UNDERSTANDING AND STRENGTHENING THE CONTRACTUAL STRUCTURES OF PUBLIC PRIVATE PARTNERSHIP (PPP) TRANSACTIONS IN NIGERIA

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ABSTRACT

This paper discusses the contractual structures of PPP transactions in order to understand the interplay of parties, their specific roles, and the standard agreement templates that could achieve the aspirations of parties and ensure the success of PPP transactions in Nigeria. Over the years, the Federal Government had instituted PPP to leverage on private finance in the provision of public infrastructure and services, and consolidated such effort with the promulgation of the ICRC Act in 2005. This saw a significant increase in PPP transactions that, as at today, there are more than fifty executed PPP agreements in the ICRC records. A careful analysis of the record would reveal that a larger percentage of the agreements are either being reviewed or terminated, abandoned or a subject of litigation. The paper, after carefully analyzing the role of parties, their interrelationships and their transaction agreements at different stages of the PPP life cycle against the context of standard PPP contractual terms, found that contractual structures account partly for the failure of PPP projects in Nigeria. It therefore recommends a legislative and institutional amendment of Nigeria's PPP process to allow for a standardized contract templates and a mechanism for quicker dispute resolution.

Keywords: Concession Agreements; Doctrine of Privity; Project Finance; PPP; Transaction Advisers and Promoters; Shareholders Agreements; Special Purpose Companies.

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INTRODUCTION

Public Private Partnership (PPP) has emerged as the most realistic alternative in Nigeria's search for an increase in its public infrastructure stock. It was for this reason that the National Integrated Infrastructure Master Plan (NIIMP)[i] and other National strategic plans of the Federal Government have made provision for the participation of the private sector in the provision of public infrastructure and services in addition to formal and informal support of the government for PPP policy and practice. It is therefore no surprise that the Infrastructure Concession Regulatory Commission (ICRC), the agency saddled with the responsibility of regulating Public Private Partnership (PPP) in Nigeria, has a record of more than fifty executed PPP agreements in different sectors of the national economy.[ii]

This record does not include the Production Sharing Contract (PSC) agreements of the Nigerian National Petroleum Corporation (NNPC) and the PPP agreements of sub-national governments. However, a careful analysis of the implementation of the agreements would show a high incident of contract failures in Nigeria. Out of the fifty PPP agreements executed by public authorities in Nigeria, only eleven were being implemented smoothly, while twenty-four agreements were undergoing review, one had expired, five were terminated, one was suspended, six were subject of disputes, and the implementation of two had been stalled.[iii] To reduce such incidents of PPP project failure, Nigeria requires a strengthening of its pre and post transaction agreements.

The paper looks at the contractual structures of PPPs to be able to proffer suggestions on how Nigeria could firm up its PPP contracts for more effectiveness. It is consequently divided into four sections. The first section is the introduction, while the second section attempts the identification of parties and their roles in PPPs. The third section discusses the transaction relationships, the ensuing contractual agreements and the absence of a standard agreement format for the guidance of public authorities as found in many jurisdictions. The fourth part is the conclusion, which makes specific recommendations. It is important to note that due to the non-availability of executed agreements as a result of non-disclosure and confidentiality clauses, the discussion in section three relies heavily on standard contractual terms and the PPP agreement guidelines of the United Kingdom.

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At the outset, it is auspicious to know that PPP is an agreement between a public authority and a private entity for the provision of public infrastructure and services on the basis of shared risks, resources and rewards. The ICRC Act defined PPP, which it referred as concession, in similar terms.[iv] Such agreements are long term and therefore require diligence, expertise and strict adherence to a Nation's PPP legal framework in their preparation. In Nigeria, every PPP agreement must be prepared within the context of extant PPP legal framework, which has the ICRC Act and the National Policy on PPP as dominant enabling guides. Other legislation in Nigeria's PPP legal framework that are necessary for the validity, effectiveness, efficiency and adequate return on investment of PPP transactions include the Constitution of the Federal Republic of Nigeria;[v] the Public Enterprises (Privatization and Commercialization) Act;[vi] and thirty-three other legislation, three Executive Orders and seven National plans.[vii]

ROLES OF PARTIES AND THEIR INTERRELATIONSHIPS IN PPPS

There are many stakeholders that play different, critical and interrelated roles in a PPP transaction from the beginning of a PPP relationship to the end of its life cycle. These stakeholders include promoters, transaction advisers, public authorities, special purpose companies, sponsors and guarantors. Others are lenders, engineering supervisors, input suppliers, project off-takers and end-users. While the first category of stakeholders are project development stakeholders, lenders ensure adequate financing of the project, engineering supervisors are concerned with the quality and standard of work, and input suppliers, project off-takers and end-users impact on the commercial viability of the transaction. The absence of any one of them could create a weak link in the effective delivery and management of the PPP project, hence all are important. This section however, discusses project development stakeholders only.

Transaction Promoters

A PPP transaction promoter plays an important role in kick-starting the implementation of a PPP project. Like any other promoter, a PPP promoter is a firm or person who does the preliminary work incidental to the formation of a business venture, including its promotion, incorporation and floatation as well as solicits for people to invest money or to subscribe for shares in the venture.[viii] Under Nigerian Law,[ix] a promoter is any person who undertakes to take part in forming a company with reference to a given project, and to set it going, and who

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takes the necessary steps to accomplish that purpose, or who with regard to a proposed or newly formed company, undertakes a part in raising capital for it.[x] The Promotion of businesses, ventures and projects is central to PPP in two ways. First, the structure of PPPs that requires the assembling of multi-disciplinary participants for effective delivery of projects. Secondly, the fact that Special Purpose Vehicles (SPVs) coordinate different interests that drives such projects.

