

disputes generally or, alternatively, in relation to specific types of dispute. This usually is included as a preliminary step in an escalation clause with other ADR mechanisms, followed by arbitration or litigation. This dispute resolution mechanism has gained more prominence recently.

Reducing the Chance for Error: Qualification Requirements and Appeals

Limited flexibility in litigation

- 14.98** There are limited ways in which to affect the qualifications or rights to appeal in the litigation context. The only true choice that a party has to affect such risks in litigation is in the choice of forum or jurisdiction.

Qualification requirements in arbitral clauses

- 14.99** Arbitration agreements also can specify certain qualifications and characteristics of prospective arbitrators. In anticipating project finance disputes, whether an arbitrator is well suited to the case may depend upon the arbitrator's ability to understand technical or legal issues that are crucial to the case. For example, the agreement could require the appointment of an accountant as an arbitrator.¹⁷⁷ It is also possible to designate arbitrators in advance, but parties should be aware that a pre-designated arbitrator may become unavailable or conflicted by the time a dispute arises.¹⁷⁸

Appeals rules in arbitral clauses

- 14.100** Some arbitral institutions have instituted arbitral rules for appeals of arbitral awards. Given the flexibility of arbitral clauses, it is possible to include a provision in an arbitration clause allowing for an arbitral appeal. In the projects context, this is not industry practice. Including appeals rules therefore should be carefully considered on a case-by-case basis.

Consolidation of Potential Disputes by Agreement

- 14.101** Other than litigation, arbitration exists only on the basis of the consent of the parties to a dispute. This requirement of consent means that non-parties to a specific

¹⁷⁷ But see Friedland at 71 (cautioning that it is unwise to specify any qualifications for arbitrators in advance because the parties may find it difficult to identify an arbitrator who fulfills the contractual criteria and also is available and unconflicted and because the parties rarely know in advance of a dispute what qualifications may be appropriate).

¹⁷⁸ See Born at 70–1.

dispute resolution clause cannot be joined to an arbitration without their express subsequent consent, no matter how instrumental they are to the dispute itself, whereas such joinder may be possible in the litigation context.¹⁷⁹ Especially in the early stages of a project, there may be significant overlap between project agreements and between different participants. A dispute regarding one contract may impact the entire project, given the transactional unity of project financings.¹⁸⁰ This may lead to a significant risk of contribution suits between the different affected parties to other agreements in order to allocate the costs of an adverse decision correctly between themselves.¹⁸¹

Structuring for permissive joinder in litigation

A second procedural complexity may arise when parallel proceedings are commenced at different times under related contracts as discussed above.¹⁸² In litigation, joinder of parties can be relatively simple if all parties are generally subject to the jurisdiction of the court before which a dispute is pending. Further, it may be helpful to include waiver clauses in an arbitration agreement stating that no

14.102

¹⁷⁹ In litigation, mechanisms generally are available for the joinder of necessary third parties. For example, as a matter of US civil procedure, a party can be joined to an ongoing proceeding, if but for the joinder, the court could not accord complete relief among existing parties. Fed R Civ P 19(a) (1)(A). Problematically, the ability of courts to join parties to an ongoing dispute will depend upon whether the court has personal jurisdiction over the additional party. In the context of projects, this frequently may not be the case. It will be especially difficult in the context of certain special-purpose vehicles incorporated in tax-favourable jurisdictions or of certain host state project participants. The typical means employed by an arbitral tribunal to join a non-signatory, which are much more limited than those available in litigation, include agency theories or, in a parent-subsidiary relationship, some form of piercing of the corporate veil. Some jurisdictions also recognize a group of companies theory to join a non-signatory to an arbitration proceeding, but this is availing only if the companies to be joined are in the same corporate family. See, for example, *Dow Chemical case*, ICC Case No. 4131 (1982), (1984) 9 YB Com Arb 136. Thus, little to no means exists to add true third parties to an arbitration proceeding, unless consent to such joinder can be obtained after a dispute arises. To the extent that certain groups of contracts with different project participants would likely lead to a cluster of disputes relating to the same underlying occurrence, it may therefore be worthwhile to keep this risk in mind at the drafting stage.

¹⁸⁰ See Dugué at 1064.

¹⁸¹ There may be many hidden costs associated with the inability to join all relevant parties in an arbitration. In some instances, a prospective claimant may conclude that without the ability to claim against multiple parties in a single proceeding, claims are not worth pursuing in multiple arbitrations or with the prospect of, at most, incomplete relief. Another hidden cost is the possibility of contribution suits. Thus, when one party is saddled with a risk that is covered by a third agreement, this party will have to commence suit anew. This need for duplicative dispute resolution has both immediate costs and long-term project costs. Most immediately, multiple disputes likely will impose greater burden and distraction upon management of the claimant, as well as higher counsel fees and multiple arbitration or litigation costs. Less immediate, but perhaps more importantly, such disputes involve project risks that project participants will continuously be in litigation or arbitration with one another as adversaries rather than partners.

¹⁸² IBA Guidelines for Drafting International Arbitration Clauses, Final Draft for Consultation, 9 March 2009, at 105.

objection would be made to joinder in any ongoing proceeding between other project participants in the underlying project agreements.

Structuring for multi-party arbitration

- 14.103** If parties desire the consolidation of related arbitral proceedings, the arbitration clause in each underlying contract should be drafted to permit consolidation.¹⁸³ A master agreement, which is incorporated by reference into the individual project contracts, is one means of providing a single contractual dispute resolution mechanism.¹⁸⁴ When drafting, one should consider whether the following elements should be included in such clauses: (i) equality among all parties in the appointment of arbitrators; (ii) parties' consent to the participation of third parties to future arbitrations; and (iii) consolidation of possible parallel arbitration proceedings.¹⁸⁵ Keep in mind that although the prospect of multiple arbitral proceedings can be addressed through multi-party, multiple-contract arbitration agreements, *all* parties must consent to such agreements.

Increasing Effectiveness: Early Remedies and Final Enforcement

Waiver of defenses to enforcement of judgments

- 14.104** It may be possible to include waivers to objections, immunities or defenses with regard to enforcement in the forum selection clause. One such typical waiver is included if a party to an agreement might enjoy sovereign immunity.¹⁸⁶ The enforceability of such waivers will differ from jurisdiction to jurisdiction. These issues will be of particular importance if the civil procedure rules of a country in which enforcement would likely be sought require *sua sponte*¹⁸⁷ determinations by the court with regard to the underlying judgments.

Early relief in arbitration

- 14.105** One of the key problems with regard to the choice of arbitration of disputes requiring the availability of quick interim relief was that such relief traditionally was not available. Some arbitral institutions have worked on introducing emergency arbitrators who are available to resolve such interim relief issues if empowered by

¹⁸³ *Ibid.* at 106.

¹⁸⁴ A multi-party agreement might permit any party to assert claims against any other party, for any respondent to add additional parties or for any party to have the right to intervene. See Born at 98–9.

¹⁸⁵ See Dugué at 1078.

¹⁸⁶ Care must be taken to ensure that the waiver is effectively drafted, because the requirements of an effective waiver may go beyond a simple statement of intention, as is the case in connection with the waiver of sovereign immunity under English law.

¹⁸⁷ I.e. of the court's own volition.

an arbitration clause.¹⁸⁸ Parties electing arbitration may agree to the availability of courts prior to the empanelment of an arbitral tribunal. In some jurisdictions, the parties may also agree to the availability of urgent relief from the court before the arbitral tribunal has been established will be assumed in the absence of the parties' express agreement to the contrary.¹⁸⁹

Limiting recourse to set aside actions

Depending on the jurisdiction, it may be possible further to reduce the ability of parties to seek to set aside an arbitral award. A waiver of this kind should be agreed to in the underlying transaction documents. If justified concerns about the suitability of the seat of jurisdiction necessitate a waiver clause, the courts of the seat of the arbitration of course may be more likely to ignore such provisions. Such a waiver clause may nevertheless help protect the award against the consequences of proceedings in a different jurisdiction aimed at setting aside the award.¹⁹⁰ **14.106**

¹⁸⁸ See American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Optional Rules for Emergency Measures for Protection. Where parties by special agreement or in their arbitration clause have adopted the AAA's rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the arbitral panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. Within one business day of receipt of notice, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications.

¹⁸⁹ See, for example, in England and Wales, s 44 of the Arbitration Act 1996.

¹⁹⁰ See, for example, *In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F Supp 907 (D DC, 1996).

This page intentionally left blank

APPENDIX 1

Checklist of Conditions Precedent, Representations, Covenants, and Events of Default for inclusion in Finance Documents

This checklist sets out, in abbreviated form, sample provisions for conditions precedent, representations and warranties, covenants and events of default that are frequently encountered in finance documents, regardless of the nature of the asset or project being financed. Not all of these sample provisions will be relevant for all transactions, and materiality and other exclusions will be the subject of negotiation. The specific terms will also vary dramatically from transaction to transaction to reflect the source of financing. For instance, capital markets terms are usually less restrictive in nature.

As in all financings, the finance documentation will additionally provide for loan and other credit mechanics that are specific to the transaction, as well as yield protection and provisions that are specific to the project or asset being financed.

1. Conditions Precedent

1.1 Conditions Precedent to Closing and First Drawdown under the Finance Documents

The following conditions precedent will be required to be met to the satisfaction of the lenders:

- (a) Execution of the credit agreement and all other related financing and security documents.
- (b) Execution of the principal project documents. For instance, the construction contract, ground lease, supply contracts, transportation agreement, offtake contracts, technology/operational licenses and operations and management contract.
- (c) Delivery of appropriate consents, and the making of appropriate filings and recordings in each jurisdiction, as necessary.
- (d) Receipt of certified copies of the organizational documents (such as the memorandum and articles of association/charter, certificate of incorporation or partnership agreement) of, and evidence of all corporate or partnership action taken by, the project company and the other principal project participants (referred to collectively as the Obligors). The identity of the entities included as Obligors are often the subject of negotiation and may include the affiliates of the project company, the equity participants, the subordinated lenders, the offtaker, the operator, the construction contractor, the feedstock supplier and each person providing credit support for the obligations of these parties.
- (e) Receipt and approval by the lenders of the most recent financial statements of the Obligors.
- (f) The absence of any material adverse change in the financial condition of any Obligor, or any person providing credit support for the obligations of such Obligor, and receipt of a certificate of an authorized officer of each Obligor certifying the same.
- (g) Receipt of a satisfactory report from the technical adviser that addresses the technical and economic viability of the project. It will, among other things, touch on the project's capital budget, construction plan, equipment selection, expected performance, development and production costs, operating costs, the operator's experience and the plan by which the project and, as applicable, the fuel or feedstock source will be operated.
- (h) Receipt of a satisfactory report from the environmental consultant providing an environmental and geotechnical risk assessment, as well as a permit review and an analysis of how environmental risks can be mitigated.
- (i) Receipt of the environmental and social management plan (ESMP) outlining the environmental and social management system to be put in place for the project.

- (j) Receipt of a certificate of an internationally recognized insurance broker stating that all required insurance policies are in full force and effect, are not subject to cancellation without prior notice, and otherwise conform with the requirements specified in the insurance provisions of the credit agreement.
- (k) Receipt of certified copies of all governmental actions, licenses, permits and approvals (collectively, the Governmental Approvals), together with copies of all applications required for the construction and operation of the project. These Governmental Approvals will, of course, be specific to each project and the jurisdiction in which it is located. Governmental Approvals required for construction or operation that cannot reasonably be obtained, or are customarily not obtained or required, until a later stage in the project's construction or after operation has commenced, will not be included unless there is reason to expect they might not be obtained when required. The project company will typically provide a certificate stating that all such Governmental Approvals are final, binding and non-appealable.
- (l) Receipt of customary land surveys and satisfactory title reports or title insurance.
- (m) Receipt of a construction budget and construction drawdown schedule that is prepared and certified by the project company as well as verified by the technical adviser.
- (n) Receipt of a base case financial model (including a capital expenditure schedule) that is prepared and certified by the project company and verified by the technical adviser showing a loan life coverage ratio of at least [1.___:1] and minimum annual debt service coverage of [1.___:1].
- (o) Absence of any defaults under any project documents.
- (p) Procurement of acceptable credit support, if required, for the contractor's obligations under the construction contract, the supplier's obligations under the supply contracts, the subordinated lenders' or equity participants' obligations under the finance documents and for each other Obligor under the project documents to which it is a party.
- (q) Issuance of the notice to proceed under the construction contract.
- (r) Receipt of a letter from the process agent confirming it has accepted its appointment as process agent for the project company and the other Obligors.
- (s) Receipt of satisfactory legal opinions of counsel for the various parties as to the matters customarily covered in project financings. These opinions are typically delivered by special financing and special local counsel to the project company, counsel to each Obligor and special financing and special local counsel to the lenders' agent/lenders.
- (t) Receipt of any other documents, opinions or representations relating to the foregoing as the agent or, depending on the nature of the financing arrangements, a lender or the majority lenders, may reasonably request.

1.2 Conditions Precedent to Initial and Subsequent Loan Drawings

The following conditions precedent will be required to be met to the satisfaction of the lenders' agent and the lenders:

- (a) The representations and warranties contained in the credit agreement are true and correct in all material respects.
- (b) No default or event of default shall have occurred and be continuing.
- (c) Reports have been received from the project company detailing the use of proceeds and showing there is no material variance between the construction status and the construction schedule that has not been addressed by the project company to the satisfaction of the lenders' agent. These reports must have been verified by the technical adviser and address all aspects of design, construction, and procurement as well as any other relevant factors required by the lenders' agent.
- (d) The project company shall be deemed to have certified to the lenders' agent and the lenders, as of the date of each loan drawing, the correctness of the matters specified in paragraphs (a) through (c) above.

1.3 Conditions Precedent to Term Loan Conversion/ Project Completion

The following conditions precedent shall be met to the satisfaction of the lenders:

- (a) The representations and warranties contained in the credit agreement are true and correct in all material respects.

- (b) No default or event of default shall have occurred and be continuing.
- (c) The technical adviser shall have certified that the requirements for 'Final Performance Acceptance' have occurred under the construction contract.
- (d) All project documents are in full force and effect.
- (e) No material adverse change has occurred in the project company's or any Obligor's financial condition, business or operations and which can reasonably be expected to result in a material adverse effect on the project or on their ability to perform their obligations under the project documents.
- (f) No party to any project document is in default thereunder.
- (g) Certified copies of all Governmental Approvals required for the construction, operation and maintenance of the project that have not been previously delivered to the lenders' agent shall have been received by the agent, together with a certificate of the project company to the effect that all such Governmental Approvals are final, binding and non-appealable.
- (h) A survey of the project shall demonstrate that, as built, the project conforms with the specifications of the project documents.
- (i) Such other documents, opinions or representations relating to the foregoing as the agent or the lenders may have reasonably requested shall have been received by the agent and the lenders. The project company shall be deemed to have certified to the lenders' agent and the lenders as of the date of term loan conversion/project completion the correctness of the matters specified in paragraphs (a), (b), (d), (e) and (f) above, or in such other paragraphs as are appropriate.

2. Representations and Warranties of the Project Company

The project company will make the following representations and warranties (subject to customary exceptions and materiality standards):

- (a) The project company is a validly existing corporation (or, as relevant, partnership) with the power and authority to carry out its business and to perform its obligations.
- (b) The project company has authority to enter into all documentation relating to the credit agreement and the project documents, and all such documentation is binding on the project company.
- (c) The execution, delivery and performance by the project company of the credit agreement and the project documents will not violate or conflict with its organizational documents, any law, rule or regulation, any Governmental Approval or any material agreement to which it is a party.
- (d) The project company possesses title to, or valid leasehold interest in, all property it purports to own (or lease) free and clear of liens, but subject to any agreed exceptions and liens created under the security documents (collectively, the Permitted Security Interests).
- (e) The project company is, and the project will be, in compliance in all material respects with all laws, rules, regulations and zoning requirements, and the requirements set forth in the project documents.
- (f) All Governmental Approvals required for the financing, construction and operation of the project, in accordance with the plans and specifications for the project, have been duly obtained and are not subject to appeal and do not contain any conditions that are not reasonably capable of being satisfied by the project company in a manner consistent with the funds available to it and without materially and adversely affecting the project. This shall not include such Government Approvals for construction or operation that cannot reasonably be, or are not required or customarily obtained, until a later stage of construction or after commercial operation has commenced, provided that there is no reason to expect they will not be obtained when required.
- (g) No litigation exists against the project company, or with respect to the project, the Obligors, the project documents, or the transactions contemplated thereby, which if adversely determined would have a material adverse effect on the project, unless such action or proceeding is unlikely to be adversely determined against the project company or such Obligor.
- (h) No potential default or event of default has occurred or is continuing.
- (i) The project company's latest financial statements, copies of which shall have been delivered to the agent, have been prepared in conformity with generally accepted accounting principles and fairly present the financial condition of the project company as of the date thereof and the results of its operations for the period then ended, and since such date there has been no material adverse change in its financial condition, business or operations.

- (j) The project company will use the proceeds of the credit facility in accordance with the terms of the finance documentation.
- (k) The project company is in compliance in all material respects with the ESMP and all applicable environmental laws.
- (l) The budgets and projections of the project are reasonable.
- (m) The security arrangements contemplated in the finance documents and project documents, and the priorities established therein, are effective and fully enforceable against the project company.
- (n) The project company has filed or caused to be filed all tax returns required to be filed by it and paid all taxes imposed upon it by a governmental authority, other than those it is contesting in good faith and for which adequate reserves are maintained.
- (o) The project company has not engaged in any material business activities, and is not a party to any material agreements, except in connection with the project and related matters.
- (p) The project company has no subsidiaries.
- (q) No information exists, unless otherwise disclosed by the project company to the agent, that would cause the information set forth in the offering/syndication information memorandum or in other specified documents supplied to the agent in conjunction with the credit agreement as of the closing date to be materially incorrect or misleading.
- (r) The services to be performed, the materials to be supplied and the property rights to be granted pursuant to the project documents assigned to the lenders comprise all of the property rights and interests necessary for the construction, operation and maintenance of the project and provide adequate ingress and egress for any reasonable purpose in connection with the construction, operation and maintenance of the project.
- (s) There are no undisclosed material liabilities.

3. Covenants

3.1 Affirmative Covenants of the Project Company

The project company will covenant that, unless waived by the agent and the lenders representing a [] per cent interest (and subject to customary exceptions and materiality standards), it will:

- (a) Preserve its existence, rights and franchises.
- (b) Permit inspection of its accounting records, and maintain such accounting records in accordance with generally accepted accounting principles.
- (c) Promptly invoice and collect for products/services.
- (d) Maintain the project in accordance with prudent applicable industry practices.
- (e) Perform all actions required of it to enter into, comply with its obligations under, and maintain in full force and effect the project documents.
- (f) Furnish annual audited financial statements, certified by an accounting firm acceptable to the agent, within [] days of the end of the year, semi-annual unaudited statements certified by an appropriate corporate officer within [] days of the end of the second quarter, together with other required information concerning the construction, operating and financial status of the project.
- (g) Diligently complete the project in accordance with the original design specifications approved by the agent.
- (h) Comply with all Governmental Approvals, laws, rules and regulations.
- (i) Maintain insurance cover over its assets and undertakings and all other insurances required in the insurance section of the credit agreement.
- (j) Give prompt notice of any litigation and defaults or events of default under the credit agreement or any other project document.
- (k) Perform and observe all of its material covenants under the project documents.
- (l) Permit the lenders' agent or its representatives at any reasonable time, and from time to time upon reasonable notice, to visit and inspect the project.
- (m) Apply the proceeds of each loan disbursement to its specified purpose.
- (n) Take all action reasonably necessary to meet performance benchmarks and other requirements by the dates originally scheduled therefor.

