NEGOTIATING CONCESSION AGREEMENTS IN NIGERIA: AN OVERVIEW*

Abstract
Due to paucity of funds, the Nigerian government has championed Public-Private Partnerships (PPPs) for the development of infrastructure within the country. One of the often-utilised PPP models that is used to accomplish this is through concessions. Lawyers negotiating concession contracts often need to sift through a complex set laws and policies along several project finance agreements. Also, due to the unique nature of infrastructure finance, there are certain principles and conventions that drive the negotiation process. Several practitioners both within the public and private sectors often find this daunting. This paper tries to work through some of the legislations, polices, conventions and institutional arrangements that drive the negotiation of concession agreements in Nigeria.

Keywords: Concessions, Public-Private Partnerships, PPP Models, Nigeria.

1. Introduction

The word 'infrastructure' was coined from the words 'infra'(beneath) and 'structure' (building) and thus usually encompass services or facilities that are underground such as piped water and sewerage or those that lie on the surface such as roads and railways.[1] Investment in infrastructure is said to have crucial input in economic development of a country.[2] The stock of public infrastructure in most countries plays an important role in the economic prosperity of countries. Therefore, most countries purse the development of their infrastructure with vigour. Infrastructure is broadly classified into economic and social infrastructure[3] Economic infrastructure provides key intermediate services to businesses and industry and its principal function is to enhance productivity,[4] development and prosperity.[5] Some examples of economic infrastructure include roads, highways, bridges, railways, airports, telecommunication installations and power stations. Social infrastructure provides basic services to households. Its main role is to improve the quality of life and welfare of citizens. Some of the recognized social infrastructure includes hospitals, schools, water supply and prison. The definition of infrastructure under the ICRC Act[6] is quite revealing. According to S. 36 of the Act:

> infrastructure includes development projects which, before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of this Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, Government buildings, tourism development projects trade fair complexes, warehouse, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council.

Nigeria operates an infrastructure deficit. Electric power is notoriously poor with an installed capacity of about 12,500 MW and a peak capacity of between 3,500MW to 5,000MW.[7] In the water and sanitation sectors, there are very low and declining levels of piped water coverage.[8] The Roads are in very poor state, with only 27% of

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[1] J.A Gomez Ibanez *Regulating Infrastructure: Monopoly, Contracts and Discretion (*Harvard University Press, USA, 2003) 4.
[2] D. Grimsey and M.K Lewis 'Evaluating the Risk of Public Private Partnerships for Infrastructure Projects', (2002) 20 *International Journal of Project Management*, 107-118; A. Threadgold'Private Financing of Infrastructure and Other Long Term Capital Projects', (1996) 1 (1) *Journal of Applied Finance and Investment* 7-12.
[3] Infrastructure can be further subdivided into "hard"' and "soft" infrastructure and also as "material infrastructure", "personal infrastructure" and "institutional infrastructure"
[4] Grimsey and Lewis, note 2 above.
[5] M. Loosemore 'Risk Allocation in Private Provision of Public Infrastructure*'*, (2007) 25 *International Journal of Project Management,*66.
[6] Infrastructure Concession Regulatory Commission (Establishment) Act, 2005.
[7] Get Invest 'Nigeria Energy Sector' Found Online at: https://www.get-invest.eu/market-information/nigeria/energy-sector/ (Last accessed on June 3, 2020).
[8] Ibid.

the federal road network in good condition.[9] Rail network is poor and freight network in constant decline**.**[10] In many urban areas, hospitals, water supply, sewerage and waste disposal infrastructure, to mention a few, are virtually non-existent.[11] Maintenance of the partially existing ones have also been poor. All these are being compounded by the twin problems of rapid population growth and urbanization. According to the World bank, addressing Nigeria's infrastructure challenge will require sustained expenditure of almost $14.3 billion a year over the next decade or about 12 % of the country's GDP. [12] The National Integrated Infrastructure Master Plan (NIIMP) puts the required expenditure figure at about $3 trillion over 30 years to meet the country's aspirations.[13] It is difficult for the government alone to come up with the substantial amounts of money that is required to finance the infrastructure gap and therefore the government has turned to the private sector to raise much need funds.

