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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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Project Finance

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Contributed by Matouk Bassiouny

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Matouk Bassiouny is a full-service independent law firm based in Cairo, with offices in UAE and Sudan. The firm specialises in advising multinationals, corporations, financial institutions and governmental entities on all legal aspects of investing and business in Egypt and the region. The team of 21 partners and over 150 lawyers are trained both locally and internationally, and fully conversant in English, Arabic and French. The Finance & Projects group's primary

goal is to provide clients with legal advice on the banking and finance sector in Egypt as well as on the strengths and weaknesses of security available to lenders in the Egyptian market. Headed by Mahmoud Bassiouny, the Finance & Projects group maintains close relationships with Egyptian financial institutions, which enables it to have first-hand knowledge of what constitutes commercially acceptable solutions for major institutions involved in large-scale deals.

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1. Project Finance Panorama

1.1 Recent Trends and Development

In recent years, the Egyptian economy has started to show symptoms of recovery after a period of stagnation and recession. The recent decrease in inflation rates and the rise in the economic growth rate has once again revitalised the loan market and provided an appetite for all stakeholders. The loan market has had a trend of increased reliance on international financial institutions and multilateral development agencies that showed a greater appetite, offered competitive interest rates and supported the availability of foreign currency during years of relative hardship.

The economic stability, as well as the policies, in currency exchange and regulations for managing inflation rates have incentivised the loan market and led to a steady development. The majority of transactions now are infrastructure projects such as those seen in the energy, water and construction sectors. These include financing the construction of power station projects, investments in the New Administrative Capital, and deals that aim at renovating the public services and utilities.

A draft of a new banking law is currently being reviewed and discussed by concerned parties and entities. This law is purported to regulate and set the framework for matters that have not historically been expressly regulated in Egypt, including financial technology.

1.2 Sponsors and Lenders

Projects are typically financed by a combination of both debt and equity and subject to a gearing ratio agreed between the lender and the borrower. Shareholders loans are typically extended and may be subject to capitalisation throughout the tenor of the debt financing in order to maintain the agreed gearing ratio. Financing backed by export credit agencies is also a typical source of financing for projects.

Egyptian banks, branches of foreign banks registered with the Central Bank of Egypt and financial institutions established by virtue of a special treaty generally act as lenders in Egypt. As a matter of Egyptian law, to undertake banking activities in Egypt, a licence from the Central Bank of Egypt is required. The definition of banking activities under Egyptian law is broad and includes any service provided customarily by banks in Egypt on a recurring basis. Accordingly, lending in Egypt on a recurring basis would require a licence from the Central Bank of Egypt.

1.3 Public-Private Partnership Transactions

Egyptian law recognises public-private partnership (PPP) contracts pursuant to which a project company is entrusted with the financing, construction, equipment and operation of infrastructure projects and public utilities, and making their services available or financing and rehabilitating such utilities with an obligation to maintain works that have been constructed or rehabilitated and to provide services and facilities necessary to enable the project to produce or provide services regularly and progressively throughout the duration of the contract.

PPPs are primarily regulated under Law No 67 of 2010 regulating partnership with the private sector in infrastructure projects, services and public utilities (the “PPP Law”) and the executive regulations enacted thereunder. PPP contracts must be concluded for a term of no less than five years and up to 30 years from the date of completion of the construction and equipping works or completion of the rehabilitation works and with a minimum aggregate value of EGP100 million. The Cabinet of Ministers, upon the recommendation of the Supreme Committee for Public Private Partnership Affairs, may, if required due to a material public interest, agree to conclude a PPP contract for a term longer than 30 years.

Pursuant to the PPP Law, PPP projects may not be tendered except following the approval of the Supreme Committee for Public Private Partnership Affairs, following the request of the competent authority in light of the studies prepared under the supervision of the PPP Central Unit at the Ministry of Finance. Contrary to Public Procurement Law No 182 of 2018, which is not applicable to PPP projects, the PPP Law does not envisage or provide for contracting by way of direct award.

