LEGAL ASPECTS OF GOLD FINANCING

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Introduction

Since I have only a short time to speak I shall concentrate in this paper on gold loans and related facilities and their use in gold project finance in Australia.

There are a number of other forms of financing which might appeal to a gold producer which might be included in the heading "gold financing".

They are:

(a) preference share issues;
(b) the issue of gold indexed bonds; and
(c) the use of gold futures and gold futures options to hedge and to obtain a fixed floor price.

However, gold loans and their relative, the forward purchase facility, are perhaps of more interest currently in view of their recent use in project financing in Australia.

The tax exempt status of a gold miner (under s 23(o) of the Income Tax Assessment Act 1936) means that it cannot claim any deduction for interest, making loans of the traditional kind less attractive and, in addition, leveraged leasing will not be available by virtue of s 51AD of the Income Tax Assessment Act 1936.

As Warren Magi indicates in his paper, gold financing is also attractive to refiners and others who require working stocks of gold, in which case the principles are similar.

Nature of gold loan

A gold loan is simply the provision of gold by the lender to the borrower with an obligation upon the borrower to deliver the same amount of gold, though not necessarily the same gold, at a specified future time.

Mechanics of gold loan

The manner in which the transaction works is as follows:

1. The lender obtains his gold under an arrangement under which he is effectively hedged against fluctuations in the price of the gold. The lender will make no profit or loss out of price fluctuations.

   The lender may fund himself by taking a back to back loan from a central bank or international body which is required to keep gold reserves, in which case the central bank would charge gold fees or interest on the gold lent, which would be passed on, with a margin, by the lender to the borrower. Alternatively, he might obtain gold by buying spot on the physical market and selling forward in a series of rolling transactions passing on any interest on the funds used to enter the transactions and any losses incurred in the course of the transaction as interest.

   It should be remembered, however, that the lender is still exposed to an increase in his credit risk, if the price of gold rises during the term of the gold loan to the borrower.

2. The lender in turn provides the gold to the borrower or to the borrower's account.

   There is usually no physical delivery throughout this part of the transaction except where the borrower is a refiner.

   It may be preferred that the gold be allocated gold (that is the gold can be identified by reference to particular serial numbers of bars) rather than unallocated so that title to the gold actually passes. But in any event except where the borrower is a refiner no physical delivery would be involved. "Loans" are often structured on the basis that the lender "lends" unallocated gold. In that event, no title to the gold passes (Re Wait [1927] 1 Ch 606, King v Greig [1937] 1 VLR 413).

3. The borrower, having received its gold, immediately resells it to obtain any proceeds for his own use.

4. On maturity of the loan, the borrower is required to "repay" the loan by delivering to the lender an amount of gold equal to the amount of gold borrowed.

5. The borrower may be given the option in lieu of delivery of paying the market value of the gold, or to achieve much the same effect, of purchasing from the lender the amount of gold which the borrower is required to deliver to the lender.

6. While the gold is outstanding, the borrower pays gold fees or interest, that amount determined either by calculating a rate percent per annum of the gold lent and paying that amount in gold or in cash at the current market value of the

gold, or calculating the current market value of the gold outstanding and paying interest on that money sum calculated at a rate percent per annum.

Legal characterisation of gold loan

It may be instructive to try and place a gold loan within familiar categories of transaction.

1. Bailment

If the transaction constituted a bailment the borrower would be reduced to a bailee and have placed upon him duties of care not particularly relevant to the transaction.

However, there can be little doubt that the transaction as structured does not constitute a bailment. There is no requirement that the borrower repay exactly the same gold in specie that he received from the lender. Further, there is no transfer of possession, and, at least where the subject gold is allocated gold, title actually passes to the borrower. (See Palmer on Bailment, 1979 pp 10, 105)

2. Sale of goods

A contract for the sale of goods is defined in s 6(1) of the Sale of Goods Act 1923 of New South Wales and in the equivalent provisions in the other states as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price". No "price" is payable in connection with the provision of gold by the lender.

Needless to say, there is of course a "sale" of gold involved should the borrower resell the gold back to the lender or purchase gold from the lender on the maturity date so that the borrower can repay the gold loan.

