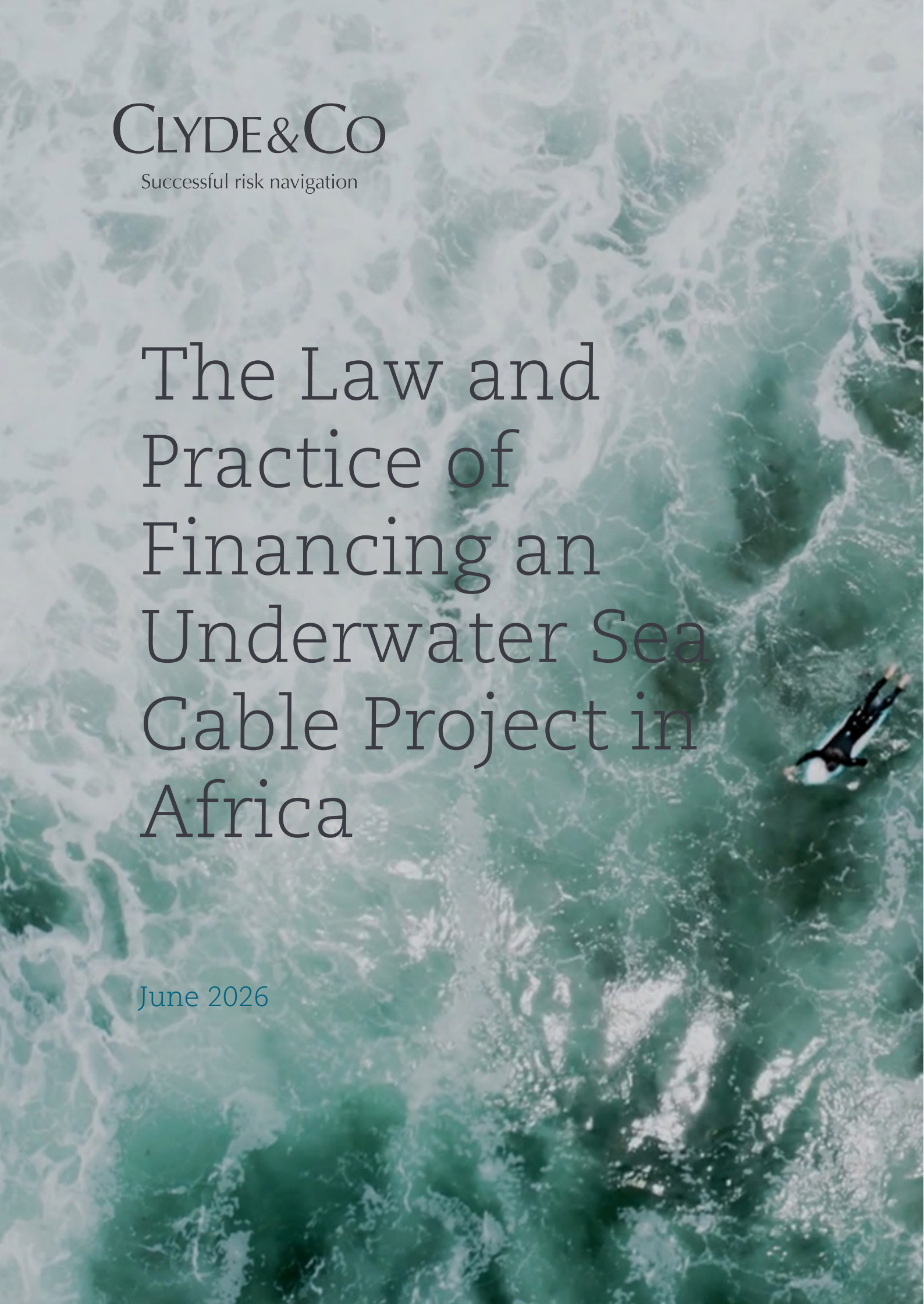
CLYDE&CO

Successful risk navigation

The Law and Practice of Financing an Underwater Sea Cable Project in Africa



June 2026

1. Introduction

1.1 History and Technology

An understanding of the history and technology of Underwater Sea Cables (**USC**s) is necessary in order to identify project risks and the drafting considerations that should be addressed in the legal documentation.

A USC can be broadly defined as an insulated wire or optical fibre which is laid on the seabed in order to carry data communications from one location to another[1].

The first commercial use of a USC was undertaken on August 28, 1850 when John Watkins Brett and colleagues placed a copper wire, insulated only with gutta percha between Dover in the United Kingdom and Calais in France (Newall, R.S (1882), p.1). Communications were established, however the USC survived only one day as it was cut by chafing on the rocks. The event served to illustrate that a USC would require strong insulation and might need to be armoured in order to protect it from the elements, a fact that remains relevant today when identifying risks in the legal documentation.

The key physical risks for USCs have remained fairly consistent throughout their development, namely:

(i) the distance from point to point in laying a USC and the hazards that are encountered at sea; and

(ii) the technology required to ensure efficient communication.

These physical risks were illustrated as the commercial markets of the United Kingdom and those of the Americas were entering a rapid period of economic growth at the end of the nineteenth century. It often took weeks or months for a message to be carried by ship from the United Kingdom to the Americas depending on weather conditions.

It was during this period that trans-Atlantic communication developed, culminating in the first successful commercial laying of a USC in 1866 by *S.S Great Eastern* under the command of Sir James Anderson, laying approximately 4,200 kilometres of telegraphic cable (Black, Robert M (1983)).

The invention of the telephone by Alexander Graham Bell in 1875 was a catalyst for continental communication. Analogue USCs came into use during the 1950s, and continued to develop over the next 30 to 40 years.

Modern USCs are fibre optic cables developed from the 1980s onwards. For a number of reasons discussed later in the risk analysis, fibre optic USCs transmit more effectively than earlier forms of USC, however they have risks attributable to their physical state. Deep sea fibre optic USCs are approximately 17 to 20 millimetres in diameter, therefore no bigger than the average garden hose. Although well armoured, particularly close to landing stations, USCs are still very much at risk from the elements.

1.2 Approach

[1] International Cable Protection Committee; https://www.iscpc.org

This article shall focus on the following:

(i) USCs in the context of emerging markets, particularly in Africa; and

(ii) The perspective of the lenders seeking to finance the development of a USC.

This article will highlight the primary considerations for lenders and their legal advisers when engaging on a USC project. Being a lender to a USC project provides the widest possible perspective of the risks and conflicting interests of other parties on such transactions. The aim of this article is to provide lenders with a practical guide to each stage of a USC transaction in an emerging market.

For the purposes of this article, the term 'emerging market' is used broadly to refer to developing countries with relatively high growth potential, but which may also face political, institutional, regulatory or market-access challenges.[2]

Although many of the legal and structural issues considered in this article arise across emerging markets more generally, the African context gives rise to certain additional questions of particular relevance to lenders, including coastal State permitting and landing rights, telecommunications licensing, foreign exchange convertibility and repatriation, and the interface with host governments and State entities. These issues should be addressed as part of the local law due diligence and the overall risk allocation in the project documents.

Given the international nature of USC projects, familiarity with international regulations and treaties is essential. This article will seek to explore the key areas of international law and the manner in which they impact the legal documents on such projects.

USC projects generally have a distinctive structure because they are performed as limited recourse project finance[3]. It will be useful to review a typical project structure and profile the various parties involved and their competing interests as these factors will inform the negotiating position.

As timing is a key factor in closing a USC project successfully, the project cycle and potential sources of delay should be understood at the outset.

[2] International Monetary Fund; '*World Economic Outlook Database – Groups and Aggregates'*, (updated April 2023); MSCI; '*Market Classification'* (2026)

[3] Export-Import Bank of the United States; '*Our Approach to Project Finance'*, (2026)

2. The Market for Underwater Sea Cables

It is a common misconception that most international communications are routed via satellites. The reality is that the overwhelming majority of international communications travel via USCs rather than satellite systems.[4] This illustrates the world's dependence on USCs and indeed the size of the market for USCs.

Taking the United Kingdom as a historical example, it has long been an important European landing point for transatlantic, African and Asian USCs.

The United Kingdom example illustrates the position in a developed country carrying extensive volumes of telecommunication traffic. But what about the situation in emerging markets? Despite widespread poverty, many of the world's emerging markets, particularly in Africa, have economic growth rates above 7 to 8%. They are also the least served in terms of telecommunications[5]. In order for private sector development and inward investment to keep pace with this growth rate, telecommunications infrastructure is a crucial component.[6]

Emerging markets are currently producing some of the latest advances in USC technology. There are clearly also challenges with doing business in emerging markets which are less evident in developed countries. Many of these are physical, such as lack of effective infrastructure or transportation which can affect a USC, or political, such as the lack of a stable government to facilitate the various permits and authorisations required in using land or infrastructure for a USC.

