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CONTRACTUAL DOCUMENTATION IN PROJECT FINANCE AND THE NEED FOR CONNECTIVITY

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ABSTRACT

Project finance cannot be done in isolation. It draws a series of participants to the projects and, therefore, culminates into different types of agreement reached by investors or parties. The agreements are geared at serving series of purposes, such as bankability, risk control mechanisms, guarantees in relation to the projects, and offering a medium of privity of contract for other parties who ordinarily would not have been privy to the agreements. The parties to project finance will require that their relationship be memorialised and specified. There are series of connected agreements which will be documented and may be linked to the main financing agreement by the parties. These agreements tend to define the obligations of the participants, their roles in the venture, and the allocation of risks. The agreements which are negotiated are required, forming part of the documentation in a project finance. These agreements specify the roles of the parties and the relationship or link to the project. This article examines the roles of these agreement, clearly stating their impacts and contribution to project finance. It makes a case for the coordination of the complexities stemming from the agreements to avoid extemporaneous effects that can jeopardise the essence of a project finance scheme.

Keywords: *Project finance, Privity of contract, Financing agreement.*

INTRODUCTION

Project finance involves multiple parties from different backgrounds, with the project company operating as the focal point or links in the variety of contracts entered by the parties.[1] It may draw parties from different countries to ensure that the project is successfully financed and the parties' needs are met. Participants in project finance may include lenders from commercial banks in host and foreign countries, multilateral financial institutions, bilateral development institutions and other security services providers.[2]

The realisation of the objectives of project finance lies mainly on the way the terms and conditions and the process governing the project finance are structured and are made to conform with the laws that may affect the parties, the projects and other stakeholders that are connected to the project. The risks inherent in the project such as construction, operation, political and market risks will need to be distributed among the stakeholders.[3] The importance of memorialisation of the parties' duties

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1. Marco Sorge, 'The Nature of Credit Risk in Project Finance' (2004) 4 BIS Quarterly Review 91, 94.
2. John Niehuss, *International Project Finance in a Nutshell* (West Academic Publishing 2015) 180.
3. Rod Morrison, *The Principles of Project Finance* (Routledge 2012) 1.

and rights is contained in chains of complex documentation processes that should eschew the unity of the transactional documents.[4] These documentations include different types of contractual agreement that have evolved over time, which the parties can employ to dictate the viability of the projects and ensure that there are no hitches. In the words of Wood, "In project finance, the contract is the king. The project contracts involve a sharing of risk".[5] This paper examines the key agreements in project finance and other relevant agreements and assesses their usefulness to the project's overall success.

PROJECT FINANCE AND THE CASE FOR MULTIPLE AGREEMENTS

Project finance has to do with the pulling of resources together by investors funding a project with the primary aim that the project will be used as a means of financing and paying back the debts for the project without recourse or minimal recourse to the sponsors of the project.[6] Therefore, the common denominator in the definition of project finance is that the cash flow from the project is utilised mainly in the payment of the debt secured for the projects.[7] The sponsors of the project source the debt for the project from different sources such as commercial banks and other financial institutions, and in most cases in form of syndicate loans since more than one lender may be involved.[8] The sponsors create a single-purpose company for building and operating the project.[9] Because of the number of investors involved, which will include domestic and international lenders, guarantors, project sponsors, project companies and purchasers, suppliers and service providers, there is the need for the relationship to be memorialised and coordinated effectively, leading to the following agreements, among others:

a. Construction Agreement;
b. Supply Agreements;
c. Purchase (or off-take) Agreement;
d. Operation and Maintenance Agreement;
e. Government Concession Agreement;
f. Shareholders Agreement;
g. Joint Venture Agreement;
h. Insurance Agreement;
i. Interest Hedge/Currency Hedge Agreement; and
j. Direct Agreement.

4. See Christopher Dugu, 'Dispute Resolution in International Project Finance Transactions' (2000) 24(4) Fordham International Law Journal 1063, 1068-1071.
5. Philip R Wood, *Project Finance, Securitisation and Subordinated Debt,* (2nd edn, Sweet and Maxwell 2007) 13.
6. Scott L Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press 2007) 4.
7. Simon Williams, 'The Ins and outs of Interest Rate Swaps in Project Finance' (2014) 33(1) National Banking Law Review 14, 15.
8. Nagla Nassar, 'Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective' (1999) 23(6) Fordham International Law Journal S60, S62-S63.
9. Wood (n 5) 3.

