



ICLG

The International Comparative Legal Guide to:

Project Finance 2014

3rd Edition

A practical cross-border insight into project finance

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Morocco

Hajji & Associés

Amin Hajji



1 Overview

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

The main significant and recent developments in the project finance market in Morocco relate to the energy sector, with the 2000 MW major solar energy plant to be established in the South of Morocco under the supervision of the Moroccan Agency for Solar Energy (MASEN), the Jorf Lasfar thermic power plant extension of 750 MW and the 850 MW wind farm plants in the north-east and southern territory of Morocco, with the national water and electricity authority (ONEE) as the contracting authority. Besides, it should be noted that the National Office of Railways (ONCF) is currently developing the high-speed train to connect Tangiers to Casablanca.

Moreover, it should be noted that currently, there is no specific legislation on public-private partnerships in Morocco. When such equivalent PPPs are organised, they are governed by common civil law. However, a special PPPs law should be promulgated in 2014 as it is currently in discussion before parliament.

The bill defines PPPs as a form of cooperation in which the state, local authorities, and in general any legal person of public law, entrust partners of private law, within the context of a long-term contract called a “contract for public-private partnership”, with the liability to realise a global mission of conception, financing of whole or part, construction or rehabilitation, maintenance and/or exploitation, of a facility or infrastructure necessary for the provision of a public service.

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

The most significant project financings that have taken place in Morocco in recent years are the Tanger-Med maritime port terminals, the Jorf Lasfar 4 & 5 thermic energy units and the Ouarzazate Solar Plant with a capacity of 160 MW.

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?

Under Moroccan law, all the debtor’s creditors have a general lien on all the properties contained in the debtor’s patrimony. Thus, in

order to benefit from preferential rights over the other creditors on specific property(/ies), a specific contract must be concluded for each form of security listing, the related assets of which are subject to the security given to the creditor.

Moreover, Moroccan security law provides for a specific legal regime for each type of asset to be provided to creditors as a security. The majority of the most valuable securities are subject to formal judiciary proceedings for collection of the proceeds, as well as a further a judicial auction of the secured asset.

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?

Indeed; collateral security may be taken over real property, plant, machinery and equipment. First of all, this collateral security does not result in a dispossession of the debtor from said land, plant, machinery and equipment. Furthermore, the validity of such collateral is subject to its publicity. Publicity of collateral taken over real property (land) is made by registration on the books of the land registry, while publicity of collateral given over plant, machinery and equipment is made before the secretariat office of the competent commercial court and by means of registration on the books of the trade registry.

However, should the land be in the public domain and/or the project construction and equipment be of public service, security cannot be taken over such assets and if taken, it cannot exceed the life duration of the related of public service project.

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?

Yes, receivables may be the subject of security. The validity of such collateral is subject to (i) submission of the proof of existence of the receivable to the pledgee, and (ii) notification to the debtor of the existence of such collateral or the exception of the collateral by means of a deed bearing a certain date. This notification is to be made either by the original creditor or by the pledgee should the latter receive a special authorisation from the creditor.

Moreover, even though security may be taken over receivables, the beneficiary is not free to collect the receivables if there is no event of default.

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

Security may be taken over cash deposited in bank accounts. Under Moroccan law, cash deposited in bank accounts is considered as a receivable. As a consequence, the same procedure indicated above for receivables applies for cash deposited in bank accounts.

Should the account beneficiary be in default in reference to any of its obligations under any project related finance agreement, the finance party may judicially claim the seizure of any amounts entered with said local bank account, and afterward file under summary judicial proceeding for the collection of the existing seized amount, capped at the level of the secured cash deposit amount. With respect to foreign bank accounts, the finance party should comply with existing local judicial proceedings in order to collect the debt proceeds.

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

Security may be taken over shares in companies incorporated in Morocco. The shares in Morocco are, by law, in dematerialised form.

The procedure for constitution of collateral security over shares consists of (i) an inscription that has to be made on the company's registers, and (ii) notification to the debtor of the existence of the collateral security over the shares.

The enforcement of the security should be preceded by a notice letter to the debtor detailing remedies which will be taken if the debtor defaults after a 10-day grace period. If the letter is unsuccessful, sale of the secured shares should be completed at a judicial auction in order to repay the creditors.

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)?

Generally, all deeds are subject to (i) signature authentication stamp over every page of the deed, and (ii) registration before the tax administration at a rate which depends on the purpose of the security interest (land, machinery and equipment, receivables, etc.).

