



ICLG

The International Comparative Legal Guide to:

Project Finance 2014

3rd Edition

A practical cross-border insight into project finance

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URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd.
April 2014

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ISBN 978-1-908070-94-4

ISSN 2048-688X

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Kosovo

Sokol Elmazaj



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Sabina Lalaj



1 Overview

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

Being an emerging market, Kosovo is experiencing significant growth in foreign direct investments and project financing. Kosovo offers an attractive environment for project financing since many of the important public services are in the process of being privatised and the need of new investors for financing is increasing.

Last year the privatisation of the energy distributor was successfully completed.

Lately Kosovo and Albania have signed a deal to build a 400kV transmission line linking their grids to help them cope with rising energy consumption and join Balkan and European networks. The German KfW development bank will provide financing of US\$103 million for the 241km line.

Also, the OPEC Fund for International Development (OFID) has signed a US\$20 million public sector loan agreement with Kosovo for the upgrading of the Milloshevë - Mitrovica M2 Main Road project.

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

Several financing projects have been successfully completed in Kosovo. The privatisation of former socially-owned enterprises (SOE) through the sale of assets or shares is generally supported by project financing. One of the largest and most recent financing projects that we can name is the privatisation of Llamkos Galvanising Steel Plant in Kosovo, consisting of the financing of acquisitions of assets.

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?

Kosovo law permits the creation of security interests over almost all assets and rights held by project companies, including mortgages over real property, pledges over movables or rights (i.e. any movable property with monetary value and any right which can be transferred legally such as movable property, receivables, cash

flows, shares or quotas, bank accounts, contractual rights, concessions, and licences). Mortgages can be established over immovable property, including land, building and fixtures.

The security agreement when using immovable property as collateral differs from the security agreements having movable property or rights as collateral. The security agreement should provide a clear description of the collateral.

Upon execution by the parties, the pledge agreements over movable property or rights are filed for registration with the Pledge Registry Sector of the Kosovo Business Registration Agency, whereas mortgage agreements are filed with the Cadastral Agency of the area where the property is located.

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?

Pursuant to the Law on Property and other Real Rights (Law no. 03/L-154), security can be taken over immovable property (i.e. land, buildings or fixtures) and movable property (i.e. machinery and equipment).

Movable property can be granted as a pledge and the pledge is subject to registration for public notice purposes. The moment of registration determines the ranking of the pledge.

Mortgages can be registered over immovable property. The mortgage agreement executed by the parties is filed for registration with the Cadastral Agency of the area where the property is located and the moment of registration determines the ranking of the security in relation to third party rights/claims over said property.

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?

The pledge over receivables is allowed under the Law on Property and other Real Rights.

The pledgor and the pledgee execute a pledge of receivables agreement that is registered with the Pledge Registry. The pledgor is entitled to continue collecting the receivables until an event of default occurs. In such case the pledgee notifies the debtors in writing and is entitled to execute its rights, as provided under the pledge of receivables agreement.

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

Security can be taken over cash deposited in bank accounts. The parties execute a pledge agreement and register such pledge with the Pledge Registry.

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

Kosovo legislation provides for the taking of security over shares. Currently in Kosovo there are no certificated shares, however, the original extract of the Kosovo Business Registration Agency is sufficient. If shares or quotas are being pledged based on a pledge agreement, the pledge would be perfected by registration with the Pledge Registry.

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)?

The Notary Fees are determined by the Administrative Instruction No. 02/2012 "On Provisional Notary Fees" (hereinafter "the Administrative Instruction"), which entered into force on 21.05.2012.

According to the Administrative Instruction, the notary fees are determined based on the value of the transaction to be executed by the parties. For transactions related to the transfer of property, the general value of property that is the subject of the transaction is considered as the basis for determining the notary fee.

For notary acts related to transactions having a value lower than EUR 100,000.00, the following fees are applicable: (i) EUR 20 for transactions having a value from EUR 0.01 to 2,500; (ii) EUR 30 for transactions having a value from 2,501 to 5,000; (iii) EUR 50 for transactions having a value from 5,001 to 20,000; (iv) EUR 80 for transactions having a value from 20,001 to 60,000; and (v) EUR 120 for transactions having a value from 60,001 to 100,000.