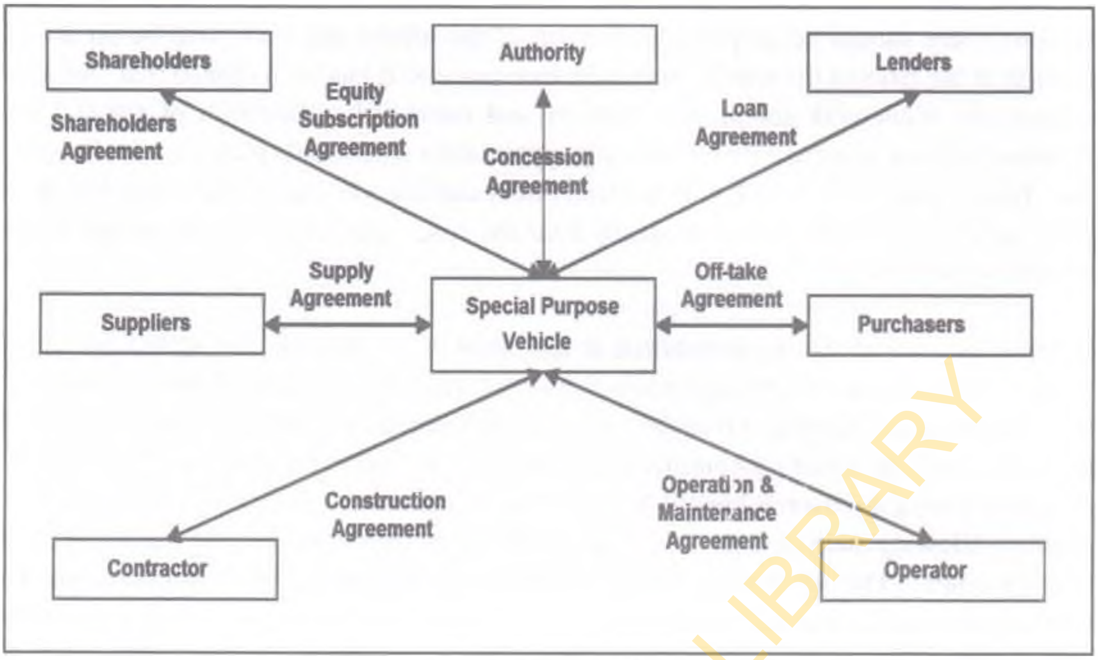

Figure 1[10]

MAIN PARTIES IN A PROJECT FINANCE WITH RELATED AGREEMENTS

From the diagram in figure 1 above, it can be depicted that project finance draws different types of parties that may be connected to the project directly or indirectly. For example, different parties are coming in to create a special purpose vehicle for the projects. We have those involved in the construction of the projects. Arrangements are made for the supply of materials for the projects. There may be equipment leasing by leasing companies. The operation and maintenance of the projects to ensure that the projects continue to function optimally will be done, including drawing different classes of engineers with varied tasks on the project. There are lenders who have offered different packages of loan. There are guarantees offered by host governments or even international financial institutions companies. This situation creates a complex web of activities with parties from divergent legal, technical, financial and socio-economic backgrounds. The essence of this is that various agreements should specify who gets what, how, and when. As put by Weems and Hwang:

> …for an integrated LNG [liquefied natural gas] project to successfully come to fruition, all project activities and facilities must be coordinated through joint, long-range planning. Contractual agreements setting forth the integrated duties and responsibilities of each of the participants in the chain are necessary together with a process for sharing information and early identification of potential problems, as is flexibility on the participant's part to resolve problems through long-term solutions that maintain the strength of the project as a whole.[11]

10. Diagram adapted directly from Sidharth Sinha, 'Project Finance', <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Cross-Border-Infrastructure-Toolkit/Cross-Border%20Compilation%20ver%2029%20Jan%2007/Session%202%20-%20Finance/Finance_01%20Project%20Finance%20-%2029%20Jan%2007.pdf> accessed 30 December 2016.
11. Philip R Weems and Monica Hwang, 'Overview of Issues Common to Structuring, Negotiating and Documenting LNG Projects' (2013) 6(4) Journal of World Energy Law and Business 267, 280.