Generally, there are four categories of promoters, namely, professional promoters, occasional promoters, entrepreneurial promoters and financial promoters.[xi] Professional promoters are persons who specialize in the promotion of companies and pursue it as their main vocation while occasional promoters are those that engage in the promotion of companies as part of their professional duties, and not on regular basis. Entrepreneurial promoters, on the other hand, conceive ideas of business, do the groundwork to establish it and subsequently become part of the business, while financial promoters are investment or industrial banks that promote companies to generate investment opportunities. In these categories, only those who take active steps in establishing ventures are regarded as promoters.[xii]

Under Nigeria's legal system, persons acting in professional capacities engaged by persons promoting companies, ventures or projects are not regarded as promoters.[xiii] In *Re Great Wheal Poolgooth Ltd*,[xiv] the court said the solicitor that drafted the memorandum and articles of association and the auditor that reviewed the value of assets to be purchased were only giving professional assistance to promoters, and were not promoters. However, a professional would be deemed to be a promoter if he is to profit from the formation of the company. For instance, a legal practitioner that took up shares in lieu of his professional fees was held to be a promoter.[xv]

The functions of these promoters, whether professional, occasional, entrepreneurial or financial, so long as they are regarded as promoters under section 61 of the Companies and Allied Matters Act (CAMA), are fundamentally the same, i.e. to discover a business idea, investigate the viability of the business idea, assemble the critical elements of the business, enter into preliminary contracts with third parties and form the organizational entity of the business.[xvi] Of particular interest are the preliminary contracts, which are sometimes called pre-incorporation contracts, promotion contracts, formation agreements, shareholders agreements, memorandum of understandings, joint venture agreements, etc. In *Sparks Electrics Nig.*

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Limited v Samuel Ponmile,[xvii] the court observed that such preliminary contracts are usually made on behalf of the company before it is incorporated.

In the discharge of their functions, promoters are expected to avoid conflicts of interests, exercise reasonable care in performing their duties and refrain from self-dealing or taking unfair advantage of their positions as promoters. This is the essence of the fiduciary relationship of promoters, who are obligated to observe utmost good faith in their dealings with the company, its investors and shareholders. It was in this regard that CAMA specifically stipulated promoters' duties to include accounting for monies or properties received, not to make secret profits, not to exploit confidential information, not to expose the company to loss and to be diligent and honest in their dealings on behalf of the company.[xviii]

The law did not give any legal status to promoters, as they are neither agents, nor employees nor trustees of the company.[xix] They could be personally liable for conducts and contracts they entered on behalf of the company and such liabilities are unlimited[xx] even after winding up.[xxi] In fact, a promoter cannot even maintain an action against the company for expenses or remuneration incurred in the course of promoting a company except if ratified after full disclosure[xxii] and if the company has the power for such ratification under its memorandum and articles of Association.[xxiii] See *Trans Bridge Company v Survey International Ltd*,[xxiv] which cited with approval the English case of *Kelner v Baxter*[xxv] that promoters remuneration are subject to ratification.

Transaction Advisers

Transaction Advisers are specialized entities that render advisory services to public authorities, private entities and lenders[xxvi] with respect to the preparation, implementation and management of PPP projects. These entities, which are professional firms and companies, could be law firms, financial, accounting or investment companies, technical or engineering firms, and even governmental PPP institutions. They could either be solo, offering separate services, or multidisciplinary with all requisite skills and expertise under their consortia. Their role is mainly to do all the detailed financial, technical and legal work required in the implementation of a PPP project.

A typical PPP project would require project identification and assessment; environmental impact assessment; cost-benefit analysis; risk identification, mitigation and allocation;

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technical solution depending on the sector and assessment of PPP options; cost, revenue forecasting, incentives and guarantees; financing costs, loan interests, currency exchanges, country tax and insurance; procurement procedures and planning; contract drafting and negotiation; and other general legal and procurement procedures.[xxvii] The PPP advisory services therefore entail advice on all these as well as to ensure the completion of a feasibility study or business case to such a standard that could establish the commercial attractiveness and bankability of a project.[xxviii]

The participation of Transaction Advisers in a PPP transaction has many advantages. It singularly lends credence to the integrity of the process. This is apart from the opportunity of the public authority to leverage on expert opinion at every stage of the process, avoids costly mistakes, learns on similar previous projects and ensures corresponding knowledge transfer from that interaction.[xxix] The Transaction Adviser addresses the competing objectives of government, creates a proper balance between risks and rewards for all parties and allows for the understanding of lending requirements of investors.[xxx]

There are three categories of contractual engagements in transaction advisory services, namely, Integrated, Separate and Mixed contractual engagements.[xxxi] The Integrated contractual engagement uses a single procurement procedure to appoint a consortium of advisers that could offer all professional advice required at any stage of the PPP process. The Separate contractual engagement, on the other hand, is where a procurement authority launches multiple procurement processes to engage each adviser required in a PPP transaction, while the mixed contractual engagement allows for the engagement of a group of professionals whose disciplines are cognate or complementary. For instance, a technical adviser can be mandated under a separate contract to deliver activities on planning, survey and environmental impact assessment while the legal and financial advisers could be engaged as a consortium.