One of the strategies adopted by government to meet its obligations is using public private partnerships (PPPs). PPPs are hard to define as there is no consensus on the exact definition of PPPs. In fact, the exact nature of PPP is still being contested.[14] Nevertheless, Public-Private Partnership (PPP) may be defined as a long term relationship between public sector agencies and private sector entities under which the responsibility for any or all of the combination of designing, financing, construction, management and operation of public infrastructure and utilities that were traditionally undertaken by the public sector are contractually shared and jointly undertaken by both the public and private sector, usually in proportion to the kind of risks each party can best carry.[15] PPPs come in different forms with most depicted with different acronyms. A number of these so-called different PPP arrangements are merely slight variants of one another. Some of the popular examples are: Build Operate and Transfer (BOT), Build Own Operate (BOO), Build Own Operate and Transfer (BOOT), Lease Renovate Operate and Transfer (LROT), concessions etc. Whilst these distinctions of the different models of PPPs are useful for risk management, in practice, there is hardly any distinction that is made amongst these variant models. Furthermore, legislations in most countries do not make these precise distinctions. For instance, the title of the principal legislation for PPPs in Nigeria, is the 'Infrastructure Concession Regulatory Commission Act'. Despite the use of the term 'concession', this Act applies to all types of PPPs whatever the nomenclature. For pragmatic reasons also, it is of little practical value to make broad distinctions on the different types of PPPs. Indeed, the characteristics or boundaries of transactions, which constitute PPPs, are not closed. For instance, the European Commission observed that PPP is still evolving, has divergent arrangements that may be adapted to suit the requirement of projects and project partners on a pragmatic basis.[16]

Since this article is focused on Nigeria, the term 'concession' is used to refer broadly to the different models of PPPs in line with the provisions of the ICRC Act. The ICRC Act defines a concession as 'a contractual arrangement whereby the project proponent or contractor undertakes the construction, including the financing of any infrastructure, facility or operation and maintenance thereof and shall include the supply of equipment and machinery for any infrastructure'[17] Furthermore, according to the ICRC Act, 'construction' means any form of engineering work whether civil or structural, mechanical or electrical and includes rehabilitation, improvement, expansion, alteration and related works or activities, supply and installation of any services'[18]

This article analyses the different legal, regulatory, and institutional framework that practitioners negotiating concession agreements in Nigeria should be familiar with. In addition, the financing of PPPs is predicated on project finance structures. It is therefore the case that lawyers negotiating concession agreements need to be familiar with the different project agreements that underpin PPPs. In summary, this paper works through some of the legislations, polices, conventions and institutional arrangements that drive the negotiation of concession agreements in Nigeria. This is hoped will be of great value to practitioners both within the public and private sectors who often find this area of practice daunting.

[9] National Planning Commission 'National Integrated Infrastructure Master Plan (NIIM)' The Presidency, Nigeria 2015.
[10] PWC 'Africa Gearing Up' found online at: https://www.pwc.com/gx/en/transportation-logistics/publications/africa-infrastructure-investment/assets/nigeria.pdf (Last accessed on June 3, 2020)
[11] Ibid.
[12] V. Foster and N. Pushak 'Nigeria's infrastructure: a continental perspective', in Sustainable Development Department Policy Research Working Paper 56862011, Africa Region, The World Bank, 2011.
[13] National Integrated Infrastructure Master Plan (NIIM) Supra.
[14] N. A Khanom,'Conceptual Issues in Defining Public Private Partnerships (PPP)' (2010) 6 *International Review of Business Research Papers,* 150-163
[15] G. Nwangwu, 'The Legal Framework for Public-Private Partnerships (PPPs) In Nigeria: Untangling the Complex Web' (2012) 7(4) *European Procurement and Public Private Partnership Law Review* 268-277.
[16]EC Guidelines for Successful Public Private Partnerships 2003 , (online) at http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf (last accessed on September 17, 2022) .
[17] S.36 of the ICRC Act.
[18] S.36 of the ICRC Act.

2. Legal and Institutional Framework for Concession Agreements

There is presently a complex web of legislations and policies regulating concession transactions in Nigeria. Therefore, a practitioner negotiating concession agreements in Nigeria needs to understand this plethora of regulations and policy guidelines and how they affect the transaction. An analysis of some of the extant regulations and policies are discussed below:

Infrastructure Concession Regulatory Commission Act 2005

The primary law regulating PPP in Nigeria is the Infrastructure Concession Regulatory Commission Act (the ICRC Act),[19] which was enacted into law in 2005. This law provides the basic legal framework for private sector participation in Infrastructure development in Nigeria. The ICRC Act vests government Ministries and other Agencies of Government with power to enter into contract with, or, grant concessions to the private sector for the financing, construction, operation and maintenance of any viable infrastructure.[20] The main function of the Commission is to take custody of every concession agreement or contract entered into by the Government Ministry or Agency and monitors its compliance with the ICRC Act and the efficient execution of any such Concession Agreement.[21] The Act also gives the Ministries, Departments and Agencies (MDAs) of Government, albeit without clarity, the powers to manage the procurement process for the award of the concessions contracts,[22] The MDAs are therefore responsible for originating and developing PPP transactions and therefore play an important role in the negotiation of concessions.