Therefore, there should be proper coordination of the affairs and there will be an avenue for allocation of the risks in the whole project finance process. It has been opined that "the contracts constitute the framework for project viability and control the allocation of risks".[12] Express stipulations of these responsibilities allow for appreciating who should play a particular role in the project finance process. The risk will be clearly allocated based on the parties' negotiation, which usually considers the party that can ideally bear the risks, appreciates it, and positions itself in ameliorating the risks.[13]

The whole essence of the documentation is that there is a linkage in the agreement and where possible, privity of contract can emanate in a situation whereby a party would not have been able to make a claim against another. Over the years, it has becomes settled by a general rule in law of contract that only parties to a contract can bring a claim under the contract.[14] Without express stipulations giving a person a benefit to claim under a contract or statutory provisions or other exceptions allowing such claims, only parties that are privy to the contract can bring an action before the court.[15] The agreements in a project finance creates such avenue for project finance identifying the parties and their connections to the project and even goes ahead in providing an avenue that allows parties to be able to bring respective claims either as being privy to the contract or by virtue of the fact that they have been granted benefits under a particular agreement forming an integral part of the project financing documentation.

Besides, having the parties' intents reduced into writing finds support in the principle of the law that the document speaks for itself. Reducing the agreements into writing obviates the parties to go through the difficult process of establishing their claims before the court or in arbitral proceedings.

ANALYSES OF THE AGREEMENTS IN PROJECT FINANCE

The preceding section has highlighted the main agreements and identified why multiple agreements are entered by the parties involved in project finance. This section will analyse the main agreements and specifically showcase their purpose in project finance, depicting how they can be instrumental to the success of project finance.

Supply Agreements

Typical project finance will have a provision for a supply agreement to be entered between the Project Company and suppliers for the supply of product in the course of the construction or during the project's lifetime.[16] In a project, a supply of raw materials may be needed. In the course of the project's construction, suppliers are involved in making the supply of certain commodities available. Depending on the nature of the project, there may be a need for continuous supply

12. Pinar Pudun, 'Risk, Risk Allocation, Risk Mitigation & How to Ensure Flexibility in Project Finance' (*Mondaq*, 14 November 2013) <http://www.mondaq.com/turkey/x/274558/Project+Finance+PPP+PFI/Risk+Risk+Allocation+Risk+Mitigation+How+To+Ensure+Flexibility+In+Project+Finance> accessed 28 December 2016.
13. See Athol Yates and Bill Sashegyi, *Effective Risk Allocation in Major Projects: Rhetoric or Reality? A survey on Risk Allocation in Major WA Construction Projects* (Institution of Engineers, Australia & Chamber of Commerce and Industry of Western Australia, 2001) 26.
14. See *Dunlop Pneumatic Tyre Co v Selfridge* [1915] AC 847. Further reaffirmed in *Scruttons Ltd v Midlands Silicones Ltd* [1962] AC 446.
15. See generally Cliona Kelly, 'Privity of Contract - The Benefits of Reform' (2008)1 Judicial Studies Institute Journal 145, 145-170.
16. Damian McNair, Alex Guy and Evelyn Chan, *Project Finance in Asia* (DLA Piper 2011) 3.

throughout the project's lifespan. For example, in a typical power station project utilising natural gas, a gas supply agreement will be entered for the supply of gas to power the project.[17] This is obviously a very important agreement as gas will have to be supplied continuously and consistently, otherwise, it will affect the cash flow of the project, and the owners of the power projects will not be able to meet their obligations for the supply of electricity.

It has been stated that "long-term supply agreement insures or guarantees the project company's access to key supplies at a pre-agreed price".[18] The importance of the supply agreement in project finance is that it contractually guarantees that supply will be made available for the project. The supply agreement is used to address and allocate supply risks.[19] The supply risks under the arrangement can easily be passed on the supplier. According to Dentons. "Where there is no long-term supplier of essential goods and/or services to a project, both the lenders and the project company are necessarily taking the risk that those supplies will be available to the project in sufficient amounts and quality, and at reasonable prices.[20] The project company will be better off mitigating its risks by entering into a supply contract that will guarantee a consistent supply of the feedstocks or raw materials for the project. The project company has the responsibility of ensuring that there is adequate supply for the project. Usually, there will be penalties for the breach in supply; where such has affected the project, not allowing the project participants to meet their respective obligation, the supplier can become liable.

Off-take Agreement

This is a contract for the purchase of the output or products of the project. One of the major considerations in project finance is whether there is an available off-taker for the output of the project. Therefore, the process of project finance will also involve negotiating with off-takers who are readily available to purchase the products generated from the project.[21] For example, looking at oil and gas projects, the off-taker who is willing to purchase the products upon oil discovery.[22] For instance, in a power project, an off-taker will be the industrial users of electricity, the distribution companies who purchase and sell electricity to consumers. In cement project finance, willing buyers should enter into an agreement that they will purchase the cement in tonnes.

