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A Review of Contractual Risk Allocation in Usance Finance Contracts

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ABSTRACT

Oil and gas projects are very complicated, and various risks are included in oil and gas projects and contracts. Different aspects of risks can be addressed in a risk management process in which assessment, efficient distribution, and allocation of contractual risks are critical. Many researchers have studied project risk management in oil and gas industries, focusing on legal and contractual risks aiming to reach an optimal risk distribution, which does not necessarily mean having a complete contract. This work thoroughly studies the related research and performs a complete review of different downstream petrochemical projects contracts to review contractual risk allocation in usance finance contracts. Concentration on used risk management mechanisms in both cases and related risks shows severe issues and bugs in both contracts. Some contractual risks are not addressed, and the case contracts are not balanced regarding contractual risks distribution.

1. Introduction

Oil and gas projects are very complicated, and more practical elements result in more complexity. More complexity means higher aspects to be covered before achieving contract goals. Uncertainty of elements which is interpreted as perceived risk increases the complexity. According to Concise Oxford English Dictionary, *risk* is a hazard, a chance of bad consequences, loss, or exposure to mischance. Risks management plays a vital role in mega projects in the oil and gas industry. In this industry, various risks, vast amounts of investment, very high cost of complete risk identification and analysis, including technical, financial, political, environmental, legal, economic, market, contractual, and other risks, have absorbed the necessity of proper risk policies.

In project management knowledge, both positive and negative risks are considered; however, only adverse effects are accounted for in many disciplines, including legal and contractual aspects.

Different aspects of risks can be addressed in a risk management process in which assessment and efficient distribution and allocation of contractual risks are critical. Having an effective and efficient contract requires optimal contractual risk management.

Optimal contractual risk management does not necessarily mean having a complete contract. Having a complete contract and considering all possible, minor or major, risks will increase the cost of risk identification, analysis, mitigation, or management tremendously, which endangers the viability of a project economically. At the same time, it means identifying and managing the significant effective risks of the project.

Clark et al. (1962) paradoxically express that contracts are both never complete and always complete.

Contracts are never fully complete because some contractual incompleteness is inevitable, given the costs of thinking about, bargaining over, and drafting for future contingencies. In addition, contracting parties may sometimes leave contracts incomplete on purpose, either because one or both parties withhold information necessary to complete the contract or because the parties have determined to agree later.

In this study, two cases of usance finance agreements (procurement services and finance) have been considered, compared, and studied regarding contractual risks.

2. Research objectives

The research objectives are to scrutinize two usance finance contracts made by and between Iranian petrochemical companies after the effectiveness of the joint comprehensive plan of action (JCPOA) because of contractual risk allocation and to check whether both adequately address the significant contractual risks and appropriately use the risk management mechanisms or not.

3. Literature review

3.1. Risk and project risk management

According to Project Management Institution, PMBOK 6th Edition (2004), project risk management includes conducting risk management planning, identification, analysis, response planning, response implementation, and monitoring risk on a project. The objectives of project risk management are to increase the probability and impact of positive risks and decrease the probability and impact of adverse risks to optimize the chances of project success."

