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An Introduction to International Factoring & Project Finance

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Law and Finance in International Trade

An Introduction to

International Factoring & Project Finance

by
Ioannis Glinavos

Abstract

This work consists of two essays on law and finance in international trade. It addresses the means of raising funds for investment through receivables financing and project finance. The first essay discusses the role of receivables financing and in particular factoring in international trade. It examines the nature of factoring transactions and presents the efforts at regulation on an international level aimed at overcoming the difficulties in enforcement. The second essay discusses project finance as a method of pooling funds for international development. It analyses the claim that project finance is a legally secure avenue to raise capital for foreign direct investment, with particular focus on the effectiveness of project finance in the context of international development projects.

Keywords

Receivables Financing; International Factoring; International Trade; Project Finance; Development

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1. International Factoring

1.1 Introduction: Receivables financing and its importance to modern international trade

Receivables financing is the procedure by which debts are sold in the market to increase liquidity. The mechanism for such dealings is based on assignments of debts. The practice of receivables financing is fundamental to the operation of the capitalist system. In the most developed countries the bulk of corporate wealth is locked up in receivables[1]. Receivables financing allows funds to be released without the need to wait for the debts to mature. This increases overall liquidity and allows the market to finance new commercial ventures. The efficient operation of international trade is to a large extent based on the contracting parties' ability to market their receivables. Some of the most common methods of receivables financing are factoring, forfaiting, leasing and securitization. In this paper I will present and explain the operation of one specific type of receivables financing, international factoring. After explaining the nature of a factoring transaction and its main types I intend to discuss the peculiarities and problems encountered in such transactions and present the efforts at international codification which attempt to tackle them and create an international environment more conducive to such transactions.

1.2 What is factoring?

Factoring is one of the oldest and most common methods of receivables financing. The main features of a factoring agreement are that the exporter assigns the benefit of the sales contract to a financial house, called the factor, who advances the purchase price for the goods or services provided, minus his charges. The factor usually advances immediately a percentage of the value of the book debts assigned, followed by the balance once the debts have been collected[2] [see GRAPH 1]. The importer directs his payment (under his contract with the exporter) to the factor. In a way, a factoring transaction represents a division of labour between the exporter and the financial house, whereby the former concentrates in his core business, which is trade, and the latter assumes the burden of streamlining the flow of funds between the trading parties[3]. Especially in the context of international trade it is often useful to interpose between the exporter and the importer someone who has experience in commercial transactions in the home jurisdictions of the parties and who is better equipped to assess credit risks and collect funds (see below). The factor may not restrict itself to a price collection service on behalf of the exporter, but may also provide credit management services. According to the provisions in the factoring agreement the factor may handle the internal credit control and sales accounting of the exporter[4]. These facilities, where agreed, will be included in the factor's charges.

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[1] Bazinas p. 315
[2] Schwank p. 19
[3] Schmitthoff p. 226
[4] Schmitthoff p. 229

1.3 Types of factoring arrangements

We now move on to consider the various methods under which international factoring can be organized. The different types of factoring affect the organization of the deal and the legal consequences but they all share the same function described above. The choice of type is usually a matter of convenience. The important element is the intention of the parties who can structure the arrangement in such a way that it best reflects their individual circumstances. To begin with, factoring can be disclosed or undisclosed. Further, factoring can be on a recourse on non recourse basis according to the individual contracts. Generally, there are three main methods of factoring international debts, the two factor system, direct import and export factoring and back to back factoring.

1.4 Disclosed and undisclosed factoring

Disclosed factoring is the arrangement under which the exporter enters into a factoring agreement with the financial house and assigns the benefit of the debts created by the sale transaction to them. The importer is then notified and effects payment to the factor. The arrangement is usually on a non-recourse basis. This means that the factor cannot claim the assigned funds from the exporter if the importer fails to pay, in other words, he assumes the credit risk in the transaction. Those debts that are not approved by the factor are assigned on a recourse basis, so he can claim against the exporter in case of any default of the importer. Recourse factoring is more accurately described as invoice discounting[5]. Factoring arrangements are usually made on a whole turnover basis. This arrangement connotes an obligation of the exporter to offer all his receivables to the factor who receives a commission[6].

Undisclosed factoring, which is usually undertaken on a recourse basis, does not involve the importer. The agreement is made between the factor and the exporter and the importer remains bound to pay as agreed under the sales contract. In receipt of payment, the exporter holds the funds in a separate bank account as trustee for the factor [see GRAPH 2].

1.5 The two factor system

An international factoring transaction involves a number of elements that differentiate it from a domestic factoring transaction. The most important differentiations are the possibly different languages of the parties to the sales contract and the difficulty in assessing the credit standing of a foreign party. In answer to these considerations the two factor system was developed. This entails the use of two factors, one in each country, dealing with the exporter and the importer

[5] Sassoon p. 248
[6] Schmitthoff p. 229

respectively. The export factor on obtaining the information from the exporter on the type of his business and the proposed transaction will contact the import factor designated by the importer and agree the terms of the deal. The importer advances funds to the import factor who then transmits them to the export factor, minus his charges. In the two factor system the import factor and the importer do not come into direct contact. The system involves three agreements, one between the exporter and the importer, one between the export factor and the exporter and one between the factors themselves. It is important to bear in mind that the import factor's obligations are to the export factor alone and they include determining the importer's credit rating and the actual collection of the debts[7] [see GRAPH 3]. The import factor assumes the credit risk in relation to approved debts and is responsible for the transfer of funds to the export factor. On the other hand, the export factor is responsible to the import factor for the acceptance of any recourse[8].

The two factor system is supported by the existence of chains of correspondent factors. These where established for the purpose of facilitating the cooperation between import and export factors by the development of common rules and accounting procedures. There are members of factoring chains in most major trading nations. Some of them restrict their membership to one factor per country (closed chains), while others are open to the participation of multiple factors in the same country (Factors Chain International).

The two factor system has various advantages. The main ones concentrate around efficiency and speed. The import factor is in a better situation to assess the credit capabilities of the importer and communicate effectively with him. He knows the legal and business environment in the country and is in a position to take swift action in the case of any default[9]. This may help to avoid misunderstandings and preempt disputes. The use of the import factor alleviates the pressure on the export factor and streamlines the procedure. The same elements make the system preferable to the exporter who is spared the inconvenience of dealing with a foreign factor. Further, there is the possibility of the client receiving lower discount charges if the import factor makes payments at the rate of discount charge in his country (if these are lower than the ones in the exporter's home jurisdiction[10]). Finally, use of this system can help in reducing the exchange risk involved in international trade by speeding up the circulation of funds. The speedier the flow of funds from the buyer to the seller, the smaller the risk of exchange rate fluctuations between the date of shipment and the date of payment.

[7] Schwank p. 21
[8] Salinger p. 116-117
[9] see note 7
[10] Salinger p. 119

The main disadvantage of the system is the expense involved. The increased cost of employing two factors makes the arrangement unsuitable for transactions of low value. Also there is the possibility of delays in the transmission of funds and the duplication of some records is unavoidable. However, the use of chains of factors makes the transactions speedier through the use of a clearing system. Further, electronic forms of record transmission can help in alleviating the need for double record keeping[11].

1.6 Direct import and export factoring

Direct import factoring connotes the situation where the exporter assigns debts to a factor in the country of the debtor. This is usually the case where there is a substantial volume of exports to a specific country. This solution is a cheap and time efficient method of debt collection but it does not serve the aim of providing finance to the exporter. The factor provides a debt collection service and does not enquire into the creditworthiness of the importer. Prepayments are not possible because that would expose the factor to high risks.

Direct export factoring on the other hand, does operate as an alternative to the two factor system. In this situation, the factor is appointed in the exporter's own country and deals with all the aspects of the factoring arrangement including the provision of financing and the assessment of the financial position of the importer. This system is inexpensive and facilitates the communication between the exporter and the factor. However, all the advantages of the two factor system relating to the import factor's proximity to the importer and his jurisdiction can be listed here as disadvantages. Communication problems with the debtor, credit risks and the occurrence of disputes are the most important problems. As Schwank argues, the greater risks involved in this method may render the cost savings illusory[12].