The Transaction Adviser is usually engaged at the start of project development stage in accordance with the provisions of the Public Procurement Act[xxxii] for procurement of consultancy services. The contractual duration could be short term or long term. It is short term where it terminates when the Agreement is signed or at the end of the procurement phase. It is long term where it covers the entire project cycle from the early preparation stage to the operations stage. Both could be effective if the Terms of Reference (TOR) for the services are

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clear and precise. However, the procuring entity must consider its budget and the complexity of the project in deciding on the duration of transaction advisory contracts.

Main Transaction Parties

The parties in a PPP transaction are essentially the public authority and the private entity. The public authority could be any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure by whatever named called.[xxxiii] These bodies are primarily responsible for project identification and conceptualization. On the other hand, the private entity, which is usually a Special Purpose Vehicle (SPV) or a Special Purpose Company (SPC) responsible for the implementation of the project, is a limited liability company with powers under its memorandum and articles of association to *inter alia*, enter into the PPP legal contract. The formation of such PPP contract entails five elements,[xxxiv] namely, offer, acceptance, consideration, intention to create legal relations and capacity to contract on the basis that the subject matter is lawful and there is mutuality of agreement and obligations.

In general contract terms, the public authority and the private entity are the respective offeror and the offeree of the transaction. An offeror is one who makes an offer, which has been defined to mean a promise that, by its very terms, is conditional upon an act, forbearance or a returned promise in exchange for the promise or its performance.[xxxv] Any offer therefore must consist of a definite proposal with clear terms and expressly communicated to the offeree.[xxxvi] If any of these elements is missing, there is no offer to form the basis of the contract.[xxxvii]

An offeree, on the other hand, is the entity that accepts an offer. Acceptance is the assent, expressly or by implication, to the terms of an offer in a manner requested by the offeror so that a binding contract is formed.[xxxviii] While the offeree must have the legal capacity of acceptance, the ability of the offeree to accept however is determined by the offeror.[xxxix] An offeror can give the power of acceptance to a single person, a specific group of people, a class of people or anyone that meets the requirement of the offer. In complex transactions like the PPP, acceptance is not a straightforward action. It involves series of negotiations after a successful bid. Such negotiations will lead to signing of a binding Agreement between the parties.

On the part of the public authority, it is not necessary that either the Federal Government or the

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Hon. Attorney General of the Federation is a party to the agreement.[xl] It suffices that the relevant federal ministry or agency is a party as the ICRC Act empowers federal ministries, departments and agencies to enter into PPP contracts.[xli]

Transaction Sponsors and Guarantors

Transaction sponsors and guarantors are critical in PPP transactions and provide comfort to public authorities that PPP contract terms and obligations would be optimally performed. The role of sponsors is informed by the need to leverage on the doctrine of privity of contract,[xlii] to ensure that the lack of goodwill of new companies does not impact negatively on project financing and to address concerns that existing liabilities of project owners do not hamper the delivery of a PPP project. A Special Purpose Vehicle (SPV) is created to be the main private party in a PPP transaction. However, as a new company with a separate legal status, a public authority would be hard convinced to contract with the SPV without putting in place additional arrangements in which project owners would be directly and legally responsible.

The additional arrangements could involve two mechanisms. The first mechanism is to make sponsors parties to the Agreement. Under the doctrine of privity of contract, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit, purports to give him a right or make him liable to it.[xliii] A person who is not a party to a contract is a stranger and, hence, could neither sue nor sued on the contract.[xliv] Sponsors would, by their inclusion as parties to the PPP Agreement, be effective parties with capacity to sue and be sued on the contract. This arrangement therefore enables the public authority to enforce performance obligations under the PPP Agreement against sponsors.

The second mechanism is to get sponsors to guarantee the SPV's general performance obligations under the PPP Agreement. In *Amede v UBA*,[xlv] the court defined guarantee as a written undertaking made by one person to another to be responsible to that other if a third person fails to perform a certain duty. It is a collateral engagement to assure that 'a contract will be duly carried out or to answer for the debt, default or miscarriage of another person'.[xlvi] Once guaranteed, the law allows the public authority to move against the sponsors for failure of the SPV to perform its obligations in the PPP Agreement. In *Amede v UBA*,[xlvii] it was further held that the liability of the guarantor to the creditor arises once the principal debtor defaults.

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TRANSACTION RELATIONSHIPS

A PPP transaction gives rise to many relationships. Beyond promoters' pre-transaction contracts, the defining relationship of a PPP transaction is that of the public authority and the private entity. Hitherto, the public authority would enter into agreement with a transaction adviser for preparation of the project including the delivery of a credible business case for project procurement. Depending on the PPP delivery model and scope of transaction advisory services, the public authority may require or engage design consultants, project managers and supervising consultants.[xlviii] The sponsors of the private entity, on the other hand, would also engage consultants, financiers, construction contractors as well as operation and maintenance contractors for optimal project delivery.[xlix] These relationships culminate in array of PPP agreements, some of which are hereunder discussed.