- (o) Obtain and maintain, or cause to be obtained and maintained, in full force and effect all Governmental Approvals that may from time to time become necessary or advisable in connection with
 - (i) the execution, delivery and performance in accordance with their respective terms of the credit agreement and the project documents, (ii) the taking of any action contemplated thereby, (iii) the timely achievement of the final completion date and (iv) the operation of the project.
- (p) Ensure the presence at the project site, throughout the construction period, of a full-time authorized representative of the project company.
- (q) Advise the lenders' agent as soon as possible of the occurrence of a force majeure event as well as the date that such force majeure event ends.
- (r) Pay and discharge all taxes, assessments and governmental charges or levies imposed prior to the date on which penalties are attached thereto, and all lawful claims which, if unpaid, might adversely affect the security.
- (s) Maintain title to all material property the project company purports to own.
- (t) Take all action required or desirable to maintain and to preserve the liens/security interests created by the security documents and the priority thereof.
- (u) Adopt an operating budget, which shall be subject to the prior approval of the lenders' agent, covering the project's operation and maintenance expenses for each calendar year.
- (v) Establish control account(s) with the lenders' agent/account bank through which all revenues of the project will be deposited and all disbursements of funds processed.
- (w) Apply all revenues in the following order of priority:
 - (i) Payment of operation and maintenance expenses;
 - (ii) Payment of debt service;
 - (iii) Funding of the capital replacement/maintenance reserve account;
 - (iv) Funding of the debt service reserve account;
 - (v) Funding of subordinated debt service; and
 - (vi) Funding of distributions to, as relevant, the project's shareholders or partners.¹
- (x) Enter into interest rate protection and currency/other hedging programmes with terms and conditions satisfactory to the lenders.

3.2 Reporting Covenants

The project company will covenant that, unless waived by the agent and the lenders representing a [] per cent interest (and subject to customary exceptions and materiality standards), it will:

- (a) Provide the agent and the lenders copies of all material documents furnished (i) to the project company by any governmental authority or Obligor or (ii) to any governmental authority or Obligor by the project company.
- (b) Furnish the lenders' agent with a copy of any material revision to the plans and specifications and any change orders under the construction contract.
- (c) Furnish the lenders' agent with any material revisions of construction schedules, expenditure drawdowns and any other financial report regarding the project as may be reasonably requested.
- (d) Furnish the lenders' agent with copies of each Governmental Approval received after the closing date and advise the lenders' agent of any change in the status of any Governmental Approval.
- (e) Furnish the agent with copies of all receipts for taxes paid and for all payments made in lieu of taxes.
- (f) Provide quarterly/semi-annual operating statements.

3.3 Negative Covenants of the Project Company

The project company will covenant, unless waived by the lenders' agent and, as appropriate, the majority lenders or all the lenders, that it will not (subject to customary exceptions and materiality standards):

- (a) Increase, assume, incur, permit or suffer to exist any security interest over any of the project property, whether now owned or hereafter acquired, except for Permitted Security Interests.

¹ A project's revenue waterfall will need to be tailored to that particular project and the priorities within the waterfall will be the subject of negotiation.

- (b) Declare or pay any dividends or make any other distribution to, as appropriate the shareholders or partners, unless the following conditions are satisfied:
 - (i) The first repayment date has occurred and all amounts due on such date have been repaid;
 - (ii) No event of default or potential event of default has occurred or would result from the proposed distribution;
 - (iii) The project's debt service coverage ratio is at least [__];
 - (iv) The debt service reserve account balance is not less than [__]; and
 - (v) The project completion date has occurred.²
- (c) Guarantee obligations of others except (i) those guarantees contained in the project documents, (ii) those indemnities in respect of unfiled mechanics' liens not to exceed an aggregate agreed amount and (iii) those indemnities to appropriate governmental bodies for the benefit of the project.
- (d) Undertake the sale of assets, other than in the ordinary course of business, in excess of an agreed amount per event and/or an agreed amount in aggregate per annum.
- (e) (i) Take any action to terminate, amend or modify, or waive timely performance under the project documents, or other documents if such termination, amendment, modification or waiver would have a material adverse effect on the project; (ii) enter into any new project document without the prior written consent of the majority lenders; or (iii) revise the construction budget.³
- (f) Suffer to exist any indebtedness (including capital leases, discounted receivables, current borrowings, guarantees, secured non-recourse debt, subordinated debt and trade debt) except:
 - (i) Indebtedness under the finance documents;
 - (ii) Indebtedness under any subordinated debt agreements;
 - (iii) Current accounts and other amounts payable in the ordinary course of business to the extent incurred for the construction or operation of the project, and amounts payable as contemplated by the operating agreement;
 - (iv) Other debt not to exceed at any one time [__];
 - (v) Other unsecured debt, in an aggregate amount not to exceed [__], expressly subordinated to all other commitments of the project company pursuant to subordination provisions satisfactory to the agent;
 - (vi) Non-recourse debt to the extent such debt is secured solely by Permitted Security Interests; and
 - (vii) Loans by the shareholders or partners, unsecured and subordinated to the satisfaction of the agent.
- (g) Merge with or into, or consolidate with, any person or acquire all or substantially all of the assets or stock of any class of, or any partnership or joint venture interest in, any person, or create or acquire any subsidiary.
- (h) Engage in any business unrelated to the ownership and operation of the project.
- (i) Make any capital expenditures other than those contemplated by the plans and specifications for the project. However, in some transactions, the project company may be permitted to make capital expenditures which are intended to enhance or to repair the project and which would not have a material adverse effect on the project or on the project company's ability to perform its obligations under the finance documents or the project documents.
- (j) Enter into any transaction with any affiliate on a basis materially less favourable to the project company than would be the case if such transaction had been effected with a person other than

² It should also be noted that the definition of the relevant debt coverage ratio will substantially affect the consequences of this clause and are often negotiated at the term sheet stage.

³ It should be noted that the issue of amendments or modifications is often negotiated in the context of the materiality (i.e. the contractual value) of such amendments or modifications or the materiality of the documents to which such amendments or modifications are to be made. In addition, issues regarding entering into new project documents without the prior written consent of the majority lenders are often negotiated in the context of the materiality of the additional project documents into which the project company desires to enter.

an affiliate, except with respect to agreements with affiliates in effect on the closing date details of which have been previously disclosed in writing to the lenders' agent.

- (k) Make any investments other than permitted investments.
- (l) Permit or consent to the transfer (by assignment, sale or otherwise) of any equity in the project company or issue new stock or other equity interests in the project company.
- (m) Enter into change orders pursuant to the construction contract without giving [] days prior written notice to the lenders' agent and only if such change orders do not provide for an increase in construction costs by an aggregate amount exceeding [] and do not provide for a material change to, or amendment of, the project or the construction schedule.

4. Events of Default

Events of default will include:

- (a) Failure to make any payment of scheduled principal under the credit agreement when due; or make any payment of interest or commitment fee payable under the credit agreement for [] days beyond the date when due.⁴
- (b) The final performance acceptance date of the project not having occurred on or before the [*date certain*].
- (c) Failure to perform or to observe a covenant set forth under [*specified covenants*] or failure to perform or to observe any other covenant or obligation under the finance documents that has not been cured within [] days after notice of such failure (or, if the project company is diligently attempting to cure the same, such longer period of time that may, in the reasonable opinion of the agent, be necessary to effect the cure, but in no event to exceed [] days).
- (d) Any representation or warranty made by the project company in any of the finance or project documents to which it is a party or any representation or warranty or statement contained in any other document provided to the lenders' agent on behalf of any other Obligor proving to have been false or misleading in any respect as of the time made, confirmed or furnished. This may be qualified by the requirement that, at the time of discovery thereof, such false or misleading representation, warranty or statement had or was reasonably expected to have a material adverse effect on the project or on the project company's ability to perform its obligations under the finance documents or the project documents.
- (e) Any Obligor filing a petition in bankruptcy or taking similar action. Depending on the nature of the transaction, it may be the case that the bankruptcy of any person other than the project company will not be deemed an event of default unless it can reasonably be expected to result in a material adverse effect on the project or on the project company's ability to perform its obligations under the finance documents or the project documents.
- (f) The commencement of an insolvency proceeding against any Obligor, or the issuance of a warrant of attachment or execution or similar process against property of such Obligor having a value in excess of [], and such proceeding continuing undismissed for more than [] days. Depending on the transaction, if such an event affects any Obligor other than the project company, it may not be deemed an event of default unless it can reasonably be expected to result in a material adverse effect on the project or on the project company's ability to perform its obligations under the finance documents or the project documents.
- (g) Final judgments in excess of [] being rendered against the project company or any other Obligor and remaining unstayed or unsatisfied for more than [] consecutive days. Depending on the transaction, if such an event affects any Obligor other than the project company, it may not be deemed an event of default unless it can reasonably be expected to result in a material adverse effect on the project or on the project company's ability to perform its obligations under the finance documents or the project documents.
- (h) The project company failing to obtain, renew, maintain or comply in all material respects with all Governmental Approvals which are at the time necessary for the continued operation of

⁴ If a grace period is agreed, it may be linked to delays in payment caused by administrative errors or similar events.

the project in the manner contemplated under the finance documents. In certain transactions, this may be limited to events where such failure can reasonably be expected to have a material adverse effect on the project or on the project company's ability to perform its obligations under the credit agreement or under the project documents.

- (i) Any action being taken by any person to terminate any project document by reason of a default by the project company; or any project document prior to its stated termination date, ceasing to be in full force and effect. In certain transactions, this may be limited to events where such occurrence can reasonably be expected to have a material adverse effect on the project or on the project company's ability to perform its obligations under the credit agreement or under the project documents.
- (j) Abandonment or condemnation of the project.
- (k) The corporate parent/lead shareholders of the project company directly or through wholly owned subsidiaries ceasing to own or to exercise control over a majority of the voting capital stock of the project company.
- (l) A default by any party under any project document, which default is not remedied within applicable grace periods. In certain transactions, this may be limited to events where such default can reasonably be expected to have a material adverse effect on the project or on the project company's ability to perform its obligations under the credit agreement or under the project documents.
- (m) Any Obligor defaulting in the payment when due of any debt of such person in excess of [___]. Depending on the transaction, if such an event affects any Obligor other than the project company, it may not be deemed an event of default unless it can reasonably be expected to result in a material adverse effect on the project or on the project company's ability to perform its obligations under the credit agreement or under the project documents.
- (n) Any subordinated lender or equity participant failing to make, when due, any subordinated loan or equity contribution required under the finance documents.
- (o) Any security document ceasing to be in full force and effect, any party thereto so asserting in writing or any security document ceasing to be effective to create a first priority perfected security interest in any of the collateral to which it relates.
- (p) Failure to comply with the minimum loan life or senior debt service coverage ratios.
- (q) A material portion of the plant or the property on which the project is situated is permanently or temporarily condemned or seized or taken by any government authority under power of eminent domain or otherwise and such action could reasonably be expected to have a material adverse effect.

APPENDIX 2

Environmental Due Diligence Checklist

The development of large infrastructure projects may raise significant issues regarding environmental liability. The following is a checklist of questions that should be posed and answered in order to evaluate the environmental risks involved in a particular project.

1. International Requirements

- 1.1 Sources of law: What treaties (e.g. international, regional, bilateral) or customary international legal principles apply to the proposed project? Are these independently enforceable against the project or its sponsors, or are they required to be implemented through national legislation?
- 1.2 Administrative: How are the obligations imposed by such sources of law enforced (e.g. only by governments or by individuals as well, and through what institutions)?

2. National Requirements

- 2.1 What categories of environmental laws (and regulations) exist in the country (e.g. those directly applicable, those governing major site or project approval, those dealing with specific permits, common law principles)?
- 2.2 How are they enforced or effectuated?
 - (a) What is the regulatory authority (if any) that administers major site or project approvals (e.g. environmental impact statement preparation and review) and what are its procedures? What are the substantive criteria, if any, under which it makes its evaluation?
 - (b) What are the regulatory authorities (if any) that administer specific permits and what are their procedures? What are the substantive criteria under which these authorities determine permit conditions (e.g. governing disposal of solid wastes, discharges to water or emissions to air)?
 - (c) What mechanisms, if any, are used to obtain public input to these approval processes (e.g. notice, hearings, informal public meetings, appellate review), on either an administrative or judicial level?
 - (d) What remedies exist for violations of laws, regulations and permit terms (e.g. administrative enforcement, permit revocation or non-renewal, judicial enforcement or independent citizens' lawsuits)?
 - (e) What is the legal significance of information provided to governmental authorities in permit applications, environmental impact statements, registrations, reports and correspondence (e.g. binding obligations under law or not)?
- 2.3 Are there any legal requirements concerning the cleanup of site conditions, whether originating from historical operations on the site or from the proposed activity? How are such requirements enforced (e.g. through administrative enforcement, judicial enforcement instigated by governmental authorities or by aggrieved parties)?
- 2.4 Is the proposed project subject to different regulatory treatment (e.g. expedited or longer review, greater or lesser public participation requirements, exemptions or additional requirements) under the statutes or programmes authorizing such projects (e.g. build-own-transfer, or build-own operate legislation)?
- 2.5 What is the nature of co-ordination and co-operation that must be achieved among government agencies in order to obtain the approvals under national law and how does such interaction work in practice?

- 2.6 Is there any basis under national law for holding shareholders, parent corporations or lenders liable for violations of environmental law or for the cleanup of contamination associated with a project?
- 2.7 Are there any proposed laws or regulations, or any provisions of existing laws or regulations, that are not yet effective, that are reasonably likely to affect environmental requirements applicable to the project?

3. Local Requirements

- 3.1 Is there a local agency that plays a role in either major site or project approval or in developing specific permit requirements for the project?
- 3.2 What are its procedures (e.g. opportunities for public participation, comment or appeal) and substantive criteria?
- 3.3 How are these procedures and criteria integrated into the national level process (e.g. is local procedure controlling or merely advisory; do local and national agencies act jointly)?

4. Privately-imposed or Informal Environmental and Social Requirements

- 4.1 Are there entities participating in the project's financing that impose environmental and social requirements independent of those imposed by international, national or local law (e.g. Equator Principles financing institutions, export credit agencies, bilateral agencies, commercial lenders or World Bank affiliates)?
- 4.2 Can such requirements be, or have they been, addressed in the same proceedings and with the same information as are required in connection with compliance with national or other laws?
- 4.3 Do these entities impose requirements in addition to those imposed by national law (e.g. consideration of climate change, public participation, evaluation of resettlement issues)?
- 4.4 If there are multiple entities with such requirements, can their procedural and substantive requirements be met through coordinated efforts directed at meeting all such requirements?
- 4.5 Is the financing subject to the Equator Principles (e.g. project with a capital value greater than US\$10M financed by an Equator Principles financing institution)?
 - (a) If so, what is the environmental and social risk category of the project (Category A, B or C)?
 - (b) Has the sponsor prepared a Social and Environmental Assessment and Social and Environmental Management Plan?
 - (c) Are there action items that need to be addressed? Note that the level of review under the Equator Principles depends on whether the project is located in a non-OECD country or country that is not classified as high income by the OECD (in which case the IFC and World Bank Performance Standards and Guidelines apply) or is considered high-income by the OECD (in which case the assessment is whether the project complies with host country laws and requirements).

5. Pragmatic Questions

- 5.1 Are national or local environmental standards set subjectively, based on the political connections of the sponsors?
- 5.2 Is there any expectation of public opposition and, if so, from whom in general? How organized is the opposition and how influential are its leaders? To which participants in the project is such opposition directed?
- 5.3 Can project economics support the more restrictive environmental regulatory options when a particular standard or requirement is contested or otherwise in doubt?

6. Business Issues

- 6.1 Is there sufficient technical information upon which to assess the risks to the project under the legal (and political) framework outlined above?

- 6.2 Are the post-closing regulatory risks (e.g. outstanding permit applications, pending or prospective appeals and applicable regulatory requirements) understood and acceptable?

7. Documentation Issues

- 7.1 Do the project company's representations, covenants, conditions to closing, defaults and remedies set forth in the loan documents contemplate the different sources of environmental requirements (e.g. treaties, laws, regulations, permits, informal guidelines, representations to the government)?
- 7.2 Are the administrative processes for obtaining approvals adequately reflected in the loan documentation (e.g. are the national and local approvals included, and have the notices been given and hearings held as required)?
- 7.3 Is the project, as proposed and described in the project documents, consistent with the regulatory approvals and requirements that will be applicable to the project after completion (e.g. do the guarantees in the construction contract match the permit limits)?
- 7.4 Are private or informal environmental guidelines, such as the Equator Principles, applicable to the project clearly set out or otherwise incorporated by reference in the loan documents (e.g. if a set of guidelines is specified, is there agreement on such specification)?

8. Risk Allocation

- 8.1 Do the representations, warranties and covenants in the loan documents clearly and precisely cover the applicable environmental requirements?
- 8.2 Can the project company financially support the reasonably foreseeable environmental compliance costs and liabilities associated with its project?
- 8.3 Have other creditworthy entities assumed risks that would reasonably be allocated to them (e.g. is the construction contractor accepting the risk of the project's capability to comply)?
- 8.4 Are the remaining risks to the lenders—either through financial effects on the project company or direct effects on the lenders—quantifiable and reasonably well understood?

This page intentionally left blank

APPENDIX 3

Checklist of Key Provisions of a Joint Venture or Partnership Agreement

The following checklist highlights some of the more significant provisions and issues that should be considered in finalizing or reviewing the agreement under which the vehicle undertaking the project is to be organized.

1. Capital Contributions

- (a) With respect to initial capital contributions, the agreement will set out any conditions to funding by the participants. This will include an obligation to fund on a date certain (regardless of completion) or only upon achievement of satisfactory completion. Certain participants may also contribute property or services and will expect that this will be appropriately valued in the agreement.
- (b) The agreement will also provide for additional contributions in the event of construction shortfalls or post-completion operating deficits and set out in detail how they will be funded.
- (c) In the event the required capital contributions are not made, remedies may include a squeeze-down of interests, a right to buy out, a right to take over control, and a right to bring in new shareholders.

2. Compensation of Participants

In some cases equity interests may be offered on a 'carried' basis for no monetary consideration, compensating participants for specific contributions.

