



# ICLG

The International Comparative Legal Guide to:

## **Project Finance 2012**

A practical cross-border insight into project finance

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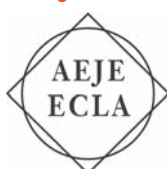
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## EDITORIAL

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Welcome to the first edition of *The International Comparative Legal Guide to: Project Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of project finance.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting project finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in project finance laws and regulations in 39 jurisdictions.

All chapters are written by leading project finance lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor John Dewar of Milbank, Tweed, Hadley & McCloy LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

*The International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk)

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# Argentina

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## 1 Overview

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

The most significant developments in the project finance market in Argentina have been evidenced in the mining, energy and infrastructure sectors.

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

The main project financings in Argentina took place in the 1990s and the first half of 2000s. Currently, and in recent years, projects of that kind are being financed through bank syndicated loans, multilateral organisations facilities, public debt issuances, or governmental investment, with specific and limited collateral, rather than using a traditional project finance structure. Recent finance projects include those in the mining and oil & gas sectors; finance projects in the infrastructure (terminal ports, airports, etc.) and agriculture sectors have also gained a relevant part in this field.

## 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?

It is possible to give asset security by means of a common security agreement, however certain assets/collateral require particular agreements to perfect the security. For example: in case of mortgages over real property, securities need to be granted through public deed and registered with the relevant registry; in case of registered pledges (over vehicles, machinery), they need to be entered into specific agreements and be registered with the relevant registries; and in case of collateral trusts, a specific trust agreement should be entered into by the relevant parties.

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

Securities can be granted over almost all assets involved in the

project. Securities over real property (land, plant, etc.) can be instrumented through mortgages or collateral trusts; machinery, equipment, and other relevant rights can be collateralised through pledges, collateral trusts and/or collateral assignments.

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

Yes. The legal figure for that should be a collateral trust or a collateral assignment/pledge, where the transfer of receivables to lenders is conditioned to the occurrence of a default. Assigned debtors can be notified at the moment of creation of the conditioned security (which would be safer) or just upon the default.

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

Yes. The legal figure to use in that case would be a collateral trust or a commercial pledge over the bank accounts and the amounts deposited therein. The trust would be safer than the pledge (since a third neutral party – the trustee – should be the holder of the account), however the trustee could face certain current foreign exchange restrictions to send the monies abroad (if necessary). In case of a pledge, it works as any other pledge over contractual rights (e.g. the rights over the opening account contract) and the pledgor remains the owner of the account.

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

Yes. The usual figure in that case would be a pledge over the shares, however collateral trusts have been used for that purpose too (though the validity of the latter is being currently discussed in local courts). Pledges over shares is contemplated in the law and can be granted either over shares in certificated form or over shares in registered form (companies can issue certificated and/or registered shares). The security is granted through a pledge agreement and the pledge is notified to the company for it to register the pledge in the company's books. If shares are in certificated form, the existence of the pledge is also endorsed in the share certificate. Sometimes, amendment of a company's bylaws are made in order to facilitate foreclosure.



**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)?**

Fees and other duties related to securities can vary from 2% to 3% of the economic value of the guaranteed amount, on an overall basis, depending on the jurisdictions involved. In many jurisdictions stamp tax can be avoided when the secured obligation has already paid the tax over its part.

**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?**

Formalities within the country should not require excessive time (not more than a month), although it depends on the jurisdiction involved (naturally, formalities in the City of Buenos Aires are often more agile than in other jurisdictions). Of course, in case a third party (e.g. government) approval is required, formalities could involve more time. As for expenses, please see question 2.6 above.

**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.?**

Apart from registration of securities with the relevant registries, in general there are no prior approvals or consents required.

### 3 Security Trustee

**3.1 Regardless of whether Argentina 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?**

A security trustee or agent can act as an attorney-in-fact for the benefit of the lenders and enforce the security on their behalf.

**3.2 If a security trust is not recognised in Argentina, 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?**

Even though the security trust figure is admitted in Argentina, lenders can otherwise enter into an inter-creditors agreement and designate thereto an agent to act on their behalf.

