Annex : Back-to-back Transaction

Introduction

A back-to-back emission reduction purchase transaction involves the purchase of VERs from a primary seller, usually a project owner, by an intermediary and the re-sale of those VERs to an identified end-buyer. The intermediary will often be a bank, a carbon trader or other large institution that has experience with emission reduction transactions and has good contacts with both sellers and buyers. The back-to-back transaction therefore facilitates the seller to reach buyers it would ordinarily not be able to reach and allows for a buyer to rely on the expertise and experience of a trustworthy intermediary in the purchase of VERs, a market the end-buyer may not have much experience in. This reduces risk and in many cases transaction costs for the buyer. In the case of voluntary projects, identifying the right project and project developer is of high importance for final buyers. The voluntary market tends to be more opaque than compliance markets and consequently many voluntary carbon buyers acquire VERs through intermediaries who have previously engaged in primary transactions.

A back-to-back transaction consists of two ERPAs – a primary ERPA and a secondary ERPA. Under the primary ERPA, the buyer (in this case the bank) contracts directly with the project developer (the primary seller). Under the secondary ERPA, the bank contracts to sell the same VERs to a (secondary) buyer. Local banks engaging in voluntary carbon transactions will generally contract with national project developers under the primary transaction and execute secondary ERPAs with foreign buyers.

The ERPAs for a back-to-back transaction are drafted, negotiated and executed simultaneously by the bank to ensure that all rights, obligations and risks line up and are passed through as required. In other occasions the intermediary entity executes the primary ERPA and engages at a later stage in a secondary transaction. This is not a pure and immediate back-to-back transaction. In this latter case the secondary buyer will likely request to have access to the primary ERPA and it is possible that the secondary buyer might have contractual requests that are not fully in line with what it was agreed under the primary ERPA. The bank and the secondary seller will have to be creative to accommodate the secondary buyer's interests respecting the primary ERPA's provisions. Needless to say, amending the primary ERPA is something to which project developers tend to object. Being aware of the particular contractual clauses to which secondary buyers will pay particular attention is essential for banks when engaging in primary transactions.

The templates that have been drafted are for a forward back-to-back transaction -in other words, a transaction relating to emission reduction units that have not yet been generated. The templates are written as if prepared by the bank, and so are favourable to the bank's position of the bank. Nevertheless the templates equally include clauses that are generally requested by both primary sellers and secondary buyers so that the banks can learn what counterparties demand in a back-to-back negotiation transaction.

The structure of the back-to-back ERPAs follows the structure of the general, neutral ERPA template to the extent possible. In this Annex, the articles and sections in which the back-to-back templates substantially differ from the general ERPA template are explained.

From an operational point of view entering into back-to-back transactions normally requires the participation of the bank´s risk department. The bank´s risk department will have an interest in understanding the transaction and the risk profile associated with the back-to-back transaction. It is thus common that the bank´s risk department requires the legal team to assess the risks of the bank under both transactions according to the risk profile assigned to such transactions elaborated by the risk department, as well as the risk exposure of the bank in general.

It should be noted that the primary ERPA contains an additional party, being the party that has identified and facilitated the transaction, in this case titled the "Agent". As discussed further below in the commentary on Article V, this is often a separate branch of the bank than is responsible for entering into the transaction itself. While a party to the transaction, the rights of the agent are limited to receiving payment for its service (the "Structuring Commission Fee" or "Arranger's Fee").

Article II - Conditions Precedent

The conditions precedent in the primary ERPA exist to protect the buyer and can be waived by the buyer alone. It would be possible though to keep some conditions precedent in favour of the primary seller under the primary ERPA but such conditions need to be limited in order to avoid giving the Seller too much control over the entry into force of the primary ERPA.

The carrying out of a complete due diligence of the Seller is of particular importance in a back-to-back transaction, as the bank may expose itself to liability under the secondary ERPA where the project does not deliver. The requirement of the acceptance of its results by the Buyer for the contract's operative provisions coming into force allows the bank to walk away from the project without liability if it is not satisfied with the results of the due diligence.

The main condition precedent in the secondary ERPA is the contingency of the primary ERPA entering into force. Clearly, without the primary ERPA entering into force, the bank will be unable to fulfil its obligations under the secondary ERPA. This condition therefore protects the bank in the event that the primary ERPA does not enter into force for any reason.

