
INTERNATIONAL PROJECT FINANCE

Law and Practice

EDITED BY
JOHN DEWAR



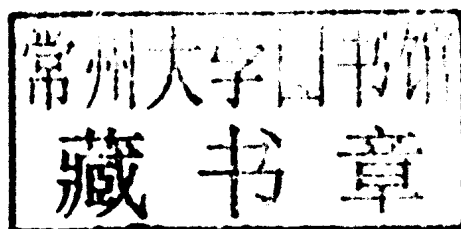
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PREFACE

The purpose of this book is to offer a new framework for the law and practice of international project finance.

My colleagues and I at Milbank approached the task with both excitement and a little trepidation. Our aim has been to write a book which analyses the law and practice of project finance from a different perspective from existing books, which have tended to be rooted in a more domestic focus.

Over the last twenty years, modern project financing techniques have spread rapidly from the US market to Western Europe and then on into emerging markets in Asia, the Middle East, Africa, and Latin America. I have felt for some time that there is a place for a book with a truly international focus, responding to the needs of sponsors, lenders, and practitioners for analysis of the legal and documentation issues of core relevance to the practice of international project finance.

Despite a significant knock during the ‘credit crunch’, and following the collapse of Lehman, the international project finance market has showed remarkable resilience. It has been sustained by the swelling demand for infrastructure, at a time when governments everywhere are seeking to manage burgeoning fiscal deficits. Therefore, in many countries, private sector-led project finance solutions have come to the fore and many governments are seeking to accelerate the introduction or continued growth of Public Private Partnerships.

Whilst economic growth has, and may continue to be, impacted by the effects of the financial crisis, the quest for oil and gas, minerals, and other natural resources continues unabated across the globe. This has led to the sponsoring and financing in the private sector of a number of ‘mega’ projects in the gas, LNG, gas transportation, refinery, and mining sectors.

The sustained demand for project finance comes at a time when commercial banks—the institutions which have historically provided the preponderance of project debt finance—have found it increasingly difficult to maintain their position as the core providers of capital. In emerging markets, and in some recent cases, even in OECD countries, the financing of many projects has only been possible with the leadership provided by Export Credit Agencies and multilateral and bilateral funding institutions. The last few years have also seen the increasing application of Islamic financing techniques (particularly in the growing Middle East project finance market). Despite the difficulties faced by the international capital markets, there has also been a resurgent focus on the project bond market. In order to tap this

diverse pool of potential sources of liquidity, it is important for both commercial principals and practitioners to have a thorough grasp of the structuring and documentation requirements of these very different funding sources.

In conceiving the book, I also concluded that a book on international project finance would not be complete without presenting and analysing the background and issues arising in the context of projects developed in civil law jurisdictions. I was therefore delighted when Antoine Maffei and Jean-Renaud Cazali of De Pardieu Brocas Maffei agreed to write a chapter analysing practice issues arising in France and other jurisdictions whose jurisprudence is based on the civil code. As project financing techniques have spread throughout Francophone Africa, an understanding of the roots of the relevant legal systems, and the particular issues arising in the context of these jurisdictions, is particularly important.

Our long-standing friend and colleague, Martin Benatar, also agreed to assist us in 'de-bunking' the arcane world of project insurance and re-insurance. For project sponsors and lenders, insurance plays a key part in the overall risk management of projects. Even many seasoned practitioners find the topic both complex and bewildering.

Notwithstanding the recent stresses at play across the global financing markets, the relatively low default rate amongst project financed transactions is a testament to the skills of practitioners in analysing and assessing risk, as well as allocating such risk in the most appropriate manner. Alas, some projects do experience financial distress and, in this context, the book includes a chapter analysing the intricacies of restructuring complex projects.

Last, but by no means least, it appeared to me that there was a need for greater understanding and clarity about the management and resolution of disputes, which regrettably do occur, and raise complex legal issues, particularly in the context of cross-border international project financings.

Many authors from different disciplines have been involved in the writing of this book and many other practitioners at Milbank have been involved in supporting the writing process. I am eternally grateful to all who have contributed and the many others who have lent their time, given their advice and insights, and above all, engaged in analysis and debate which has considerably enhanced the knowledge set forth in the pages which follow.

Apart from the invaluable contributions made by all my colleagues, I have also received tremendous support from my unflappable assistant, Josie, who for some time has had to put up with the combined demands of a busy legal practice, as well as the editing of this book. I have also promised to my wife, Geraldine, and my son, William, that the many weeks of nocturnal activity will diminish following the book's publication!