1.7 Back to back factoring

Back to back factoring is an arrangement most suitable for debts owed by the exclusive distributors of products to their suppliers. The structure of the agreements is similar to the ones already considered with one material difference. The exporter enters into a factoring agreement with the export factor who contracts with the import factor in the usual way. The difference lies in the existence of a separate factoring agreement between the import factor and the distributor. Included in that arrangement is a right to set off credits arising from the domestic sales of the distributor with his debts to the supplier[13]. This is to guard against default by the distributor due to

[11] Salinger p. 121
[12] p. 22
[13] Salinger p. 128

the fact that the goods have already been sold to third parties and thus the supplier cannot take a security interest over them to guarantee repayment of the debts.

1.8 Special considerations for international factoring

In the course of the previous analysis we have touched upon the particular characteristics that differentiate international factoring from analogous domestic transactions. Language and communication problems stemming from different commercial traditions are the most obvious but usually the least severe of the problems that an export factor may face. Exchange rate fluctuations and political risks represent the most potent dangers. International receivables financing requires a much greater deal of caution than domestic factoring, because an assessment of normal commercial risks may not be enough to guarantee a profitable transaction. The most serious complication however is the need to create valid assignments in foreign jurisdictions. It is imperative for the operation of any factoring agreement that the rights vis-à-vis the debtor and third parties are adequately recognized and protected in the jurisdiction of both the exporter and the importer[14].

Generally debts are considered to situate in the country where the debtor has his place of business, because that is where they can be enforced[15]. However, this general rule is liable to be altered by the contractual provisions that gave rise to the debt. Questions of the validity of the assignment will be determined by the law of the factoring agreement as chosen by the parties. Compliance with the contractually stipulated law however, may not guarantee enforcement in another jurisdiction, which has its own mandatory rules for the assignment of receivables. In England these are contained in section 136 of the Law of Property Act 1925. Also, when the debtor is insolvent, the courts may disregard the choice of law in the factoring agreement and apply the law of the debtor's country[16]. The factor will have to grapple with the different registration requirements and the peculiarities of different legal systems, as types of assignment valid in one country may be unavailable in another. For example there has been long standing doubt over the possibility to factor future receivables in England. The position now seems to be that this is possible only under a whole turnover agreement[17]. The factor stands to lose greatly in the event of his claim being subordinated to the claim of another creditor who manages to attach a debt because of some lack of compliance with national legal formalities. As far as priorities are concerned, the common law rule in *Dearle v Hall*[18] stipulates that priority is given to the first

[14] Sassoon p. 254
[15] *Re Claim by Helbert Wagg & Co Ltd* [1956] 1 Ch. 323
[16] see *Tan Valley Joinery Ltd v CF Financial Services Ltd* (1987) SLT 207
[17] Sealy and Hooley p. 907
[18] (1823) 3 Russ 1

creditor to give notice the debtor. This however, is not common to other jurisdictions where priority may reside with the assignee whose assignment is first in time[19].

1.8.1 The UNIDROIT Convention on International Factoring[20]

In recognition of the importance international factoring has as a source of funds for the purposes of international trade, the Rome Institute for the Unification of Private International Law (UNIDROIT) in May 1988 produced a Convention on International Factoring in Ottawa, Canada. The Convention aims to help overcome the difficulties outlined through this work, and make the international assignment of receivables a more accessible form of finance. As of 7/2/2001 14 states, including most major industrialized powers like the UK, the US, Germany, Italy and France have signed the convention[21]. So far it has been ratified by 4 states[22]. Another 2 have acceded to the Convention[23].

The convention applies to international factoring transactions. A transaction is international when the parties have their place of business in different states[24]. A factoring contract is one which involves the assignment of receivables arising from commercial (excluding transactions with ultimate consumers) sales of goods transactions and under which the factor provides finance, ledgering[25], collection of receivables and protection against the debtor's default[26]. The Convention may be adopted or rejected as a whole by the parties[27].

As far as the substantive provisions are concerned, the Convention specifies that the debtor is under an obligation to pay the factor (in the absence of knowledge of superior rights) for identified receivables arising out of contracts of sale concluded at or before the time of written notice of the assignment to the debtor[28]. An issue of controversy in English law, is the question of whether the debtor can recover sums paid to the factor if the contract between the supplier and the debtor (buyer) is not performed[29]. The solution adopted by the convention is that there is no liability on the factor for defaults under the primary contract between the seller and the buyer, unless, the factor has not advanced the funds to the supplier, or he has done so with knowledge of the

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[19] Salinger p. 262
[20] Also known as the Ottawa Convention on International Factoring
[21] See UNIDROIT website @ http://www.unidroit.org/english/implement/i-88-f.htm#NR11
[22] France, Germany, Italy, Nigeria where it has entered into force
[23] Hungary and Latvia
[24] Article 2
[25] Maintenance of accounts relating to receivables Art. 1(2)(b)
[26] Article 1
[27] Article 3
[28] Article 8(1)
[29] Goode p. 511

supplier's default[30]. Finally, the Convention provides that rules governing the original assignment will also apply to subsequent assignments of the same debts[31].

An issue of particular importance is the extent to which a prohibition on assignments of the benefit of the main sales contract renders the factoring agreement void. In English law, a prohibition against assignment may nevertheless operate as a declaration of trust in favour of the assignee in the presence of clear intention of the parties[32]. The position appears to be that a prohibition relates to assignments of the benefit of the obligation and not to declarations of trust, unless it is made especially clear in the prohibiting clause[33]. The solution finally adopted in the Convention is that the assignment of a receivable by the supplier to the debtor shall be effective despite any agreement between them to the contrary[34]. However, the above shall not apply to those Convention countries that have made the relevant declaration[35].

The Convention is characterized as a move in the right direction in making international factoring more accessible as a means of obtaining finance for international trade. The fact that it has entered into force means that at least some states recognize its potential. However, the scope of the UNIDROIT's work was limited and some of the most important problems regarding international factoring are not addressed. The pressing issue of priorities as between the claims of the factor and third parties in the event of insolvency of the debtor is not addressed. Further, there is not any suggestion of a conflict of laws rule that could serve as a guideline in dealing with such problems[36]. Additionally, the Convention is limited in its application and does not cover domestic factoring and the relations between the factors and their clients. This is seen by some as a disadvantage[37]. Finally, the compromise reached in Article 6 over the effects of prohibitions on assignment may limit its effectiveness and discourage factors especially when dealing with small exporters[38]. A unqualified adoption of article 6(1) would thus have been preferable because it would encourage certainty in factoring transactions globally.

1.8.2 The United Nations Convention on the Assignment of Receivables in International Trade

One of the most important recent developments in the effort of unification of law regarding receivables financing is the UNCITRAL Convention on the Assignment of Receivable in

[30] Article 10
[31] Article 12
[32] *Don King Productions Inc v Warren* [1999] 2 All ER 218
[33] Sealy and Hooley p. 873
[34] Article 6(1)
[35] Article 6(2). So far, France and Latvia have used this provision to exclude the operation of Article 6(1) see note 20.
[36] Sassoon p.258
[37] Salinger p. 270
[38] Salinger p. 271

International Trade[39] which was adopted by the UN General Assembly in 12 December 2001[40] and is open for signature by national governments. The Convention aims to encourage the practice of international receivables financing as a method of facilitating international trade. Its main goal is to reduce the cost of transactions such as international factoring, project financing and securitization (among others) through the use of uniform rules[41]. The current situation as described above is seen as a disincentive for the widespread use of receivables financing as a method of raising finance for trade. The divergence of national laws and the multiplicity of often contradictory criteria for the assignment of receivables are at the root of the problem. The Convention specifically addresses the questions regarding the validity of assignments made in foreign jurisdictions and the vital issue of priorities in the event of insolvency of the debtor.