The Declaration of Comfort has been added as an optional condition precedent to both the primary and secondary ERPAs. A Declaration of Comfort can be applied when dealing with a counterparty regarding which there is uncertainty over its ability to meet any debt or liabilities, but which is owned by a larger parent company which is more capable of meeting liabilities. Sample Declaration of Comfort text is provided in the schedule of both the primary and secondary ERPA.

The secondary ERPA contains an additional condition precedent in favour of the buyer –a legal opinion as to the bank's rights over the contracted VERs under the primary ERPA. This is likely to be required by

the secondary buyer in the case that the bank refuses to share the primary ERPA or the results of the due diligence performed by the bank with respect to the project or primary seller with the secondary buyer.

Article III – Contract VERs

Section 3.01 Sale and Purchase

To reduce risks for the bank, the primary ERPA generally contains an obligation for the primary seller to deliver a fixed amount for each year (the "Guaranteed Annual Amount"). This amount corresponds to the "Indicative Annual Amount" that is the subject of the transaction in the secondary ERPA. In this case, however, the parties under the secondary ERPA agree that the obligation to deliver the stated amount is contingent upon the bank receiving the full amount of VERs from the primary seller. There will thus be no obligation for the bank under the secondary ERPA to deliver VERs if the project fails to generate these amounts or there is no delivery under the primary ERPA. This provides a relevant degree of protection to the bank from liability where the project does not deliver. At the same time, the secondary buyer is protected by being permitted to refuse delivery of amounts lower than the indicative annual amount and to terminate where the indicative annual amount is not met in two consecutive years (see commentary on section 3.02 and article XIII).

It is important to note that sale and purchase construction included (i.e. the use of "Indicative Annual Amounts") is only one of several potential options. In many cases, buyers will seek to include a guaranteed minimum amount, and to be accorded the right to terminate where such an amount is not reached. This may be an annual amount or an overall contract amount. In the latter case, a date will generally be set after which the buyer may terminate if the minimum amount has not been reached. Other potential sale and purchase constructions include:

(i) Overall amounts that are divided into lots over several years. If an amount lower than the annual lot is delivered in a given year, the outstanding amount is carried over to the following year, until the overall amount is reached;

(ii) Overall amounts divided into lots that equate to a percentage of Available VERs per year. This is, however, not so common, and is not a preferred option for buyers. However, where the bank sells project VERs to several buyers it is beneficial to establish percentages for each.

It should be noticed that the definition of contract VERs under the primary ERPA establishes the seniority rights of the bank over any other buyers of VERs from the project. As a result, contract VERs expressly relate to the first quantities of VERs the project will generate.

Section 3.02 Notification, Delivery and Registry Account

This Section sets out the obligations to notify the bank and the secondary buyer concerning the issuance and delivery of the contract VERs, the contingency where the amount of VERs generated by

the project is not sufficient to reach the Guaranteed or Indicative Annual Amount, and the registry account into which the delivery of the VERs should take place.

A key situation to provide for in a back-to-back transaction is that where VERs generated by the project fall below the contracted amounts. The templates provide a structure where the secondary buyer has the option whether to accept the lower amount in lieu of the contracted amount. Upon issuance, the primary seller is required to notify the bank of the exact number of VERs that is available for delivery. The bank must then notify the secondary buyer of the amount available for delivery and the secondary buyer can decide whether to accept this lower amount of VERs. Where the secondary buyer decides to accept, the bank will then accept the lower amount of VERs from the primary seller. Similarly, where the secondary buyer rejects the lower amount, the bank will do likewise. The contract could also state that the secondary buyer needs to accept any VER that is delivered by the bank up to the contracted amount eliminating the option offered to the secondary buyer of refusing VERs below the contracted amounts. Such a provision would be most favourable for the bank as in case there are VERs delivered to its account the bank will always have the possibility to make a profit by selling those VERs to the secondary buyer.

In the case that the bank accepts a lower amount of VERs than the contract VERs the primary ERPA includes a provision on liquidated damages applicable to the difference between the lower amount that will be delivered to the bank and the contractual VERs amounts for that year. This clause could also be drafted as an indemnity payment clause by which if the primary seller is not able to deliver all or parts of the annual guaranteed amounts, then he will pay an indemnity to the bank. This indemnity would be calculated as the difference between the guaranteed annual amount and the amount of VERs actually delivered multiplied by an indemnity amount that the parties would agree in the contract. The primary ERPA includes an example of a clause on indemnity payment. It is necessary though to check the permissibility of indemnity clauses under the governing law at stake and the jurisprudence related with this subject. See Section 12.03 provides for further remedial payments in case of non-delivery.

