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Compare and Contrast Offtake Agreements and Concession Agreements

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Abstract
There are many types of project agreements that are executed for infrastructure projects; oil and gas exploration projects; and liquefied natural gas development projects. These agreements commonly tend to fall into two categories: offtake agreements and concession agreements. This paper advances the understanding of the main project agreements, it explains the agreements and their models. The paper aims to explore the similarities and differences between offtake and concession agreements. The research methods adopted in this study include qualitative comparative methods and the comparison and contrast between agreements are performed through *extensive study of the relevant literature.*
Keywords: Project finance, project agreement, offtake agreement and concession agreement.

1. Introduction

In a country's economic progress, infrastructure development, oil and gas exploration and liquefied natural gas development are top priorities and play a massive role in a country's economic success. In many countries, the Government does not have enough funds for investing in mentioned projects and this is a principal constraint to growth. Therefore, the best solution for financing these projects is project finance, which is raising funds to pay the cost of the large capital projects from several different countries. The term 'project finance' is increasingly becoming a part of our everyday language and being used in almost in every part of the world. Scott L. Hoffman defines project finance as: " *a nonrecourse or limited recourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing, of a particular facility in a capital-intensive industry, in which lenders base credit appraisals on the projected revenues from the operation of the facility*".[1] Also, RishadSadikot defines it as: " *a method of raising long-term financing for major projects based on lending against the cash flow generated by the project alone. This refers to the fact that project sponsors or creditors are repaid or earn a return solely from the revenue that is generated by sale of the project's output*" .[2]

Project financing is used by many companies as a suitable way for fulfilling large projects in a number of situations such as: natural resources project (mining, oil and gas), independent power project in the electricity sector, also for public infrastructure for example: roads, transport, public building, and also for the explosive growth in mobile telephone networks worldwide.[3] Furthermore, there are a number of typical characteristics of project finance for instance: through a special purpose legal entity, which is provided for a ring-fenced project and usually, for a new project, not an established business. Moreover, there is a high ratio of debt to equity and there are no guarantees or limited guarantees from the investors for the project finance debt and lenders to be generated by the project for repayment and interest, only the future cash flow projected. Project company's agreements are the main security for lenders. [4] The project agreements may include two types of agreements: the first one is A Project Agreement, which may by either an Off-take Agreement or a Concession Agreement. The second one is Other Project Agreements such as Turnkey Engineering, Procurement and Construction (EPC) contract, Input Supply Contract, Operating and Maintenance (O&M) Contract and Government Support Agreement.[5]

This paper aims to explain the two main models for a project agreement, which are offtake agreements and concession agreements. The paper will further compare and contrast offtake agreements and concession agreements.

[1]S L. Hoffman, *The Law and Business of International Project Finance* (3rd edn Cambridge University Press, New York 2008) p 4.
[2]R Sadikot, 'Islamic Project Finance: Shari'a Compliant Financing of Large Scale Infrastructure Projects' (2012) Spring AlNakhlah (Journal on Southwest Asia and Islamic Civilization) 1-9.
[3]E R Yescombe, *Principles of Project Finance* (Academic Press, London 2002) p. 6
[4]ibid., p. 7.
[5]ibid., p. 9.

2. Main Models for a Project Agreement:

A project agreement is defined by E. R. Yescombe as "*a contract that provides the framework under which the project company obtains its revenues*". [1] Main models for a project agreement are divided into two categories: offtake agreements, under which the project company engages in extracting a production such as oil and gas or electricity and then, sells it to an offtaker. The other category is concession agreements, which are used for providing services such as toll roads, hospitals and mobile phone networks to the public or government by the project company. [2] Furthermore, both offtake agreements and concession agreements include different structures or forms. It can be said that this is a significant deference between them, which will be explained below.

2.1 Offtake Agreement:

Agreements such as offtake agreements become of vital importance where a project is dependent on guaranteed offtake for its products[3] because offtake agreements represent the source of revenue for the project. An Offtake agreement is a legal contract between two parties regarding specific amounts of goods to be delivered from one party to the other. It is usually used by energy producers like coal mines, power plants[4] and also for extracting oil and gas. However, it has been used in some cases of toll transportation facilities, for example the Channel Tunnel.[5]

An offtake agreement may be made with a purchaser for the purchase of any output produced by the project, in order to divert market risk away from the project company and the lenders.[6] In this agreement, the offtake purchaser has to pay for an amount of project service or procure a certain amount of project output over a given time. It therefore provides a secure supply of the required product for offtaker, and the ability to sell its products and secures the project payment stream for the project company.

