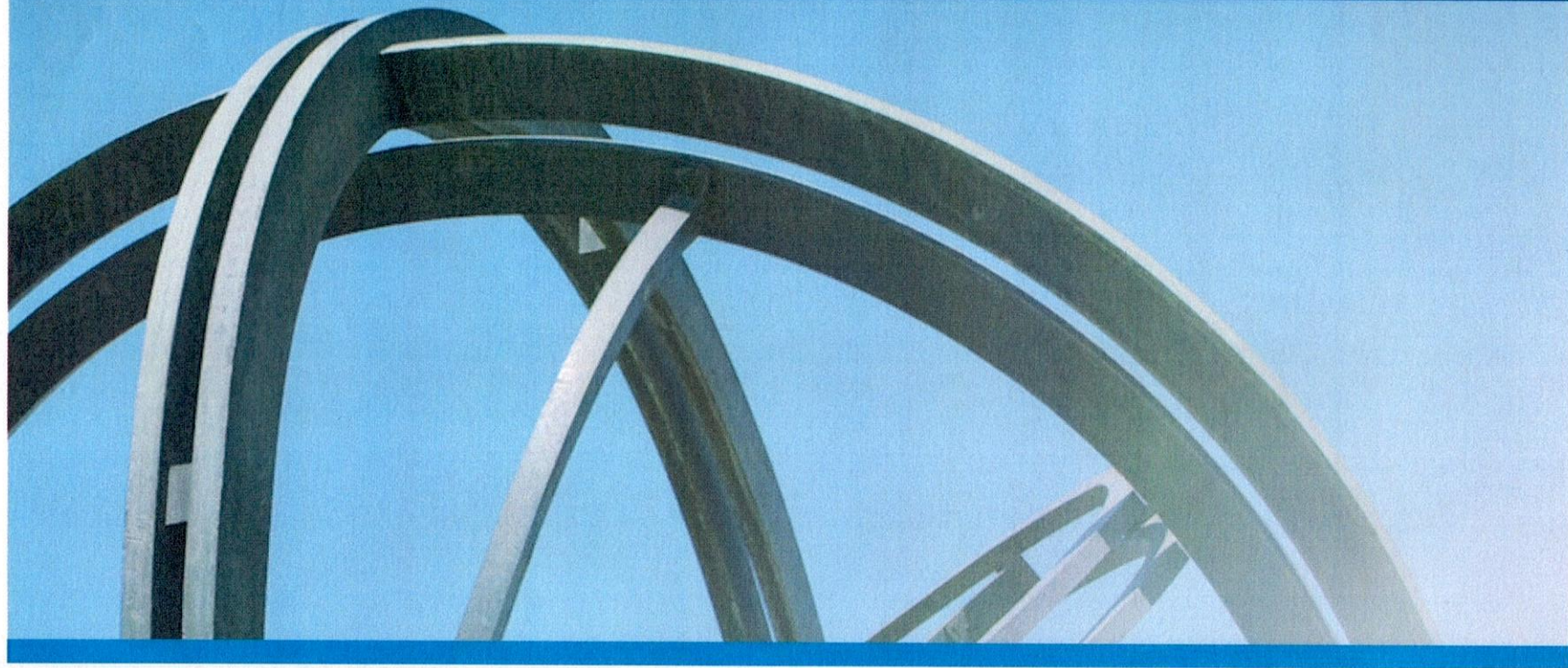


WHITE & CASE



## Completion Support/Security in Project Finance

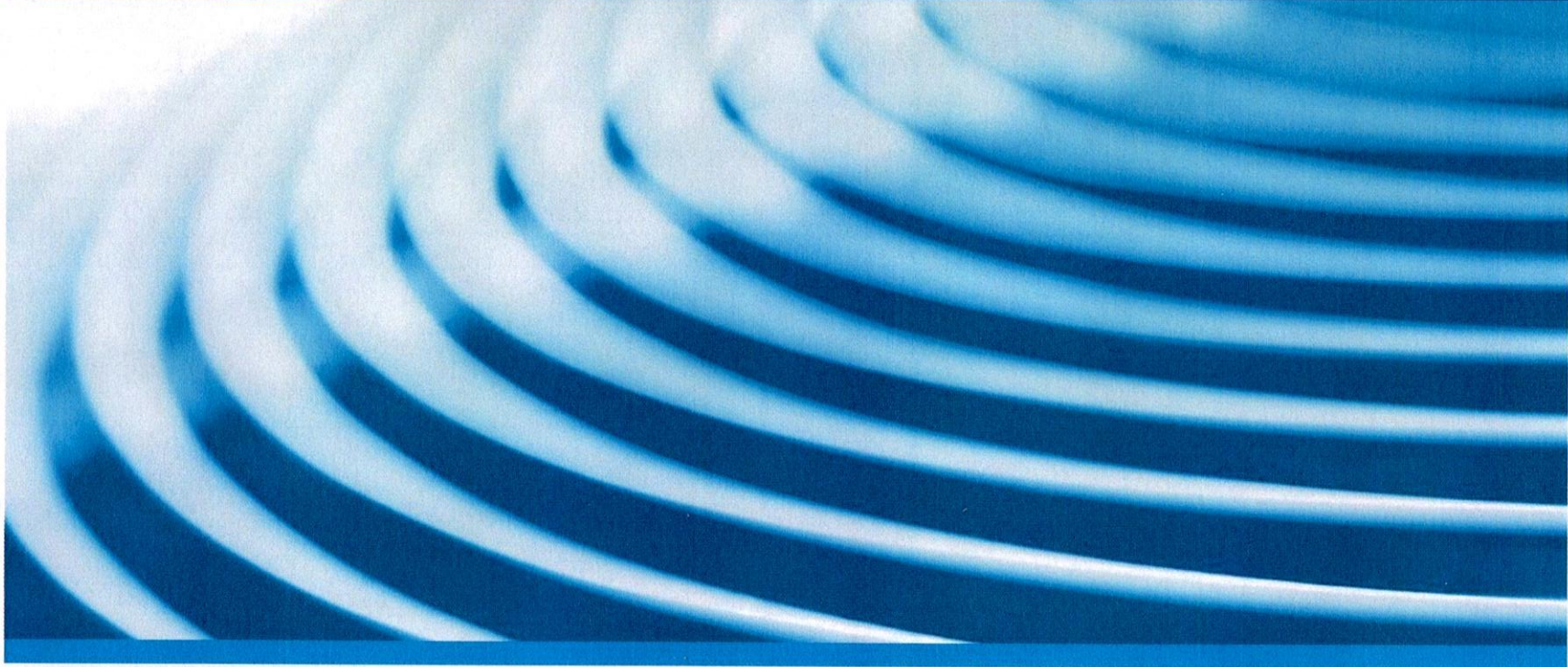
ESQ LEGAL – POWER/PROJECT FINANCE WORKSHOP

Olaniwun Ajayi LP

Nneka Wood



WHITE & CASE



Completion Support

Why?!?

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# Pre-Completion Risk

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- **High Risk Periods/Aspects**

- Greenfield vs Corporate Risk
- Long construction periods
- Capitalisation of interest
- Construction phase

- **Key Risk – Construction**

- Performance
- Delay

- **Risk Allocation**

- EPC Contractor?

*Depreciation credit worthiness  
However liquidation damages is capped at 15%.*

## Allocation of Risk to EPC Contractor? (1)

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|  |   |
|--|---|
| <b>EPC Contractor</b>                    | <ul style="list-style-type: none"><li>▪ One main EPC contractor or several?</li><li>▪ Credit standing of EPC Contractor</li><li>▪ Competence and track record of EPC Contractor (history / sector / geographical)</li><li>▪ Also a Sponsor? (conflict of interest / EPC terms at arm's length?)</li></ul>   |
| <b>Delay in Completion / Performance</b> | <ul style="list-style-type: none"><li>▪ Turn-key lump sum (ie. fixed price / date certain / turn key)</li><li>▪ Performance liquidated damages – ie. built but underperforms</li><li>▪ Delay liquidated damages – ie. completion severely delayed</li><li>▪ Acceptable construction programme</li><li>▪ Acceptable contractual arrangements</li></ul> |
| <b>Permits</b>                           | <ul style="list-style-type: none"><li>▪ EPC Contractor responsible for obtaining ongoing permits</li></ul>  |
| <b>Technology</b>                        | <ul style="list-style-type: none"><li>▪ Tried and tested</li></ul>  |