3. Allocation of Cash and Tax Benefits

The agreement will allocate both cash distributions and tax benefits, typically by taking into account the percentage interests of the parties. A mechanism is typically included, so that in the event there are changes in such percentage interests, cash and tax benefits will be allocated accordingly.

4. Participants' Area of Responsibility

The roles of the participants should be clearly defined and the agreement will ideally govern conflicts of interest by excluding shareholders from votes when they are conflicted.

5. Management of the Venture

- (a) Typically, one shareholder will control the venture as the managing shareholder. The agreement should clearly establish the managing shareholder's role, as well as that of the other parties.
- (b) Voting procedures are typically established for major decisions between the shareholders. These will specifically cover major issues such as:
 - (i) Dissolution and winding up of the vehicle;
 - (ii) Admission of any new or additional shareholders;
 - (iii) Removal of any shareholder;
 - (iv) Election of a 'liquidating shareholder'; and
 - (v) Preparation of tax returns.
- (c) Other major issues will often include:
 - (i) Financing—whether to incur indebtedness;
 - (ii) Security—whether to sell, pledge, mortgage, grant of security interest in, or transfer company assets;

- (iii) Budgets—whether to adopt or materially modify the development budget or annual operations budget;
- (iv) Major contracts—whether the company should execute material amendments, terminate, or grant a material waiver of any major contract (including major change orders);
- (v) Capital expenditures—whether any expenditure should be made in excess of specified amounts in settlement of claims; and
- (vi) Day-to-day operations—whether decision making procedures should be changed (e.g. governing the organization of the management committee) and decisions with respect to interim and annual reporting requirements.

6. Expansion

- (a) The agreement may anticipate expansions of the project and govern the rights of shareholders to enter into such expansions. In lieu of a right to participate, a shareholder may sell its existing rights in order to take part in the project expansion.
- (b) The criteria, implementation and cost of an anticipated expansion should be set out in advance and for those shareholders who fund the project expansion, the agreement should ensure that the benefits of the expansion are allocated accordingly.

7. Events of Default and Remedies

Events of default and applicable cure periods will be included, along with appropriate remedies which will typically range from damages to the more drastic granting of buy-out rights, changes of management, changes of voting rights and even election to wind up the company.

8. Restrictions on Rights to Transfer

- (a) Any transfer of rights will usually be subject to the transferee having the requisite expertise, financial responsibility and compatibility with the project and the shareholders.
- (b) The shareholders may also seek to place a cap on the number of shareholders and/or have rights of pre-emption/first refusal or first offer to any transfer.
- (c) The agreement may also seek to address the tax consequences of transfers.
- (d) In the event unrestricted transfers are permitted, the agreement may allow for termination following certain transfers.
- (e) Other considerations the parties may wish to address, include compliance with applicable law as well as with the loan and other agreements.

9. Dissolution and Liquidation

- (a) There are number of circumstances in which the participants may wish to dissolve the entity, including upon its insolvency. Dissolution may also be provided to occur on an agreed-upon date.
- (b) The agreement should provide for management during winding up and the balancing of capital accounts for tax purposes.

10. Governing Law

While a partnership, joint venture or shareholders' agreement may be governed by the law of the 'host' jurisdiction, where that law is not well developed or when the participants are based in a number of different jurisdictions, the choice of a 'neutral' law may be more appropriate.

11. Dispute Resolution

Most agreements will provide for disputes to be settled in a neutral forum. This will often involve some form of binding arbitration.

APPENDIX 4

Checklist of Key Provisions in a Concession Agreement

In projects relating to a natural resource, such as minerals extraction and oil and gas or in relation to the provision of public infrastructure, such as a toll road, bridge or tunnel project, the government will usually enter into a concession agreement with the project company that sets out the responsibilities and liabilities of each party and provides the necessary legal framework to make the project viable.

The nature of a concession agreement varies from project to project depending on a number of factors including:

- (i) the type of project in question (for instance whether it is a Build, Own, Transfer (BOT) or Build, Own, Operate (BOO) structure);
- (ii) the natural resource being exploited or the infrastructure being developed; and
- (iii) the degree to which the government is to be involved in the project.

Whether the government or the sponsors have leverage in negotiating a concession agreement depends largely on the market and the nature of the project. On the one hand, the government may select a bidder and award the concession following a competitive procurement process. In such cases, the government may be less likely to yield on issues and, as a result, the bidders may have to accept less favourable terms. In other cases, the sponsors may have greater negotiating power. As a result, whilst there is no single standard form concession agreement, developed forms of concession agreements have emerged in certain jurisdictions which include commonly accepted terms.

The following checklist examines the more significant provisions and issues that should be considered when negotiating or reviewing concession agreements.

1. Objectives

The objectives of a concession agreement are to set out (a) the rights and obligations of the project company and the government in respect of the project and (b) the ownership rights to the assets of the project.

2. Scope, Duration and Termination

A concession agreement is the foundation of a project and, as such, the provisions setting out the scope, duration and the conditions for its termination should be clearly stated.

2.1 Scope

The agreement should (a) define the period for which the concession is being granted and (b) include a specific description of the physical area and rights that it covers.

2.2 Duration

The concession should be valid at least for the life of the project and, from a lenders' perspective, it should extend beyond the term of the loans by an agreed period or 'tail'.

2.3 Termination

- (a) The concession agreement will typically contain provisions which enable the agreement to be terminated upon:
 - (i) breach of any material term of the agreement;
 - (ii) insolvency of the project company;

- (iii) intentional and material misrepresentation by the project company in procuring the government's execution of the concession agreement;
 - (iv) assignment of an interest in the concession agreement by the project company without prior government consent;
 - (v) payment default under the concession agreement by the government or the project company; and
 - (vi) failure by the government or the project company to comply with a final determination or arbitral award.
- (b) The concession should not automatically terminate upon the enforcement of security by the lenders and the circumstances under which the government may terminate the concession should not be expropriatory in nature. In many cases, there will be compensation payable upon termination of the concession agreement, the quantum of which usually varies depending upon the nature of the relevant termination event. If the government elects to take ownership of the assets following a project company default, termination compensation is often sized to enable repayment of the outstanding debt owed to the lenders. If termination arises due to government default, the termination compensation is usually increased to include an amount to compensate the sponsors (i.e. returning their equity investment plus an amount reflecting, e.g., the net present value of the profits they would otherwise have made had the concession not terminated).

3. Rights and Obligations

3.1 Government obligations

The government's obligations often include:

- (a) to grant the right to access and (if applicable) exploit a resource, infrastructure and/or service in a specified area for a specified period. However, governments will often reserve the right to offer access to other parties, provided it does not interfere with the concession holder's use of their right;
- (b) provide the project with the requisite licences and permits and assist in acquiring any necessary approvals from other government ministries;
- (c) to provide assistance in procuring leases, easements and other rights of way, if necessary;
- (d) to complete any infrastructure necessary for the project to be successful;
- (e) to provide assistance in procuring, amongst other things, security protection (although this is often at the project company's cost);
- (f) to pass any necessary legislation to enable the project to progress; and
- (g) to guarantee the provision of any necessary feedstock supplies, e.g., fuel gas for LNG projects and feedstock for petrochemical projects.

3.2 Project Company obligations

There should not be any unduly onerous terms imposed on the project company, such as high levels of liquidated damages if the completion of the project is not achieved by a scheduled date and to the extent that the project company is unable to pass-through all such liquidated damages to its own contractor. Customary project company obligations include:

- (a) to finance, construct, operate and maintain the project to the schedule and specifications set forth in the concession;
- (b) to comply with all applicable legislation, in particular environmental and social regulations;
- (c) to use its best efforts to avoid obstructing or interfering with the operations of any third party;
- (d) to undertake to employ a minimum number of host country citizens for the purposes of constructing and operating the project; in addition, the government may require the project company to offer a mutually agreed number of nationals from the host country an opportunity for on-the-job training and practical experience; and
- (e) to pay concession fees where appropriate—such payments are ordinarily facilitated through the payment of royalties from profits and lease and other payments to the government or government bodies.

4. Force Majeure

This clause addresses material risks that are generally acknowledged to be beyond the control of either party. This sort of clause often includes the following elements:

- (a) a general description of events constituting force majeure;
- (b) force majeure is stated to be a risk shared by the parties;
- (c) no party should be unduly prevented from claiming a force majeure event has taken place;
- (d) the party claiming force majeure should be required to use reasonable efforts to overcome or mitigate the effects of such force majeure, and the burden of proving such force majeure should fall upon the claiming party;
- (e) a concession is often extended by a period equal to the duration of any force majeure event, with consideration given to whether any caps to such extensions are applicable; and
- (f) force majeure events arising from government action or inaction—circumstances where the government takes certain actions or fails to take actions which impact upon the project and are out of the control of the other party, may be subject to a compensation regime to ensure that the project company is not unfairly disadvantaged by the government.

5. Change in Law and Government Action

These provisions usually address material governmental actions that could alter the economics of the project.

- (a) The concession agreement should set out arrangements relating to a change in law. Ideally, such arrangement should, at the least, stipulate that the concession period will be extended if the construction of the project is delayed because new regulations come into force requiring, e.g., a re-working of the design or the re-fitting of new environmental protection equipment.
- (b) There may be a grace period for a change in law to allow the project to adapt and there may be an obligation on the government to provide assistance to the project in such circumstances. In certain projects there can be a large amount of time between winning a bid and the start of the project's operation. The sponsors will seek to ensure any change of law during the bid process will be covered by such a provision.
- (c) Whilst it is accepted that in order effectively to run the state, governments must be free to implement necessary laws, such laws may at times be detrimental to the project. Similarly, a government cannot bind its successor not to change the law. It is for these reasons that the concession agreement may contain 'stabilization' provisions requiring the government to 'freeze' the law in respect of the project, or, to the extent this is not possible, pay compensation for such changes in law.
- (d) Where the concession is granted in an emerging market and if project revenues are received in local currency, it will be important to have assurances from the government regarding the convertibility of such revenues to meet the foreign currency obligations of the project, such as debt service, operating costs (e.g. for the importation of spare parts) and the distribution of dividends to foreign shareholders. Equally important will be assurances as to the transferability of such funds and the ability to operate foreign bank accounts.

6. Tax Issues

A concession agreement may contain assurances about the granting of subsidies and tax concessions, such as tax holidays, necessary for the project to be economically attractive to investors. It is important to ensure, at a minimum, certainty as to the level of withholdings on the repatriation of profits generated from the project or on interest paid to lenders.

7. Dispute Resolution and Governing Law

- (a) Because concession agreements are agreements with governments, they are most often governed by the laws of the jurisdiction of the state in which the project is situated.

- (b) In many jurisdictions, a concession agreement may be promulgated into law and the statute will govern the project. Any amendment or change in arrangements may not be valid unless also made as law, and in certain circumstances may require governmental approval.
- (c) It may be preferable to seek an arbitration agreement, calling for the venue to be located in a 'neutral' country. Consideration should be given as to whether arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), which was established by the Washington Convention of 1965, may be appropriate. ICSID jurisdiction applies in relation to disputes between a contracting state (or any constituent subdivision or agency designated by the contracting state) and a national of another contracting state. The convention calls for the direct enforcement of awards against the contracting state without the range of exceptions contemplated by, e.g., the 1958 New York Convention on the Recognition of Foreign Arbitral Awards.

APPENDIX 5

Checklist of Key Provisions in Turnkey Construction/EPC Contracts

The following checklist sets forth the key provisions in a turnkey construction contract that are typically required by the project company (Owner) and its lenders. The list, however, is by no means exhaustive; each project will have its own special requirements that will need to be addressed after consultation and negotiation among the Owner, the lenders, their engineers and the contractor (Contractor).

1. Project Design

The design of a project is generally determined by the nature and complexity of the project's technology and should be provided by the Contractor after consultation with the Owner and its advisers (note that the design is often included as part of the Contractor's 'scope of work' to prevent the Contractor from shifting performance or warranty-related liability to a third party, such as a technology provider which may not be creditworthy).¹ The economics, feasibility and efficiency of the design are usually reviewed and approved by the lenders' technical adviser as part of its due diligence.

2. Scope of Work

The 'scope of work' sets out the Contractor's responsibilities for all aspects of design, engineering, procurement, construction and equipping of the project.

3. Contract Price

The contract price is generally a fixed price, subject to mutually agreed changes. The price should include all taxes (although in many cases, any sales tax on equipment used for construction will be excluded from the contract price and paid directly by the Owner), insurance costs, and other costs incurred during the project's construction phase. Pricing on a 'time and material' or 'cost-plus' basis is generally resisted by Owners, although some contracts may provide for a cost escalation mechanism tied to the cost of equipment integral to the project (e.g. a turbine) in the event that the placing of orders for such equipment is delayed through no fault of the Contractor or its subcontractors. Additionally, the construction contract may provide for a 'bonus' payment to the Contractor in the event of early completion and acceptance. The argument for such a payment is that early operation enables the Owner to enjoy earlier than anticipated revenues as well as savings of construction period interest, and the Contractor should therefore share in the benefit.

4. Payment Schedule

The payment schedule is usually based on the Owner's 'notice to proceed' and construction milestones that have been achieved. Payments are made for work actually completed and for materials actually purchased and incorporated in such work. Title to the work and materials purchased often vests in

¹ In some projects, such as certain projects in the process industries, this may not be possible, in which case the risk will need to be mitigated, e.g., through completion support.

the Owner upon payment, although risk of loss should remain with the Contractor until the final completion of the project. The contract may provide for a retention from each payment, with any retained amount to be paid upon final acceptance. In some contracts, in lieu of a cash retention, the Contractor is obliged to post a retention bond issued by a bank having a prescribed credit rating and this allows the Contractor to be paid in full for each milestone which is achieved.

5. Performance Security

Both the Owner and the lenders customarily require the obligations of the Contractor to be appropriately credit enhanced. Therefore, it may be necessary for the Contractor to provide a parent guarantee of its performance and payment obligations. In addition, the Contractor will be obliged to furnish a performance bond with a face value of, e.g., 25 per cent of the contract price. In addition, it is likely that the Contractor will be entitled to a sizeable 'advance payment' when the Owner issues the 'notice to proceed'. In such instances, it is common for the Contractor to provide an advance payment bond with a face value equating the relevant advance payment. As the project proceeds, the face amount of the bond reduces in stages to zero. In addition, during the warranty period,² the Contractor is usually obliged to post a warranty bond with a face value of around 5 per cent of the contract price.

6. Completion Schedule

The contract typically provides for a 'date certain' scheduled completion date for the project. The Contractor will often be required to pay liquidated damages for delays not required pursuant to a change order or arising from a force majeure event, and is given a limited time to cure any failure to pass agreed upon performance tests before paying additional 'buy-down' or performance liquidated damages as a result of having under performed.

7. Mechanical Completion

Mechanical completion occurs when the project and all related facilities and systems are completed in accordance with the design specifications, irrespective of whether in fact it will satisfy the performance guarantees. The Owner and the lenders will require the Contractor unconditionally to agree to cause mechanical completion to occur.

8. Performance Tests and Guarantees

Performance tests, together with acceptable test procedures and assumptions for the evaluation of such performance tests, are carefully assessed and approved by the lenders' technical adviser. The tests typically cover (i) efficiency (in a power project measured in terms of heat rate, which assesses the project's consumption of energy and raw materials); (ii) compliance with applicable environmental and other governmental requirements; (iii) net capacity (e.g., a minimum daily production level); and (iv) reliability (e.g., ability to operate at the guaranteed capacity over a specified period of time). The performance tests must be satisfied while the plant complies with all laws, rules, regulations and permits applicable to the plant. The Contractor (or, if the Contractor is not sufficiently creditworthy, the Contractor's parent or an acceptable guarantor) is required to guarantee that if the performance tests are not satisfied, it will pay damages sufficient to enable the Owner to prepay or 'buy-down' the project debt to a level that can be serviced and retired on the basis of an amortization schedule which takes into account the project's impaired performance.

9. Substantial Completion

Substantial completion occurs upon the successful completion of all performance tests or payment of appropriate buy-down or liquidated damages.

² See paragraph 5–14 below.

10. Final Completion

Final completion occurs upon the satisfactory completion of all ‘punch-list’ items that include non-essential finishing items, like painting and landscaping. Some contracts provide that final completion does not occur until the lapse of all warranty periods.

11. Liquidated Damages

These are generally divided into two categories: delay damages and performance damages. Delay damages should be payable for each day during the cure period which applies should the Contractor fail to complete the works by the scheduled date. These damages need to be calculated to cover debt service (which typically includes only interest) and the Owner’s fixed operating expenses, together with any damages payable to the offtaker/purchaser of the project’s product or services during such period, after which the Contractor must demonstrate satisfaction of the performance guarantees or pay the applicable performance or ‘buy-down’ liquidated damages.

12. Force Majeure

From the Owner’s and the lenders’ perspective, the definition of this term should not be overly broad. Although it is often difficult to avoid the ever present phrase ‘including, but not limited to’, the definition generally excludes strikes affecting only the Contractor, its employees or its onsite subcontractors, and any other event that is within the control of the Contractor. It will be important to ensure that the force majeure provisions ‘mesh’ with those to be found in the project’s concession agreement or offtake contract.

13. Change Orders

Material change orders generally require the approval of the lenders, acting on the advice of their technical adviser. The lenders will not wish to allow change orders other than as the result of events of force majeure or unless otherwise agreed to by the Owner and the lenders.

14. Warranties

The Contractor should provide equipment that is ‘new and clean’ and should be prepared to warrant against deficiencies or breakdown for a period of at least one to two years after final completion (it is common to provide for an ‘evergreen warranty’ that renews the warranty period for any part or component that needs to be repaired or replaced).

15. Indemnity

The Contractor typically agrees to indemnify the Owner, the lenders and their representatives and agents from any third party claims arising out of the acts or omissions of the Contractor, its employees or agents in connection with the performance of the construction contract, including claims for personal injury, property damage, regulatory penalties, fines and patent infringement.

16. Subcontractors

The construction contract often defines subcontractors broadly to include offsite suppliers of specially manufactured equipment. The Owner and the lenders may seek to restrict the Contractor’s right to subcontract and, in certain instances, the Owner and/or the lenders may require ‘direct’ rights vis-à-vis key subcontractors which may, e.g., allow a transfer of the relevant subcontract to the Owner or its designee following default by the Contractor.

17. Limitation on Liability

There is generally an overall cap on the liability of the Contractor under the construction contract, and specified sub-limits for liquidated damages. Indemnities and certain other obligations are sometimes excluded from such limitations.

18. Termination or Suspension

The lenders will seek to limit the Contractor's right to terminate the construction contract or suspend performance in the case of non-payment.

19. Insurance

A typical insurance package (obtained preferably by the Owner) will include: employer's liability, workmen's compensation, comprehensive auto liability, comprehensive general liability, delay in start-up and builder's all-risk coverage.

20. Dispute Resolution

The Contractor often agrees to continue to perform during the pendency of a dispute, which is to be ultimately resolvable by arbitration or judicial process. Arbitration procedures should be clearly articulated to avoid unnecessary delay and expense in resolving disputes.