Types of Offtake Agreements:

There are various forms, which offtake agreements can take:

2.1.1 Take or Pay Contract:

A take or pay contract is a legal agreement between an offteker of a facility's output and a project company, under which the offtaker agrees to take the project's product or to make payments to the project company for its good or service to maintain its capacity to produce and deliver the good or service. Moreover, the offtake purchaser makes payments whether or not the good or service is generated at the purchaser's request. Therefore, the buyer payment obligation for the capacity component is unconditional.[7] Under take-or-pay contracts, payments may be set to cover all fixed costs of the project, fixed operating costs and maintenance costs, debt service, after-tax equity return, or may cover only part of the project's available capacity.[8]

It should be noted that, sometimes, these contracts are on a "hell-or-high water" basis[9] where, the payment obligation exists even if the project company produces nothing or it is incapable of producing anything. Additionally, in the 1950s and 1960s,a number of so-called "promotional pipelines" were financed on the basis of take-or-pay contracts, which freed the gas purchasers from their obligations to pay in certain circumstances of force majeure.[10]

2.1.2 Take and Pay Contract:

Sometimes, this is called a 'take-if-offered' contract. It is requires the offtaker to take and pay for the project output or to pay the project company as if it did take the output. Inother words, the offtaker pays only for whatever is taken on an agreed price basis. In this contract, it is optional for the purchaser to refuse deliveries if it pays a capacity charge. The charge reflects the producer's fixed costs and the purchaser is not required to buy

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[1] ibid., p. 69.

[2] Professor A Haynes, 'International Project Finance Law: Oil and Gas: Week 3 Lecture Notes' (Wolverhampton: Wolverhampton University 2013) <https://wolf.wlv.ac.uk/lssc/73144/3.1%20Project%20Agreements%20Questions.docx?menu=930696>, accessed 7 May 2016.

[3] T Sharma, *International Project Finance: A Legal and Financial Guide to Bankable Proposals* (Tottel Publishing, Haywards Heath 2006) p. 168.

[4] O Vitez, 'What is an offtake agreement?' <http://www.ehow.co.uk/about_5571814_offtake-agreement.html> accessed 15 Jun 2016.

[5] Tang Q Cuong, 'Policy Analysis for Improving Performance of PPP Projects in Vietnam', Master Thesis (Civil Engineering and Geosciences Delft University of Technology, The Netherlands, June 2010), p. 18.

[6] Madialo L Odero, 'Public-Privet Partnerships and The Development of Infrastructure in Kenya: Understanding and Resolving Disputes', Master Thesis (University of Nairobi, School of Law 2010), p. 70.

[7] Hoffman, op. cit., p. 210.

[8] J Ruster, 'Mitigating commercial risks in project finance' Public Policy for the Private Sector, Note 69 (1996), p.3 <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/069ruster.pdf> accessed 9 Sep 2016.

[9] Yescombe, op. cit., p. 70.

[10] J D Finnery, *Project Financing:Asset-Based Financial Engineering*(2nd edn John Wiley & Sons, Inc., Hoboken, New Jersey 2007) p. 92.

the output if it does not want to do that. However, if the project company has actually produced and delivered, only in this case is the buyer obligated to pay.[1]

It should be said that there is still confusion between the definitions of take-or-pay and take-and-pay contract in the project finance community. Clearly, the difference between them is that, take-and-pay requires a payment only if the product is produced but take-or-pay requires a payment unconditionally.

2.1.3 Blended Contract:

Sometimes, offtake contracts are created to include aspects of both take-or-pay and take-and-pay contracts. In this type of contract, in specified cases of service interruption, purchaser payments are required. These payments can be advance payments or loans that the project company credits against service provided later. [2]

2.1.4 Long-Term Sales Contract:

In a Long-term sales contract, the offtaker agrees to buy specified contract quantities of product from the project, based on market prices at the time of purchasing or based on an agreed market index. These contracts usually are found when the project company wants to ensure that its output product can easily be sold, especially in oil and gas, mining and petrochemical contracts. The contract may have a floor or minimum price for the commodity.[3] Moreover, the term of this type of agreement is usually one to five years. Also, contract damages may be payable to the project company, if the offtaker does not buy conforming goods.[4]

2.1.5 Hedging Contract:

To protect the project company against a fall in the market price of the product, this type of contract can be used. In market traders, it can enter into various kinds of hedging contract, for instance, it is possible to do by long term forward sale agreements at a fixed price. Also, where the sale is at the market price but not dropping below a set level or rising above another stated price, this contract can be done. Therefore, the variation in price is only within these stated parameters.[5]