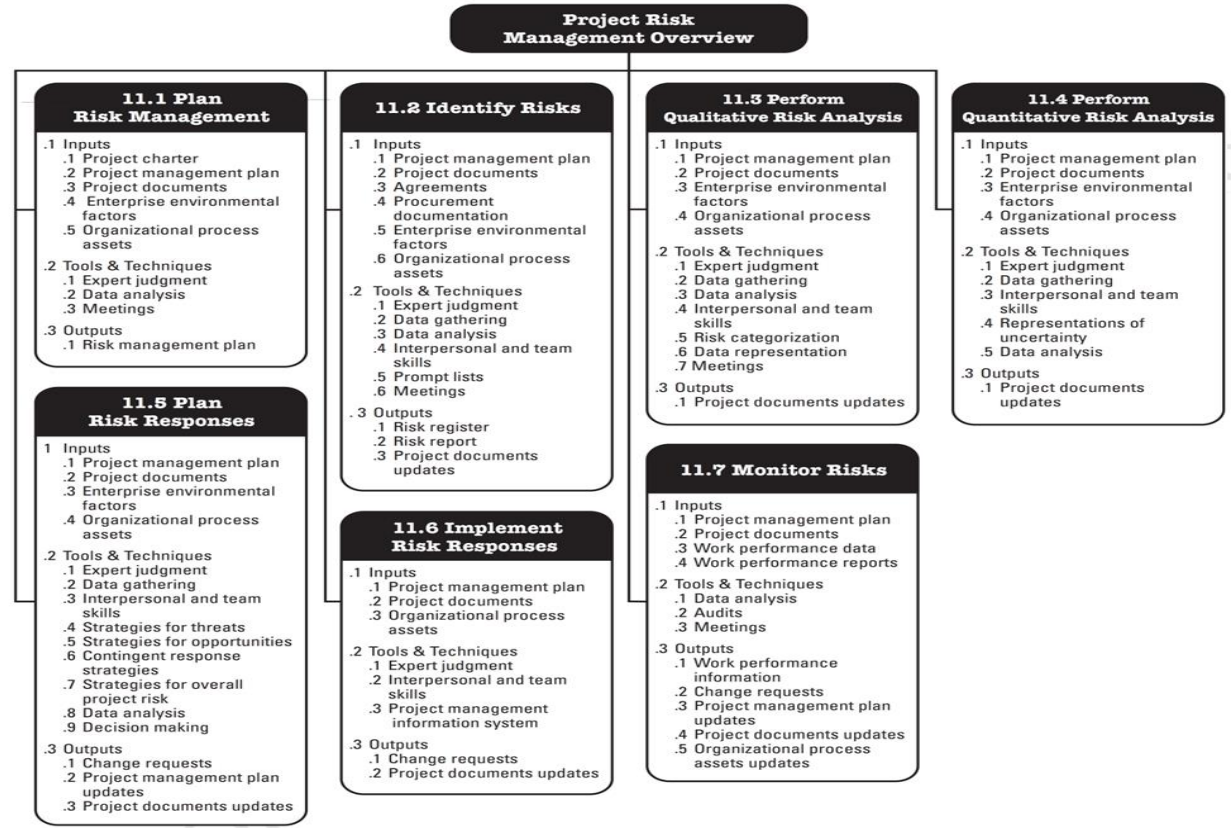

Figure 1. pmbok project risk management overview.

Lyons and Skitmore (2003) surveyed senior management in the Queensland engineering construction industry concerning risk management techniques. Risk management is used more in the execution and planning stages of the project than in the conceptual or termination phases. Risk identification and assessment are also commonly used before risk response and documentation. Moreover, brainstorming is the most typical risk identification technique. Qualitative risk assessment methods are also employed most frequently, and risk

reduction is the most frequently used risk response method, using contingencies and contractual transfer preferred over insurance. Project teams are the most frequent group employed for risk analysis before in-house specialists and consultants.

Not all received data, perceived risks, and identified risks can be considered wholly studied and reacted risks in the risk management process as it may dramatically increase the cost of project risk management.

Kutscha and MarkHall (2010) first discussed which information is utilized, deemed irrelevant, and hence excluded. Little research has been carried out to ascertain the manifestation of barriers to optimal project risk management, such as *irrelevance* and the deliberate inattention of risk actors. This paper presents the results of a qualitative study of IT project managers, investigating their reasons for deeming certain known risks irrelevant. The results confirm and expand on Smithson's (1989) ignorance and uncertainty. Taxonomy of ignorance and uncertainty offers further context-related insights into the phenomenon of irrelevance in project risk management. We suggest that coping with irrelevance requires defense mechanisms, effective relevance management, and setting and sticking to priorities.