Public Enterprises (Privatisation and Commercialisation) Act 1999 (Privatisation Act)[23]

The Privatisation Act provides the legal framework for the privatisation and commercialisation of various public assets in Nigeria. It also creates the National Council on Privatisation ('NCP') as the apex body charged with the responsibility of setting and administering the Federal Government's policies and objectives on privatisation and approving transactions.[24] The Act also established the Bureau of Public Enterprises ('BPE') to function as the secretariat of the NCP and carry out the actual day-to-day privatisation activities.[25] Several transactions had been consummated under the Privatisation Act including concessions[26], which are also covered by the ICRC Act[27]. This has led to a lot of confusion and friction between the two organisations. Apart from these two principal laws analysed above, there are other laws, which have also not either been contemplated by the ICRC Act or taken the ICRC Act into account. These laws are discussed below:

Public Procurement Act 2007

The Procurement Act applies to procurement of goods and services carried out by the Federal Government of Nigeria and any public body engaged in procurement and all entities, which derive at least, 35% of the funds appropriated or proposed to be appropriated for any type of procurement from the Federation share of the Consolidated Revenue Fund[28]. By implication therefore, the Act does not apply to procurement carried out by the constituent states of the Federation. The Procurement Act does not expressly mention procurements done under PPPs like concessions and so it is believed that it only applies only to traditional forms of procurement done by the Federal Government of Nigeria. This is however questionable because the Procurement Act also applies to procurement of goods and services for infrastructure projects[29]. It is obvious that the Procurement Act did not take the ICRC Act or Privatisation Act into contemplation, as it ought to have, being later in time. It ought to have expressly eliminated the application of the Act to PPPs if it was its intention. The procurement guidelines under the ICRC Act are however very sparse and only limited mainly to the requirement to advertise in newspapers and seeking approvals from FEC[30]. Even though the PPP policy and operational guidelines have tried to elaborate further on procurement aspect of PPPs, there are still doubts as to the application or otherwise

[19] ICRC Act 2005.
[20] S.1 ICRC Act 2005.
[21] SS. 14, 15, 16 and 17 of ICRC Act 2005.
[22] SS.2, 4, 5 and 6 of ICRC Act 2005.
[23] Privatisation Act 1999.
[24] SS. 9,10 &11 of the Privatisation Act 1999,
[25] S.12 of the Privatisation Act 1999,
[26] For example, the concession of the 26 Ports and mining assets were done under this law.
[27] The ICRC Act deals with contracts and concessions. See for example SS. 1,2& 3 of the ICRC Act 2005.
[28] S.15 of the Procurement Act, No.14 of 2007.
[29] It is however silent on the non-tender aspects of PPP transactions or handling of unsolicited bids.
[30] Ss.2, 3, 4 & 5 of the ICRC Act 2005.

of the procurement Act. The policy guidelines provide that ICRC through its PPP resource centre will work with the Bureau of Public Procurement[31] to develop appropriate procurement processes for PPPs[32].

Debt Management Office Act 2003

The Debt Management Office Act[33] established the Debt Management Office to inter alia prepare and implement a plan for the efficient management of Nigeria's external and domestic debt obligations and set guidelines for managing the country's risk and currency exposure with respect to all loans[34]. PPP transactions will obviously require the Government of Nigeria to borrow both externally and internally as well as issue guarantees, therefore the Debt Management Office will necessarily be involved, however there is nothing in any of the existing laws regulating PPPs that takes this fact into consideration. The National PPP Policy acknowledges the importance of the Debt Management Office by encouraging project teams within the MDAs to consult it prior to engaging multilateral agencies to provide guarantees or other financial instruments[35]. There is however nothing in the extant legislations that remotely considers or integrates the role of the Debt Management Office in the PPP process.

Fiscal Responsibility Act 2007

The Fiscal Responsibility Act establishes the Fiscal Responsibility Commission to ensure that the objectives of the Act are met[36]. The function of the FRC that relates to PPPs is the promotion of the prudent management of the country's financial resources. This is done through the monitoring and enforcement of provisions of the Act that results in the greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal operations. The Commission is also responsible for imposing limits on the country's spending and borrowing and thus invariably affects the nature and quantum of the fiscal support the public sector may offer to PPP project. The Act mandates that any MDA that is desirous of borrowing shall specify the purpose for which the borrowing is intended and present a cost benefit analysis, detailing the economic and social benefits of the purpose for which the intended borrowing is to be applied.[37] Note the proceeds of the borrowing should be applied solely towards long term capital expenditures.[38]

National Planning Commission Act 1993

The National Planning Commission was established by Act No.12 of 1992 and later amended by Act No. 71 of 1993.[39] The major function of the Act as it relates to infrastructure development is in relation to designing, coordinating and monitoring the implementation of the Nation's infrastructure master plan. It is therefore necessary that the ICRC will need to first ensure that any of the projects ear marked for PPP is included in the nation's master plan designed by the National Planning Commission and also ensure that its activities are in concordance with that of the National Planning Commission.