2.1.6 Throughput Agreement:

This is usually used in connection with oil or petroleum product pipeline finance. During a specified period, under this agreement, the oil or gas producers are required to provide a certain throughput to the pipeline so that the pipeline operator can cover all its operating expenses and meet its debt service.[6]

2.2 Concession Agreements:

A concession agreement is entered into between a public- sector entity and the project company (the figure), under which the project company must operate and the types and period of concession are specified. For instance, the concession may state that the firm finances, upgrades, build, maintains, and operates a road for 20-30 years, in a road project, before transferring ownership to the government.[7] Additionally, under this contract, the aim of the project is to provide a service rather than product to the public-sector entity or to the public.[8]The concession agreement contains the detailed obligations and rights of the parties and also creates the right and obligation to build, own and transfer ownership to the host government infrastructure used for the general benefit of the population. Therefore, It should clearly state the rights such as terms and duration of the concession, capacity of extending the concession even if there are changes in the law, termination of the concession, and ability of banks to freely transfer the concession to a third party.[9]

[1]Hoffman, loc. cit.
[2]ibid., p. 210, 211.
[3]Yescombe, op. cit., p. 71.
[4]Hoffman, op. cit., p. 211.
[5]Professor A Haynes,loc. cit.
[6]A Merna,Y Chu and F Al-Thani, *Project Finance in Construction: A Structured Guide to Assessment* (Wiley-Blackwell, Chichester 2010) p. 63.
[7]W Tan, *Principles of Project and Infrastructure Finance* (1st edn Taylor & Francis, Abingdon 2007) p. 222.
[8]Yescombe, op. cit., p. 79.
[9]A Fight,*Introduction to Project Finance* (1st edn Butterworth-Heinemann, Elsevier, Oxford 2006)p. 112-113.

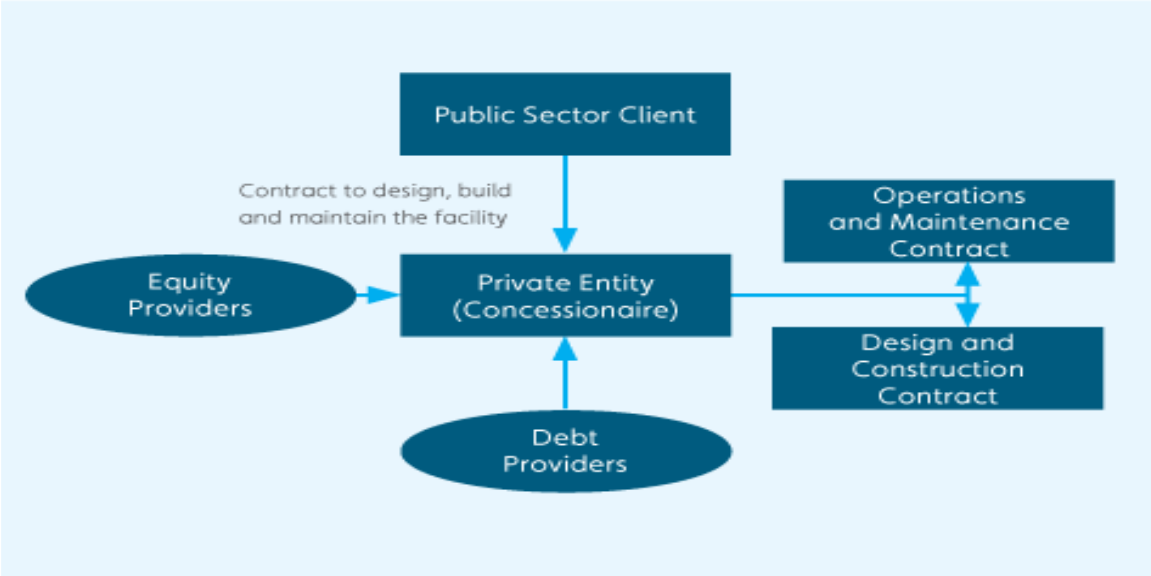

Figure . A typicalconcession contracts
Source: http://www.nzsif.co.nz/Social-Infrastructure/What-are-Public-Private-Partnerships/ (accessed 14 Feb 2016).

