10 things to know about project finance in Korea

SHIN & KIM

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***Seung-Gyu Yang** of **Shin & Kim** in South Korea looks at project finance in Korea*

1 Types of collateral/security

Security and collateral can only be established and effected in a manner provided by law. Real property, plant and machinery, movable property, share, deposit claim, contractual rights, receivable, insurance claim can be used as collateral.

Types of security interests that can be created are mortgage, pledge, and yangdo dambo (a security assignment), depending on the type of an asset. Yangdo dambo is a security right created by transferring legal title to a collateral to a creditor.

2 May an agent or trustee hold collateral on behalf of the lenders as secured party?

No. However, the generally accepted view in Korea is that a parallel debt structure may be used for such an arrangement. Under this structure, the debt owing to the security agent/trustee must be established as an independent obligation of the debtor to such person, separate from its obligations to the creditor.

3 Restrictions on foreign investments in projects

The principal law on foreign exchange transactions in Korea is the Foreign Exchange Transaction Act (the FETA). According to the FETA, most large-scale investments related to a foreign national or foreign currencies (including loans, bonds, issuance or offering of securities, acquisition of domestic real estate or the rights thereto) are subject to reporting requirements to the Ministry of Strategy and Finance (or, in certain cases, to a designated foreign exchange bank or the Bank of Korea).

In the case that a foreign national intends to invest by acquiring stocks of a Korean corporation or by providing loans for a five-year or a longer term to the same corporation, that foreign national must report to the Minister of the Ministry of Trade, Industry and Energy prior to the investment according to the Foreign Investment Promotion Act (the FIPA).

4 Restrictions on remittances of investment returns

If the Korean government deems that (a) it is inevitable due to certain emergency circumstances, such as natural calamities, war or grave and sudden changes in economic situations in or outside Korea, or (b) a serious difficulty in international balance of payments and international finance, or serious obstacles in implementing currency policies, exchange rate policies or other macroeconomic policies due to the capital movement in and out of Korea have occurred or are likely to occur, the Korean government may impose certain restrictions on foreign exchange transactions, such as employing a permit system for foreign exchange transactions, or requiring deposits of a certain portion acquired from the capital transaction.

However, foreign investments made pursuant to the FIPA are not subject to any restrictions under the FETA, and repatriation of amounts invested are guaranteed regardless of the Minister’s decision to impose the above restrictions.

5 Foreign law governed contract

An agreement whereby foreign laws should govern relevant contracts is effective except with respect to certain matters that require an application of the mandatory laws of Korea.

6 Submission to foreign jurisdiction

A clause under relevant agreements providing for the submission by a Korean party to a foreign jurisdiction is valid and binding on that Korean party under Korean law to the extent that (a) the relevant court has jurisdiction over the matter under laws of a foreign jurisdiction, (b) the matter is reasonably related to such court’s jurisdiction, (c) the jurisdiction of such a court is not too manifestly unfair or unreasonable to be against the public policy of Korea, and (d) a Korean court has no exclusive jurisdiction over the matter.

7 Bankruptcy proceeding affecting lender to enforce security

The Debtor Rehabilitation and Bankruptcy Act regulates bankruptcy and rehabilitation proceedings. The purpose of a bankruptcy proceeding is to enable a debtor facing financial difficulties to suspend a creditor’s operation, liquidate and distribute its assets. The purpose of a rehabilitation proceeding is to rehabilitate the debtor by reconciling the interests of its creditors and other interested parties.

Under bankruptcy proceedings, a court declares the debtor bankrupt based on the debtor’s inability to pay debts or the excess of the debtor’s indebtedness over its total assets, and the trustee will be appointed by the court to administer and liquidate the bankruptcy estate.

Under bankruptcy proceedings, the bankruptcy estate will be distributed to creditors in the following priority order:

(1) secured creditors (who are not bound by bankruptcy procedures and may enforce their security interests outside the bankruptcy proceedings and have priority in proceeds resulting from the enforcement of their security interests);

(2) creditors with estate claims (including claims for costs of judicial proceedings, tax claims, wage and severance claims, management expenses incurred in connection with the management, liquidation and distribution of the bankruptcy estate, and other claims arising from the administration of the bankruptcy estate);

(3) creditors with other statutorily preferred claims; and

(4) other unsecured creditors.

Unlike bankruptcy proceedings, secured claims in rehabilitation proceedings are not recognised and cannot be enforced outside the rehabilitation proceedings. For rehabilitation proceedings, creditors have rights to vote on whether to approve or disapprove the rehabilitation plan, and distribution to creditors is made in accordance with the approved rehabilitation plan.

8 Public-private partnership (PPP)

PPP infrastructure projects may be implemented under the Korea Public and Private Partnership Act on infrastructure (the KPPP Act). The KPPP Act lists 48 target businesses including roads, railways, ports, telecommunications, energy, environment, airports, and cultural facilities, and provides for several procurement schemes, including BTO, BTL, BOT and BOO. The KPPP Act does not contain any provision related to brownfield PPP projects.

9 Relevant government departments with authority over typical projects

The Ministry of Land, Infrastructure and Transport and the Ministry of Trade, Industry and Energy have the relevant authority to issue business licenses and relevant permits. Depending on the project, the local government has the authority to issue a construction permit.

10 Government approvals over environmental concerns

The Environmental Impact Assessment Act requires government agencies to assess the environmental impact at the government development planning stage to reflect any environmental issues in their project plans, and any sponsor to conduct an environment impact assessment.

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