1.4 Structuring the Deal

Egyptian law does not provide for specific restrictions in relation to the form of the company in the context of a project financing, although from a practical perspective, such borrower is typically a joint stock company. One point to note when structuring the security package is that an upstream corporate guarantee by an Egyptian entity is only permissible to the extent that the guaranteed entity is not represented on the board of directors of the Egyptian company.

Projects are typically financed by a combination of both debt and equity and subject to a gearing ratio agreed between the lender and the borrower. Shareholders loans are typically extended and may be subject to capitalisation throughout the tenor of the debt financing in order to maintain the agreed gearing ratio. Financing backed by export credit agencies is also a typical source of financing for projects.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

Egyptian law recognises various forms of security over assets, including real estate mortgage, tangible and intangible movables mortgage, pledge of bank accounts, pledge of shares, security on claims and receivables such as accounts receivables and rights under contracts. The security takes the form of an agreement between the pledgor and the pledgee.

Perfection of the security will vary subject to the nature of the same. In order to perfect a real estate mortgage, it shall be notarised with the Notary Public, while perfection of a possessory mortgage entails transferring the possession of the movables, subject of the mortgage, to the pledgee in order for the pledge to take effect. The Egyptian Collaterals Registry (ECR) has been recently established to register security interest over movable assets. In the case of a share pledge, the relevant security interest must be registered with Misr for Central Clearing, Depository and Registry (MCDR). Unregistered security interests would carry the risk of unenforceability towards third parties.

2.2 Charges or Interest over All Present and Future Assets of a Company

Floating charges are not explicitly regulated under Egyptian law. However, under the Movable Collaterals Law, a pledge may be granted over future assets and registered with the ECR. Security interest may also be granted to secure a future debt, an overdraft, or a revolving line of credit.

2.3 Registering Collateral Security Interests

The fees for registering securities will vary according to the type of the security and, in certain instances, subject to the amount of the loan. Egyptian banks benefit from a maximum ceiling of EGP100,000 in relation to Notary Public fees payable for the registration of real estate mortgages where the value of the loan exceeds EGP30 million.

2.4 Granting a Valid Security Interest

In order to ensure the validity of security interest, local security documents are usually drafted in a manner where each item of collateral is explicitly identified. Egyptian law does not expressly regulate floating charges over all assets of a company as prevalent in certain jurisdictions, but rather that security may be granted over a certain asset, eg, a bank account, which credit may vary from time to time.

2.5 Restrictions on the Grant of Security or Guarantees

There is no explicit legal provision restricting the target from granting security in the context of the acquisition of its own shares. In practice, the acquirer grants the shares of the target as security for the financing of its transaction. In this regard, we note that the target may not provide a guarantee in relation to liabilities of any of its board members, and hence the

acquirer may not be represented in the board of directors of the target.

Generally, no further consents are required. Please refer to **2.3 Registering Collateral Security Interests**. From a practical perspective, registration of in rem security interests may trigger significant survey fees subject to the nature and size of the land, and as determined on a case-by-case basis.

2.6 Absence of Other Liens

In respect of liens, it is worth distinguishing between two types; namely, mandatory rights preferred by law and security created by the owner of the asset. In relation to the former, the source of the lien would be a legal provision and the same would not be searchable per se. In respect of the presence of other security, certain types of security interests are searchable, such as a pledge over shares deposited with MCDR, real estate mortgages, fonds de commerce mortgages and security over movable assets that has been registered with the ECR. Other types of security interests may not be searchable, such as assignments by way of security, possessory mortgages or security over insurances. Lenders generally seek comfort through conducting their own due diligence and searches, representations from the borrower or the guarantor confirming absence of other security and negative pledge undertakings to prevent the creation of security at a later stage.

2.7 Releasing Forms of Security

Security release mechanics vary depending on the type of security, but security interests are typically released upon the instructions of the pledgee following the complete repayment of the debt obligations by the pledgor.