The Convention prevails over the UNIDROIT Convention on International Factoring except where it does not apply to the rights and obligations of a debtor and the Ottawa Convention does[42]. However, the Convention has been very recently adopted and it has not as yet come to force[43], while the Ottawa convention is currently in operation. Nevertheless, the adoption of the Convention is a major development for the practice of international factoring. In the following section I will provide a brief summary of the Convention provisions and contrast them to the provisions of the Ottawa Convention.

The convention applies to assignments of receivables, described as a transfer by agreement from one person to another of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum from a third person[44]. Thus, the Convention encompasses a wide range of transactions, such as factoring, forfaiting, securitization, assignments of future income streams in project finance and refinancing transactions including the transfer of tort receivables, insurance policies and deposit accounts[45]. The Convention applies to assignments with some international element. This may relate to the assignment or to the receivable[46]. At this point the Convention differs from the Ottawa Convention where internationality only relates to the receivables. Thus, assignments, whether domestic or international, of international receivables and international assignments of domestic receivables are included within the scope of the convention[47].

[39] The text of the Convention is available on the internet @ http://www.uncitral.org/en-index.htm
[40] UN General Assembly Resolution A/RES/56/81
[41] Trager p. 613
[42] Article 38
[43] The Convention comes into force after ratification by a minimum of five states (Art. 45.1) and it is open for signature till 31/12/2003 (Art. 34.1)
[44] Article 2
[45] Bazinas p. 318
[46] Article 3
[47] See note 44

Another difference between the two Conventions is that the UNCITRAL Convention can be varied by agreement in the contract between the parties[48], while as we have seen above the UNIDROIT Convention can be either accepted or rejected as a whole, without provision for any variations. One of the fundamental principles of the Convention is the principle of party autonomy. This fundamental notion of contract law runs through all conventions on international trade. The fact that the possibility of derogation from the Convention articles is wider in the UNCITRAL Convention suggests a deeper dedication to this idea[49].

The Convention does not require that the agreement complies with specific formalities, like writing[50]. These are left to be regulated by national law[51]. The Convention recognizes the validity of assignments of bulk (not individually identified) and future receivables[52]. This is important in the context of factoring and more so in securitization, which relates to large pools of low value receivables. Further, according to the Convention, security rights attached to the assigned receivables are automatically transferred to the assignee[53]. The solution adopted in respect of anti-assignment clauses in the primary contract is similar to the one adopted by the UNIDROIT Convention, without however the option of derogation[54]. Article 9 states that anti-assignment clauses are ineffective but they do not affect any liability arising out of breach of contract. The assignor will incur liability for breach, but the breach itself cannot be used as an excuse to avoid the contract or the assignment agreement.

The Convention deals with the rights and obligations of the parties to some detail. The relationship between assignor and assignee is covered by articles 11-14 and articles 15-21 deal with debtor protection. Due to the limited space in this work it is not possible to consider these provisions in detail. It is sufficient to make the general point that the drafters of the Convention tried to achieve a balance between facilitating receivables financing and debtor protection[55]. While the assignment does not create contractual relations between the factor and the debtor, it may affect his rights and obligations under the primary contract. In order to protect him against prejudicial changes to his situation the Convention encompasses the general principle that the assignment cannot change the debtor's rights and obligations except as provided by the convention itself[56].

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[48] Article 6
[49] The principle of party autonomy is based on article 3(1) in the Ottawa Convention. Article 6 of the UNCITRAL Convention is closer in its formulation to article 6 of the CISG (UN Convention on Contracts for the International Sale of Goods 1980). See Ferrari p. 158
[50] See Article 5 for a definition of writing.
[51] Smith p. 478
[52] Article 8
[53] Article 10(1)
[54] See note 35
[55] Bazinas p. 322
[56] Article 15(1)

Where the Convention makes its most significant contribution to the existing law on receivables financing, is its attempt to lay down clear priority and conflicts rules. The Convention provides for an international registry of assignments to deal with priorities between different assignees of the same receivables. The system is described in section 1 of the Annex to the Convention. According to article 1 thereof:

> *As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of conclusion of the respective contracts of assignment.*

The priorities between the interested parties in the event of insolvency proceedings against the debtor are dealt with in the framework of the registration system in article 2 in the following way:

> *The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.*

In order to determine priorities between the assignor and third parties the Convention provides a clear conflicts rule that the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant[57]. Chapter V of the Convention contains detailed conflicts rules. The contract of assignment is deemed as an independent contract subject to the law chosen by the parties. In the absence of such choice the contract is governed buy the law of the state with the closest connection to it. There is a rebuttable presumption that this is the law of the state of the assignor. The law that determines the rights and obligations of the debtor is that of the contract that gives rise to the receivable.

1.9 Conclusion

International factoring is a method of obtaining finance and enhancing liquidity with great potential. The use of factors to provide prepayments for the sale of goods and services in an international context is necessary to increase the volume of international trade. Further, what factoring does in

[57] Article 22

essence is to introduce intermediaries between the buyer and the seller where the communication between them may be difficult due to language, culture or different trading practices[58]. The factor can facilitate trade in such situations and undertake the burdensome obligations of debt collection across national borders. Thus, international factoring can be used to effectively finance and facilitate international trade. Despite this fact however, factoring is still to a great extent an infant industry[59]. The reason for this possibly rests on the problems of creating assignments that are valid in more than one jurisdiction. The uncertainty of enforcing claims in foreign states and the lack of any clear priority rules to determine the rights of the assignee vis-à-vis third parties may account for the reluctant expansion of factoring in international trade. The operation of the UNIDROIT Convention and the adoption of the UN Convention will help overcome these difficulties and create an environment of certainty of legal framework this practice needs to flourish. Receivables financing in general and international factoring in particular have too great a potential to be overlooked as methods of financing cross border transactions.

[58] Schwank p. 23
[59] Sassoon p. 259

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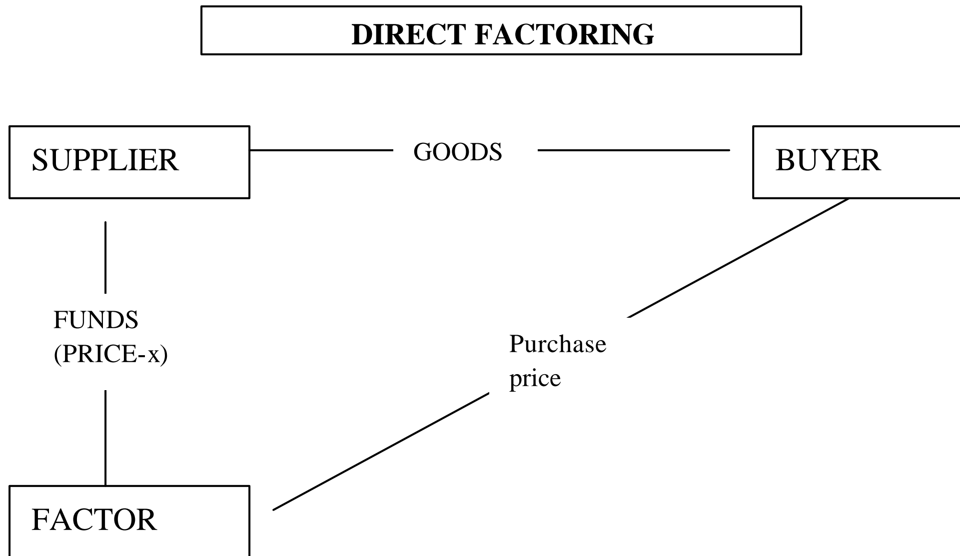
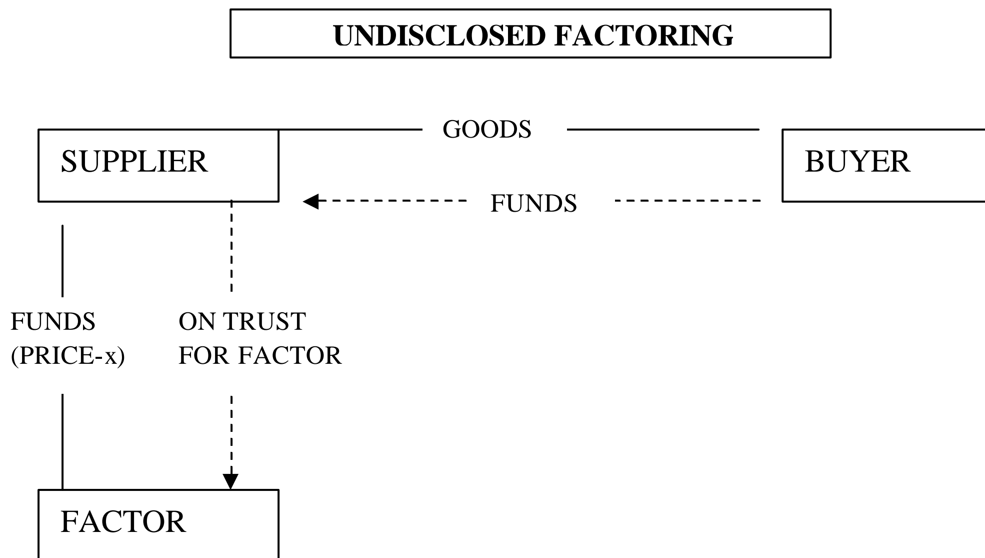
1.11 ANNEX