National Policy on Public Private Partnerships

The National PPP Policy was in essence designed to explain and fill in the gaps in the ICRC Act. Relying on its mandate to provide general policy guidelines and rules and regulations for its operation, ICRC produced the National PPP policy, which was approved by the Federal Executive Council (FEC) in April 2009.

3. Negotiating the Concession Documents

When lawyers negotiate contracts, what they do in the fact is the negotiation of risks. The underlining structure of concession projects means that there are two parties collaborating as partners but at the same time involved in a negotiation process that is adversarial. This combination means that parties try to negotiate the best possible deals for themselves, which if successful leads to an agreement that both parties consider to be fair and acceptable to them. In the process of negotiating their contract, the parties agree on which of them to whom a particular risk should be allocated to and the price of the allocated risk. The structure of concession contracts also means that the party that bears a particular risk is incentivised to find ways of avoiding the risk or reducing the impact of this risk if they occur. For instance, the party assuming the risk may decide to transfer the risk through insurance or subcontract it to another party. This sort of risk mitigation is only possible because the

[31] S.3 of the Procurement Act established the Bureau of Public Procurement to administer the provisions of the Procurement Act.
[32] National PPP Policy, p. 10.
[33] Debt Management Office Establishment, (etc.). Act 2003.
[34] See S.6 of Debt Management Act 2003.
[35] National PPP Policy p.9.
[36] S.1 of the Fiscal Responsibility Act 2007.
[37] S. 44(1) of the Fiscal Responsibility Act.
[38] S.44 (2) (b) of the Fiscal Responsibility Act.
[39] National Planning Commission Act No.71 of 1993.

nature of concessions encourages parties to whom risks have been allocated to take ownership of the risk and mitigate them. Contractual clauses are the basic instruments for the transfer of risk in concession projects. Some of the clauses that are used to allocate risks are: indemnities, conditions, warranties, and force majeure clauses. Negotiation of contracts should be conducted in an atmosphere of cooperation and trust between the parties, where parties are only allocated risks which they can manage charging only reasonable premiums. As Ward *et al* point out:

> Successful and appropriate allocation of risk presupposes an atmosphere of trust between contracting parties and a clear mutual appreciation of all relevant project risks and their effects… in the absence of one or both of these guidelines, it is perhaps not surprising that the debate about the appropriate allocation of risk is often diverted to the investigation and clarification of the effectiveness of allocation mechanism such as contract clauses.[40]

It is also worth mentioning that there are several risk management devises that are useful for dealing with risks during the earlier stages of a transaction, especially during the feasibility studies stages. They are also valuable during contractual negotiations. These devices like risk registers and risk matrixes help in identifying and evaluating project risks to ensure optimal risk transfer and requisite mitigation. Where they are put to good use, the outcomes from the exercises are ultimately transferred into the concession agreements. The National Council for Public Private Partnerships (US) defines Public-Private Partnership (PPP) as 'a contractual agreement between a public agency (federal, state or local) and a private sector entity...'[41] This definition like most other definitions of PPPs, rightfully underscore the contractual nature of PPPs. However, the main contract between the public sector and the private sector, which is referred to as the grant or concession agreement, usually breeds an additional avalanche of contractual arrangements. Some of these further contracts include the EPC contracts, the Shareholders Agreement, Operations and Maintenance Contracts and the Financing Agreements. These are all further elaborated on below.

4. Grant/ Concession Agreements

The use of the word 'grant' in this section is firstly to underline the fact that the nature of the agreement under discussion is one that conveys a right or entitlement to the private sector and also to underscore the fact that this principal PPP agreement under discussion can either be a concession agreement or even wider than a traditional concession agreement. However, it is not unusual to refer to this 'grant agreement' as a concession agreement. This is also the style adopted by the ICRC Act. The reason for this approach might be due to the fact that concessions are the most popular of all the PPP grants, or put in another way, that most grants by the public authority to a private sector operator involves some form of concession. Bearing these clarifications in mind, further discussions under this section will basically employ the term concession agreement to refer all forms of grants. The Concession Agreement is therefore the principal contractual document delineating the rights and obligations of the parties in a PPP arrangement. Over the years, its use has become not just commercially pragmatic but also politically expedient. The reason for this is that unlike privatization, concessions ensure that the ownership of public assets do not transfer from the government to the private sector. A concession agreement grants a right (usually exclusive) hitherto belonging to the public sector to a private sector partner to operate and manage an asset for certain duration of time. Usually, and particularly in greenfields, this right is coupled with a right to invest in the construction of the asset to provide the specified services. It is this right to invest that is depicted by the letter 'B' standing for 'build' in the different PPP acronyms like BOT, BOOT etc. The Concession Agreement also often demands that the private sector grantee makes either upfront fixed payments or periodic term payments to the grantor. The making of this payment is significant not just because it generates revenue for government but also because it evidences the fact that the ownership of the asset remains with the grantor.