Regarding the pledge of shares, the termination instructions by the pledgee must be notified to MCDR to release the block placed on the shares. For other forms of registrable securities, the release will have to be also effected in accordance with instructions from the pledgee to the authority responsible for the registration of the pledge.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

The enforcement of security under Egyptian law is generally completed through selling the asset by public auction through courts. Certain laws expressly set forth simpler enforcement procedures, such as the Banking Law in relation to the enforcement of a share pledge registered in favour of Egyptian banks and the Movable Collaterals Law in relation to a pledge over bank accounts. A general overview on enforcing security in Egypt is as follows.

- *Immovables (ie, lands and buildings)*: an “execution order” is issued by the competent court upon the request of the

creditor and annotated in the competent Notary Public. The creditor shall notify the debtor of the execution order and grant a period of 30 days to the debtor to make the due payment. If the debt is not paid, the property will be sold in public auction under the supervision of the enforcement judge.

- *Movables*: the creditor has the right to request from the competent court the sale of the pledged property in whole or in part following the lapse of five days from the notification to the debtor with the due payment.
- *Share pledge*: following serving a notification to the debtor with the due payment, the creditor may enforce its rights over the shares in accordance with the Egyptian Exchange sale and purchase rules.
- *Bank accounts and cash deposits*: a set-off is usually executed between the pledged accounts/deposits and the amounts owed by the debtor.

3.2 Foreign Law

The choice of foreign law as the governing law of the contract is valid to the extent it does not contravene Egyptian public policy or public morality. The submission to a foreign jurisdiction is generally a valid and enforceable choice, subject always to private international law rules. The Egyptian law in certain matters provides for the exclusive jurisdiction of local courts.

Waiver of immunity from lawsuits in the Arab Republic of Egypt is upheld. However, public assets (ie, assets owned by public entities and allocated for public utility) cannot be the subject of any enforcement proceedings according to the Egyptian Civil Code.

3.3 Judgments of Foreign Courts

In relation to foreign court judgments, a request for enforcement of a foreign court judgment must be filed before Egyptian courts, in order to review that the foreign judgment satisfies the following conditions (without reviewing the merits of the dispute):

- the courts of Egypt are not competent to hear the dispute, and the foreign courts are competent for the matter in accordance with the rules of international private law for the choice of jurisdiction in that country;
- that the parties to the dispute were duly notified and properly represented in the proceedings;
- that the judgment is final and enforceable in accordance with the law of the foreign country;
- that the judgment does not conflict with any prior judgment issued by an Egyptian court in the same case and is not contrary to public policy in Egypt; and
- the country where the court judgment is issued adopts a reciprocal treatment for the judgments of Egyptian courts.

In relation to foreign arbitral awards, Egypt is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Arbitration Convention of 1958. A foreign arbitral award obtained in a state that is a party to the New York Convention should be recognised and enforced by the competent Egyptian court under an exequatur after verifying that:

- the arbitral award does not conflict with prior judgments issued by Egyptian courts on the same subject matter of the dispute;
- the arbitral award is not contrary to public policy in Egypt; and
- the party against whom the arbitral award is rendered has been duly notified.

3.4 A Foreign Lender's Ability to Enforce

There are no specific restrictions on a foreign lender's ability to enforce its rights under a loan or security agreement to the extent that the structure of the agreements and perfection requirements are in compliance with the law.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

The Banking Law defines banking activities as those that involve accepting deposits and providing loans to companies and individuals. These are the main activities of commercial banks in Egypt and would require the entity that practises these activities to have a licence from the Central Bank of Egypt. The Banking Law includes an explicit restriction on any entity not licensed to practise such activities.

This restriction, although broad and explicit, is faced with the reality that many foreign commercial banks provide loans to companies in Egypt, including governmental and public entities, on a non-recurrent basis. It is also common practice to have intra-group and shareholders loans without considering such transactions caught by the Banking Law restriction.