For transactions exceeding the amount of EUR 100,000.00, the fee will increase by EUR 20 for every EUR 20,000.00, but it cannot exceed the total fee amount of EUR 1,000.

In case the transaction value cannot be determined, the fee will be imposed according to the time spent by the notary on preparing the documents. The hourly fee applicable to legal entities is EUR 40.

Furthermore, the notary is entitled to compensation in accordance with time spent for the issuance of various permits, approvals, extracts or certificates from public registers.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The perfection of a mortgage takes about a business week, while the perfection of pledges takes no more than one working day. The tariffs payable for the perfection of pledges are not significant, while the tariffs for filing with the cadastre office depend on the value of the secured debt. For the notary fees, please refer to 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.?

In general, no regulatory consents are required for the creation of securities, excluding cases when the consent is required by the relevant legal instrument (i.e. concession or privatisation agreement), where the approval of the state contracting authority is required for creating securities over the assets of the private entity party to the concession or privatisation agreement.

3 Security Trustee

3.1 Regardless of whether Kosovo 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?

The concept of security trustee and/or agent is not widely recognised by Kosovo legislation. In the case of a loan made by a bank operating in Kosovo to a private party secured by a mortgage over an immovable property, the parties may agree when signing the mortgage contract (and such agreement should be clearly stated in the mortgage contract) that the enforcement of the mortgage through the sale of collateral can be made out-of-court through a security trustee/agent. For the sake of clarity this type of agreement may take place only if the mortgagor is a business entity and the immovable property, when the mortgage is perfected, is used for conducting business activity. It is uncommon to encounter this kind of arrangement in other cases or for other types of securities.

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

Please see question 3.1 above.

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 most cases the law requires that the collateral be sold at a public auction. In addition, the enforcement can be suspended in certain cases by a court decision. The regulatory consents could be required only in rare cases, depending on whether the sale of the collateral is subject to regulatory consent.

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

No specific restrictions apply to foreign investors.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Subject to Law no. 2003/4 “On liquidation and reorganization of legal persons in bankruptcy” (the “Bankruptcy Law”), as amended, the beneficiary of a registered mortgage of immovable property or perfected pledge of movable property is entitled to adequate protection of its secured interest in the bankruptcy estate in order to maintain the condition and value of such property as it was on the date when the bankruptcy proceeding commenced.

Further, the law foresees that in case the property subject to a registered mortgage or perfected pledge is not adequately protected, the secured creditor may submit a written request to the court for a substitute adequate protection.

Based on the request, the court shall issue a ruling on the request for adequate protection no later than twenty days after its submission. During this period the moratorium placed on the bankruptcy estate, suspending all actions against the bankruptcy estate by the creditors, shall cease to the extent necessary for the creditor to exercise its rights over the secured property.

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?

Under the Bankruptcy Law the following ranking applies to the repayment of obligations:

- (a) secured claims, subtracting reasonable costs for the sale of goods;
- (b) priority claims, including: (i) court expenses; (ii) administrator’s expenses; (iii) administrator’s remuneration; (iv) administrative expenses required for the maintenance and protection of the estate, including expenses due to the continued operation of the debtor after the petition submission date; (v) reorganisation expenses; (vi) reorganisation financing and credit in case of reorganisation failure; (vii) payments and expenses for personnel during the time of case administration; and (viii) creditors’ committee expenses;
- (c) claims for unpaid pre-petition employees’ wages (limited to two months’ salary or wages per person);
- (d) unpaid tax obligations until the moment of the opening of bankruptcy procedures;
- (e) unsecured claims, including wage claims not subject to higher priority treatment; and
- (f) claims of the debtor’s owners, shareholders, founders, participants or partners.

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

According to the Bankruptcy Law, individual businesses, insurance companies, financial institutions, pension providers, and enterprises in public and social ownership that are not yet transformed into legal entities are excluded from bankruptcy proceedings.

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?

Subject to the Bankruptcy Law, the bankruptcy cases shall be heard by the Commercial Matters Department of the Basic Court with jurisdiction in the geographic area in which the debtor’s principal place of business is located. The law does not foresee any available alternatives to court proceedings for a creditor to seize the assets of the project company in an enforcement.

However, it is important to mention that only a few bankruptcy cases are filed in court due to lack of experience in dealing with the bankruptcy process in Kosovo.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cram down of dissenting creditors?