Regardless of the additional factors to consider when dealing with emerging markets, it is clear that there is a strong and growing market for USCs.[7] The market has also evolved structurally. Recent analysis indicates that global investment in subsea cable infrastructure is increasing materially, with significant participation by major technology companies and other private investors, and with a growing distinction between traditional consortium systems and privately sponsored cable systems.[8]

These developments are relevant to lenders because they affect ownership structures, capacity pre-sales, route priorities and negotiating dynamics, while recent disruptions have also underlined the continuing importance of resilience, route diversity and timely access to repair capability.[9]

Working in emerging markets typically involves greater risk than in developed markets, but the potential rewards are often correspondingly higher. As the number of USCs increases in developing countries, competition in the market increases and prices for end users tend to fall. A possible consequence of this is that the sponsors of such projects may experience lower returns on their investments, depending on the competitive and regulatory environment. The

---

[4] International Telecommunication Union; '*Submarine Cable Resilience*', 2024
[5] International Telecommunication Union and United Nations Educational, Scientific and Cultural Organization; '*The State of Broadband in Africa 2025*', 2025
[6] World Bank; '*From Connectivity to Services: Digital Transformation in Africa*', 2023
[7] International Finance Corporation; '*The Undersea Infrastructure Bringing More People Online in Emerging Markets*', 2025
[8] International Finance Corporation; '*The Undersea Infrastructure Bringing More People Online in Emerging Markets*', (2025)
[9] International Telecommunication Union; '*Submarine Cable Resilience*', (2024)

opposite has been the case in emerging markets where the lack of Information and Communication Technology (**ICT**) infrastructure has meant that having the same level of internet connectivity as in developed countries has meant higher prices for the end user.[10]

When considering the market for USCs, it is not only important to consider the volume of purchasers of ICT capacity, but also to assess the market for equipment providers and construction contractors – essentially the 'builders'.

The USC market is unique in having a very limited number of builders. There are several reasons for this including the sophistication of the technology required and the amounts to be invested in laying the cable and deploying a cable ship prior to payment. This is important as the builders that are available have a lot of market power and therefore stronger negotiating positions on USC projects. The negotiating strength of the available builders should be kept firmly in mind when proposals are made during the transaction.

[10] Cariolle, J, Houngbonon, G V, Silue, T and Strusani, D; '*The Impact of Submarine Cables on Internet Access Price, and the Role of Competition and Regulation*', Policy Research Working Paper 10840, World Bank, (2024)

3. International Law Affecting Underwater Sea Cables

3.1 Foundation Treaties

The foundation international treaties which regulate USCs are:

(a) Convention for the Protection of Submarine Telegraph Cables 1884 (**CPSTC**);

(b) Geneva Convention on the Continental Shelf 1958 (**GSC**); and

(c) Geneva Convention on the High Seas 1958 (**CHS**).

CPSTC was signed by 26 countries including the United States and Great Britain. Many of its provisions are still in use and relevant to the legal adviser acting on USC projects today. It is substantially reproduced and developed in later legislation culminating in United Nations Convention on the Law of the Sea (1982) (**UNCLOS**).

Key provisions to be aware of while considering the specifics of a project include:

(i) Article III which confirms that on granting a concession for landing a USC, States should endeavour to insist on proper safety measures being taken regarding the track of a USC and its dimensions; and

(ii) Article VIII which deals with competency of courts to deal with USC disputes and confirms that infractions of CPSTC shall be dealt with in the courts of the State to which the vessel causing the offence belongs.

Article 2 of the CHS broadly defines the high seas and emphasises that they are open to all nations. Article 1 of the GSC focuses on the sea bed and the subsoil to a depth of 200 metres or more.

The CPSTC should be distinguished from the two Geneva Conventions, as UNCLOS confirms that it prevails and has largely superseded CHS and GSC, however the CPSTC is supplementary to UNCLOS (Articles 311(1) and 311(2) UNCLOS).

The CPSTC should therefore be reviewed to ensure that compatible protections are reflected in the project documents. An example would be to set out the manner in which two parties are to resolve disputes, however to ensure that when a vessel is involved, (should the parties be from countries party to CPSTC) that the correct court is referred to in accordance with Article VIII of CPSTC.

3.2 UNCLOS

UNCLOS is the key international treaty relevant to USC projects. UNCLOS was developed following a recognition that the two Geneva Conventions, CHS and GSC, were trailing behind the development of technology in exploration of the sea and the potential for disputes between nations in their increasingly aggressive exploration for resources at sea.

UNCLOS provides a comprehensive legal framework in which its signatories accept the management of the sea and their actions in relation to the sea. For USC projects, the key point is that UNCLOS generally preserves the right to lay

and maintain USCs beyond the territorial sea, but that right must be exercised with due regard to the rights of coastal States and existing users of the seabed. It is designed as a consolidation of previous treaties referred to above and deals *inter alia* with the following issues, which should also be considered when developing the legal documents for a USC project:

(a) the different regions of the sea;

(b) freedom of States as regards the sea;

(c) protection of the sea – environmental issues;

(d) disputes between parties at sea;

(e) rights of access to the sea (in particular land locked countries); and

(f) the establishment of the International Seabed Authority.

Whilst all of the issues listed above are important, the different regions of the sea are the most fundamental from a practical perspective. The legal analysis should therefore focus not only on whether a cable may be laid in a particular maritime zone, but also on the extent to which coastal State rights, local law and practical route constraints may affect the project.

Before reviewing the different regions of the sea, the analysis should begin with the following questions:

(i) is the coastal State to which a USC is to land a party to UNCLOS?

(ii) is the area in which a company intends to land a USC used widely for commercial fishing and other activities?

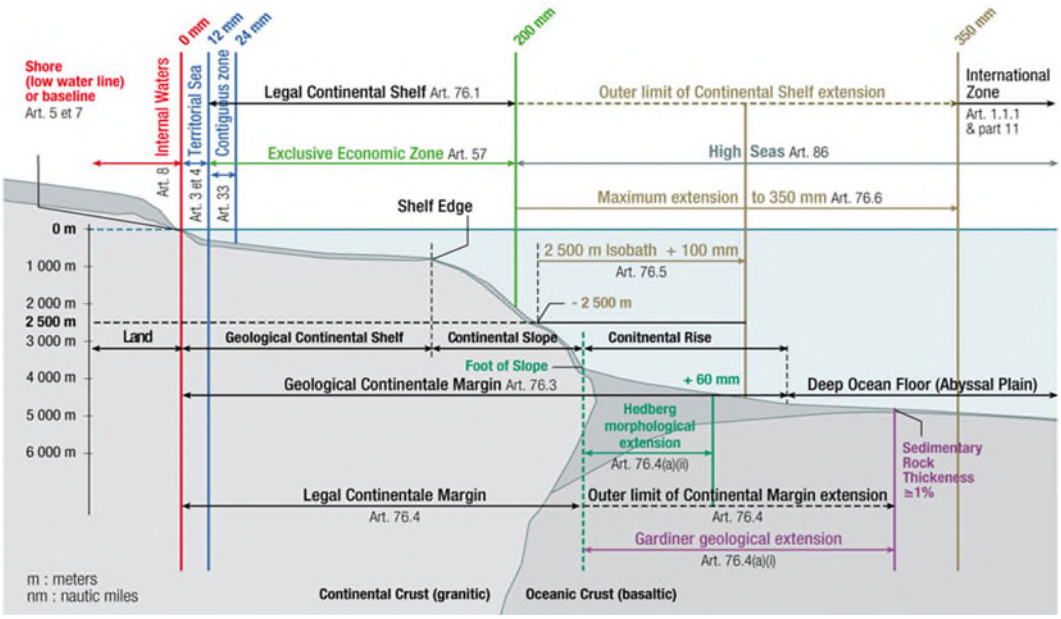
(iii) has any party purchased exploration and production rights from a coastal State which may impact the laying of a USC?

(iv) has there been an assessment by way of seabed desktop survey to monitor what lies on the sea bed?

The importance of these initial questions lies in the fact that, although UNCLOS sets out the rights and obligations of States, the practical ability to lay and maintain a USC will often depend on local permitting, environmental regulation and co-ordination with existing seabed users. The starting point is to check whether the relevant State(s) is a party to UNCLOS and how UNCLOS is implemented in practice under local law.

Figure 1[11]

[11] Le Cercle Polaire; '*The Arctic Ocean belongs to whom*' https://www.lecerclepolaire.com/the-arctic-ocean-belongs-to-whom-2/



Territorial Sea (Articles 2 & 3 UNCLOS)

A coastal State's territorial sea extends to 12 nautical miles. Within this 12 nautical miles, a State has sovereignty and may exercise its jurisdiction by regulating use through laws, permit obligations and other legal measures, subject to UNCLOS and other applicable rules of international law. In practical terms, the landfall, beach manhole, landing station and near-shore route are likely to be the most heavily regulated parts of the project and will require careful local law analysis and a robust permit strategy.