John Dewar
1 March 2011

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Martin Benatar is a recognized market leader in providing insurance advice on behalf of senior lenders with 14 years' experience of working exclusively as an adviser to financiers, primarily in the UK, Europe, and the Middle East but also throughout Asia and the Americas. Martin's 23-year insurance career began as an underwriter for the Commercial Union, a major composite insurer and he took responsibility for the UK construction account and ultimately their property market account. He has provided dedicated consultancy advice to financiers since recruited specifically for that purpose by Sedgwick in 1997. He moved to Miller in 2002 and successfully developed their lender advisory business before joining Jardine Lloyd Thompson Limited (JLT) in 2006, where he was responsible for Financial Insurance Due Diligence until 2010. In 2011, while still a part-time employee of JLT, he has established his own independent advisory business primarily dedicated to the space sector. He has served on a number of market bodies and regularly speaks at conferences and seminars for lawyers, ECAs, and project finance teams. He presented an annual insurance lecture for the project finance course at the London Business School between 2000 and 2006. A graduate in political science, he is ACII qualified and a Chartered Insurance Practitioner.

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Jean-Renaud Cazali is a member of the Paris Bar and has been a partner with De Pardieu, Brocas, Maffei since 2008. Jean-Renaud started his career with Société

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LIST OF FINANCIAL TERMS, ABBREVIATIONS, AND ACRONYMS

AAU	Agreement Among Underwriters
ALOP	advance loss of profit insurance
BIT	bilateral investment treaty
BLOU	broker's letter of undertaking
BLT	build, lease, transfer
BOAD	West African Development Bank
BOO	build, own, operate
BOOT	build, own, operate, transfer
BOT	build, operate, transfer
BTO	build, transfer, operate
CABEI	Central American Bank for Economic Integration
Capex	capital expenditure
CASDB	Central African States Development Bank
CDB	Caribbean Development Bank
CEAR	construction erection all risk insurance
CIRR rate	commercial interest reference rate
COD	commercial operation date; the date on which the construction phase of a project is completed and the operation phase begins
DBFO	design, build, finance and operate
DEG	German Investment Corporation
DFI	development finance institution
DSCR	debt service cover ratio
DSRA	debt service reserve account
DSU	delay in start up insurance
EAC	East African Community
EADB	East African Development Bank
EBL	equity bridge loan
EBRD	European Bank for Reconstruction and Development
ECA	export credit agency
ECOWAS Fund	Fund for Co-operation, Compensation and Development (Economic Community of West African States)
EEA	European Economic Area
EIA	environmental impact assessment
EIB	European Investment Bank
EIF	European Investment Fund
EITA	Extractive Industries Transparency Initiative
EPCM	engineering, procurement and construction management
EPC	engineering, procurement and construction
ESMP	environmental and social management plan

List of Financial Terms, Abbreviations, and Acronyms

EURIBOR	Euro Interbank Offered Rate
FCPA	Foreign Corrupt Practices Act of 1977 (15 U.S.C §§ 78dd–1, et seq.)
FMO	Netherlands Development Finance Company
FONPLATA	Financial Fund for the Development of the River Plate Basin
FSA	fuel supply agreement
GCC	Gulf Cooperation Council
GPA	World Trade Organization's Plurilateral Agreement on Governmental Procurement
Hermes	Euler Hermes Kreditversicherungs-AG
IACAD	Inter-American Convention Against Corruption
IADB	Inter-American Development Bank
IBRD (World Bank)	International Bank for Reconstruction and Development
ICMA	International Capital Markets Association
ICSID	the International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IDC	interest during construction
IDEP	United Nations African Institute for Economic Development and Planning
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation, part of the World Bank Group
IFRS	international accounting standards within the meaning of IAS Regulation 1606/2002 to the extent applicable to the relevant financial statements
IPO	initial public offering
IPP	independent power project
IRR	internal rate of return
ISDA	International Swaps and Derivatives Association
IsDB	Islamic Development Bank
ISO	International Standards Organisation
IWPP	independent water and power project
JBIC	Japan Bank for International Cooperation, the international arm of Japan Finance Corporation
K-Exim	Export-Import Bank of Korea
K-sure	Korea Trade Insurance Corporation
LIBOR	the London Interbank Offered Rate (the reference rate for lending in the London interbank market)
LLCR	loan life cover ratio
LMA	Loan Market Association (London)
LME	London Metal Exchange
LNG	liquefied natural gas
LOI	letter of intent
LSTA	Loan Syndications and Trading Association (New York)
MAC	material adverse change
MIGA	Multilateral Investment Guarantee Agency
MRA	maintenance reserve account

NDF	Nordic Development Fund
NETA	New Energy Trading Arrangement
NEXI	Nippon Export and Investment Insurance
NIB	Nordic Investment Bank
NPV	net present value (of future cashflow)
O&M	operation and maintenance
OECD	Organisation for Economic Cooperation and Development
OHADA	Organisation pour l'Harmonisation du Droit des Affaires en Afrique
Opex	operating expenditure
OPIC	Overseas Private Investment Corporation, an agency of the US government
PD	property damage insurance
PFI	the Private Finance Initiative, a PPP programme promoted by the UK government
PIM	preliminary information memorandum
PPA	power purchase agreement
PPP	public-private partnership
PRI	political risk insurance
Proparco	Promotion et Participation pour la Coopération Économique
PSA	production sharing agreement
PWPA	power and water purchase agreement
SACE	Servizi Assicurativi del Commercio Estero (SACE SpA)
SEC	US Securities and Exchange Commission
SFD	Saudi Fund for Development
SINOSURE	China Export & Credit Insurance Corporation
SPV	special purpose vehicle
SWTI	site wide terrorism insurance
TPL	third party liability insurance
US Exim Bank	Export-Import Bank of the United States
World Bank	the International Bank for Reconstruction and Development