### 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?**

In case of mortgages over real property, public auctions are required

(though they can take place out of court in some cases). As for commercial pledges, the parties can regulate the foreclosure procedure at their convenience, however the creditor should then report the results to the court. When real property, plants or other essential elements of business of the debtor are involved, it is possible (and usual) that judges (upon labour or creditors blocking procedures) try to prevent or delay foreclosure in order to keep ongoing the business of the company.

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

In case the investor or creditor has no domicile or assets within the country, it would be required to constitute a minimum guarantee to cover eventual judicial fees and expenses in order to foreclose the securities with a local court.

## 5 Bankruptcy 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?**

In case the bankruptcy proceeding is carried out in Argentina, all creditors of the project company should verify their credits with the local court. All claims against the project company should be included in the same bankruptcy proceeding. Patrimonial claims and interests that are not secured with mortgage or pledge are suspended. Securities with special preference (mortgages and pledges) can be foreclosed separately once they have been duly verified in the bankruptcy proceeding.

**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?**

Creditors should verify their credits within the first 15-20 days of the opening of the bankruptcy proceeding. Tax debts, employees' claims, judicial fees, and other pending constructors' fees have special preference with respect to securities.

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

As creditors, it is discussed whether trustees should verify their credits in the bankruptcy proceedings or not, though it would be advisable to do so. As debtors, trusts are exempted from bankruptcy laws and they are liquidated as the parties agree on the trust agreement (pursuant Trust Law No. 24,441).

**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?**

Mortgages can be enforced out of court, however there has to be a public auction and the results must be rendered with a court. In case of commercial pledges and trusts, the parties can agree special foreclosure proceedings, which could consist of public or private auctions, private sales, etc.

## 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 general restrictions on foreign ownership of a project company, except in certain specific industrial areas (e.g. media/broadcasting, transportation services). In order to be a shareholder of a local company, foreign owners must be registered (as mere foreign shareholders) with the relevant public registry of commerce, in which case they must file certain documentation to certify their foreign legal existence and a foreign genuine activity.

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

Argentina is a party to numerous bilateral investment treaties (more than 50), most of which were signed in the 1990s. Apart from that, Argentine Foreign Investment Law No. 21,382 commands that foreign investors should receive equal treatment to that of resident investors.

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

Apart from the bilateral investment treaties, which usually set forth particular conditions for nationalisation or expropriation of assets of foreign investors, local laws of expropriation (National Law No. 21,499 and particular expropriation laws in the different provinces) do not distinguish between the nationality of the persons or the activities involved.

## 7 Government Approvals/Restrictions

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

At the federal level, it is the *Secretaría de Minería* for mining, the *Secretaría de Energía* for energy, and the *Secretaría de Industria*, in general. In addition, each Province has its own relevant authority.

### 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?

For foreign exchange purposes the financing documents should be filed with the Argentine Central Bank. As for the project documents, they should be filed with certain relevant authorities in order to get benefits and exemptions when applicable. All documents can be entered into through private instruments, except for those related to real property, which have to be instrumented through public deeds.

### 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 Argentine rural land (not urban land) by foreign

persons (e.g. entities that are controlled – in any manner – by a foreign company with more than 25% of participation or a proportion sufficient to exercise control) has been recently restricted by Law No. 26,737. Pursuant to such law, now a foreign person cannot own more than 1,000 hectares of rural land and shall obtain a certificate from local government. In addition, acquisition of rural land by a foreign person does not qualify as a foreign investment subject to protection by the Argentine foreign investment regime. Apart from that, special authorisation should be obtained from the Argentine government in order to acquire any property, or exploit permissions or concessions within the Argentine Security Zones (e.g. zones located next to the country's borders).

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

Mining companies must pay royalties to the Provinces and export duties (*Retenciones*) to the Federal Government for the sale of extracted minerals. Provinces that have adhered to the Mining Investment Law No. 24,196 cannot levy royalties that exceed 3% of the mine mouth value (similar to a net smelter return royalty) of the extracted minerals. As per *Retenciones*, the minerals exporters pay to the Federal Government taxes up to 5 to 10% of the FOB value of the minerals – depending on the type of the mineral exported.