The off-take agreement is used for mitigating off-take, demand and market risks.[23] The off-take agreement guarantees consistent cash flow in the project because there is an obligation on the buyers to purchase the product.[24] There are may be provisions for "take or pay" clauses in the agreement. The "take or pay" connotes that the purchaser is under an obligation to buy the product, failing which he will reimburse the project owner.[25] Whether the purchaser purchases the product or

17. Dentons, *A Guide to Project Finance* 22, <www.dentons.com/~/media/6a199894417f4877adea73a76caac1a5.ashx> accessed 3 January 2017.
18. Phillip Fletcher and Andrew Pendleton, 'Identifying and Managing Project Finance Risks: Overview (UK)' Practical Law Finance 2014) 4.
19. Sinha (n 11).
20. Dentons (n 19) 14.
21. McNair, Guy and Chan (n 18) 3.
22. ibid.
23. Sinha (n 11).
24. McNair, Guy and Chan (n 18) 3.
25. See J Michael Medina, Gregory A McKenzie and Bruce M Daniel, 'Take or Litigate: Enforcing the Plain Meaning of Take-or-Pay Clause in Natural Gas Contracts' (1986) 40 Arkansas Law Review 185, 187-188.

not, it must pay for it.[26] The English law recognises the inclusion of "take or pay" clauses as enforceable. The House of Lords in *Total Gas Marketing Ltd* v *Arco British Ltd and Others* [27] confirms the enforceability of such provisions in contracts entered under English law.

Within the off-take agreement, there can be clauses that enable the seller to also sell the products to a third party willing to take it if the off-taker cannot take it in accordance with the terms of agreement of the parties. One important virtue of the off-take agreement is that there is purchase guarantee, the credibility or creditworthiness of the off-taker is also verified and memorialised in the agreement.[28] Therefore the off-take agreement responds to market risks, known as the purchase risks. There is the risk that the products may not be purchased, but with the entering into an off-take agreement, the risk is reduced, unlike in a situation where the project company will search for a purchaser by the time the project kicks off. The agreement, therefore, ensures consistency in the generation of revenue streams from the project.[29]

Operation and Maintenance Agreement

This agreement is made for rendering operation and maintenance services for the project to continue making the project operationally viable.[30] It is a contract entered between the project company and the operator for the operation and maintenance of the project.[31] It is not sufficient that a project has come into operation without effectively putting in place an operation and maintenance procedure.[32] Operation and maintenance is very important in ensuring that the projects continue to operate at an optimal level. This will involve engaging engineering firms who carry out either periodic or ad hoc maintenance of the project. Usually, agreement is entered with companies who can maintain the project even after commercial close has been achieved. This keeps the project going while ensuring that all engineering or construction projects are addressed. Checks are run on the project based on the terms and conditions in the operation and maintenance projects.

The operation and maintenance contracts can be utilised in checking operating risks. The company engaged in operation and maintenance may bear the risks arising from failure to maintain the project or keeping it to be continuously viable. Based on the agreement, the parties can enter into the obligation on operation and maintenance in the main project agreement.[33] For example, a purchaser will want to have a guarantee that his purchase will not be interfered with by requiring that the seller should guarantee that adequate arrangements shall be made in ensuring that the project is maintained on regular bases such as changing of parts and servicing of the machines or parts of the projects. One good thing in maintenance is that there is also a guarantee of consistent cash flow from the project as interruptions are minimised.[34]

26. See Michael A Polkinghorne, 'Take-or-pay Conditions in Gas Supply Agreements' (2014) 4 OGEL <https://www.ogel.org/article.asp?key=3516> accessed 28 December 2016.
27. [1998] 2 Lloyd's Rep 209.
28. Michael E Pikiel Jr, 'Key Documents in Project Financing — A Brief Tutorial', (*Law360,* 15 June 2015) <http://www.law360.com/articles/667842/key-documents-in-project-financing-a-brief-tutorial> accessed 31 December 2016.
29. McNair, Guy and Chan (n 18) 3.
30. ibid 3-4.
31. Pikiel Jr (n 31).
32. Keeley Patrick J Keeley, 'Project Financing for International Independent Power Facilities: Management of Risks' [1996] Journal of Energy & Natural Resources Law 445, 453.
33. Keeley (n 35) 453
34. ibid.