21. Assignment

The construction contract should be assignable as collateral security to the lenders, and the Contractor usually agrees to execute a consent to such assignment (or direct agreement) in form and substance reasonably satisfactory to the lenders. The direct agreement typically approves the lenders' further assignment of the construction contract upon foreclosure by the lenders.

APPENDIX 6

Checklist of Key Provisions in Feedstock Supply Contracts

Feedstock supply contracts in an energy or a process industry project ensure that the project will have a sufficient amount of feedstock (typically this includes, in the case of a power project, fuels such as coal, oil and/or gas or, e.g., in the case of a petrochemical project, feedstock such as ethylene) to operate the facility. If the feedstock supply contract does not provide for delivery of feedstock to the facility site, transportation arrangements need to be made for delivery. The purpose of the feedstock supply contract is to guarantee the project a steady, uninterrupted supply of its entire requirements for feedstock at fixed or predictable prices for the entire life of the debt. While these contracts are usually negotiated and executed prior to or at the time the debt financing closes, full scale deliveries will not start until the project is ready for commercial operation, which may be two or three years later.

The following list outlines key provisions in a feedstock supply contract that are typically required by the project company (Owner) and its lenders. This list is by no means exhaustive as each project will have its own special requirements that will need to be addressed after consultation and negotiation among the Owner, the lenders, their technical advisers and the feedstock supplier (Feedstock Supplier).

1. Types of Feedstock Supply Contracts

1.1 Requirements Contracts

- (a) The Owner may be obliged to purchase all, or a large portion of, the feedstock required by the project from the Feedstock Supplier.
- (b) The Feedstock Supplier is obliged to supply a corresponding amount of the project's feedstock requirements.

1.2 Output Contracts

- (a) The Feedstock Supplier may be obliged to sell its entire output to the project company (such as gas from a dedicated gas field).
- (b) The Owner may be obliged to purchase the entire output of the Feedstock Supplier.

1.3 Take-or-pay Contracts

- (a) The Owner is obliged to purchase a specified volume of feedstock or make minimum periodic payments to the Feedstock Supplier even if feedstock is not being taken by the Owner. In the event that feedstock is paid for, but not taken, the Owner typically has the right to take a corresponding amount of additional feedstock in succeeding years.
- (b) The Feedstock Supplier is obliged to supply a specified volume of feedstock.

2. Term of Contract

- (a) The term of the feedstock supply contract should be structured to correlate with that of the project loans, often with an option for the Owner to extend it for successive terms.
- (b) The term usually begins contemporaneously with the commencement of commercial operations, but should also provide for the supply of feedstock during the commissioning and performance testing of the project.

3. Quantities Delivered

- (a) The total quantity of feedstock to be delivered under the feedstock supply contract must be sufficient to operate the project facility at anticipated levels of operation. The Owner will seek feedstock supply flexibility during the commissioning period of the project facilities and there may be a 'ramp up' phase during which feedstock supply is increased in line with the requirements of the project facilities.
- (b) Delivery schedules must accommodate the project facility's consumption and storage capacity.
- (c) The Owner will seek to have the flexibility to adjust the delivery schedule according to the project facility's consumption.
- (d) The Feedstock Supplier typically measures the quantities delivered, while the Owner requests the right to inspect the measuring devices used.

4. Quality of Feedstock

- (a) The Feedstock Supplier should agree to deliver feedstock that conforms to the specifications required by the project facility (such specifications are usually part of the performance warranties in the construction and operating contracts).
- (b) Feedstock that reduces only the efficiency and output of the project facility may be acceptable at a reduced price that is calculated to compensate the Owner for any loss of revenue or increase in costs caused by, e.g., substandard fuel.
- (c) Feedstock that will damage the project facility or cannot be used for technical, environmental or economic reasons may be rejected by the Owner.
- (d) In power projects, regular fuel samples may be taken for analysis. Typically, one sample is tested and one sample is kept by each of the Feedstock Supplier and the Owner to assist in resolving any future disputes.

5. Transportation/Place of Delivery

- (a) The Owner will seek to: (i) be a third party beneficiary under any transportation contracts, (ii) have a right to receive any notices of default and (iii) have a right to cure any such default.
- (b) If the Feedstock Supplier is not itself obliged to deliver feedstock to the project facility, one or more long term transportation contracts may need to be negotiated.
- (c) Title to feedstock will often pass to the Owner upon delivery to the project facility. If title passes earlier, it will be necessary to ensure that insurance is in place and to assess which party bears the liability for the period in which the feedstock is in transit.

6. Price

- (a) Price may be fixed for a period of time or the entire term (the latter is unusual in longer term contracts) or may fluctuate based on price escalators or deflators. A portion of the price may be fixed and the other portion variable.
- (b) Examples of escalators include: the Consumer Price Index, the GNP price deflator, various labour cost indices, raw material price indices, or changes in average prices paid by representative feedstock purchasers similar to the project.
- (c) It is important that the indices are readily ascertainable and estimated with accuracy. Ideally, this would include a cap on price increases during the term of the feedstock supply contract, although this is often difficult to achieve.
- (d) In the context of power projects, the price escalation formulae in the fuel supply contract should correlate with the price escalation formulae in the power purchase agreement so that higher feedstock costs correspond to higher project revenues under the power purchase agreement.

7. Force Majeure

- (a) The force majeure provision allocates economic risk for unforeseen events outside of the control of the parties to the contract. Negotiations usually centre around:
 - (i) who can best control the risk; and
 - (ii) who can insure against the risk.
- (b) Force majeure events usually excuse performance for a specified time, after which the feedstock supply contract can be terminated.
- (c) In the event the Feedstock Supplier claims a force majeure event has occurred (or is ongoing), the Owner often has the right to purchase feedstock elsewhere.

8. Representations and Warranties

- (a) The Feedstock Supplier typically represents and warrants to the Owner that:
 - (i) it has sufficient feedstock to satisfy the Owner's requirements, which usually means up to the maximum projected requirement to operate the project facility at the output used for the project's financial forecasts;
 - (ii) the quality of feedstock will conform to the required specifications; and
 - (iii) the Feedstock Supplier has all required permits and authorizations and will comply with all such permits and applicable law.
- (b) The lenders will often require that the Feedstock Supplier provide either dedicated reserves or a guarantee from a corporate parent to ensure that it will perform its obligations. If gas reserves are dedicated to the project, the lenders may also request that ongoing evidence of the adequacy of the relevant reserves be furnished periodically (e.g. reserve reports or revalidations thereof).

9. Indemnification

- (a) The indemnification provision typically covers the project company against a breach by the Feedstock Supplier of the feedstock supply contract and covers losses and expenses resulting from third party litigation.
- (b) Environmental liability should also be addressed.

10. Assignments

Assignment provisions will allow for collateral assignment to actual and potential lenders. The lenders are usually entitled to notice of any defaults and the right to cure such defaults within an extended cure period. The Feedstock Supplier typically executes a consent to assignment (or direct agreement), which often approves the lenders' further assignment of the contract following foreclosure.

11. Governing Law and Dispute Resolution

In many cases, the feedstock supply contract will be governed by the law of the host jurisdiction. However, because feedstock supply often involves trans-border shipments, the contract may be governed by the law of a 'neutral' jurisdiction. Difficulties may arise where the governing law, or the forum for dispute settlement, differs as between the feedstock supply contract and the project's offtake contract. It is preferable, where issues of fact or law may be common to a dispute among the parties (e.g., whether an interruption in feedstock supply is excusable by force majeure), to ensure that the issue is resolved in a single proceeding with the goal of a common resolution among the parties.

This page intentionally left blank

APPENDIX 7

Checklist of Key Provisions in Offtake/Power Purchase Agreements

Since the power purchase agreement (the PPA) is the principal revenue source in a power generation project, it is one of the most significant contracts for the project company (the Owner) and its lenders. PPAs are usually negotiated very early in the development process and tend to be substantially completed by the time the Owner seeks debt financing. Many of the principles and provisions described below will equally apply in other offtake contracts for other types of projects.

Not all PPAs are 'bankable' or financeable, and consequently, the lenders may seek amendments, either directly to the PPA or in the consent to assignment (or direct agreement) entered into by the relevant utility. However, utilities may be required, or at least inclined, to use contract forms that have previously been approved or accepted by their management and, in some cases, the applicable regulatory authority. In such cases it may be difficult to negotiate or obtain amendments to a PPA that differ substantially from such forms.

The following outline highlights some of the more significant provisions and issues that should be considered in negotiating or reviewing PPAs.

1. Types of PPAs

- (a) The need for power in a utility's service area is not constant. It will fluctuate at any given time depending on a number of factors, including the season, the temperature and the time of day or night. A utility must therefore be in a position to deliver power when needed and as efficiently as possible.
- (b) To accomplish this objective, utilities own, or purchase, electricity from different types of generating facilities some of which run constantly (referred to as 'base-load' or 'must-run' facilities) and others that only cover 'high peak' demands and are easily and economically turned on and off (referred to as 'peaking' or 'despatchable' facilities).
- (c) PPAs take different forms depending on the type of generating facility involved. With respect to a 'must-run' facility, the utility will purchase a fixed amount of energy and capacity. With respect to a 'peaker' facility, the utility will purchase, in effect, the right to a fixed amount of capacity, but may not be obliged to purchase any actual power.

2. Term

- (a) The customary term of a PPA runs from 10 to 20 years or more from the date at which the 'initial operations' of the facility are commenced. There are often renewal options.
- (b) The lenders will typically structure the term of the debt so that the final payment under the loan agreement occurs substantially prior to the termination of the PPA. In practice, this means anywhere from 2 to 10 years, which ensures that there is a cushion or 'tail' between the final payment under the credit facility and the termination of the revenue source (the PPA) in the event that the debt is not repaid as originally scheduled for any reason, including force majeure.

3. Price

- (a) Pricing often equals some percentage of 'avoided cost', which means the cost the purchasing utility would incur to generate or otherwise acquire the power if it did not purchase electricity from the project company under the PPA. As part of this calculation, there is typically a pricing adjustment mechanism linked to an index such as inflation.

- (b) Pricing in PPAs typically consists of either (i) capacity payments and energy payments (a Capacity PPA) or (ii) energy payments only (an Energy Only PPA).
- (c) A capacity payment is a price paid to reserve the available capacity of the facility, regardless of whether the utility actually purchases any electricity.
- (d) An energy payment is the price paid for the actual power delivered. The Owner and the lenders will want these energy payments to correlate as closely as possible to the anticipated fuel costs of the project, with appropriate escalators to reflect any increases in such fuel costs. They will also want the right to renegotiate the energy payments if the energy payments and the actual fuel costs no longer correlate.
- (e) It is essential that the revenue of any PPA, whether a Capacity PPA or an Energy Only PPA, be adequate to cover the cost of operating the facility, repaying the debt and providing a reasonable return on equity.
- (f) In international projects, where the currency of payment between (i) the utility and its consumer and (ii) the Owner and the lenders, are different, the Owner is exposed to currency risk. Accordingly, the Owner may seek pricing under the PPA to be linked to the exchange rate of the currency of the project debt.
- (g) Bonus payments may be included with respect to available capacity above the originally stated available capacity, while a reduction in capacity will often lead to substantial penalty payments to the utility. The proposed capacity must therefore be realistic and attainable.
- (h) In many instances, the PPA is structured so that the project receives payment for capacity and/or energy in excess of the utility's 'avoided cost' (e.g. the utility's hypothetical cost of purchasing alternative capacity) during the early years, and payments which are less than the 'avoided cost' during the latter years. Over the full term of the PPA, the average of the payments made for capacity and/or energy will equal the tariff (the Tariff).
- (i) These early payments are often referred to as 'front-loaded' payments and may facilitate the financing of the project by providing early additional revenue in order to amortise the debt incurred to finance the project.
- (j) While utilities may be willing to provide for such 'front-loaded' payments, they will be concerned about the project having been paid in excess of the Tariff if the PPA is terminated prior to its expected term. To cover this risk, the utility may require that an energy bank account or suspense account be established, although not necessarily funded. Such accounts are used to keep track of the incremental payments being made in excess of the average Tariff.
- (k) If the PPA is terminated prior to its expected term, the project may be obliged to repay the incremental excess, which is the difference between the amount the utility would have paid if it had paid the Tariff, and the amount actually received by the utility.

4. Conditions Precedent

- (a) All PPAs will have a variety of conditions precedent that need to be satisfied before the utility is obliged to purchase power. In certain instances, failure to satisfy the conditions precedent by a date certain may entitle the utility to terminate the PPA. Since many of these conditions precedent are related to the safety of the system or are mandated by regulators, utilities may not be willing to modify these conditions precedent.
- (b) Typical conditions precedent are:
 - (i) commencement of construction by a specified date;
 - (ii) achieving further construction milestones by specified dates;
 - (iii) commencement of initial operations by a specified date;
 - (iv) obtaining certain permits by specified dates;
 - (v) execution of fuel supply contracts that conform to certain criteria;
 - (vi) construction of the facility in accordance with the design approved by the utility; and
 - (vii) initial synchronization of the facility with the utility's system.
- (c) In reviewing the conditions precedent, the lenders and the Owner must be satisfied that each can be accomplished as and when required. To the extent possible, the time when any condition precedent must be satisfied should be extended in the event of force majeure.

- (d) An ultimate 'hell or high water' date (meaning the last date upon which initial operations must occur regardless of any delay, including force majeure) may, however, be acceptable if sufficient time is afforded to cover all reasonable contingencies.

5. Force Majeure and Regulatory Considerations

- (a) The lenders and the Owner will seek the broadest definition of force majeure in order to protect against (i) the Owner becoming obliged to pay delay or performance damages and/or (ii) the termination of the PPA. The utility may demand the right to terminate the PPA in the event of an extended force majeure event.
- (b) The force majeure definition customarily includes:
 - (i) natural disasters;
 - (ii) war and terrorism;
 - (iii) governmental actions;
 - (iv) system emergencies; and
 - (v) labour strikes.
- (c) If the project's capacity is unavailable due to force majeure events, the utility will sometimes agree to continue the capacity payments for a limited period of time and if the relevant circumstances constitute 'political force majeure' (e.g. arising from a change in law) the utility may agree to continue making capacity payments during the subsistence of such an event.

6. Security

- (a) It is not unusual for a utility to require security in connection with (i) a delay in initial operations after a specified date, and (ii) the performance obligations of the Owner under the PPA.
- (b) In satisfaction of such security obligations, utilities have required letters of credit, corporate guarantees and second mortgages on the facilities. The second mortgage may raise concern for the lenders who will often object to sharing the only collateral securing their debt and may be uneasy about the various and sometimes conflicting rights of the lenders and the utility in connection with the collateral.
- (c) A utility may also require a step-in right in the event of a default (especially a performance default) under the PPA. With such a right, a utility could 'step-in' and operate the facility itself. The lenders may be concerned about this risk unless the utility also assumes all of the Owner's obligations to the lenders and others under the loan agreement and the other project documents.

7. Curtailment of Electricity Deliveries

- (a) A PPA that does not provide a certain stream of revenue (with limited exceptions) may not be financeable. The right of the utility to curtail its purchase of power should be strictly limited unless the PPA is structured so that the capacity payment component is sufficient to satisfy fixed operating costs and debt service.
- (b) Utilities will usually be permitted to curtail for:
 - (i) utility maintenance, within defined limits of days/hours per month/year and with appropriate notice to the project; and
 - (ii) in the event of an emergency shutdown (although in this context the definition of emergency should be narrow).
- (c) Capacity payments should continue to be made if the utility reduces its consumption of power below the level specified in the PPA, whether due to forced outages or otherwise.
- (d) In a cogeneration project, the requirements of the steam host must also be considered. If the electric output of the facility must be curtailed due to the utility's requirements, the cost of producing steam to satisfy the requirements of the steam host will be substantially increased. To address this concern, the force majeure definition in the steam sales agreement might include facility shutdowns caused by the utility.

8. Interconnection

- (a) The Owner is typically responsible for delivering its power to the utility's existing power lines.
- (b) The utility may agree to provide the necessary interconnection facilities. However, in a number of projects, the Owner is obliged to finance and construct such facilities and, at project completion, transfer such 'special facilities' to the utility, which then takes responsibility for the ongoing operation and maintenance of the interconnection facilities.

9. Line Upgrades

- (a) The Owner may be asked to pay for upgrades to the utility's existing power lines in order to handle the increased load resulting from the project becoming operational.
- (b) In this event, it is usually prudent to:
 - (i) avoid open-ended commitments;
 - (ii) negotiate up-front cost sharing to be made with other users;
 - (iii) consider the tax benefits associated with the upgrades when negotiating the payments; and
 - (iv) specify additional operating costs, if any.

10. Assignment

- (a) The PPA should allow for the assignment of collateral to the lenders as well as the right of the lenders to receive notice of any default and the right to cure such default.
- (b) Assignment conditions and the lenders' rights to notice and cure rights for default are typically set out in a separate consent to assignment (or direct agreement). Sometimes a utility has its own form of consent that it prefers to execute.

11. Termination

- (a) The PPA should set out clearly the basis on which either party may terminate the agreement. Termination by the utility may leave the project with no access to the market and thus should be limited to significant events. The project company will want meaningful grace periods and cure rights while the lenders will insist upon step in rights.
- (b) In emerging market PPAs, there are often detailed provisions relating to the payment of termination amounts, the size of which varies depending on the nature of the termination event. There is typically no buyout unless the utility wants to purchase the project. On the other hand, if a termination event occurs following breach by the utility, the termination amount could be sized to cover the repayment of debt and may also contain an equity component which includes returning the investment made by the shareholders of the project company and a return on equity based on the net present value of the potential revenue stream from the project (which is determined based on the return on equity that would have otherwise been made over life of the project).

12. Governing Law

In most cases, the PPA will be governed by the law of the host jurisdiction, but where that law is not well developed, it may be preferable to select a well recognized governing law.

13. Dispute Settlement

Most Owners will wish disputes to be settled in a neutral forum. In many cases this will involve binding arbitration.

APPENDIX 8

Checklist of Key Provisions in Operation and Maintenance Agreements

This checklist sets forth lists key provisions typically contained in an Operation and Maintenance Agreement (O&M Agreement). The list, however, is by no means exhaustive. Each project will have its own unique requirements that will need to be provided for after consultation and negotiation among the project company (the Owner), the lenders, the lenders' technical adviser and the operator (Operator).

1. Objectives

The objectives of an O&M Agreement include:

- (a) Ensuring the Operator meets performance guarantees tied to maximizing revenues under the project's offtake agreements.
- (b) Allocating the risk of any operational deficiencies of the facility.
- (c) Managing the cost of operating the facility and, in particular, ensuring that project revenues will cover all operational and other costs.

2. Structure of Contracts

There are three basic structures for an O&M Agreement:

2.1 Cost Plus Structure

Under a cost plus contract, the Owner pays the costs reasonably incurred by the Operator in the operation and management of the facility, including a provision for overhead and a fixed fee.