This element is important as the USC will inevitably need to land at a coastal State in order to be linked to telecommunications infrastructure further inland. This means that extensive due diligence will need to be carried out on the laws of the coastal State in order to ensure that a USC can have an effective and legally compliant landing and is in compliance with all local laws.

An understanding of Articles 2 and 3 of UNCLOS is also important as there are coastal States where the USC will not be landing, but instead will be running parallel to. From a practical perspective, the construction contract should reflect the approved route and allocate responsibility for obtaining and complying with any necessary coastal State consents, approvals and permit conditions.

Contiguous Zone (Article 33 UNCLOS)

The contiguous zone extends up to 24 nautical miles from a coastal State and is adjacent to the territorial sea (Article 33(2) UNCLOS).

A State may exercise the control necessary in its contiguous zone in order to prevent and punish infringements of its:

(i) customs;

(ii) fiscal laws;

(iii) immigration laws; and

(iv) sanitary laws and regulations.

(Article 33 (1) (a) UNCLOS).

It is important however to distinguish the contiguous zone from the territorial sea. The contiguous zone is not an area of full sovereignty and does not constitute a general regulatory zone for USC projects. Accordingly, the existence of the contiguous zone does not of itself require the USC to be laid outside 24 nautical miles.

The fact that a USC passes through the contiguous zone does not mean that extensive due diligence should not be undertaken on the coastal State's laws. UNCLOS is helpful; however, due diligence in the contiguous zone can be more limited and focused on the areas identified above. This is to be distinguished from due diligence in respect of a State's territorial sea, which needs to be much more extensive, as it will capture the full range of laws of the State which may affect the USC.

Exclusive Economic Zone (EEZ) (Articles 55-73 UNCLOS)

The exclusive economic zone extends to 200 nautical miles from the baseline and begins beyond the territorial sea. It is a specific legal regime under UNCLOS in which the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the waters, seabed and subsoil, together with jurisdiction in certain matters including the protection and preservation of the marine environment.

Crucially however, the EEZ is not part of the coastal State's sovereignty in the same way as the territorial sea. Other States retain the freedoms referred to in Article 58 UNCLOS, including the freedom to lay USCs and pipelines, together with other internationally lawful uses of the sea related to those freedoms. In exercising those freedoms, other States must have due regard to the rights and duties of the coastal State.

From a practical perspective, it is therefore not correct simply to say that a coastal State can prohibit or permit cables in an unrestricted way in the EEZ. The better analysis is that a USC may be laid in the EEZ, but the route and installation programme must take into account activities such as fishing, oil and gas operations, environmental measures and existing infrastructure on or below the seabed. If for example there is large scale oil and gas activity off the coast of a coastal State, it will be important to survey the location of all known cables and pipelines in order not to infringe existing rights.

Continental Shelf (Articles 76-85 and Article 79 UNCLOS)

Continental shelf is broadly defined under UNCLOS as the seabed and subsoil of the submarine areas adjacent to the coast of a particular State, extending beyond the territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles where the continental margin does not extend that far.

All States are entitled to lay USCs and pipelines on the continental shelf. Article 79 UNCLOS is the key provision. While a coastal State has the sovereign right to explore the natural resources of its continental shelf and may take reasonable measures in connection with the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, it may not impede the laying or maintenance of cables on the continental shelf beyond what UNCLOS permits.

When laying USCs or pipelines, States must also have due regard to cables or pipelines already in position and, in particular, possibilities of repairing existing cables or pipelines must not be prejudiced. These provisions highlight the importance of a comprehensive survey prior to laying a USC and underline why cross party agreements and co-ordination with other infrastructure owners are often critical on USC projects.

The High Seas (Article 86-115 UNCLOS)

The high seas are those parts of the sea that are not included in the exclusive economic zone, the territorial sea, internal waters or, in the case of an archipelagic State, archipelagic waters. The concept therefore concerns principally the water column beyond national jurisdiction.

Under UNCLOS no State is allowed to claim or exercise sovereignty over the high seas, hence the principle of the freedom of the high seas (Article 87 UNCLOS). That freedom includes freedom to lay USCs and pipelines.

Article 112(1) of UNCLOS provides: "All States are entitled to lay USCs and pipelines on the bed of the high seas beyond the continental shelf". This remains an important comfort point for USC projects that traverse areas beyond both the EEZ and the continental shelf of any coastal State.

The distinction between the high seas and the continental shelf should however be kept clearly in mind. For many USC projects, the water column may be part of the high seas while the seabed is subject to the continental shelf rights of a coastal State. In those circumstances, the legal analysis must address both regimes: the freedoms applicable in the water column and the specific rules governing the seabed.

Furthermore, Articles 113-115 UNCLOS have provisions governing:

(i) Breaking or injury of a submarine cable or pipeline (Article 113 UNCLOS); and

(ii) Breaking or injury by owners of a submarine cable or pipeline of another USC or pipeline (Article 114 UNCLOS).

States are under an obligation to enact into their law a punishable offence for any party wilfully or through culpable negligence breaking or injuring a USC (Article 113 UNCLOS). There is an exception to this rule for parties who cause damage while saving their lives or saving their ships after having taken all possible necessary precautions.

States are also under an obligation to enact into law a punishable offence for parties who own USCs and in carrying out their business activities break or injure another existing USC. The punishment shall be that the offending party bears the cost for any repairs (Article 114 UNCLOS).

There is therefore a positive obligation to take into account any existing cables. These provisions highlight the importance of a comprehensive survey prior to laying a USC.

In practice, a third party technical engineering company is mandated to undertake a survey. It is important to ensure that the contract appointing such companies includes a reference to their professional indemnity insurance, so that those relying on the results of the survey have recourse in the event of

significant errors. It will also be necessary to ensure that any cap on liability placed on such third-party company is reasonable from the lenders' perspective.

UNCLOS in the context of emerging markets

It is important to be aware of the challenges of enforcing UNCLOS in emerging markets. Many States in emerging markets lack the resources or technical ability to implement the provisions. The legal adviser may therefore discover during due diligence that the practical implementation of UNCLOS under local law is uneven, incomplete or uncertain, notwithstanding the State's signature and ratification of the treaty. The position can be contrasted with more developed States where UNCLOS has been signed, ratified, adopted into local law and rigorously enforced.

Therefore a review of local laws of a coastal State should be undertaken as early as possible in the project cycle, namely the due diligence phase. In practice, due to the complexities of USC projects, the legal adviser is likely to be an international adviser, who is not necessarily familiar with the local law of the relevant coastal State. Lenders should also procure local counsel in relevant coastal jurisdiction(s) in order to assess that State's interpretation of UNCLOS under local law.

Recent developments

The practical regulatory environment affecting USCs continues to evolve. In particular, the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (the **BBNJ Agreement**) entered into force on 17 January 2026.[12] Although it does not alter the core rights under UNCLOS relating to USCs, it introduces a more developed framework in areas beyond national jurisdiction in relation to environmental impact assessment, area-based management tools and marine protected areas.[13]

In practice, this may require increased co-ordination with environmental authorities, marine spatial planning processes and other regulators, particularly where a proposed route or repair operation may interact with protected areas or sensitive marine environments.

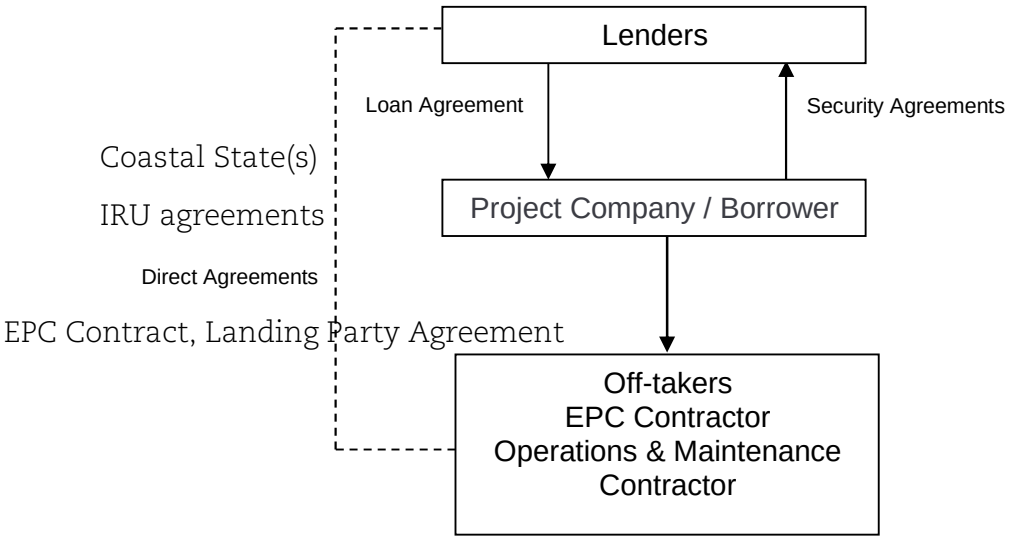
[12] United Nations; '*BBNJ Agreement*', (2026)
[13] Beckman, R, Bressie, K and Ong, J; '*2024 ICPC-CIL Workshop Report on Law of the Sea and Submarine Cables*', (2024)

4. Typical Project Structure

4.1 The Parties and their objectives

The typical parties to a USC project are displayed at Figure 2 below:

Figure 2



The identities of the project parties and their objectives should be understood clearly, because those objectives shape the negotiating dynamic. In this article, "Project Company" means the special purpose vehicle established to undertake the USC project.

