The Projects and Construction Review

Second Edition

Editor

Júlio César Bueno

Law Business Research

The Projects and Construction Review

SECOND EDITION

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE

Júlio César Bueno

> *La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque.* Michel Villey, *Critique de la pensée juridique moderne* (Dalloz (Paris), 1976).

In this preface I would like to recognise the great contributions of Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers, to the area of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), UK (Phillip) and Australia (Doug) – they have equally influenced lawyers, bankers, owners, contractors, engineers, designers, lenders and public authorities in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package. I am very happy to have three chapters they have specifically prepared for the introductory part of this book, discussing new trends in project finance, dispute resolution and relationship contracts.

I also thank all the law firms and their members who graciously agreed to contribute their countries' chapters. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by these leading experts in 29 countries has shown us that in order to understand the world we must first comprehend what happens in our own communities; to further advance our understanding of the law, we must resist the modern view that all that matters is global and what is local is of no importance. New jurisdictions covered in this year's edition include: Australia, India, Korea, Qatar and Spain.

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP-IBA), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL) and the Forum Committee on the Construction Industry of the American Bar Association (ABA). We are also celebrating the recent creation of the Latin American Society of Construction Law and its chapter in Brazil. All of

these institutions and associations – ICP-IBA, ACCL, SCL and ABA – have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice. I would like to thank their leaders and members for their important support in the preparation of this book.

I hope you enjoy this second edition of *The Projects and Construction Review* and look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
July 2012

Chapter 24

SOUTH AFRICA

Anton Barnes-Webb, Rob Morson and Daryn Webb[1]

I INTRODUCTION

Project finance is not new to South Africa. It has been used for many of the significant public infrastructure projects in the past 10 to 15 years: in toll road projects, the Gautrain rapid rail link, in office accommodation, hospital and prison projects and, in the past year, to procure renewable energy projects. For private infrastructure, it has also been widely used in mineral and natural resource projects and for telecommunications infrastructure.

The Development Bank of Southern Africa and the Industrial Development Corporation feature prominently in project finance transactions in South Africa and are expected to continue to do so. They often play multiple roles: as project lenders, equity lenders, equity providers, advisers and project managers.

Multilateral agencies also feature, although to a lesser extent.

II THE YEAR IN REVIEW

The most significant feature of the project finance market in South Africa over the past year has undoubtedly been the procurement, by the Department of Energy ('DoE'), of renewable energy projects pursuant to the DoE's renewable energy independent power producer programme. The aim of this programme was twofold:

a to make a start on meeting South Africa's obligations in respect of renewable energy production in South Africa; and

b to put in place a significant number of renewable energy projects, to supply renewable energy to Eskom.

1 Anton Barnes-Webb, Rob Morson and Daryn Webb are partners at Bowman Gilfillan.

The principal forms of renewable energy being procured are solar (both photovoltaic and concentrated solar plant), wind and, to a lesser degree, hydro. Currently the programme is about to commence its third round of bidding for the award of a power purchase agreement with Eskom, the state power utility. The round 1 bids have been submitted and are in the process of reaching financial close, round 2 bids have been submitted and have, at June 2012, just entered the preferred bidder stage, and the date for submission of bids for round 3 is currently set at the end of July 2012.

While it is generally acknowledged in the market that the request for proposal from the DoE and the programme itself have been well organised and run, there are a number of concerns within the market about the level of risk that has been imposed on project companies and lenders on the terms of the power purchase agreement and implementation agreement provided under the programme. Nevertheless, notwithstanding those concerns, it looks as though a significant number of these projects will run to completion.

Because of the large number of bids and preferred bidders who are endeavouring to be awarded projects, the relatively small market in South Africa of project finance advisers has been stretched, and in many cases, use has been made of advisers who are not customarily project finance advisers. The effect of this programme absorbing much of the project finance capacity in South Africa has also been that several other projects have suffered delays in consequence.

The South African government generally remains committed to a roll-out of a significant number of infrastructure projects over the next decade, as part of its commitment to reducing unemployment in South Africa. Many of the details of that infrastructure programme roll-out are still to be finalised, but if it does proceed as anticipated, it will mean that there is significant ongoing activity within the project finance market in South Africa for the foreseeable future.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Ownership structures vary, as they do internationally. In public-sector projects, ownership inevitably is retained by the public sector throughout the project.

ii Documentation

The documentation commonly used in international project finance transactions is largely replicated in South African transactions. Usually, the project vehicle is a newly incorporated and registered private company.