3. Loans

A "loan" of gold would fall within the dictionary definition of the term. The Macquarie dictionary defines "loan" as follows:

"'loan' 1. the act of lending; a grant of the use of something temporarily; (the loan of a book);

2. something lent or furnished on condition of being returned esp. a sum of money lent at interest..."

An American publication (Black's Law Dictionary Fifth Ed) includes the following definition "... Anything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use". Liberty National Bank & Trust Co v Travellers Indemnity Corporation. (58 Misc 2d 443, NYS not S 2d 983, 986)

However, the reported English and Australian cases usually deal with the concept of a loan of money, particularly as most refer to money lending or similar legislation when it is clear from the terms of the statute that references to a loan of money are intended (see for example Pannam The Law of Money Lenders, 1965 p 8 et seq).

The definition of "Loan" in section 82A of the Stamp Duties Act of New South Wales, for example, only refers to loans of money.

The question will often arise as to whether a gold loan constitutes a "loan" for the purposes of negative pledges, financial ratios and cross-default clauses in debenture trust deeds and loan documentation. The question is also relevant whether a trustee given the power to "borrow" under its trust deed or a company given the same power under its memorandum can raise a gold loan. Obviously, the answer will depend on the drafting of the particular clause.

My view is that clauses referring to a "loan" or "borrowing", would cover gold loans, unless, as many such clauses do, the language expressly refers to the "borrowing of money". In any event, I think that the common phrase "raising moneys" would include a gold loan.

4. Nature of gold

It seems clear that gold is moveable personal property and is included within the term "goods" or "chattels".

One question which may be asked is whether it constitutes money.

Like Professor Goode's putative reader (RM Goode, Payment Obligations In Commercial and Financial Transactions, First Edition, 1983, p 6), one may ask, why does it all matter?

The answer is that there are a number of distinctions between money and other forms of personal property which are important in appreciating the problems which might arise in documenting and enforcing a gold loan as opposed to a loan of money. However, the rationale of the cases which make those distinctions may not rest on the categorisation of the subject matter and principles which apply to money may be found to apply to gold or some goods and vice-versa.

In general the following statements apply:

(a) The remedy for breach of a contract to deliver a chattel is damages. Damages are not available for a breach of an obligation to pay money.

(b) Obligations to pay money are enforceable in the courts by a simplified liquidated claims procedure.

(c) Specific performance is generally not available for the enforcements of monetary obligations. However, it is also true to say, as discussed below, that specific performance is not available in respect of contracts relating to goods for which there is a ready market, like gold.

(d) The maximum "nemo dat quod nom habet" applies to goods, but not to money (see cases cited in FA Mann, The Legal Aspects of Money (fourth ed, 1982 p 6) so that a person cannot generally become owner of gold by buying it from a person who does not own it.

(e) Set-off will not be available at law in respect of a claim for unliquidated damages but may be available in equity (Hanak v Green [1958] 2 All ER 141). It will also be available in set-off on winding up or bankruptcy under section 86 of the Bankruptcy Act 1966.

The question may also be relevant for the purposes of determining whether or not a document securing a gold loan is subject to loan security duty.

For example, the definition of "mortgage" in the New South Wales Stamp Duties Act 1920 is fairly typical:

> "'Mortgage' means a security by way of mortgage or charge -
>
> (a) for the payment of any definite and certain sum of money advanced or lent at the time or previously due or owing, or forborne to be paid, being payable; or
>
> (b) for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current together with any sum already advanced or due or without, as the case may be."

It should be noted, however, that definition might be extended by the further definition of mortgage in section 83(1) which has its equivalents in other states and does not appear to be confined to marketing obligations (Wilcox Mofflin v CSD [1978] ATR 584 but see City of London Breweries v IRC [1899] 1 QB 121).

The other question would be whether a document evidencing an obligation to deliver gold could be a "debenture", that is, an instrument which evidences or creates indebtedness. In New South Wales, in relation to the remaining head of loan security duty, "bonds or covenants" are under section 83(2) only dutiable if they secure a "loan" as defined above.