Lenders

The role of the lenders is to advance funds to the Project Company at a designated interest rate and for a margin. Their key concern and objective is to be repaid the original amounts together with the built in profit element which reflects the risk they are taking in lending.

The objectives of the lenders are to be distinguished from those of the other parties on a USC project. Far too often on USC projects do certain parties assume that the interests of the Project Company and those of the lenders are aligned. The reason for this misconception is because unlike other types of financing, USC projects are based on project finance principles, the lenders look to be repaid principally out of the revenues produced by the project. It is therefore in the lenders' interest that the Project Company negotiates reasonable contracts with its counterparties. To this extent therefore, the lenders will have views aligned to the Project Company in encouraging it to negotiate robustly for satisfactory contracts. By contrast the Project Company may be more willing to compromise due to other factors such as timing and potential shareholder profit which do not affect the lenders.

Lenders should bear in mind that the Project Company's shareholders stand to receive significantly greater upside than the lenders if the project succeeds. The

Internal Rate of Return (**IRR**) of USC projects in emerging markets can, in some cases, be attractive, not only because of the risks associated with the project, but also because demand for digital infrastructure and international capacity may remain strong in under-served markets.

Depending on the size of the financing, there may be more than one lender. The financing may therefore be syndicated to a group of lenders either prior to close of the project or following close of the project. As such, there may be sub-groups of lenders. Examples of such sub-groups are:

(i) Commercial lenders;

(ii) Development Finance Institutions (**DFIs**); and

(iii) Export Credit Agencies (**ECA**s).

Each of these sub-groups will have slightly different interests. The lending group on a USC project will usually rely on one international legal adviser rather than each lender hiring its own counsel. It is both cost effective and the alignment of common terms in the documents is easier with a shared adviser.

Commercial lenders fit the profile described above, namely that they wish to advance funds to the Project Company at a designated interest rate and for a given margin. They are risk averse and require a great deal of comfort following initial due diligence prior to any commitment to lend.

DFIs are established by treaty and have States as their members. An example of a DFI is the African Development Bank (**AfDB**) which has as its purpose "to contribute to the sustainable economic development and social progress of its regional members individually and jointly".[14]

Another example of a DFI is the Asian Development Bank, established in 1966 with 69 member countries (50 from the region and 19 from other parts of the world).[15] A DFI has slightly different interests to a commercial lender. Sustainable development in the State in which the project is taking place is important for example. The price of lending may therefore be lower than that of a commercial lender given that pure profit is not the priority for DFIs. Insurance considerations are addressed in further detail below, however DFIs also bring a measure of political-risk comfort to other transaction parties. An example could be a USC project off the coast of East Africa. The State where the USC must land is likely to be one of AfDB's 54 regional member States. It is often perceived that there is less risk of such a host State fettering the right of a private sector entity under licences and other required permits when it is known to the host State that the AfDB is a party to the transaction (an organisation to which it is a member).

The objectives of ECAs are to support companies from that State in their external activities. Therefore for example, if the EPC Contractor on a USC project is Canadian, it would not be unusual for Export Development Canada, the Canadian ECA to provide some type of support to the project, perhaps by way of insurance guarantee, or export credit by way of financing. The ECAs may use the common legal adviser, however as one may imagine, they have specific and limited objectives in relation to the project.

---

[14] Article 1, Agreement Establishing the African Development Bank, (1964)
[15] Asian Development Bank; https://www.adb.org/

Recent volatility in credit markets has triggered an upsurge in interest in the financing options available to ECAs and they have targeted USC projects in some instances. ECA support has always been important for smaller businesses looking for business abroad, however in more recent years, larger suppliers of ICT infrastructure have sought ECA financing.

Project Company / Borrower

The key objective of the Project Company is to carry out the project for profit. The shareholders of the Project Company are commonly referred to as the "project sponsors". The project sponsors will look to the potential IRR of a USC project before committing to undertake it. As discussed above, the IRR of a USC project in an emerging market can, in some cases, be attractive.

The project sponsors also wish to spread risk associated with the project to other parties, including lenders, the host State(s), sub-contractors and others. It should be noted that the project sponsors are likely to establish the Project Company as a Special Purpose Vehicle (**SPV**). As such, the SPV will have no previous track record nor significant assets other than those developed on the project. This structure is a defining feature of limited recourse financing, under which most USC projects in emerging markets are structured.

Although the lenders will take security over all the Project Company's assets, they do not have recourse to any other source of funds or assets other than the project assets themselves. The lenders therefore have an active interest in the success of the project and the cash-flows produced from it in order to repay their loans.

Off-takers

The off-takers produce the cash-flow of the USC project. They enter into contracts with the Project Company to purchase capacity produced by the USC. In practice, the off-takers will be onshore telecom companies with a large customer base. They will then market this capacity to end users in the form of mobile phone, internet and other communication packages.

The contracts between the off-takers and the Project Company are referred to as Indefeasible Right of Use agreements (**IRU**s). The detailed terms are considered below.

Lenders will need to know both (i) how many IRUs have been signed before close and (ii) on what terms.

The number of IRUs will indicate whether there are sufficient numbers when compared against the repayment profile of the loan agreement in order to repay the debt. There will be a financial modeller working with the lenders who undertakes the substantive mathematical calculation.

The terms of the IRU agreements, which are addressed in detail below, will be important in order to ensure that the Project Company is receiving a fair deal, and to establish the payment mechanics.

EPC Contractor

The Engineering, Procurement and Construction (**EPC**) Contractor is the key party in physically bringing the project to fruition. The term "EPC" comes from

the fact that the construction company contracted to carry out the works will usually:

(i) Design the USC and hold the technology intellectual property rights to such design;

(ii) Procure all necessary materials for the construction of the USC; and

(iii) Construct all elements of the USC in order to make it operational.

The EPC contract is likely to account for the majority of the project costs. Lenders should ensure their legal adviser is involved at every stage of negotiating this contract. The question has occasionally been asked why the legal adviser acting for the lenders would be involved in such negotiations, given that they are held between the Project Company and the EPC Contractor, and furthermore that the lenders are not a party to the EPC contract. The reason is because the interests of the Project Company and the lenders are only partly aligned. The majority of the lenders' funds will be applied under the EPC contract, and they will therefore seek to ensure that the Project Company has negotiated favourable terms and does not incur significant potential liability under that contract.

Landing Party Agreement Counterparty

In order to exploit broader terrestrial continental networks, the USC will need to land ashore and connect to ICT infrastructure.

A company is employed to provide this ICT infrastructure, usually at facilities close to the beach where the USC has landed. The USC can then benefit from ongoing connectivity.

The host company will want to limit its risk to the moment it takes responsibility for the cable as it enters the building. The host company will want to ensure that all responsibility for obtaining permits and licences at the beach are the responsibility of the Project Company.

By contrast, the Project Company will wish to ensure that the host company has robust responsibility for the safety and integrity of the USC once the host company is involved. It is this balance of rights and responsibilities which forms the basis of a landing party agreement, which is examined in more detail below. The Project Company should not be left unduly exposed under the landing party agreement.

A key element of the due diligence will be technical. The lenders will wish to ensure that the host company has the necessary experience in order to be sure of onward connectivity. Cash flows will never be generated from the USC project if the host company is unable to perform.

Other important parties

Financial Adviser / Market Analyst

The financial adviser/market analyst acts initially on behalf of the project sponsors. Their objectives are to review the market for ICT in the region in question and to calculate whether there is a sufficient appetite and pipeline of IRUs in order to be profitable to the project sponsors.

The lenders will have internal financial modellers and market analysts who will take the data from the project sponsor's financial adviser and calculate whether there will be enough cash-flow generated by the USC project to service the debt. The lenders and their legal adviser should be aware of the activities of all of these parties. There may not be a need to review detailed figures; however it will be important that the lender and their legal adviser are commercially aware of any financial issues which arise in order that they are accurately captured in the legal documents.

Insurers (commercial, technical and political risk)

Insurance is an important part of USC projects. Common risks which are insured include:

(i) construction;

(ii) default;

(iii) delay in start up; and

(iv) third party liability.