Pre-Transaction Agreements

Pre-transaction agreements are agreements, which are entered by the parties prior to, in preparation for, or in contemplation of the main PPP Agreement. They are necessary as they provide the basis, capacity and readiness to enter into a PPP transaction. They complement to ensure that national laws are followed, structures are created, agreements are protected and strategies are adopted for the successful bidding, negotiation and implementation of a PPP project. These agreements, which are entered at various stages, contain clauses that are peculiar to their goals and objectives. The study has identified five important pre-transaction agreements for discussion. These are shareholders' agreement;[l] memorandum of understanding;[li] non-disclosure and confidentiality agreement;[lii] non-compete agreement;[liii] and transaction advisory and project consultancy agreement.[liv]

Shareholders Agreement

A shareholders agreement is a contractual arrangement among persons who agreed to form a company or partnership. It outlines the respective rights and obligations of members and describes how the company should be structured and operated.[lv] It aims to bind shareholders to rules and regulations in order to pre-empt issues that could become contentious in the future. Although this document is optional and strictly for and by the shareholders, it is however necessary in PPPs, as the public authority may insist on knowing the rights of consortium

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members since, for instance, there could be a term that a PPP contract may be terminated where a consortium member exits.

Shareholders agreements ensure that shareholders are treated fairly and that their rights are protected. The terms and rights under shareholders agreements form the basis of the memorandum and articles of associations (memo) of the company registered with the Corporate Affairs Commission. It is typically more extensive and affords more protection to shareholders.[lvi] It is however subject to the provisions of the Companies and Allied Matters Act as, under section 254 of the Act,[lvii] neither the memo nor the shareholders agreement could alter its express provisions. It should be noted that since the memo follows a statutory model, shareholders agreements might contain a supremacy clause to ensure that they override the memo.[lviii]

A standard shareholders agreement should provide for allocation of key roles and responsibilities of members, the management of the company, the obligations of directors, the mode for share sale and transfer, capital and financial contributions, minority protection, payment of dividends, liquidation preferences, dispute resolution and termination of the agreement. The list is not exhaustive, as it should admit of any clause or provision that could further secure the interest of shareholders and the company in the long run.[lix]

It is important for the agreement to outline the fair and legitimate pricing of shares, state how third parties would become future shareholders (deed of accession or deed of adherence), and provide safeguards for minority positions (protective provisions). It should contain a table outlining shareholders and their respective percentages of company ownership, possible restrictions on transferring company shares, pre-emptive rights of existing shareholders and details on payments of subscribed shares.[lx]

In the distribution of shares, there are many clauses that incentivize and hold members responsible. These include sweat equity clause in favour of founders that could not be monetarily remunerated for their efforts; share vesting clause that only crystallizes when a stipulated condition occur, e.g. remaining with the business for a minimum period of time; good and bad leavers clauses, which forces a shareholder to transfer his shares at either current market or original price rate depending on his conduct or reason for exit; and pre-emptive rights and anti-dilution clauses that require the company to offer any newly issued shares to existing

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shareholders proportional to their existing shareholdings.[lxi] There is also a clause that restricts transfer of shares to a third party without first offering it to the company or to the existing shareholders. Another clause that is popular is the drag-along clause or tag-along clause, which ensures that the minority shareholders are not short-changed.[lxii] This clause allows the majority to either force the minority or include the shares of the minority in its negotiation to sell their shares on same terms and conditions.

Memorandum of Understanding

A Memorandum of Understanding (MOU) is a written agreement detailing the preliminary understanding of parties who intend to enter into a contract or some other agreement, and is used to outline conditions of transactions so as to bring the intentions of parties into reality.[lxiii] It is usually non-committal, non-binding and an outline of expectations. In *BPS Construction and Engineering Co. Ltd v Federal Capital Development Authority*,[lxiv] the Supreme Court observed that the MOU was just a process in the journey to a contract. It is like a letter of intent, which does not hinder parties from negotiating with third parties. More often than not, such agreements are so worded as not to create any obligation on either side. But in some cases it may contain a specific invitation to commence preliminary work, which at least creates a binding obligation to pay for that work.[lxv]

MOUs are usually referred to as memorandum of intent, term sheet or commitment letter, and except for unsolicited proposals, it is doubtful if MOUs have any utility under the ICRC legislation and guidelines.[lxvi] In any case, where the procurement process is not competitive, it is necessary for parties to execute an MOU. Parties should also insist on an MOU where they have pre-transaction obligations of critical preliminary technical work, e.g. survey, plans and engineering designs. Presumably, MOUs may not however be necessary where the public authority assumes sole or significant responsibility in preliminary technical works.

The components of an MOU should include the details and aspirations of the parties, the scope and terms of collaboration, applicable legislation as well as the conditions under which the MOU can be terminated, altered or amended.[lxvii] The MOU should reflect the true intentions of parties to ensure that there are no ulterior or hidden motives. It should contain a recital to indicate the clear objectives, goals, aspirations and capacities of the parties. The operative clauses should stipulate the obligations of parties and the timelines for their performance.[lxviii]It

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is also important that a statement to the effect that the MOU is not a legally enforceable contract between the parties be inserted in the MOU.