Operation and maintenance are critical to avoid technical defects and allows for the response action taken on the project. The operation and maintenance requirement allows for the maintenance culture to be built into the project to allow for extenuating circumstances due to operational breakdown that may truncate the entire project. In a gas project, it will be expected that routine inspections are carried out to ensure that there are no leakages or that the valves and metres are working accordingly. The operation and maintenance agreement can be made a condition precedent by the lender who will require certain minimum benchmark or standards in the operation and maintenance agreement.[35]

Construction Agreement

The construction agreement is an agreement entered between the Project Company and contractors engaged in the project's construction.[36] It may draw different forms of construction agreement with a different group of engineers. Construction agreements are entered by the parties to ensure that the projects are constructed in accordance with specifications. The construction contract will set out clearly when the project will be handed over to the parties. It involves engineering contracts whereby the parties enter a commitment to build or construct the projects. A construction project specifies when the project will come into operation, i.e. when the project has achieved commercial close.

The construction risks are usually born by the company engaged in the construction. Therefore, the project company passes the risk to the contractor.[37] The contractor has the expertise and is more positioned to assume such risks.[38] According to Fletcher and Andrew Pendleton:

> The lenders and the project company frequently address the risks associated with the construction of the project by entering into a turnkey construction contract with the construction contractor (or contractors) under which, in exchange for a fixed contract price, any such contractor agrees to construct the project by a specific date and in accordance with the agreed specifications.[39]

The project's viability will depend on the terms of the construction contract as per the quality of equipment used and when the project will be delivered. Some clauses will specify when the project will attain commercial close. A good construction contract will also include provisions for testing the project before it is handed over to a party. Therefore, the construction contract will be detailed on the procedure for test running of the equipment. Generally, the project financiers will want to see that the operation and maintenance agreement is entered with a company with a track record or experience in discharging operation and maintenance activities of similar projects.

Part of the project risks is managed under the construction contract. The risks of delay in completion of construction, failure to meet the project's performance criteria, changes in design, force majeure risks, cost overruns, and environmental risks can be negotiated and allocated through

35. Michel Kerf, R David Gray, Timothy Irwin, Céline Levesque, Robert R Taylor and Michael Klein, *Concessions for Infrastructure: A Guide to their Design and Award* (World Bank 1998) 162.
36. Wood (n 5) 4.
37. Jeffrey Delmon, *Project Finance, BOT Projects and Risk* (Kluwer Law International, 2005)
38. ibid.
39. Fletcher and Pendleton (n 21) 3.

the construction contract.[40] The construction process constitutes one of the major areas where the risks are high. This is when the project has not started generating revenue and huge resources must have been expended at that stage. The viability of the projects is a key consideration. Any form of failure will affect the project at this stage. The parties to the construction contract may also enable the lenders for the project to enter and carry out inspections at every stage in which payment may be made. It may also be provided that financiers or lenders are present during the testing of the project. Where there are issues with the construction, the project may be affected and may not get to commercial operation. It will be expected that the project should be ready at the due date, but where there is a failure, it means there may be damages on the part of the project company for not delivering the project or not making the output or products available which is meant to be sold.[41] Damages arising against the project company can then be by the construction contractor that has failed to deliver the project within the due date. The principal (Project Company) may "seek to have recourse to the contractors' unconditional security".[42]

Government Concession Agreement

The government can enter concession agreements in some related project finance transactions.[43] The project finance, in some cases, may involve public-private partnerships (PPP). There may be concession contracts that the government may enter with the project company where there are such arrangements.[44] The government often enters these agreements to enhance private sector participation in public infrastructure-related projects such as the construction of bridges, hospital, electricity transmission lines, roads, and so on.[45] It is expected that the government develops a workable policy and legal framework that enhances the concession agreement.[46] This is so where the government is interested in retaining the ownership of the project. Examples of this agreement will be the build operate and transfer (BOT) or build, own operate and transfer (BOOT).[47] The financiers of the projects take possession of the project for a specific duration that will be sufficient for it to have made its profit having financed the project.[48] The concession agreement may take 20-30 years, depending on the project's payback period and the cash flows. Usually, the project's duration begins at the completion of the project and when it is made available for public use.[49] That is to say, the agreements are usually for a long term period as opposed to short term.

The rationale for this is to entrust the viability of the projects to the companies who have the expertise and to enable the investors to control the project and make adequate returns within a stipulated period before transferring it to the government. The support of critical infrastructure has been done under these arrangements. Examples of these are seen in the construction of airports,

40. Keeley Patrick J Keeley, 'Project Financing for International Independent Power Facilities: Management of Risks' (1996) Journal of Energy & Natural Resources Law 447-450.
41. Sinha (n 11).
42. Patrick Mead, 'Current Trends in Risk Allocation in Construction Projects and their Implications for Industry Participants' (2007) 23(1) Construction Law Journal 23, 36.
43. Wood (n 6) 16.
44. McNair, Guy and Chan (n 18) 1.
45. ibid.
46. Keeley (n 43) 454.
47. See McNair, Guy and Chan (n 18) 1.
48. McNair, Guy and Chan (n 18) 2.
49. US Federal Highway Administration, 'Model Public-Private Partnerships Core Toll Concessions Contract Guide' (September 2014) 10 <http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf> accessed 28 December 2016.

railways etc. In infrastructural projects, the government may need finance for it and does not have the capacity to secure the required finance for the project or also manage the early stages of the projects.[50] The viable option will be to enter into a concession where the project will be under the control of the project company, capable of responding to the teething problems regarding the project.

