WHO'SWHOLEGAL

The International Who's Who of Business Lawyers

ROUNDTABLE

The International Who's Who of Project Finance Lawyers **has brought together five of the leading practitioners in the world to discuss key issues facing lawyers today**

Participants

OSCAR AITKEN
Carey y Cía Abogados
Chile

DAVID PLATT
Shearman & Sterling LLP
England

DEVENDRA PRADHAN
Pradhan & Associates
Nepal

DANIEL WEINHOLD
Weinhold Legal, v o s
Czech Republic

MICHAEL STONEHAM
Dundas & Wilson CS LLP
Scotland

THE RETURN OF BIG PROJECTS

Who's Who Legal: *After a generally slow 2009, many of the lawyers we consulted were optimistic about 2010. Are big projects making a comeback in your jurisdiction? How do current market conditions compare with those before the global financial crisis?*

Daniel Weinhold: We are expecting new projects, mainly in the energy sector, in connection with the reconstruction of pre-existing energy facilities, as well as construction of new energy sources. A significant upcoming project involves the enlargement of the Temelín nuclear power plant, which is now in the stages of preparation.

Since it will be one of the largest ever projects in the Czech Republic, we expect that it will also require the realisation of some "smaller" projects on the side of companies participating in this project as well.

It is worth mentioning that the reconstruction deals in the energy sector are driven by the end of the standard economic cycle in this industry, rather than by the attempts of Czech politicians to help the Czech economy through an increase of government spending.

David Platt: In the Middle East there certainly seem to be more projects "in the pipeline" than there were this time last year. There are IPPs and IWPPs at various stages in Oman, Saudi Arabia, the UAE, Morocco and Tunisia, to name but a few, and a growing number of PPP-type transactions. The big LNG projects appear to have ceased but there is increasing activity in the petrochemical, mining and industrial sectors.

So the projects are coming back (though they never entirely went away). They are, however, going to be harder to do as liquidity from commercial banks has not returned to pre-crisis levels, and as we see, there is relatively limited evidence of a returning appetite for underwriting risk.

Devendra Pradhan: The adverse impact of the recent financial crisis has not ended yet. In the recent global market, project financiers are often seen either delaying or abandoning projects. Undoubtedly, Nepal can not stand aloof of the recent global financial crisis. Despite being geographically a small country on the global map, Nepal has huge potential in the renewable energy sector, more particularly in hydroelectricity sector. Nepal is the second largest country after Brazil in terms of hydroelectricity capacity. The government of Nepal is trying to lure global investors in big hydroelectricity projects; however, global financiers have yet to come back in Nepal. In addition to the global financial crisis, Nepal has recently overcome a decade-long domestic conflict and is currently in a post-conflict phase. The country is under the process of making a new constitution. Several global financiers, including the International Finance Corporation, have been closely monitoring the progress on the peace process in order to launch new projects in Nepal. As such, the comeback of big projects in Nepal depends upon the success of the peace process and political stability in near future. In recent days, the Asian Development Bank has been playing an active role in the development of infrastructure projects in Nepal.

Oscar Aitken: I believe in Chile there is also a great general mood with respect to project finance work in 2010. The financial crisis did not affect Chile too much – mainly due to the resources that the country has abroad, part of which were used in the stimulus plan sponsored by the previous administration. Market conditions are fine, mostly due to the optimism created by the new administration and the belief that a new government will improve the performance in several areas in which the pace was slowing down during past years.

Michael Stoneham: In Scotland, so far as big projects are concerned, there has not yet been a comeback.

The Replacement Forth Crossing is an exception, but that is a project which clearly needs private finance to support it. So far it is floundering between the Scylla of the Scotland government's inability to persuade the UK treasury to support it by advancing future capital spending allocations, and the Charybdis of the government's suspicion of PPP structures and private profit derived from public assets.

In Scotland, apart from a few large transport and offshore wind projects, the name of the game is relatively smaller-scale and community ownership elements in projects. The NPDO (non-profit distributing organisation) model was devised to deliver this and to cap equity returns and has been used on recent schools and health projects. The Scottish Futures Trust, an embryonic national infrastructure fund, is tasked with developing this concept into areas such as local health (hub), waste and housing and giving Scotland a distinctive positioning within the overall UK framework.

Current market conditions are clearly affected by the availability of loan capital from the major London-based banks, with financial and documentation terms significantly hardened since 2006, but one benefit of UK government ownership of UK banks has been a greater focus on supporting UK projects.

Political aspects remain highly relevant in Scotland, as in the UK as a whole. A nationalistic Scottish government is pressing for greater financial autonomy as well as developing a distinctive Scottish solution for major projects. And the impact of public sector cuts is yet to be felt. So there is plenty of activity, but times are challenging for the project finance industry.