It is generally believed that bullion can never be money. (See for example, Mann, Op Cit, p 22).

In Moss v Hancock [1899] 2 QB 111 at 116 Darling J said:

> "Money as currency, and not as medals, seems to have been well defined by Mr Walker in 'Money, Trade and Industry' as 'that which passes freely from hand to hand through the community in final discharge of debts and full payment for commodities being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or to apply it to any other use than in turn to tender it to others in discharge of debts or payments of commodities'."

Mann suggests that "in law, the quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as a universal means of exchange in the state of issue" (Mann, Op Cit, p 8).

Gold has neither the characteristic of being a "medium of exchange" nor does it have any unit of account. There appears to be little doubt, particularly since the movement of currencies away from the gold standard, that gold is not money. That is not to say that the word "money" cannot, when appearing in documents such as wills, be defined to include all wide classes of personal property (see for example Perrin v Morgan [1943] AC 399 at 407, 413).

Forward purchases

Mechanics

Forward purchases are, mechanically, variations on the theme which short circuit steps 2 and 3 of the mechanics of the gold loan mentioned above.

That is, no gold changes hands at the date of borrowing. Instead of onlending it to the borrower then purchasing it and in turn selling the gold to obtain funds to pass on to the borrower, the lender borrows the gold from the central bank, and sells it into the market, passing the proceeds to the borrower by way of an advance payment of the purchase price of gold to be delivered by the borrower on the maturity date.

This is merely a forward purchase, under which the "lender" as a buyer purchases gold from the "borrower" or "seller", the price being paid immediately against future delivery of the gold.

It is however somewhat different from the classic forward purchase used in project financing arrangements in that the obligation is measured by reference to a quantity of gold and not by reference to any monetary amount.

The remaining steps are the same as a gold loan. The borrower is obliged on maturity to deliver gold and is obliged in the meantime to pay interest or fees on the undelivered gold.

Nature of forward purchases

Forward purchases fall clearly within the definition of "sale of goods" quoted above. They do not constitute loans, in the normal sense.

Nevertheless, for convenience I shall continue to refer in this paper to the parties to a forward purchase agreement as "borrower" and "lender".

As it does involve the principles applicable to a sale of goods, the concept of forward purchase invokes the sales of goods laws, and therefore, involves problems which do not apply to gold loans.

There are, however, a number of advantages:

1. In the case of a gold miner which is concerned that the exemption under section 23(o) of the Income Tax Assessment Act might be removed, forward purchases may offer a possible mechanism by which income from the proceeds of sale may be brought into account while still tax exempt depending on the accounting treatment used (see IT 2085, Arthur Murray (NSW) Pty Limited v The Commissioner of Taxation 114 CLR 314). If it can be shown that gold to be sold corresponds with anticipated production.

   Conversely, the suggestion has been made in the case of a tax paying borrower that, if in its accounting treatment, the seller treats the income under the forward purchase agreement as unearned and carried in the company's balance sheet and brought to account as and when deliveries of gold are made, it may be possible to postpone the assessable income until the delivery date.

2. The transaction may not be a "loan" for the purposes of negative pledges and the like, being a sale and purchase transaction (see for example Chow Yoong Hong v Choong Fah Rubber Manufactory [1961] AC 834).

Structures

Set out in the appendix [at the end of this paper] are some structures applicable to gold facilities for gold miners.

A. Is the straightforward facility with the lender taking credit risk. The borrower as a gold mining company is exempt from income tax under section 23(o) of the Income Tax Assessment Act and is not entitled to claim any interest or fees paid as a tax deduction.

   In the case of a loan, gains or losses arising on the loan from the fluctuation of gold prices are probably treated as a capital item in the borrower's tax account, but the issue is not certain.

   In the case of a forward purchase, as discussed above it may be possible for the borrower to account for the sale price recovered on drawdowns as tax-exempt income at that date under section 23(o).

B. Is where the credit risk is assumed by a bank, which issues a letter of credit or guarantee in favour of the lender. That letter of credit or guarantee may be denominated in gold so that the bank will be taking a price risk as part of its credit risk.