Applicable hydrocarbon legislation also establishes export taxes and royalties payable to the Provincial and Federal Governments. The prior collects export duties and royalties from hydrocarbons produced offshore beyond 12 miles. Provincial governments levy royalties of up to 12% of the produced oil.

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

Yes, Argentine law establishes that any foreign exchange transaction executed in any currency or transfer of funds of any kind, from both inside and outside Argentina, must be executed in accordance with the Argentine Central Bank regulations. Any transaction that does not comply with the foreign exchange regime will be subject to specified penalties. These penalties range from fines up to 10 times the amount of the infringing operation, to suspensions from operating in exchange transactions, to prison penalties in certain cases where there are prior ruled offences.

### 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?

In general, funds transferred to Argentina must be registered with the Argentine Central Bank and must remain in the country for at least 365 days. During that period, if no exception applies, the rule is that 30% of the amount brought into Argentina will be frozen in a mandatory, no-interest, US-denominated time deposit for 365 days. This obligation is binding upon the local resident receiving the moneys. One of the main exceptions to this mandatory deposit is established for the direct foreign investment.

Regarding financial indebtedness, any amount borrowed by an Argentine resident from foreign financial facilities must be registered with the Argentine Central Bank, be brought to Argentina and converted into local currency within a certain time period (30 days). As per “outflow” restrictions, the funds must remain in the country for at least 365 days from such registration. However, access to the foreign exchange market is allowed for payment of debt interest services. There are also certain restrictions/conditions

on the ability of Argentine residents to prepay the principal of the loan and to restructure it.

Direct investment repatriation is allowed, provided that the non-resident investor has maintained it in Argentina for 365 days. Currently, for new investments, the investor also has to prove that the investment has been constituted by remitting and liquidating (conversion to local currency) the funds in the local market.

It should be noted that regulations provide certain exceptions and special treatments for specific uses of foreign funds when they are applied to certain sectors and industries (the “actual” economy). Up until recently, mining and oil sectors were excepted from liquidating their exports in the country, however this exemption ended late in 2011.

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

Yes, Argentine law allows Argentine residents to establish and maintain accounts in foreign currency in the country and abroad and it also allows non-residents to establish and maintain accounts in the country (notwithstanding, non-residents without fiscal domicile or branch/subsidiary in Argentina could face certain restrictions).

#### 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 Argentina or abroad?

The Argentine Central Bank allows the remittance of funds abroad to pay profits and dividends to non-Argentine residents shareholders (and holders of ADRs and BDRs), as long as it corresponds to closed and audited balances.

#### 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 many material environmental and health and safety laws impacting upon project financing, both at a Federal and at a Provincial level. Due to our Federal System, the National Congress has the power to enact minimum standards legislation which cannot be diminished by Provincial laws. Examples of Federal and Provincial laws impacting upon project financing include: environmental impact legislation; and hazardous waste management legislation.

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

Certain regulations exist that set forth requirements in order to hire local suppliers or workers.

### 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?

Law No. 12,988/47 prohibits insuring persons, goods or any

insurable interest of national jurisdiction with offshore insurance companies. Then, the local project assets shall be insured with a national insurance company (or a local branch of a foreign one) supervised by the Argentine Insurance Commissioner.

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

From the insurance stand point, there are no restrictions for the payment by an insurance company to foreign (secured) creditors.

### 9 Foreign Employee Restrictions

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

For a foreign worker to be employed by a company in Argentina, said employee must have a working visa. It should also be mentioned that Argentine labour law will apply to all employment agreements executed within Argentine territory, regardless of the place where the agreement has been signed.

### 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?

Argentina’s regulations set forth two main regimes that may represent restriction or control on importing project equipment. The first control is set by the Federal Tax Agency, by which importers who are interested in importing all kinds of products to be used locally, must apply for an affidavit that must be authorised by the relevant governmental authority. The other restriction that contractors may face is the necessity of obtaining a Non-Automatic Import Licence, in case the equipment to be imported has a custom tariff classification code that is reached by these licences. In addition, in case contractors are planning to import steel destined for the building industry, they must obtain a Certificate of Steel Safety within the Bureau of Fair Trade.