STIMULUS SPENDING

Who's Who Legal: *With several governments implementing financial stimulus packages, many governments are focusing on infrastructure development to kick-start their economies, and project finance lawyers are seeing a surge of demand. Is this the case where you are? What other recent government measures affect project finance?*

Oscar Aitken: The stimulus plan implemented in Chile during the past administration was widely approved of among internal and foreign financial actors. However, from the nearly US$4 billion that the plan cost, only US$700 million was intended for infrastructure development. In Chile most of the basic public infrastructure has been built during the last 15 years, in which 51 projects represented more than US$11 billion. The current shortfall on road infrastructure has been estimated at US$1.5 billion, according to the government.

The administration in power since last March has indicated that investments in public infrastructure, according to the government programme, should focus on schools, hospitals and public transportation.

Michael Stoneham: UK banks, no doubt encouraged by government shareholders, have certainly identified UK projects as a core part of future business to which capital should be allocated – in contrast to the leveraged and property finance sectors presently.

The UK government pre-election budget plans included a significant focus on infrastructure and energy projects, although it seems as if housing projects will be less fortunate. All this needs to be tested once the reality of budget deficit reduction measures hits home post-election.

In Scotland, it is seen as inevitable that there will be reduced spending available to support capital projects, even though the government is devising new funding approaches. One, called tax incremental financing, uses earmarked or allocated revenue streams for specific purposes. Another is the limited use of government guarantees for loans made by public bodies or as a take-out for front-ended development finance.

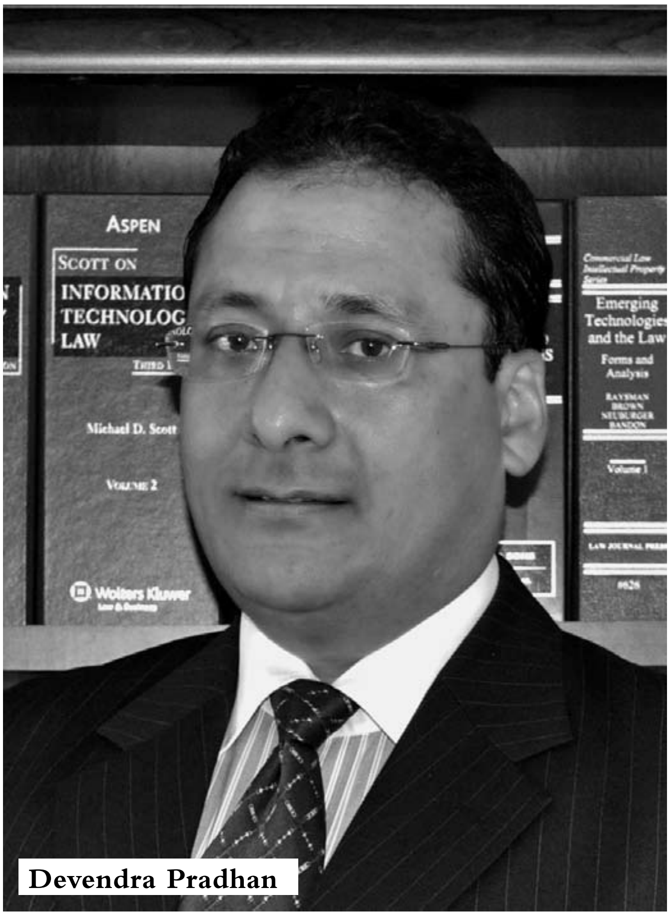
The emphasis is on innovation in supporting financing techniques, developing out from the traditional project finance base, in order to attract the core financing.

Similarly, the UK government has recently launched a consultation on the ROC regime which supports renewable energy projects. Whilst started for the right reasons, the inevitable effect on project financing is to introduce potential uncertainty at a time when the market had more or less learnt to live with, if not love, the ROC structures.

No one should be in any doubt that project finance operates in a very political environment!

Devendra Pradhan: Unlike other jurisdictions, the government of Nepal has not implemented any financial stimulus packages to cope with the financial crisis. In fact, Nepal has suffered more due to the domestic conflict, as compared to the global financial crisis. Infrastructure projects have always been the

Michael Stoneham



priority for the government of Nepal, which has implemented various laws providing incentives for infrastructure projects. Project financing is taken as a new method of financing in Nepal, which is typically seen in hydroelectricity projects and other infrastructure projects. Only a handful of lawyers are seen practising in this area. The success of project financing activities in Nepal undoubtedly depends upon the success of the peace process and political stability.