Non-Disclosure and Confidentiality Agreements

At the outset of negotiations, officers and representatives of a public authority could come into contact with sensitive information, novel ideas and trade secrets of the project promoter. In the same vein, the public authority or other prospective consortium members could disclose sensitive information in the course of PPP project negotiations. If adequate care is not taken, such confidential information, novel ideas or trade secret may be stolen, communicated or used in a manner that is prejudicial to the interests and opportunities of the parties. It is therefore necessary to protect against the improper use or disclosure of such information by the parties.[lxix]

The mechanism devised to protect such prejudicial use of sensitive information or trade secrets is the Non-Disclosure Agreement. A Non-Disclosure Agreement (NDA) is a legally binding contract that requires parties to treat each other's specific information as confidential or a trade secret, and to promise not to disclose the information or secret to others without proper authorization for a defined period of time.[lxx] Another mechanism at protection of confidential information or trade secret is the Confidentiality Agreement (CA). It is used when a higher degree of secrecy is required. While the NDA implies that you must not disclose personal or private information, the confidentiality agreement is more proactive in making sure that the information is kept secret. Both NDA and CA can be a subject of substantive Agreement or a clause in either a preliminary agreement like the MOU or in the substantive agreement.

Companies use these clauses to ensure that the other party or its officers, representatives and agents negotiating with it do not steal its commercial ideas. They effectively create legally binding obligations not to disclose or prejudicially use information that are agreed to be confidential. In the event of any breach by the recipient, the disclosing party could be entitled to damages for breach of contract. Other resources that could give rise to damages for the breach of the non-disclosure obligations may include copyright infringements, trade secret misappropriations and breach of fiduciary duties.

The components of NDA[lxxi] include the definition of what is deemed to be confidential, the scope of legal obligations to disclose by the receiving party, the confidential information that are excluded from disclosure, the consent required before any disclosure of information, the

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return or deletion of information as may be applicable, the jurisdiction in the event of dispute, the term or period of the obligation, the remedies for breach and a non-binding clause to the effect that the execution of NDA or CA does not signify a legally binding relationship between the parties.[lxxii]

Non-Compete Agreements

The non-compete agreement or clause is deployed as a mechanism to protect a company or business against competition by persons who have become exposed to its trade secrets as well as a measure to enhance the viability of a PPP project. Thus, a non-compete agreement is a contract wherein a partner or an employee promises not to enter into competition of any kind in respect of a similar business idea in the event of either failure or takeoff of the project. The restriction to competition could be over a specified period of time, within a particular geographical coverage or in the performance of specific services. A typical non-compete agreement also includes the main non-compete clause, a non-solicitation covenant, a confidentiality clause and exclusion of inconsistent provisions in other documents or agreements.[lxxiii]

Though it is a restrictive covenant and subject to strict scrutiny, a non-compete agreement is binding and enforceable in law. In the case of *Koumolous v Leventis Motors Limited*,[lxxiv] the Supreme Court noted that while covenants in restraint of trade are generally unenforceable, there would be an exception where such clauses are shown to be reasonable with reference to the interest of the parties and of the public. Thus, the requirement of reasonability was held to be satisfied in that case as it only afforded adequate protection to the business of the employer and therefore enforceable. However, in *Kholopikiaan v Metal Furniture Limited*[lxxv] a restraint clause that covered a radius of 800 miles from Ikeja was held to be unreasonable as it logically extended beyond Nigeria to some parts of West Africa.[lxxvi]

Transaction Advisory and Project Consultancy Agreements

Transaction advisory and project consultancy agreements are generally contracts of employments to render specific services. However, such are independent contracts whereby the contractors are not restricted from other business engagements during the pendency of their agreements. The drafting of such consultancy agreements should flow from the terms of reference (TOR). For instance, a typical TOR for transaction advisory services would include

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a requirement that the proposed transaction adviser should be competent, that he should represent a team of other suitably qualified and experienced financial, technical and legal advisers, that he should be able to help the public authority undertake a comprehensive feasibility study for the project and, if required afterwards, he should provide advisory services for the procurement of the project.[lxxvii] Care should be taken to comprehensively incorporate the TOR into the agreement so as to have consistency of objectives.

Apart from the parties' clause and recital, the agreement should describe the scope of services including a reference to the TOR, which should be attached as an appendix. It should contain the commencement date, the period of the services and the remuneration. Since it is a contract for service, the agreement should stipulate the specific number, qualification and role of required personnel as well as undertakings on keeping of records, furnishing of requisite information and general standards of performance. In addition, the agreement should contain the confidentiality clause, prohibition of conflicting activities, loyalty clause, Termination clause, reimbursement of expenses, return of papers clause, liability clause, notices, arbitration and Force Majeure.[lxxviii]

The agreement should also contain a provision on the submissions of reports, data and other generated documents. Reports are usually structured into three stages, namely, inception report, draft report and final report to be submitted at periodic intervals. It should also provide for indemnity and adherence to discipline, safety and security procedure that are prescribed from time to time. Prior to the testimonium and attestation paragraphs, the agreement should contain a general clause that provides for non-solicitation, comprehensiveness of the agreement between the parties, the freedom to do similar businesses, a disclaimer that the agreement does not create any other or additional relationship between the parties, waiver, severability and survival of specific clauses upon termination.[lxxix]

Main Transaction Agreements

What effectively brings into life the transaction between the public authority and the private entity is the main transaction agreement. The main agreement is very critical because it breeds a host of many agreements before and after its execution. These Agreements include construction, management & operation, financing, input supply and off-take agreements. The main agreement made the execution of some of the above agreements obligatory and a condition precedent to its effectiveness or coming into force. The importance of the main