   The bank would in turn take an indemnity from the borrower which may be limited recourse and secured by a charge over the project assets and the usual project warranties and covenants.

C. Is applicable where the bank relies on a guarantee or other support from a project sponsor.

D. Sets out the position where the sponsor wishes to be able to deduct fees and other outgoings payable under the gold facility against its income tax. It uses the proceeds of the financing to acquire preference shares in the operating company. On repayment the sponsor buys gold from the operating company to deliver to the lender.

There is a greater likelihood that any gains or losses in the case of a gold loan arising from price fluctuations are treated as a capital item.

In forward purchases the position may be somewhat more complex and, may depend, as stated above, on the accounting treatment given.

The documentation

The documentation for a gold loan is in many ways similar to that which would be employed in the loan of a currency other than domestic currency of a borrower.

Documentation for a forward purchase facility would be similar.

There are some variations on the theme to allow greater flexibility but basically the mechanics follow the outline specified above.

Considerations in preparing documentation are as follows:

<u>The delivery obligation</u>

The repayment obligation is expressed as an obligation to deliver a specified amount of gold in gold on the maturity. The document would specify the place and manner of delivery.

The borrower may be given a right to prepay delivery the gold early. On any event of default the lender is entitled to accelerate the loan or delivery obligation and require immediate delivery of gold.

Some difficulty may flow from this, arising from the fact that the obligation is expressed in gold not money:

1. The liquidated claims procedure may not be available in the case of default. If the borrower fails to deliver gold on the due date the lender may be left with a claim for unliquidated damages.

2. It seems unlikely that specific performance will be available.

   Classically, specific performance is not available in the case of the sale of goods because damages are an adequate remedy. Usually, the purchaser will be able to obtain similar goods in the market and damages will be the loss which he sustains in doing so. However there are cases where because of the rarity of the subject matter or other circumstances damages have been held not to be an adequate remedy and specific performance awarded (Dougan v Ley (1946) 71 CLR 142, Aristoc Industries Limited v RA Wenham (Builders) Pty Limited [1965] NSWR 581 and Doulton Potteries Limited v Bronotte [1971] 1 NSWLR 591).

In view of the fluctuations in the price of gold, it might have been possible, had the breach date rule referred to below been inflexibly applied, to try to argue that the damages obtained under that rule may not have been adequate to the purchaser if the price of gold had risen sharply between breach and judgment. This would run against generations of authority, albeit authority that applied before significant inflation became a fact of life (see below).

All states other than New South Wales have provisions in the Sale of Goods Act which follow s 52 of the Sale of Goods Act 1893 (UK) which provides "in any action for breach of contract to deliver specific or unascertained goods the court may direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages".

However it appears the same factors are taken into account in applying this legislation as apply in equity in determining whether damages are awarded (Cohen v Roche [1927] 1 KB 69; Behnke v Bede Shipping Co Limited [1927] 1 KB 649; In re Wait [1927] 1 Ch 606).

3. A rigorous application of the "breach date rule" would have the same effect in relation to gold loans and forward purchase transactions as it would have had with foreign currency loans prior to the Miliangos Case (Miliangos v Frank (Textiles) Ltd [1976] AC 443).

Application of the breach date rule has the effect that damages are fixed by reference to the market value of the gold at the due date for delivery, ignoring any subsequent fluctuations in price which occur by the time of execution of judgment or payment. However, particularly since inflation has taken hold as a fact of life, there have been a number of cases which soften the effect of that rule in various ways (Wroth v Tylor [1974] Ch 30; Radford v De Froberville [1978] 1 All ER 533; Wenham v Ella (1972) 127 CLR 456; Johnson v Agnew [1979] 1 All ER 883; The Millstream Pty Limited v Schultz [1980] 1 NSWLR 547).

In Wenham v Ella Barwick CJ said (at p 460):

> "to assess damages in contract as at the date of the breach does not mean that damages accruing thereafter by reason of the breach are not recoverable."

It appears that a court may take account of subsequent fluctuations in price.