Moreover, except for mortgages (security over land) which have to be made by and before a notary, other deeds may be concluded under private signature.

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?

The filing, notification or registration requirements in relation to security over assets do not require a significant amount of time. These formalities may be fulfilled in a relatively short time. As regards the amount of fees related to such securities, except for the fees of authentication of signature (stamp duties) which consist of a stamp over every page of the security deed, the registration fees are calculated over the amount/value of the transaction at a rate that depends on the nature of the property over which the security is constituted.

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.?

In general, no regulatory or similar consents are required with respect to the creation of security. However, such consents may be required in the hypothesis where the debtors have entered into an investment agreement with the government under which such consent is required prior to the granting of a security.

However, should the project plant to be established be in the public domain, there are legal provisions and specific public authority consents required under certain agreements with respect to the creation of security over public real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or over ground).

3 Security Trustee

3.1 Regardless of whether Morocco 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?

Under Moroccan law, security interests cannot, in principle, be taken by an agent on behalf of one or more creditors. They must be taken in the name of each of the creditors or in the name of a security agent who must in turn disclose the names of each of the secured creditors. Thus, the security agent that has a valid mandate from each creditor may enforce the security and apply the proceeds from the security to the claims of all the lenders.

3.2 If a security trust is not recognised in Morocco, 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?

A security trust is not recognised in Morocco and there might be a very weak and risky alternative mechanism available, such as a parallel debt or joint or 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. There are some security interests, such as mortgage over real estate, or pledge over machinery and equipment, which definitively cannot be organised under parallel debt structuring.

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?

Except for the enforcement of any secured bank account, there are significant restrictions which may impact the timing and value of

enforcement, such as a requirement for a public auction or the availability of court blocking procedures to other creditors/the company, together in respect of regulated assets.

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

Except for the enforcement of any secured bank account, there are significant restrictions which may impact the timing and value of enforcement, such as the requirement for a public auction and the availability of court blocking procedures to other creditors and/or the company together in respect of regulated assets.

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?

First of all, it should be noted that the opening judgment of an insolvency proceeding may not constitute, notwithstanding anything to the contrary, grounds for termination of a contract. Therefore, the lenders may not insert a clause in the finance documents providing for the termination of the contract if the company has to go through insolvency proceedings.

Moreover, the entry of a company into insolvency proceedings involves the company complying with a plan elaborated by the receiver. This plan may implement deadlines of payment to all or part of the creditors of the company.

However, the entry into insolvency does not prevent the lenders from pursuing the enforcement of their collateral security, provided of course that the debtor is in default regarding the finance documents and that the enforcement of such securities is allowed by the contract.

Finally, it should be noted that the debtor's entry into insolvency proceedings has the effect of freezing creditors' judicial actions against the insolvent person.

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?

There are preference periods during the insolvent person's reorganisation under the judicial receiver which can be around eight months, but are commonly on-going for years. The court may use 18-month clawback rights, and there are other preferential creditors' rights – e.g., tax debts, social security contributions, or employees' salary claims – with respect to the security.

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

Public entities, except those organised as corporations, are excluded from bankruptcy proceedings and the public legislation is applicable. The public legislation may provide for the waiver of performance and jurisdiction immunities to said public person in order that it can pay compensation to its creditors. Moreover, credit institutions are subject to specific bankruptcy proceedings provided for by the legislation applicable to credit institutions.

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?

Under Moroccan law, only court proceedings may be followed for the enforcement of a security.

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?

There are no other processes than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts.

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

The legal representatives of a company who continue to trade whilst their company is in financial difficulties in Morocco may be judicially guilty of fraudulent bankruptcy and fined between MAD 10,000 (approx. USD 1,250) and MAD 200,000 (approx. USD 25,000) and/or imprisoned for one (1) to ten (10) years. Moreover, aforesaid legal representatives may face commercial deprivation for at least five (5) years along with the inability to perform elective public functions.

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 restrictions on foreign ownership of a project company, but they are subject, as are any local companies, to regulatory control in terms of environment and labour, and to applicable taxes, if any. It should be noted, however, that there are activities in certain sectors, such as insurance agents and transport of goods by sea, in which foreign ownership cannot exceed 49% of the share capital.

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

Morocco has entered into more than 33 bilateral investment treaties and more than 54 non-double taxation treaties with countries such as France, United Kingdom, United States, etc., with whom the country has developed long-standing commercial, economic and political relationships.

