

# Negotiating an ERPA Role Play

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Latin American Carbon Forum  
Santiago, 29 October 2008

## How is the session organised?

- Introduction
- Objectives
- Main aspects of an ERPA
- ERPA role play
- Deal and options description
- Report to the group and discussion

## Introduction

- International law firm based in Amsterdam, offices in New York, London and soon Beijing
- Firm has been involved in CDM since 2001
- Advising governments (Annex I and non-Annex I), multilaterals, carbon funds and private sector participants (sellers, buyers and project developers)
- Ongoing advise on drafting and negotiation of ERPAs

## Objectives

- Overview of ERPA structure
- Discussion of provisions which usually are subject of negotiation
- Practical experience of negotiating a number of common provisions in an ERPA
- Sharing result of discussions with the group

Limitations: time, context, size of the group

Not legal advice

# Emission Reductions Purchase Agreement ("ERPA")

- Two main types:
  - 1) project related: "new" emission rights are created and traded (CERs, ERUs)
  - 2) agreements related to existing emission rights (AAUs, EU Allowances, secondary trading of CERs en ERUs); Off-Take, On-sale, ISDA, SERPA

## ERPA (cont.)

- Legal framework:
  - International (Kyoto Protocol)
  - Regional (e.g. in Europe EU ETS Directive)
  - National
    - Environmental law
    - Foreign Investment law
    - Administrative law
    - Tax law
    - Securities and financial regulations
    - etc...

## What is an emission right ?

- Different definitions
- Kyoto Protocol defines CER, ERU, RMU en AAU
- National legislations may include specific definition
- Contractual definitions

## THE ERPA *project related*

- Commercial contract
- Conditions precedent in respect of project
- Definitions (including type of Emission Reduction, e.g. CER)
- Control of project cycle: validation, registration, verification
- Amount: build in flexibility, reasonable estimate (indicative Delivery Schedule)
- Option for additional Emission Reductions
- Option Emission Reductions price: fixed or market price

## **THE ERPA (*cont.*)** ***project related***

- Delivery: verification report, receiving on account
- Delivery formalities: approval by Host Country, instructions to Executive Board, (joint) Focal Point nomination
- Payment: advance payment, on achieving (project development) milestones (e.g. verification report), upon delivery
- [Defaults and penalties]
- Indemnities
- Choice of law and dispute resolution mechanisms

## Role play - structure

- Instructions
- Presentation of deal and options for negotiation
- Division in groups (sellers and buyers) and relocation to different parts of the room
- Negotiation of deal options by the teams
- Report back to the group and discussion

## Role play - instructions

- Division in groups of sellers and buyers and sub-groups of sellers and buyers for negotiation
- Each team to appoint someone to report the results of negotiation
- Things to take into account for report:
  - If an agreement was reached
  - how was the agreement reached
  - important issues discussed

## Role play – instructions (*cont.*)

- 20 minutes for discussion of all variables and record discussions
- Deal options on Power Point
- Sellers and buyers:
  - try to negotiate the best option for their own position
  - discuss openly on their position and most favourable scenarios
  - reach an agreement on one of the options given or modify the options to create an alternative acceptable to both
- Reporter to take note of discussions to report back to group in plenary

## The Deal

- The Project is a wind farm with the potential to reduce 850 000 tonnes of CO2 (generate 850 000 CERs) before 31 December 2012 and possibility to continue generating emission reductions post-2012
- The Seller is the developer of the project and owner of the CERs to be generated by the project
- The Buyer is a private entity from an Annex-I country that seeks to purchase CERs, on a forward basis, for compliance purposes

## The Deal – Advance Payment scenarios

### Option A:

- Advance payment to Seller of 50% of total purchase price upon fulfilment of some conditions precedent (completion of PDD and submission for Registration with EB)

### Option B:

- Seller will pre-pay some project development costs (PDD preparation, validation report, monitoring plan and registration costs) to be set-off against payments of CERs

## The Deal – Focal Point scenarios

### Option A:

- The Seller will be sole Focal Point for communication regarding issuance and forwarding of CERs

### Option B:

- The Buyer will be sole Focal Point for communication regarding issuance and forwarding of CERs

## The Deal – Delivery default scenarios

### Option A:

- In the event of a delivery default, the Seller shall arrange for an amount of replacement CERs equal to the default volume and of the same type as those generated by the Project to be delivered to the Buyer

### Option B:

- In the event of a delivery default, the Seller shall pay to the Buyer the positive difference, if any, between (a) the market price of the amount of CERs not delivered, and (b) the contract price of the amount of CERs not delivered

## The Deal – Choice of law and dispute resolution

### Option A:

- The governing law will be the law of the host country
- Any disputes will be settled by the courts of the host country

### Option B:

- The governing law will be the English Law
- Any disputes will be settled by international arbitration (the seat of arbitration being Santiago and the language of arbitration being English)

**TIME IS OVER!**

**REPORT BACK TO DISCUSS**

# Muchas gracias!

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