In the case of a forward purchase, one problem which may be encountered is s 53(3) of the Sale of Goods Act 1923 of New South Wales (which follows s 51 of the Sale of Goods Act 1893 of the United Kingdom) which states:

> "(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver."

That section is tempered somewhat by s 55 which provides:

> "Nothing in this Act shall affect the right of the buyer or seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

I submit that the use of the words prima facie in s 55 would indicated there is nothing inconsistent in the Sale of Goods Act with the line of cases quoted above.

A happier solution might have been to extend the principal in Miliangos beyond foreign currencies to gold so allowing judgments expressed in gold on the ground that gold is historically almost equivalent to currency. However, that would seem unlikely to succeed, as the House of Lords in Miliangos appears to proceed on the basis the foreign currency was still "money" and also on the basis that specific performance is not available for enforcement of obligations to pay any money, domestic or foreign.

I would suggest the document should contain an indemnity similar to a currency indemnity to guard against fluctuations of price occurring after the breach mark for fixing of damages.

However, such amelioration of the breach date rule and such indemnity may be of little value where there is still a ready market for the purchase of gold, in view of the duty of the non-defaulting party to mitigate its loss. If the borrower defaults under its obligation to deliver gold then it would be argued that the lender should mitigate its loss by acquiring physical gold as soon as possible.

The indemnity and the special damages would probably only cover any fluctuations that might arise in the reasonable time that it took the lender to establish that there had been a default, and that the borrower is not going to comply with its obligations, and to buy the requisite gold.

In the event the borrower is wound up, the debt owing to the lender is calculated as at the date of commencement of winding up and the lender would probably not be able to claim damages arising from fluctuations after the commencement of the winding up. For the purposes of an insolvent company that date is not the date when the court makes the relevant order but the day on which a petition for the winding up of the company was presented. (In re Lines Bros [1982] 2 All ER 183).

Protection could be added by inserting an additional indemnity against fluctuations in price between the date of commencement of winding up and the last day for filing of proofs. However the efficacy of this provision must be questionable.

At the very least the document could provide that if the borrower fails to deliver gold when due, it shall pay the market value of the gold as at delivery date.

As that amount must be a genuine pre-estimate of damages for failure to deliver as discussed above, there can be no question that it constitutes a penalty.

That provision might be inserted in addition to the indemnities mentioned above. The insertion of such a provision may however prejudice any argument that any mortgage securing that repayment obligation is not liable for stamp duty as it does not involve the payment of money (see Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps (Vic) 80 ATC 4323) and may possibly allow argument that the document constitutes a debenture and is stampable with loan security duty, even though the liability to pay the sum in question is contingent (see Comptroller of Stamps (Vic) v Handevel Pty Limited 84 ATC 4338 and Slavenburg's Bank v Intercontinental Ltd (1980) 1 WLR 1076 contra Burns Philp Trustee Co Ltd v CSD 83 ATC 4487 and Broad v CSD 80 ATC 4579).

Frustration

Care must be taken that supervening illegality or other event which affects the capacity of the borrower to deliver gold does not discharge the contract by frustration. The contract should expressly provide that the obligation to deliver gold is not discharged by any such event, and in any event provide that if the borrower is unable to deliver gold, it is required to pay the monetary equivalent.

In relation to forward purchases, a problem might arise from section 12 of the Sale of Goods Act 1923 of New South Wales and its equivalent in other states. That section provides:

> "12 Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided."

It is important to note that that section only applies to agreements to sell specific goods. In the case of unascertained goods, such as a contract to sell unallocated gold, the contract is not void. However, such contract for sale would become a contract for the sale of specific goods as and when gold was unconditionally appropriated to the contract with the express or implied consent of the buyer.

Unwinding costs

The document should contain an indemnity against any costs incurred by the lender in unwinding any position taken by it to fund the loan, in the event of prepayment on acceleration or other exercise of any prepayment right by the borrower.

Security against fluctuations

The document may provide that if the price of gold rises, and thus the credit exposure of the lender increases, the borrower is required to deposit either gold or cash to cover the increase in exposure.

As with all agreements to give subsequent security over unspecified property, such an obligation can only be of limited comfort to the lender. If the borrower fails to provide the security, the increased credit risk remains.

