



ICLG

The International Comparative Legal Guide to:

Project Finance 2014

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A practical cross-border insight into project finance

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Egypt



Dr. Ahmed El Borai



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1 Overview

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

Over the past few years, it is difficult to assess, with substantial certainty, any notable developments in the project finance market. With the advent of two revolutions, it is contemplated that the project finance market will develop further over the next few years, with the surge of a large number of infrastructure projects, along with an increasing interest in Islamic finance structures.

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

There were a few financings over the past period, among which one can cite the following:

- Egyptian Nitrogen Products Company ENPC S.A.E. – USD 630,000,000 and 2,310,000,000 Egyptian Pounds (2009).
- Etisalat Misr S.A.E. – USD 300,000,000 and EGP 5,500,000,000 (2010).
- Egyptian Ethylene & Derivatives Company S.A.E. – USD 1,250,000,000 (2012).
- Egyptian Chemical Industries Company .S.A.E. – USD 212,800,000 and EGP 1,315,000,000 (2013).

2 Security

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

A specific agreement is required for each type of asset. For instance, a piece of land owned by the debtor can be foreclosed upon only if a duly executed and registered real estate mortgage agreement is in place. Similarly, a commercial mortgage requires a specific agreement along with the list of assets (tangible or intangible) being pledged to the benefit of the lender(s). While specific agreements are required for each type of asset, the loan agreement (executed between lender and borrower) usually contains the full set of security/collateral offered by the borrower in connection with any given financing.

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

Security can be taken over real property through the execution and registration of a real estate mortgage agreement. Other types of asset, such as a plant, machinery or equipment, can also be pledged through the execution and registration of a commercial (*fonds de commerce*) mortgage. In a nutshell, and for both types of security agreement, lender(s) and borrower agree and identify the assets being mortgaged while enlisting the events of default (allowing foreclosure on such assets). Registration takes place with either the land registrar (for real estate) or with the commercial registry (for other tangible/movable assets).

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

Security can be taken over receivables through the execution of an assignment of rights from the borrower/debtor in favour of creditors/lenders. The manner in which such receivables would be collected depends on the agreement between the chargor and the chargee. In any event, to ensure the enforceability of the charge/assignment agreement, the obligor must acknowledge the assignment agreement and must undertake to abide by its terms and conditions. Without such an acknowledgment and undertaking, the assignment agreement is not perfected. A three-partite agreement (between chargor, chargee and obligor) can also be used to create a valid and enforceable assignment agreement.

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

Security can be taken over cash deposited in a bank account through a specific consent form/pledge agreement executed between the borrower (account holder) and the bank. That being said, banks have, by virtue of law, a general lien over any and all accounts they hold. The purpose of this general lien is to offset any amounts fallen due by the account holder to the bank.

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

Shares of companies incorporated in Egypt may be pledged in

favour of creditor(s)/lender(s). As regards shares that are in a material certificate form, the pledge process entails the inscription of the pledge on the shares registry of the corporation, and possibly the physical custody of the shares certificate with the creditor/lender. For immaterialised shares, the pledge process only requires the inscription of the pledge on the corporation's share register, the corollary of which is to give a constructive notice to any third-party acquirer or new lender.

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

For the registration of a real estate mortgage agreement, irrespective of the number of lending banks, the authorities charge a maximum amount of EGP 100,000. As regards foreign banks (which are not supervised by the Central Bank of Egypt), the registration fees are 0.75% of the foreign banks' commitments, without a cap. That being said, there is currently an ongoing initiative at government level to cap all registration fees, including those owed by foreign lenders, at EGP 100,000. Stamp tax duty is incumbent upon both lender and project company, with an aggregate value amounting to 0.2% (for each party) of the loan amount.

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

Real estate registration is not costly, relative to the loan amount and foremost, the value of the land being mortgaged. In terms of time, the process would only take a few days once the proper documents are in place.

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

There are no consents, governmental or otherwise, required prior to the execution and perfection of a security agreement. The mortgagor must be the owner of the assets being pledged and must have the proper authority to mortgage/pledge the assets in question.