The project documents will usually comprise whatever concession agreement may be needed for the project, a design and construct subcontract, an operations and maintenance subcontract, any critical supply agreements and anchor offtake agreements, the project insurances and the agreements and constitutional documentation regulating the ownership of the project vehicle.

The finance documents will usually comprise facility agreements, a common terms agreement, the security documentation and those direct agreements required by

the lenders, which will commonly be with the subcontractors and, in the case of PPPs, with the relevant government authority as well.

iii Delivery methods and standard forms

The South African construction environment is sophisticated and generally akin to that of more developed jurisdictions. As a general rule, all internationally recognised methods or delivery and transactional structures are used in South Africa. From a transactional perspective these include single contractor and consortia/joint venture arrangements (with OEM/contractor or multiple-contractor unincorporated joint ventures being most common).

Delivery methods depend on owner requirements, the status of the owner (i.e., private or public sector) and the nature of the works. The private sector, and in particular private sector mining and industrial clients, contract across the full spectrum of delivery methods including EPC/turnkey, EPCM and alliancing arrangements (with the latter finding less favour, especially in high-value projects, and with EPCM often being not true EPCM but rather comprising an owner/consultant EPCM team with mixed roles and responsibilities).

Public sector procurement, on the other hand, has a strong tendency towards EPC/turnkey or multiple-consultant/contractor structures, with the public entity responsible for procurement and the project execution phase undertaken by a mixed client/consultant team. Multiple-contractor arrangements, whether in the public or private sector, typically include mixed DB and construct-only or erect-only contracting arrangements.

The delivery method of choice for project finance transactions (in keeping with single-point responsibility and step-down of risk principles) is EPC/turnkey. Alliancing and other delivery methods will find favour in the lower (subcontractor) tiers but not at the level of the principal agreement. The same applies for PPPs, which are usually project financed.

Construction procurement in South Africa is undertaken using both bespoke and standard-form contracts.

The FIDIC silver,[2] yellow[3] and red book[4] forms are all widely used, as is NEC3 produced by the Institution of Civil Engineers. The FIDIC and NEC forms are both approved for use for direct (as opposed to PPP) public-sector procurement by the South African Construction Industry Development Board ('CIDB') (established in terms of the Construction Industry Development Board Act 38 of 2000). Regulations promulgated by the CIDB oblige organs of state to use only approved standard forms for construction procurement (and encourages the use of the approved standard form contracts for private sector construction procurement) to promote efficiency. Other approved forms include the Joint Building Contracts Committee ('JBCC') 2000 suite of contracts (last updated in 2007), which is used for owner-designed building works; and the General Conditions

2 Conditions of Contract for EPC/Turnkey Projects, First Edition, 1999.

3 Plant and Design-Build, First Edition, 1999.

4 Construction, First Edition, 1999.

of Contract for Construction Works 2010 (GCC) produced by the South African Institute for Civil Engineering (although the 2004 version is still widely used), which is used for works of civil construction.

Given the need to step-down risk and minimise time and cost shift, PPP and other project-financed construction is generally undertaken on bespoke contracts or on the FIDIC silver book (EPC/turnkey projects). Due to its approach to risk allocation and compensation events, the NEC is used not widely used for this purpose.

Construction professionals are often appointed using industry-standard agreements, although bespoke agreements are also widely used. Standard-form contracts include the NEC professional services contract, the FIDIC client/consultant model services agreement and various standard forms, prepared and distributed by various South African professional organisations and associations. The NEC professional services contract or bespoke agreements are usually used for more complicated EPCM-type arrangements.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

In PPPs, the regulatory risk associated with the procurement process is often considered a significant one. It usually has to be managed and mitigated through sponsor and lender due diligence, because legal opinions by the lawyers advising the public sector are not provided. Recent experience has indicated that the South African authorities are willing to provide limited access to documentation in order for this due diligence to be conducted, a tendency that is increasingly being resisted by non-South African participants in PPP and IPP projects.

ii Limitation of liability

Contracts typically exclude liability for consequential and indirect loss, and cap the contractor's liability for direct damages. The cap is usually determined as a percentage of the contract price and is subject to negotiation, and often depends on the nature of the works. Civil engineering contracts typically have a lower cap than DB contracts.