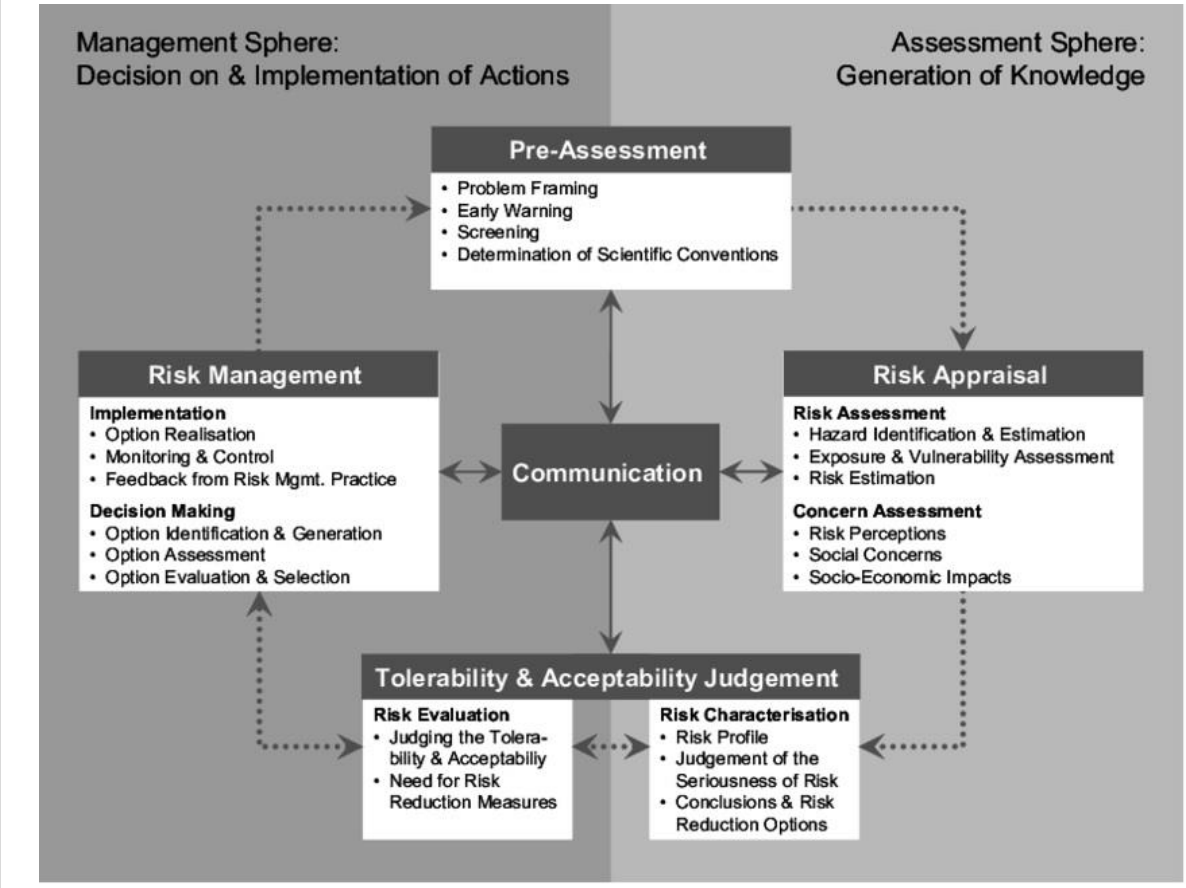

Figure 2. IRGC risk governance process (adopted from IRGC 2005, p. 65).

Van Der Vegt (2018) focuses on the fourth phase, risk management. This phase comprises the selection of measures to avoid, minimize, mitigate, and offset risk, the implementation of risk management, the acceptance of responsibility, risk monitoring and control, and stakeholder communication and involvement.

Renn et al. (2011) express that neither the characterization (uncertain, complex, and ambiguous) of the systemic risk at hand nor the contingent evaluation of the risk (acceptable, tolerable, intolerable, disputed) result in a simple typology for risk management. Nevertheless, the characterizations and evaluations provide some guidance for risk management about designing a process that holds the promise of being sensible, which risks are to be prioritized, and which options seem sensible in which contexts. From the above reflection and similar reflections in other contributions to

this particular issue, it is clear that the traditional risk management style is not just inadequate to deal with systemic risks, but it might even fuel societal controversies around risk.