3 Security Trustee

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

The concept of the security agent is recognised in Egypt. The agent has the authority, by virtue of a mandate issued to its favour by the syndicate of lending banks, to enforce the security taken over the debtor's estate and to apply the proceeds in repayment to each lender. Generally, the security agent's role, along with the extent of its authority, is detailed in the loan agreement executed by and between any syndicate of banks and the borrower.

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

The concept of agency is recognised under Egyptian law and constitutes common practice among lending banks. The security agent, who is empowered by the remainder of lenders, is authorised to safeguard the security/collateral offered by the borrower and to foreclose on the same if and when the need arises.

4 Enforcement of Security

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

The enforcement of any type of security does not require regulatory consent. However, the enforcement of real estate and commercial mortgage agreements follows a rather stringent process. Lenders/creditors must first apply, before a court of competent jurisdiction, for a motion to foreclose on the security at stake. Once granted by the court, a public auction must take place and the assets are sold to the highest bidder. It is noteworthy to mention that the process of foreclosure is mandatory and cannot be waived or amended by the consent of the parties. Depending on the size of the loan and the assets being auctioned, the process may take several months before any value could be applied in repayment to lenders. In contrast, the enforcement on a pledge of shares is a rather swift process. If and where insolvency proceedings against the debtor are simultaneously underway, the foreclosure process would however take longer than just a few months.

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

There are no special restrictions or provisions affecting foreign investors and/or creditors.

5 Bankruptcy and Restructuring Proceedings

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

The initiation of insolvency proceedings precludes secured and unsecured creditors from pursuing their claims individually and entails a stay of proceedings in relation to any ongoing lawsuits initiated prior to the opening of insolvency proceedings against the debtor. Upon the initiation of insolvency proceedings, whether voluntary or involuntary, a general moratorium against all individual creditors' claims is issued, and creditors are prohibited from independently initiating any lawsuit to recover their claims from the debtor. However, by way of exception to this general prohibition, the legislator has endowed secured creditors, subject to obtaining an authorisation from the court, with the authority to

undertake preservation measures to protect the assets of the debtor if the insolvency trustee fails to adequately fulfil his role.

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

In terms of clawback provisions, there is a period of up to two years before the bankruptcy declaration date that could be considered as a suspect period, during which, creditors may claim the non-opposability of fraudulent transactions as well as prepayments made by the debtor during such period. As regards preferences, trade law establishes a number of privileges over the debtor's assets; these are:

- (i) judicial expenses;
- (ii) public treasury claims;
- (iii) expenses related to the preservation and repairs of the bankrupt's assets;
- (iv) general privileges (which include wages of employees);
- (v) special privileges (for instance, debts related to agricultural expenses and tools, arrears owing to lessors or hotel owners, and payment due to sellers of movables); and
- (vi) special privileges over real estate (the priority of claim for a real estate seller ranks as of the date of registration and is followed by architects, subcontractors and real estate co-owners' claims).

It is noteworthy that creditors' priority rankings are mandatory provisions under the Trade Law and bear a public order character. Therefore, these priorities can neither be contractually amended among the parties to a contract nor changed by the decision of the court.

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

Only public entities enjoy some form of immunity against bankruptcy proceedings. Public entities (or entities offering a public service) cannot be declared bankrupt and are subject to the provisions of administrative law, wherein no insolvency provisions or processes are foreseen.

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

A court-sanctioned process, especially within the confines of bankruptcy proceedings, is required for the enforcement of any type of security. Even where creditors and debtor may, in the course of bankruptcy proceedings, agree on a given restructuring or settlement plan, the court must approve the same before its implementation.

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

Upon the initiation of insolvency proceedings, whether voluntary or involuntary, a general moratorium against all individual creditors' claims is issued, and creditors are prohibited from independently initiating any lawsuit to recover their claims from the debtor.

Article 605 of the Trade Law clearly stipulates the aforementioned

principle in addition to a general prohibition against any and all independent judicial proceedings to be taken against the debtor (such as preservation measures in the form of attachments, etc.).

This overriding principle applies to all creditors, whether secured, unsecured or generally privileged. While the law is silent as to whether "cramming down" dissenting creditors is a possibility, the entire reorganisation option is contractual rather than by operation of law. The court has no power to impose any restructuring whatsoever upon dissenting creditors within a given composition.