Generally, the following are not taken into account to determine limitation of liability:

a proceeds from principal-controlled insurances (where the building contract parties are automatically covered, under a blanket insurance policy, for all approved works);
b liability from the annulment of principal-controlled insurance policies;
c delay damages; and
d low performance damages.

However, this is subject to negotiation and depends on the level of the cap.

Force majeure exclusions are available and enforceable in our law. Common law recognises force majeure exclusions even where parties have failed to cater for force majeure in their contractual arrangements. Project finance documents typically expressly regulate the parties' rights and obligations with force majeure events.

A force majeure event will generally excuse a party from liability for failure to perform its obligations. In a force majeure event it not customary for either party to claim damages for loss suffered as a result of a force majeure event.

iii Political risks

The arrangements that are used to mitigate against political risks include:

a procuring appropriate political risk insurance cover from institutions such as the Export Credit Insurance of South Africa ('SASRIA') and in some cases Lloyd's of London;

b obtaining assurances from the relevant government departments, especially regarding the availability of consents and permits;

c procuring guarantee coverage from MIGA against risks such as expropriation, and war and civil disturbance; and

d protections afforded to any party and their assets against revocation of a contractually valid offtake agreement, nationalisation or expropriation; currency exchange and transfer restrictions, war and civil disturbance, etc.

There are various constitutional protections afforded to any party and their assets against nationalisation or expropriation. The finance documents will also endeavour to cover various remedies that will be available to lenders in the event of nationalisation or expropriation.

The South African Constitution provides for the protection of rights to property, and persons may only be deprived of rights of property in terms of a law of general application, and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. This constitutional protection is not limited to South Africans and also extends to foreign investors to the extent that they are holders of rights of property in South Africa.

South Africa is member of MIGA, and depending on the type of investment, (e.g., investment without a direct shareholding, like turnkey contracts) they are typically funded by MIGA.

V SECURITY AND COLLATERAL

Where there is no requirement for registration of security in the South African Deeds Registry the security may be given directly to the lender by the borrower. However, where there is registered security, security company structures are commonly used to create security; this structure consists of a private company (the security SPV) being incorporated for the purposes of holding all of the security.

The security SPV grants a guarantee to the lenders for the obligations of the borrower under the finance documents. The borrower in turn provides an indemnity to the security SPV and the borrower secures its obligations under the indemnity by granting security to the security SPV. The shares in the security SPV are usually held by an owner trust or other administrative party.

Typically, a borrower will give (1) registered mortgage bonds over all of its material moveable and immoveable assets; (2) pledges and cessions of all of its rights (to revenue; to claims against third parties, to bank accounts and amounts standing to the credit of those accounts, to short-term investments and permitted investments, to insurance and under the project documents); and (3) a notarial bond over registered leasehold and certain types of tangible movable rights. A pledge and cession is also usual by each of the project company's shareholders of all of that shareholder's shares in and claims against the project company.

Suretyships and guarantees are contractual arrangements. They do not give any preference to the creditor on the insolvency of the grantor of the suretyship or guarantee. For this reason suretyships and guarantees given by third parties are themselves often backed up by real security in the form of one of the securities set out above.

Lenders will normally expect project sponsors to enter into binding commitments to inject their equity and sponsors may wish to offer various limited forms of support. This is usually regulated in a shareholders' agreement, equity subscription agreement or sponsor support agreement. Sponsors may also offer other forms of support such as completion guarantees, shortfall guarantees, technical support undertakings and letters of comfort.

Step-in rights are commonly used in project finance structures in South Africa. The lenders usually require certain step-in and other rights granted to the project company under certain key project documents and any claims that the project company has against the subcontractors. At a minimum, these step in rights would allow the lenders to step into those documents in place of the project company in circumstances where the subcontractor has the right to terminate the relevant project document (i.e., would enable the lenders to cure any project company default and prevent termination of the subcontract in order to keep the subcontractor working). In many cases lenders will also, following an event of default, be entitled to take control of, and direct the affairs of the project company, although the point at which they are entitled to do so is often the subject of intense negotiation. The step-in rights will commonly be contained within the direct agreements.

