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Project Finance

2024

13th Edition

Contributing Editor:

John Dewar
Milbank LLP

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Why the World Needs Project Bonds (and Project Finance Lawyers)

Milbank LLP



John Dewar

Why Project Bonds?

Project finance is a financing technique used to fund investment across a broad spectrum of industrial activities, notably in the natural resources, telecommunications, transportation, social infrastructure, power generation, and transmission sectors. One of the primary attractions of project finance for a project's owner, typically referred to as a "sponsor", is that the cost of financing a project using this technique can be minimised to the extent that the debt incurred to finance the project will be repayable over a long period of time using the proceeds of the project's net revenues.

At the outset of any project, a sponsor will keenly assess the financial markets so as to consider how best to finance its project. As one would expect, one of the sponsor's principal considerations at this stage will be obtaining the cheapest source of debt to finance the construction of its project. Factors that will impact on a sponsor's cost of financing its project will include the project's location, the industry in which the project will operate, the identity of the sponsor(s) and the project company's contractual counterparties; however, the crucial determinant will often be one over which a sponsor has no control: the liquidity of the debt markets (bank, capital and public) at that moment in time.

Capital markets project financings have evolved rapidly, covering a broad range of electricity, renewable energy, oil and gas, mining, and water sector projects, as well as infrastructure-related assets, such as toll roads, railways and rolling stock. In addition, project bonds have been used to finance social infrastructure such as hospitals, schools, and prisons (as a result of private financing initiatives in countries like the UK). Further afield, project bonds have played critical roles in financing oil and gas and other energy-related projects in the Middle East, Africa, and the former Soviet republics of Central Asia, presenting opportunities to connect international institutional investors seeking to diversify their portfolios with interesting new projects and geographic regions. As new markets focused on green energy sources continue to emerge, project bonds are likely to find a place in the financing of a variety of new project classes.

Historically, commercial banks have been the primary source of project financing. However, as has been well publicised, in recent years, commercial banks in developed markets have faced tighter credit constraints due to a combination of the effects of the financial crisis (and more recently the COVID-19 pandemic) and the need for commercial banks to increase their capital bases. This has resulted in a period of (relative) decline in lending from these traditional providers of project finance. Many commentators predict that this trend appears unlikely to

be reversed any time soon given the effects of Basel III, which requires commercial banks to match their liabilities (loans) to their assets, impacting the ability of commercial banks to provide loans with long tenors (which, as alluded to above, is an important attribute for the use of project finance loans). At previous points in the credit cycle, commercial banks had been able to provide project finance loans with tenors of up to 30 years. In recent years, most commercial banks struggle to provide uncovered loans with tenors exceeding 15, let alone 20 years. The current interest rate environment has also resulted in increased margins which has driven some sponsors to use mini-perms (shorter term loans with tenors of five to seven years) to finance the construction and early operation phase of their projects, with a view to refinancing the debt with other banks or in the project bond market. The regulations have also impacted banks from different regions in different ways. For example, U.S. banks have been pulling back heavily from long-tenor project financings, whereas a number of lenders from Japan or China have continued to be able to offer longer tenor debts where appropriate.

The reduced liquidity in the commercial bank project finance market combined with the need to finance large-scale "mega-projects" (where the debt requirement runs into billions of dollars), as well as the seismic shift in the market embodied in the push to Net Zero and the push into the Energy Transition, has necessitated the mobilisation of increasingly diverse sources of capital. Sponsors (and their respective financial and legal advisers) have sought to meet this challenge by carefully structuring multi-sourced financing packages to raise funding for projects from a wide variety of existing or "new" sources of debt, which has included (i) commercial banks from Asia, the Middle East, and Latin America, (ii) increased involvement by export credit agencies, multilateral lending agencies and development financial institutions ("public debt"), (iii) subordinated or second lien lenders led by the large direct lending funds, and (iv) for the stronger projects, the capital markets.