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

There is presently no specific legislative scheme regulating the liabilities of directors vis-à-vis the creditors in connection with financially distressed companies in Egypt. However, directors' liability is subject to the general provisions of bankruptcy proceedings regulated under Law No. 17 of 1999 and the Egyptian Criminal Code, which specify the criminal liability for the acts of directors committed on or before the declaration of bankruptcy upon the finding of certain elements such as bad faith or fraud (or both) – and allow for the filing of criminal charges against the bankrupt entity, its directors or its managers, with the potential penalty of imprisonment and/or a fine. Article 704 of Law No. 17 of 1999 provides for the directors' personal liability to severally and jointly pay the company's debts, in the event the company's assets are not sufficient to pay more than 20% of its total liabilities upon the declaration of bankruptcy. This provision establishes a rebuttable presumption of liability based on the assessment and valuation of the bankrupt's assets versus its ability to reimburse the debts at stake. The legislator inserted this provision into the law in order to assist creditors when they collect on their claims when it is otherwise difficult to prove or substantiate the negligent management of the bankrupt's directors or board members. Also as a part of personal liability, directors and managers may be disqualified by a court ruling to manage any other company due to their gross negligence and/or wilful misconduct.

6 Foreign Investment and Ownership Restrictions

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

There are no special laws or regulations imposing any restrictions or additional fees for project companies owned and/or controlled by foreign investors.

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

Egypt has executed several BITs, the effect of which as regards the protection of foreign investments has not been tested.

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

The process of nationalisation and expropriation is regulated by Egyptian administrative law. Project companies, along with their assets, may be expropriated if and where i) a just compensation is

paid by the government in return and ii) the expropriation is deemed necessary for the achievement of a higher societal and public interest. For the past three decades, there has been no such instance where a project company has been nationalised or expropriated by the government.

7 Government Approvals/Restrictions

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

The General Authority for Investment has general authority to supervise and regulate the activities of project companies and their corporate standing. Additional authorities may be involved depending on the sector within which a given project company operates.

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

Financing or project documents need not be registered in order to be valid and fully enforceable as per their terms. As explained earlier however, security documents require registration to be perfected and subsequently enforceable.

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

Ownership of land does not require any licences, rather it is substantiated by a deed of ownership registered with the land registrar. Natural resources and pipelines are generally not subject to private property (subject to a few exceptions); the State has a monopoly over natural resources, their exploitation and the administration thereof.

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

Natural resources are generally confined to the authority and monopoly of the State.

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

As of the mid 1980s, there are no restrictions in Egypt as regards banking and financial operations in foreign/hard currencies and far less any impediments to foreign fund transfers. For more than two decades, individuals as much as corporate entities have been allowed to transfer foreign funds to overseas jurisdictions irrespective of whether or not such transfers were justified by substantiating invoices or any other document. However, with the advent of the Egyptian revolution in January 2011, the central bank of Egypt has issued certain directives to the banking sector, in the form of soft laws, in order to reduce the dissipation of foreign currency from the Egyptian banking system and to prevent fraudulent overseas transfers, generally linked and underlying more serious attempts to tamper with evidence in connection with financial crimes.

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

There are no restrictions in that respect. Repatriation of investment returns and/or loan repayments overseas are allowed for as long as substantiating accounting and legal documents are in place.

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

A project company may open bank accounts in overseas jurisdictions, provided conditions imposed by the latter are met.

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

There are no restrictions by law, however, it is customary to contractually restrict any dividend distribution at the project company level until completion of the project. Such a restriction often takes the form of a negative pledge contained in the loan documentation between project company and lender(s).

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

There are environmental, health and safety laws in place. Project companies are bound to abide by such laws and regulations and would be subject to routine inspections and supervision by representatives of the Egyptian Environmental Affairs Agency (working under the authority of the Ministry of Environment). Other authorities may also exercise their jurisdiction over the project company, and most notably in terms of safety, the Egyptian Industrial Development Authority (IDA).

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

There are no specific laws to regulate procurement for the private sector. Procurement takes place pursuant to the provisions of the civil and trade laws.

8 Foreign Insurance

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

There are no restrictions in that respect.

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

A foreign secured creditor may be named as beneficiary to an insurance policy over project assets. There are no restrictions in this respect.