VI BONDS AND INSURANCE

Performance bonds and bank guarantees are commonly used in project finance transactions in South Africa to secure performance of the subcontractors. There is no specific construction-related insurance that must be maintained by law.

Construction contractors, as with all employers (in the context of an employer–employee relationship) must register with the Compensation Fund for the Compensation for Occupational Injuries and Diseases Act 130 of 1993, or with a licensed compensation insurer. Under the Construction Regulations 2003, prescribed in terms of the Occupational Health and Safety Act 85 of 1993, employers must ensure principal contractors (appointed under the Construction Regulations) are registered and in good standing with the compensation fund or a licensed compensation insurer, before construction work starts.

Contract works insurance, public liability insurance and marine insurance (as applicable) are typically procured by the employer or the contractor, and the contract typically regulates the obligation to procure and maintain insurance. Insurance for physical loss or damage arising from strike, riot, civil unrest and/or terrorism is provided by SASRIA. A SASRIA coupon is typically procured together with (and linked to) contract works insurance.

No project in South Africa has yet been financed through a project bond.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The type of security determines whether it is necessary to enforce the security through a public sale of the secured asset through the courts. With certain types of security (such as security conferred by way of a cession in security, a pledge and a special notarial bond), the secured creditor can, without prior judgment against, or pursuit of, the security provider, procure the sale of the secured assets and apply the proceeds to satisfy the principal obligation.

In the case of a mortgage bond or a general notarial bond, the secured creditor must first perfect the security by taking possession of the secured assets, after obtaining a court order directing attachment of the relevant asset. The secured creditor can then procure the sale of the assets, and apply the proceeds to discharge the principal obligation.

In some cases the secured creditor can simply agree with the borrower that the secured assets are sold without the need for judicial execution. This is known as *parate executie* (the right of a creditor to realise a borrower's property without first obtaining a court order). An agreement of *parate executie* concerning moveable pledged and delivered to the secured creditor is valid, provided there is no prejudice to the security provider. However an agreement of this nature is invalid in relation to security over immoveable property, and secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

Under common law, once insolvency procedures are commenced, a creditor holding moveable or immoveable property as security cannot realise the security itself, but must deliver it to the liquidator for realisation. However, a secured creditor can realise moveable property itself provided the procedures set out in the Insolvency Act 1936 are followed.

Where a secured creditor realises the security of an insolvent borrower, the creditor must pay the proceeds to the liquidator. The secured creditor is only entitled to a payment out of such proceeds if its claims are proved and admitted under the Insolvency Act. Where a secured creditor values its security when proving its claim the liquidator can, unless the security has already been realised, take over the relevant property at the value placed on it by the creditor. Takeover in this context means, in effect, the liquidator buying the property from the creditor for an amount equal to the value placed on it, effectively settling the claim and freeing the property from the creditors' rights.

The South African Insolvency Act distinguishes between a secured creditor, a preference creditor and a concurrent creditor. A secured creditor holds real security for his claim and is entitled to be paid from the proceeds of the property in which it holds

security. A preferring creditor does not have security over specific assets but, by virtue of the Insolvency Act, is entitled to be paid before the concurrent creditors. The concurrent creditors are the creditors who have neither a secured nor a preference claim and who are paid after the secured and preference creditors.

If a creditor has security against a debtor in the form of a pledge (whether by physical delivery of the asset or by cession *in securitatem debiti*), a mortgage over immoveable property, a special notarial bond or a reservation of ownership, the creditor is a secured creditor and will receive the proceeds of the sale of the property in respect of which the security was given.

If a creditor has a general notarial bond which has not been perfected or where the creditor has failed to take possession of the debtor's assets, the creditor merely has a preference claim, which will be settled after the claims of the secured creditors and the other preference creditors are met.

Where a creditor has a suretyship or guarantee and the principal debtor is liquidated, the creditor can sue the surety or guarantor for payment. However, if the surety or guarantor is not able to pay (even after the sequestration of the estate), the creditor has no further recourse.