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agreement therefore cannot be understated, as its neglect or shoddiness could be fatal to the success, viability or sustainability of any PPP project. It is on this account that some jurisdictions, like the United Kingdom, went further to institute guidelines that could standardize their PPP project agreements.[lxxx]

The transaction agreement could either be for asset management or for asset delivery. An asset management agreement, which always relate to the management and improvement of an existing asset, is normally used for a concession, lease or Affermage. While asset delivery agreements are normally used for BOT models and its different variants. Depending on the intentions of the parties, the fundamental elements and terms of the two categories of agreements are essentially the same.[lxxxi] For the purpose of this work, and except where otherwise specifically stated, all agreements under this section would be referred to as concessions.[lxxxii]

A concession agreement is usually a tripartite agreement comprising of the public authority as the principal or lessor, the private entity or special purpose company (SPC) as the concessionaire and another private entity as the sponsor. In few instances, the public authority may have an additional party in the agreement if an agency exists that has a statutory responsibility to syndicate or coordinate the transaction. For instance, the Bureau of Public Enterprises (BPE) was a party in the NPA concessions as a result of its responsibility under the Public Enterprises (Privatization and Commercialization) Act[lxxxiii] to privatize and commercialize public enterprises. The parties, in line with standard contractual agreements, are defined and their obligations extended to their agents, assigns and successors in title.

PPP has always been controversial in the public court. Its long duration makes it more controversial while the statutory procurement requirements make it vulnerable to deliberate political interferences. The preamble should therefore be robust enough to cover the description of the parties, their legal capacities, the process pursued in arriving at the preferred bid, the competence of the parties as well as the accurate objective and description of the transaction.[lxxxiv] The advantage of this is to leverage on the rebuttable presumption of preamble on facts contained therein and a conclusive presumption that a document was duly executed and attested if it is 20 years old.[lxxxv]

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As further safeguard against ambiguity in a long-term relationship, the concession agreement should provide a clause for operational definition and interpretation of terms where key words and phrases should be expressly defined.[lxxxvi] The clause should also provide for what would prevail if there were any discrepancy or ambiguity in the text of the agreement. Beyond the preamble and the interpretation clauses, there are clauses that are irreducible minimum for any standard concession agreement such as duration of contract,[lxxxvii] the service commencement,[lxxxviii] protections against late service commencement,[lxxxix] supervening events,[xc] warranties,[xci] price and payment mechanisms,[xcii] availability requirements,[xciii] performance requirements,[xciv] payment mechanism management and monitoring,[xcv] maintenance of asset,[xcvi] payments and set-off,[xcvii] price variations,[xcviii] change in ownership,[xcix] Dispute resolution,[c] step in,[ci] termination and treatment of assets at maturity.[cii]

It is important to highlight the centrality of the operative clause, as it conveys the rights, privileges, obligations or interests in the asset from the public authority to the private entity. It also states what is expected of the private entity at the end of the concession period, i.e. transfer of the assets to the public authority. It is the operative or grant clause that distinguishes on the various types, models and classifications of the agreed PPP transaction, and hence, the grant clause gives indication whether the transaction is a concession, Affermage, lease, amortization project or even a Build-Own-and-Transfer (BOT) or Build-Own-and-Operate (BOO).

Since the grant clause is key to a PPP agreement, adequate care should be taken in drafting it. It is advisable that any grant in the clause should be conditional upon the seriousness or commitment of the private entity. The agreement should therefore provide a clause on condition precedent that would require the submission of financial closures and guarantees as well as execution of construction, input supply and off-take agreements before a specific date.

A PPP agreement is usually entered for a definite term, and as such will always stipulate the length or duration of the relationship. There are however, multiple periods in a PPP relationship from the execution of the agreement to the final handing over of assets and operations. The agreement should define the length of the entire concession as well as stipulate the commencement, effective and expiry dates of the concession.[ciii] It needs to clearly state when the condition precedent would take effect and its duration, when the financial close is to be achieved and when construction is to start and be completed. The agreement should also stipulate a commercial operation date (COD) and the final date for the hand over of operations.

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These dates are not cast in iron, as there are provisions that allow for extension of the periods in respect of unforeseen delays.

In stipulating the period to satisfy the conditions precedent, consideration should be made to the complexity of the specific items expected of the private entity, e.g. finalization of technical drawings, establishment of the relevant SPC; provision of construction agreement, work plan and asset transfer plan; provision of performance bonds and relevant insurance cover; evidence of irrevocable financing from project lenders, provision of specified approvals and permit; etc. In the same vein, the effective date should also consider those provisions that need to take effect immediately upon the signing of the agreement, e.g. liability of parties prior to the effective date and after termination but before handing over of the asset.

Another important clause is on rights and obligations of the parties. This clause usually contains the principal and incidental obligations, representations and warranties of the parties in respect of project site handing over, project financing, project development, delivery, operation and its management.[civ] There is also the standard of work, the competence, capacity and status of sub contractors,[cv] and the quality of materials clauses. These are clauses that ensure that only competent personnel execute the projects, and in a manner that is diligent, professional, and using standard materials.