9 Foreign Employee Restrictions

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

There are few rules that ought to be observed when recruiting foreign personnel in any company in Egypt. To encourage hiring Egyptian expertise and labour, any company hiring foreign workers or employees must observe a ratio of nine Egyptian employees/workers to one foreign employee. Where the foreign employee offers a set of experience, education or skills unavailable within the Egyptian labour market, then an exception to the above-mentioned ratio could be obtained. It is noteworthy to mention that foreign board members or directors would automatically obtain their work permits/residence and they are not taken into account for the purpose of calculating the nine to one ratio.

10 Equipment Import Restrictions

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

There are no restrictions with respect to the import of equipment to be used by construction contractors.

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

Import duties vary depending on the equipment being imported. The levies imposed generally range between 10% and 23% of the equipment value.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Force majeure provisions are embedded in the Egyptian civil code. *Force majeure* events would be enforceable if they satisfy a three prong test set forth by the legislator and subsequently elaborated by jurisprudence. To constitute *force majeure* as intended by law, the event must be i) external to the will of the contracting parties, ii) unforeseeable and iii) insurmountable (cannot be remedied at a reasonable cost). It is important to note that parties to a financing agreement may agree on additional events that would constitute *force majeure*, the occurrence of which would suspend (for a specific period) or terminate their agreement.

12 Corrupt Practices

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

There are no special laws and/or rules appurtenant to project finance in order to prohibit corrupt business practices and/or bribery. Such matters are dealt with under criminal laws in Egypt. Subject to the sovereign appreciation of the court, corrupt business

practices or bribery can be penalised with a minimal fine of EGP 1000 and/or imprisonment for a period no less than two years.

13 Applicable Law

13.1 What law typically governs project agreements?

Generally, project agreements are governed by the laws of the contractor's forum.

13.2 What law typically governs financing agreements?

The vast majority of financing agreements are governed by Egyptian laws. A few cases, involving international banks and overseas financiers, have elected to use the laws of a foreign jurisdiction to govern the financing agreement.

13.3 What matters are typically governed by domestic law?

Typically, even where a foreign law governs any given financing, security agreements are always governed by domestic law, being the law where the security is taken. As stated earlier, domestic courts have exclusive jurisdiction when it comes to the appreciation of the validity and enforceability of security documents.

14 Jurisdiction and Waiver of Immunity

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

The submission of a dispute to a foreign jurisdiction may be binding and enforced upon the parties, especially if the financing agreement attributes jurisdiction to a foreign forum of jurisdiction. That said, where recognition procedures are lodged before a domestic court, the latter may, on the ground of public policy, reverse or revisit (on the merits) the findings of a foreign jurisdiction. This, however, has seldom occurred before domestic courts.

15 International Arbitration

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

Arbitration clauses, deferring any financing-related dispute to an arbitral tribunal located overseas, would be recognised and enforced by local courts.

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

Yes, Egypt is a signatory to the 1958 New York Convention.

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

The validity and enforceability of security documents are subject to the sole appreciation of the court and hence, such dispute *per se* cannot be deferred to arbitration.

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

Certain disputes involving a large contingent of employees, within the confines of the negotiation of a collective agreement, are automatically and exclusively deferred to arbitration under the auspices of the Ministry of Manpower.

16 Change of Law / Political Risk

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

Insofar as project financing is involved, there has been no call for political risk protection. The involvement of a central government nonetheless occurs in the context of a settlement of an investment-related dispute involving the host government. Other than the foregoing, changes in law are an inherent risk to any investor, irrespective of the jurisdiction in question.

17 Tax

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

The repayment of a loan (owed to a foreign lender/bank), the tenure of which is less than three years, calls for a tax, deductible at the source, of 20%, irrespective of whether or not the borrower is owned by foreign or domestic investors. On the other hand, claims under a guarantee or enforcement of security calls only for minor administrative fees.

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

Within the general legal and regulatory framework, there are no special laws that grant privileges to foreign investors or creditors. That being said, the Investment Guarantees and Incentives Law (Law No. 8 of 1997) sets up a more lenient legal regime, with notable tax exemptions and privileges to investors, whether domestic or foreign. Among the advantages, one can cite an income tax exemption for a period of five years from the initiation of the corporate activity, a unified regulatory body in charge of granting all requisite licences and permits, the possibility to maintain the corporate capital in foreign currency, etc. As regards loans, mortgages and other security documents, there is only one common and unified regime, applicable to lender(s) and project companies across the country.