The concession agreement will also allow the private sector recover its investment and make profits from the exploitation of the grant. The revenue of the private sector may accrue from periodic availability payments from the granting authority or from direct collection of user fees from the public for services rendered. The concession agreement contains some key terms, which are unique to these types of agreements. The most important of these clauses is 'the Grant'. This is the operative clause in the agreement and conveys the right or interest in the asset from the public authority to the private sector. Another is the 'Concession Term' which defines the length of the interests of the private sector in the concession. The 'Payment Terms' stipulates the amount and method of payment of the concession fee by the private sector. The 'Operations and Maintenance'

[40] Stephen C. Ward et al'On the Allocation of Risk in Construction Projects,' (1991) 9 (3) International Project Management 104–147.

[41] See 'What are PPPs?' available at https://www.icrc.gov.ng/ppp/> last accessed 15 November, 2022.

clause grants the private sector concessionaire with authority to operate and maintain the asset conveyed. The Concession Agreement will also contain an obligation on the private sector concessionaire to transfer the property back to the government at the end of the concession term. Finally, the agreement will give the public authority power to periodically inspect and monitor the concession to ensure that the concessionaire is keeping to its obligations.

5. Construction Agreements

Once the private sector entity or project company has secured the grant or concession, it commences negotiation of the construction contract with a contractor. The major objective of this contract is to ensure that the contractor delivers a facility in accordance with the specification of the project company. To ensure that the entire construction process is delivered in an efficient manner, within time and cost, the most common construction contract awarded by the project company is the type that bundles together the Engineering, Procurement and Construction (EPC) aspects of the project and commonly referred to as 'EPC' contract. The advantage of the EPC contract is that it saves time and money as it allows the three aspects of the project to move concurrently on a turnkey basis. The payment structure of the EPC contractor may be restructured in various ways. For instance, it is usually designed as a Fixed Price Contract, which allows the project company to pay a fixed fee to the contractor for its services. This is particularly helpful where the project company is worried about inflation or currency exchange risks and wishes to transfer them to the contractor. For assuming these risks, the contractor would typically charge a risk premium to enable it to manage whatever contingency that is likely to arise. However, there are certain instances where the contractors risk premium will not suffice, especially where the fault for the occurrence of the risk is not that of the contractor. In these cases, the contractor protects itself by negotiating a contingency payment to manage the uncertainties. These are usually in cases where a force majeure event occurs or where the delay that leads to the manifestation of the change in price is the fault of the project company. The alternative arrangement is a 'Cost plus Fee Contract', which ensures that the project company assumes the cost of construction and only pays the contractor a fee for its services. This arrangement effectively transfers all risks capable of increasing construction costs to the project company. Whatever payment model is chosen, the major aim is to ensure that the contractor is efficient in delivering the project on time and within cost. Therefore, an incentive may be built into the contract rewarding the contractor where it meets targets and a penalty where it exceeds budget. Construction contracts will typically contain a number of key terms: This includes the scope of work, contractor and project company's responsibilities, the payment terms and conditions of subcontracts.

6. Operations and Maintenance Agreements

After the private sector company completes the construction of the PPP project, it will then have to operate and maintain the facility for the remainder of the concession period. The company is faced with two options: to either operate the facility itself or to subcontract this aspect to other specialist companies. It will be recalled that the project company is usually a consortium of different companies including financiers. Therefore, self-operation is only possible where one of the consortium members has experience in operating the facility, in which case the responsibility for operation and maintenance is assigned to that entity. Nevertheless, regardless of whether the consortium is self-operating of subcontracting, it normally enters into an operation and maintenance agreement either with the subcontractor or with its consortium member that is charged with the responsibility. The Operation and Maintenance Agreement, like other PPP Agreements must take cognisance of the different risks that are likely to arise during the course of the operations and maintenance process and mitigate them. Some of the risks are the possibility that the operator may not perform according to contract (due to inexperience or negligence) or that operating and maintenance costs may exceed budgets. The risk of inexperience is easily handled by making sure that there is a competitive bidding process that selects the best qualified and experienced organisations to undertake O&M. Negligence or other instances of non-performance may be mitigated by requiring the appointed O&M Company to post performance bonds or guarantees, which secures the right of the project company to liquidated damages upon the occurrence of the guaranteed event. It is important to ensure that the O&M contractor has the financial capacity to meet its obligations to the project company.

7. Off taker Agreements

Investors would like to assure themselves that there is a ready market for the product or services, which is the output of the PPP project. The reason for this is that the cash flow and profit of the business depends on this and financiers under non-recourse financing relying on the assurances of the off take in funding the project. There are different ways through which investors ascertain certainty of off take. One of which is by requesting for a purchase guarantee from the Government or otherwise the project company will enter into forward agreements with potential purchasers of the project offerings. These potential purchasers are the ones referred to as off takers, guaranteeing the purchase of the products or services. A good example of an off-take agreement is the Power Purchase Agreement in electricity sales, where the government or another entity buying electricity enters into an agreement with a power utility to purchase power from the utility at a particular price and under certain terms during the term of the Agreement. This agreement guarantees cash flow to potential investors.