We should note at this point that projects bonds are not a new phenomenon. Sponsors have accessed the international and domestic capital markets to raise financing for projects since the 1980s. The attractiveness of the project bond market as a source of financing tends to be cyclical and unsurprisingly holds more appeal when the comparative cost and availability of funding from the traditional sources of project financing makes it challenging or more expensive to construct a financing plan based solely on bank and/or public debt. In these circumstances sponsors may look to fund all of their debt requirements using project bonds or integrate the project bonds with other forms of debt in a multi-sourced financing

structure. The U.S. project finance market has a long history of utilising project bonds (and indeed to date most project bonds have been issued in the U.S. market for predominantly U.S. projects).

Although there is a perception amongst some sponsors that issuing project bonds can be problematic, the tenors which can become available in the capital markets have indicated this is a financing option that cannot be ignored by sponsors seeking to optimise their financing plans. As the current relatively high-interest-rate environment starts to show signs of easing, sponsors will become more focused on the financing and re-financing opportunities offered by the bond market.

Problematic Project Bonds?

The steady, predictable nature of a typical infrastructure project's revenues makes projects particularly suitable for capital market investors. In most cases a project will have an offtake agreement (for example, a power purchase agreement or a concession) that will provide a secure and predictable revenue stream over a period of time exceeding the tenor of the project's debt. Furthermore, more often than not, offtake agreements are entered into with governmental agencies or supported by creditworthy entities, further enhancing the attractiveness of the revenue stream. As the long-term reliability of the offtake revenues underpins the repayment of a project bond, investors will focus close attention on ensuring that the project will in fact be able to generate robust revenues over the payback period of the project bond. An offtake agreement backstopped by a good credit and a solid pricing structure will enable potential project bond investors to be assured of a long-term, stable and predictable revenue stream.

Notwithstanding the above, issuing a project bond is a labour and time intensive process. And once a sponsor has issued a project bond, it then has to interface with a large pool of bondholders during the life of a project (rather than a group of lenders accustomed to the demands of a project financing). These two factors have meant that, historically, where possible, sponsors have tended to finance their projects using the loan markets. Notwithstanding the benefit of (currently) competitive debt costs and longer tenors available from the capital markets, a decision to issue project bonds is not, therefore, one that is taken lightly by a sponsor. We have set out below some of the more pertinent considerations that need to be taken into account when making a decision to raise finance for a project in the capital markets.

Regulatory requirements

Project bonds are tradeable securities and are therefore subject to extensive and complex securities laws which seek to protect investors from abuses such as fraud, insider trading and market manipulation. The securities laws to which a project bond will be subject, which do not apply to loans, inevitably make the process of issuing a project bond more laborious than entering into a loan due to the regulatory work entailed (which can be extremely time-consuming).

Historically, the largest market for project bonds has been the U.S. market and therefore generally, issuers (both U.S. and foreign) will seek to structure their project bond offering so that they can make offers and sales into the U.S. market to ensure access to sufficient investor demand and competitive funding terms for their bond. As with any jurisdiction, raising capital from the public markets in the U.S. is heavily regulated by both state and federal law. The body that regulates these

matters in the U.S. is called the United States Securities and Exchange Commission (SEC) and the principal legislation that applies to offerings in the U.S. is the Securities Act of 1933 and the Securities and Exchange Act of 1934. This legislation requires all offerings to be registered with the SEC and imposes extensive disclosure and reporting obligations on the issuer, both prior to, and after the offering. Project bonds issued to U.S. investors under Rule 144A require underwriters to obtain so-called "10b-5" disclosure opinions which will require both sponsors' and underwriters' counsel to carry out extensive due diligence in relation to the project.

Credit rating requirements

Credit rating agencies such as Standard & Poor's, Moody's, and Fitch regularly rate debt issuances by projects. These rating agencies publish details of the criteria they use to rate power and other projects, which, unsurprisingly, are very similar to those used by commercial banks in making their own credit assessments. The minimum required credit rating level to allow many classes of investors to acquire project bonds is an "investment grade" rating. Regardless of the strength of the sponsors or the project's risk mitigants, achieving such a rating will always be challenging if the sovereign rating of the host country lies below that level. One of the primary reasons why project bonds have in the past held little appeal for sponsors as an alternative to loans is because many project companies located in emerging jurisdictions have lacked the ability to obtain a sufficiently robust credit rating.