Nevertheless, the document would provide that failure to provide such security would be an event of default. If the borrower fails to provide security, the lender can accelerate the delivery obligation and close out his position, fixing his exposure at the current price and avoiding any subsequent increases.

In the case of a gold miner, the lender may be more prepared to take this risk on the basis that if the price of gold rises, so does the profitability of the mine and the capacity of the borrower to repay.

The deposit of gold could be made by way of pledge. If the pledge is made by way of physical deposit of the gold and not by deposit of documents of title, it would not constitute a mortgage for the purposes of the definition of "mortgage" in the Stamp Duties Act 1920 of New South Wales.

As to a deposit of money, I do not propose to enter into the debate as to whether or not a lender may have charge over a deposit with the lender (see Broad v The Commissioner of Stamp Duties (NSW) (1980) 11 ATR 59 and Ex-parte Caldicott; re Hart (1883) 25 Ch D 716).

My own view is that even if one can have a charge over a deposit, if one limits the terms of the deposit, or makes it clear that the deposit is made in connection with the lending transaction as part of the same transaction, the lender can be adequately protected.

It might be argued that such an arrangement constituted a charge itself, or that it attempted to interfere with the priority of disposal of assets on a winding up (see British Eagle International Airlines Limited v Air France [1975] 1 WLR 758). My own view is that the only property of the borrower involved is a right as against the lender, it does not have any property in the money itself. An obligation to repay a deposit does not have to be absolute, it can be subject to terms and conditions. The property of the borrower is only its right to repayment subject to those terms and conditions. Secondly in view of the existence of s 86 in the Bankruptcy Act 1966 which gives a statutory obligation to set-off, it is difficult to argue that a contractual provision designed to achieve the same effect, interferes with the order of priority on a winding up.

In the case of security deposit, I would suggest that it be on terms that it is only repayable if there has been no event of default and the borrower has performed all its obligations under the agreement and it delivered all outstanding gold.

Further considerations

Applicability of gold clauses cases

It might be asked whether the so called "gold clauses cases" mentioned in Weaver & Craigie (Banker and Customer in Australia 1975 pages 80-85) and Mann (the Legal Aspects of Money 4th Ed 140 seq) might be applicable. In those cases the courts construed so called gold clauses, which were designed to try and secure that obligations were met in gold rather than in devalued currency. The clauses usually required payment in gold coins. However those cases have all turned on construction as to whether the parties intended to pay the nominal value of the currency with gold coins as the manner of payment, or physical gold coins. If the contract makes clear that the obligation is to be satisfied by the delivery of physical gold, or its money value at the required time for delivery of that gold, the cases should have no application.

In the 1930s there was a world wide legislative push against such clauses, the Joint Resolution of Congress of 1933 in the USA and in NSW the Gold Clauses (Construction) Act 1934.

The Act effectively only applied to obligations entered into before the Act was passed, in any event as a gold loan or forward purchase provides for the delivery of physical quantity of bullion without reference to any monetary amount, which is unlikely that the provisions of those statutes would have applied.

Futures Industry Bill

An exposure draft of the Bill has been presented for discussion. If adopted, it will form part of the uniform system of law and administration in relation to companies law and be adopted by each State and Territory, other than the Northern Territory.

The Bill contains a very wide definition of "Futures Contract" which is contained in the schedule and reads as follows:

> "A futures contract is a contract the effect of which at the time of its information is:

(a) that a person is -

(i) obliged to pay to another person; or
(ii) entitled to receive from another person,

at a specified future time an amount of money calculated in an agreed manner by reference to a specified state of affairs existing at that future time,

or, as an alternative to, or instead of, the effect referred to in paragraph (a) -

(b) that a person is obliged to deliver to another person, at a specified future time, a specified quantity of a specified commodity at a specified price or a price calculated in an agreed manner,

whether or not, in either case, the contract has any other effect or is capable of being varied or discharged before that future time."

It seems clear that gold loans and forward purchases will constitute a futures contract as defined. This may seem alarming until we examine the Bill further.