18 Other Matters

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

Perhaps the sole consideration one ought to take into account is that project financing in Egypt can be more time-consuming than usual.

The process of agreeing upon and executing the full set of financing and security documents, thereby reaching consensus among several lenders, can be complex. Certainly, there is a growing need to streamline project financing in Egypt.

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

Project companies, established under the form of a joint stock company (whether publicly listed or not) can issue bonds or notes provided: i) an extraordinary general assembly resolves the issuance in question; ii) the company has been rated (by a specialised and licensed rating company); and iii) a prospectus appurtenant to the issuance is prepared and submitted to the regulator (the Egyptian Financial Services Authority). The latter has the upper hand in granting permission to the project company for the prospective issuance.

19 Islamic Finance

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

1. *Istisn'a* and *Ijarah* combined

The most common form of Islamic project finance structures is the procurement (*Istisna'a*) and forward lease (*Ijara*) combination. Such a structure is based on a procurement agreement (or *Istisna'a*) between the project company (as the procurer) and a special-purpose vehicle (SPV) (owned by the bank/lender). The procurement agreement operates for the construction phase of the project, whereby the project company agrees to procure assets on behalf of the SPV by a certain date. Upon delivery of the assets, title thereto and possession thereof passes to the SPV. The SPV would act (on behalf of the bank) as the purchaser under the procurement agreement. As consideration for the project company procuring the assets, the bank agrees to pay the project company an amount no greater than the total project cost of these assets. This is the equivalent of the principal loan amount in a conventional project financing. The total project cost is paid to the project company through phase (or milestone) payments, which are equivalent to drawdowns under conventional loans. During the construction period of the project, the project company (through the SPV) is entitled to reduce the total project cost payable by the Islamic financiers by altering the specifications of the assets (equivalent to a cancellation under conventional facilities). The project company, as lessee, and the SPV, as lessor, will also enter into a forward lease agreement (*Ijarah*) to lease the assets on delivery. The forward lease agreement operates during the operational phase of the project. In some transactions, the bank/lender may require *Shariah*-compliant insurers on a *takaful* (cooperative) basis.

2. *Ijarah*

The *Ijarah* structure may be used in two situations:

(i) Where a developer may also be an investor in the project company and contributes the land for the project development as an in-kind contribution. The land is subsequently leased to the SPV created by the bank to hold the asset and subleased back to the developer (also the borrower in this scenario). The SPV will lease the project assets back to the developer through the *Ijarah*

agreement. The basic rent will generally be the same as the debt service payable by the SPV to the bank under the relevant Islamic facility agreement.

(ii) Where the project has already been completed, and will subsequently be financed by a purchaser by way of an *Ijarah* (lease) arrangement. The contract represents a transaction in which a known benefit (i.e. usufruct) associated with a specified asset is sold for a repayment. In the course of this sale of usufruct, ownership of the asset is not transferred. It is important to note that under such structure, the bank maintains ownership of the asset.

3. Wakala

A *Wakala* structure would not be used independently – it is an agency structure, which would usually be combined with an *Ijarah* structure. Banks would appoint the developer (also the borrower in this scenario) as their *wakil* (agent) to build the project on their behalf and to make the necessary payments through the project company. Banks/lenders would then lease the project assets back to the Project Company, using an *Ijarah* structure for rental income.

4. Tawarruq (Commodity Murabaha)

This is a purely financing structure, under which the project company and the bank enter into commodity trading arrangements to raise financing. Similar to asset financing, the cash received by the project company – pursuant to the commodity trading arrangements – will be used to fund projects and the project company will have an outstanding obligation to pay the financial institution the agreed marked-up price for the commodities. Once again, the project company would often provide collateral security in favour of the bank for the performance of its obligations under the financing.