8. Financing Agreements

Like in majority of projects, whether PPPs or traditionally procured projects, obtaining finance to execute the project is one of the important steps towards the development of the project. In broad terms, the financing raised can come as either debt or equity; other forms of finance are merely different shades of either of them. Equity investors, for increased rewards, take more risk in the business than credit providers and therefore even though their investments and returns are hardly guaranteed their rewards are expected to be higher. On the other hand, providers of credit to the project would typically require security for their investments and any credit assessment of the project is based on the value of the asset provided as security by project promoters. Creditors would therefore have recourse to the security provided by the borrower in cases where the borrower is unable to pay back the debt. This traditional distinction between equity and debt providers enumerated above becomes a little more blurred under project finance. This is because provision of credit in such cases is typically done through non-recourse or limited recourse financing. Non-recourse financing as the name implies is a project financing structure where lenders look towards the proceeds of the project or/and the assets of the project as security for their loans to the project company. The implication of this is that borrowers under PPP projects will have to prove to financiers that the project will be able to repay the loan and interest when they become due. This as one can imagine is not a particularly easy task as lenders rely principally on the technical and financial project documents for this assurance. Some of these documents are the feasibility studies, the Environmental and Social Impact Assessment Reports, the Financial Models and a host of other supporting Agreements. These agreements include the Shareholder Agreements, Concession Agreements, Guarantee Agreements, Operation and Maintenance Agreements, Off Take Agreements etc. Typically, these agreements are presented before financiers who determine whether looking at these documents in their entirety and collectively, they would be willing to invest in the project. If the answer to this determination is in the affirmative, it will go on and negotiate the financing documents with the project sponsors. Having discussed a number of these Agreements above, this section will focus on the principal financing documents. These are:

a) Loan Agreements: This is the primary financing document. It details and regulates the relationship between the sponsor borrower and the lenders.
b) Intercreditor Agreements: Since PPPs are usually financed via syndicated loan arrangements with multiple debt providers, the intercreditor agreement is usually entered into amongst the different debt providers to document their various interests, rights and obligations against one another. One of the important issues which an intercreditor agreement deals with is the priority of lenders in repayment and their various lien positions vis-a-is one another.
c) Direct Agreements: This Agreement is entered into between the lenders and the government. It grants financiers step in rights in the event that the private sector becomes unlikely to fulfill its obligation to repay the loans. These rights would allow the banks or other financial institution to take over the asset and recover their investments in the event of default from their private sector borrowers. This was widely used during the power sector privatization in Nigeria.
d) Credit Enhancement Agreements: In theory PPPs are consummated through non-recourse project finance. However, in practice lenders will require some form of additional support to make a project bankable. Credit enhancing agreements mitigate credit default risks and enhance the credit worthiness of the project. In Nigeria, most investors have requested for some form of sovereign guarantee to enhance the credit worthiness of the project.
e) Export Credit Agreements: Sometimes project sponsors might seek financing from Export Credit Agencies (ECA) and therefore enter into Export Credit Agreements. The nature of the financial support from these agencies to the project include direct lending which is usually conditional upon the purchase of equipment from the country of origin of the ECA. The other is the financial intermediary loan where the ECA grants loans to a domestic commercial bank for un-lending to the project sponsor. Also the interest rate equalization which allows a commercial bank to receive the difference between the market rate and its lending rate to the project sponsor from the ECA.

9. Risk Management through Contracts

The Concession Agreement is the principal document that regulates the partnership between the private and public sector parties and ensures risk allocation between them. It also provides the foundation on which other project documents like the financing agreement rests. The other contractual documents that are relevant to risk allocation are the shareholders agreement between project sponsors, the credit agreement with the project lenders, EPC Contract, operations and maintenance contract and supply contracts. Specific level of risk allocation between the private and public sector partners vary according to the transaction method adopted for a project. This is because the scope of activities delegated to the private sector varies from mode to mode. Contractual clauses themselves are the basic instruments for the transfer of risk in PPPs and risk allocation in PPP contracts significantly affects project outcomes. For instance, project related risks such as construction risks, cost overruns risks and demand risks are all allocated through the contract design. For each type of contractual mode (whether BOT, DBFO, Concession etc.), risk is allocated to the private sector through contractual incentives and penalties incorporated within the payment mechanism and through activities for which the private sector party is responsible.