Schuhmann and Eichhorn (2016) followed three objectives to reconsider contract risk and contractual risk management: to assess the extent to which theoretical concepts and corporate practice are reflecting the contract's risk management dimensions; to identify ways to make total usage of the contract's risk dimensions for risk management purposes; to overcome the isolation of the contract caused by its perception as a legal instrument by integrating its handling into the overall corporate management processes.

3.2. Incomplete contracts

Baker and Kimberly (2006) worked on incomplete contracts in a complete contract world and considered the role of contract doctrine in facilitating optimal investment in contractual relationships. All contracts are incomplete because they do not specify the optimal actions for the buyer and seller in every future contingency. This incompleteness can lead to under- and over-investment in resources specifically targeted to the needs of the other contracting party. Economists and legal scholars have looked at complicated contractual solutions and the ownership of assets to solve these investment problems.

3.3. Contractual risk allocation

Triantis did not dispute the notion that contracting parties can allocate even unforeseen risks contractually by doing so at a broad level (1992).

Maniruzzaman (2009) discussed the legal/contractual risk in the oil and gas industries focusing on the international oil companies renowned as IOCs and state companies known as NOC's. With the subject of risk engineering and dispute resolution, the paper discussed the legal/contractual risk-mitigation engineering over the following: governing law clause, dispute settlement clause: arbitration/mediation, stabilization clause, progressive taxation/profit-sharing method, political risk insurance. Then, it provided some solutions to risk and dispute management.

Shilliday et al. (2007) discussed contractual risk-shifting in offshore energy operations. They focused on the legal issues relating to contractual risk-shifting provisions between the parties engaged in these ventures to address the various risk-shifting and risk-limitation devices commonly used in contracts by offshore oilfields.

Hewitt (2015) looked at some liability allocation mechanisms in upstream project contracts, commonly coming into play when disaster strikes, where the courts have considered such mechanisms.

Zulhafiz (2017) focused on the contractual mechanisms on upstream oil and gas industries to help achieve a fair allocation of risk between operators and contractors in the oil and gas projects. Contractual provisions are used to allocate risks, especially those related to people, property, and the environment. Risk allocation provisions deal with hypothetical events, indicating that the person's identity bearing the liability which will accrue if certain events take place is determined in advance.

There is always a concern about unbalanced risk distribution due to differences in the parties' bargaining power or negotiators' non-professionalism.

Zulhafiz and Abdul Rahman (2019) expressed that in the absence of a law to regulate imbalanced risk allocation and unfair indemnity in oil and gas, service contracts should be perceived as a serious issue because they lead to the problem of inequality of bargaining power resulting from the dominant position of the operators over the contractors.

4. Research methodology

A detailed literature review was conducted to achieve the primary goal of this study. The first is identifying and assessing contractual risks as an essential part of legal risk (also known as insurable risk) and how they have been distributed and allocated between the parties. The second is checking if relevant risk management mechanisms cover all significant contractual risks through the contracts. The main risk factors are determined and searched in the two case contracts. Contracts I and M are precisely searched, and the risk management mechanisms and their sufficiency are reflected in the findings.

Zulhafiz (2017) accounted for the most common risks of the oil and gas industry, which raise critical legal repercussions, including:

1. Market risks such as changes to the oil price, interest rates, and exchange rates;
2. Credit risks such as default;
3. Operational risks such as equipment failure, workforce, and CAPEX/OPEX overrun;
4. Geological risks such as dry wells;

5. Environmental risks such as pollution;
6. Political risks such as change of government;
7. War/terrorism, expropriation, and change of regulatory regime;
8. Legal risks such as contractual, tort, and statutory duties, consequential loss, exclusion of negligence, liability, and indemnities.