There are classes of risks that the concession agreement may take care of. Where the concession involves private sector, the risks pertaining to "financing, designing, constructing, operation and management" will be borne by the private entities, while "regulatory and political risks" such as "delay in project approvals, land acquisition, change in laws and policies affecting revenue" will be borne by the public sector.[51] The government perceives the efficient allocation of the risk as "a good deal" for the society, while the private entity perceives it as "ensuring that the project is financeable and has an attractive risk-return ratio."[52] Therefore the concession agreement in relation to the success of the project financing constitutes a tool for mitigating political risks associated with the project financing.[53]

Insurance Agreement

An insurance agreement is entered with the insurance company or institution by a party to the project. It may be entered by the project company, the construction contracture or any party allocated the particular risks.[54] There are many risks involved in project financing. The risks may include construction risks, technology risks, payment risks, market risks etc.[55] The use of insurance to forestall unforeseen circumstances that may be inimical to the project is important. The risks will need to be underwritten by entering into insurance policies. Insurance may be in respect of insuring the equipment or the projects or other risks that is associated with the projects. In oil and gas exploration and production, it is expected that the "operator will maintain various insurances relevant to blowout, including third party legal liability and control of wells, re-drill and clean-up of sudden and accidental pollution from a well out of control".[56]

Entering into an insurance contract may be made as a condition precedent to the project finance agreement. Classes of insurance can be obtained as in the case of local insurance companies or even through multilateral institutions such as the World Bank's Multilateral Insurance Guarantee Agency (MIGA) which may offer political risk insurance.[57] The usual practice is that upon the occurrence of

50. Charles G Renner and Steve James, 'Contractor Risks and Rewards in Public-Private Partnerships', (*Construction Executive's eNewsletters and Digital Magazine*, 1 October 2014) <https://enewsletters.constructionexec.com/managingyourbusiness/2014/10/contractor-risks-and-rewards-in-public-private-partnerships/> accessed 28 December 2016.
51. See Adekilekun Mubarak Tijani, Legal and Regulatory Framework for Public-Private Partnerships in Infrastructure Development: A Case Study of Three African Models and Core International Frameworks (PhD Thesis, University of Malaya 2014) 70.
52. Pauline Hovy, 'Risk Allocation in Public-Private Partnerships: Maximizing value for Money' (The International Institute for Sustainable Development 2015) <https://www.iisd.org/sites/default/files/publications/risk-allocation-ppp-maximizing-value-for-money-discussion-paper.pdf> accessed 28 December 2016.
53. Keeley (n 43) 454-455.
54. Dentons (n 19) 47.
55. Wood (n 6) 4.
56. Peter Cameron, 'Liability for Catastrophic Risk in the Oil and Gas Industry' (2012) 6 International Energy Law Review 207, 211.
57. Niehuss (n 2) 230.

the risks involved, the insurance company or agency is required to step in to bear the risks. Therefore, a party allocated with particular risks bears the responsibility of ensuring that the parties obtain the right insurance policy. There may be insurance of the project against fire, political risks insurance or even export credit risk insurance. The execution of the insurance agreement may be made a condition precedent for the coming into effect of the off-take agreement.

Shareholders Agreement

The shareholders' agreement is an agreement entered by the sponsors of the SPV, who make up the shareholders of the project company, spelling out their rights and obligations.[58] The shareholders are very important in the project finance. The fact is that resources have been pulled and different parties have stakes depending on their shares in the project. Therefore, where there is the incorporation of a special purpose vehicle for the project, the companies forming the SPV constitute the shareholders. The shareholders' agreement set out the rights and obligations of the sponsors of the SPV.[59] The shareholders' agreement governs the relationship of these companies that make up of the shareholders.[60] Since the SPV is a creation of the shareholders, they specify the governance of their relationship through the shareholders' agreement. The agreement details the commitments of the shareholders in the project finance. Overall, the shareholders' agreement ensures the appropriate governance of the SPV for the realisation of the project.[61]