## Allocation of risk to EPC Contractor? (2)

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- **Allocation of risk to EPC Contractor (No Sponsor Completion Support) – Downside**
  - Requires extensive and costly Due Diligence (especially if more than one main EPC Contractor)
  - More complicated / onerous financing terms – impact considerable
  - Extensive direct agreements with EPC Contractors
  - Comes at a cost - pricing
  
- **Benefits of Sponsor Completion Support**
  - Efficiency – Lenders less concerned during construction phase – impact on financing terms
  - Can absorb the “unknown”
  - Benefit to Sponsors – pricing + limited right to enforce during completion period
  - Timing

# Completion Support - Guarantee of Debt vs Undertaking

| Guarantee vs Undertaking (English law)   |   |
|--|---|
| <p><u>Completion Guarantee of Debt</u></p> <p>✓</p>  | <ul style="list-style-type: none"> <li>• Agreement to pay a definite sum of money on specified date or upon occurrence of event etc.</li> <li>• Only need to <u>claim for payment of debt</u> ie. prove date / event has occurred</li> <li>• <u>No</u> need to prove that lender has suffered any loss</li> </ul>   |
| <p><u>Undertaking to meet “cost overruns” or to ensure that completion occurs by long stop date</u></p> <p>✗</p> | <ul style="list-style-type: none"> <li>• If does not specifically provide for guarantee or payment of debt – lenders need to <u>claim damages</u> (causation / remoteness / mitigation)                             <ul style="list-style-type: none"> <li>• Has to prove loss</li> <li>• That loss was reasonably foreseeable at time of entry into contract</li> <li>• Took all reasonable steps to mitigate loss</li> </ul> </li> <li>• Damages difficult to assess (eg. some value attributed to security over a semi completed project)</li> </ul> |