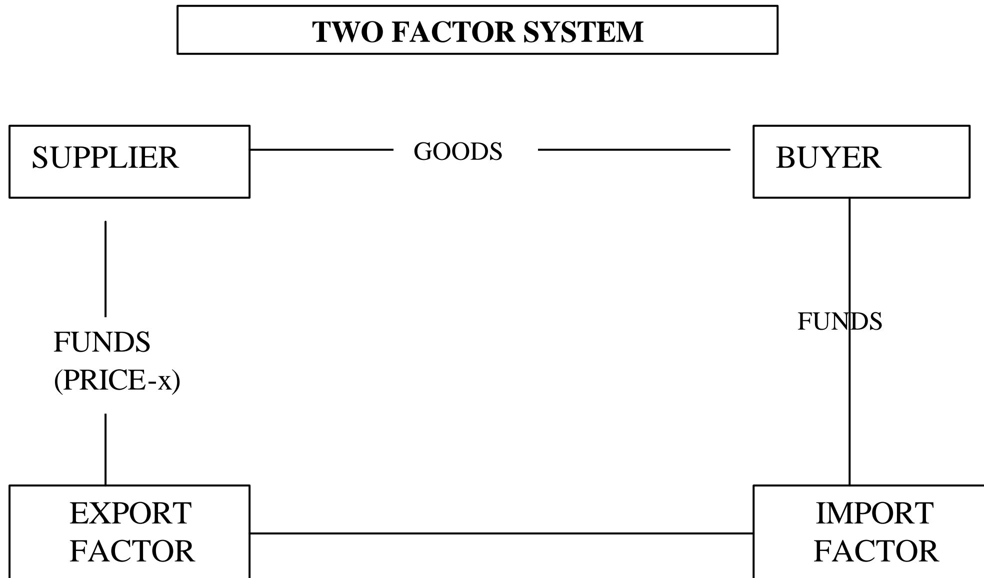
1.11.1 GRAPH 1



1.11.2 GRAPH 2



1.11.3 GRAPH 3



X connotes the factor's charges

2. Project Finance: Security for international loans

2.1 Introduction

Banks and private institutions are the main conduits of funds for international development. Major international banks often become involved in international lending on a large scale. One of the most effective methods of pooling funds for international development is project financing. In the modern financial climate, most of the funding for development comes from private sources. The changed political circumstances of the last decade have opened up new markets and have increased the need for capital for infrastructure development in many developing countries. These facts, along with the scarcity of available public funding have made project financing the primary method of financing infrastructure development both in the developed and the developing world. Securing public finance for development is unrealistic for Less Developed Countries (LDCs) due to their particular circumstances. Also, obtaining funding through the capital markets may not be such an attractive option due to low credit ratings because of political and economic instability. For this reason most LDCs choose the privatization of public industries as a way of attracting capital to improve their facilities. Project finance is the best avenue to secure such capital because it is better suited to deal with the political and commercial risks involved in development[60]. One of the major issues for the international lender is how best to guard his interests and secure his investment against any default. In this paper I will explain the nature and operation of project financing, outline the risks inherent in such projects and present the role security plays for international loans. Particular focus will be placed on the operation of security interests, their type and effectiveness in the context of international development projects.

2.2 What is Project Finance?

Project finance can be described as financing of a natural resource project or other asset or undertaking, which is repaid principally from the cash flow generated from the project or asset being financed[61]. It is used primarily for oil, gas and power development but it is a suitable means of finance for all kinds of infrastructure development. The main characteristic of project finance is that it is a commercial venture that is being undertaken to generate profits for the financier. The potential beneficial effects to the country where the project is being undertaken are taken into account but its profitability is the main consideration. This distinguishes private lending from institutional lending undertaken by institutions such as the World Bank which is conditional upon the beneficial effects to the development of the host state[62].

[60] Stelwagon p. 50
[61] Mills p. 305
[62] Chatterjee p. 421

Project financing is organized through a project company created for the purposes of the specific project. The Company then utilizes the funds advanced by the lenders and pays the contractor who builds the infrastructure, contracts an operator and makes the agreements with the purchasers of the products that are to be produced. The project sponsors and other lenders are repaid from the proceeds once the project becomes operational. The whole package is very complex and it requires careful drafting so as to mitigate the risks and ensure adequate and balanced coverage in the event of default by one of the participants[63].

Project financing has a number of advantages in relation to other forms of financing for international development. Other than often being the only available source of finance, project financing can ensure the equal allocation of benefits and burdens between different capital contributors, it helps limiting risks by isolating the project sponsors from the project company and it can be used to avoid showing the associated debt on the corporate sponsor's balance sheet. This can be important in maintaining institutional credit ratings[64].

2.3 What are the risks involved in Project Financing?

Project financing has to do with development projects in foreign states. The states that are more suitable to this type of financing technique are usually LDCs. This in itself suggests the difference with other commercial projects undertaken in the developed economies of the west. The international lender has to take into account a number of risks that go beyond the normal commercial risks contemplated in the domestic arena. In non recourse or limited recourse financing[65] the borrower's risk is limited to his own equity investment, while the lender faces a perilous situation unless adequately covered though different security techniques[66].

There are two main types of risk related to project finance, the commercial and the political risk. The commercial risks carry all the normal risks associated with capital intensive large scale development projects. Those include the fluctuation in consumer demand, prices for the product, input costs, the solvency of creditors and cost overruns[67]. However, the severity of the above is closely related to the type of project in question and its output. As we have seen above, project finance usually has to do with the extraction and utilization of oil and natural gas and the production of electricity. The effect of output price fluctuations and input costs will depend on the product and the nature of the offtaker (public or private) as well as the specific contractual terms

[63] See Annex for graphic illustrations of different project finance structures.
[64] See note 2
[65] The Project Company takes all loans in its own name, which means that the project sponsors do not show these debts on their balance sheets. The lenders will have no recourse to the project sponsors but only to the Company's assets, unless otherwise agreed. This restricts the means of repayment to the cash flow proceeds.
[66] Blumental p. 268
[67] See note 66

negotiated between the project participants. One of the special commercial risks, specifically related to projects in LDCs, which can be encountered from the beginning of the process, is the risk of failing to secure the award of the project in the bidding process[68]. Doubts over the lawfulness and due process of public tenders in LDCs may hinder the project from beginning in the first place.