The shareholders' agreement in project finance does some very key things that are instrumental to the overall success of the projects. They include matters pertaining to the share capital and its amount, when it should be raised, and its form. It will also provide how the project is to be funded. There will also be voting rights and how it is to be conducted, matters bothering on the governance of shares, how the dividend is to be shared and how the SPV will be managed.[62]

Joint Venture Agreement

The joint venture agreement involves an agreement in which the parties pull their stakes together in project finance.[63] In practice, the parties specify their obligations such as the management of the joint venture, financial contributions to the project through respective cash call obligations, and outsourcing the staff of the respective parties for the project.[64] The joint venture agreement has been used typically in oil and gas project finance.[65] This joint venture arrangement may take various forms, which may involve the incorporation of a company by the parties. There are instances

58. McNair, Guy and Chan (n 18) 4.
59. The Treasury, 'Contractual Framework for Standard Form Public Partnership (PPP) Project Agreement: Overview' (New Zealand Government, October 2013) 5 <http://www.treasury.govt.nz/statesector/ppp/standard-form-ppp-project-agreement/cfsfppppa-ov-oct13.pdf> accessed 30 December 2016.
60. See sample of the agreement in HM Treasury, PF2 – HoldCo/ SPV Shareholders' Agreement Standard Form – October 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250190/PU1572_PF2_shareholders_agreement_p02.pdf>
61. HM Treasury, 'A New Approach to Public Private Partnerships', 31 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf> 28 December 2016.
62. Dentons (n 19) 16.
63. See Richard Keck, 'Joint Venture Agreements in Project Development and Finance: An Introduction' (2010) Butterworths Journal of International Banking and Financial Law 102, 102-103.
64. Keck (n 69) 102-103.
65. See Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Malthouse Press Ltd, 2001) 38 – 40.

whereby the joint venture may also operate in the form of a partnership. The parties have a percentage of their stakes clearly memorialised in the joint venture agreement. The joint venture agreement principally concerns with the management of the project itself.[66]

Interest Hedge/Currency Hedge Agreement

The international character of project finance raises the issue of exchange rate risks. In an interest hedge agreement, the lender agrees to pay an equal amount on the interest over a specified period without any change.[67] In the case of the currency hedge agreement, the agreement fixes a stipulated exchange rate.[68] Hedging is used to protect the borrower from the adverse effect occasioned by changes in exchange and interest rates.[69] The financing may be drawn from foreign currencies and there may be a need for payment of the loans under the agreement to be met through foreign currency.[70] The exposure is even more complicated given the fact that the currency for the purchase of the product depreciates more in relation to the currency for the loans.[71] This implies that there will be a conversion into foreign currency to meet payment obligations.

Therefore, the purpose of these agreements will be to ensure that fluctuations in exchange and interest rates do not constitute negative impacts on the revenue stream from the project. In that regard, creating an avenue whereby there is a currency hedged to mitigate the devaluation in local currency becomes necessary.[72] Similarly, the interest rate will also need to be hedged.

Direct Agreement

Multiple parties are involved in project finance, which constitutes the counterparties. They may include the contractors, suppliers, purchasers or other service providers for the project. A direct agreement is a contract entered with third parties or the key subcontractors to enable the lender to step into the other party's position.[73] Thus, the direct agreement allows the lender to step into the position of the project sponsor where there is a default in the path of the project sponsor that would have resulted into the termination or suspension of the contract.[74] The direct agreement provides for consent in the assignment of the contract where there is a default.[75] It gives room for further clarification and renegotiation with the lenders.[76] Therefore, where there is a performance default, the direct agreement provides the financier with the step in right into the main project agreement

66. Dentons (n 19) 16.
67. Wood (n 6) 4.
68. ibid.
69. Graham D Vinter and Gareth Price, *Project Finance: A Legal Guide* (Sweet and Maxwell 2010).
70. See Pikiel Jr (n 31).
71. See Wood (n 6) 8.
72. Christopher Kerin, 'Risky Business: Risk Management Cruises into the 21st Century' (2008) 24 Building and Construction Law Journal 94, 114.
73. World Bank Group, 'Lender Issues - Taking Security/Step-in Rights/Government Support' <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-environment/lender-issues-step-in-rights#Step_in_Rights_for_Lenders> accessed 28 December 2016.
74. Mayer Brown, 'Project Finance Documentation: Fit for Purpose?' <https://www.mayerbrown.com/files/Publication/fccd680c-1e70-4958-870a-ece19e647e57/Presentation/PublicationAttachment/eccf6440-a9ee-4838-a919-becc356bdd93/NEWSL_MINING_MAR09_BULLETIN_PROJECT_FINANCE.PDF> accessed 28 December 2016.
75. Colin Gin, 'Project Finance Documentation' (27th Training Program of Asian EXIM Banks Forum on Project Finance June 2014) <http://www.asianeximbanks.org/sites/default/files/session3.pdf> accessed 28 December 2016.
76. ibid.