The agreement should also contain a payment clause, where it shall stipulate the type of concessions fees, variable fees, royalties and any other fee payable under the agreement.[cvi] It should be express on the amount payable and the manner and times for its payment. In similar importance is the Operation[cvii] and Maintenance[cviii] (O & M) clause. This clause is one of the elements in a concession agreement that distinguishes a transaction as a PPP relationship, as the clause grants a right and authority to operate and maintain the asset conveyed. The last clause worthy of mention is the maturity clause. It allows for the transfer of the asset back to the public authority at the end of the concession period. The clause should be comprehensive, carefully drafted and contain clauses on treatment of asset at maturity that includes transfer, preservation and residual liability, if any, of all assets including the main and other operational assets of the concession.[cix]

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Financing Agreements

Financing agreements could give rise to a variety of collateral agreements such as loan agreements, viability gap funding agreements, sovereign guarantees, etc. Although not specifically defined in the Nigeria's National Policy on PPP, the United Kingdom, in its efforts to achieve a more commercially balanced contracts in its PFI projects,[cx] had defined financing agreements as all agreements and instruments relating to the financing of a PFI project including agreements for rescheduling of indebtedness or its refinancing.[cxi]

Financing of PPP projects is difficult, complex and requires utmost diligence. This is due to the fact that it involves large capital and a relationship with the government that inherently have slow processes on account of their bureaucracy, red tape and complex budgetary process. In addition, it is a long-term relationship and repayment or investment recovery is usually linked to performance of the constructed asset. While sponsors' equity determines the confidence of investors to the project and is available from the first day after the execution of the main agreement, it is however inadequate to comprehensively deliver a project, hence the recourse to loans and other funding or guarantee mechanisms. It is for this reason that specific forms of financing PPP projects are developed.

There are two popular forms of financing a PPP project, namely, Loan Finance and Project Finance. The Loan Finance or Corporate Finance[cxii] is taken on the basis of a largely statistical evaluation of the creditworthiness, historical income statements, Balance sheet, cash flows, the governance policy as well as availability of asset collateral and the share capital adequacy of the private entity. Liability under Loan Finance is squarely on the private entity and the asset collateral.

On the other hand, Project Finance is granted on the basis of future cash flow availability of the project company. The lender solely depends on the development of the project and the underlying business plan. Hence, detailed project risk analysis and comprehensive risk structuring are essential before a decision to fund the project is taken. Sponsors provide no guarantees beyond the right to be paid from the cash flows of the project.[cxiii] In other words, it is none or limited recourse, and in the event of default, liability is restricted to the assets of the project company. In fact, a loan loses its identity as Project Finance when its full liability is extended to the Promoter or Sponsor Company.[cxiv] Other distinguishing features of Project

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Finance include the centrality of the SPV, risk handling structures, and off-balance sheet finance.[cxv]

Project Finance has been in practice since the 17th century, cutting across major sectors of commerce and infrastructure including maritime, oil and transport, and has now crystallized with many participants said to be about nineteen even though it may successfully be concluded with fewer number of participants.[cxvi] Project Finance was largely used to fund oil acquisition and exploration, securing the loans against prospective oil income. The Suez Canal is another good example of infrastructure Project Finance.[cxvii]

Beyond the two types of PPP financing, another critical issue is the funding sources of a PPP project. It usually entails different funding sources, which could include equity, loans, export credit, export enhancement credits, viability gap, sovereign guarantees, Irrevocable Standing Payment Order (IPSO), loan guarantees and payment guarantees as well as the guarantees of Multilateral Investment Guaranty Agency (MIGA) against currency, expropriation, war and breach of contract; and IFC's full and partial risk guarantees.[cxviii] The project funding could be from a single source or a combination of many sources. However, for proper risk management, it is always advisable that the funding should come from multiple sources, e.g. a debt equity mix.[cxix]

Funding impacts on many relationships including the construction, operation and management, off-take and input supply contracts.[cxx] As could be seen, these financing agreements transcend loan facilities but extend to safeguards that would ensure proper application of funds, sufficiency of cash flows and its effective application in repayments. Financing agreements would always require utmost diligence.

Hence, besides the parties' clause, the interpretation clause and the usual information in a preamble, it is necessary to make reference to the principal agreement for symmetry of objectives. The operative clause will thereafter contain such issues pertaining to the financial status of the project sponsors; the terrain and location of project site; the legal framework, tax regime and foreign exchange regulations; the project financial parameters; construction, input supply and off take agreements; and dispute resolution mechanisms.[cxxi] These should be adequately provided in project finance agreement.

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Implementation Agreements

Implementation agreements relate to those transactions of the private entity to create the asset, operate it optimally, manage it efficiently and maintain it effectively so that the mutual objectives of the PPP project partners could be achieved. These agreements are the construction agreements and the operation and maintenance agreements.