These practices have led to a development in the construction of the rule regarding the Banking Law restriction, so that the acceptable interpretation is deemed to catch lending activities by an entity that is recurrent, continuous and offered on a non-solicited basis to potential borrowers in Egypt. The settled position, then, is that competent authorities close their eyes to foreign lenders providing loans to Egyptian entities as long as such lending is not advertised or offered to the public and is not considered a significant part of the lending activities of the foreign lender.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Egyptian law is clear on restricting foreign lenders from taking security in relation to certain types of collaterals, while in certain other types there is a disparity between theory and practice. The law does not exclude foreign entities from being a security beneficiary except under the Mortgage on Commercial Establishments Law, which regulates the pledge granted on movable assets of companies, including intangible assets and their registration. The beneficiaries under said law must be a bank registered in Egypt or otherwise any approved non-banking financial institutions.

In relation to the Movable Collaterals Law, which regulates the granting of securities such as pledges over bank accounts, future assets and movable assets, including intangible assets, the law requires the entity benefiting from the security to be licensed as an Egyptian bank, or a financial leasing company, or other Egyptian companies licensed to provide credit solutions. This means that the ECR is limited to Egyptian entities, which can exclusively have the online accessibility to the register.

In relation to real estate mortgages, Egyptian law does not include any general restriction on foreign lenders from being a mortgagee under a mortgage contract. However, there is a disparity between the legal rule and its application. The offices of the Notary Public in Egypt, being the competent authority responsible for real estate mortgage registration, do not, as a matter of practice, accept any mortgage registration with a foreign entity as a beneficiary. It is yet to be clarified whether such practice is based on internal regulations or a common practice developed throughout the years.

The pledge on shares in a joint stock company is executed in the form of an agreement that has to be registered with MCDR, the central depository of all shares in joint stock companies, in order to block any trading on the shares in the registers of MCDR. One of the requirements for MCDR to register such pledge is that the pledgee must be coded on the Egyptian Exchange to be able to sell the shares in an enforcement scenario. This coding system on the Egyptian Exchange is available for foreign as well as Egyptian entities and individuals.

4.3 Foreign Investment Regime

Foreign investment is primarily regulated under the umbrella of Egyptian Investment Law No 72 of 2017 and its executive regulations. The Investment Law was promulgated to provide investors with legal safety, guarantees, incentives and certain tax exemptions for their investments. There are some general guarantees and incentives applicable to all companies operating under the Investment Law, while there are other specific incentives and guarantees pertaining to special zones. Examples of the guarantees and incentives set out under the Investment Law include:

- fair and equitable treatment to any investor in Egypt, whether a foreign or national investor;
- foreign investors are entitled to obtain a residency in Egypt for the duration of their investment provided that certain conditions are met and sustained; and
- tax and non-tax incentives enjoyed by investment projects that are subject to the Investment Law, which incentives are divided into general, specific and additional incentives.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

At present, there are no restrictions on foreign currency payments abroad or repatriation of capital and/or dividends by foreign investors. In practice, commercial banks may request underlying documents to substantiate the transfer. The exportation of the Egyptian pound offshore is not permissible.

4.5 Offshore Foreign Currency Accounts

There are no restrictions under Egyptian law for an Egyptian company to create and maintain an offshore foreign currency account.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

Subject to the nature and type of the financing and project agreements, it is generally not required for finance documents (save for certain onshore security documents) to be filed, registered or recorded with any government authority in order to ensure enforceability. Certain project documents, such as those granting an in rem right, must be registered with the Notary Public in order to ensure enforceability under Egyptian law. Additionally, the approval of the competent authority may be required in relation to the security package to be granted to lenders subject to the nature of the project.

5.2 Licence Requirements

Save to the extent of two properties that are subject to a maximum area, foreign individuals/entities may not own land in Egypt. However, an Egyptian real estate investment company may be fully owned by foreigners.