The contract may basically allocate risks using indemnities, conditions, warranties and force majeure clauses. However, contract design is not a straightforward task. Problems arise when the contract transfers the wrong amount or the wrong types of risk to the private sector party. It is therefore widely acknowledged that the imperfect allocation of risk in contracts constitutes one of the primary reasons for the failure of PPP arrangements.[42] Failure to allocate risks properly in PPP contracts may lead to other uncontemplated consequences like contract re-negotiation. Contract renegotiation may invariably lead to bargaining between the private sector operator and the government in a non-competitive and non-transparent environment. Renegotiation might in that instance become a part of the strategy for the private sector to ask for other concessions from the government by raising other unrelated issues at the risk of damaging the public interest in the project. Marques and Berg contend that this promotes opportunistic behaviour, including opportunistic bidding at the tender stage, so that the winners curse becomes a winners blessing.[43] Where risk is inappropriately or excessively transferred to the private sector it might reduce the number of bidders and foster opportunism of the remaining tenderers.[44]

The PPP contract should be drawn up in such a way to take into consideration all eventualities that may affect the risk profile of the parties. Contracts that fail to address risk in a comprehensive manner are likely to raise the cost of infrastructure services to the final consumers.[45] On a policy level, it can be useful to provide for risk allocation and mitigation guidelines in policy and legislative instruments. This will guide the parties through the contract negotiation process in the allocation, mitigation and pricing process before reducing them into contractual clauses as either for instance conditions or warranties or other contractual terms. There is also sometimes a need for standardization of PPP contracts by creating templates as it may contribute towards greater transparency and reduces the incidence of corruption. However, such standardization may lead to a greater deal of rigidity in the PPP process.

When allocating risks in contractual documents, the following goals should be pursued:

a) to provide incentives to reduce long term costs of a project;
b) to provide incentives to complete the project on time and within budget;
c) to provide incentives to improve the quality of service and revenue yield;
d) to insure the public and private partners against risk. Risk insurance for the public partner helps to improve its profile of expenditure on the project by converting variable operation and capital cost into predictable unitary payments. Risk insurance for the private partner helps reduce the cost of capital.[46]

These goals can be achieved by contractually providing for the service output specifications of the private sector. This will fully ensure that risk for the quality of the service is transferred to the private sector by ensuring that the private sectors revenue has a correlation with the quality of its service. It also enables the public sector effectively monitor the output of the private sector. Below are some of the different ways in which selected risks are handled in PPP contracts:

Insurance Risk

Insurance is a viable tool for mitigating risks. However, at times insurance for certain risks may become unavailable or available on unfavourable terms. To address this issue, PPP contracts may include insurance benchmarking with an adjustment to PPP payments if market insurance premiums vary beyond a threshold. This will of course make the project more expensive and government payments unpredictable. In some instances, un-insurability which typically constitutes an event of default under the project loan is a termination event, unless the public sector agrees to act as insurer of last resort.

[42] See G. Nwangwu above.
[43] R. C Marques & S.V Berg, 'Public-Private Partnership Contracts: A Tale of Two Cities with Different Contractual Agreements' (2011) 89(4) Public Administration, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120073> last accessed 15 November, 2022.
[44] Ibid.
[45] Ibid.
[46] E. Iossa, G. Spagnolo and M. Velez, 'Contract Design in Public Private Partnerships' (2007) World Bank Report, 2012.

Design, Construction and Technical Specification Risk

When the Design, Construction and Technical Specification Risk eventuate it may lead to the project not being concluded at all or concluded on time. The PPP contracts should be designed to be output based, such that the private sector assumes the design and construction risk. Payments also have to begin on the satisfactory completion of construction. i.e. no service, no fee. This was one of the major problems with the Lekki Toll Road Concession in Lagos where the concessionaire started collecting tolls on the road after completing only less than 10% of the road project. [47] The project Special Purpose Vehicle (SPV) usually takes the construction and design risk and passes it down to construction subcontractors with appropriate warranties to the public sector. It is not advisable for the public sector to approve or sign off on design, as this will unwittingly transfer the risk back to it. This seems to be one of the shortcomings of the MMA2 Airport Concession, where the public authority approved all the private sector party's designs. The contract may also employ liquidated damages provisions to ensure that the private sector compensates the public sector for this risk.[48] However, care should be taken to ensure that it does not become a penalty provision by ensuring that compensation is only payable upon the public partner suffering economic loss from late delivery.

Planning and Approvals Risk

Even though planning risks should be allocated to the private sector, the public sector may commit itself by way of warranty in the contract to provide assistance.

Change in Law Risk

This is best treated as a shared risk whereby the general change in law risk is shared and change in law specific to the project is retained by the public sector. In a separate work, Yongijian *et al* recommended that change of law risks should be handled as follows:

- If a significant change in law prevents the private sector party from fulfilling its obligations, then the private sector party should be entitled to receive corresponding payments irrespective of its inability to supply contracted services.
- The private sector can be restored to the same economic position if the change in law results in additional cost to the private sector company over and above an agreed threshold.
- The change in law provision should apply to any change in law after bid submission date and should include any changes in tax regulations etc.[49]

Operational Performance Risk

This risk is better allocated to the private sector through the use of contractual incentives and penalties incorporated within the payment mechanisms and performance/quality requirements to enforce standards during the operating phase. The contract should therefore clearly specify the consequence of not meeting these requirements.