For USC projects in emerging markets, it is necessary to consider practical and unpredictable risks, such as piracy.

An event of piracy could set back a project timetable by months if not years and could potentially cancel the project should a ransom need to be paid by the project sponsors.

Many insurers will not provide piracy cover in the region, although project sponsors should still test the market. Many survey ships on the east coast of Africa opt for armed security rather than take out comprehensive insurance for example. A combination of security and a limited insurance policy can often be the best mitigant.

It is advisable for the lenders to be named as co-insured together with the Project Company in the policy documents. The reason for this as shall be illustrated below is that the lenders will take security over the insurance policies (usually an assignment of all insurance proceeds), therefore being named as co-insured facilitates this process.

Political risk is an important aspect of undertaking projects in emerging markets. As discussed above, some comfort may be taken by the existence of DFIs on a transaction, however commercial lenders and the project sponsors (for their equity contribution) may wish to take out specific political risk insurance cover.

4.2 The Documents

Shareholders Agreement

As mentioned above, the Project Company is likely to be established as an SPV specifically to carry out the USC project.

The form of the SPV will depend on legal and commercial considerations. The key legal issue will be the local law of the relevant jurisdiction in which the SPV is established. The SPV could be established as a joint venture for example if

the local law states that there needs to be some local participation in the Project Company. Alternatively the legal form could be a limited liability company or other entity.

The commercial considerations are often tax related. In practice, however, the choice of jurisdiction will also need to take into account treaty access, substance requirements, withholding tax, KYC and anti-money laundering considerations, and any applicable sanctions or transparency requirements.

Issues to consider:

(i) In a typical USC project, the lenders should encourage a considerable equity commitment in the project profile. It is for this reason that projects are generally geared 80:20 or 70:30 (debt to equity).

(ii) The identity of the project sponsors will be one of the criteria under which the lenders will base their decision to advance funds. They may have relevant experience which is critical to the successful deployment of the USC. It is for this reason it is recommended to look for a 'lock-in' period whereby the key shareholders in the Project Company are restricted from disposing of their shares. The length of such a lock in period is largely a commercial decision depending on how critical the project sponsors experience is. A reasonable length of time may be until the end of the construction period. It shall be illustrated below that risk on a USC project is higher during the construction period when there are no revenues generated by the Project Company.

(iii) The lenders will seek to take security over all of the Project Company's shares. They will wish to ensure that the Project Company cannot refuse to register shares which are transferred to the lenders when they enforce security over the shares. The lenders will therefore require an inclusion in the Project Company's constitutional documents to this effect.

EPC Contract

The EPC contract is central to the USC Project. It will set out the terms under which the EPC Contractor agrees to carry out the works by specified dates. These dates or 'build milestones' are inserted into a schedule to the EPC contract in order that it is very clear what needs to be achieved in a particular timescale. Any delay in construction is likely to increase the costs of the USC project and may affect the lenders' ability to be repaid when due. Such delays may result in cost overruns.

Lenders are typically advised to seek a "turnkey" contract based on a standard industry form of construction contract, such as those published by the Fédération Internationale des Ingénieurs-Conseils. The phrase turnkey is derived from the fact that under such arrangements the EPC Contractor is responsible for the design, construction and commission of all construction works rather than various parties having separate responsibility for design and others for construction. At the end of the process the Project Company will simply then need to 'turn the key' and the system should work. Having central responsibility limits interface risk between various parties.

As stated above, due to the importance of the EPC contract, the lenders should ensure their legal adviser is involved in the negotiations. This is particularly important on USC projects as there are only a few large EPC Contractors in the market capable of undertaking large scale deployment of vessel and cable lay. These EPC Contractors have strong negotiating power and the Project Company will benefit from having the lenders backing them during negotiations. The EPC Contractor will be aware that the USC project is unlikely to be viable without debt finance therefore they are compelled to listen to representations of the lenders.

Issues to consider:

(i) Project completion is the point at which the construction phase ends. The Ready for Service (**RFS**) date is the date when the USC is operational and ready for service. The RFS date will match project completion. Evidence that the works are satisfactory and that the system works is established by a series of completion tests certified by the Project Company's independent engineer. The EPC contract should include satisfactory provision for completion testing.

(ii) The EPC Contractor needs to be incentivised to meet project completion. Financial penalties or liquidated damages should be included to incentivise timely completion. The term 'liquidated damages' is used where the damages are agreed by the parties before the event triggering them. The amounts are usually fixed by reference to a percentage of the EPC contract price and payable over a specified period.

(iii) The Project Company's rights to assign the EPC contract may be subject to the EPC Contractor's consent, not to be unreasonably withheld or delayed. A standard provision should be inserted into the EPC contract which permits free assignment by the Project Company by way of security to and from the lenders.

(iv) The point at which title to the USC transfers from the EPC Contractor to the Project Company is important. Some EPC contracts state that the USC does not transfer until it is complete and paid for. This presents an insolvency risk for the Project Company. If the EPC Contractor goes insolvent, then the Project Company will probably have already paid up to 80% of the EPC contract price but will have no ownership or title in the works equipment, and therefore would have difficulties in holding onto it when the liquidator arrives. The legal cure for this is the insertion of an insolvency termination provision to provide for transfer of title.

(v) The EPC Contractor will own the intellectual property (**IP**) rights to the technology of the USC. The EPC contract should contain a licence in favour of the Project Company to use the IP rights for the life of the USC.

(vi) The length of any prescribed warranty period is also important. A warranty period for works may be one of the few remedies available to the Project Company for faulty works. The case of *Amoco (UK) Exploration Company v Telephone Cables Limited* (2002) illustrates the point. In that case, a USC linking two North Sea platforms was severed during a storm. The defendant company which laid the

cable argued that it did not have an obligation to repair the cable at its own cost due to an implied variation in the agreement. The Court held that there was an obligation to repair at its own cost as the defect became apparent during the warranty period set out in the agreement and there was no implied variation.

Landing Party Agreement(s)

The landing party agreement will be important to the Project Company from the perspective of onward transmission of data once the USC docks to land.

The USC will need to be armoured and dug deep into the ground below the beach in order to protect it sufficiently as it meets the host company ICT infrastructure.

Issues to consider:

(i) Responsibility for permits will always be a contentious issue. The host company will want the responsibility for acquiring relevant permits to sit with the Project Company. From the Project Company's perspective they will wish to have a host company which is a 'one stop shop' for looking after the USC once it meets land. A compromise is invariably found somewhere in between the two positions however the lenders' legal adviser would be useful support and leverage to the Project Company in such negotiations.

(ii) The trigger for operation of the USC under the EPC contract should match that of the obligations of the host company to ensure onward connectivity. The reason for this is that there is no point in having a fully operational USC provided by the EPC Contractor if it cannot then transmit onward to the end users. Any mismatch would affect the Project Company's ability to produce revenue from the USC. These agreements should therefore be aligned on a back-to-back basis in this respect.

IRU Agreement(s)

The IRU agreements are the key off-take agreement for a USC Project. They are the framework under which the Project Company will sell capacity to off-takers and thereby produce revenue to repay the debt under the loan agreement. It is therefore key that these agreements are well drafted and limit the risk to the Project Company.

IRU agreements are often structured for periods of 15 to 20 years, broadly reflecting the typical working life of a USC. The Lenders will look to secure an 'up front' commitment by off-takers. They will wish to ensure that as much payment can be made to the Project Company as possible ahead of the RFS date of the USC.

Under a standard IRU agreement, the off-taker commits to purchasing a certain quantity of capacity over a specified period. The off-taker will sign up for this capacity before the USC is fully operational, therefore they run the risk that the USC is not operational before their on-selling contracts to end users are available. Off-takers will therefore argue that rather than making any up front commitment, they instead make payment deposits contingent on the USC becoming operational. Particular care is required in drafting any provisions under which deposits are contingent on the USC becoming operational.

Issues to consider:

(i) The off-takers are likely to be local telecommunications companies selling capacity to end users. They will argue therefore to pay for the capacity in local currency. The problem with this arrangement in emerging markets is that local currencies may often be volatile, prone to fluctuation and an uncertain revenue stream for the Project Company. Furthermore, the Project Company is likely to draw under the loan agreement provided by international banks in a more recognised international currency such as United States dollars or European euros. This position presents a currency risk for the lenders. Lenders should insist that off-takers pay in full or in part in the same currency as the loan agreement, unless the position is otherwise hedged. A further aspect to this risk is related to the EPC Contractor who is also likely to be an international operator needing to be paid in United States dollars or European euros. Many elements of the technological supply chain on a USC project will have this requirement therefore the risk extends further than just the loan agreement.