Daniel Weinhold: It is questionable if, due to the fact that no real political government has been in place since spring 2009 in the Czech Republic (after the fall of Topolánek's government in March 2009, a provisional government was formed), there has been a positive or negative effect on the Czech economy. The stimulus package adopted by the interim government was focused primarily on the small and medium-sized enterprises, and limited only to the year 2009. On the other hand, huge infrastructure projects would significantly increase the budget deficits, and the total amount of public debts in the years to come would ultimately deteriorate the macroeconomic figures of the Czech Republic, as well as its popularity among foreign investors.

David Platt: The Middle East has (with the possible exception of Dubai) been less hit by the crisis than other areas, in that the recession has not resulted in a crash in oil prices. As such (again with the exception of the bailout of Dubai), there have been relatively few major steps taken. That said, at a more micro level we are seeing a more flexible approach being taken by project procurers in terms of the level and certainty of financial support that they expect to see accompanying bids, and also a preparedness for project procurers to consider bringing along part or all of the debt financing package. This was traditionally the way projects in Qatar, especially in the LNG area, were affected, but we see some early indications that other jurisdictions are considering similar approaches for the big projects that would otherwise struggle to achieve their debt funding requirements.

ACTIVITY IN RENEWABLES

Who's Who Legal: ***The renewable energy sector appears to be a bankable option for project financings in numerous jurisdictions. Does your experience confirm this? What reasons could you give for this increase in popularity?***

Devendra Pradhan: Renewable energy has become increasingly popular these days. Renewable energy also seems to be a bankable option for project financing as it is replenished constantly and it creates a lesser degree of adverse impact on the environment, compared to other types of energy generation method. From the project financier's viewpoint, the most significant aspect of renewable energy projects is that it has longer life and lesser operational costs which make it a very reliable source of energy. The successful experimentation of renewable energy projects in the global marketplace – for example, wind energy in Europe and the United States; solar energy in Spain, the United States and Kenya; geothermal energy in Iceland, Eastern Asian countries, Latin America and the United States; and hydroelectricity projects in China and Brazil – has demonstrated that renewal energy will certainly become the wave of the future in the energy sector and shall become the most popular source of energy in the global energy marketplace.

David Platt: There are two reasons. First, insofar as wind energy at least is concerned, the generation costs are coming down so as to be almost equivalent to all-in conventional thermal generation costs. Second, governments are seeking to diversify their energy sources (in Europe, away from polluting coal and Russian gas) and thus continue to encourage such projects through favourable feed-in tariffs. I cannot fully agree with the comment above – whilst renewable energy will become more popular, the inherent inflexibility of the energy source will mean that it is almost always (other, perhaps, than countries with extensive, non-seasonal hydroelectric capacity) going to be in second place to conventional and nuclear generation.

Oscar Aitken: There are huge opportunities in the energy sector in Chile. The energy shortage that we suffered a few years ago has opened the eyes of the authorities to the need for more investments in the area, which of course may have an impact on the renewable energy sector. In 2008 a new energy law was approved requiring new energy projects to invest in and supply energy from non-conventional sources. One of the most important effects of the law is to establish conditions to attract investment in projects, eliminating entry barriers and making these new sources compatible with the country's electricity market.

On other hand, the Chilean geography has also been named as one of the most important factors that may create a good environment for renewable energy projects, since there are huge extensions of land where geothermal, sunlight, wave and wind, mini-hydropower, and biomass energy generation can be placed in optimum conditions.

Daniel Weinhold: The Czech Republic was, like many other European countries, hit by the enthusiasm for renewable energy. Unfortunately, the renewable energy boom also attracted some questionable investors with limited equity and know-how. Moreover, if all the announced renewable energy projects were to be carried out, the Czech power grid would collapse within weeks. The banks also have take into consideration the current political and expert debates on how to accelerate the decrease of the guaranteed minimum price for electricity from renewable sources.

In view of the above, we foresee a limited appetite among our clients to finance new renewable energy projects in the Czech Republic. There are also pending legislative changes making some renewable energy projects (in particular solar energy) less attractive.

Michael Stoneham: Scotland has the potential to be a world leader in the renewables sector. Resources of water for hydro, forestry for biomass, wind and waves have encouraged the Scottish government to set renewables targets in excess of those applying in the UK as a whole.

Onshore wind farm activity is building momentum, whether at the small scale community level or with the bigger portfolio based wind farm investments of major developers such as Fred Olsen. Offshore wind is now starting in earnest with the award of the first 10 or so concessions.

There is growing demand for biomass, though supply issues remain unresolved, and innovative developments with wave and tidal power schemes. For some reason, though, solar energy seems to be more low key in Scotland.

This is all clearly a growth industry for decades to come. Project financing is underpinned by the ROC regime, which works sufficiently well for this purpose. And is supplemented by the new feed in tariffs available for smaller schemes. What is missing in many cases at present, however, is sufficient equity or mezzanine funding to support senior debt.