- (a) Most risks associated with the performance of the facility during its commercial operations remain with the Owner, thereby reducing both the Operator's fee and its profits.
- (b) A broad termination provision minimizes the risk to the Owner of excessive costs and deficient performance by the Operator.
- (c) The lenders may resist cost plus contracts that do not adequately mitigate the risk of cost overruns, which in turn could reduce the net revenues from which debt service is paid.

2.2 Bonus/Penalty Structure

This contractual structure measures the Operator's compensation through incentives tied to the facility's output and/or the Operator's ability to meet the operating budget. The Operator is provided with incentives to maximize facility output and minimize operational costs. For instance:

- (a) Bonuses and penalties may be based upon agreed operational performance levels for output. Projected levels of facility output and efficiency should be set according to the performance capability achieved during the facility's completion testing, as required by the construction contract.
- (b) If projected output is reached and all efficiency, pollution and other governmental standards are met, incentive compensation may be paid to the Operator as a percentage of cashflow, generally from revenues attributable to performance above guaranteed levels.
- (c) In the case of deficient performance, the Operator may be required to compensate the Owner for any non-operational periods and/or the cost of the repair and replacement of parts. However, the Operator may resist such penalties in the case of output deficiencies caused by events beyond the Operator's control, such as equipment failure, fuel supply interruptions and force majeure events.

- (d) Bonuses and penalties may also be based on deviations from the project's operating budget.
- (e) The project's operating budget is typically negotiated annually between the Owner, the Operator and the lenders (through the exercise of their rights under the finance documents).
- (f) The operating budget should include all major costs within the Operator's control, including labour and general administrative expenses. Costs such as spare parts, consumables and minor equipment repairs may also be included.
- (g) Maximum penalties and bonuses are often capped.

2.3 Fixed Price Structure

Under this structure, the Owner and the Operator agree to a fixed price for the operation of the facility. The Operator's profit is measured by the difference between the total costs incurred to operate the facility and the contract price. This structure is usually the most costly to the Owner because the Operator charges a premium for its assumption of the project's operational risks. This form is most commonly applied when the Operator is an affiliate of the Owner or of the construction contractor.

3. Term

The term of the contract varies by transaction, but typically correlates with the term of the project loans.

4. Scope of Work

- (a) The actual obligations delegated to the Operator will depend on the technology of the project, the expertise of the Owner and the nature of the fuel or feedstock supply arrangements. The O&M Agreement should always clearly define the Operator's duties and responsibilities.
- (b) The Operator's duties generally include:
 - (i) provision of all necessary personnel and services for the operation, maintenance and repair of the facility, including the preparation of an annual budget, operating procedures and a maintenance program; and
 - (ii) monitoring compliance with all other project contracts, government permits, licenses, applicable industry standards and good engineering practices.
- (c) The Operator's duties may include the procurement of fuel or feedstock depending, of course, on whether a fuel or feedstock supply contract has been entered into by the Owner.
- (d) Warranties received from outside vendors or subcontractors are generally passed through to the Owner, but maintained and administered by the Operator.

5. Force Majeure

- (a) Lenders and Owners prefer that the definition of force majeure be narrow and include a 'closed' or exhaustive list of events permitting a claim of force majeure. If it is necessary to broaden the term, specific 'events' or 'occurrences' will be added to the list.
- (b) The definition will generally state that force majeure events are causes outside the control of the parties that cannot be avoided by the exercise of due care.

6. Authority of Operator

The Owner must determine the scope of the Operator's authority to enter into contracts on behalf of the Owner.

7. Termination

- (a) Lenders and Owners prefer that the grounds for termination of the O&M Agreement by the Operator be extremely limited and, if any are agreed, that they be carefully defined.
- (b) Generally, the Owner's ability to terminate or replace the Operator is limited to a material breach of contract (which will include failure to meet performance guarantees over a set period) by the Operator, or the Operator's bankruptcy or insolvency, except in the case of a 'cost plus' agreement, where termination rights may be broader.

- (c) The lenders will often prevent the Owner from terminating or replacing the Operator without giving their own consent to the change.

8. Insurance

- (a) The Operator is generally required to carry insurance, including worker's compensation, comprehensive general liability, comprehensive auto liability and excess umbrella liability coverage.
- (b) Usually, the Owner will carry the necessary property and business interruption insurance.

9. Warranties

The Operator may give the following warranties:

- (a) the project's operations will be performed 'in accordance with applicable industry standards and good engineering practices';
- (b) all equipment or parts will be new and free of all material defects and utilized according to manufacturer and supplier recommendations; and
- (c) operating personnel will be appropriately trained and have relevant experience.

10. Indemnity

- (a) The Operator may agree to indemnify the Owner, the lenders and their representatives and agents from any third party claims arising out of the acts or omissions of the Operator, its employees or agents in connection with the performance of the O&M Agreement, including claims for personal injury, property damage, regulatory penalties, and fines.
- (b) The O&M Agreement sometimes provides an indemnity by the Operator to the Owner for any liability to the offtakers (e.g. the purchasing utility) arising from the fault of the Operator.

11. Assignment

- (a) The Operator is usually prohibited from assigning its rights or obligations under the O&M Agreement without the Owner's consent.
- (b) The O&M Agreement should allow for collateral assignment to lenders, with the right to receive notice of any default and the right to cure the Owner's defaults.
- (c) Assignment conditions and cure rights are typically set out in a separate consent to assignment (or direct agreement).

This page intentionally left blank

INDEX

- Accounts agreements**
 - control through ‘waterfall’ accounts 7.53–7.55
 - key provisions 7.57
 - political risks and local laws 7.56
 - regulation of cash flow 7.52
- Achalandage** 12.32
- Acte authentique** 12.36
- Acte sous seing privé** 12.36
- Advisers and consultants**
 - auditor’s comfort letter 9.91–9.92
 - construction role 2.92
 - financial role 2.77
 - operational role 2.104
 - risk identification 4.04
 - feasibility studies 2.38–2.41
- Affermage**
 - concessions distinguished 12.07
 - PPP distinguished 12.10
 - origins 12.02–12.03
 - risk 12.06
 - use in transport sector 12.08
- Africa**
 - environment and social risks 4.76
 - export credit agencies 8.03
 - multilateral development banks 8.06
 - multilateral lending institutions 3.48
 - Organisation pour l’Harmonisation du Droit des Affaires en Afrique* (OHADA)
 - content of laws 12.198–12.201
 - French influence 12.188–12.189
 - importance 12.182–12.184
 - institutions 12.192–12.197
 - member States 12.190–12.191
 - objectives 12.185–12.187
 - reliability of local law and courts 1.36–1.37
- All risks insurance**
 - material damage 6.12–6.15
 - property damage 6.18–6.19
 - transit of goods 6.16–6.17
- Alternative dispute resolution**
 - alternative to arbitration 14.90
 - conciliation 14.91–14.93
 - dispute boards 14.96
 - expert determination 14.94–14.95
 - management resolution 14.97
 - mediation 14.91–14.93
- Ancillary agreements**
 - direct agreements 11.105–11.114
 - equity support
 - capital contributions 11.10–11.30
 - completion 11.31–11.41
 - overview 11.05–11.09
 - post completion 11.42–11.46
 - security arrangements
 - bank accounts 11.86–11.88
 - contractual rights 11.75–11.82
 - financial collateral arrangements 11.89–11.90, 11.96–11.100
 - floating charges 11.91–11.95
 - further assurances clauses 11.51–11.53
 - insurance 11.104
 - lenders’ approach 11.55–11.58
 - overview 11.47–11.50
 - permitted investments 11.101–11.103
 - project company’s assets 11.70–11.74
 - rationale 11.59–11.65
 - receivables 11.83–11.85
 - sponsors’ interests 11.66–11.69
- Arbitration**
 - see also* **Litigation**
 - advantages 14.14–14.15
 - appeals 14.22–14.23, 14.100
 - certainty of outcome 14.21
 - choice of arbitrator 14.18
 - common arbitration clauses
 - applicable language 14.74
 - choice of law 14.85–14.86
 - confidentiality 14.79
 - costs and fees 14.84
 - enforcement of awards 14.81–14.82
 - exclusivity 14.66
 - final and binding effect 14.83
 - importance of addressing key issues 14.64
 - jurisdiction 14.80
 - qualification requirements of arbitrators 14.99
 - scope of arbitration 14.67
 - scope of disclosure 14.78
 - seat of arbitration 14.75–14.77
 - selection of governing institution 14.68–14.69
 - selection of panel 14.70–14.72
 - severability 14.73
 - consolidation of disputes
 - requirement for consent 14.101
 - structuring for multi-party arbitration 14.103
 - structuring for permissive joinder 14.102
 - disclosure of documents 14.19–14.20
 - enforcement of awards
 - early relief 14.105
 - established law 14.59

- Arbitration** (*cont.*)
enforcement of awards (*cont.*)
 New York Convention 14.60–14.61
 setting aside 14.106
 Washington Convention 14.62
importance of legal assessment 1.50–1.53
‘jurisdiction’ clauses 14.07
OHADA 12.196, 12.198
political risks
 consent by participants 14.42–14.43
 expropriation 14.27
 investment agreements with host
 country 14.26–14.29
 preference for contractors and operators 14.24
 service of claim 14.16
 structuring for multi-party arbitration 14.103
Attribution judiciaire 12.70
Automobile insurance 6.28
- Berne Union** 8.29
Best efforts underwriting 9.43
Bidding process
 EU Procurement Directives 12.14–12.16
 public procurement in France 12.20–12.21
 role of host governments 2.32–2.37
Bonds *see* **Project bonds**
Bribery 7.81–7.82
Build, lease, transfer (BLT) 2.143
Build, own, operate (BOO) 2.141
Build, own, transfer (BOT) 2.142
Build, transfer, operate (BTO) 2.144
- Capital contributions**
 alternative routes 11.10–11.12
 entitlement to equity 11.22–11.27
 JV or partnership agreements App 3
 maintenance of capital rules 11.16–11.18
 quantum 11.13–11.14
 shareholder loans 11.19–11.21
 shares or subordinated loans 11.15
 timing 11.28–11.30
Cash traps 7.57
Cession Dailly
 acknowledgement of assignment 12.103
 application to PPP 12.104–12.109
 consideration 12.97
 effects 12.101
 form of assignment 12.99
 importance 12.93–12.94
 nature of parties 12.95–12.96
 notice 12.102
 security over claims 12.65
 types of receivables 12.98
Civil disturbances 4.65
Civil law jurisdictions
 competition law 12.174–12.176
 direct agreements
 efficacy 12.177–12.178
 insolvency 12.164–12.171
 rationale 12.127–12.128
 ‘*stipulation pour autrui*’ 12.129–12.132
 fiducie regime 12.119–12.126
 hedging breakage costs 12.149–12.153
 indemnification by public
 authority 12.146–12.148
 insolvency of project company 12.154–12.157
 *Organisation pour l’Harmonisation du Droit des
 Affaires en Afrique* (OHADA)
 content of laws 12.198–12.201
 French influence 12.188–12.189
 importance 12.182–12.184
 institutions 12.192–12.197
 member States 12.190–12.191
 objectives 12.185–12.187
 origins of project finance 12.01–12.05
 private sector contracts
 affermage 12.06–12.08
 power purchase agreements 12.11–12.12
 public private partnerships 12.09–12.10
 public procurement
 ‘*cession Dailly*’ 12.104–12.109
 consequences of breach by public
 authority 12.27–12.28
 EU framework 12.14–12.16
 hedging breakage costs 12.149–12.153
 implementation in France 12.17–12.28
 indemnification by public
 authority 12.104–12.109
 ‘*stipulation pour autrui*’ 12.129–12.132
 remedies
 direct agreements 12.164–12.171
 insolvency 12.154–12.157
 management of insolvency
 proceedings 12.172–12.173
 security interests 12.158–12.163
 security documentation
 mortgages over real property 12.43–12.53
 overview 12.42
 pledges over business assets 12.29–12.41
 pledges over intangible property 12.61–12.126
 pledges over tangible property 12.54–12.60
 security granted by sponsors 12.179–12.181
 termination or cancellation of project contracts
 default events 12.145
 force majeure 12.138–12.142
 nullity of project contract 12.136–12.137
 overview 12.133–12.134
 public interest 12.143–12.144
 wrongful trading 13.15–13.17
Commitment letters 3.63–3.68
Compensation *see* **Damages**
Competition law
 civil law jurisdictions 12.174–12.176
 risks 4.99–4.103

Completion

- EPC contracts App 5
- equity support
 - completion defined 11.35–11.41
 - overview 11.31–11.34
- performance testing 4.22
- risk
 - cost overruns 4.15
 - delay 4.14
 - guarantees 4.13
 - meaning and scope 4.07–4.08
 - technology development 4.16–4.21
 - 'turn-key' construction contracts 4.09–4.12

Concession agreements

- allocation of risk in project
 - documentation 5.59–5.65
- key provisions App 4
- protection against political risks 14.26

Concession system *see Affermage*

Conciliation 14.91–14.93

Conditions precedent

- checklist of sample provisions App 1
- credit agreements 7.07–7.11
- ECA covered facilities 7.96
- power purchase agreements App 7

Confidentiality

- accounts agreements 7.57
- arbitration 14.88
- common arbitration clauses 14.79
- mediation and conciliation 14.92

Connected projects 2.58–2.59

Consequential loss insurance

- business interruption 6.23
- delay in start up 6.22

Construction erection all risk insurance 6.12–6.15

Construction phase

- accounts agreements 7.57
- advisers and consultants 2.92
- allocation of risk in project documentation
 - multiple procurement contracts 5.27–5.29
 - 'split' contracts 5.30–5.32
- energy and infrastructure
 - access needs 2.89
 - housing and social development requirements 2.91
 - overview 2.87–2.88
 - power and water 2.90
- example structure 2.93
- limitations on creditors' options 13.96–13.97
- overview 2.81–2.82
- preparations for operation phase 2.93
- role of contractors 2.83–2.86

Consultants *see Advisers and consultants*

Contractors

- preference for arbitration 14.24
- role 2.83–2.86
- treaty-based protection against political risks 14.40

Contrats de partenariat public privé

- affermage* 12.09–12.10
- legislative basis 12.09

Convertibility of currencies 4.45

Corporate governance

- importance of legal assessment 1.16–1.17

Corporate taxes

- importance of legal assessment 1.28–1.30

Corrupt practices 4.104–4.112

Corruption 7.81–7.82

Costs

- civil law jurisdictions
 - hedging breakage costs 12.149–12.153
 - mortgages over real property 12.50
- common arbitration clauses 14.84
- control of insurance programme 6.35
- dispute boards 14.96
- operational risks 4.30
- operations and maintenance
 - agreements App 8
- origination phase 2.63–2.64
- overruns on completion 4.15
- role of contractors 2.84
- role of host governments 2.12–2.13
- role of lawyers 1.08
- terms of credit agreement
 - breakage costs 7.13
 - increased lenders' costs 7.34

Covenants

- bond trust deeds 9.86–9.87
- checklist of sample provisions App 1
- credit agreements 7.37–7.38
- mezzanine debt facility agreements 7.68
- restructuring 13.86–13.88
- 'trigger' for restructuring
 - impact of covenant 'loosening' 13.43
 - timing and nature of default 13.42

Coverage ratios 3.09–3.10, 7.40–7.46

Credit agreements

- cancellation 7.17–7.22
- conditions precedent 7.07–7.11
- covenants 7.37–7.38
- default events 7.47–7.49
- drawdown of loans 7.12–7.14
- financial ratios 7.40–7.46
- increased costs 7.34
- interest payments 7.23–7.25
- market disruption clauses 7.26–7.27
- overview 7.03–7.05
- prepayment 7.17–7.22
- purpose clauses 7.06
- remedies 7.50–7.51
- repayments 7.15–7.16
- representations and
 - warranties 7.35–7.36
- tax gross up 7.31–7.33
- yield protection 7.28–7.30

- Credit support** 8.37
 accounts agreements 7.57
 construction contracts 5.26
 equity bridge loans 7.70, 7.75
 export credit agencies
 guarantees and direct loans 8.11–8.13
 political and comprehensive risk
 coverage 8.14–8.16
 political risk insurance 8.17
 insurance companies 6.47–6.48
 liability of sponsors in restructuring 13.28
 multilateral development banks
 co-financings 8.35–8.36
 overview 8.31–8.34
 reinsurance 6.49
 role of sponsors 2.51–2.53
- Creditors** *see also* **Intercreditor agreements**
 competing issues in bond markets 3.34
 coordinating committees 13.46–13.50
 limitations on options
 absence of adequate security 13.94
 construction phase 13.96–13.97
 contractual rights 13.95
 enforcement 13.99–13.105
 operations phase 13.98
 preferred creditor status 8.37
 restructuring
 central role 13.21–13.26
 coordinating committees 13.46–13.50
 rights under pledges 12.40–12.41
 standstill agreements
 contents 13.66–13.73, 13.67–13.68
 importance 13.61–13.63
 negotiation after insolvency process 13.65
 participants 13.64
- Currencies**
 drawdown of loans 7.12
 export credit agencies 8.49
 multilateral development banks 8.49
 risks
 convertibility 4.45
 overview 4.41–4.43
 revaluation 4.44
 sources of funding 4.49–4.55
 transfer restrictions 4.64
 transferability 4.46–4.48
- Customs duties**
 importance of legal assessment 1.34
- Damages**
 allocation of risk in construction contracts
 agreed damages 5.17
 delay damages 5.22
 liability caps 5.25
 payment schedules 5.19–5.20
 performance damages 5.23
 key provisions in EPC contract App 5
 payment to host governments 2.18
- Debt financing**
see also **Project Bonds; Export credit agencies;**
 Multilateral development banks
 ancillary agreements
 overview 11.01–11.04
 bank lending 3.22–3.26
 equity bridge loans 3.16
 mezzanine debt 3.20–3.21
 objectives of lenders 2.70–2.73
 overview 3.01–3.07
 shareholder loans 3.17–3.19, 11.19–11.21
 types of lender 2.68–2.69
- Default events**
 accounts agreements 7.57
 checklist of sample provisions App 1
 credit agreements 7.47–7.49
 equity bridge loans 7.74
 Islamic finance 10.48, 10.53–10.55
 key provisions of JV or partnership
 agreement App 3
 shareholder funding 11.26
 ‘trigger’ for restructuring
 impact of covenant ‘loosening’ 13.43
 overview 13.38–13.41
 timing and nature of default 13.42
- Delay**
 allocation of risk in construction contracts 5.22
 completion risk 4.14
 delay in start up insurance 6.22
- Délégation** 12.64, 12.66, 12.72–12.76
- Délégation de service public**
 consequences of breach 12.27–12.28
 EU framework 12.14–12.16
 implementation in France 12.17–12.28
 origins 12.02
- Development agencies**
 political risk absorption 4.61
 source of funding 3.46
- Direct agreements**
 civil law jurisdictions
 efficacy 12.177–12.178
 insolvency 12.164–12.171
 rationale 12.127–12.128
 ‘*stipulation pour autrui*’ 12.129–12.132
 documentation 11.105–11.114
- Directors**
 central role in restructuring 13.14–13.20
 liability insurance 6.31
- Disclosure**
 arbitration 14.19–14.20
 bond insurance 3.32
 common arbitration clauses 14.78
 litigation process 14.11
 offering circulars
 competitors 9.57
 description of project 9.55
 financial information 9.69–9.70
 importance 9.53–9.54