List of Islamic Financial Terms, Abbreviations, and Acronyms

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
A.H.	after Hijri
<i>Akhlaq</i>	moralties and ethics
<i>A'qd</i>	a bilateral contract
<i>Arbun</i>	a down payment
<i>Fatwa</i>	an Islamic legal opinion
<i>Fiqh al Muamalat</i>	Islamic commercial jurisprudence
<i>Gharar</i>	the sale of probable items whose existence or characteristics are uncertain or speculative (<i>maisir</i>), the risk of which makes it akin to gambling (<i>qimar</i>)
<i>Hadith</i>	each saying, act or approval of the Prophet (PBUH) as complied by the <i>Sahabah</i>
IFSB	Islamic Financial Services Board
IIFM	International Islamic Financial Market

List of Financial Terms, Abbreviations, and Acronyms

<i>Ijarah</i>	lease purchase finance
<i>Ijma</i>	the consensus of the <i>Mujtahid</i> on a particular interpretation of or application of the <i>Sharia'a</i>
<i>Ijtihad</i>	the individual interpretation of <i>Sharia'a</i> principles by <i>Mujtahids</i> to infer expert legal rulings from foundational proofs within or without a particular <i>Madhab</i>
<i>Istisna'a</i>	commissioned manufacture of a specified asset
<i>Manfa'a</i>	usufruct or other benefit derived from an asset
<i>Mudarabah</i>	investment fund arrangement
<i>Mujtahid</i>	independent Islamic jurists qualified to exercise <i>Ijtihad</i>
<i>Murabaha</i>	cost plus financing
<i>Musharaka</i>	joint venture arrangement
<i>Musharaka Muntahiya Bittamleek</i>	Diminishing <i>Musharaka</i>
<i>Qard Hassan</i>	an interest-free loan as permitted by the <i>Qur'an</i>
<i>Qiyas</i>	the interpretation by analogical reasoning where one situation is measured against another by the <i>Mujtahids</i>
<i>Qur'an</i>	Book of Allah (SWT)
<i>Rab al-mal</i>	capital provider
<i>Rahn</i>	mortgage or pledge
<i>Riba</i>	any excess paid or received on a principal amount or an additional return received on the principal which is derived by the mere passage of time
<i>Sahabah</i>	closest companions of the Prophet (PBUH)
<i>Sharia'a</i>	Islamic law as derived from the <i>Qur'an</i> and <i>Sunnah</i>
<i>Sukuk</i>	trust certificates
<i>Tafsir</i>	exegesis of the <i>Qur'an</i>
<i>Takaful</i>	<i>Sharia'a</i> -compliant insurance
<i>Wa'd</i>	a unilateral promise
<i>Wakil</i>	an agent

GLOSSARY

concession	an authority to develop, construct and operate a project granted to a project company by a host government for a defined period of time
construction phase	the initial period of a project during which the plant or other project assets are constructed usually by an EPC contractor
drawdown	the borrowing of a loan pursuant to the terms of a facility agreement
EPC contract	engineering, procurement and construction contract (i.e. a 'turnkey' construction contract)
EPC contractor	strictly, the contractor under an EPC Contract, but commonly used in a generic sense to refer to a construction contractor
EPC Delay LDs	the liquidated damages payable by an EPC Contractor to a project company pursuant to an EPC Contract if and when the construction of a project is delayed
Equator Principles	the principles described in 'The 'Equator Principles' – A financial industry benchmark for determining, assessing and managing social and environmental risk in project finance' dated July 2006 and available at < http://www.equator-principles.com/Equator_Principles.pdf >.
finance documents	the agreements that document the financing of a project
Financial Close	the date on which all conditions precedent under a project's finance documents are satisfied or waived
Financial Model	a financial model of a project development using a computer spreadsheet program
Gearing leverage ratio	the ratio of a company's (consolidated) borrowings to its tangible net worth (or adjusted shareholders' funds)
host country	the country in which a project is located
multilateral agency	an entity established by a number of countries to promote the development of particular projects around the world or in certain regions by, for example, direct lending or insuring lenders against political risk
offtaker	a purchaser of the product(s) produced or manufactured by a project
operation phase	the period of a project that follows the construction phase during which the project becomes operational
project company	an entity that develops, owns and operates a project which is ultimately owned by the sponsor(s)
project documents	the documents that relate to the construction, operation and maintenance of a project
security documents	the agreements that document the security taken by the financiers

Glossary

shareholder	a sponsor which holds the shares in the project company
sovereign immunity	a prohibition preventing the seizure of a government controlled entity and its assets that emanates from a law providing that entity immunity in that regard
sponsor	an entity responsible for promoting and/or developing a project and usually a direct or indirect shareholder in the relevant project company