Construction Agreement

A construction contract is an agreement between two or more parties to execute the construction works as per certain terms and conditions.[cxxii] Its major objective is to ensure that the contractor delivers a facility in accordance with agreed specification and period of completion. The most common form of construction contract in PPPs is the Engineering Procurement Contracts (EPC), which is used to undertake construction works in large scale and complex infrastructure projects.[cxxiii] Under an EPC or turnkey contract, a contractor is responsible for all design, engineering, procurement, construction, commissioning, and handover to the principal who needs only to turn a key to start operating the facility. They are mostly preferred by project lenders on account of risk transfer and the certainty of both final price and completion date.[cxxiv]

EPC contracts is very popular in many emerging economies, for instance in Saudi Arabia where it is called as LSTK (Lump Sum Turn Key); in Qatar where it is commonly referred to as EPCC (Engineering, Procurement, Commissioning Contract); and is found in many Persian gulf countries as EPIC (Engineering, Procurement, Implementation Contract).[cxxv] By whatever name, a standard EPC contract imports FIDIC conditions of contracts and contain clauses that include scope of work, parties' responsibilities, payment terms, conditions of subcontractors and incentives or penalties for early or delayed completion.[cxxvi]

Operation and Maintenance Agreement

On completion and commissioning of the project, the private entity has the responsibility to operate and maintain the constructed facility either directly or through a specialist third party company. For latter, it enters into an Operation and Maintenance (O&M) agreement with the company. The O&M transaction strives to mitigate identified risks that could arise in the operation and maintenance process of the facility. The agreement therefore, apart from the normal format including parties, preamble and operative clauses, should contain

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representations on the experience and skill of the operator, Performance level and liquidated damages for non-performance; and a stipulation on the status of the employees of O&M contractors.

Transaction Support Agreements

Transaction support agreements are those agreements that assure on the capacity of the private entity to conclude the bidding process, gives comfort that the primary obligations under the agreement will be performed, that the construction of the asset or delivery of the services will be done in accordance with agreed terms and conditions, or that the viability of the project is assured. It also involves assurances that the project asset is kept safe and indemnified against fortuitous events during its construction and throughout its operation on to its handing over to the public authority. The substantive PPP agreement usually makes such support agreements as condition precedent, a *sine quonon*, to its effectiveness or validity. These include bonds and guarantees, insurance agreements, and off-take or purchase agreements.

Absence of Agreement Formats in the National Policy

There is no any regulation debarring the use of any of the above agreements by public authorities in Nigeria. In the same vein, except for specific provisions of the ICRC Act and Executive Order 007, there is no regulation that guides public authorities on specific contract formats to use in PPP agreements. The ICRC Act only stipulated for competitive procurement and debars public authorities from issuing guarantees and letters of comfort without requisite approval.[cxxvii] The Executive Order 007, on the other hand, stipulated that agreements shall be consistent, in form and substance, with the indicative MOU provided in the second schedule of the Executive Order.[cxxviii]

It is axiomatic that the Nigeria's National Policy on PPP has not taken advantage of standard contract guidelines or format in the development and implementation of its PPP policy and processes. For instance, the UK HM's Treasury Standardization of PFI contracts had gone a long way in bringing certainty to investors on the contractual obligations of parties in any PPP transaction. So also was the effort of the United Nations Economic and Social Commission for Asia and the Pacific when its Transport Policy and Development section developed key sections of PPP contract for Asia and the Pacific.[cxxix] The attempt of the Executive Order 007

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to introduce a contractual agreement format as a schedule, though commendable, is not comprehensive enough to address salient issues inherent in PPP agreements.

This absence of a standard PPP contract format could impact to the success or otherwise of many PPP projects in Nigeria. There is therefore a need for a contract format with alternative dispute resolution mechanism for use by all public authorities in Nigeria. The dispute resolution mechanism in the National Policy is weak or almost non-existent. In view of the slow process of the Nigeria's justice system, the National policy ought to have instituted a quicker alternative dispute resolution mechanism in PPP contract agreements that could offer a more efficient and cost-effective method of resolving disputes. Restricting PPP dispute resolution to the only two traditional methods, i.e. litigation and formal arbitration, would impede the growth of PPP and its implementation in Nigeria.

CONCLUSION

The paper had discussed the various stakeholder relationships and contractual structures underpinning PPP legal obligations and justiciable commitments. These structures have the capacity to create standard PPP agreements that could timeously deliver privately funded public infrastructure that are effectively operated, efficiently managed and transferred back to public authorities in good working condition after generous recovery of private investments. Unfortunately, this will be difficult to achieve within the context of Nigeria's extant National Policy on PPP, which appeared to relegate the mechanism that featured prominently in this paper, i.e. standard contract format with robust provision on alternative dispute resolution. It is probable that if the Federal Government institutes a comprehensive PPP contract template with a modern dispute resolution mechanism as done in other jurisdictions, the PPP process in Nigeria will not only grow but its rates of success could significantly increase.

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[lxxvii] PPP in Infrastructure Resource Centre for Contracts, Laws and Regulations, 'PPP Transaction Advisor: Terms of Reference', (World Bank, December 2008), < https://ppp.worldbank.org/public-private-

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[lxxix] Ibid, 1226 – 1227.
[lxxx] HM Treasury, 'Standardization of PFI Contracts Version 4' (2007).
[lxxxi] George Nwangwu, 157.
[lxxxii] The study feel enamored to adopt this as the general terminology since every PPP relationship, as George Nwangwu puts it, is a concession of some sort by a government to a private entity. Op. cit. 156.
[lxxxiii] Cap. P38, LFN 2004.
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[ci] Ibid, 240.
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[ciii] HM Treasury, *Standardization of PFI Contracts Version 4* (The Stationery Office, 2007), 15.
[civ] Ibid, 24. The guidelines advised public authorities to consider the range of services that offer optimal value for money, which may include both soft and hard services.
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