The most common legal/contractual risks are accounted as follows:

- Breach of contractual liabilities (client or contractor);
- Ownership of generated documents by contract parties (based on intellectual property ownership laws);
- Liability and obligations against third party's claim;
- Ownership transfer and risk transfer related to project commodities and equipment;
- Termination of the contract risks (by client or contractor);
    - The performance or contract full accomplishment risk;
    - Termination by the client;
    - Termination by contractor;
    - Termination by force majeure (sanctions and social unrests);
- Legal, governing law, or interpretation risk;
- Dispute resolution risk;
- Risks related to drafting or standard form of contracts;

Typically, four steps are taken for risk management in oil and gas industries:

1. Preventing the identified risk by risk mitigation;
2. Transferring the risk to other parties through contracts or insurance with the aim of optimal risk handling by the more eligible party to address the determined risk;
3. Decreasing or damping the effects of risk by utilizing damage reduction approaches;
4. Accepting the risk for minor risks which are inevitable and nontransferable.

Some general mechanisms are getting used to transfer the risks to other parties, including insurance companies, to increase the efficiency and effectiveness of a contract to achieve the contractual goals.

Maniruzzaman (2009) accounted the risk and dispute management strategies as:

- Equity participation by the host government;
- Corporate social responsibility: social, environmental and health considerations for the host community;
- Transparency;
- Early-detection-and-prevention mechanism for disputes;
- Involvement of international financial institutions.

However, the most common and vital risk distribution mechanisms in oil and gas contracts are accounted as follows:

1. Exclusion clauses (liability excluding clauses): Edwards (1995) describes this contractual clause as one specified party is exempted from the consequential losses and overall liabilities of specific risk to the other parties, including third parties. It is worth noting that this clause is limited to financial damages according to Iran civil law and some other civil laws like the French unfair contracts terms act 1977.
2. According to Downie (2012), liability limitation clauses foresee and calculate parties' liabilities and limits or put a cap on them.
3. Indemnification clauses: West and Lewis (2009) explain that indemnification provisions generally stipulate the period after closing during which a buyer may bring a claim based upon a representation and warranty outlined in the transaction agreement. Second, indemnification provisions typically restrict the number of damages available for any post-closing breach to a specified percentage of the purchase price. Third, most indemnification provisions seek to preclude small claims by establishing so-called "deductibles" or "baskets", which set a minimum dollar threshold below which a buyer's losses do not qualify for reimbursement. Zulhafiz (2017) states that indemnities can be in different forms: one-party indemnification, mutual indemnification, or knock-for-knock indemnity.
4. Liquidated damages or penalty clause: according to Iran civil law, this is a kind of punishment in which the national courts cannot sentence the defaulted party to less or more amount agreed and fixed in the contract.
5. Insurance coverage: obligation to buy a specified type or a level of insurance coverage or clause. Insurance is one of the most common approaches of contractual risk distribution in which one party transfers the specified risk with a specific financial liability to another party against an

insurance premium. Maniruzzaman (2009) discusses the types of insurance to cover political risks used in ECA finance-supported projects. Investment–insurance programs similar to that of the OPIC (related to U.S. Overseas Private Investment Corporation) and MIGA (related to World Bank's Multilateral Investment Guarantee Agency) may be available from export credit agencies ("ECAs") in many countries, including some developing countries. However, such programs may be subjected to respective national objectives (like minimum national contents), which may impose strict requirements for eligibility. Several private insurers, such as the American International Group, Lloyds of London, Sovereign Risk Insurance Limited, Chubb, and Zurich Emerging Markets Solutions, offer comparative alternatives. There is a close relationship between the indemnification clause and the insurance clause. i.e., the indemnifier party can transfer whole or a part of its liabilities covered by insurance to the insurance company in the name of liability insurance coverage.

6. Arbitration clause
7. Stability and frustration clauses regarding the interpretation and freezing the governing law
8. Customized drafting of contracts

5. Results and discussion

Two cases of usance finance contracts in Iran's petrochemical industries are considered: contract I and contract M. After the effectiveness of the Joint Comprehensive Plan of Actions, usance finance was used for financing the greenfield and brownfield projects. The typical project finance arrangements could not be used due to the uncertainties still in the political and economic atmosphere.

The structure of these finances is usance, primarily short-term financing through the ECA (Export Credit Agency). This finance method is not of high interest among finance absorbers due to the brief finance period; however, it was used at high uncertainty circumstances after JCPOA.

