law on Bankruptcy or the Enterprise Law, secured debts (in order of seniority) take priority over unsecured debts and distributions to preferred and common shareholders. However, tax claims, wage claims, and "lien rights" claims of contractors and suppliers (akin to a mechanic's lien) take precedence over the claims of secured creditors.

No special rights, remedies, or priorities are available to the claims of foreign investors or creditors under Lao PDR insolvency procedures.

## CONTRACTUAL PROTECTIONS

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### 18. What other forms of contractual protections are available to lenders to protect their investment?

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Lenders in project financings will generally require step-in rights and security interests over all project assets (both movable and immovable), share pledges from all project company shareholders, and representations and warranties from the borrower.

The step-in rights for lenders will be provided by "direct agreements" with the Government with respect to concession agreements and direct agreements with key project contractors, such as the power off-taker and the EPC/construction contractor.

Project insurances will be assigned to the project lenders. In most cases, political risk insurance payable to the project lenders will be required.

## INSURANCE

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### 19. What insurance arrangements are typical for projects in your jurisdiction? How do lenders protect their interests as regards project insurance?

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Under Lao PDR law, project companies must insure their project with a Lao insurer. However, reinsurance with foreign reinsurers is permitted. Given the limited financial capacity of local insurers, projects are typically reinsured 100% with a foreign reinsurer.

Project lenders will be additional named insured on the policies and in the event of default, or *force majeure* events, will have the right to apply the insurance proceeds to pay down the debt.

Required insurances will generally include:

- All risks cover.
- Third party indemnity cover.
- Delayed opening cover.
- Business interruption cover.
- Terrorism cover.
- Environmental risks cover.

- Political risk insurance.

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### 20. Are lenders named as co-insured or joint insured?

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Lenders can be named as co-insureds under insurance policies. The lenders will typically require an assignment of reinsurance policies that contain "cut-through" provisions requiring direct payment of reinsurance proceeds to the lenders.

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### 21. Are non-vitiation provisions common?

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The Insurance Law does not prohibit the inclusion of a non-vitiation clause in an insurance policy. The inclusion of this clause will be a matter of negotiation between the policy holder and the insurance company. The insurer can resist providing this waiver of defence against policyholder misrepresentations.

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### 22. How are insurance proceeds treated and applied?

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Finance documents will generally:

- Require lender consent to the use of insurance proceeds for repair or reconstruction in the event of *force majeure* events.
- Permit the lenders to elect to provide the insurance proceeds to pay down debt.
- A concession agreement will usually contain relevant provisions governing how insurance proceeds are applied in the event of *force majeure* or termination of the concession, subject to the prior rights of the project lenders.

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### 23. Are there any restrictions on insurance over projects provided by foreign companies?

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There are no restrictions under Lao PDR law to the payment of insurance proceeds to foreign creditors.

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### 24. Is reinsurance a feature of project financing in your jurisdiction? Are there any other aspects of project insurance that are particular to the jurisdiction?

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Lao PDR laws require all Lao risks to be insured with a Lao insurer. However, up to 100% foreign reinsurance is permitted.

## PROJECT RISKS

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### 25. What risks are typical in your jurisdiction and how are these mitigated or allocated?

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In addition to typical risks faced by project developers in an emerging country (such as currency risk and political risk), another major risk for power projects is hydrology risk. This risk has been mitigated in a limited number of power projects through a tariff scheme, whereby the off-taker commits to make a minimum payment to the project company during a limited debt repayment period regardless of project availability. Under the scheme, there is a "true-up" of the minimum payments against actual project availability at the end of the debt repayment period.

Lenders to Lao PDR projects will generally require political risk insurance. Terrorism cover is also normally required.

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Risks of change in law are usually addressed in the concession agreement, which will provide relief (subject to negotiated thresholds) in the form of tax or royalty relief or extension of the concession term.

Interest rate and currency risks are often mitigated by required hedging. In mining projects, the lenders often require commodity price hedging.

## **PUBLIC PRIVATE PARTNERSHIPS (PPPS)/PRIVATE FINANCE INITIATIVES (PFIS)**

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### **26. Has your jurisdiction enacted any specific legislation for enabling the use of PPPs or similar funding models such as PFIs?**

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There is no PPP or PFI law in the Lao PDR, although the National Assembly is considering a PPP law for possible adoption in 2018.

### **27. Are there any limitations on the use of PPP or PFI transactions?**

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There is currently no PPP or PFI law in the Lao PDR.

### **28. How are projects involving PPPs or PFIs typically financed? How does this differ to other projects?**

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There is currently no PPP or PFI law in the Lao PDR.

### **29. Can security be given to lenders by a concessionaire over interests in PPP or PFI projects? Does this require consents?**

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There is currently no PPP or PFI law in the Lao PDR.

Direct agreements with the Government with respect to concession agreements are common in project financings.