(ii) As highlighted above, the most important issue for the lenders is to have the Project Company produce revenues as soon as possible. The accurate sculpting of payments by the off-takers is therefore an essential factor. The best way to ensure a reasonable payment profile is to ensure that the off-takers make a significant payment deposit, perhaps 10% of the contract value on signature. Should the scheduled RFS date be met, the off-taker would then pay a large percentage of the contract value up front, perhaps 40% with 2 or 3 further payments during the life of the contract. Should the scheduled RFS date not be met, the off-taker should have the right to terminate the agreement and have the payment deposit refunded to it. This issue again highlights the importance of the EPC Contractor meeting the scheduled completion date of the works.

(iii) The off-takers will want the governing law of the IRU agreement to be local law. This issue can present challenges in emerging markets as it may be more difficult to anticipate the outcome of court proceedings in less developed legal systems. In order to mitigate against this risk, it is advisable to argue for the governing law of a more developed jurisdiction, or alternatively retain local law as the governing law but have disputes dealt with under arbitration with a recognised international arbitral body such as the International Chamber of Commerce, subject to local law allowing this. The decision of such arbitral body should be final.

Cross Party Agreements

Cross party agreements govern the relationship, duties and responsibilities of a party whose infrastructure is already situated on the seabed and which a new cable may cross over.

Existing infrastructure could range from another USC or for example an oil and gas pipeline or other extractive industry technology.

The survey ship which maps the seabed should have highlighted any existing infrastructure on the cable route. Once established, the Project Company

would need to contact the owner of the existing infrastructure in order to alert them of the cable route and enter into a cross party agreement.

The legal structure of cross party agreements works on the basis of indemnities from one party to the other for any damage caused by the actions of that party.

Issues to consider:

Although cross party agreements are important documents, they should not be overly complicated. Due diligence will highlight which cross party agreements are required. They should then be included as a condition precedent to disbursement.

The need to take account of other party rights is illustrated by the case of GEO Networks Ltd v The Bridgewater Canal Company Ltd [2010] EWCA Civ 1348. In that case, the Court of Appeal overturned the earlier High Court decision and held, in the context of the Electronic Communications Code, that the relevant consideration was for the right to carry out the works, rather than a separate right to keep the cable in position once installed.

Although this case concerned the statutory regime applicable to a canal crossing in the United Kingdom, it nevertheless illustrates the importance of identifying the rights of existing infrastructure owners and addressing them properly in the project documentation. Existing rights will need to be addressed during due diligence.

Direct Agreement(s)

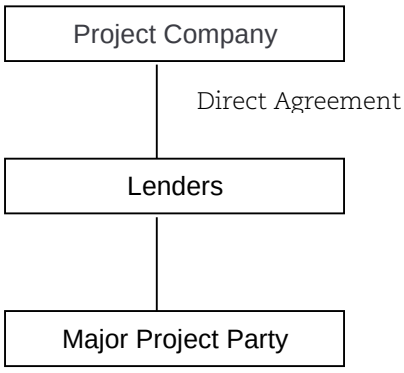
The lenders will not be party to some of the key project contracts such as the EPC contract, landing party agreement or any important IRU agreements. Given the significance of these contracts, the termination of one or more of them could potentially collapse the USC project.

Lenders should therefore push for direct agreements with the major project party. Direct agreements are tri-partite agreements between the lenders, the Project Company and the major project party, for example the off-taker. The objective of a direct agreement is to enable the lenders to 'step into the shoes' of the Project Company.

Issues to consider:

Figure 3

- Consent to charging
- No right to terminate without notice
- Step-in rights



The three basic fundamentals of direct agreements should be contained in the draft document, namely:

(i) the major project party consents to the Project Company charging or assigning by way of security the Project Company's rights under the underlying agreement;

(ii) there is a restriction on the major project party's ability to terminate the agreement before the lenders have had an opportunity to take steps; and

(iii) the lenders are granted a stand-still period during which they may decide whether to take action, including stepping in or transferring the Project Company's rights to another entity in order to continue the project.

Cable Maintenance Agreement(s)

The lenders will wish to ensure that the USC is properly maintained and to make provision to repair or replace part of the cable in the event that there is damage. Cable maintenance agreements are generally between the Project Company and an organisation which the Project Company would join and pay an annual subscription for cable maintenance. The Atlantic Cable Maintenance and Repair Agreement is an example of such an agreement for cables situated in the Atlantic Ocean.

Issues to consider:

As with cross party agreements, the cable maintenance agreement need not be overly complicated. It will be sufficient to include a condition precedent to disbursement that the Project Company must sign a cable maintenance agreement in a form satisfactory to the lenders.

Loan Agreement

Prior to drafting the loan agreement, a term sheet should be prepared. The term sheet and mandate letter are the initial stages of negotiation of the finance documents. The term sheet generally records the principal terms of the USC project and, although it may be signed or initialled by the parties, it is not typically legally binding. The Project Company will engage lenders in the mandate letter, which is legally binding. The term sheet will be an annexure to the mandate letter so that the parties know the indicative terms of the project. The amount of time committed to drafting and discussing the term sheet should be monitored closely by both the lenders and the Project Company. USC Projects are generally tied to a tight timescale for closing linked to construction and the RFS date therefore if the parties are not careful, the term sheet negotiations with various iterations of the document may become as protracted as negotiations of the first draft of the loan agreement. The mandate letter should ensure that the Project Company pays for certain items which the lenders will not wish to cover for example, appraisal costs including their travel to the site and other forms of initial due diligence. The Project Company should also be committed to paying for the services of any external advisers (including legal and technical) who the lenders engage.

Issues to consider:

Below is a non-exhaustive review of the 'spine' of the loan agreement, highlighting areas of particular relevance on a USC project in an emerging market.

Parties

It is not only the Project Company and the lenders who should be parties to the loan agreement. It is not unusual for other members of the Project Company's group to be parties to the loan agreement, particularly where they are guaranteeing the obligations of the Project Company.

What is the loan for? Purpose Clause

The loan agreement needs to set out clearly what the loan is for. In complicated USC Projects it is not unusual to have a loan agreement with several facilities for example:

(a) Cost Overrun Facility – to cater for any cost overruns in the construction period;

(b) Working Capital Facility – to enable the Project Company to fund start up costs which are not accounted for in the project sponsor's equity contributions.

Conditions Precedent

There will be various conditions precedent or 'CPs' to disbursement of the loan agreement. On a USC Project in an emerging market these will not only include typical CPs such as evidence of the Project Company's incorporation in the form of constitutive documents, but also project specific issues which flow from the due diligence of the local adviser. For example, if a particular risk is identified, such as fishing rights near the landing site of the USC, the following example CP may be useful:

"Evidence satisfactory to the lenders that the Borrower has full right and title to the land and infrastructure located at [x]"

Such CPs force the Project Company to be proactive and find solutions to risks identified by the lenders.

Interest Provisions

The loan agreement will either have a fixed rate of interest or a floating rate by reference to an agreed risk-free rate (**RFR**) or, where appropriate, a forward-looking term rate. In sterling financings this will ordinarily be SONIA and in United States dollar financings SOFR[16]. Due (among other considerations) to the international nature of USC projects, funds are generally advanced at a floating rate, however the documentation will need to specify clearly the basis on which the relevant RFR is calculated, including whether it applies on a daily simple basis or is compounded in arrears over the relevant interest period, together with the applicable conventions for any lookback, observation period, day count and rounding.[17]

---

[16] Financial Conduct Authority, '*About LIBOR transition*', (2026)
[17] Alternative Reference Rates Committee / Federal Reserve Bank of New York, '*SOFR "In Arrears" Conventions for Syndicated Business Loans*', (2020)

Market disruption clauses remain particularly important to USC projects in emerging markets, however they should no longer be drafted solely by reference to an interbank offered rate. Due to the increased risk of lending in these markets, and the use of RFR-based pricing, the loan agreement should contain clear provisions dealing with the temporary unavailability of the relevant rate, the replacement of the applicable benchmark where necessary, and the conventions applicable to a compounded rate. Lenders will therefore wish to ensure that the interest provisions contain an alternative method of setting the interest, together with appropriate provisions dealing with break costs, funding losses or increased costs, so that the economics of the financing are preserved if the primary rate is unavailable or the agreed methodology cannot be applied in the ordinary way.

Where the financing is advanced on a floating rate basis, lenders may also require appropriate hedging of interest rate exposure, and the interaction between any hedge arrangements and the finance documents should be considered as part of the overall project finance structure.

Representations and Warranties

The lenders will want the Project Company to make representations regarding its status through the life of the loan agreement. Additionally the Project Company will need to warrant certain information. A particularly important representation in USC projects in emerging markets regards any pending litigation against the Project Company. Given that the Project Company will operate in foreign jurisdictions, an important risk to the lenders is that they cannot control which third parties claim against the Project Company. DFIs will also usually require fairly stringent environmental and social representations to be inserted into the loan agreement.