The contract activities include P(S) plus F services, in which a foreign manufacturer or exporter supplies the required financial resources for the end-user through its country's ECA resources and the foreign country insurance supports it. The procurement service does not include the purchase engineering activities but the participation in commercial negotiations and payment arrangements. Finance services are in the form of the "ECA suppliers credit scheme" for foreign exporter companies. The supplier credit criteria are defined and discussed within OECD consensus and Cheney (1985). This type of contract is also known as a sales framework agreement.

5.1. Exclusion clause

Contract I do not have an expressing title of exclusion clause; however, some parts related to the termination clause, including force majeure, have the same exclusion clause application.

The critical point is the contract's position toward the possible risk of US sanctions or other sanctions. US sanctions are not directly addressed or foreseen in the contract. However, a statement of "force majeure shall include war, civil commotion, storm, tidal waves, flood, and any action taken by a government" is written which is vague enough and does not limit the term "a government" to related governments of contract parties or any other government; the US government can be meant or not.

Contract I also exclude the contractor from the transfer of title risk based on Incoterms 2010 delivery: contractor shall not be responsible for nor bear any risk of loss or damage to the equipment at all times after that.

Contract M also does not have any expressing title as an exclusion clause. However, the force majeure excludes parties from taking risks. Interestingly, this contract has accepted "Iranian governmental laws and Iranian regulations" as a substance of force majeure. The third-party sanctions do not explicitly express the US sanctions. However, they use the phrase "any obligation under this contract", which can expose any party to this agreement to any measures, of any nature, adopted by foreign authorities, including federal or state, and by international and supranational organizations against Iran and its subjects, which any measures or any nature and federal or state can be interpreted as accepting US sanctions as a force majeure condition.

5.2. Liability limitation clause

Contract I have an explicit clause of limitation of liabilities which limits the contractors for no liability to the client over the following risks:

- Retained obligation: any obligation owed by the contractor under a sales contract, except for the obligation to pay the purchase price for equipment sold;

- Any right held by the contractor in any agreement the solvency of the obligor whether in contract, tort (including negligence), breach of statutory duty, or any other legal basis;
- Any loss of profits, loss of operations, loss of data, loss of contracts, loss of market shares, loss of goodwill or any incidental, special, indirect, consequential, or other economic loss suffered by any client party, any representative of a client party or any other person under or in connection with any related agreement;
- Any liability to any party other than a client in connection with a related agreement or transaction contemplated in this agreement;

Contrary to Contract I, Contract M does not entirely exclude the transfer of title liabilities and expresses that supplier shall have no liability for any damages until and unless the supplier receives it from the vendor, except for the case the supplier causes such delivery failure.

5.3. Indemnification clauses

In Contract I, the client will indemnify the contractor according to any breach of a related agreement, negligent act or omission, or willful misconduct caused by the client's representative.

Moreover, the client shall indemnify the contractor if the commercial negotiations do not go on the pre-agreed advanced payment amount. Hence, the client shall cover all costs and expenses incurred by the contractor's actions regarding the purchase orders.

Further, the client shall indemnify the contractor concerning the performance of or failure to perform any obligation owed by the contractor to such vendor under a vendor sales contract with such a vendor (excluding any retained obligation). Any equipment sold under such vendor sales contract (including any defect in equipment, connection with export or import of equipment, or any technical or commercial risk associated with equipment) or any client's failure should comply with this agreement.

The client also shall indemnify the contractor for any payment by a contractor to a vendor under a vendor sales contract which is restricted or prohibited under any applicable statute, laws, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of relevant governmental authority, or contractor is unable to make such a payment for any other reason.

The client shall indemnify the contractor for the costs and expenses incurred by the contractor as a result of delayed shipment date later than the date fixed months after the effective date as a result of an act or omission of a client party or a vendor and not contractor.

However, contract I has an explicit indemnity clause, which has two parts of client and contractor's indemnities.

The client shall indemnify the contractor against any claim, loss, and liability arising from (i) an event of default in respect of a client's party or a breach by a client's party of an obligation it owes under the related agreement; (ii) a negligent act or omission or willful misconduct of a client's party or a representative of a client's party in connection with a related agreement; or (iii) any other circumstance indemnified under another provision of this agreement.