## **SOCIAL, ETHICAL AND ENVIRONMENTAL ISSUES**

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### **30. What social and ethical issues are relevant to project financing in your jurisdiction?**

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Corruption, especially in the form of demands by government officials for "under the table payments" in exchange for expedited permits and approval considerations, is an on-going issue in the Lao PDR.

Project developers who obtain financing from international lenders are often be required to comply with the Equator Principles. However, regional and Chinese banks are generally less stringent in this respect. Power projects located on the mainstream Mekong River must follow guidelines issued by the Mekong River Commission.

The Lao PDR has adopted laws against bribery, corruption and money laundering.

### **31. What environmental risks might be encountered? How is potential environmental liability assessed and how is liability allocated?**

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Over the past decade, the Government has developed increasingly sophisticated regulations on environmental and social matters

about the development of large infrastructure projects. The Environment Impact Assessment Decree requires development projects to conduct an Environmental Impact Assessment and prepare various social and environmental management and monitoring plans. Power projects located on the mainstream Mekong River must also comply with the guidelines of the Mekong River Commission.

Failure to comply with environmental obligations provided in a concession agreement can result in significant fines for the project company and the suspension of construction. Therefore, it is prudent practice for the project company to ensure that its environmental obligations under the concession agreements are reflected in its construction contracts, thereby reducing its exposure to risk.

## **NATURAL RESOURCES AND MINERALS**

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### **32. Who has title to minerals or other natural resources? Can foreign companies acquire rights to such assets?**

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Investors cannot acquire ownership rights over minerals or other natural resources. All mining activities are subject to the negotiation of a concession agreement with the Ministry of Energy and Mines and the Ministry of Planning and Investment (with input from relevant line ministries). There are two distinct types of concession agreements:

- Prospecting and exploration phase agreements.
- Exploitation phase agreements.

### **33. What royalties and/or taxes are payable on the extraction of minerals or other natural resources? How is the charge calculated?**

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Royalties and taxes are typically negotiated through a concession agreement. The Minimum Royalty Decree sets the minimum royalty at 6% of the value of the extracted minerals. An exemption from the Tax Law or the Minimum Royalty Decree will require approval of the National Assembly Standing Committee.

### **34. Are there restrictions, fees or taxes on the export of minerals or natural resources?**

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Presently, export duties are not imposed on the export of minerals. Export duties are imposed on exported timber (other than harvested plantation trees).

## **FOREIGN INVESTMENT**

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### **35. Are there any incentives to encourage foreign investment in projects?**

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Tax incentives and exemptions are provided under the Investment Promotion Law.

An exemption is provided from import duties and VAT on:

- Imported materials and equipment, which are unable to be manufactured in the Lao PDR.
- Imported vehicles and machinery that directly support manufacturing.
- Imported raw materials, materials and equipment, and equipment parts used in manufacturing for export.

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- However, no import duty or VAT exemption is granted on imported fuels, gas, lubricants, service vehicles or "other equipment".

Profit tax incentives and land lease fee exemptions under the Investment Promotion Law are not applicable to "concessionary" activities, which must negotiate any profit tax incentives or land lease fee exemptions as part of the concession agreement. Any incentives will generally require approval of the National Assembly Standing Committee.

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### **36. Are there investment treaties that protect foreign investment in projects?**

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The Lao PDR has entered into bilateral investment treaties with numerous countries, including Thailand, Vietnam and China.

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### **37. What fees or taxes are payable on foreign investment in a local project company? Are payments of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions subject to fees or taxes?**

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No taxes are imposed on investments in the Lao PDR, whether via equity or debt.

The payment of interest and fees to lenders (foreign and domestic) are subject to a 10% withholding tax. Payments of dividends to shareholders are subject to a 10% withholding tax.

Capital gains on the sale of shares in Lao PDR companies are subject to a withholding tax of 10% of the gain (if documented) or 2% of the sale price (if the gain or loss cannot be documented).

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### **38. Can project companies establish and maintain foreign currency accounts, both locally and in other jurisdictions?**

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Foreign currency accounts can be opened in the Lao PDR without restriction. However, the Law on Management of Foreign Currency prohibits the use of foreign currency for domestic transactions without specific approval of the Bank of Lao PDR (BOL).

Foreign investors must use the Lao PDR banking system for all transactions. The establishment and use of an offshore bank account by a Lao PDR company requires prior approval from the BOL.

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### **39. Are there any restrictions on the payment of dividend/repayment of shareholders' loans to a foreign parent?**

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A loan from a foreign shareholder requires the prior approval of the Bank of Lao PDR (BOL). Without BOL approval, the repayment of principal or interest on the shareholder loan via the transfer of funds outside of the Lao PDR is prohibited.

Dividends are payable to shareholders out of annual net profit, provided that the company's tax and labour payments have been fulfilled and the company does not have accumulated losses. In addition, BOL regulations require evidence that the registered capital of the foreign shareholders has been fully paid-up, as a prerequisite to the remittance of dividends abroad.