- issuer's industry 9.59
 - management 9.61–9.62
 - other indebtedness 9.60
 - preliminary and final offerings 9.71–9.74
 - project agreements 9.56
 - related transactions 9.64
 - risk factors 9.58
 - role of lawyers 9.67–9.68
 - sponsors 9.63
 - taxation 9.65
 - use of proceeds 9.66
- project bonds
 - European Union 9.23–9.27
 - general considerations 3.32
 - other jurisdictions 9.27
 - United States 9.10–9.22
- utmost good faith 6.57–6.61
- Dispute boards** 14.96
- Dispute resolution**
 - see also* **Enforcement and remedies**
 - alternative dispute resolution
 - alternative to arbitration 14.90
 - conciliation 14.91–14.93
 - dispute boards 14.96
 - expert determination 14.94–14.95
 - management resolution 14.97
 - mediation 14.91–14.93
 - arbitration and litigation compared
 - choice determined by
 - documentation 14.06–14.07
 - key features of arbitration 14.14–14.24
 - key features of litigation 14.08–14.13
 - common arbitration clauses
 - applicable language 14.74
 - choice of law 14.85–14.86
 - confidentiality 14.79
 - costs and fees 14.84
 - enforcement of awards 14.81–14.82
 - exclusivity 14.66
 - final and binding effect 14.83
 - importance of addressing key issues 14.64
 - jurisdiction 14.80
 - qualification requirements of arbitrators 14.99
 - scope of arbitration 14.67
 - scope of disclosure 14.78
 - seat of arbitration 14.75–14.77
 - selection of governing institution 14.68–14.69
 - selection of panel 14.70–14.72
 - severability 14.73
 - dependence on enforcement 14.52
 - importance of initial assessment 1.03
 - key provisions in concession agreement App 4
 - key provisions in EPC contract App 5
 - key provisions of JV or partnership agreement App 3
 - means of enforcement 14.01
 - multi-tiered approach 14.87–14.90
 - political risks
 - investment agreements with host
 - country 14.26–14.29
 - regulatory and tax risks 14.25
 - treaty-based protections 14.30–14.51
 - power purchase agreements App 7
- Dividend restrictions**
 - accounts agreements 7.57
 - effect of security over sponsors' interests 11.68
- Documentation**
 - accounts agreements
 - control through 'waterfall' accounts 7.53–7.55
 - key provisions 7.57
 - political risks and local laws 7.56
 - regulation of cash flow 7.52
 - agreements governing relationship between equity investors 2.136
 - ancillary finance agreements
 - direct agreements 11.105–11.114
 - equity support 11.05–11.46
 - overview 11.01–11.4
 - security arrangements 11.47–11.104
 - environmental diligence checklist App 2
 - common arbitration clauses
 - applicable language 14.74
 - choice of law 14.85–14.86
 - confidentiality 14.79
 - costs and fees 14.84
 - enforcement of awards 14.81–14.82
 - exclusivity 14.66
 - final and binding effect 14.83
 - jurisdiction 14.80
 - qualification requirements of arbitrators 14.99
 - scope of arbitration 14.67
 - scope of disclosure 14.78
 - seat of arbitration 14.75–14.77
 - selection of governing institution 14.68–14.69
 - selection of panel 14.70–14.72
 - severability 14.73
 - credit agreements
 - cancellation 7.17–7.22
 - conditions precedent 7.07–7.11
 - covenants 7.37–7.38
 - default events 7.47–7.49
 - drawdown of loans 7.12–7.14
 - financial ratios 7.40–7.46
 - increased costs 7.34
 - interest payments 7.23–7.25
 - market disruption clauses 7.26–7.27
 - overview 7.03–7.05
 - prepayment 7.17–7.22
 - purpose clauses 7.06
 - remedies 7.50–7.51
 - repayments 7.15–7.16
 - representations and warranties 7.35–7.36
 - tax gross up 7.31–7.33
 - yield protection 7.28–7.30
 - ECA covered facilities 7.78–7.79
 - bribery and corruption 7.81–7.82

Documentation (*cont.*)

- ECA covered facilities (*cont.*)
 - conditions precedent 7.96
 - documentation 7.78–7.79
 - eligibility criteria 7.80
 - environmental covenants 7.83–7.91
 - fees and premium 7.98
 - funding issues 8.38–8.39
 - prepayment 7.97
 - role 7.77
 - stapling 7.92–7.94
 - subrogation of rights 7.100
 - voting 7.95
- equity bridge loans
 - credit support 7.70, 7.75
 - default events 7.74
 - drawdown provisions 7.72
 - increasing use 7.69
 - interest payments 7.75
 - repayment clauses 7.73
 - subordination 7.71
- importance of legal assessment 1.54–1.57
- influence of legal opinions
 - local laws 11.119–11.122
 - purpose 11.115–11.118
 - types of opinion 11.123–11.128
- intercreditor agreements
 - core provisions 7.102
 - desirability 7.101
 - drafting and negotiation 7.105–7.108
 - hedge providers 7.129–7.132
 - intercreditor restrictions 7.114–7.116
 - project bonds 7.135–7.137
 - secured creditors 7.104
 - senior lenders 7.110
 - subordinated classes of debt 7.103
 - subordinated creditors 7.111
 - typical creditor classes 7.109
 - value protections 7.117
 - voting 7.118–7.126
- mezzanine debt facility agreements
 - key features 7.63–7.67
 - overview 7.59–7.62
 - selected issues 7.68
- multilateral development banks 8.38–8.39
- process management 1.63
- project bonds
 - auditor's comfort letter 9.91–9.92
 - global notes 9.84
 - intercreditor agreements 9.89
 - offering circulars 9.50–9.74
 - role of lawyers 9.94–9.97
 - security documents 9.90
 - special requirements 1.57, 9.02–9.03
 - trust deeds 9.83, 9.85–9.88
 - underwriting agreement 9.75–9.82
- restructuring 13.83–13.84
- risk allocation

- aims 5.01
- construction contracts 5.16–5.32
- development agreements 5.59–5.65
- force majeure 5.05–5.07
- importance 5.02–5.03
- joint venture agreements 5.15
- negotiation trade offs 5.08–5.13
- operations and maintenance
 - agreements 5.33–5.37
- shareholder agreements 5.15
- site purchase and lease agreements 5.38–5.40
- suppliers 5.54–5.58
- security documentation
 - importance of legal assessment 1.58–1.62
- shareholder senior facilities 7.58
- subordinated shareholder debt 7.71, 7.69

Drawdown provisions

- checklist of sample provisions App 1
- credit agreements 7.12–7.14
- equity bridge loans 7.72
- export credit agencies 8.40
- mezzanine debt facility agreements 7.68
- multilateral development banks 8.40
- standstill agreements 13.70

Due diligence

- as condition precedent 7.08
- environmental diligence checklist App 2
- project bonds 9.37–9.40
- risk allocation 5.10
- risk identification 4.03–4.06
- role of lawyers 1.08

Employer's liability insurance 6.29–6.30

Energy

- allocation of risk in fuel supply
 - agreements 5.54–5.58
- concession agreements
 - allocation of risk in project
 - documentation 5.59–5.65
 - key provisions App 4
 - protection against political risks 14.26
- construction phase 2.90
- domination of sector by large utilities 2.08
- feedstock supply contracts App 6
- fuel suppliers 2.99–2.100
- GPA
 - focus on output of project 2.37
 - governing agreement for procurement 2.33
 - guidance on bidding 2.36
 - key provisions 2.35
 - parties 2.34
- power purchase agreements 12.11–12.12, App 7
- project bonds 9.06
- risks associated with industry 4.40

Enforcement and remedies

- see also* **Dispute resolution**
- arbitral awards
 - common arbitration clauses 14.81–14.82

- early relief 14.105
- established law 14.59
- New York Convention 14.60–14.61
- setting aside 14.106
- Washington Convention 14.62
- civil law jurisdictions
 - direct agreements 12.164–12.171
 - insolvency 12.154–12.157
 - management of insolvency
 - proceedings 12.172–12.173
 - pledges of shares 12.89–12.91
 - public procurement 12.27–12.28
 - security interests 12.158–12.163
- credit agreements 7.50–7.51
- direct agreements 11.107–11.112
- environmental safety 4.74
- governing law 1.48
- intercreditor agreements
 - release of subordinate security 7.128–7.134
 - senior lenders' rights of enforcement and release 7.127
 - subordinate creditor value protections 7.117
- judgments
 - civil law jurisdictions 14.56
 - cross-border issues 14.53
 - England and Wales 14.55
 - international regimes 14.57–14.58
 - United States 14.54
 - waiver of defences 14.104
- key to dispute resolution 14.52
- legal opinions 11.127–11.128
- mezzanine debt facility agreements 7.68
- mortgages over real property 12.49
- OHADA 12.196
- restructuring
 - limitations on creditors' options 13.99–13.105
 - options generally available 13.90–13.91
- security documentation
 - lender's approach 11.56
 - rationale 11.60–11.64
- shareholder funding 11.26–11.27
- Engineering, procurement and construction**
 - see* **EPC contracts**
- Environmental impacts**
 - advisers and consultants 2.41
 - checklist for due diligence App 2
 - export credit agencies 8.43–8.44
 - general risks 4.71–4.80
 - importance of legal assessment 1.41–1.43
 - multilateral development banks 8.43–8.44
 - OECD Recommendations 7.83–7.91
 - role of host governments 2.25, 2.23
- EPC contracts**
 - credit support 5.26
 - delay damages 5.22
 - general provisions 5.16–5.18
 - jurisdictional relevance 11.48
 - key provisions App 5
 - liability caps 5.25
 - multiple procurement contracts 5.27–5.29
 - payment schedules 5.19–5.20
 - performance damages 5.23
 - scheduling guarantees 5.21
 - 'split' contracts 5.31–5.32
 - warranties 5.24
- Equator Principles**
 - general adoption 1.43
 - management of environmental and social risk 4.77–4.78
- Equity bridge loans**
 - facility agreements
 - credit support 7.70, 7.75
 - default events 7.74
 - drawdown provisions 7.72
 - interest payments 7.75
 - repayment clauses 7.73
 - separate loan agreement 7.76
 - subordination 7.71
 - source of funding 3.16
- Equity investors**
 - agreements governing relationship 2.135–2.137
 - ancillary agreements for support
 - capital contributions 11.10–11.30
 - completion 11.31–11.41
 - overview 11.05–11.09
 - post completion 11.42–11.46
 - assessment of optimal sources 3.09–3.12
 - dilution and cross-charge
 - mechanisms 2.138–2.139
 - financial role 2.65–2.67
 - new equity during restructuring 13.89
 - as project originators 2.42–2.59
 - risk 3.08, 5.15
 - selecting ownership structure
 - government involvement 2.114–2.117
 - more than one participant 2.118
 - shareholder senior facilities 7.58
 - sources of funding
 - equity bridge loans 3.16
 - overview 3.01–3.07
 - subordinated shareholder debt 3.17–3.19
 - typical participation 3.13–3.15
 - status in restructuring 13.31
- European Union**
 - competition law 4.99–4.103
 - corrupt practices and money
 - laundering 4.104–4.112
 - export credit agencies 3.43, 8.03
 - multilateral development banks 8.06
 - multilateral lending institutions 3.48
 - project bonds
 - disclosure 9.23–9.27
 - governing law 9.35–9.36
 - selling restrictions 9.33
 - public procurement
 - consequences of breach 12.27–12.28

- European Union** (*cont.*)
 public procurement (*cont.*)
 EU framework 12.14–12.16
 implementation in France 12.17–12.28
 reliability of local law and courts 1.36
 right to impose sanctions 4.68
- Events of default** *see* Default events
- Expert determination** 14.94–14.95
- Export credit agencies**
see also Multilateral development banks
 accommodation of Islamic finance 10.24
 Berne Union 8.29
 conditions precedent 7.11
 covered facilities
 additional conditions precedent 7.96
 bribery and corruption 7.81–7.82
 eligibility criteria 7.80
 environmental covenants 7.83–7.91
 fees and premium 7.98
 prepayment 7.97
 role 7.77
 stapling 7.92–7.94
 subrogation of rights 7.100
 voting 7.95
 credit alternatives
 guarantees and direct loans 8.11–8.13
 political and comprehensive risk
 coverage 8.14–8.16
 political risk insurance 8.17
 working capital facilities 8.18
 defined 8.03
 differing mandates 8.04
 documentation requirements 1.45–1.47
 drawdown of loans 7.12
 funding considerations 8.10
 funding issues
 documentation 8.38–8.39
 drawdown provisions 8.40
 environmental and social
 considerations 8.43–8.44
 intercreditor agreements 8.41–8.42
 monitoring requirements 8.45
 government backing 8.02
 impact of credit crisis 8.50–8.52
 importance 8.01
 infrastructure development programmes 3.05
- OECD Arrangement on Export Credits
 applicable rules 8.19
 avoidance of distortion in global
 trade 8.20–8.23
 Helsinki Package of tied aid 8.27–8.28
 minimum interest rates 8.25–8.26
 ‘starting point of credit’ 8.24
- Prague Club 8.30
 recent trends
 ‘cooperation’ agreements 8.47–8.48
 local currency options 8.49
 source of funding 3.40–3.44
- Expropriation**
 default events 7.49
 political risks 4.63
 treaty-based protection 14.31
- Fair and equitable treatment** 14.32–14.34
- Feedstock supply** App 5
- Fiducie regime** 12.119–12.126
- Finance**
 alternative financing
 bond markets 2.74
 Islamic finance 2.75
 swaps 2.76
 debt financing
 objectives of lenders 2.70–2.73
 types of lender 2.68–2.69
 equity finance 2.65–2.67
 example financial structure 2.63
 financial collateral 11.89–11.90, 11.96–11.100
 overview 2.63–2.64
 selecting ownership structure 2.120
 sources of funding
 assessment of optimal sources 3.09–3.12
 bank lending 3.22–3.26
 bond markets 3.28–3.37
 commitment letters 3.63–3.68
 equity investors 3.13–3.19
 Islamic finance 3.27
 issues for prospective lenders 3.91–3.100
 lease structures 3.53–3.54
 letters of intent 3.55–3.58
 mandate letters 3.69–3.84
 market flex provisions 3.101–3.108
 mezzanine debt 3.20–3.21
 multilateral lending institutions 3.45–3.52
 overview 3.01–3.07
 public sector lenders 3.38–3.39
 term sheets 3.59–3.62
- Financial ratios** 7.35–7.36
 assessment of optimal debt sources 3.09
 project bonds 9.88
 terms of credit agreement
 backward and forward DSCR 7.45
 importance of accuracy and review 7.46
 LLCR 7.45
 overview 7.40–7.44
- Firm commitment underwriting** 9.43
- Fixed charges** 11.91–11.95
- Floating charges** 11.91–11.95
- Force majeure**
 civil law jurisdictions 12.138–12.142
 concession agreements App 4
 EPC contracts App 5
 feedstock supply contracts App 6
 insurance
 insurability 6.41
 natural causes 6.39
 political causes 6.40

- operations and maintenance agreements App 8
- power purchase agreements App 7
- risk allocation 5.05–5.07
- risk assessment 4.83–4.89
- Forum**
 - importance of legal assessment 1.49–1.52
 - political risks 4.70
- Forward sale structures** 2.147
- France** *see* **Civil law jurisdictions; European Union**
- Frustration of contracts** 4.90–4.96, 5.03
- Full value coverage** 6.38
- Further assurances clauses** 11.51–11.53
- Global notes** 9.84
- Governing law**
 - choice of forum 1.49–1.52
 - choice of law 1.45–1.47
 - common arbitration clauses 14.85–14.86
 - enforceability 1.48
 - feedstock supply contracts App 6
 - key provisions in concession agreement App 4
 - key provisions of JV or partnership agreement App 3
 - overview 1.44
 - political risks 4.70
 - power purchase agreements App 7
 - project bonds 9.35–9.36
 - security documentation
 - bank accounts 11.88
 - contractual rights 11.77–11.80
 - land and buildings 11.70–11.74
 - sponsors' interests 11.68
 - sovereign immunity 1.53
 - Wakala* agreements 10.38–10.39
- Governments**
 - see also* **Export credit agencies; Multilateral development banks**
 - allocation of risk in project
 - documentation 5.59–5.65
 - approach to industrial regulation 1.21–1.23
 - avoidance of political risks
 - investment agreements with host country 14.26–14.29
 - overview 14.25
 - bidding process 2.32–2.37
 - concession agreements
 - allocation of risk in project
 - documentation 5.59–5.65
 - key provisions App 4
 - protection against political risks 14.26
 - goal as project originator
 - attracting new capital 2.26–2.29
 - competitive advantage 2.31
 - minimization of costs 2.12–2.13
 - risk transfer 2.14–2.23
 - safety and efficiency 2.24–2.25
 - technology development and training 2.30
 - importance of legal assessment 1.45–1.47
 - 'official' funding sources 8.07–8.09
 - political risks
 - breaches of contract and denial of justice 4.66–4.70
 - currency transfer restrictions 4.64
 - expropriation 4.63
 - insurability 6.40
 - overview 4.56–4.62
 - war and civil disturbance 4.65
 - public procurement in civil law jurisdictions
 - EU framework 12.14–12.16
 - implementation in France 12.17–12.28
 - public procurement rules 4.97–4.98
 - public sector lenders
 - export credit agencies 3.40–3.44
 - overview 3.38–3.39
 - role in restructuring 13.35
 - selecting ownership structure 2.114–2.117
 - sovereign immunity 1.53
 - state aid
 - competition law 4.103
 - OECD Arrangement on Export Credits 8.20–8.23
- Guarantees**
 - completion risk 4.13
 - ECA covered facilities 7.77
 - export credit agencies 8.11–8.13
 - key provisions in EPC contract App 5
 - operations and maintenance 2.98
 - scheduling guarantees 5.21
- Health and safety** 2.23–2.25
- Helsinki Package** 8.27–8.28
- Huissier** 12.67, 12.83
- Ijarab** 10.19–10.21
 - lease structures
 - general principles 10.45–10.49
 - late payment fees 10.57
 - mandatory repayment 10.53–10.55
 - service agency agreements 10.58
 - total loss of assets 10.56
 - voluntary prepayment 10.50–10.52
- Immigration law** 1.34
- Imprévision** 12.141
- Information gathering**
 - see also* **Offering circulars**
 - due diligence
 - conditions precedent in credit agreements 7.08
 - environmental diligence checklist App 2
 - project bonds 9.37–9.40
 - restructuring process 13.58–13.60
 - risk allocation 5.10
 - risk identification 4.03–4.06
 - role of lawyers 1.08
 - financial information 13.54–13.57
 - restructuring process 13.51–13.53

Infrastructure

- construction phase
 - access needs 2.89
 - housing and social development requirements 2.91
 - overview 2.87–2.88
 - power and water 2.90
- development programmes 3.05
- role of export credit agencies 3.41
- role of host governments 2.21–2.22