Consent and intercreditor issues

One of the advantages of a project bond for sponsors is that bondholders will typically have less onerous documentation requirements which afford the project company greater flexibility as to how it constructs and operates the project (it should be noted that a sponsor will not benefit from this flexibility if the project bond forms part of a multi-sourced financing).

Despite the extensive documentation governing the project participants' relationships, issues that had not been contemplated at the time of signing can (and often do) arise during the life of any financing and, when this happens, lender consent will usually be required for an amendment or waiver of the relevant terms of the finance documentation. In the context of project bonds, this process can be problematic for sponsors as it is generally more difficult to obtain the consent required to amend (or obtain waivers of) finance documentation from a large pool of bondholders than a group of commercial banks or agencies accustomed to the demands of a project financing. In those cases where a modification of the project bond documents is required (e.g. delay of project beyond the specified contingency period) the typical mechanism of seeking consent through a trustee to procure approval for the relevant change or waiver is more complicated and potentially more time consuming than interfacing with a bank with project finance experience to reach a solution.

As mentioned in the introduction, sponsors will now frequently employ multi-sourced financing structures for their projects, which means that it is not unusual for a project to be financed by both straight debt from the commercial loan market, public debt and project bonds from the capital markets. Incorporating a bond offering into a project's capital structure and harmonising the intercreditor relationship between

commercial banks, export credit and development agencies and bondholders (who will rank on a *pari passu* basis) requires careful handling by the lawyers. A project's financing will now often involve weaving together the intricate requirements of a wide variety of lenders. Divergent currencies, tenors and interest rate mechanisms are now only the more technical issues to address; harmonising the interests of a large group of lenders, some of whom may have a long-term focus on development or other policy matters, some of whom do not (capital markets investors being particularly driven by short-term gains from trading their project debt), can be particularly challenging.

Construction risk

Construction is generally considered to be one of the most significant risks in a project because of the project's reliance on a limited number of assets to generate revenue. It follows that construction risk, although it can be mitigated through the use of completion support, has long been regarded as being the main obstacle to project bonds being more widely used in the project finance market. Bondholders have historically been reluctant to take any form of construction risk on a project. This reluctance stems from the identities of the investor base for project bonds which typically comprises insurance companies, bank treasuries, pension funds and asset managers looking for long-term assets with predictable revenue flows. One very popular option for sponsors is therefore to hardwire into the initial finance documentation the possibility of refinancing the initial loans with project bonds (as these will likely become available on more attractive terms once the project is fully operational since bondholders will no longer be taking a project's construction risk into consideration when pricing the debt).

Any credit rating assigned to a project bond during a project's construction phase will likely be heavily impacted by the construction contractor's creditworthiness. Possible ways of mitigating construction risk (and therefore improving the credit rating of a project bond) include:

- Obtaining a construction contract with a guaranteed maximum price, and thereby transferring the risk of cost-overruns during the construction period on to the contractor. The construction contract would also likely include financial bonuses and liquidated damages so as to incentivise the contractor to build the project according to the original schedule and budget and compensate the project for any loss or delay in production.
- Obtaining an on-demand, unconditional, and irrevocable letter of credit or performance bond provided by a financial institution with a strong credit rating in an amount sufficient to cover the estimated replacement costs associated with an insolvent or underperforming contractor, delays, or costs overruns.
- Implementing a financing structure that permits payment of scheduled debt service under a downside construction scenario (e.g. to address delays in project completion). This might involve a rated sponsor providing a completion guarantee or a debt service undertaking which provide credit support until the project reaches commercial operation.

In addition to the above risks, financing a project using capital market instruments also presents a unique challenge in that a phased drawdown period typically represents a challenge for an asset class which does not, typically, provide for a phased commitment from its investors. Therefore, when

issuing a project bond during the construction phase of a project there can be a significant "cost of carry" as interest will need to be paid on drawn (but unused) debt. This "cost of carry" may take away a significant part of the upside of the lower cost of funding obtained through accessing the capital markets. Arranging project bonds for projects still in their construction phase requires additional thought from those involved in structuring the deal.