The Insolvency Act allows the court to set aside dispositions made by an insolvent debtor in circumstances which constitute impeachable transactions as contemplated by Sections 26 (dispositions without value), 29 (voidable preferences), 30 (undue preference to creditors) and 31 (collusive dealing before sequestration) of the Insolvency Act. Thus, if a company disposes of any assets, at a time when its liabilities exceed its assets, at less than market value or in a manner that prefers or prejudices creditors, the liquidator can recover the assets from the third party.

Section 88 of the Insolvency Act provides that where a special notarial bond or a mortgage bond is passed over assets to secure a previously unsecured debt, which was unsecured for at least two months before the registration of the notarial bond or mortgage bond, and the debtor is liquidated within six months of the registration of the notarial bond or mortgage bond, no preference is recognised under the notarial bond or mortgage bond. Effectively, the creditor loses his or her security.

In most impeachable transactions, the other party must, for no consideration, return the asset so disposed or its value to the estate and then prove a concurrent unsecured claim for any loss it suffers. In the case of a collusive dealing, the other party can, in addition, forfeit his or her claim and is guilty of a criminal offence.

In South African law preference claims, constitute, charges against the non-secured assets of the insolvent estate. None of these preference claims has priority over secured creditors in respect of the proceeds of the secured assets, except for local authorities (municipalities), which are entitled to be paid for rates and property taxes in arrears for up to two years preceding the date of liquidation out of the proceeds of the immoveable property in preference to, and even to the exclusion of, the mortgage bondholder (a similar preference over the mortgage bondholder is given to a body corporate of a sectional title property scheme for arrear levies).

Certain entities such as banks, pension or provident funds, long-term and short-term insurers, or companies in which the government has the sole shareholding, are subject to specific rules and to the supervision of the body regulating the industry.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

EIAs are provided for in regulations to the National Environmental Management Act 107 of 1998 ('NEMA').

There are three lists of activities that require environmental assessments:

a activities that require a basic assessment to be carried out before being authorised;

b activities requiring scoping and EIAs to be undertaken before being authorised; and

c activities in specific geographical areas in each province (for example, protected areas, important areas for biodiversity conservation, estuaries, and sites or areas identified under an international convention).

The National Environmental Management: Air Quality Act 39 of 2004 provides measures for the prevention of pollution and ecological degradation, particularly in the control of emissions, and securing ecologically sustainable development.

The National Water Act 36 of 1998 gives effect to a public rights system under which water is allocated on an administrative licensing basis. This Act contains stringent polluter-pays provisions in the event of on and off-site water contamination. Under this Act people involved or in control of the construction projects are required to take all reasonable measures to prevent water pollution if their activities pollute water. Failure to take these reasonable measures exposes the contractor to criminal liability and liability for pollution clean-up costs.

The National Environmental Management Act: Waste Act 59 of 2008 requires holders of waste to both ensure that the waste is treated and disposed of in an environmentally sound manner and prevent any employee or any person under his or her supervision from contravening the Waste Act.

Hazardous substances are regulated by the Hazardous Substances Act 15 of 1973, which provides for the control of hazardous substances that can cause injury, ill-health or death to human beings. A licence is required to supply, let, use, operate or apply a hazardous substance as identified in this Act.

In the general environmental management principles section, NEMA requires that development must be socially, economically and environmentally sustainable. This includes:

a avoiding pollution and degradation of the environment;

b managing waste;

c using and exploiting non-renewable natural resources responsibly;

d adoption of a risk-averse and cautious approach in developments; and

e anticipating and preventing negative effects on the environment and on people's environmental rights and, where they cannot be altogether prevented, ensuring that they are minimised and remedied.

Authorisations granted under NEMA are subject to this principle.

The CIDB (Construction Industry Development Board) Regulations provide for the establishment of a register of contractors, and require that any enterprise tendering or entering a construction works contract with the public sector must be registered in the

appropriate grading and designation. Contractors tendering or entering a construction works contract with the private sector are not restricted in this way. In addition, all home builders must be registered with the National Home Builders Registration Council ('NHBRC'). Contractors registered with the NHBRC do not also have to register with the CIDB, if the public sector procurement relates to the construction of a home.