# Terms of Completion Guarantee - Guarantee of Debt (1)

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- **Fundamental Characteristics**

- Guarantee of Debt – “on demand” and unconditional / irrevocable
- Normally “several” in nature (pro rata in accordance with Sponsor’s interest)
- Weak sponsor - cash collateralisation / other support?
- Guarantee and Indemnity (legal risk passed on to Sponsor)

- **Termination**

- Completion Date (i.e. passing of prescribed completion test)
- Payment in full of all debt (which is guaranteed)
- Payment in full under Completion Guarantee of Sponsor’s proportion of debt

- **Benefit to Sponsor – ultimately capped at amount of debt which is being guaranteed**



## Terms of Completion Guarantee - Guarantee of Debt (2)

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|                               |  |
|-------------------------------|--|
| <b>Scheduled Debt Service</b> | <ul style="list-style-type: none"><li>▪ Guarantee of <u>scheduled</u> debt service (principal + interest) when due and payable (to the extent not paid by project company)</li></ul>   |
| <b>Accelerated Debt</b>       | <ul style="list-style-type: none"><li>▪ Ability of Lenders to call on guarantee for entire outstanding debt (all amounts outstanding) upon occurrence of a “Fundamental Event of Default”:<ul style="list-style-type: none"><li>▪ Failure to achieve Completion by “Long Stop” date</li><li>▪ Payment default of debt by project company</li><li>▪ Payment default by a Sponsor under its Completion Guarantee</li><li>▪ Insolvency / credit downgrade of Project Company or a Sponsor</li><li>▪ Breach of share transfer provisions (pre – completion period)</li><li>▪ Permanent abandonment / expropriation of Project (or material part of Project)</li><li>▪ Core covenant breaches (negative pledge, restriction on debt, disposals etc.)</li></ul></li></ul> <p style="text-align: center;"><u>Can be subject to further additional grace periods</u></p> |

## Terms of Completion Guarantee - Guarantee of Debt (3)

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### ■ Other terms:

- "Long Stop" date
- Restriction on Enforcement
- "Fundamental Events of Default"
- Assumption of Liability by other Sponsors
- Waiver of Subrogation – i.e. Until debt is paid in full, Sponsors waive all rights to receive compensation from Project Company for payments that are deemed to be made by Sponsors
- Representations and warranties given by Sponsor – scope

*Very important.*  
*Date to pay full final guarantee*  
*After → Non recourse.*

# Core Terms of Completion (1)

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- **Technical Completion**

- Physically complete so that it can be put to use
- Demonstrated required performance / reliability criteria (tested over prescribed period)
  - **Buy-down upon partial completion?**

- **Financial Completion**

- All payments made under construction contracts (other than permitted retentions, holdbacks + minimum amounts under a bona fide dispute)
- All material consents obtained + going forward
- No “Event of Default” / “Potential event of Default”
- Financial Ratios (eg. Debt to Equity) – to enable Sponsors to “back-end” equity
- Upstream Facilities / Downstream Facilities (e.g. delivery of cargoes / shipping / connecting infrastructure etc.)
- DSRA fully funded
- Direct Agreements obtained for new Project Documents / Non-Disturbance Agreements
- Security in place

## Core Terms of Completion (2)

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- **Reports**

- Technical Report / Insurance Report (operational insurances in place) / Environmental Report / Shipping Report / updated Reserves Report etc.

- **Certification**

- Self Certification / certification from Lenders' consultants?
- Self certification – eg:
  - **Payments made under construction contracts**
  - **Material consents obtained**
  - **No Default**
- Certification by Lenders' consultant – eg:
  - **Technical completion / insurances / environmental matters etc.**

**Completion test always heavily negotiated as it determines when completion guarantees fall away and Project goes non-recourse**

# Other Forms of Sponsor Support (1)

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|                              |  |
|------------------------------|--|
| <b>Interest Guarantee</b>    | <ul style="list-style-type: none"><li>▪ Guarantee simply covering the interest accruing on a loan</li></ul>  |
| <b>Shortfall Guarantee</b>   | <ul style="list-style-type: none"><li>▪ Guarantee to pay any sums remaining due to the Lenders after termination of the loan and realisation of security</li></ul>   |
| <b>Buy Down Undertakings</b> | <ul style="list-style-type: none"><li>▪ Undertaking to prepay the project company's loans so that they meet certain specified cover ratios</li></ul>   |
| <b>Comfort Letters</b>       | <ul style="list-style-type: none"><li>▪ eg covering continued ownership and commitment to project + provision of personnel / technical services</li><li>▪ may cover Sponsors' intention were a EoD to occur in the future</li><li>▪ legal binding nature of letter needs to be clarified from outset</li></ul> |

## Other Forms of Sponsor Support (2)

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- **During construction period**
  - Cost Overruns - undertaking to meet cost overruns:
    - **in an amount equal to the excess of all Project Costs incurred over funds received from Lenders + pre-completion revenues)**
  - Existing Project Cashflow pre-completion
  - Letters of credit / contractors' bonds
  - Covenant controls and collateral from weak Sponsors