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

Moroccan law excludes nationalisation or expropriation of project companies and assets. However, investment for example in the agricultural, fishing, hydrocarbon, telecommunication and banking sectors is restricted and/or regulated by specific dedicated public authorities.

7 Government Approvals/Restrictions

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

Depending on the economy of the project, the Moroccan state delegates or organises specific wholly-owned national private project companies that have full authority to implement the project with the foreign winning bidders' project consortium or entity.

With respect energy projects, the relevant government department is generally the minister in charge of mines, energy, water and environment, along with specific agencies such as the National Office for Hydrocarbons and Mines (ONHYM) or the National Agency for the Development of Renewable Energies and Energy Efficiency (ADEREE).

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?

The financing or project documents do not have to be registered or filed with any government authority, or otherwise comply with legal formalities, to be valid or enforceable. However, the financing documents should be disclosed to the Moroccan exchange authority named *Office des Changes* in order to ensure the free repatriation of the principal financing and net interest of any applicable taxes.

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, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, generally requires a temporary occupation or ownership agreement with local projects over the project assets licence. It should be noted that foreigners cannot acquire agrarian lands in Morocco in their personal name but rather through a legal entity.

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

There are royalties and fees, including taxes, payable on the extraction or export of natural resources, as provided under the Moroccan Hydrocarbon Law of 1 April 1992 as amended in 2000 and its application decrees.

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

There are restrictions on foreign currency exchange as the Moroccan dirham is not convertible. However, the free transfer of initial investment with any related revenues are freely transferable in foreign currencies.

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 on the remittance and repatriation of

investment returns or loan payments to parties in other jurisdictions. Controls are subject to the payment of applicable taxes by the beneficiary, especially withholding taxes.

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

Project companies can establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions, subject to their obtaining clearance from the Moroccan exchange authority.

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 Morocco or abroad?

There is no restriction on the payment of dividends from a project company to its parent company where the parent is incorporated in Morocco or abroad. This is subject, however, to the payment of applicable tax, mainly the 15% withholding tax for dividends to be paid to parent companies abroad.

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 material environmental, health and safety laws and regulations that impact upon a project financing as provided, amongst others, by the Moroccan Environment Law of 12 May 2003, and by the Moroccan Labour Law of 11 September 2003. The Ministry in charge of environment and the Ministry in charge of labour administer such laws and regulations.

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

There is no specific legal/statutory framework for procurement by project companies.

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?

Moroccan insurance law provides for insurance policies over project assets to be provided or guaranteed by Moroccan insurance companies, except with special authorisation from the Moroccan exchange authority.

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

Insurance policies over project assets are payable to foreign (secured) creditors, subject to the insurance premium being paid locally.

9 Foreign Employee Restrictions

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

Foreign workers, technicians, engineers or executives being employed by a project company are generally restricted from working in Morocco if persons with similar skills are available within Morocco. A dedicated labour authority is empowered to undertake such examination and authorisation, if any.

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 on importing project equipment or equipment used by construction contractors, but customs controls and fees, together with taxes, are payable at the importation stage. However, as project financing relates to major public works, substantial customs and tax incentives are granted to foreign project investors.

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

A project finance generally benefits from tax and customs incentives, which are applicable when the project entity is required to import related equipment and machinery. There are, however, some minimum importation costs which are payable and there are some exceptions for import duties if some of the project equipment is to be used for a temporary period and then exported.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Yes. *Force majeure* exclusions are available and enforceable, provided that they are duly agreed without any reservation by the contracting parties.

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?

General Moroccan rules prohibiting corrupt business practices and bribery, provided under the Moroccan criminal code of 1962 as amended, are applicable. The fines range from MAD 2,000 (~ USD 250) to MAD 3,000,000 (~ USD 375,000) and an imprisonment from five (5) to twenty (20) years.

13 Applicable Law

13.1 What law typically governs project agreements?

Local laws are generally applicable, as the majority of project obligations are performed in Morocco. However, Moroccan international private law of 1913 provides for the free choice of jurisdiction and law by contracting parties.

13.2 What law typically governs financing agreements?

Generally, foreign laws of the foreign financing parties govern such agreements.

13.3 What matters are typically governed by domestic law?

All onshore security contracts are necessarily subject to domestic law, the enforcement of which should mandatorily be made before Moroccan courts.

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?