Apart from these registration requirements, there are no specific licences required by contractors for construction work. There are, however, various works specific approvals or consents, required under applicable legislation (including environmental, and health and safety legislation and regulations), and relevant municipal or other building regulations.

ii Equator Principles

The major commercial banks in South Africa have all adopted the Equator Principles.

iii Responsibility of financial institutions

The two primary statutes regulating environmental pollution and degradation extend the net of liability to include even those persons who 'indirectly contribute to' the pollution and degradation. While the ambit of this terminology has not been tested in court, it is possible that in certain circumstances liability may be extended to include a lender, but in the absence of some direct intervention this is unlikely.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs have their own regulatory framework in South Africa. The Public Finance Management Act and regulations promulgated under it regulate PPPs with government departments and entities within the national and provincial government spheres. The Municipal Finance Management Act and regulations promulgated under it regulate PPPs with municipalities and entities within the local government sphere. There is substantial policy consistency between the regulations, so while the institutional systems and decision-making processes differ, the fundamentals of affordability, risk transfer and value-for-money are consistent across all spheres.

Standardised provisions were first introduced in 2004. The PPP Unit initiated a review of the standardised provisions in 2009, which as at June 2011 is still ongoing.

Typically, the procurer issues a request for qualification ('RFQ') to potential tenderers who must respond to the RFQ to qualify for participation in the subsequent stages of the tender.

A fully termed RFP, requesting all qualified tenderers to submit a bid for the proposed project is then issued. The base agreement for the RFP is the PPP agreement itself.

Occasionally the government runs a best and final offer ('BAFO') process after the RFP closes. This process stage is likely to become less frequent as the process of concluding PPPs and standardised terms becomes more settled and common practice.

After the RFP and BAFO processes (if relevant), a preferred bidder is selected and negotiations are conducted, to execution. The PPP Unit's preference is for all of

the project and finance documents to be developed in parallel, so that financial close is reached at the same time as the PPP agreement is concluded.

Each stage requires a specified approval from the relevant treasury.

ii Public procurement

Section 217 the South African Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

This requirement is repeated in the Public Finance Management Act and there are similar requirements in various provincial tender board statutes and in the Local Government Transition Act in relation to municipalities. A decision to call for, the adjudication of, and the granting of a tender constitutes administrative action.

Black economic empowerment ('BEE') is a central part of the South African government's economic transformation strategy. The formulation of policy and legislation to achieve BEE has been driven by the Office of the Presidency, together with the Department of Trade and Industry. A multifaceted approach to BEE has been adopted with a number of components that aim to increase the numbers of black people that manage, own and control the country's economy, and to decrease racially based income inequalities. In public sector projects, achieving BEE goals is a significant evaluation criterion.

According to principles of administrative law and the Constitutional principle of legality, public procurement that fails to comply with the provisions of the Constitution or relevant legislation will be invalid and may be set aside by a court. In appropriate cases, and in accordance with the normal requirements relating to bans, a public body could be banned from engaging in unlawful procurement activities.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

South African residents are subject to exchange controls in terms of the Exchange Control Regulations, issued under the Currency and Exchanges Act 1933.

The purpose of exchange controls is, *inter alia*, to regulate inflows and outflows of capital from South Africa. South African residents are not permitted to export capital from South Africa except as provided for in the exchange control rules.

A non-resident may freely convert any rand currency earned in South Africa to a foreign currency (e.g., branch profits). However, the local authorised dealer bank will require proof from the local auditor that the profits were actually earned by the branch. A subsidiary may also freely remit any profits subject to audit confirmation of such profits.

A non-resident shareholder may freely remit dividends, profits or income distributions in proportion to the percentage shareholding or ownership and may sell shares and remit the profits subject to the administrative requirements mentioned above.

A South African resident company may remit profits to foreign investors subject to the administrative process.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific rules or requirements, and South Africa does not have a dedicated forum (court or otherwise), for project or construction disputes. In the absence of a written agreement to the contrary, the default position is that disputes are dealt with in the court having jurisdiction (which, having regard to the value of such disputes, will almost always be the High Court).

ii Arbitration and ADR

As a rule parties to project and construction contract include dispute resolution terms in their contracts which:

a provide for final and binding arbitration;
b generally include adjudication as a precursor to arbitration; and
c sometimes provide for mediation as a preliminary or intermediate step in the dispute resolution process.