In recent years, innovative bonds have come to the market with the aim of resolving such construction-related risks for both sponsors and investors. For example, the €1.77 billion bond financing for the construction of the Superstrada Pedemontana Veneta toll road in Italy involved listed senior and junior notes, and a delayed draw financing structure in which issue proceeds were put into a liquidity management transaction and made available to an escrow account in instalments and then released for construction costs once pre-agreed conditions were satisfied.

Operating period risk

After the construction period, typically no significant or unforeseeable (operating) costs are required to be borne by the project, which reduces risk and (assuming the project has been constructed in accordance with its specifications) allows a steady cash flow during the payback period of the bond. This "de-risking" of the project makes a successful placement of a project bond far more straightforward. That said, a project is not entirely without risk during the operations period as there remains a risk that the project will experience operational problems resulting in higher than expected costs, lower availability or limited production.

Possible ways of mitigating operational risk (and therefore improving the credit rating of a project bond) include:

- The use of an experienced operator under a long-term service agreement (or a fully funded operations and maintenance reserve account).
- The use of proven technology. Projects that make use of proven technology with a long and effective track record are generally considered more likely to experience success than projects that rely on new unproven technology.
- Obtaining sufficiently robust feedstock or fuel supply arrangements.
- Obtaining (and maintaining) comprehensive insurance policies and business interruption insurance.

Notable Project Bond Activity

According to data gathered by Refinitiv, there were 96 project bond issuances closed in 2022 with an aggregate value of approximately \$38.6 billion. The majority of bond transactions were in the transportation and power industries with the oil and gas industry also seeing a number of issuances. The U.S. had the biggest proportion of these transactions with more than three times the volume of any other individual country. In 2023, there was an increase in volumes to 104 project bond transactions with an increased value of \$63.5 billion, with the majority of bond transactions being in the oil & gas and transportation industries. The U.S. market closed by far the largest proportion of these transactions with approximately \$35 billion of project bonds. So, despite the relatively high interest rate environment, the project bond market has been relatively active, particularly in the U.S. At the time of writing, the U.S. Federal Reserve and other central banks have signalled that monetary policy is unlikely to tighten and the markets are

beginning to price in a lower interest rate environment. This is likely to lead to an increase in project bond market activity.

Recent ground-breaking project bonds include the issuance by EIG Pearl Holdings, an investment vehicle that co-owns Aramco Oil Pipelines with Saudi Aramco, issued \$2.5 billion in dual-tranche amortising bonds. The proceeds of the bonds were used to partially refinance existing bank debt which was used to part fund the purchase of a share of stabilised crude oil pipelines which cover more than 4,000 km in the Kingdom of Saudi Arabia. Moody's assigned A1 ratings to the proposed senior secured bonds.