Moreover, the contractual parties also agree on such issues as dispute resolution and governing law, and the consequences of force majeure and events of default.[1] The contract may be granted by different methods, including direct negotiation, competitive bidding, and a tender procedure.[2]The first concession contracts were granted for the creation and financing of the Mediterranean–Atlantic Channel (Canal du Midi launched in 1666) and Canal de Briare (1638).[3] The modern version of this contract goes under different names for instance, Service Agreement or Project Agreement and typical examples where concession agreements are used, are toll roads and bridges, transportation systems, ports and airports, water and sewage systems and public-sector building such as schools, government offices and hospitals.[4]

Types of Concession Agreements:

There are different structures for concession agreements including the following:

2.2.1 Build-Operate-Transfer (BOT):

Under BOT, a government requests the private promoter to design, build and operate the facility for an agreed period and after this period, transfer ownership to the government free of cost and this is the main idea of (BOT). In the other word, BOT is an arrangement where the private sector designs and builds the infrastructure, funds its construction facility and owns, maintains and operates it over an agreed period often as long as 20 to 50 years. The period is referred to as the 'concession' period. At the end of the concession period, the facility is transferred back to the government, after the project company has obtained a positive return for its equity investors.[5]

During the concession period,the company receives sufficient revenue to: "service debt incurred in designing and building the facility, cover its working capital and maintenance costs, repay its equity investors and hopefully provide them a reasonable profit ".[6] In a BOT project, participants include the government, the concessionaire (a private company), lenders (banks), contractors, equity investors, suppliers, operators and financial advisers.[7]These schemes are also referred to as 'BOO'(Build-Own-Operate), 'BOOT' (Build-Own-Operate-Transfer), 'FBOOT' (Finance-Build-Own-Operate-Transfer) or rarely other acronyms. BOT agreements could be used for an oil refinery, power station, new road or bridge, water treatment plant, all of which would

[1]X Phomsoupha, 'Project Financing in Laos' Hydropower for Export of Electricity to Thailand' (2012) 10 Hydro Nepal: Journal of Water, Energy and Environment 7-10.
[2]AAPallis, T E Notteboom and PW De Langen, 'Concession agreements and market entry in the container terminal industry' (2008)10 Maritime Economics & Logistics 209-228.
[3]D Grimsey and M K Lewis, *Public and Private Partnerships. The Worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elgar, Cheltenham 2004) p. 47-48.
[4]Yescombe, op. cit., p. 79-80.
[5]S K Shrestha, 'Prospects of BOT (Build-Operate-Transfer) Projects for Infrastructure Development in Nepal' (2011) 8 Journal of the Institute of Engineering 138–142
[6]ibid.
[7]S M JAD, 'Build, Operate, And Transfer (BOT). Project Development System In Saudi Arabia', [web document] (2005),<http://faculty.kfupm.edu.sa/CEM/assaf/Students_Reports/Build-Operate-and-Transfer-Project.pdf> accessed 9 Jan 2016.

previously have seen direct funding.[1]The Turkish Government used the first BOT on a power plant project in the early 1980s.[2]

2.2.2 Build-Own-Operate-Transfer (BOOT)

BOOT is an arrangement where a concession company (private entity) designs, finances, builds, operates and maintains a facility. Ownership rests with the concessionaire[3] and it charges user fees for a specified concession period. At the end of this period, ownership and operating rights are transferred back to the public sector normally without charge and if not already transferred upon completion of the facility.[4] During the concession period, the concession company owns and operates the facility and collects revenues for repaying the financing and investment costs. Additionally, it maintains and operates the facility and makes a margin of profit.[5]The first BOOT project in Chinais Shajiao and was transferred to the Shenzhen government successfully in September 1999.[6]

2.2.3 Build-Transfer-Operate (BTO)

In BTO, the concession company (private entity) constructs and builds the facility and then transfers the ownership to the public sector or government.[7] In other words, a project company completes the project and transfers it back to the host government for a specified consideration. Then, the government contracts with a private company to operate the facility during the contract term, and either pays the operator a fee or receives royalty payments from the operator.[8]

2.2.4 Build-Own-Operate (BOO)

In a typical BOO structure, the control and the title of ownership of the projects remain with the private sector, that is, there is no transfer of ownership to the government. Under the BOO project, the private sector entity is responsible for financing, building, owning and operating an infrastructure facility effectively in perpetuity. An example of BOO is the water treatment plants serving parts of South Australia.[9]

2.2.5 Build-Lease-Transfer (BLT)

In these arrangements, the sponsor leases the assets from the contractor once the project is finished and paid for. It will be leased for a designated period of time and during this time; the sponsor retains control and operates the facilities. The sponsor takes final possession of the project's assets, when the lease expires.[10]