Undertakings, Covenants and Reporting Requirements

An important undertaking from the Project Company's perspective is the negative pledge, under which the Project Company undertakes not to grant security or enter into similar arrangements in favour of other creditors. For a USC project in an emerging market, the lenders will wish to ensure that the Project Company is established uniquely for the purpose of exploiting the right to the USC and the sale of capacity to off-takers. No further indebtedness should be allowed.

Financial covenants are in place generally to ensure that the financial status of the Project Company can be monitored. For USC projects, ratios should be linked to the revenues coming in from off-takers. If these ratios are coming close to breach, this should be picked up in the reporting requirements which should be somewhat more frequent than in other types of project. A breach should lead to an event of default.

Events of Default

The occurrence of an event of default gives the lenders the right to accelerate the loan.

Acceleration clauses entitle the lenders to:

(a) require immediate repayment;

(b) cancel their commitments; and

(c) enforce security.

Some typical events of default on a USC project will include:

(i) failure to pay amounts due under the loan agreement;

(ii) breach of financial covenant;

(iii) incorrect or misleading representation;

(iv) ineffective or unenforceable finance documents;

(v) cross-default; and

(vi) insolvency/creditor process;

There are two additional events of default which should be fully considered and discussed.

The first is the change of control provision. As discussed previously, the lenders may wish for certain shareholders to retain their existing shareholding in the Project Company. The Project Company will seek to limit this 'lock-up' until certain risky periods are over, such as the end of the construction period. The lenders may wish to agree to this however if there are any key shareholders who are required for the marketing and operation of the USC then a change of control mechanic may be useful throughout the life of the loan agreement. The penalty for such a change would be an event of default. The lenders may also consider making such a change an automatic prepayment event.

The second important provision is the material adverse change provision. This is especially useful in emerging markets transactions as it may be triggered by macro-economic and political changes which affect the Project Company. The change would occur if it affects the Project Company in a way that is materially adverse in the opinion of the lenders. The provision should usually require a majority lender decision. The Project Company's adviser is likely to argue strongly against the provision, or indeed to limit its application. It is a commercial decision, given the nature of the project whether to make this a non-negotiable point or not. For a USC project in an emerging market it is fairly standard to have a material adverse change clause, however the lender should consider the option and then confirm whether, given the commercial risks in the USC project they wish to pursue it in the documentation.

An important issue to bear in mind across all the project documents is the choice of law and jurisdiction. Given the international nature of USC projects, it is necessary to review these provisions across all contracts, in particular those which may already have been executed (such as IRU agreements). Ideally, both law and jurisdiction will be specified by express clauses in the relevant contracts.

Intercreditor Agreement

As previously discussed, the lenders' legal adviser is likely to be acting for a number of lenders within the lending group. It is important that they remain impartial during intercreditor discussions and it should be made clear at the

outset of the USC project that the adviser will simply present two or three models of intercreditor arrangement and voting rights to the lending group and the lenders' group should be able to choose the appropriate option. In the event that a lender requires specific legal advice they will need to seek advice from a separate legal adviser on their own behalf.

A typical USC project will often involve the layering of varied types of debt. The ranking and priority of the indebtedness is managed through the intercreditor agreement. It will contain provisions establishing who may enforce security over the Project Company and whether the lenders consent is required before the enforcement takes place. Junior creditors would generally be excluded from taking enforcement action against the Project Company for a period of time should the loan go into default.

Account Bank Agreement

The project accounts are vitally important in a USC project in emerging markets. If one thinks practically about the type of security available, the USC itself is an extensive ICT 'kit' which has very little use if it is damaged and requires replacement. The USC is also likely to have been designed by the EPC Contractor therefore they are the only party who is likely to be able to prepare any replacement. The landing stations are owned by the host company and even if the Project Company owned them they have little residual value if sold on an enforcement as they require a USC to dock to them. If the project was already in serious trouble then a USC may not be viable.

Project cash flows are crucial and should be secured comprehensively, including through security over payments under the IRU agreements. They will wish to have a bank which will hold these funds, if possible offshore. If due to local laws on repatriation of funds some element of the proceeds needs to be placed onshore, then another bank would also be appointed to hold the relevant accounts. There may therefore be an onshore account bank and an offshore account bank. In practice these parties may be one of the lenders executing a dual role as a lending bank in one capacity and an account bank in another capacity.

The account banks will need to be party to the intercreditor agreement. The account bank agreement however will set out the circumstances under which the project accounts will operate and the parties' obligations to the account banks.

Security Agreements

Lenders should take security over all project assets to the fullest extent possible under applicable law. Local counsel should advise on the available local-law security options from the outset.

Local counsel are unlikely to have significant direct contact with the international lending group and should therefore liaise through the lenders' legal adviser, who will be familiar with the various local options and able to advise the lenders accordingly. The following security options should be considered from the outset:

Mortgages or Charges

These may be taken over equipment, land and crucially over the shares in the project company.

A share mortgage for example would allow the lenders to exercise their rights as sole shareholder and if necessary replace the existing board.

Assignment of Insurances

As previously discussed, insurance is a key element of USC projects in emerging markets. Lenders are advised to take an assignment of all insurance proceeds. In the event of a claim under the insurances, any proceeds would then be paid directly to the lenders, or preferably to an account over which they will have security.

Assignment of Contracts – generally

Lenders are advised to take a general assignment of any project contracts. The key contracts to consider in this instance are the IRU agreements.

Charge over Accounts

It is recommended that lenders take security over the funds held in the accounts of the account banks. This can be done with a fixed charge. A floating charge can also be taken over any account which is used by the Project Company into which proceeds and IRU revenues are paid, however as stated above, an assignment of the underlying contract pursuant to which monies are paid should also be taken.

Security over ICT Licence

The Project Company will also have a licence to operate the ICT infrastructure. This will be a licence in the local jurisdiction. Clearly this is a crucial element to a USC project as without it the Project Company will not be in a position to operate. The lenders should establish with local counsel the possibility of taking security over the licence.

5. The Project Cycle

5.1 Due Diligence

The first step in the project cycle is the due diligence phase. Due diligence is undertaken on the Project Company and the physical logistics of the project by the lenders. The extent of the due diligence exercise will depend largely on the asset being financed and the type of financing structure. In this case, the asset is risky technology in the form of a USC and the finance structure is limited recourse lending. A USC project is also potentially multi-jurisdictional. This position indicates that the due diligence should be fairly extensive. Should the finance structure have been different, for example a corporate loan to a borrower with an extensive balance sheet and various assets over which security would be taken, the need for (non-financial) due diligence diminishes. In this case, the lenders would satisfy themselves in the knowledge that they have security over all the valuable assets on the company's existing balance sheet.

Effective due diligence in emerging markets depends on close co-operation with local counsel. Should a USC pass through the exclusive economic zone of several jurisdictions, the following type of questions should be asked to local counsel(s) at the due diligence phase. These are questions that the lender's legal adviser will ask on the lender's behalf, but it is helpful to be aware of for context.

Applicable Laws

(a) What are the principal laws regulating the telecommunications industry?

(b) Which government ministry or department is responsible for their administration?

(c) Provide details of the different types of permit capable of being held by [*name of telecoms company or relevant subsidiary*] that exist under the applicable telecoms law.

Environmental Laws

(a) Provide a brief outline of applicable environmental law.

(b) Is an environmental impact assessment required in respect of the USC?

(c) Is there an obligation to consult with local communities and stakeholders?

Local Laws- interaction with international law

(a) How does local law interpret the territorial zones under UNCLOS (i.e. territorial, contiguous, exclusive economic zone, continental shelf and high seas)?

Taxation

(a) What documentary taxes or stamp duties will be payable as a consequence of entering into the project agreements?

The list of questions raised above is not exhaustive. Consideration may also need to be given to issues arising in other areas, including, but not limited to:

(i) the status of the Project Company;

(ii) security arrangements; and

(iii) insolvency laws.

In a contemporary USC financing, lenders and their advisers should also consider a wider range of regulatory and operational risks than may previously have arisen. These may include sanctions, export controls, anti-money laundering and anti-bribery compliance, beneficial ownership and transparency requirements, national security or critical infrastructure approvals, cybersecurity and physical security of landing stations, and environmental permitting obligations. [18]

In practice, this requires close coordination between legal, technical, insurance and compliance advisers, particularly where the cable route, landing points or supply chain may be affected by marine protected areas, heightened security considerations or constraints on the availability of repair vessels and specialist equipment.[19]

5.2 Risk Matrix and Amending the Project Documents

The results of the due diligence questions will provide an overview of the key risks on the USC project. Many of the project documents will already have been signed. In particular the EPC contract will have been signed at an early stage prior to lender involvement.

The lenders should however cover off the risks highlighted by the due diligence and this may involve reopening the project documents, amending them and re-signing them. The Project Company will clearly wish to avoid any reopening of these documents due to delays in the project. The lenders' adviser should then prepare a risk matrix which presents the most significant risks and how they can be mitigated.