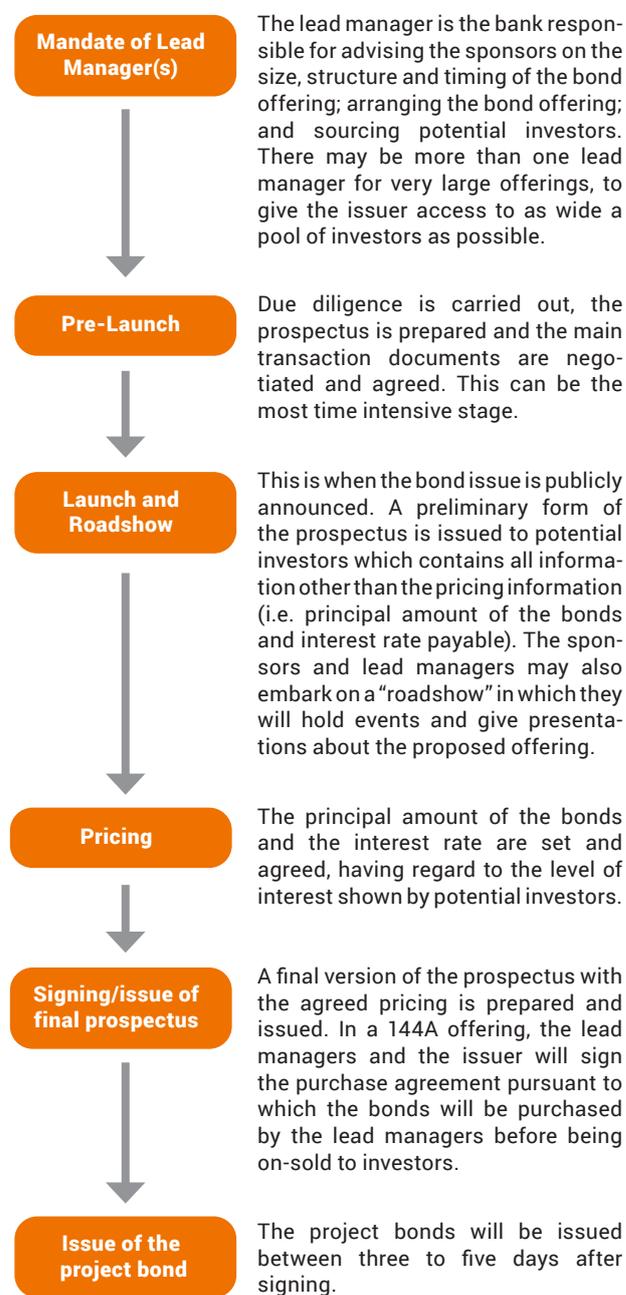
The growth of Islamic finance has also led the issuance of project *sukuk* (Islamic bonds). In 2023 there was a highly innovative project *sukuk* issuance by TMS Issuer S.à r.l (as part of a total \$4.5 billion project bond issuance, together with GreenSaif Pipelines BidCo S.à r.l ("GreenSaif")) for the refinancing of the bridge facility entered into in connection with GreenSaif's acquisition of a minority stake in Aramco Gas Pipelines Company, a subsidiary of Saudi Arabian Oil Company. This was an AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions)-compliant share-based project *sukuk* structure which was nearly 16 times oversubscribed by Islamic investors. This new structure highlights the considerable investor appetite for high-quality project *sukuk* issuances with reliable underlying cash flows. The GreenSaif *sukuk* issuance represents a new financing solution for energy and infrastructure developers seeking to raise a combination of Islamic and conventional facilities.

Another notable capital markets offering in the Gulf Cooperation Council ("GCC") region in the past decade was the \$2 billion equivalent *sukuk* that formed part of the multi-sourced \$12.5 billion project financing of the Sadara chemical project. The Sadara Basic Services Company issued a 15.75 year \$2 billion equivalent *sukuk* to finance part of the development of the Sadara chemical and plastics production complex in Saudi Arabia. *Sukuk* permit bond-like financings to be structured in a way that is compliant with *Shari'ah* law. Although to date the absolute number of *sukuk* issuances remains a small proportion of bond issuances, the GCC nations have a large pool of underutilised sovereign capital and Islamic finance structures such as *sukuks* are an obvious fit for the region. There is a confluence of a generally-acknowledged need for infrastructure development and increasing political support for the development of Islamic finance as an alternative to conventional finance. We expect to see project *sukuks* become a commonplace feature of multi-sourced project financings in the GCC region. Globally, the *sukuk* market is expected to attract some of the world's largest and most important institutional investors across the U.S., Europe and Asia, as they may be drawn to *sukuks* as an effective way of investing in strong companies that are located in fast growing regions of the world.