2.2.6 Build-Operate-Share-Transfer (BOST)

In a BOST contract, a concession or a franchise is granted to a private company by a government to finance and build or modernize a specific port/terminal for a certain period of time. The revenue, which is obtained from terminal operations throughout the concession period, is shared with a designated public authority. Additionally, the commercial risks are shared between the government/public authority and the concessionaire. The government regains ownership of the improved asset at the end of the concession period. An example of BOST comes from the proposal of BCC Shipping & Shipbuilding Ltd and its UK partners for developing Tadri Mini Seaport at Karnataka State in India.[11]

Additional structures for concession agreements include: BLTM (Build, Lease, Transfer, Maintain), BOOR (Build, Own, Operate, Remove), LROT (Lease, Renovate, Operate, Transfer),DBFO (Design, Build, Finance, Operate), DCMF (Design, Construct, Manage, Finance) and DBFOM (Design, Build, Finance, Operate, Manage) etc. However, because of the limitation of words, they will not be explained in detail here.

3. Comparisons and Contrasts between Offtake Agreements and Concession Agreements

In terms of compare and contrast offtake agreements and concession agreements, there are a number of similarities and differences between them, as follow:

3.1 Similarities between Offtake Agreements and Concession Agreements

Obviously, offtake agreements have many characteristics in common and similarities with concession agreements for instance, in terms, control, compensation for additional costs (breaches by the offtaker or contracting authority, changesin circumstances, changes in law and latent defects), force majeure, emergency

[1]D McNair, 'Project Financein Asia' <http://www.mcmullan.net/eclj/projfin.html> accessed 14 May 2016.
[2]Shrestha,loc. cit.
[3]Grimsey and M K Lewis, op. cit., p. x.
[4]Madialo L Odero, op. cit., p.34.
[5]N J Smith(ed.),*Engineering Project Management* (Blackwell Science, Oxford 2002) p. 250
[6]Merna,Y Chu and F Al-Thani, op. cit., p. 65.
[7]JAD, op. cit., p. 5.
[8]J Dewar,*International Project Finance: Law and Practice* (Oxford University Press, Oxford 2011) p. 51.
[9]Grimsey and M K Lewis, op. cit., p. 28.
[10] H Ghersi and J Sabal, 'An Introduction to Project Finance in Emerging Markets', [web document] (2006),<http://apps.esade.edu/facultybio/downloadDoc?fbitem=63042&tipodoc=OD1> accessed 7 Jul 2016.
[11]TNotteboom, 'Concession agreements as port governance tools' (2007) 17Research in Transportation Economics 437-455.

take over by contracting authority, termination and event of default.

3.1.1 Term (duration)

The terms (duration) of offtake agreements and concession agreements will run for a finite period of time[1] and they should be valid at least for the life of the project. The life of projects are different from project to project. Therefore, the terms are different in both offtake and concession agreements from one project to another. There are three factors that influence the term of the agreements: firstly, the useful life of the project which sets the maximum term of the project agreement. Secondly, the likely term of the debt and thirdly, the residual value of the plant or land. At the end of the project, this residual value should make it possible to continue to operate profitably and efficiently. [2] For instance, in oil well or gas field projects, the depleted source on top of it, may have valueless lands. However, in toll road or railways projects, the residual value could be very high.[3]

Moreover, in both offtake and concession agreements, the term can be renewed and there is a renewal option. It can be for certain number of renewal periods dependent on the agreement of both parties.[4]

As mentioned before, there is no specified term in all offtake and concession agreements. It can be said that the duration of time is different between offtake and concession agreements. John D. Finnerty states that the mean length of the concessions agreements granted by the host governments worldwide was 28.3 years, and the median length of the concessions was 25.0 years between 1997 and 2001, also more than half were between 21 and 30 years, (as shown in Table 1).[5]

Table 1 Length of Concession Agreements, 1997–2001

Number of Years							
≤10	11–20	21–30	31–40	41–50	>50	Mean	Median
Number	14	70	166	18	13	15	28.3	25.0
Percent	5%	24%	56%	6%	4%	5%		

Note: The concession period is the number of years the project sponsor will operate a given project.
Source: J D Finnery, *Project Financing: Asset-Based Financial Engineering*, p. 40.