Under the templates the bank can also choose to offer replacement VERs to the secondary buyer, and in this case the primary ERPA requires the primary seller to provide such replacement VERs to the bank. This option allows the bank the possibility to realise its full payment under the secondary ERPA and avoid having to claim damages from the primary seller. As the provision of replacement VERs by the primary seller is at the discretion of the bank, the option also exists for the bank to secure replacement VERs directly where this can be done at a lower price than that under the primary ERPA.

The acceptance of replacement VERs is ultimately at the discretion of the secondary buyer, however. While in contracts for the sale of CERs it is not uncommon for the provision of replacement CERs to be within the discretion of sellers, this is less common in VER contracts. This is due to the reduced substitutability of VERs in comparison with CERs. As they are commonly used for reputational rather than compliance purposes, the type and even specific origin of the VERs are often much more important factors for buyers compared.

Where the secondary buyer decides to accept a lower amount of the contract VERs and/or replacement VERs the total number accepted is termed the "Alternative Contract Amount". This is then deemed to constitute the contract VERs for the relevant year, and the remaining provisions of the ERPA with respect to purchase and sale simply apply to these VERs. The same provisions apply under the primary ERPA.

It is worth noting that the bank is offered a higher degree of protection in case of the contract amount not being realised than the secondary buyer is. Where this occurs under the primary ERPA and the bank rejects the provision of a lower amount and does not seek replacement VERs, an "under delivery" occurs, entitling the bank to the remedies under Articles XII and XIII, including termination after the expiration of a cure period. In contrast, where the secondary buyer neither accepts a lower amount or replacement VERs under the secondary ERPA, an "Alternative Contract Amount Rejection" occurs (Section 3.02(c)). This entitles the secondary buyer to terminate only after its occurrence in two consecutive years (section 13.04). This arrangement allows the bank extra negotiating space and limits its liability.

The provision on deemed delivery included in the general ERPA template under Section 3.02(b) is to the benefit of the seller in the contingency where the buyer's account is not able to accept delivery. This provision has therefore been removed from the primary ERPA, and been kept in the secondary ERPA.

It is of high importance in back-to-back transactions to make delivery dates compatible under both primary and secondary ERPAs. It is advisable that the bank also considers eventual cure periods in case of delays in delivery that will need to be reflected in delivery dates set out under the secondary ERPA.

Article IV - Option VERs

A call option (a purchase option for the buyer) has been chosen for this template, as a put option (a sale option for the seller) is less common in a back-to-back transaction.

Note that the Exercise Period during which the buyer can exercise the call option should be sufficiently longer in the primary ERPA than in the secondary ERPA so as to allow time for the bank to relay the issuance notice to the secondary buyer and react to the exercise of the option by the secondary buyer.

Article V – Price and Payment

As explained in the introduction, the profit the bank gains from the back-to-back transaction arises from the difference between its purchase price and its onward sale price. The bank should therefore endeavour to negotiate a sufficiently lower price under the primary ERPA than under the secondary ERPA to cover its costs and allow for a profit margin. The size of the price spread will ultimately depend on a range of factors, most notably the risk the bank absorbs under the transaction.

It will be noted that the bank is entitled to interest on late payments under the secondary ERPA, while this option is not provided under the primary ERPA.

Apart from the profit obtained through the price differential in a back-to-back transaction, banks can earn other profits in the course of such a transaction. One means is through the imposition of a structuring commission fee under the primary ERPA, in consideration for the support offered to the project. It is worth noting that where banks have a special carbon finance departments or established carbon finance vehicles that are responsible for carbon transactions, general bank branches may charge a fee to the carbon finance unit for passing on projects they have identified and collaborating in the transaction. A typical structuring commission fee clause is included as an option in section 6.03 of the primary ERPA. The template assumes that the general bank branch to which this fee is due is a separate legal entity from the buyer, and so this branch is included as a separate party to the primary ERPA (the "Agent").

Equally, banks might consider the application of an arranger's fee to the buyer under the secondary ERPA. The imposition of such an arranger fee would be to compensate the bank for the work and efforts to identify, arrange and finance the project. The secondary ERPA includes a typical arranger's fee clause in section 6.03. Note that in this case the arranger's fee is paid directly to the bank rather than a separate entity. This is because, firstly, the carbon finance unit is often the party that secures a secondary buyer and, secondly, in order to reduce complications for the secondary buyer.