The Bill will operate to prevent any person carrying on the business of a "futures adviser" or a "futures broker" without a futures licence unless it falls within certain exemptions.

"Futures broker" is defined to include a person who carries on a business of dealing in futures contracts on the instructions of others. It is difficult to see that a person who enters into gold loans or gold purchases as lender will be doing so "on the instructions of others" in the normal course.

Equally there seems to be little danger that such person might be conducting business as a "futures adviser", which is defined to mean a person who carries on business of advising other persons concerning futures contracts.

It seems to me that the legislation will not affect the business of providing gold facilities in terms outlined above. However, it may be prudent to obtain an exemption under the Bill.

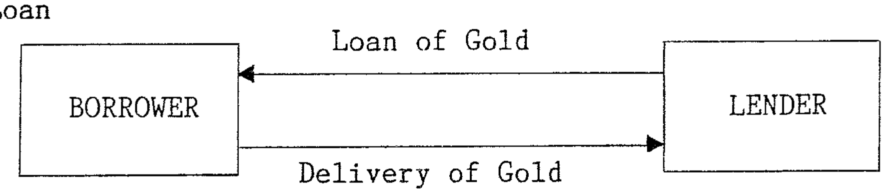
The explanatory memorandum to the Bill (at page 20) states that the draftsman recognises that the Bill contains a wider definition of "futures contract" which will cover many transactions which would not normally be regarded as futures contracts, and that there may be a need for exemptions by regulation or order.

APPENDIX

STRUCTURES OF GOLD FINANCING

A

Gold Loan



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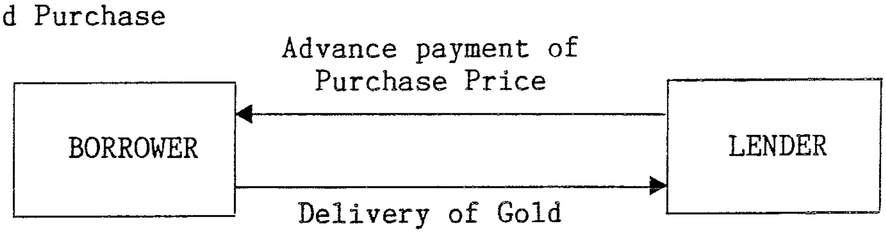

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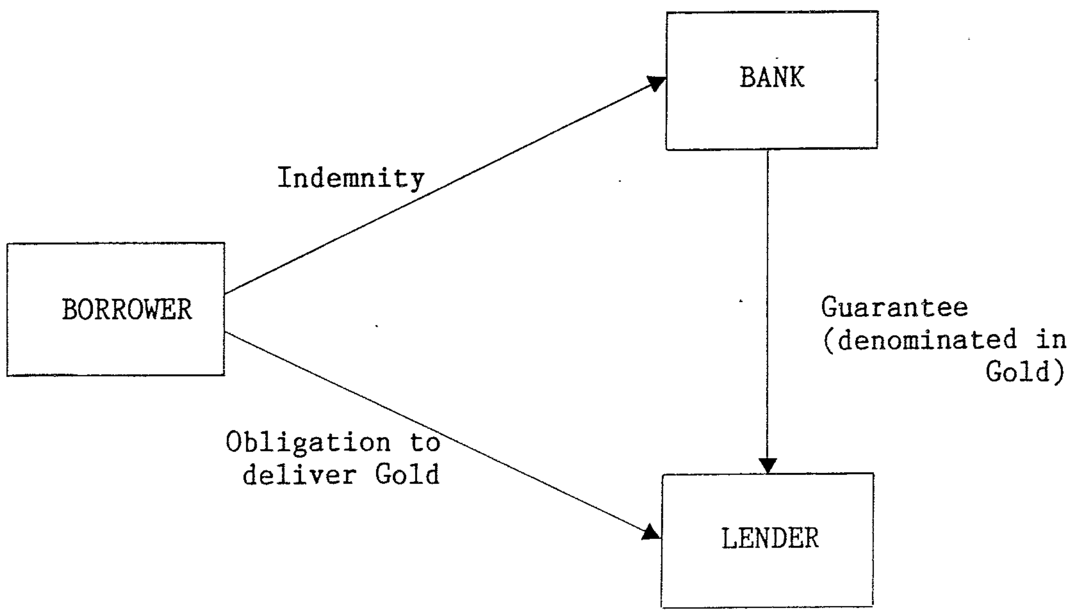