INSOL 13.25

Insolvency

- see also* **Creditors; Restructuring**
- civil law jurisdictions
 - default events 12.145
 - direct agreements 12.164–12.171
 - enforcement of security 12.154–12.157
 - management of insolvency proceedings 12.172–12.173
- default events 7.48–7.49
- importance of proper documentation 1.62
- intercreditor agreements 7.113
- role of reinsurance 6.50–6.53

Insurance

- 'average clause' 6.68
- breaches of contract and denial of justice 4.66
- breadth and scope of losses covered
 - force majeure 6.39–6.41
 - full value coverage 6.38
 - standard exclusions 6.42–6.44
- broker's letter of undertaking
 - customary provisions 6.91–6.92
 - purpose 6.90
 - reinsurance 6.93
- creditworthiness of risk carriers 6.47–6.48
- currency transfer restrictions 4.64
- general issues 4.81
- general legal principles 6.68–6.70
 - amendments to cover 6.88–6.89
 - assignment of policies 6.83–6.85
 - contribution 6.71–6.72
 - insurable interests 6.65–6.67
 - joint insurance 6.62–6.64
 - lenders' interests 6.76–6.78
 - loss payee provisions 6.86
 - subrogation 6.73–6.75
 - utmost good faith and disclosure 6.57–6.61
 - vitiation and invalidation 6.79–6.82
 - waiver of rights 6.87
- key provisions in EPC contract App 5
- operations and maintenance agreements App 8
- participants 6.12
- political risks 4.60–4.62, 14.44–14.48
- procurement and maintenance 6.45–6.46
- project bonds 9.38
- project company control 6.32–6.36
- reinsurance

- credit issues 6.49
- market practices 6.54–6.55
- protection against insolvency 6.50–6.53
- risks covered
 - automobile insurance 6.28
 - consequential loss 6.22–6.23
 - directors' liability 6.31
 - employer's liability 6.29–6.30
 - general liability insurance 6.24–6.26
 - material damage 6.12–6.15
 - overview 6.10–6.11
 - property damage 6.18–6.19
 - sabotage and terrorism 6.20–6.21
 - transit of goods 6.16–6.17
 - security documentation 11.104

Intercreditor agreements

- core provisions 7.102
- desirability 7.101
- drafting and negotiation 7.105–7.108
- enforcement and release 7.128–7.134
- export credit agencies 8.41–8.42
- intercreditor restrictions 7.114–7.116
- multilateral development banks 8.41–8.42
- project bonds 3.34, 7.135–7.137, 9.89
- secured creditors 7.104
- selected issues 7.112–7.113
- senior lenders 7.110
- subordinated creditors 7.111
- typical creditor classes 7.109
- value protections 7.117
- voting
 - calculation of entitlements 7.123
 - common structures 7.126
 - overview 7.118–7.122
 - regulation of entitlements 7.124–7.125

Interest payments

- credit agreements 7.23–7.25
- default events 7.47
- equity bridge loans 7.75
- mezzanine debt facility agreements 7.63
- OECD Arrangement on Export Credits 8.25–8.26
- standstill agreements 13.69

International Bank for Reconstruction and Development (IBRD)

- membership of World Bank 8.33
- source of funding 3.47

International Development Association (IDA)

- membership of World Bank 8.33
- source of funding 3.47

International Finance Corporation (IFC)

- environment and social risks 4.76
- environmental and social responsibilities 1.42
- membership of World Bank 8.33
- source of funding 3.47

International Swaps and Derivatives Association (ISDA) 4.55

- International Union of Credit (IUC)** 8.29
- Islamic finance**
- accommodation of conventional structures 10.24
 - importance 10.01–10.02
 - mainstream consideration 3.27
 - manifestation of divine law 10.04–10.07
 - multi-tranche financing 10.26–10.31
 - integration with conventional techniques 10.62–10.64
 - Istisna'a* agreements 10.42–10.44
 - lease structures 10.45–10.58
 - risk assessment 10.23
 - role of scholars and regulators 10.08–10.09
 - Sharia'a* law
 - documentation of transactions 1.57
 - enforceability 1.48
 - source of funding 2.75
 - types of transaction
 - Ijarah* 10.19–10.21
 - Istisna'a* 10.18
 - Mudarabah* 10.15
 - Murabaha* 10.17
 - Musharaka* 10.16
 - profit and loss sharing techniques 10.14
 - Sukuk* 10.22
 - underlying principles 10.10–10.13
 - Istisna'a*
 - general principles 10.18
 - multi-tranche financing agreement
 - general principles 10.42–10.43
- Joint insurance** 6.62–6.64
- Joint venture agreements**
- overview of key provisions App 3
 - risk allocation 5.15
 - unincorporated joint ventures
 - complexities 2.131
 - defined 2.129
 - important features 2.130
- Jurisdiction**
- see also* **Civil law jurisdictions**
 - arbitration
 - common arbitration clauses 14.80
 - 'jurisdiction' clauses 14.07
 - limitations on creditors' remedies 13.99–13.101
 - litigation 14.07
 - operation and maintenance 11.48
- Land and buildings** 11.70–11.74
- Language**
- common arbitration clauses 14.74
 - process management 1.63
- Lawyers**
- see also* **Legal issues; Litigation**
 - drafting of offering circulars 9.67–9.68
 - negotiation role 2.78
 - operational role 2.104
 - risk identification 4.05
- Lease structures**
- allocation of risk in project
 - documentation 5.38–5.40
 - Islamic finance
 - general principles 10.45–10.49
 - late payment fees 10.57
 - mandatory repayment 10.53–10.55
 - service agency agreements 10.58
 - total loss of assets 10.56
 - voluntary prepayment 10.50–10.52
 - source of funding 3.53–3.54
- Legal issues**
- see also* **Governing law; Local laws**
 - assessment of local laws and regulations
 - changes in law 1.39–1.40
 - corporate governance 1.16–1.17
 - customs and immigration 1.34
 - industrial regulation 1.18–1.23
 - overview 1.15
 - permitting 1.24–1.25
 - reliability of local law and courts 1.35–1.38
 - taxation 1.28–1.34
 - complexities of diverse markets 1.04
 - environmental impact 1.41–1.43
 - finance documentation 1.54–1.57
 - focus on risk 1.01
 - governing law
 - choice of forum 1.49–1.52
 - choice of law 1.45–1.47
 - enforceability 1.48
 - overview 1.44
 - sovereign immunity 1.53
 - insurance
 - amendments to cover 6.88–6.89
 - assignment of policies 6.83–6.85
 - contribution 6.71–6.72
 - insurable interests 6.65–6.67
 - joint insurance 6.62–6.64
 - lenders' interests 6.76–6.78
 - loss payee provisions 6.86
 - subrogation 6.73–6.75
 - utmost good faith and disclosure 6.57–6.61
 - valuation of subject matter 6.68–6.70
 - vitiation and invalidation 6.79–6.82
 - waiver of rights of subrogation 6.87
 - overall risk assessment 1.07–1.10
 - process management 1.63–1.64
 - project bonds
 - disclosure 9.09–9.27
 - securities regulation 9.07–9.08
 - relevant disciplines
 - importance 1.05
 - overview 1.06
 - security documentation 1.58–1.62
 - social considerations 1.41–1.43

- Legal opinions**
 local law 11.119–11.122
 project bonds 9.94–9.97
 purpose 11.115–11.118
 types of opinion
 corporate opinions 11.124–11.126
 enforcement 11.127–11.128
 overview 11.123
- Lenders** *see* **Debt financing**
- Letters of intent** 3.55–3.58
- Lex situs** 1.59
- Liability insurance**
 automobile insurance 6.28
 directors' liability insurance 6.31
 employer's liability 6.29–6.30
 general liability insurance 6.24–6.26
- Licenses** *see* **Permitting**
- Limited liability partnerships** 2.134
- Liquidated damages**
 key provisions in EPC contract App 5
 payment to host governments 2.18
- Listed bonds** 9.98–9.100
- Litigation**
see also **Arbitration**
 disclosure of documents 14.11
 enforcement of judgments
 civil law jurisdictions 14.56
 cross-border issues 14.53
 England and Wales 14.55
 international regimes 14.57–14.58
 United States 14.54
 waiver of defences 14.104
 judgments and appeals 14.12
 'jurisdiction' clauses 14.07
 lack of flexibility 14.13
 quick provisional remedies 14.10
 service of claim 14.09
 structuring for permissive joinder 14.102
 variation between countries 14.08
- Loan Market Association (LMA)**
 absence of standard documentation 1.56
 intercreditor agreements 7.108
- Loan Syndications and Trading Association (LSTA)** 1.56
- Local laws**
see also **Governing law; Political risks**
 accounts agreements 7.56
 environmental diligence checklist App 2
 condition precedent in credit agreements 7.08
 financial collateral arrangements 11.89–11.90,
 11.96–11.100
 general risks
 environmental safety 4.73
 procurement rules 4.97–4.98
 key provisions in concession agreement App 4
 legal assessment of host countries
 changes in law 1.39–1.40
 corporate governance 1.16–1.17
 industrial regulation 1.18–1.19
 overview 1.11–1.15
 permitting 1.24–1.25
 reliability of local law and courts 1.35–1.38
 taxation 1.26–1.34
 legal opinions 11.119–11.122
 revenue risks for off-takers 4.29
 selecting ownership structure 2.119
 special purpose companies 2.128
- Mandate letters** 3.69–3.84
- Marché public** 12.03
- Market disruption clauses** 7.26–7.27
- Market flex provisions** 3.101–3.108
- 'Market-out' clauses** 9.80
- Marketing agreements** 5.47
- Material adverse changes**
 issues for prospective lender 3.91–3.100
 lender requirements 3.85–3.87
 sample clauses 3.88–3.90
 'trigger' for restructuring 13.44–13.45
- Material damage insurance** 6.12–6.15
- Mediation** 14.91–14.93
- Mezzanine debt**
 facility agreements
 key features 7.63–7.67
 overview 7.59–7.62
 selected issues 7.68
 senior lenders' rights of enforcement 7.127
 senior lenders' rights to release 7.128–7.134
 source of funding 3.20–3.21
- Middle East**
 export credit agencies 8.03
 importance of Islamic finance 10.01–10.02
 multilateral development banks 8.06
 multilateral lending institutions 3.48
 parties to GPA 2.34
 reliability of local law and courts 1.36
 selecting ownership structure 2.116
- Millennium Challenge Corporation (MCC)** 8.07
- Money laundering** 4.104–4.112
- Moratorium** *see* **Standstill agreements**
- Mortgages over real property**
 civil law jurisdictions 12.43
 cost 12.50
 enforcement 12.48–12.49
 lender's lien 12.51–12.53
 nature and form 12.44–12.47
- Mudarabah** 10.15
- Multilateral development banks**
see also **Export credit agencies**
 alternative source of funding 3.45–3.52
 credit alternatives
 co-financings 8.35–8.36
 overview 8.31–8.34
 preferred creditor status 8.37

- defined 8.05–8.06
- drawdown of loans 7.12
- environment and social risks 4.76
- funding considerations 8.10
- funding issues
 - documentation 8.38–8.39
 - drawdown provisions 8.40
 - environmental and social considerations 8.43–8.44
 - intercreditor agreements 8.41–8.42
 - monitoring requirements 8.45
- government backing 8.02
- impact of credit crisis 8.50–8.52
- importance 8.01
- local currency options 8.49
- Multilateral Investment Guarantee Agency (MIGA)**
 - alternative source of funding 3.47
 - membership of World Bank 8.33
 - political risks cover 14.45, 14.48
- Multiple procurement contracts** 5.27–5.29
- Murabaha**
 - general principles 10.17
 - multi-tranche financing, 10.63
- Musharaka**
 - general principles 10.16
- Nantissement de materiel et outillage** 12.54, 12.58–12.60
- Non-discrimination** 14.35
- Off-take agreements**
 - allocation of risk in project documentation
 - marketing agreements 5.47
 - power purchase agreements 5.48–5.53
 - take or pay contracts 5.43–5.45
 - tolling contracts 5.46
 - various types of agreement 5.41–5.42
 - competition law risks 4.100–4.101
 - jurisdictional relevance 11.48
 - power purchase agreements
 - allocation of risk in project documentation 5.48–5.53
 - key provisions App 7
 - public procurement 12.11–12.12
 - revenue risks 4.23–4.29
 - role 2.101–2.103
- Offering circulars**
 - categories of information
 - competitors 9.57
 - description of project 9.55
 - financial information 9.69–9.70
 - importance 9.53–9.54
 - issuer's industry 9.59
 - management 9.61–9.62
 - other indebtedness 9.60
 - preliminary and final offerings 9.71–9.74
 - project agreements 9.56
 - related transactions 9.64
 - risk factors 9.58
 - role of lawyers 9.67–9.68
 - sponsors 9.63
 - taxation 9.65
 - use of proceeds 9.66
 - importance 9.50
 - US requirements 9.51–9.52
- Officers' liability insurance** 6.31
- Operations and maintenance agreements**
 - allocation of risk in project
 - documentation 5.33–5.37
 - jurisdictional relevance 11.48
 - key provisions App 8
- Operations phase**
 - accounts agreements 7.57
 - advisers and consultants 2.104
 - allocation of risk in project
 - documentation
 - off-take agreements 5.41–5.53
 - operations and maintenance agreements 5.33–5.37
 - example structure 2.93
 - general risks 4.30–4.33
 - force majeure 4.83–4.89
 - supervening events 4.82
 - guarantors 2.98
 - limitations on creditors' options 13.98
 - non-discrimination by host company 14.35
 - off-takers 2.101–2.103
 - overview 2.94–2.95
 - role of operator 2.95–2.97
 - suppliers 2.99–2.100
 - transfers of ownership 2.105–2.109
- Operators**
 - preference for arbitration 14.24
 - role 2.95–2.97
 - treaty-based protection against political risks 14.41
- Organisation for Economic Cooperation and Development (OECD)**
 - Arrangement on Export Credits
 - avoidance of distortion in global trade 8.20–8.23
 - Helsinki Package of tied aid 8.27–8.28
 - minimum interest rates 8.25–8.26
 - 'starting point of credit' 8.24
 - environmental covenants 7.83–7.91
 - guidelines in bribery and corruption 7.81–7.82
- Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA)**
 - content of laws 12.198–12.201
 - French influence 12.188–12.189
 - importance 12.182–12.184
 - institutions 12.192–12.197
 - member States 12.190–12.191
 - objectives 12.185–12.187

Overseas Private Investment Corporation (OPIC)

- 'official' funding sources 8.07
- political risks cover 14.45, 14.48

Ownership *see* Structures

Participants

- allocation of rights and obligations 2.01–2.02
- construction phase
 - advisers and consultants 2.92
 - contractors 2.83–2.86
 - energy and infrastructure 2.87–2.91
 - example structure 2.93
 - overview 2.81–2.82
 - preparations for operation stage 2.93
- corporate legal opinions 11.124–11.126
- financing stage
 - advisers and consultants 2.77
 - alternative financing 2.74–2.76
 - debt financing 2.68–2.73
 - equity finance 2.65–2.67
 - lawyers 2.78
 - overview 2.63–2.64
- general risks 4.113–4.114
- insurance 6.12
- operations phase
 - advisers and consultants 2.104
 - example structure 2.93
 - guarantors 2.98
 - off-takers 2.101–2.103
 - overview 2.94–2.95
 - role of operator 2.95–2.97
 - suppliers 2.99–2.100
 - transfers of ownership 2.105–2.109
- project origination
 - host governments 2.09–2.37
 - overview 2.05–2.08
 - private sponsors and equity investors 2.42–2.59
 - project companies 2.60–2.62
- restructuring
 - creditors 13.21–13.26
 - governments 13.35
 - implementation of agreement 13.81–13.82
 - motives and aspirations 13.11–13.13
 - other parties 13.36
 - project companies 13.14–13.20
 - sponsors 13.27–13.31
 - underlying project parties 13.32–13.34
- standstill agreements 13.64
- treaty-based protection against political risks
 - consent to arbitration 14.42–14.43
 - contractors 14.40
 - lenders 14.39
 - operators 14.41
 - requirements 14.37
 - sponsors 14.38
- variations according to circumstance 2.04

Partnerships

- advantages 2.132
- hybrid entities 2.134
- important features 2.133
- overview of key provisions of a Joint Venture or Partnership Agreement App 3

Permitting

- default events 7.49
- importance of legal assessment 1.24–1.25
- project bonds 9.38
- role of host governments 2.29
- underwriting agreements 9.77

Personnel *see* Skills and personnel

Political risks

- accounts agreements 7.56
- breaches of contract and denial of justice 4.66–4.70
- currency transfer restrictions 4.64
- dispute resolution
 - investment agreements with host country 14.26–14.29
 - regulatory and tax risks 14.25
- ECA coverage
 - comprehensive risk coverage 8.14–8.16
 - insurance 8.17
- expropriation 4.63
- insurability 6.40
- insurance 14.44–14.48
- optimal structures to minimize risks 14.49–14.51
- overview 4.56–4.62
- treaty-based protection
 - expropriation 14.31
 - fair and equitable treatment 14.32–14.34
 - non-discrimination 14.35
 - potentially eligible participants 14.37–14.41
 - umbrella clauses 14.36
 - war and civil disturbance 4.65

Post completion support 11.42–11.46

Power purchase agreements

- allocation of risk in project
 - documentation 5.48–5.53
- key provisions App 7
- public procurement 12.11–12.12

Prague Club 8.30

Preferred creditor status 8.37

Prepayment

- credit agreements 7.17–7.22
- ECA covered facilities 7.97
- Islamic finance
 - mandatory repayment 10.53–10.55
 - voluntary prepayment 10.50–10.52

Price

- EPC contracts App 5
- feedstock supply contracts App 6
- power purchase agreements App 7