Article VI – Taxes and Costs

The provisions on taxes and costs have been amended somewhat from the general ERPA template in order to reflect to a greater extent the position of the bank. Therefore, the primary seller and the secondary buyer bear the taxes and the costs to a greater extent. Nonetheless, each party generally covers taxes imposed by its own jurisdiction, reflecting common international commercial practices.

Under the primary ERPA the seller is responsible for all project development costs. While it is uncommon for a secondary buyer to be responsible for project costs, the secondary ERPA clarifies this in order to provide assurance to the secondary buyer (Section 6.02(a)).

The primary ERPA also includes a typical structural commissioning fee under section 6.03, while the secondary ERPA incudes an arranger's fee under section 6.03.

Article VII - Obligations of the Parties

In the case of the primary ERPA, where the Buyer is dealing directly with the project owner, the obligations of the Seller are broadly the same as those included in the general ERPA template. While in the neutral ERPA template alternative options were provided with regards to the nomination of project participants, project proponent or authorized representative as the case may be, in Section 7.01(b)(ii) of the primary ERPA the choice has been made to place this decision with the bank. This allows the bank the opportunity to nominate itself, the secondary buyer or a trusted entity and thus maintain greater control and supervision over the project.

In the secondary ERPA the obligations of the Seller differ substantially from those in the primary ERPA, as the project implementation is generally not directly in the control of the bank. The secondary buyer may seek to require the bank to exercise a certain degree of control over the project or at the very least, to obtain accurate and timely information on the progress of the project, and may therefore try to negotiate binding obligations of the bank to this effect. Under the template it remains within the bank's discretion whether to be listed as a project participant, as the bank may want to avoid any potential liability associated with this status. Such liability may include, inter alia, the following:

- In the case of the Gold Standard, project proponents can be liable for breach of the Gold Standard's Terms and Conditions, including indemnifying the Gold Standard for any liability arising with respect of third parties;
- In the case of the VCS, project proponents are jointly and severally liable for representations, warranties and obligations expressed in the VCS Registration Deed of Representation;
- Depending on the terms of relevant agreements, project participants or proponents may also be liable to validators, verifiers, registry administrators or other entities with which contracts are entered into in the course of project development;
- Where VERs from the project are sold to third parties, potential liability may arise in tort for any negligence of project participants/proponents that results in loss to buyers under relevant ERPAs.

However, the bank does undertake to keep the secondary buyer informed of progress and key milestones. The assurance contained in the following Article ("Representations and Warranties") that the bank will use its best endeavours to help the progress of the project may help to further satisfy buyers in this respect.

Article VIII – Transition of Turkey to Compliance Markets

The provision on transition of Turkey to compliance markets in the primary ERPA is broadly similar to that in the neutral ERPA. The key difference is that the initiative to begin negotiations on the transfer of the project to an alternative standard rests only with the bank.

In the secondary ERPA, the bank is also granted the right to propose switching to an alternative standard. The secondary buyer is then provided with the option of whether to agree to negotiations taking place on this matter between the bank and the primary seller. Once such consent has been granted, the bank is free to enter into an agreement with the primary seller on this matter. Once the project has been registered under the alternative standard, the contract will automatically be altered to cover the sale and purchase of credits from the alternative standard under the same terms and conditions, unless the parties agree otherwise.

Additionally, in the secondary ERPA the obligation for the seller to avoid double counting does not arise. This is because the seller is not directly responsible for this matter.

Article IX – Representations and Warranties

The Buyers representations and warranties in the primary ERPA are reflect standard representations and warranties found in ERPAs. However, the bank should review these carefully as they are formulated quite broadly and the bank may want to minimize its warranties.

In the primary ERPA, the option has been added to make the Seller's representation of having full legal title over the generated VERs more stringent by requiring the obtainment of opinion of legal counsel to this effect. Including this can give added comfort to the bank that the VERs will be delivered free of any competing legal claims, thus minimising any risk under the secondary ERPA.

In the secondary ERPA, the bank represents and warrants that it will use all its reasonable endeavours to assist the primary seller in the registration of the projects. In addition, the option is provided for the bank to undertake to have itself included as a project participant or proponent. This provides added security to the secondary buyer that the project will be closely supervised. However, before doing this the bank should consider and seek to mitigate any potential liabilities it may expose itself to by being listed as project participant/proponent (see commentary on Article VII above for further discussion on such potential liabilities).

Article X – Notice of Deviation in Quantity of VERs from the project

Section 10.01(b) has been added to the primary ERPA to enable the bank to require the Seller to take all reasonable measures to ensure that the quantity of VERs generated from the project meets the expected quantity. This provides the bank with the opportunity to take early action to ensure delivery in the event that the project experiences difficulties.