either as a means of performing those terms or to extricate itself.[77] For instance, in power project finance, the lender enters into the direct agreement with the off-taker and the project company, thereby establishing a contractual relationship between the lender and the off-taker of the electricity.[78] The lender may seek an amendment of the power purchase agreement or further clarification even though the responsibility of seeking finance is ultimately of the project company.[79] Capturing the purports of the direct agreement, Project Finance and Development Committee of the American Bar Association's (ABA) Section of Business Law in its *Model Consent to Assignment for Project Finance Transactions* states that: "Such an agreement…provides the lenders with additional rights and remedies, thus enhancing the comprehensiveness of their security in the project through direct privity of contract with such counterparty".[80]

It may be appropriate to conclude that the direct agreement enables the financiers or lenders to possess the right to step into the project to as a remedial measure against default of the project company; enabling the lenders or financiers to exercise the right of novation/substitution in the project where it becomes expedient to do so.[81]

THE NEED FOR COORDINATION

A critical consideration that must be given to project finance is that the agreements constituting it should be properly coordinated. More so, risks in the agreements will be borne by different parties. There should be linkages in the agreements. For example, force majeure risks may be commonly demonstrated in the contents of most agreements.[82] It is therefore advised that "counsel and negotiators must carefully craft and harmonise these agreements to ensure that a sensible and workable allocation of force majeure risk is achieved and that the agreements work in harmony to achieve the agreed allocation".[83] Thus, there should be cooperation among the parties involved because it aids in the success of the project.[84] In drafting the agreements, all the terms "must be drafted in a way that their functions are integrated" and the "reason for non-performance in one contract must be reflected in all the chain of contracts".[85]

77. World Bank Group (n 79).
78. African Legal Support Facility and Commercial Law Development Program, United States, *Understanding Power Purchase Agreements* 42, <http://cldp.doc.gov/sites/default/files/Understanding_Power_Purchase_Agreements.pdf> accessed 3 January 2017.
79. African Legal Support Facility and Commercial Law Development Program (n 84) 42.
80. Project Finance and Development Committee of the American Bar Association's (ABA) Section of Business Law, *Model Consent to Assignment for Project Finance Transactions (with Commentary)*, <http://www.mccarter.com/files/Uploads/Documents/Website/ABAModelAgreement_Biser102012.pdf> accessed 30 December 2016.
81. African Legal Support Facility and Commercial Law Development Program (n 84) 163.
82. Weems and Hwang (n 12) 291.
83. Weems and Hwang (n 12) 291.
84. Shuibo Zhang, Shuaijun Zhang, Ying Gao and Xiaoming Ding, 'Contractual Governance: Effects of Risk Allocation on Contractors' Cooperative Behavior in Construction Projects' (2016) 142(6) Journal of Construction Engineering and Management 1, 1.
85. Teixeira de Freitas e Dias da Silva, 'Legal Aspects of Project Finance', <http://teixeiradefreitasadvogados.com.br/blog/wp-content/uploads/2015/10/Legal-Aspects-of-Project-Finance.pdf> accessed 28 December 2016.

CONCLUSION

Project finance involves the utilisation of different types of agreements because of the numerous stakeholders that are engaged in the process. The process of documentation of project finance involves interplay and interconnection of agreements that specify the rights and obligations of the parties to the project and how the finance of the project is to be governed by the dictates of the law or conventional practices.

Most of these agreements may be said to have developed as conventional practices and in response to the need to protect the parties' interests. The agreement serves varied purposes in project finance ranging from the creation of certainty, defining the right and obligations of the parties, risk allocation, creating of privity of contract and ensuring that the parties are well aware of the contents of their intentions which is reduced into writing and in the form of agreements. The success of the project lies in the way these agreements are structured.

The agreement must meet the overall interest of the parties that have pulled resources together, relying on the viability of the project to make adequate returns. The success or otherwise of these documents will largely affect the project's cash flow, which is a product of the agreement reached by the parties. Therefore, the overall governance of the project finance is conducted within the ambit of the law and the various agreements constituting project finance documentation. Proper coordination and allocation of the respective risks and creating the required linkages in the agreement will are keys to the objectives of realisation of the project financing.