Additionally, he states that both the mean and median length of offtake agreements were about 20 years between 1997 and 2001. He mentions that more than half (52%) of the offtake contracts extend between 11 and 20 years and about 20% had a duration of 25 years (as shown in Table 2). These long-term contracts are usually in the oil and gas and power industries or are for infrastructure projects.[6]

Table 2 Length of Offtake Contracts, 1997–2001

Number of Years							
	≤5	6–10	11–15	16–20	21–25	>25	Mean	Median
Number	6	15	46	71	40	45	19.5	20.0
Percent	3%	7%	20%	32%	18%	20%		

Note: The offtake period is the number of years with contracted purchase of output.
Source: J D Finnery, *Project Financing: Asset-Based Financial Engineering*, p. 41.

3.1.2 Control

In both offtake and concession agreements, the project company is responsible for certain areas of the project for instance, designing the facility and arranging construction. Moreover, the offtaker and contracting authority are responsible for the project or service which must be provided and also responsible for how this should be done.[7] Despite this, the offtaker and contracting authority do not have the capacity to require changes in design, to supervise, or otherwise to become directly involved in the building or operation of the scheme (the construction process). However, it is necessary to check some aspects of the project. Therefore, they have the contractual and legal right to have a third party to run the necessary checks.[8]

[1]Professor A Haynes, op. cit., p. 6.
[2]Yescombe, op. cit., p. 86-87.
[3]Professor A Haynes,loc. cit.
[4]A R Shaikh and others, *International Corporate Practice - A Practitioner's Guide to Global Success*(Practising Law Institute, New York City 2008) p. 16-39.
[5]Finnery, op. cit., p. 40.
[6]ibid., p. 41.
[7]Professor A Haynes,loc. cit.
[8]ibid.

3.1.3 Compensation for Additional Costs

Under the Project Agreement, a unitary charge can be adjusted to compensate the project company for additional costs in a limited number of circumstances. Firstly, compensation would be payable when the project company suffers a loss of revenue or suffers extra costs where the offtaker or contracting authority fails to meet its obligations. Secondly, if it is necessary, the offtaker or contracting authority will be able to make changes in the specification of the project or to change the basis of the project, for example, converting an oil-fired power plant to gas fired. Again in this case compensation is necessary for additional costs.[1]

Another circumstance is changes in law. Any additional capital or operation costs ~~are made~~ for the project company caused by changes in law may be payable by the offtaker or contracting authority. Finally, compensation would be payable to the project company where any latent (hidden) defects occur in the transferred assets, or payable in other unforeseeable circumstances.[2]

3.1.4 Force Majeure

Graham D. Vinterb defines force majeure as *"a commercial law concept, which prevents a party to a contract being in breach of his obligations to the extent he cannot perform them as a result of supervening events outside his control."*[3]Ayaz R. Shaikh and others define it as *"an event that is beyond the control of a party and prevent the party from performing its obligations under the contract."*[4] Force majeure can bring the contract to an end. In civil law states, this is part of the legal system. However, in common law states it has to be added as a term to the relevant contract. The force majeure events include: natural disasters (often referred to as acts of God), war and terrorism, governmental actions, system emergencies and labour strikes.[5]

A Force majeure clause eliminates or mitigates material risks that are recognized to be beyond the control of the contract parties. Therefore, the results of force majeure are: no penalties are imposed for non-performance, no payments are due from the offtaker or contracting authority in case of not delivering the product or service, remaining liable to make any monetary payments due under the contract and finally cancelling the contract if it will be impossible to carry out. These results will occur when a party is subject to force majeure or when there is an event of force majeure.[6]There are to types of force majeure events, temporary and permanent. Temporary force majeure will result in delay and also prevents the project from being completed or make the project impossible to complete. Therefore, the project company will be permitted a delay to cover the lost time with payments also being put back by the same amount.[7] Permanent force majeure will make it permanently impossible to complete the project and consequently, it will come to an end.[8]In the case of force majeure as a termination event of contract, there will be a clause which allows the agreements to be cancelled with no penalty.