Natural resources are primarily governed, inter alia, by the Egyptian Constitution, Law No 61 of 1958 as amended in relation to granting of concessions relating to the investment of natural resources and public utilities, as well as the relevant law of the concession setting out regulatory and contractual terms.

5.3 Agent and Trust Concepts

The concept of trust is not recognised under Egyptian law. Agency is recognised and regulated under Egyptian law and security agency is commonly used in syndicated financing and for the purposes of holding security for foreign lenders. Whether the security agency relationship is drafted as a trusteeship or otherwise, there is a wide consensus among legal practitioners to characterise trust agreements as an agency agreement.

5.4 Competing Security Interests

Regarding the priority of competing security interests, certain creditors enjoy a general or specific lien created by virtue of the law over all or part of the assets of the debtor. For example, the law determines a priority ranking of a lien for judicial expenses and tax obligations over any other debts. Other than lien rankings provided by the law, different lenders have the right to secure their debt and subordinate contractually their rights between themselves and/or other creditors, such as in the case of subordinating a shareholder loan to a creditor. If there is no subordination contractually, the rank of each security interest is determined pursuant to its date of the registration and perfection, whereby earlier registration takes precedence.

Any contractual subordination executed prior to bankruptcy procedures will survive. However, the borrower shall not undertake any action contradicting the reconstruction plan (eg, granting securities) prepared in light of its potential bankruptcy that will affect the lenders' interests. Accordingly, the contractual subordination concluded after the reconstruction plan may not survive, subject to the discretionary power of the competent court. If the competent court declared the bankruptcy of the borrower, it shall not administrate or dispose of its assets and hence the contractual subordination will not survive.

5.5 Local Law Requirements

According to Egyptian law, a foreign company may not carry out any sort of business in Egypt, commercial or non-profitable, without having an established legal entity in Egypt. Such legal entity may take the form of a company, branch or representative office. In order to undertake a project in Egypt, the same must be owned by an Egyptian company. From a lending perspective, there are no legal requirements for borrowers to be organised under the laws of Egypt. The regulatory framework applicable to certain industries may often necessitate the project company to take the form of an Egyptian joint stock company.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

Egyptian law differentiates between insolvency procedures applied to non-merchant individuals and bankruptcy pro-

cedures applied to merchants, including companies. The Restructuring, Rescue, and Bankruptcy Law issued in 2018 provides two procedures that mitigate the financial distresses of a company and provide a first line of defence ahead of bankruptcy. These proceedings are as follows.

- *Restructuring*: the purpose of restructuring is to figure out a plan to organise the financial and administrative works of the bankrupt company. Any company may request restructuring provided that its capital is no less than EGP1 million and has conducted business for the previous two years without committing any fraud. The company may not request restructuring if a judgment has been issued declaring its bankruptcy or opening rescue procedures. The competent judge will approve the plan prepared by the restructuring committee. The company will remain in control of its business; nonetheless, the competent judge may appoint an assistant.
- *Rescue*: subject to the condition of two years of conducting business, any company that may be declared bankrupt, and did not commit fraud or gross negligence, has the right to request “a rescue from bankruptcy” in case there is a disorder in its financial conditions that may lead to cessation of its due payments (even if a bankruptcy declaration has been requested). It is worth noting that the right to request rescue from bankruptcy must be submitted to the competent court. Any company may request a “rescue from bankruptcy” upon the approval of the majority of partners or general assembly as the case may be; however, a company subject to liquidation procedures may not request the same. The company will remain in control of its business under the supervision of a rescue secretary appointed by the competent court.

6.2 Impact of Insolvency Process

Upon the issuance of a judgment declaring the bankruptcy of the debtor, the debtor may not repay any debt owed by it or fulfil any of its rights, save in relation to commercial papers, which may be paid at maturity provided that the bankruptcy administrator does not object to such settlement. Following the judgment, the interest on unsecured loans shall be suspended, and the interest on secured loans may not be requested unless to the extent of the amounts collected from selling any collateral assets. Payment of the principal shall take priority, followed by the interest due before the issuance of the judgment, then the interest due after the issuance of the judgment.