Financial/Economic Risk

The payment mechanism is also used to allocate economic risk between the public and private sectors. Proper allocation ensures that the users of the facilities only pay for services or outputs delivered. The public sector should have the right to withhold payments if the services are substandard and not remediated on time.

Exchange Rate Risks

To the extent that equity and debt funding for the project is denominated in local currencies, the public sector need not bear exchange rate risk. However, if funding for the project is denominated in foreign currencies, the government is likely to bear the exchange rate risk in other to maximize cost efficiency of the project. One of the ways of handling this in the contract is by ensuring that the project payments are adjusted for exchange rate variations. The alternative would be to provide in the contract for compensation to the private sector where the event, which is within the control of the public sector, eventuates. This is necessary in other to restore the economic equilibrium of the contract. Note also that delay in making payments usually exacerbates the

[47] See O. Fakoya, 'Lekki-Epe Express Toll Palaver – Government versus People', Sahara Reporters Online, 20 August 2010 available at https://saharareporters.com/2010/08/20/lekki-epe-expressway-toll-palaver%E2%80%93-government-versus-people last accessed 31 October 2022.

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[49] S. Wang and Y. Ke, 'Risk Management of Infrastructure Projects in China with the Case Study of the National Stadium' January 2008, Conference Paper, Inaugural Conference on Construction Law and Economic Circle in Asia and Pacific available at https://www.researchgate.net/publication/260267579_Risk_Management_of_Infrastructure_Projects_in_China_with_Case_Study_of_the_National_Stadium> last accessed on 15 November, 2022.

exchange rate risk, parties should therefore ensure that the time difference between the submission of invoices and the making of payments is greatly reduced.

Default Risk

This occurs when the SPV is not able to deliver either during construction or operation phase of the project. This can be dealt with and mitigated in the contract by providing step-in rights for the public sector to come in and replace the private sector partner. The step-in rights may also be granted to the financiers as the default by the private sector may also affect the ability of the concessionaire to make its loan repayments.

Demand Risk

This occurs when the end user demand for project output is lower than the base case original forecast. In many sectors it is difficult for the private sector to reliably predict end user demand. In such cases the PPP payment mechanism may be designed to eliminate demand risks. The contract design may also be used to mitigate demand risk. This may be dealt with by directly guaranteeing minimum purchase of project output or indirectly through adjusting tariff with demand or a combination of them. For example, the price would increase in accordance with the reduction of demand beyond agreed thresholds. The government may also insist that price be reduced if the market volume increases. The contract may also provide for fixed term plus a given extension period if the level of demand is below an agreed break-even point specified in the contract. Another option is to grant an upfront subsidy, or a demand guarantee limited to a strictly enforceable period (e.g. 3 years, to vary according to the project's attractiveness). In toll road projects, the introduction of a dynamic tolling regime is another option. In this case toll pricing vary according to travel peaks or time of day or days of the week. It is also good practice where a non-compete clause is employed, to link the clause with congestion limits and expansion obligations. These will also help strike a good balance with the long-term sustainability of the infrastructure sector. These issues are considered in greater detail in Chapter 8 of this book, which deals exclusively with demand risk.

Political or Legal Risks

This includes risks of expropriation, non-convertibility or non-repatriation. This may be dealt with through political risk insurance to cover for example sovereign default and expropriation. The contract may deal with this risk by specifying for example that expropriation is an event of default and that war and strife may be termed a force majeure event.

10. Conclusion

This paper has analysed the labyrinth of legislative framework governing concession/PPP projects in Nigeria and the complexity involved in negotiating these types of projects. The underlining structure of concession projects means that there are two parties (the public and private parties) collaborating as partners but at the same time involved in a negotiation process that is adversarial. This combination means that parties try to negotiate the best possible deals for themselves, which if successful leads to an agreement that both parties consider to be fair and acceptable to them. In the process of negotiating their contract, the parties agree on which of them to whom a particular risk should be allocated to and the price of the allocated risk. The level of complexity involved in the trading of risks demand a well-ordered negotiation process. Furthermore, this paper underscores the importance of regularising the cross-cutting and in some instances overlapping nature of the legal regime governing concession contract/ PPPs in Nigeria. This paper goes further to analyse the risk management process and its centrality to effective project financing. Thus, it is submitted that filling the gaps in incomplete long term agreements requires proper risk management. This involves managing risks in an optimal and broad manner, taking into consideration the capacities of contracting parties in allocating risks. Where possible, risks should be mitigated in a manner that greatly reduces their effects where they eventuate. These aspects taken together form the bulwark of effective project financing for an economy which is in dire need of private finance to satisfy her infrastructure needs.