5.3 Financial Close of the Project

Financial close of the USC project must be controlled by the lenders' legal adviser. Historically, parties often signed in person; in current market practice, however, cross-border financial closings are more commonly coordinated through virtual or hybrid execution processes. The lenders' legal adviser should coordinate the closing process, including the circulation of execution versions and the organisation of signing arrangements across jurisdictions, whether by electronic signature, virtual closing, or, where required, physical execution.

Issues to consider:

1. *Execution Blocks* – the correct execution block should be used for each party and each type of document. For example, where a document is a

[18] International Telecommunication Union; '*Submarine Cable Resilience*', (2024)
[19] Beckman, R, Bressie, K and Ong, J; '*2024 ICPC-CIL Workshop Report on Law of the Sea and Submarine Cables*', (2024)

deed governed by English law, it will typically be required to be executed in the presence of a witness. Specimen signatures should be obtained in advance and appended to a directors' certificate in respect of the shares of the Project Company.

2. *Share Certificates* – where security is taken over the shares, the relevant share certificates and stock transfer forms should be checked and processed correctly.

3. *Constitutional Documents* – the constitutional documents should confirm that the Project Company has capacity to enter into the transaction and that the directors have the necessary authority.

4. *Solvency Certificate* - reassurance should be obtained in writing from the directors of the Project Company that it is solvent and has no material liabilities as of the date of close which have not already been disclosed to the lenders.

5. *Conditions Precedent* - all conditions precedent delivered by the Project Company should be collated. The lenders should receive a conditions precedent satisfaction letter from their legal adviser prior to any disbursement of funds.

6. *Legal Opinions* - Both the Project Company's legal adviser and the lender's legal adviser will need to provide legal opinions to their clients. Local counsel to the lenders will also be required to provide opinions where necessary.

7. *Searches* - A full company search on the Project Company should be undertaken both in the middle of the transaction and just before close. This is to ensure that no material changes have taken place in for example the shareholding of the Project Company. A winding-up search should also be carried out to ensure that there are no recent insolvency proceedings.

8. *Post Close Matters* - There are various post close matters, the most significant of which is registration of any security. Local counsel will also need to be supervised as to any local registrations and stamping of local security documents. Due to the amount of conditions precedent involved in a USC project, it is not unusual for the Project Company to fail to meet some at close. In this case, the lenders should consider the importance of the conditions precedent and decide whether to waive them, with the following options:

(a) permanent waiver of the condition precedent; or

(b) waiver for a specified period following signing, within which the Project Company must satisfy the condition (a condition subsequent).

A permanent waiver should generally be avoided, as conditions precedent are included for a reason, often reflecting due diligence findings or established market practice. Postponing satisfaction to a later date is typically a less risky option.

6. Conclusion

The key themes arising from USC projects are organisation and versatility. Parties must remain alert to the legal and commercial issues while also keeping a close eye on project stage and timetable.

Reflecting on the key areas to focus:

Market and Technology

An in-depth interest in commercial and technological aspects of the project is essential.

It is helpful to gain an understanding of the technology surrounding USCs by regularly reviewing industry journals and publications. Furthermore, an understanding of the technological risks which can affect a USC is important. It is important to be able to discuss and understand the advice of various legal and non-legal advisers such as the independent engineer and the insurance adviser. These advisers will have worked in the industry for many years and it will benefit lenders if they have a grasp of the technical terms used and the headline risks associated with the project.

International Law

An understanding of the international law which underpins USC projects is recommended in order to grasp the structure of the transaction. This is helped by the fact that there is such a comprehensive body of law contained in one treaty – UNCLOS. Although UNCLOS is so broad that it could have 3 or 4 treaties contained in one, the style and methodology is consistent and it is a user-friendly text which is of great assistance to key players.

In the end, despite all the legal protections contained in the various project documents, it may be that UNCLOS is the only real remedy when the USC is threatened by third party States, which essentially pose the most significant international threat to the smooth operation of the project.

The Emerging Market Factor

The element of emerging markets must always be considered. Parties to USC projects often discuss the 'standard' nature of certain processes, be they associated with technology or a point in negotiations. The emerging markets element will usually operate to disrupt anything which the parties ordinarily assume was 'standard'. It is important to bear this in mind from the outset. In particular, when considering emerging markets, it is worth remembering the adage—often attributed to the British Special Boat Service—that no plan of battle survives initial contact with the enemy. [20]

The Parties and their objectives

An understanding of the competing interests of the parties to the USC project is crucial for a smooth closing process.

The project cycle

[20] Royal Navy; '*Special Boat Service*', https://www.royalnavy.mod.uk/organisation/units-and-squadrons/special-boat-service/special-boat-service

Timing and project stage should be monitored closely throughout the transaction. There are times in the project cycle where negotiating a given point will only delay matters. An example is due diligence. Certain facts come out of due diligence which appear such a threat to the project that there is a temptation to raise them immediately and negotiate a solution. A protracted negotiation at an early stage may cause delay.

The statements above must be tempered with the reality of trying to close the project. Once the due diligence phase is over, it is important to push as hard as possible to have the project closed. It may seem slightly counterintuitive, however compressing the timetable and limiting the amount of time in which the parties may discuss issues is the appropriate way in which to come to decisions and close the project. The project cycle is constantly fighting a backdrop of market conditions for the sale of capacity under IRU agreements and the potential for a competing USC which may attract some of the existing or new off-takers who are the essential cash flow for the lenders.

It has been shown that the challenges of financing a USC project in emerging markets are numerous, however if one bears in mind the need for organisation and versatility, not only can a project be closed successfully on paper, but there is the added benefit of knowing that through their prudence, lenders have contributed to improving the ICT infrastructure of less developed markets around the world.

7. References

7.1 Books Referenced

Black, Robert M; *The History of Electric Wires and Cables., Peter Pereginus Ltd London*, 1983

Newall, R.S; *Facts and Observations Relating to the Invention of the Submarine Cable.*, E. & F.N Spon, London, 1882

Roden, C.E, Richardson, A.G and Franz, R.E; *Submarine Cable Mechanics and Recommended Laying Procedures.*, Bell Laboratories, USA, 1964

7.2 Periodical Articles, Other Published Sources and Official Documents

Alternative Reference Rates Committee / Federal Reserve Bank of New York; 'SOFR "In Arrears" Conventions for Syndicated Business Loans' (2020)

Beckman, R, Bressie, K and Ong, J; '2024 ICPC-CIL Workshop Report on Law of the Sea and Submarine Cables' (2024)

Cariolle, J, Houngbonon, G V, Silue, T and Strusani, D; 'The Impact of Submarine Cables on Internet Access Price, and the Role of Competition and Regulation'., Policy Research Working Paper 10840, World Bank, (2024)

Centre for Protection of National Infrastructure; 'An overview of the use of submarine cable technology by UK PLC' (2006)

Export-Import Bank of the United States; 'Our Approach to Project Finance', explaining that limited recourse project finance depends on project cash flows for repayment and relies on the contractual structure of the project (2026)

Financial Conduct Authority; 'About LIBOR transition' (2026)

International Finance Corporation; 'The Undersea Infrastructure Bringing More People Online in Emerging Markets' (2025)

International Monetary Fund; 'World Economic Outlook Database – Groups and Aggregates' (updated April 2023); MSCI; 'Market Classification' (2026)

International Telecommunication Union and United Nations Educational, Scientific and Cultural Organization; 'The State of Broadband in Africa 2025' (2025)

SoPC4, HM Treasury; 'Standardisation of PFI Contracts', Version 4 (2007), The Stationery Office

ICPC Ltd/UNEP; 'Submarine Cables and the Oceans: Connecting the World' (2009)

United Nations; 'BBNJ Agreement' (2026)

World Bank; 'From Connectivity to Services: Digital Transformation in Africa' (2023)

7.3 Table of Statutes

Agreement Establishing the African Development Bank 1964

Companies Act 2006

Convention for the Protection of Submarine Telegraph Cables 1884

Geneva Convention on the Continental Shelf 1958

Geneva Convention on the High Seas 1958

Law of Property (Miscellaneous Provisions) Act 1989

United Nations Convention on the Law of the Sea 1982

7.4 Table of Cases

Amoco (UK) Exploration Company v Telephone Cables Limited [2002] EWHC 2534 (comm.)

GEO Networks Ltd v The Bridgewater Canal Company Ltd [2010] EWCA Civ 1348

Kleinwort Benson Ltd v Malaysia Mining Corpn [1989] 1 All ER 785

Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China [1937] 1 All ER 231

Westminster Bank Executor & Trustee Co (Channel Islands) Ltd v National Bank of Greece SA (1970) 46 TC 472

500

Partners

5,500

People globally

70+

Offices worldwide*

www.clydeco.com

*includes associated offices

v2.25