It is unclear whether, in practice, the non-availability of a capital importation certificate for registered capital held in offshore bank accounts, or resulting from debt-to-equity conversions or provisions of "in-kind" capital, such as project development

expenses, will restrict the ability of foreign investors to receive dividends or the return of registered capital.

Liquidating dividends (that is, return of registered capital (equity)) require the following:

- A special shareholder resolution.
- Government approval of the decrease in registered capital.
- Notice to all creditors.
- Public notices (ten times).
- Repayment in full to any objecting creditor.

In addition, any registered capital (equity) to be repatriated is limited to the registered capital brought in through the Lao PDR banking system, for which a capital importation certificate is required.

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### **40. Are there restrictions on the importation of equipment from abroad for use in a project?**

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To import goods into the Lao PDR, an import plan covering six months or one year (depending on the goods) and an import licence must be obtained from the relevant authorities. A foreign-invested company intending to import goods for use in local operations must request approval from the Investment Promotion Department (IPD) prior to obtaining an import licence from the Trade Department of the Ministry of Industry and Commerce.

On arrival in the Lao PDR, imported goods must be stored in a customs warehouse. The importer must then submit a detailed declaration and payment form to inspection officers. The inspection officers are responsible for the required import documents (for example, bills of lading, airway bills, shipping documents) and the goods. The importer can remove the goods from the warehouse after payment of relevant duties and taxes.

Concessionary companies may be granted the right to import equipment on a temporary basis for construction purposes. Depending on the specific grant of rights under the concession agreement, the right may extend to the contractors as well.

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## **CHOICE OF LAW AND JURISDICTION**

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### **41. Will local courts recognise a choice of foreign law or jurisdiction in a project contract or financing agreement? Are there any mandatory rules that apply despite a choice of foreign law or jurisdiction?**

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#### **Foreign law**

The choice of foreign law is not prohibited under Lao PDR law for most project contracts, unless the contractual provisions would be contrary to Lao PDR state or public interests. However, the choice of foreign law is not permitted for concession agreements, land leases or security documents which must be governed by Lao PDR law.

#### **Jurisdiction**

Lao PDR law and judicial practice does not indicate whether the courts would accept a choice of foreign jurisdiction in a project contract or financing agreement.

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### **42. Are waivers of immunity enforceable?**

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The Government of the Lao PDR generally accepts explicit "waiver of sovereign immunity" wording in concession agreements and related project documents. However, the authors are unaware of

any test of the validity of waivers of sovereign immunity in Lao courts.

#### 43. Will the courts recognise a foreign arbitral award or court judgment?

The Lao PDR is not a party to the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 (Hague Foreign Judgments Convention). However, the Civil Procedure Law provides for the recognition of foreign judgments subject to certain conditions. To be recognised by the Lao PDR courts, a foreign judgment must:

- Be translated into the Lao language (and this translation certified by a Lao PDR court).
- Be from a country that is a signatory to a treaty to which the Lao PDR is also a signatory or party (the law does not specify which treaty).
- Not contradict Lao PDR laws, civil procedure rules, or rules and regulations regarding security and social order.
- Not impact adversely on the sovereignty of the Lao PDR.

Lao courts can decide not to recognise a foreign court judgment in the following cases:

- If the judgment is subject to continuing proceedings or appeals and is not a final decision.
- If the losing party in the foreign judgment did not participate in the proceedings and the judgment was made in default.
- If the matter considered by the foreign court was properly under the jurisdiction of the Lao courts.
- If the judgment conflicts with the Lao PDR Constitution or laws.
- If other non-specified issues relating to the foreign judgment are brought to the attention of the Lao courts.

Given these constraints, a judgment from a foreign court is only likely to be enforced in the Lao PDR following a complete retrial, or retrial of the major issues, absent a treaty to the contrary.

Regarding international arbitral awards, the Lao PDR is a party to the New York Convention. The Economic Dispute Resolution Law provides that the Lao PDR acknowledges and enforces arbitral awards of foreign or international economic dispute resolution organisations and makes specific reference to the New York Convention.

A foreign arbitral award is enforceable in the Lao PDR under the Dispute Resolution Law, which directs that the People's Court of the Lao PDR will consider certifying these awards when the following requirements are fulfilled:

- The parties hold the nationalities of countries who are parties to the New York Convention.
- The arbitral award does not conflict with the Constitution and laws and regulations on national security, social order and the environment.
- The party against whom the arbitral award is being enforced holds business operations, shares, savings accounts, or other assets in the Lao PDR.

Once the award has been acknowledged and certified by the People's Court of the Lao PDR, the arbitral award will be implemented in accordance with the Law on Judgment Enforcement.

#### REFORM

#### 44. Are there any recent or proposed legal developments affecting project finance?

The amended Law on Water and Water Resources was recently adopted by the National Assembly and promulgated. An amendment to the Electricity Law is pending.

### ONLINE RESOURCES

#### Lao Official Gazette

W [www.laoofficialgazette.gov.la/](http://www.laoofficialgazette.gov.la/)

Description. Official Lao PDR government website for publication of legislation.

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