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

Import duties are payable, depending on the tariff code assigned to the imported product. Generally, duties go from 5% to 35% of the product imported price, but actually such range rarely exceeds 18%. As for the mining sector, Law No. 24,196 provides exemptions for certain companies registered with the Mining Investors Registry.

### 11 Force Majeure

#### 11.1 Are force majeure exclusions available and enforceable?

Yes, Argentine law admits *force majeure* exceptions. It will always depend on the facts of the specific case, which have to be unpredictable and out of the control of the person who tries to abide to the *force majeure* exception. As the law is quite broad in this respect, it is common that parties agree in the contract which facts should be considered or not as *force majeure*.



## 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?

Argentina has signed the most relevant anti-corruption international conventions, including recently the UN Convention against Business Corruption. On the domestic side, the bribery of foreign public officials is prohibited and penalised by section 258 *bis* of the Argentine Criminal Code (imprisonment from one to six years and disqualification for life from any public office). The bribery of domestic public officials is prohibited by sections 256 to 259 of the Argentine Criminal Code (the person who gives or offers a bribe can be punished with imprisonment from one to six years), and as of 2012 officials of the financial sector can be punished in case they receive or accept a bribe (section 312). It should be noted that recently, legal entities became criminally liable under Argentina criminal law (previously only individuals could be criminally liable), and they can be punished with fines, suspension of business, cancellation of legal capacity, loss of benefits, etc.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Global project agreements, credit agreements and common security agreements are typically governed by a law satisfactory to the lenders (e.g. NY Law, English Law, etc.). Securities in particular (which rely on assets located in Argentina) are generally governed by Argentine law.

### 13.2 What law typically governs financing agreements?

As said before, financing agreements are typically governed by a law satisfactory to the lenders (e.g. NY Law, English Law, etc.).

### 13.3 What matters are typically governed by domestic law?

Particular agreements regarding securities that rely on assets located in Argentina are generally governed by domestic law. Notwithstanding this, every matter related to real property located in Argentina must always be governed by domestic law.

## 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?

Yes, provided that the contract has any reasonable point of connection with that jurisdiction (e.g. forum shopping is not admitted).

## 15 International Arbitration

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

Yes, in regards to patrimonial issues the parties can submit their

disputes to arbitration. International arbitral awards are recognised by local courts, provided that certain requisites have been verified (the tribunal was competent, the award is definitive, the defendant has been duly summoned, there has been a due process, there has not been a previous contradictory decision by a local court, and there has been no breach to the international public order of Argentina).

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

Yes. Argentina is a contracting state to the New York Convention on the Recognition of Foreign Arbitral Awards (1958), only for commercial controversies.

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

Disputes which do not involve patrimonial issues or that cannot be settled by the parties are not arbitrable.

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

No, they are not.

## 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?

Apart from bilateral treaties among countries and other general fiscal stability benefits for certain sectors, there have not been specific public political risk protections so far.

## 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?

For interests payable from Argentina to foreign related creditors, thin capitalisation rules apply, according to which interests cannot exceed the 2:1 debt to equity ratio. In addition, if the creditor is a related party they cannot be deducted until they are effectively paid. If the creditor is a bank, a 15.05% withholding over the interests must be performed at the moment of payment. If the creditor is not a bank, a 35% withholding rate applies. In case of the proceeds of a claim or enforcement, no withholding should apply over the portion which represents principal; only over the interest at the above-mentioned rates.

### 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?

In general, there no special incentives to foreign investors or creditors. Depending on the type of activities (e.g. mining), fiscal



stability may be applicable on the local project company. As a preference, we can mention that capital gains obtained by a foreign shareholder from the sale of shares of companies incorporated in Argentina are exempted from income tax. Apart from that, Argentina has a wide net of Double Tax treaties that foresee tax benefits (local limitations on withholdings) in the case of royalties, interests and dividends. There are no differences between local and foreign investments for purposes of effectiveness or registration.

## 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 Argentina?

Recently, Argentina has evidenced an increase in social protests and political discussions with respect to the rational exploitation of natural resources, mainly trying to put some restrictions against very huge projects. Then, before starting any project of that kind, investors and companies should pay careful attention to the eventual political and social impact of the project on the areas where the project is planned to be developed.



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