3.1.5 Emergency Take Over by Offtaker or Contracting Authority

In order to take over the project, the offtaker or contracting authority will need emergency powers, under necessary circumstances. For instance the offtaker or contracting authority or service has the right to take over and operate the project itself to ensure continuity of supply. This will happen, when there is a default by the Project Company. Moreover, the offtaker or contracting authority have the same rights in emergency situation seven if there is not a default.[9]The implications of emergency takeover may make the project company concerned and in some cases, the project company may fear that the use of this clause could be triggered for political reasons. Therefore, the negotiations over this clause should be done very carefully. The most important part of this clause is to define when the project is deemed to be in default or what are the events of default.[10]

3.1.6 Termination

In both offtake agreements and concession agreement, there are a number of contractual bases for terminating the contract before the end of its normal term in addition to force majeure and emergency takeover. The agreements should clearly set out the events under which either party may terminate the agreement.[11]For instance, one party or either party will be able to terminate the agreement under a number of circumstances such as: breach of any material term of the agreement, the project company's insolvency, intentional and material misrepresentation by the project company, payment default under the project agreement or failure to comply with a final determination or arbitration award by the offtaker or contracting authority or the project company.[12]

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[1]Yescombe, op. cit., p. 88.
[2]ibid., p. 89.
[3]G D Vinter, *Project finance: A Legal Guide*(3rdedn Sweet & Maxwell, London 2006) p. 142.
[4]Shaikh and others, op. cit., p. 64.
[5]Dewar, op. cit., p. 491.
[6]Yescombe, p. 89.
[7]Professor A Haynes, op. cit., p. 7.
[8]Yescombe, op. cit., p. 91.
[9]ibid.
[10]Professor A Haynes, p. 7-8.
[11]Dewar, op. cit., p. 492.
[12]ibid., p. 477-478.

3.1.7 Events of Default:

One contractual party can regard the contract as being at end when events of default arise. However, in such situations, the right of continuation will be retained. Therefore it could be said that the difference between a termination event and an event of default it that a termination event will terminate the contract but an event of default retains the right to continue. Consequently, if parties decide to continue the contract, this will trigger re-negotiation.[1] "*The biggest threat posed to the borrower by the event of default is the ability that lenders then acquire to accelerate outstanding loans; acceleration will typically cross-default all of the borrower's debt and almost certainly lead to insolvency.*"[2]

In both offtake agreements and concession agreements, typical events of default are as follows: failure to complete or develop the contracted project by the agreed date, breach of specified performance figures, non-payment of fees or interest when due, the insolvency or bankruptcy of the project company and failure to remedy breaches of the contract. [3]

3.1.8 Dispute Resolution:

Most parties prefer their disputes be settled in a neutral forum. Therefore for this purpose, they seek an arbitration agreement. This involves binding arbitration in many cases.

Generally, there are many similarities between offtake agreements and concession agreements such as choice of law, governing law and remedies. However, they will not be explained in detail here because of the limitation of words.

3.2 Differences between Offtake Agreements and Concession Agreements:

There are many differences between offtake agreements and concession agreements. Offtake agreements are different to concession agreements in a number of ways, for instance, definition, types of agreement, objectives, participant parties and obligations of parties, nature and scope, risks, price, governing law and key provisions and terms. And again, because of the limitation of words, only the most significant differences will be explained here.

3.2.1 Definition of Offtake Agreements and Concession Agreements:

An Offtake agreement is a legal contract between a project company and an offtaker, which obliges the offtaker to purchase all or part of the producer's future production[4]at an agreed price and volume. *"Offtake agreements are the legal instrument through which the project cash flow is generated."*[5] (See 2.1)

E. R. Yescombe defines the concession agreement as *"a contract between a public-sector entity and the Project Company, under which a project is constructed to provide a service (rather than a product as under an Offtake Contract) to the public-sector entity, or directly to the public."*[6]Concession agreement could provide a service to a contracting authority, which is a Service Contract or give a right to collect tolls or tariffs from the general public, which is a Toll Contract. (See 2.2)

3.2.2 Types of Offtake Agreements and Concession Agreements:

There are various types for both offtake agreements and concession agreements. The types of offtake agreements include: take or pay contract, take and pay contract, blended contract, long-term sales contract, hedging contract and throughput agreement.(See 2.1.1 to 2.1.6)Concession agreements also have many types but themost significant are BOT, BOOT, BTO, BOO, BLT and BOST.(See 2.2.1 to 2.2.6)

3.2.3 Aim and Objectives of the Agreements:

The objective of concession agreements is to determine the rights and obligations of the contractual parties, which are the project company and the government, in the project. Moreover, they set out the rights of ownership to the assets of the project. [7] However, the objective of offtake agreements is to ensure that an offtaker purchases future goods produced by the project company, and also to reduce market risk and to provide a revenue stream for the supply of the raw material, the creation of any necessary processing plant, its process and protection and the cost of financing.[8]

3.2.4 Nature and Scope:

The nature of concession agreements is different from one project to another, based on various factors such as the types of project, whether the project is exploiting a natural resource or developing the infrastructure and also,