6.3 Priority of Creditors

The liens ranked by the law take priority (such as debts related to judicial expenses and tax dues). After satisfaction of rights mandatorily preferred by law, secured creditors shall recover outstanding debt from the assets taken as a security according to the ranking of registration (ie, first, second, third degree). Finally, the unsecured creditors will share

any remaining enforcement proceedings on a pro rata basis related to the total indebtedness of the debtor.

6.4 Risk Areas for Lenders

There is an inherent risk associated with the fact that the monies of the debtor may not be sufficient to pay the debt of all creditors. In that case, the proceeds will be shared on a pro rata basis between creditors unless there are secured creditors.

6.5 Entities Excluded from Bankruptcy Proceedings

Unincorporated joint ventures, the public sector and public business sector entities are excluded from bankruptcy proceedings by virtue of Article (1) of the issuance articles of Bankruptcy Law No 11 of 2018.

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Insurance companies may not provide insurance over project assets that are contrary to Egyptian public order.

7.2 Foreign Creditors

Egyptian law does not restrict the payment of insurance policies to foreign creditors. This is subject to any agreement between policyholders and the insurance company. Some agreements may provide for the payment of insurance policies for the purpose of the restoration of the damaged assets, while other agreements may provide for the payment of insurance policies for the purpose of the mandatory prepayment of the debt.

8. Tax

8.1 Withholding Tax

Interest payments to entities that are non-resident in Egypt by entities that are resident or have a permanent establishment in Egypt are subject to withholding tax at a rate of 20%, whether paid directly or indirectly, without any deductions, and subject to any double taxation treaty that may provide for a lower withholding tax rate or an exemption from tax, to the extent the tenor of the loan or credit facility is less than three years.

Interest payments to any offshore lender in connection with a loan or credit facility with a tenor of at least three years are exempt from withholding tax. Withholding tax must be remitted to the Tax Authority during the first 15 days of the month following the month in which the withholding has occurred.

8.2 Other Taxes, Duties, Charges

Pursuant to Egyptian Stamp Duty Law No 111 of 1980, the stamp duty rate over loans is 40 basis points levied annually on the highest debt balance under the facility, loan or borrowing provided by banks during the financial year. The stamp duty is split equally between the lender and the borrower and is payable in quarterly instalments by the lender. The burden of this tax may not be shifted by contract. Pursuant to the principle of territoriality, stamp duty is not applicable to a facility, loan or borrowing provided by foreign banks that are not registered in Egypt.

8.3 Limits to the Amount of Interest Charged

Under the Egyptian Civil Code, to the extent that interest payable by an Egyptian entity would exceed 7% per annum, including compounding or capitalisation of interest, or interest exceeding the principal, such excess is unenforceable.

It may be argued that the calculation and determination of interest is subject to Article 50 of the Commercial Code, which allows such rate between merchants to a contractual maximum of the rate declared by the Central Bank of Egypt from time to time. This restriction does not apply to banks licensed and registered in Egypt to undertake banking activities, which are entrusted to freely set interest rates subject to the nature of the banking activity according to Banking Law No 88 of 2003.

9. Applicable Law

9.1 Project Agreements

Egyptian law often governs project agreements as project agreements are frequently entered into between the public sector and private sector. Project contracts entered into between two or more private sector parties are also typically governed by local laws.

9.2 Financing Agreements

In relation to project financing provided by one or more Egyptian banks, finance documents would typically be governed by Egyptian law, with the Cairo Regional Centre for International Commercial Arbitration (CRCICA) as the dispute resolution forum. With respect to cross-border project finance transactions where lenders are based offshore, financing documents are commonly subject to English law.

9.3 Domestic Laws

All matters related to Egyptian public policy or public morality are governed by Egyptian law in addition to local law security documents.

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