Article XI – Force Majeure

In the primary ERPA, the bank will want to pay attention that the Force Majeure provisions are not formulated too widely in order to limit the seller's ability to be shielded by them. Therefore, an extra provision has been added to Section 11.02(a) to prohibit reliance on Force Majeure Event in the event that the seller's negligence or wrongdoing has contributed to the force majeure event. This may arise, for example, where the seller has taken inadequate precautions to protect project equipment against foreseeable extreme weather events.

It is worth noting that the definition of "force majeure event" under section 1.01 of the secondary ERPA expressly includes the occurrence of a force majeure event with respect to the primary seller under the primary ERPA as a force majeure event with respect to the bank. This clarifies that the bank is excused by force majeure events that directly affect the project or other events that prevent the primary seller from delivering.

It should also be noted that the time period during which non-Performance may continue due to Force Majeure before the agreement is terminated is longer in the secondary ERPA (60 days) than in the primary ERPA (45 days). This provides the bank some additional space to negotiate with the secondary buyer and prepare for potential termination.

Article XII – Events of Default and Remedies

As discussed in the commentary on section 3.02, the back-to-back templates provide a higher degree of protection for the bank against non-performance of the primary seller than for the secondary buyer in respect of the bank's non-performance. As such, an under delivery constitutes an event of default under the primary ERPA, but under the secondary ERPA no under delivery is defined (though note that an "alternative contract amount rejection" is defined – see commentary on section 3.02 above). The contracted VERs under the secondary ERPA are only those that are generated, issued and transferred to the bank under the primary ERPA. Only when the banks fails to deliver contract VERs that were generated by the Project and received from the primary Seller will there be a delivery failure by the bank and consequently an event of default. This protects the bank against liability and loss of profit for the primary seller's non-performance and allows.

The primary ERPA also includes as possible events of default acts and situations related with the invalidity of existing credit guarantees. These can be included in the event that the bank requested some type of credit guarantees from the seller and such guarantees have not been fulfilled. That would be the case, for instance, where the bank requires some type of personal guarantee to cover liabilities derived from the primary ERPA.

It is worth noting that the back-to-back ERPAs differ in the formulation of the term "non-Defaulting Party". This is due to the back-to-back ERPAs potentially containing three parties. As such, it is important that only parties to which obligations are owed can enforce those obligations.

It is important to remember that the cure period in Section 12.02 should be longer in the secondary ERPA than in the primary ERPA, to allow for a time lapse between issuance of a default notice by the secondary buyer and issuance of a corresponding notice by the bank. This also allows additional time for the event of default to be cured under the primary ERPA before termination of the secondary ERPA, thus providing an added opportunity to rescue the transaction.

Section 12.03

In the primary ERPA, the Seller's entitlement to liquidated damages under Section 11.03 in the case of Payment Failure by the bank has been removed. The Seller is entitled to the recovery of delivered VERs for which payment has not been made. Banks should consider however that it will be difficult to avoid liquidated damages in case of gross negligence or wilful misconduct by the bank.

The bank can recover liquidated damages for an Event of Default under the provisions of Section 12.03(b) in the primary ERPA, defined as a set damage fee per VER that was not bought that year. Liquidated damages are also available where an "Alternative Contract Amount" is being transacted, reflecting the fact that the bank will earn less money under such a transaction.

The damage fee should be set at a level that accurately reflects the damages the no-defaulting party is likely to incur as a result of the defaulting party's non-performance. Punitive damages are not permitted

under English law, and damages that do not reasonably reflect actual foreseen damages may be struck down by the courts. Banks should always check the permissibility of punitive damages and penal clauses in general under the governing law of the contract.

For the primary ERPA, non-delivery of VERs to the buyer will result in its inability to transfer corresponding VERs to the secondary buyer. Since the buyer's profit from the transaction arises from charging a higher fee in the secondary ERPA than it pays in the primary ERPA, it is reasonable to set the damage fee at an amount equal to the difference between the price in the primary ERPA and the price in the secondary ERPA.

In the case of non-payment under secondary ERPA, the bank may be forced to re-sell the unpaid-for VERs. Therefore, clause 12.03 (a) allows the bank to recover any losses due to this transaction, namely the price difference and any transaction costs. The secondary Buyer will only be entitled to liquidated damages for default by the bank in the case of gross negligence or wilful misconduct. This protects the bank from liability arising out of the primary seller's non-performance, while re-assuring the secondary buyer against the bank engaging in misconduct or overly neglecting its duty of care.