Once the project is under way a multiplicity of other commercial risks present themselves. A point of increased interest for lenders in non recourse financing projects is the need for completion of the project within the agreed schedule. Delays in construction increase the costs considerably and may render the project unprofitable from the start. This will mean severe loss for such lenders who can only look to the project company's assets for satisfaction of their dues. Once the project is operational the risks are lower but the risks of technical failure, security and price stability for inputs, maintenance and customer retention are still important. In the context of power development projects the relationship between the project company and the host government is of primary importance. The demand growth for the product may be slower than expected with the result of delayed recoupment of the invested funds. Further, the public utility must be able to meet its obligations to the project company and make timely payments for the purchased products. Finally, the local government must in conjunction with the public utility have the ability to maintain the power network that will bring the product to the ultimate consumer[69].

One very important area of project risk is the need to obtain government approvals and licenses. This is particularly significant with respect to environmental legislation. The event of a project being shut down because it falls foul of environmental regulation could prove catastrophic for the lenders. Also the lenders need to be protected against environmental liabilities if they take over control of the project exercising their security interests[70].

Where project financing in developing countries clearly deviates from the norms of domestic development is the need to assess the political risk involved in the project. Even though it is the developing countries that present the greatest opportunities for profit through large projects, they are the most dangerous in terms of respect of the rule of law and economic stability. The volatile nature of many regimes in LDCs makes the need to assess the political risk involved one of the primary considerations from any lender's perspective. Political risk includes both the possibility of political and financial unrest and the chance that the host government through its actions will have a negative effect on the projected profitability of the project[71]. More specifically, a number of currency-related risks need to be taken into consideration. The project company needs to be

[68] Stelwagon p. 47
[69] Stelwagon p. 48
[70] Mills p. 310
[71] Mills p. 309

able to expatriate its profits without undue restrictions and needs to be able to convert its earnings to hard currency to be able to service its debt. Currency exchange controls that limit its ability to service its debts when they are denominated in hard currencies leave the profits subject to devaluation risks that may render the project unprofitable.

Further, in countries where a change of government may bring about a radical change of policy the project may become subject to expropriation. This may be done through a direct taking of the enterprise by the host state[72], or through a number of regulatory measures that gradually diminish the value of the investment (creeping expropriation).

2.4 Guarding against the risks

The risks described above portray the unique nature of project financing. The difference from normal commercial ventures in the domestic context is evident as the risks are qualitatively and quantitatively different. In order to guard against the above risks the lenders and the project sponsors will have to make an in depth analysis of all the parameters of a proposed project before embarking upon it. International lenders will usually prefer dealing with multinational corporations, which have the necessary expertise in dealing with large projects and will prefer the use of well-established technologies and techniques[73]. The allocation of risks between the lenders, the project sponsors and the host government (where involved) is a necessary precondition to the mitigation of losses in the event of some mishap. Allocating the risk to those more suitable to bear the burden is the best way of ensuring the viability of the relationship.

The availability of insurance and third party guarantees offers protection against most of the risks described above, be them of a commercial or a political nature. Multilateral organizations such as the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) as well as bilateral sources like the Overseas Private Investment Corporation (OPIC) and the US Eximbank can provide political risk insurance where this is not readily available through the private insurance market[74].

The issue of security over the assets of the project company specifically and the borrowers generally is a matter of primary significance to the lending institutions. The taking of security in the context of project financing differs from analogous transactions in the domestic context. The fact that the project takes place in another jurisdiction means that the legally available forms of security may be different than those operating in the home jurisdiction of the lenders. Furthermore, not all types of available security are suitable to secure international lending. The following part

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[72] See for example the arbitral proceedings in *AGIP v Congo* (ICSID Tribunal 1979)
[73] Mills p. 306
[74] Stelwagon p. 49

will focus on an analysis of the significance, purpose and feasibility of taking security for international loans in the context of a project financing operation.

2.5 Security for international loans

Security for loans has the objective of putting the lender in a preferential position as regards other creditors of the borrower[75]. In that respect, security for domestic loans serves the same purpose and shares similar characteristics to security for international lending. In the event of the borrower becoming insolvent the secured creditor can use the asset subject to the charge to recoup his investment while other unsecured creditors will have to prove in the insolvency and get a proportional share of what is left of the company's assets. These are usually found to be less than the whole extent of the company's liabilities. Selling the borrower's assets in the event of default is the 'aggressive' aspect of security interests. This will usually be sufficient in domestic projects and may be adequate in some international development projects. However, the sale of movables like aircraft of ships is more likely than the sale of infrastructure developments. In order for the security to fulfill its 'aggressive' function the asset must be freely marketable, its value must be ascertainable and the lenders must have the capability of realizing the asset without incurring liability to third parties[76]. This is rarely true for most types of developments attracting project financing. Immovable project assets and pieces of infrastructure are often not marketable and a sale may be politically sensitive or subject to government approval which could be difficult to obtain[77].

Security however, may serve a different purpose. International lenders may use security as a 'defensive' mechanism, no so much using their power of sale, as utilizing it to prevent any default. For example, the taking of security interests may be used to exclude other creditors from taking security over the project company's assets for their debts, as well as protecting the lenders from unsecured creditors. In order to remove the possibility of creating additional obligations to third parties the project company's activities are limited to the project in question[78]. Also, the difficulties with realizing the project company's assets do not affect the controlling power offered by them. Those jurisdictions that allow for a comprehensive floating charge over the borrower's assets and recognize the right of the lenders to the appointment of a receiver provide the international lender with a powerful weapon. Instead of withdrawing from the project in the event of default, the lender can assume the management of the business through the receiver in order to safeguard his investment. In England the well-developed principles in this area give the lenders a wide choice

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[75] The Law and Practice of International Banking p. 362
[76] Vinter p. 149
[77] Wood p. 30
[78] Cuthbert [Part I] p. 118

on methods to safeguard their interests[79]. In jurisdictions like most civil law countries and the US where the notion of a receiver is not acceptable in the same way, the lender will have to seek other legal forms to create effective security. In the US for example the bankruptcy procedure prohibits the creditors from running the borrower's business in order to serve their own interests[80].

Where it is not possible to assume the management of the business through the appointment of a receiver, the lenders may have the option of taking control of the project through security over the project company's shares. Also there may be provision in the project company's constitutional documents for a 'golden share' that allows the lenders to appoint a governing director of the company in the event of a default[81]. Assuming control of the project in such a fashion however, exposes the lenders more directly to a number of risks they would wish to avoid. For example the lenders may incur liability to the project company and any guarantors if they realize its assets below market value, and they may incur liability to third parties through the contractual agreements entered into by the project company while under their control[82]. Further, assuming control of the company by the lenders will not affect priorities as regards other creditors.

One final avenue used to duplicate the effects of the appointment of a receiver for jurisdictions where this is not available would be ring-fencing covenants that restrict other liabilities. These in conjunction with negative pledge clauses that prohibit the creation of other security interests over the same assets ranking prior to those of the project lenders, could afford them with a greater degree of protection. However, these carry the risk of being breached and they cannot protect against liabilities arising out of damages for breach of contract, tort and environmental liabilities and government impositions[83].

2.6 Possible types of security interests

At this point in the discussion it would be useful to briefly present the types of security that may be available to the lenders in different jurisdictions. The complex set of relationships between the different participants in project financing provides ample opportunities for the taking of security. Notwithstanding the unavailability of some forms of legal charge in some jurisdictions there is a wide choice of measures that can be used to create a comprehensive security package.

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[79] In England the floating charge has been long recognised. Its main characteristic and advantage is the managerial freedom it affords the chargeholder (*Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284). The floating chargeholder has the right to appoint a receiver and has an absolute veto on the appointment of an administrator (*Re Croftbell Ltd* [1990] BCC 781). The list of registrable security interests can be found in section 396 of the Companies Act 1985. It appears that charges over bank accounts are now possible, despite the theoretical difficulties surrounding them (*BCCI No 8* [1998] AC 214). For more information on English law see Sealy and Hooley Ch. 26.