A key capital market offering in Latin America was the recent project bond issuance by Valia Energía, one of the largest private energy generation platforms in Mexico, in connection with a \$530 million bond financing and related working capital facility by Buffalo Energy Mexico Holdings, S.A. de C.V., Buffalo Energy Infrastructure, S.A. de C.V. and Buffalo Energy, S.A. de C.V., as co-issuers. This is a portfolio financing contributing to expanding Valia Energía's footprint in the Mexican energy market. Valia Energía, a portfolio company of global private equity fund manager Actis, has a total commercial capacity of 3.2 GW distributed among seven gas-fired power generation plants. This was the first project bond in Mexico since 2020 and the first offering by a Mexican first-time issuer since 2021.

Issuance of a Project Bond

The principal stages in a project bond issuance are set out, in brief, below:



Bondholders will principally be focused on the return which will be paid on their investment, represented by the interest payable on the bonds, and a key consideration of a potential investor in project bonds is the risk of default on payment. In evaluating such risk, investors will assess the issuer based on: (i) the information set forth in the offering document or prospectus; and (ii) the credit rating given to the issuance.

Most of the issuer's disclosure obligations are met through the information which it provides in the prospectus (sometimes called an "offering circular" or "offering memorandum"). The issuer is responsible for ensuring that all information that may be relevant to a decision to purchase the bonds, and thereby invest in the project, is included in the prospectus. The sponsors and their advisers (upon whom responsibility

for the preparation of the document will fall) will need to be meticulous and exercise caution when making statements in the prospectus, because an issuer will incur liability under the anti-fraud provisions of U.S. securities laws if information in the prospectus is defective or deficient in a material respect. The prospectus will contain detailed descriptions of the project and the key project and finance documents, as well as financial information about the key entities involved in the project. There will also be a section detailing the risk factors associated with the project. All of the above will need to be factually accurate and comprehensive.

Conclusion

In the context of the push to Net Zero and the structural changes embodied in the Energy Transition, commercial banks and their credit committees are reviewing project structures and credit risk with far greater scrutiny than was previously the case. This scrutiny, combined with the complexity of large-scale projects, means that many project financings are taking longer to execute than they did previously. As lenders' documentation requirements and credit approval conditions have slowed down the timetable for the execution of transactions, the competitive edge that the loan market once enjoyed over capital markets because of its ability to execute transactions rapidly, has therefore lessened, and it seems likely that if commercial banks' ability to provide long-term debt remains constrained, and the pricing of bank debt in a number of markets remains relatively expensive in comparison to bond yields, then more sponsors will shift their attention to the project bond market, particularly as an attractive refinancing option.

There are still risks inherent in project bonds that institutional investors have not historically been comfortable with, such as construction risk and there will still be inherent challenges in adapting structural components of project bonds (such as long draw-down periods and higher pre-payment costs) to standard project finance transactions, but with the right investors, a well-structured project and strong risk mitigants, the project bond market can be an attractive alternative to other, more traditional, sources of financing. However, unless all construction risks can be adequately mitigated, it will continue to be hard to close pure project bonds prior to project completion. An optimised structure would consist of a traditional construction financing provided by commercial banks and/or agency lenders and once the project is in commercial operation a capital market refinancing. Such a structure would avoid capital market investors having to take construction risk and would avoid the issuer bearing the cost of interest payments for non-utilised debt during the construction period. However, given the constraints that face the conventional banking market, it is not unreasonable to predict that sponsors will continue to need to turn to the capital markets as a source of funding for their projects (particularly as the current interest rate environment starts to soften). With time, those investors will perhaps become more accustomed to the strong credit characteristics of project debt and the unique requirements of project financing transactions, and it may be the case that capital market issuances will become increasingly common.

Acknowledgment

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John Dewar is a partner in the London office of Milbank LLP and a member of the firm's Global Project, Energy and Infrastructure Finance Group. John is widely recognised as a leading individual in his field by a number of journals, among them: *Chambers UK* (which designated him among the first tier of project finance lawyers in the UK); *Chambers Global*; *The Legal 500*; and the *Who's Who of Project Finance*. He has advised on project financings all around the world and has built an extremely broad practice and outstanding reputation for advising on the most innovative and significant "market-first" transactions in the development and financing of mining and metals, oil and gas, natural resources, independent power, renewable energy, telecommunications, satellite and other infrastructure projects.

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