Article XIII – Termination

The termination provisions under the primary ERPA broadly reflect those under the general ERPA template. However, there are two important differences. Firstly, the buyer is also provided an additional right to terminate in the case that less than 25% of the total number of Contract VERS have been delivered by a certain date, or if the buyer as project participant/proponent. The former right seeks to protect the buyer's right to terminate even if it decides to accept a lower amount of VERs from the seller in one or more years under clause 3.02 (b). Secondly, the agent is not permitted to terminate the ERPA. This is because the agent's interest in the transaction is limited to the right to be paid a single fee, and so allowing it to terminate for non-performance would unduly disrupt the transaction to protect only an ancillary right. Moreover, the agent does not have any obligations under the transaction and so is not adversely affected by its continuation.

Since Article XII of the secondary ERPA does not provide a remedy for non-delivery of the contract amount to the secondary buyer, a remedy is instead provided under Article XIII. In this case, should the secondary buyer choose to reject any alternative amount of VERs (or Replacement VERs) for two consecutive years, it may terminate the agreement with immediate effect (Section 13.04). This provision seeks to provide a balance between the interests of the bank in maintaining the bargain in the event of the primary seller's non-performance and the interests of the secondary buyer of being required to remain in an unfavourable bargain.

In the secondary ERPA a section has been included that allows Parties to terminate the Agreement in the case of primary ERPA Termination, with the exception being termination of the primary ERPA upon fulfilment (Section 13.06). The fulfilment of the primary ERPA does not necessarily mean that the obligations under the secondary ERPA have been fulfilled. Early termination of the primary ERPA is, however, likely to prevent the bank's obligations under the secondary ERPA from being realised, and

thus this provision protects the bank from liability in this situation. Note however that the secondary buyer may seek restrictions on termination or other protections in the event that the primary ERPA is terminated as the result of a breach of the primary ERPA by the bank.

Under Section 13.07 where the primary ERPA is terminated and the bank is entitled to compensation the bank should use best efforts to enforce its rights, and the parties should enter into good faith negotiations to agree on the division of any damages received, taking into account their actual losses.

The secondary ERPA includes a clause by which the secondary buyer requires the banks the enforcement of the bank's rights under the primary ERPA. Pursuant to clause 13.07(a) of the secondary ERPA, the bank will have an obligation to enforce, as far as can reasonably be expected, its rights under the Primary ERPA in case of a breach (intentional or not) of the primary seller. This provision thus requires the bank to seek damages under the Primary ERPA if the primary seller violates any its obligations under the Primary ERPA that give rise to a claim for damages. Any compensation obtained by the bank under the Primary ERPA would have to be shared equitably and proportionally with the secondary Buyer (once any advance payment provided by the bank under the primary ERPA is deducted from the compensation amount).

Article XIV - Liability and Limitation of Liability

The provisions on liability in both templates broadly reflect those in the general ERPA template.

Article XV – Miscellaneous Provisions

Section 15.05

An exception to the non-assignment clause is introduced in the secondary ERPA whereby the bank may assign its rights to receive payment for the VERs to another entity, without the consent of the Buyer.

Section 15.09

Since the present templates are for training purposes they have been prepared such that the English language prevails and English law and dispute settlement in The Hague, The Netherlands applies. This reflects common practice in international ERPAs. In a back-to-back transaction involving a Turkish project and Turkish bank, however, it is likely that for the primary ERPA the Turkish language will prevail and Turkish law and dispute settlement in Turkey will apply. In the case of the secondary ERPA in which the buyer is a non-Turkish entity, it is likely that the English language will prevail and a neutral governing law and dispute settlement venue will be chosen. English law is the most commonly chosen governing law, though New York law is also regularly applied. Common dispute settlement venues other than the Hague include London, Paris and New York.

When banks participate in back-to-back transactions in which they provide finance to a Turkish project most of the relevant financing agreements will be under Turkish law. It is important to understand the legal consequences of the related contracts and its impact in the secondary ERPA.

Schedule 2 – Contract Amount and Contract VER Price

Care should be taken when negotiating the ERPAs that the Delivery Dates included in Schedule 2 do not create problems for the bank in the Secondary Delivery if the Primary Delivery is delayed. There should be sufficient space between the delivery dates and cure periods in each ERPA so as to allow for transaction times and some added flexibility for the bank in case of contingencies.