South Africa is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The conduct of an arbitration is regulated by terms of reference and rules that are agreed to by the parties and, in South Africa, is subject to the provisions of the Arbitration Act 42 of 1965, which provides a statutory framework for arbitrations. The most commonly used rules of arbitration are those of the Association of Arbitrators (Southern Africa) and the Arbitration Foundation of South Africa.

Adjudication and mediation are non-legislated voluntary processes that are regulated by terms of reference and rules agreed to by the parties.

XII OUTLOOK AND CONCLUSIONS

As South Africa continues an ambitious programme of infrastructure development, aimed at increasing economic productivity and creating employment after a long period of underinvestment, it is anticipated that project finance, mobilised from the private sector and its development finance institutions, will be used significantly.

Appendix 2

ABOUT THE AUTHORS

ANTON BARNES-WEBB

Bowman Gilfillan

Anton Barnes-Webb is a partner in Bowman Gilfillan's corporate department and is the head of the firm's project finance and infrastructure practice area. He specialises in project and other financing transactions and mergers and acquisitions.

In the project finance field Mr Barnes-Webb has been involved in a number of projects, advising lenders in some transactions, and borrowers in other transactions. Recent examples are leading the team that advised Rand Merchant Bank and Standard Bank in their financing of the Gautrain Rapid-Rail Link project and advising Eskom on financing for its new coal-fired power station being constructed at Medupi.

In the mergers and acquisitions area Mr Barnes-Webb has recently advised Sappi on its €750 million acquisition of paper-mill and associated businesses in Europe from M-Real Corporation and on the international rights offer to raise €450 million made by Sappi shortly after that to raise funding required for that acquisition. He has also advised a range of multinational and local companies in various other merger and acquisition transactions.

An increasing amount of his work has involved acting in financing transactions in several jurisdictions in Africa outside South Africa, including Mozambique, the Democratic Republic of the Congo, Angola, Zambia, Nigeria, Equatorial Guinea, Gabon and Lesotho.

ROB MORSON

Bowman Gilfillan

Rob Morson is a partner in Bowman Gilfillan's corporate department. He specialises in construction and engineering law and is the corporate department construction and engineering practice area manager. He also heads up the Bowman Gilfillan construction law group.

Mr Morson was admitted as an attorney in 1996 and has practised in both the commercial and litigation fields. He has advised employers, contractors and consultants on contracts (both standard form and special purpose), disputes and other matters in connection with, inter alia, energy, port, mining and process plant projects (including waste treatment, cement, paper and acid plants and aluminium smelters), equipment supply, erection and refurbishment projects, fabricated steel supply and line-pipe supply projects and industrial and commercial property transactions. He has extensive experience in the use of FIDIC, NEC, JBCC and other standard forms.

Mr Morson is ranked by both *PLC Which Lawyer* and by *Best Lawyers* in the field of construction law in South Africa. He is currently advising clients on various process plant, mining and energy projects and is the lead lawyer to Eskom in connection with the new Medupi and Kusile power stations. Other clients for whom he acts include Airports Company South Africa, the City of Johannesburg, Barloworld, BHP Billiton, ENRC Pretoria Portland Cement and Xstrata Coal.

DARYN WEBB

Bowman Gilfillan

Daryn Webb joined Bowman Gilfillan in 1991 and has been a partner since 1997. Having done general corporate, commercial, M&A and state restructuring work for a number of years, he now specialises in project and infrastructure work and corporate, project and other finance.

Mr Webb led the team that advised on the Department of Trade and Industry PPP, was part of the team that advised the lenders on the Gauteng Rapid-Rail Link project, and also led the team that advised on the financing of the black economic empowerment equity transactions of Goldfields in 2003, of FirstRand Bank Limited in 2005 and of Pretoria Portland Cement and Barloworld in 2008.

Outside South Africa, Mr Webb has advised on transactions in Mozambique, Nigeria, Botswana, Tanzania, Kenya, Zambia and Zimbabwe. He has been recognised in project finance by the *International Who's Who of Business Lawyers* and *Chambers Global*, and in 2010 received the South African ILO Client Choice award for banking.

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