The Kosovo Bankruptcy Law defines the conditions and procedures for the liquidation or reorganisation of legal persons in bankruptcy and determines the rights and duties of the parties participating or affected by such proceedings. The law provides for the possibility of the project company being insolvent and/or the insolvency trustee to draft a reorganisation plan and submit it to the competent section of the court dealing with insolvency proceedings. The purpose of the reorganisation plan is to avoid liquidation of the project company’s assets and to enhance the chances for the project company’s creditors to get their credits repaid.

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

Kosovo Law on Business Organization stipulates no specific liabilities in such a case. However, it stipulates duties of the directors such as the duty to act (i) in good faith, (ii) in the reasonable belief that he/she is acting with proper authority and in the company’s best interests, and (iii) with due and diligent care and attention to his/her responsibilities. The directors of a company who vote for or assent to any prohibited distribution shall be jointly and severally liable to the company for the amount of the distribution.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

No restrictions or control fees apply to foreign investors. Subject to Law no. 04/L-220 “On Foreign Investment”, which entered into force on 24.01.2014, Kosovo guarantees fair and equal treatment to foreign investors and their investments in Kosovo. In no case can the treatment, protection or security be less favourable than that required by international law or any provision of the present law.

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

Kosovo has already signed various bilateral investment treaties, however, as mentioned above, there are no restrictions for foreign investors.

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

Under the Constitution of the Republic of Kosovo the expropriation of private property is permitted only when it is necessary or appropriate in order to achieve a public purpose or the promotion of the public interest and is followed by the provision of immediate and adequate compensation to the expropriated owner. Currently, expropriation in Kosovo is governed by Law no. 03/L-139 “On Expropriation of Immovable Property”, as amended.

According to article 7 of the Law on Foreign Investments no. 04/L-220, entered into force on 24.01.2014, the foreign investment shall not be subject to any form of expropriation or nationalisation directly or indirectly or any other equivalent measure, except in cases where there is a special public interest established by law, which will result in a non-discriminatory, immediate, adequate and effective compensation in accordance with legal procedures. The Law on Foreign Investment sets forth the procedure and the manner of compensation.

7 Government Approvals/Restrictions

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

The government, through the ministry in charge of the specific sector or committees created with the participation of representatives of several ministries involved in the project, manages the award of projects.

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?

No specific requirements exist related to the filing of project documents in order for them to be valid and enforceable. Depending on the security package of the project, the pledge agreements and the mortgage agreements should be registered.

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)?

In Kosovo, natural resources are not privately held unless the state has actually given such natural resource for private ownership. Consequently, the right to exploit natural resources is a sovereign right, and a title vested in the state. The government periodically licenses specifically identified natural resources for private exploitation upon payment of prescribed royalties. Private enterprises have been granted rights to explore for minerals in several places.

Foreign investors enjoy equal treatment with the local investors in the licensing process.

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

The extraction/exploitation of natural resources is subject to licensing by the state and payment of the respective royalty.

Kosovo legislation does not impose any restrictions for exporting natural resources. The payable taxes are defined from the Ministry of Finance and include custom duties and other taxes applicable for all exported products.

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

Kosovo has a free market of foreign exchange operations. There are no restrictions for the company to transfer funds from Kosovo to international banks.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions in Kosovo. Beside the bank transfer fee, there are no other controls or fees.

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

The law is silent in this regard, however, in practice the project companies maintain such accounts.

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 Kosovo or abroad?

Subject to Company Law, the dividend should be paid based on the shareholders' decision, however, no restrictions are foreseen in this regard.

In relation to the tax legislation, pursuant to Law no. 03/L-162 “On Corporate Income Tax”, the dividends received by resident and non-resident taxpayers are exempted from corporate income tax.

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?

Law no. 03/L-043 “On Integrated Prevention Pollution Control”, Law no. 03/L-214 “On Environmental Impact Assessment”, Law no. 03/L-025 “On Environmental Protection” set out the criteria to be met while realising a project which has an environmental impact. Subject to these laws, the companies cannot operate without obtaining the environment permit issued from the Ministry of Environment and Spatial Planning. Also, all constructed facilities, installations and machinery that have been subject to an environmental impact assessment cannot commence operations without an environmental permit from the Ministry of Environment and Spatial Planning.