[80] Vinter p. 150

[81] See note 77

[82] Vinter p. 168

[83] See note 77

The starting point in building a security package is the concession agreement. Most project finance development will be based upon a concession granted by the host government. Effective security over this agreement will be necessary to give full value to any security over the project assets[84]. The package will include security over the project assets, movable (machinery, products, inputs) and immovable (plant, real property). The technicalities that will determine the exact legal form of such security will depend on local laws. Further, the most important aspect of an operating project is the cash flows it generates. These will be channeled through the project company's bank accounts. The lenders will need to attain a valid security interest over these accounts to control the flow of funds[85].

A useful mechanism to protect the lenders from the effects of the project company's default is the use of direct agreements between the lenders, the project contractors and the host government. The object of a direct agreement is to suspend the rights of third parties to move against the project company, in order to satisfy their claims, in the event of a default on its loan obligations[86]. The lenders are thus allowed to step into the shoes of the project company to try and revive the project before the contracts are cancelled. Direct agreements are a very useful contractual method of putting the lenders in control of an ailing company in those jurisdictions where the appointment of a receiver is not possible through the use of universal security interests. However, as it has been discussed above, the assumption of control by the lenders directly may increase their exposure to other creditors. Often, collateral guarantees are used to create direct relations between the lenders and parties contracting with the project company (like professionals used in the project). These usually take the form of an acknowledgment that a duty of care is owed by the third party to the lenders[87].

Another useful method of structuring a project finance scheme is to use a security trust. For those countries where the notion of a trustee is recognized, all security for the various creditors can be pooled under common terms. This allows new funds to be advanced without upsetting priorities and it removes insolvency risks by the holders of the security interests[88].

For projects in developing countries with host government involvement, it may be possible to obtain some sort of government support to guard against some of the most pressing commercial and political risks described above. Often the government will accept contractual obligations not to discriminate against the developer and not to change its legal and regulatory regime to the detriment of the profitability of the project. One contractual method used to try and retain the legal

[84] Cuthbert [Part II] p. 128
[85] Cuthbert [Part II] p. 129
[86] Vinter p. 159
[87] Wood p. 33
[88] Cuthbert [Part III] p. 7

status quo existing at the time of the concession agreement is the use of stabilization clauses. These clauses attempt to freeze the legal framework of the host state at the time of the agreements on the project. This is said to provide certainty to the foreign investor that the profitability of the project will not be upset by political intervention. However, the legality and effectiveness of stabilization clauses in the context of state sovereignty has been seriously doubted[89].

The host government, the shareholders, or third parties involved in the project may provide guarantees to secure the obligations of the project company in the event of a default. When such guarantees are not forthcoming the lenders may receive a comfort letter stating the intention to assist the project company in meeting its obligations. However, the legal effect of a letter of comfort will depend on its precise wording[90] and is a much less effective mean of security than a guarantee, which creates clearly enforceable contractual obligations. Finally, one should be aware of the possibility of obtaining insurance cover against commercial and non commercial risks both in the private insurance market and from multilateral institutions (see above).

2.7 Problems with legal security

In the course of the preceding analysis we have touched upon the problems created by the lack of correspondence of legal methods for obtaining security in different jurisdictions. This is a major problem for the lenders since they will need to acquire a workable knowledge of the foreign legal system in order to effectively structure the project and reduce their exposure. This may be difficult when the project is situated in an LDC with an underdeveloped legal system. The drafters of the security agreements need to be very careful to avoid transplanting legal concepts from their own jurisdiction to another where they do not always fit. This may provide the lender with a false sense of security, which can lead to dangerous exposure[91]. Some of the most common problems encountered in foreign jurisdictions may include the unavailability of universal security interests, like the floating charge (mentioned above), the need for a court order to effect sale of the secured assets, the lack of the notion of possessory management, burdensome formalities, prior higher ranking rights over the assets, cancellation of government licenses on default of the project company, restrictions to sale to aliens, currency and exchange controls and finally the impossibility of taking security over chattels not in the lender's possession[92].

At this point is useful to lay down some of the basic conflict of laws rules that touch upon the taking of security over foreign assets. Where English law can be brought to bear on the

[89] For more information on stabilization clauses see Waelde, T. & Ndi, G. *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation* [1996] 31 Tex Int'l LJ 216
[90] See *Kleinwort Benson Limited v Malaysian Mining Corporation BHD* [1989] 1 All ER 785
[91] Delaume p. 215-216
[92] Wood p. 31

arrangement, even as a simple matter of convenience, it will arguably provide the lender with more effective protection. Immovable assets are governed by the law of the jurisdiction in which they are situated. English courts will not normally make an order against foreign land[93]. As far as moveable tangible assets are concerned the applicable law will be the law of the place where the assets are situated at the time of transfer. Chattels that can move independently (like aircraft and ships) are treated by some states according to the rule of the flag, like natural persons with a specific nationality[94]. Of course while in the territory of a state the local mandatory rules apply and may affect the security interests. Problems may arise in respect of security over intangible property, like charges over debts. Here, the law of the contract of assignment and the law of the place where the assignment took place may be relevant, but there is no clear answer on an international level[95].

The difficulties with the taking of security for international loans in the context of project financing raise the issue of the practicability and desirability of legal security in this context. One might argue that the costly and lengthy feasibility studies that precede the lender's involvement in a development project would be enough to provide adequate assurance against the risks described above. Perhaps the difficulty with creating enforceable and practical security interests over the project's assets makes them redundant. It is submitted that it would be wrong to take such a view of legal security for project financing. Apart from the obvious ability to extract the lender's funds in the event of a default (as mentioned above), security serves a number of other functions to the benefit of everyone involved. Despite the practical difficulties, the taking of security is a way to commit both the lender and the borrower into the project and ensure that in the event of difficulties, the borrower will not be able to abandon the project. Further, the taking of security affects the evaluation of the risks involved in the project because it makes the chance of default more serious. Also, the backing of security makes the lender's debts more easily marketable, so he can raise additional capital through factoring and analogous transactions[96].

2.8 Conclusion

As we have seen in the preceding analysis, international lending is a complex process that requires a considerable investment of time and money, especially in assessing the advisability of lending in the early stages of the bank's involvement. The complexity of putting together a project finance package however, does not reduce its effectiveness as a means of funding international development. Security admittedly plays a central role in the transaction. Even though the basis for

[93] See for example *Grey v Manitoba Railway Co* [1897] AC 254
[94] See *The Jupiter* [1924] P. 236
[95] The Law and Practice of International Banking p. 363-364. Recent efforts at international codification, like the recently adopted UN Convention on Assignments of Receivables in International Trade (12/12/2001, General Assembly Resolution A/RES/56/81) will help in creating a more certain international legal environment.
[96] Allan p. 58-59

any commercial action is the possibility of profit generation, the lenders need to have some assurance that they will be able to extract their funds in the event of their projections being incorrect. Apart from the legal and business logic behind security, it also serves an important psychological function[97]. In sum it is possible to construct a solid security package for the lenders using the available legal tools that the relevant jurisdiction allows. This in conjunction with third party guarantees from private and institutional actors, coupled with comprehensive insurance has the capacity of reducing the risks involved in project financing to the level where it is highly attractive for the lenders to invest. As far as LDCs are concerned, the global climate is broadly in favour of foreign direct investment and the competition between developing countries in attracting investment suggests that they will pursue legal and political reforms that make their jurisdictions more protective of international investors[98]. The modernization of the legal framework will mean in most circumstances an improvement in available security techniques[99].