OTHER ACTIVE SECTORS

Who's Who Legal: ***What other industries are seeing an increase in projects activity in 2010?***

David Platt: Worldwide, my understanding is that China's demand for resources means continuing activity over all resources sectors (oil and gas, LNG, mining). Continuing economic development and diversification the Middle East are driving first, major refinery, petrochemical and smelter projects; and second, power and water projects in part to satisfy the power demand expected from the new industrial projects. The other traditional areas for project financing activity (transport, water, PPP and social infrastructure) continue to produce a flow of transactions.

Oscar Aitken: In the mining sector, we expect the government to begin the discussion on lithium concessions, which currently are reserved for the exploration and exploitation by the state only. Since the Atacama Desert in northern Chile is one of the richest places on earth in lithium, a change on this may imply a great stimulus in project finance for the next decades.

The earthquake that hit the central-southern part of Chile has also shifted the priorities in connection with infrastructure development, but this also can be a great opportunity for private companies seeking opportunities in this area, since the government is less likely to make direct investments in public infrastructure.

Daniel Weinhold: I expect that new projects may appear in connection with the enlargement of the Temelin nuclear plant and reconstruction of other energy plants in Czech Republic and in the engineering industry.

Daniel Weinhold

Oscar Aitken

Devendra Pradhan: For project financing in Nepal, hydroelectricity is considered to be the most ideal sector. Nepal has a total of 82,000MW hydroelectricity capacity. However, out of which only 43,000MW is considered to be economically feasible. At present, Nepal was only able to develop a very small portion of 600MW hydroelectricity. There is significant demand for power domestically in Nepal. Also, there is a huge potential for exporting the surplus electricity to the market in India. Undoubtedly, hydroelectricity is lucrative sector in Nepal and project financiers have been eyeing this area. It is expected that there would be increase in the number of projects in Nepal in this sector in 2010. Additionally, it is also expected that there would be increase in project activities in transportation, tourism, civil aviation, telecommunications industries in Nepal in 2010.

As a developing country, Nepal is aiming to achieve rapid development. The Three Year Interim Plan (2007/08 – 2009/10) also provides significant emphasis towards infrastructure projects. Apart from hydroelectricity generation and distribution projects, there are other lucrative sectors such as highways, railways, ropeways, water supply and sanitation, irrigation, airports, utility distribution, etc, which are considered a priority sectors

Michael Stoneham: Currently there is much activity in Scotland in the waste and local health (hub) sectors, catching up with equivalent programmes in England.

Some new PPP schemes in education are being planned, though not on the same scale as in recent years. There are some transport projects progressing. And there are plans to finance mid-market housing provision.

What we won't be seeing, under present Scotland government policy, is development of new nuclear plants – though life extension projects for existing plants remain relevant. The question of how to deal with the energy gap remains out for answer at the present time. Gas storage projects are perhaps a part of the answer but many more are needed.

Grid connection, including giving Scotland an opportunity to export surplus power, remains topical. Plans for a European grid connector network running south from Norway to Portugal could involve some element of connection with Scotland. These would be ambitious projects, though we have recent experience of interconnectors in electricity and gas being completed between Scotland and Ireland.

EMERGING MARKETS

Who's Who Legal: *Which jurisdictions are emerging as popular areas for clients to pursue projects?*

David Platt: Most practitioners in Europe would indicate that they see considerably increased activity and prospects in North Africa and Sub-Saharan Africa as well as the more traditional markets in the Middle East and Europe. The bigger transactions in these markets tend to be resources-based but there are an increasing number of power and similar projects big enough to require international financing. In the Middle East, Saudi Arabia seems to be on the point of really taking off with some huge (multibillion-dollar) projects looking like moving into the financing phase. Further, last year saw activity in Jordan and the first successful project financing in Syria.

In the Far East, my impression is that Indonesia and Vietnam have big power programmes to build and finance and that they will thus produce a lot of work, but I defer to those practising in the region.

Oscar Aitken: Chilean entrepreneurs are investing heavily in Peru, Colombia and Brazil.

Devendra Pradhan: Practitioners genuinely foresee an increase in project finance activities in sub-Saharan African countries along with the Middle Eastern and European market. In addition, Asia-Pacific regions and South Asian regions, such as Thailand, Indonesia, Vietnam, China and India, are also seen as the lucrative jurisdictions. In fact, amid the global financial crisis, there was a robust increase in lending in project finance transactions by Indian banks. China and India are the largest markets in Asia for project financing. However, international financiers seem to have a minimal role in the Indian project finance market, as domestic banks in India are able to raise financing from local sources.