Regarding health and safety, according to the decision no. 81/06, dated 07.03.2006 of the Executive Agency of Kosovo Labour Inspectorate, the companies operating in Kosovo are obliged to obtain work consent. Such obligation also derives from Law no. 04-L-161 “On Safety and Health at Work”. The request for obtaining this consent is filed with the Executive Agency of the Kosovo Labour Inspectorate.

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

Procurement in Kosovo is governed by Law no. 04/L-42 “On Public Procurement of Kosovo”. In general, the procurement law is not applicable to private companies, unless the private company is operating on the basis of a special or exclusive right, or undertaking carrying out a procurement activity on behalf of or for the benefit of a public authority, public service operator or public undertaking.

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?

As a general rule, foreign insurance companies cannot operate or issue insurance policies directly in Kosovo, unless the insurance company is licensed by the Central Bank of Kosovo.

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

We do not identify any restriction in the law.

9 Foreign Employee Restrictions

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

The employment of foreigners in Kosovo is governed by Law no. 04/L-219 “On Foreigners”, entered into force on 20.09.2013 which provides that a foreigner may work in the Republic of Kosovo on the basis of residence and work permit, or on the basis of a certificate for employment notification pursuant to the conditions set forth by the said Law. There are also categories of foreigners who are exempted from such requirements.

The Law on Foreigners also provides that the Government of the Republic of Kosovo shall adopt a decision which shall set out an annual quota of employment of foreigners at the latest by 31st of October for the upcoming year, for new and extension of issued permits.

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?

Imports in Kosovo are governed by Law no. 04/L-048 “On Foreign Trade”. The custom duties and other taxes are imposed by the Ministry of Finance. Subject to the said regulation, there are no custom duty exemptions for importing products into Kosovo.

Importing project equipment requires an import declaration and the payment of the corresponding customs duties (including VAT). As a general rule, the import of goods or equipment does not require prior authorisations.

However, some goods or equipment can only be imported upon satisfaction of special requirements, depending on the applicable

import regime (i.e. gas and hydrocarbons, and products subject to environmental requirements).

The import of certain equipment is exempt from VAT. The list of exempted equipment is updated periodically by the government, however the list is not extensive, since in principle almost all imported equipment is subject to these taxes.

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

The import of equipment to Kosovo is subject to payment of (i) customs duties at the rate of 10% of the product value, and (ii) value added tax (VAT) at the rate of 16%.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Kosovo legislation recognises *force majeure* exclusions.

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?

Corruption practices are sanctioned by the Penal Code and Law for Penal Responsibility of the Legal Persons for Penal Violation (Law 04/L-030). Under the Penal Code, offering bribery to public officers for obtaining benefits is subject to imprisonment, starting from three months up to three years.

13 Applicable Law

13.1 What law typically governs project agreements?

Irrespective of Kosovo conflict-of-laws rules, project agreements and financing agreements may be governed by their corresponding choice of law clauses, which may be either Kosovo or foreign laws.

While Kosovo law generally allows the parties to choose the applicable law, project agreements are usually subject to Kosovo law, because for infrastructure development, contracts usually contain a number of regulatory and local issues, and interface with permits and concessions and the substantial performance of the contracts in Kosovo plays a major role.

On the other hand, pursuant to Kosovo’s conflict-of-laws rule (*lex rei sitae*), real estate property rights cannot be subject to a choice of law other than the law of the property’s location. Therefore, real estate property and rights shall always be governed by Kosovo laws.

13.2 What law typically governs financing agreements?

Kosovo law generally allows the parties to choose the applicable law. As to the documents of the financing package, loan agreements are usually subject to the laws chosen by the investors/lenders, whereas security documents (mortgages, share pledges) are subject to Kosovo law.

13.3 What matters are typically governed by domestic law?

Real estate rights, mortgages and pledges are governed by Kosovo 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?

Subject to Kosovo legislation, the submission to a foreign jurisdiction is effective and enforceable under Kosovo law.

However, the submission to a foreign jurisdiction is legally binding when the subject matter of the contract is not subject to the exclusive jurisdiction of Kosovo courts (i.e. real estate rights, natural resources), and the parties have unequivocally waived their corresponding jurisdiction.