In return, the contractor shall indemnify the client against any claim, loss, land liability arising directly or indirectly from (i) a breach by the contractor of an obligation it owes under this agreement; or (ii) a negligent act or omission or willful misconduct of contractor or a representative of contractor in connection with this agreement.

Contrary to contract I, contract M does not include any indemnification clause explicitly or implicitly.

5.4. Liquidated damages clause

Contract I does not include any liquidated damages clause, but contract M has several terms.

Suppose the supplier fails to deliver any products following the relevant individual contract. In that case, the supplier shall pay the purchaser liquidated damages in the amount the supplier receives from the vendor according to the relevant vendor contract. Such payment of liquidated damages shall completely satisfy the supplier's liability for loss and damages caused by delays in the products' delivery. The supplier shall have no further liability whatsoever to the purchaser in respect thereof.

5.5. Insurance clause

Due to the natural financial resources of both contracts, those are covered with ECA mandatory insurance: export and investment insurance. The insurance policy covers all transactions contemplated in the agreements, pre-shipment, and post-shipment stages.

5.6. Arbitration clause

Contracts I and M both use the arbitration clause for dispute resolution, and both contracts use ICC rules of arbitration with the arbitration seat of Zurich, Switzerland.

5.7. Governing law, stabilization, frustration, or compliance clause

Both contracts use the laws of Switzerland as governing law of the contract and express that The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this agreement.

An article of compliance has been set in both contracts, obligating the client to guarantee full contract compliance with all applicable anti-bribery and corruption laws (UK Bribery Act) and sanctions laws and regulations.

5.8. Customized drafting of contracts

Both contracts are customized through several rounds of negotiations in different aspects, which reduces the risk of standard forms contracts. The results of studying and comparing both cases contracts are summarized in Table 1.

Table 1: Risk management mechanisms used in contracts I and M.

Contractual risk management mechanism	Type of covered risk	Contract I	Contract M
Exclusion clauses	Force majeure risks	Yes	Yes
	USA sanctions risk	No	No
	Transfer of title risk	Yes	-
Liability limitation clauses	Liability risks	Yes	Yes
	Transfer of title risk	-	Yes
Indemnification clauses	Commercial negotiations risk	Yes	No
Liquidated damages	Defect in equipment, export, or import of equipment or any technical risk	Yes	No
Insurance coverage		Yes	No
Arbitration clause	Restricted or prohibited payment risk	No	Yes
Governing law/stability and frustratio clauses	Foreign exchange risks	Yes	Yes
Customized drafting of the contracts	Liquidated damages	Yes	Yes
	Different risks	Yes	Yes
	Dispute risk	Yes	Yes
	Legal and change of law risk		
	Drafting and standard form risk		

6. Conclusions

Legal and contractual risks management is an integral part of the total project risk management process. The first step in risk management is studying and identifying the risks in a project. The main question over here is to what extent and in which depth those risks shall be identified and taken into account, which affects the expense, schedule, and implementation procedures of the risk management process.

As discussed above, two cases of usance finance contracts in the form of sales framework agreements were chosen to be analyzed. The reason for choosing these contracts was the very high customization level—none standard form—of those due to the high uncertainty degree governing them.

Analyzing the results by concentrating on used risk management mechanisms and related risks shows severe issues and bugs in both contracts.

Some risks, such as US sanctions risk, are not addressed, and some contractual terms suffer from a lack of clarity, resulting in further disputes.

The total risk distribution in case contracts is not in a

balanced manner. Contract I appears to be a complete contract concerning covered risks in comparison with contract M. However, contrary to the contracts between state-owned companies or semi-state owned companies, such as petrochemical companies of Iran and private companies, in which the risk distribution is unbalanced toward the contractor (private company) due to the special conditions of Iran, the financiers have much higher bargaining power in negotiations, demonstrating the results in liability limitation clause.

Considering the current political status of Iran, which still limits the typical finance and project finance arrangements, having a more detailed contractual risk list and providing solutions for balanced risk distribution among parties in an optimal way better for both client and contractor are recommended for further studies.

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