[1]Professor A Haynes,loc. cit.
[2]Dewar, op. cit., p. 180.
[3]Professor A Haynes, p. 8.
[4]Ahmed, P Anita, and X Fang, *Project Finance in Developing Countries*(No. 7 Word Bank: International Finance Corporate, Washington D. C 1999) p. 46.
[5]S Gatti, *Project Finance in Theory and Practice: Designing, Structuring, and Practice* ...(Academic Press: Elsevier, Waltham USA 2012) p. 317.
[6]Yescombe, op. cit., p. 71.
[7]Dewar, op. cit., p. 477.
[8]Merna,Y Chu and F Al-Thani, op. cit., p. 46.

to what extent the government is involved in the project. Such agreements define the period of granted concession and moreover, they comprise a specific explanation of the physical area and rights that they cover.[1]However, the nature of an offtake agreement and the scope of its undertakings depend on the market into which the project produce is to be sold.[2]

3.2.5 Obligations of Parties:

The main contractual parties in offtake agreements and concession agreements are the project company, the government and the offtaker. The most significant project company obligations are financing, constructing, operating and maintaining the project in accordance with the agreed schedule and specifications; complying with all valid legislation, including social regulations and specific environmental protection; also, the project company has to endeavor to avoid interfering with any the third party operations; it has to pay the necessary concession fees and finally, it has to employ a minimum number of host country citizens for operating the project.[3]

Moreover, the government has a number of obligations for instance, grantingaccess rights and the right to exploit a resource (if applicable), substructure and/or service in a specified area for an agreed period of time; providing the requisite licences, permits and security protection for the project; completing any necessary infrastructure and passing any necessary legislation for the project to progress and be successful.[4]

The offtakeris obliged to purchase a significant amount of project product or pay for an amount of project service for a specified period of time.[5] Consequently, thissafeguards the project payment stream.

3.2.6 Governing Law:

In concession agreements, the government is one of the most important contractual parties. Therefore, the governing law usually is the law of the jurisdiction of the country in which the project is located.[6]The law of the host jurisdiction most often governs Offtake agreements. However in some cases, a well recognized governing law is preferable if the law of the host jurisdiction is not well developed. [7]An important safeguard, which the parties can use is a "stabilization clause". The purpose of this clause is to 'freeze' the laws of the host country during the agreed time of the project.[8]

Finally it should be said that despite the differences between offtake agreements and concession agreements, in some case they might be one agreement and the same document where the offtaker may also be the grantor, or a government entity such as a public utility.[9]

4. Conclusion:

In conclusion, this paper has found that the best way for financing infrastructure projects is project finance, which is a way of raising funds to pay the cost of large capital projects from several different countries. Situations in which project financing is used include: natural resources projects (mining, oil and gas), independent power projects in the electricity sector, also for public infrastructure for example: roads, transport, public building, and also for the explosive growth in mobile telephone networks worldwide.

The paper also has explained project agreements, which are divided into two categories: offtake agreements and concession agreements. Under an offtake agreement, the project company engages in extracting and production such as oil and gas or electricity and then, sells it to an offtaker. However, concession agreements are used for providing services such as toll roads, hospitals and mobile phone networks to the public or government by the project company. Furthermore, the essay has demonstrated various types of both offtake agreements and concession agreements. The types of offtake agreements include: take or pay contract, take and pay contract, blended contract, long-term sales contract, hedging contract and throughput agreement and themost significant types of concession agreements are BOT, BOOT, BTO, BOO, BLT and BOST.

In addition, this study has compared and contrasted offtake agreements and concession agreements. Consequently, it indicated a number of similarities and differences between them. The similarities, which are explained in detail, are term, control, compensation for additional costs (breach by the offtaker or contracting authority, change in circumstances, change in law and latent defects), force majeure, emergency take over by contracting authority, termination, dispute resolution and events of default. The differences between them explained above are definition, types of agreement, objectives, nature and scope, governing law. Finally, the paper has explored that in some case an offtake agreement and a concession agreement might be one agreement

[1]Dewar, loc. cit.
[2]ibid., p. 124.
[3]ibid., p. 478.
[4]ibid.
[5]Madialo,op. cit., p. 57.
[6]Dewar, op. cit., p. 479.
[7]ibid., p. 492.
[8]M Khatchadourian, 'Legal Safeguards in Egypt's Petroleum Concession Agreements'(2008) 22Arab Law Quarterly387-396.
[9]Madialo,op. cit., p. 60.

and the same document where the offtaker may also be the grantors, or a government entity such as a public utility.

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