A party's submission to a foreign jurisdiction and waiver of immunity is legally binding and enforceable, provided it has full capacity and/or a sponsor authority's preliminary approval to submit to such provisions.

15 International Arbitration

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

Yes, contractual provisions requiring submission of disputes to international arbitration and arbitral awards are recognised by local courts.

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

Morocco has been a contracting state to the New York Convention since 12 February 1959. It should be noted that the new Moroccan Constitution Law of 2011 expressly provides for the superseding of the ratified international convention onto the applicable laws.

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

Except for tax, criminal and family law cases, all disputes may be arbitrated under local law.

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

There are no types of disputes subject to mandatory domestic arbitration proceedings.

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?

To the best of our knowledge, no call for political risk protections, such as direct agreements with central government or political risk guarantees, have been made.

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?

A 10% withholding tax on interest payable on loans made by foreign lenders is to be made by the borrower. The same tax is applicable to the proceeds of a claim under a guarantee, but none is applicable for the judicial proceeds of enforcing security.

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?

The Moroccan Investment Charter of 1995 provides for tax incentives for any investors, local or foreign, including project financing investors. The same law provides for possible advantageous incentives from the Moroccan state if the initial investment is above approx. USD 24 million, and if it has potential for high local employment. It should be noted that Moroccan exchange regulation provides for the free transferability of initial investment and revenues subject to the payment of applicable taxes, if any.

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 Morocco?

When participating in project financings in Morocco, equity investors or lenders should strictly comply with applicable regulation in respect of the project industry, together with a clear and objective definition and scope of their investment with Moroccan authorities, specifically the Moroccan exchange authority, in order to comply with applicable tax and exchange regulations, which are quite sophisticated and sometimes complex.

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.

There are no legal impositions to project companies issuing bonds or similar capital market instruments. However, it should be noted that capital market instruments may only be issued by joint stock companies.

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 Morocco.

The Islamic Finance instruments are not yet regulated under Moroccan law. However, it should be noted that there is currently a bill of law on financial institutions which includes *inter alia* the following Islamic Finance instruments: *Mourabaha*, *Ijara*, *Moucharaka* and *Moudaraba*. This law should be promulgated in 2014 as it is currently in discussion before parliament.

Nevertheless, any agreement governed by Moroccan law may include reference to Islamic Finance instruments as long as these instruments are not breaching the applicable law, regulation and public policy.

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?

Pursuant to the article 13 of the Moroccan International Private Law dated 12 August 1913, the parties may freely choose the law applicable to their contractual relationship. Therefore, the parties may choose that the *shariah* law become the governing law of a contract or a dispute.

Nevertheless, to the best of our knowledge, there have been no recent notable cases on jurisdictional issues regarding the applicability of *shariah* or the conflict of *shariah* and local law relevant to the commercial or, more specifically, the finance sector.

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

The inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in Morocco. Indeed, the annual late fee is based on the regulatory rate of three per cent (3%) set by the Moroccan Central Bank (named *Bank-Al Maghrib*) and may be increased with a fixed margin currently set at seven per cent (7%).



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Education

- Juris doctor in Law, Faculty of Law, University Hassan II - Casablanca.
- Postgraduate Doctorate in Law, Faculty of Law & Economics of Toulouse - France.

Professional Career

- Founding and Managing Partner of Hajji & Associés since 1996.
- Professor at the Faculty of Law of Casablanca: doctoral studies in international commercial law and business law.

Associative & Scientific Activities

- Founder member of the Moroccan Association of business lawyers.
- Acting Chairman of the ICC Morocco Commission on Law and Practice and of the Moroccan Institute of Business Law.
- Founding Member of Aerial, a community of African lawyers specialised in air finance law.

Working Languages

- Arabic, English and French.



Association d'avocats

Hajji & Associés was established in 1996 by Amin Hajji. It is composed of two partners and six associates. The firm is located in the business centre of the city of Casablanca. Nearly ninety per cent of its clients are international corporations, with an Anglo-Saxon predominance.

The firm has since developed a way of working oriented to international business and its legal counsel activity has been furthered in areas of project finance such as: energy, notably aeronautic asset-based financing and leasing; mergers & acquisitions; telecommunications; distribution contracts; intellectual property; labour law; cyber law; and competition issues.

Furthermore, the firm represents its clients before Moroccan courts, mainly in commercial and civil litigations. International arbitration is also a new activity which the firm is developing progressively.