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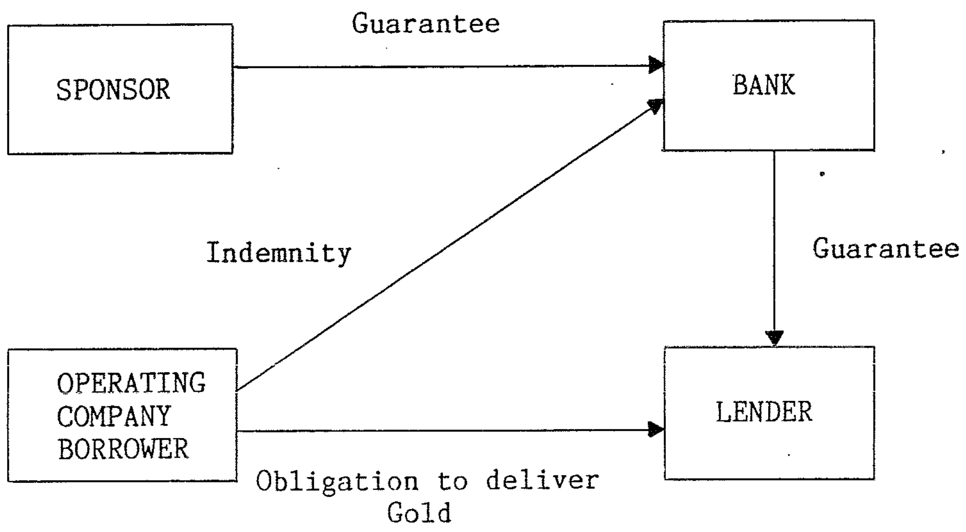
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SPONSOR
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Indemnity
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OPERATING COMPANY BORROWER
LENDER
Obligation to deliver Gold

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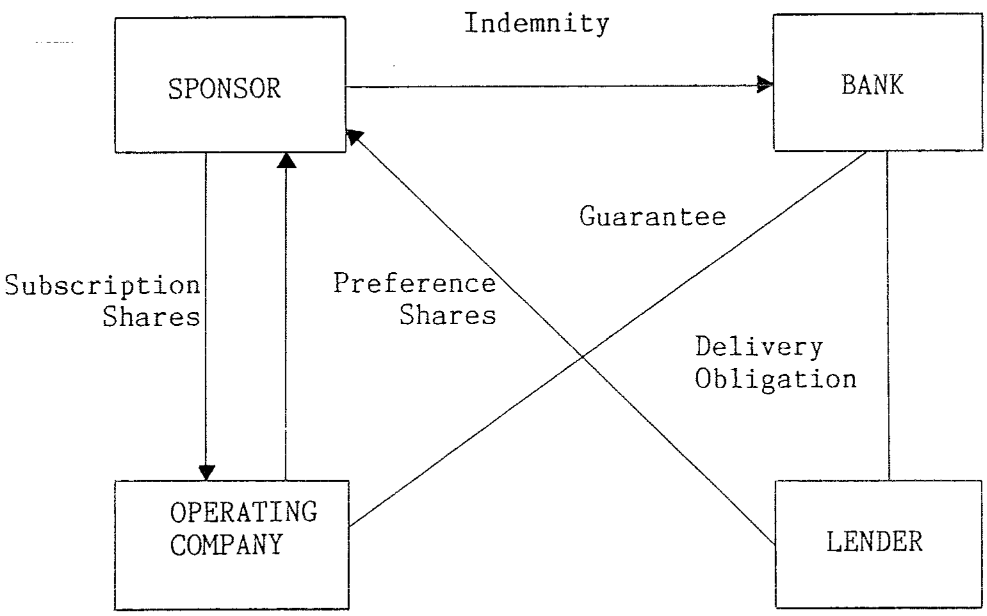
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