15 International Arbitration

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

Kosovo legislation is silent regarding the obligation to submit the disputes to international arbitration. On the other hand, the law regulates the recognition of the international arbitral awards by local courts in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

Though Kosovo is not yet a party to the New York and/or ICSID Convention, Kosovo recognises arbitration awards and arbitration agreements, in accordance with the said Convention.

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

The general principle is that any dispute that can be decided by a civil court, involving private rights, can be referred to arbitration. Disputes that cannot be resolved through arbitration include antitrust and insolvency.

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

Kosovo legislation is silent regarding an obligation to submit the disputes to domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

To the best of our knowledge, there have been no calls for political risk protection 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?

The withholding tax on the loan interest is at a rate of 10% of the gross payment amount.

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?

Kosovo legislation does not provide for preferential incentives to foreign investors or creditors. No taxes apply to foreign investments, loans or other security documents, other than the registration tariffs mentioned above.

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 Kosovo?

The newest state in Europe has been gifted with enviable human and natural resources, from minerals to fertile agricultural land, from a young and dynamic labour force to a favourable central location in the region.

The combination of these assets create an overwhelming potential for investors and will certainly contribute to the growth of the Kosovo economy. Kosovo is experiencing a significant increase in the level of foreign direct investment and has engaged in a series of significant projects to improve its infrastructure and meet the needs of an expected increase in foreign trade.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Securities trading or offering in Kosovo is not specifically regulated.

Pursuant to Kosovo Law no. 02/L-123 "On Business Organizations", as amended, the joint stock companies may create and issue securities other than shares of stock, including (i) bonds, (ii) securities that are convertible into shares of stock, and (iii) options to acquire shares of stock. No securities that are convertible into shares of stock and no options to acquire shares of stock may be issued unless the authorised number of the concerned shares of stock, as specified in the company's charter, is sufficient to cover both (i) the future issuance of the concerned shares of stock, (ii) the future issuance of any shares of stock that are issued on other convertible securities and options already issued, and (iii) all other shares of stock already issued.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in Kosovo?

Law no. 04/L-093 “On Banks, Microfinance Institutions and Non Bank Financial Institutions” stipulates that banks are authorised to engage in Islamic finance or Islamic banking (defined as a type of bank, including a department or division of a non-Islamic bank that undertakes the business of banking according to *Shari’ah* principles) subject to their licences and consent of the Central Bank of Kosovo and to conditions and regulations provided by the Central Bank of Kosovo. Accordingly, such instruments might be used within the mentioned limits.

19.2 In what circumstances may *Shari’ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari’ah* or the conflict of *Shari’ah* and local law relevant to the finance sector?

When referring to disputes with international element, article 28 of Law no. 03/L-006 “On Contested Procedure” amended with Law no. 04/L-118, provides that the local court is competent to settle a dispute when its competence is expressly determined by law or international contract.

In theory, either the parties or the cause of action of the agreement should have a close connection with the choice of the governing law by the parties.

In case of an eventual dispute between two domestic parties, the selection of *Shari’ah* principles as the governing law of the Agreement, might present difficulties in being accepted as such by the court.

According to Western doctrine studies, the principles of *Shari’ah* do not fit into any of the applicable Western systems (i.e. civil law and/or common law), because they are not limited/applicable to any specific territory or state structure, nor are they valid for all residents of each state. In this context, the Kosovo courts might not accept the application of a non-national system of law such as the principles of *Shari’ah*.

We are not aware of any case law with regard to the applicability of *Shari’ah* law in Kosovo. Hence to the best of our knowledge the applicability, acceptance and/or enforcement by Kosovo courts of *Shari’ah* law principles has not been tested before Kosovo courts.

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

Subject to general principles on contract as set out by Law no. 04/L-077 “On Obligational Relationships”, a contract is valid if the requirements indicated under the said law are met.

The application of interest in a loan agreement is customary and allowed under the Kosovo law, and its inclusion in a loan agreement would not affect its validity and/or enforceability.



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Sokol joined Boga and Associates in 1996. He is a partner of the firm and Country Manager for Kosovo.

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Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality legal, tax and accounting services to its clients. The firm also operates in Kosovo (Pristina) offering a full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga, was also Senior Partner/Managing Partner of KPMG Albania.

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