[97] Allan p. 58
[98] This is evidenced in the UNCTAD World Investment Reports of 1998 and 1999
[99] Fleisig p. 44

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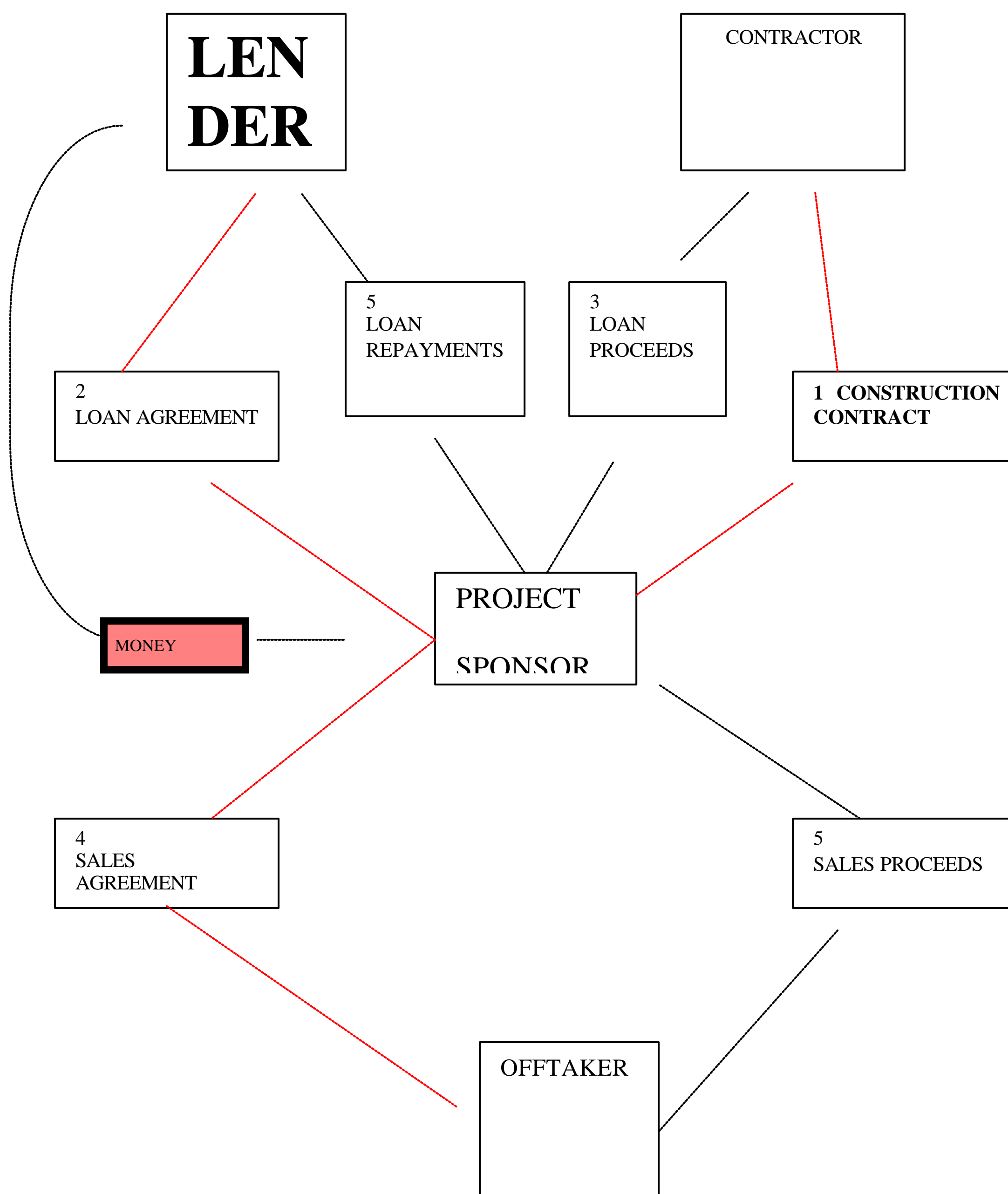
2.10 ANNEX[i]