Priority

- see also* Intercreditor agreements

- accounts agreements 7.57
- civil law jurisdictions 12.40–12.41
- mezzanine debt facility agreements 7.67
- new equity during restructuring 13.89
- shareholder senior facilities 7.58
- subordinated debt
 - capital contributions 11.15
 - facility agreements 7.69, 7.71
 - source of funding 3.17–3.19
- Privatizations** 2.148
- Process management** 1.63–1.64
- Procurement**
 - see also* EPC contracts
 - allocation of risk in multiple procurement contracts 5.27–5.29
- GPA**
 - focus on output of project 2.37
 - governing agreement 2.33
 - guidance on bidding 2.36
 - key provisions 2.35
 - parties 2.34
- insurance 6.45–6.46
- public procurement in France
 - 'cession Dailly' 12.104–12.109
 - consequences of breach 12.27–12.28
 - EU framework 12.14–12.16
 - hedging breakage costs 12.149–12.153
 - implementation 12.17–12.28
 - indemnification by public authority 12.104–12.109
 - 'stipulation pour autrui' 12.129–12.132
- public procurement rules 4.97–4.98
- Project bonds**
 - 'cross-contamination' challenges 7.135–7.137
 - disclosure
 - European Union 9.23–9.27
 - general considerations 3.32
 - other jurisdictions 9.27
 - United States 9.10–9.22
 - documentation
 - agreements among underwriters 9.93
 - auditor's comfort letter 9.91–9.92
 - global notes 9.84
 - intercreditor agreements 9.89
 - offering circulars 9.50–9.74
 - overview 9.49
 - role of lawyers 9.94–9.97
 - security documents 9.90
 - special requirements 1.57, 9.02–9.03
 - trust deeds 9.83, 9.85–9.88
 - underwriting agreement 9.75–9.82
 - due diligence 9.37–9.40
 - general considerations
 - competing intercreditor issues 3.34
 - disclosure 3.32
 - negative arbitrage 3.36
 - one-time funding 3.37
 - overview 3.28–3.31
 - waivers and amendments 3.33
 - importance 9.06
 - legal issues
 - disclosure 9.09–9.27
 - governing law 9.35–9.36
 - securities regulation 9.07–9.08
 - selling restrictions 9.28–9.34
 - listing 9.98–9.100
 - rapid evolution 9.04–9.05
 - role in restructuring 13.36
 - selling restrictions
 - European Union 9.33
 - other jurisdictions 9.34
 - United States 9.29–9.32
 - source of finance 2.74
 - source of funding 9.01
 - underwriting process
 - bank lending distinguished 9.41
 - 'roadshow' meetings with prospective investors 9.45–9.48
 - types of underwriting 9.42–9.44
- Project companies**
 - central role in restructuring 13.14–13.20
 - control of insurance programme 6.06, 6.32–6.36
 - direct agreements 11.105–11.114
 - key provisions in concession agreement App 4
 - role as project originators 2.60–2.62
 - security over assets
 - bank accounts 11.86–11.88
 - contractual rights 11.75–11.82
 - land and buildings 11.70–11.74
 - plant and equipment 11.70–11.74
 - receivables 11.83–11.85
- Project finance**
 - allocation of rights and obligations 2.01–2.02
 - expansion into new regions and industries 1.04
 - form of secured lending 1.01
 - Islamic techniques 10.23
 - origins in civil law jurisdictions 12.01–12.05
 - risk assessment 4.01–4.02
- Promotion et Participation pour la Coopération Économique (PROPARCO)** 8.07
- Property damage insurance** 6.18–6.19
- Public ownership**
 - public private partnerships in France
 - affermage* distinguished 12.07
 - legislative basis 12.09
 - role of host governments at end of project 2.20
- Public sector agencies**
 - export credit agencies 3.40–3.44
 - overview 3.38–3.39
 - role in restructuring 13.35
- Purpose clauses**
 - credit agreements 7.06
 - mezzanine debt facility agreements 7.68

- Receivables**
 - assignment 11.83–11.85
- Regulation**
 - see also* **Political risks**
 - dispute resolution 14.25
 - environmental diligence checklist App 2
 - fair and equitable treatment 14.32–14.34
 - government approaches 1.21–1.23
 - importance of legal assessment 1.18–1.23
 - legal assessment of host countries 1.18–1.19
 - overview 1.11–1.15
 - power purchase agreements App 7
 - project bonds 9.07–9.08
- Reinsurance**
 - broker's letter of undertaking 6.93
 - credit issues 6.49
 - market practices 6.54–6.55
 - protection against insolvency 6.50–6.53
- Remedies** *see* **Enforcement and remedies**
- Repayment clauses**
 - credit agreements 7.15–7.16
 - equity bridge loans 7.73
 - mezzanine debt facility agreements 7.68
- Representations**
 - checklist of sample provisions App 1
 - default events 7.48–7.49
 - feedstock supply contracts App 6
 - project bonds 9.40
 - terms of credit agreement 7.35–7.36
 - underwriting agreements 9.77–9.78
- Reservation of rights** 13.41, 13.73
- Restructuring**
 - amount of ongoing debt 13.80
 - corporate restructuring
 - distinguished 13.04–13.06
 - defined 13.01
 - documentation 13.83–13.84
 - implementation of agreement 13.81–13.82
 - key factors 13.10
 - limitations on creditors' options
 - absence of adequate security 13.94
 - construction phase 13.96–13.97
 - contractual rights 13.95
 - enforcement 13.99–13.105
 - operations phase 13.98
 - need to re-assess risk 13.07–13.09
 - options generally available
 - additional equity 13.89
 - debt for equity swaps 13.92–13.93
 - enforcement of security 13.90–13.91
 - re-setting of covenants 13.86–13.88
 - overview 13.03
 - participants
 - creditors 13.21–13.26
 - governments 13.35
 - motives and aspirations 13.11–13.13
 - other parties 13.36
 - project companies 13.14–13.20
 - sponsors 13.27–13.31
 - underlying project parties 13.32–13.34
 - process
 - default 'triggers' 13.38–13.43
 - formal organization of
 - creditors 13.46–13.50
 - information gathering 13.51–13.65
 - material adverse change
 - 'trigger' 13.44–13.45
 - overview 13.37
 - rationale 13.02
 - standstill agreements
 - contents 13.66–13.73
 - importance 13.61–13.63
 - negotiation after insolvency process 13.65
 - participants 13.64
 - substantive negotiations 13.74
 - valuations
 - English approach 13.77–13.79
 - importance 13.75
 - key assumptions 13.76
- Revaluation of currencies** 4.44
- Risk**
 - see also* **Insurance**
 - allocation in project documentation
 - aims 5.01
 - concession and development agreements 5.59–5.65
 - construction contracts 5.16–5.32
 - force majeure 5.05–5.07
 - importance 5.02–5.03
 - joint venture agreements 5.15
 - off-take agreements 5.41–5.53
 - operations and maintenance agreements 5.33–5.37
 - shareholder agreements 5.15
 - site purchase and lease agreements 5.38–5.40
 - suppliers 5.54–5.58
 - apportionment within Islamic finance 10.23
 - disclosure in offering circulars 9.58
 - disputes arising 14.03–14.05
 - due diligence 4.03–4.06
 - ECA coverage
 - political and comprehensive risk coverage 8.14–8.16
 - political risk insurance 8.17
 - environmental diligence checklist App 2
 - equity investors 3.08
 - focus of lawyers 1.01
 - foundation of project financing 4.01–4.02
 - general issues
 - competition law 4.99–4.103
 - completion risk 4.07–4.22
 - corrupt practices 4.104–4.112
 - currency 4.41–4.55
 - environment and social risks 4.71–4.80
 - force majeure 4.83–4.89
 - frustration 4.90–4.96

- insurance 4.81
 - money laundering 4.104–4.112
 - off-takers 4.23–4.29
 - operations phase 4.30–4.33
 - participant risk 4.113–4.114
 - political risks 4.56–4.70
 - procurement rules 4.97–4.98
 - supervening events 4.82
 - suppliers 4.34–4.40
 - importance of legal assessment
 - changes in law 1.40
 - overall risk assessment 1.07–1.10
 - permitting 1.25
 - limitations on creditors' remedies
 - jurisdiction risk 13.99–13.101
 - project contract risk 13.102–13.105
 - permitted investments 11.102
 - restructuring
 - underlying rationale 13.07–13.09
 - role of host governments 2.14–2.23
 - role of operator 2.97
- Sabotage insurance** 6.20–6.21
- Security documentation**
- ancillary agreements
 - bank accounts 11.86–11.88
 - contractual rights 11.75–11.82
 - financial collateral arrangements 11.89–11.90, 11.96–11.100
 - fixed or floating charges 11.91–11.95
 - further assurances clauses 11.51–11.53
 - insurance 11.104
 - lender's approach 11.55–11.58
 - overview 11.47–11.50
 - permitted investments 11.101–11.103
 - project companies' assets 11.70–11.74
 - rationale 11.59–11.65
 - receivables 11.83–11.85
 - sponsors' interests 11.66–11.69
 - changes resulting from standstill 13.71
 - civil law jurisdictions
 - mortgages over real property 12.43–12.53
 - overview 12.42
 - pledges over business assets 12.29–12.41
 - pledges over intangible
 - property 12.61–12.126
 - pledges over tangible property 12.54–12.60
 - importance of legal assessment 1.58–1.62
 - intercreditor agreements 7.104
 - project bonds 9.90
 - release of subordinate security 7.128–7.134
- Senior lenders**
- central role in restructuring 13.23
 - intercreditor agreements
 - consent to amendments 7.117
 - drafting and negotiation 7.106–7.107
 - general principles 7.110
 - release of subordinate security 7.128–7.134
 - rights of enforcement and release 7.127
 - requirement for equity support 11.08
- Shareholder senior facilities** 7.58
- Shares**
- capital contributions 11.15
 - pledges under civil system 12.80–12.92
 - Security over sponsors interests 11.66–11.69
- Sharia'a law**
- documentation of transactions 1.57
 - enforceability 1.48
 - foundation of Islamic finance 10.04–10.07
 - multi-tranche financing 10.26–10.31
 - role of scholars and regulators 10.08–10.09
 - underlying principles 10.10–10.13
- Site purchase agreements** 5.38–5.40
- Skills and personnel**
- advisers and consultants 2.38–2.41
 - operational risks 4.31
 - operators 2.95–2.97
 - selecting ownership structure 2.112–2.113
 - sponsors 2.54–2.57
 - support from sponsors 11.07
- Social considerations**
- construction phase 2.91
 - environmental diligence checklist App 2
 - export credit agencies 8.43–8.44
 - general risks 4.71–4.80
 - importance of legal assessment 1.41–1.43
 - multilateral development banks 8.43–8.44
- Sources of funding**
- assessment of optimal sources 3.09–3.12
 - bond markets
 - competing intercreditor issues 3.34
 - disclosure 3.32
 - negative arbitrage 3.36
 - one-time funding 3.37
 - overview 3.28–3.31
 - uncertainty prior to commitment 3.35
 - waivers and amendments 3.33
 - commitment letters 3.63–3.68
 - currency risks 4.49–4.55
 - debt financing
 - bank lending 3.22–3.26
 - mezzanine debt 3.20–3.21
 - equity investors
 - equity bridge loans 3.16
 - subordinated shareholder
 - debt 3.17–3.19
 - typical participation 3.13–3.15
 - Islamic finance 3.27
 - issues for prospective lender 3.91–3.100
 - lease structures 3.53–3.54
 - letters of intent 3.55–3.58
 - mandate letters 3.69–3.84
 - material adverse changes
 - lender requirements 3.85–3.87
 - sample clauses 3.88–3.90
 - multilateral lending institutions 3.45–3.52

- Sources of funding** (*cont.*)
 - 'official' funding sources 8.07–8.09
 - overview 3.01–3.07
 - project bonds 9.01
 - public sector lenders
 - export credit agencies 3.40–3.44
 - overview 3.38–3.39
 - risk 3.08
 - subordinated shareholder debt 3.17–3.19
 - term sheets 3.59–3.62
- Sovereign immunity** 1.53
- Special purpose companies**
 - advantages 2.126
 - disadvantages 2.127–2.128
 - jurisdictional relevance 11.48
 - uses 2.125
- 'Split' EPC contracts** 5.31–5.32
- Sponsors**
 - see also* **Equity investors**
 - central role in restructuring 13.27–13.31
 - civil law jurisdictions 12.179–12.181
 - dilution and cross-charge
 - mechanisms 2.138–2.139
 - disclosure in offering circulars 9.63
 - non-financial support 11.07
 - role as project originators
 - breakdown by sector 2.06
 - connected projects 2.58–2.59
 - credit support 2.51–2.53
 - maximization of returns 2.46
 - overview 2.42–2.45
 - sale of goods 2.48
 - sale of services 2.49–2.50
 - skills and personnel 2.54–2.57
 - strategic expansion 2.47
 - role of operator 2.96
 - security over interests 11.66–11.69
 - shareholder senior facilities 7.58
 - treaty-based protection against political risks 14.38
- Standby underwriting** 9.43
- Standstill agreements**
 - contents
 - contractual 'moratorium' 13.67–13.68
 - drawdown provisions 13.70
 - duration 13.72
 - interest payments 13.69
 - new company obligations 13.71
 - overview 13.66
 - reservation of rights 13.73
 - importance 13.61–13.63
 - negotiation after insolvency process 13.65
 - participants 13.64
- State aid**
 - competition law 4.103
 - OECD Arrangement on Export Credits 8.20–8.23
- Structures**
 - civil law jurisdictions
 - affermage* 12.06–12.08, 12.06–12.08
 - power purchase agreements 12.11–12.12, 12.11–12.12
 - public private partnerships 12.09–12.10, 12.09–12.10
 - dilution and cross-charge
 - mechanisms 2.138–2.139
 - example financial structure 2.63
 - operations and construction phases 2.93
 - optimal structures to minimize political risks 14.49–14.51
 - overview 2.110–2.111
 - relationship between equity investors 2.135–2.137
 - selecting ownership structure
 - finance considerations 2.120
 - general considerations 2.112–2.113
 - government involvement 2.114–2.117
 - local laws 2.119
 - management implications 2.122
 - more than one participant 2.118
 - taxation 2.121
 - transfers of ownership during operations
 - phase 2.105–2.109
 - types of ownership vehicle
 - overview 2.123–2.124
 - partnerships 2.132–2.134
 - special purpose companies 2.125–2.128
 - unincorporated joint ventures 2.129–2.131
 - types of structure
 - build, lease, transfer (BLT) 2.143
 - build, own, operate (BOO) 2.141
 - build, own, transfer (BOT) 2.142
 - build, transfer, operate (BTO) 2.144
 - forward sale structures 2.147
 - privatizations 2.148
 - transfer of operating rights (TOR) 2.145
 - 'within the fence' projects 2.146
 - variations according to circumstance 2.04
- Subordinated debt**
 - see also* **Intercreditor agreements**
 - capital contributions 11.15
 - facility agreements 7.69, 7.71
 - source of funding 3.17–3.19
- Subrogation of rights**
 - ECA covered facilities 7.100
 - general legal principles 6.74–6.75
 - insurance 6.73–6.75
 - waiver of rights 6.87
- Sujétions Iprévues** 12.142
- Sukuk**
 - general principles 10.22
 - multi-tranche financing 10.59
- Supervening events** 4.82
- Suppliers**
 - allocation of risk in project
 - documentation 5.54–5.58
 - general risks 4.34–4.40

- key provisions in feedstock supply
 - contracts App 6
 - role 2.99–2.100
 - support from sponsors 11.07
- Swaps**
 - civil law jurisdictions 12.150
 - debt for equity swaps in
 - restructuring 13.92–13.93
 - interest rate fluctuations 4.53–4.55
 - source of funding 2.76
- Take or pay contracts** 5.43–5.45
- Taxation**
 - disclosure in offering circulars 9.65
 - dispute resolution 14.25
 - expert determination 14.95
 - importance of legal assessment
 - corporate taxes 1.28–1.30
 - customs duties 1.34
 - other taxes 1.31–1.32
 - withholding tax 1.33
 - key provisions in concession
 - agreement App 4
 - key provisions of JV or partnership
 - agreement App 3
 - partnerships 2.132
 - project bonds 9.38
 - role of host governments 2.23, 2.29
 - selecting ownership structure 2.121
 - special purpose companies 2.127
 - ‘split’ EPC contracts 5.30
 - tax gross up in credit agreements 7.31–7.33
- Technology development**
 - completion risk 4.16–4.21
 - role of host governments 2.30
- Term sheets** 3.59–3.62
- Termination**
 - civil law jurisdictions
 - Project company default 12.145
 - force majeure 12.138–12.142
 - nullity of project contract 12.136–12.137
 - overview 12.133–12.134
 - public interest 12.143–12.144
 - concession agreements App 4
 - EPC contracts App 5
 - Islamic finance 10.53–10.55
 - JV or partnership agreements App 3
 - operations and maintenance agreements App 8
 - power purchase agreements App 7
- Terrorism insurance** 6.20–6.21
- Third party finance** *see* Debt finance
- Titre exécutoire** 12.49
- Tolling contracts** 5.46
- Transfer of operating rights (TOR)** 2.145
- Transit insurance** 6.16–6.17
- Trust deeds**
 - covenants 9.86–9.87
 - debt-to-equity ratios 9.88
 - formal requirement 9.83
 - general principles 9.85
- ‘Turn-key’ construction contracts**
 - allocation of risk in project
 - documentation 5.18
 - completion risk 4.09–4.12
 - key provisions App 5
- Umbrella clauses** 14.36
- Underwriting process**
 - agreements among underwriters 9.93
 - bank lending distinguished 9.41
 - documentation 9.75–9.82
 - ‘roadshow’ meetings with prospective
 - investors 9.45–9.48
 - types of underwriting 9.42–9.44
- Unincorporated joint ventures**
 - complexities 2.131
 - defined 2.129
 - important features 2.130
- United States**
 - choice of law 1.45–1.47
 - corrupt practices and money
 - laundrying 4.104–4.112
 - export credit agencies 3.43, 8.04
 - insurance law principles 6.61
 - litigation process
 - disclosure of documents 14.11
 - enforcement of judgments 14.54
 - judgments and appeals 14.12
 - lack of flexibility 14.13
 - quick provisional remedies 14.10
 - service of claim 14.09
 - material adverse changes clause 3.90
 - ‘official’ funding sources 8.08
 - party to GPA 2.34
 - project bonds
 - disclosure 9.10–9.22
 - governing law 9.35–9.36
 - offering circulars 9.51–9.52
 - role of lawyers 9.94–9.97
 - selling restrictions 9.29–9.32
 - reinsurance market 6.54
 - right to impose sanctions 4.68
 - selecting ownership structure
 - 2.116–2.117
 - special insolvency regime 1.62
- Utmost good faith** 6.57–6.61
- Valeurs mobilière** 12.84
- Valuations**
 - insurance 6.68–6.70
 - restructuring
 - English approach 13.77–13.79
 - importance 13.75
 - key assumptions 13.76

Voting

- ECA covered facilities 7.95
- effect of security over sponsors' interests 11.68
- intercreditor agreements
 - calculation of entitlements 7.123
 - common structures 7.126
 - overview 7.118–7.122
 - regulation of entitlements 7.124–7.125

Wakala

- asset agency agreement 10.41
- asset participation agreement 10.40
- general principles 10.32–10.39

War 4.65

Warranties

- allocation of risk in construction
 - contracts 5.24
- feedstock supply contracts App 6
- finance document checklist of sample provisions App 1
- key provisions in EPC contract App 5

- operations and maintenance agreements App 8
- role of operator 2.97
- suppliers 2.100
- terms of credit agreement 7.35–7.36
- underwriting agreements 9.77

'Waterfall' accounts

- accounts agreements 7.53–7.55, 7.57
- mezzanine debt facility agreements 7.66

Withholding tax 1.33

'Within the fence' projects 2.146

World Bank

- composition 8.32
- environment and social risks 4.76
- environmental and social responsibilities 1.42
- membership 8.33
- source of funding 3.47

Wrongful trading 13.15–13.17

Yield protection

- credit agreements 7.28–7.30
- mezzanine debt facility agreements 7.68