5. Mudarabah

The *Mudarabah* model is essentially a profit-sharing partnership, pursuant to which a *mudarib* or developer provides management expertise to the bank, who is known as *rabb al-mal* (capital owner). The share of expected future profits between the developer and the bank is mutually agreed upon between the parties, at the outset the transaction. The bank bears all losses of invested assets (be it cash or other forms of capital). In case there is more than one investor, losses are to be shared according to the investment share of each investor. The entrepreneur (project company) must not bear any of

the loss attributable to the invested capital. The entrepreneur is not allowed to take any form of remuneration other than a profit share. Technically, the entrepreneur (project company) receives no compensation for its efforts unless the project is profitable.

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

Generally, *Shariah* is not recognised or treated as a “governing law”. It is instead a set of principles, which may form the basis of the governing law or be used by the relevant courts or adjudicatory bodies to determine the outcome of a specific matter. *Shariah* principles may differ depending on the prevalent School of Islamic Jurisprudence. In some jurisdictions, the law is usually stated as being “subject to general principles of *Shariah*”, which may affect various aspects of a financing, including the taking of security, payment of interest, taxation, bankruptcy, etc.

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

According to *Shariah* precepts, money is considered without intrinsic worth, and cannot be used on its own to generate more funds. Otherwise, it would amount to interest (known in Arabic as *riba*). Consequently, any obligation to pay interest is considered to be null and void. *Shariah* prohibits unfair exploitation and unjust enrichment, and therefore prohibits the charging of interest, penalty charges and default fees on delayed payments, which are standard in conventional financings. However, *Shariah* recognises the damage occurring to a party to whom money is owed by a defaulting debtor. It is therefore acceptable for a creditor to charge liquidated damages to a defaulting debtor. It is noteworthy to mention that the liquidated damage amount must be distributed to charity after deduction of the actual loss incurred by the bank/lender.

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Dr. El Borai is currently a Law Professor and Head of the Social Legislation Department, Faculty of Law, University of Cairo and Advocate before the Egyptian Court of Cassation and the *Conseil d'Etat* (since 1983). From 1995, Dr. El Borai sits as member of the Committee of Legal Experts of the Arab Labour Organisation (ALO), and, since 1999, as member of the Committee of Experts-Counsellors of the International Labour Organization (ILO). Dr. El Borai's publications include the following: "*The International Legal Framework for Migrant Workers: the United Nations Convention on the Protection of Rights of all Migrant Workers and Members of their Families*", July 2007; "*The Regulation of Immigration of Labor between the Arab States according to International and Arab Labor Practices*"; and "*Legal Framework for the Protection of Immigrant Labor in the Arab States*", research (in English and Arabic) commissioned by the ILO for the First Conference on Immigration of Labour between Arab States.

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Dr. El Borai has held such posts as: former assistant lecturer at the University of London, Queen Mary University and Westfield College; former assistant lecturer at Southern Methodist University, Dallas, Texas; lecturer for the ethics, conflict of interests and legal writing courses with the American Bar Association; Continued Legal Education (CLE) Program; lecturer in Labour Law with the American University in Cairo - Management Centre; and lecturer in contract and commercial law in the MBA Programme of the *Ecole Supérieure Libre des Sciences Commerciales Appliquées* (ESLSCA). Dr. El Borai is a former legal consultant to the World Bank's financial sector in Washington, D.C. He holds a PhD from the University of London in Cross-Border Corporate Insolvency, an LL.M. from the University of Warwick (UK), an LL.M. from Southern Methodist University (TX), an LL.B. from Paris I Panthéon-Sorbonne and an LL.B. from the University of Cairo.



El-Borai & Partners

El-Borai & Partners was established in 1986 by Dr. Ahmed El Borai. The Firm, initially specialising in labour and civil law matters, has recently been the subject of significant growth, both in terms of client base and specialties. With its exceptional attorneys, of-counsels and staff, the firm has expanded its scope of services and expertise into business and commercial law, including private equity, M&A, banking, project finance, PPP, corporate restructuring, commercial agencies, real estate, energy and information technology. Moreover, the Firm has a strong procedures and government relations department. The Firm enjoys a strong regional presence with a large local and international client base, including: leading local corporations; regional and international financial institutions; transnational corporations; and governmental organisations. The Firm has been selected to represent prominent local, regional and international clients in major transactions that have taken place since its inauguration. Such transactions include, but are not limited to, strategic mergers & acquisitions, private placements, syndicated loans, real estate development and public concession agreements.