2.10.1 BASIC PROJECT FINANCE STRUCTURE



2.10.2 FINANCING STRUCTURE

GUARANTEE OF REPAYMENT IN CASE OF SHORTFALL

4 SPONSOR SUPPORT AGREEMENT

LENDERS

1 LOAN AGREEMENT

6 DEBT SERVICE

FUNDS

DEALING WITH TRUSTEES

COLLATERAL TRUSTEES

2 TRUSTEE & SECURITY AGREEMENT

ASSIGN MENT

PROJECT CO

PROJECT SPONSORS

6 EXCESS REVENUE

FOR LOAN

ASSIGN EQUITY TO TRUSTEE AS SECURITY

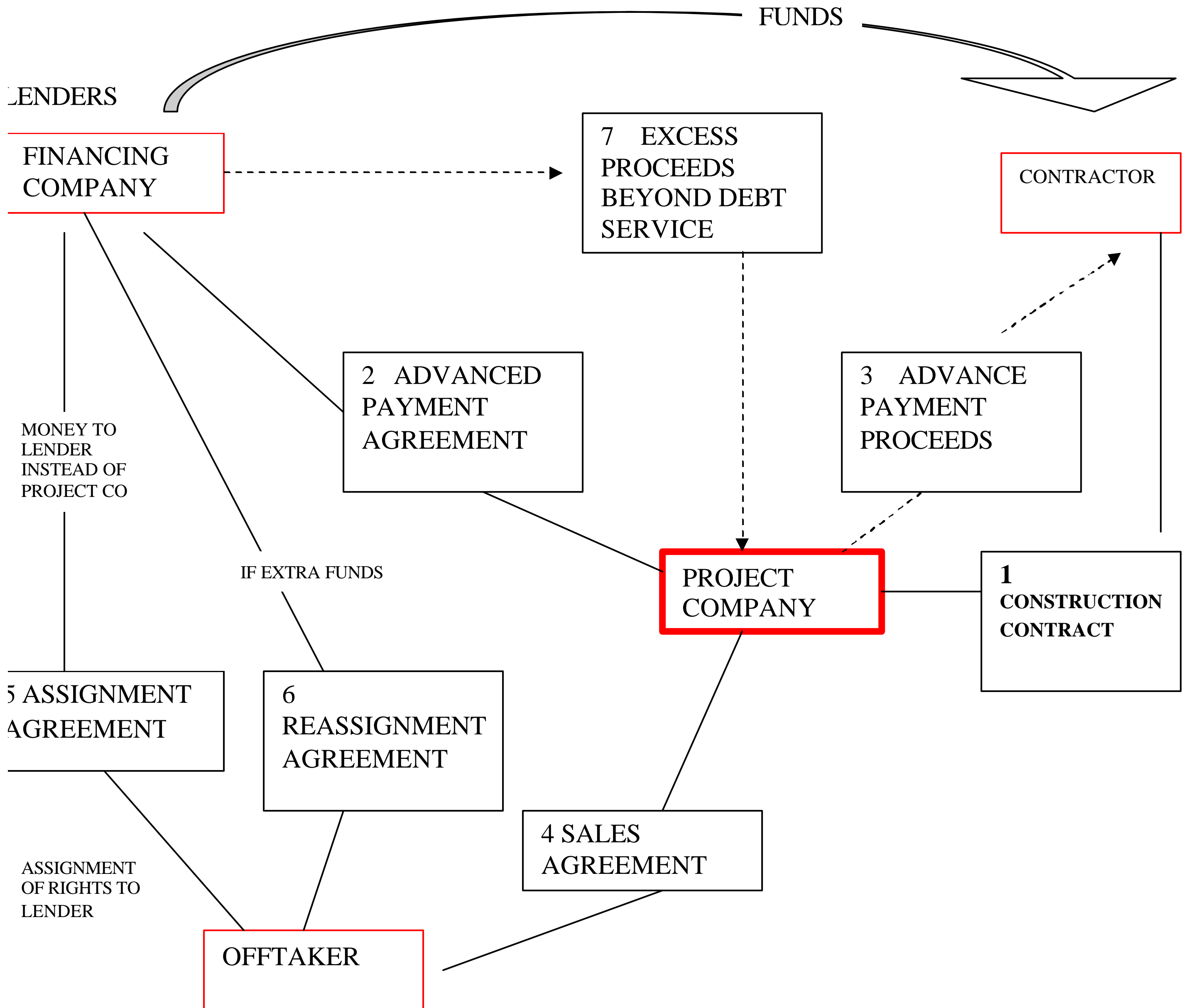
3 PLEDGE AGREEMENT

5 SALES PROCEEDS

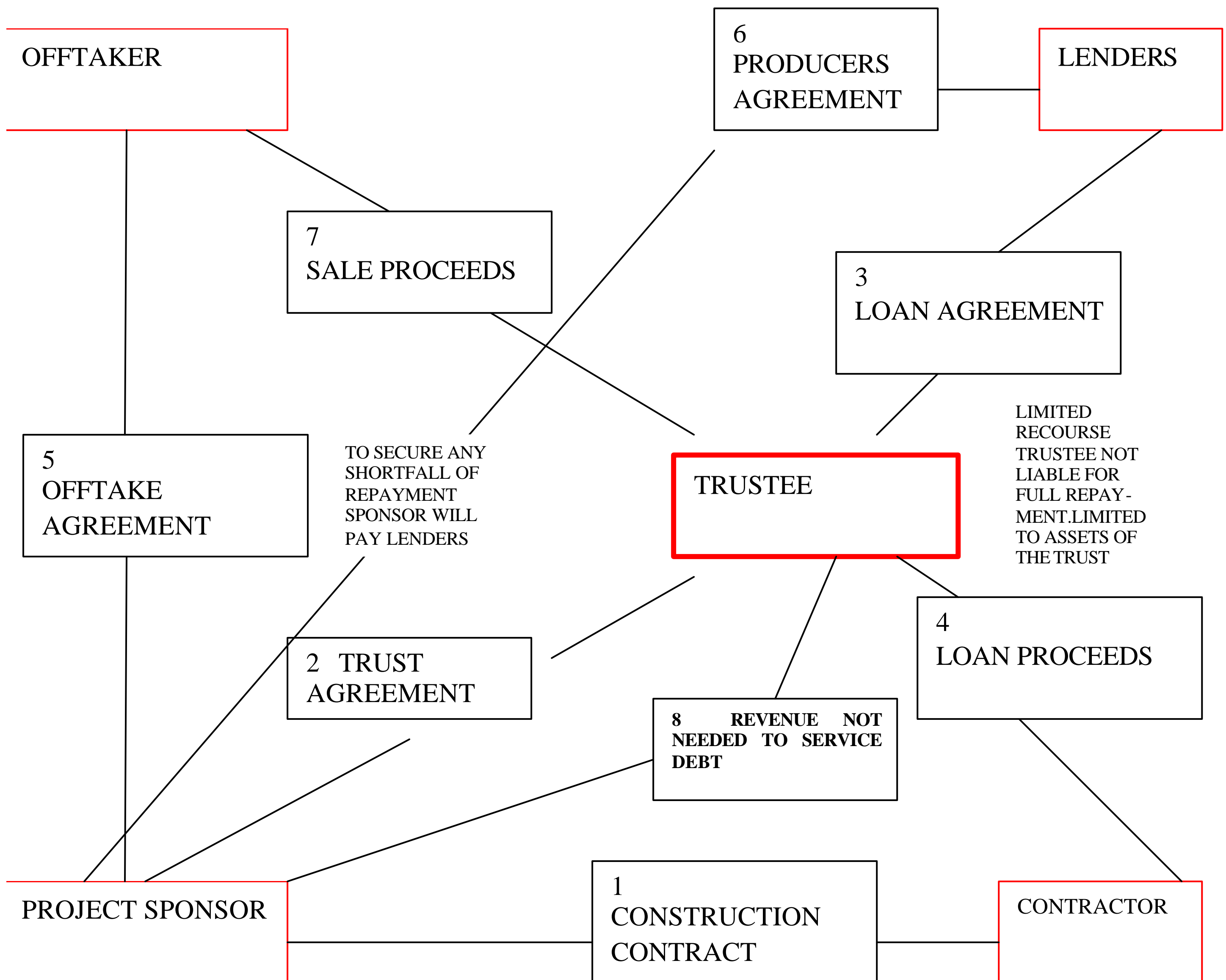
PAYS EXPENSES TO OPERATOR

OFFTAKER

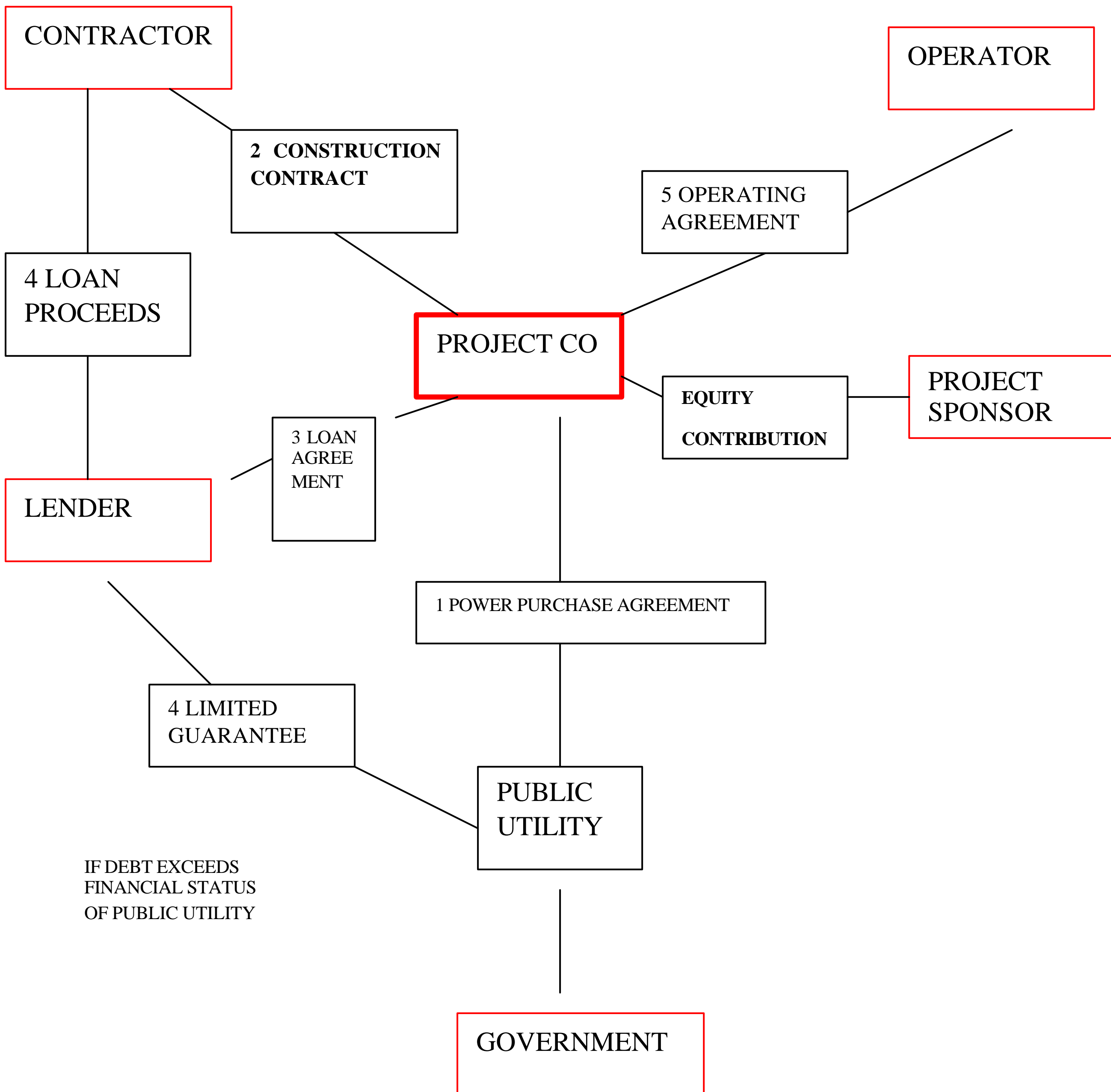
2.10.3 ADVANCE PAYMENT STRUCTURE



2.10.4 TRUSTEE BORROWING STRUCTURE



2.10.5 BUILD-OPERATE-TRANSFER STRUCTURE



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[i] The numbers in the boxes indicate the order in time in which the contracts usually are agreed.