Banking and Financial Services Law Association 2013 Conference

Unlocking the Tripartite

Chair: Karla Fraser, Allens
Panel: Grant Ahearn, Norton Rose Fulbright
Geoff Busch, Russell McVeagh
James Darcy, Allens
Hugh Kettle, Bell Gully
David Mason, Ashurst

› Overview of session

Å The Panel

Å Tripartite Agreements ï an overview of typical provisions

Å Perspectives ï contractor, sponsor, financier and Government

Å Q&A with Panel Members

Å Questions from the floor

The Panel

- Grant Ahearn, Norton Rose Fulbright
- Geoff Busch, Russell McVeagh
- James Darcy, Allens
- Hugh Kettle, Bell Gully
- David Mason, Ashurst

› Tripartite Agreements ï an overview

Å When is a tripartite required?

- a Key Contract prohibits or restricts the Borrower from giving security over, or assigning its rights under, the Key Contract
- the Key Contract is essential to the continued operation of the Borrowerœ business / integral to cashflow
- the Key Contract gives Contractor the right to terminate the Key Contract if:
  - the Borrower breaches the Key Contract;
  - security is enforced;
  - an administrator, receiver etc. is appointed to the Borrower.
- other restrictions under the Key Contract that might hinder enforcement of security

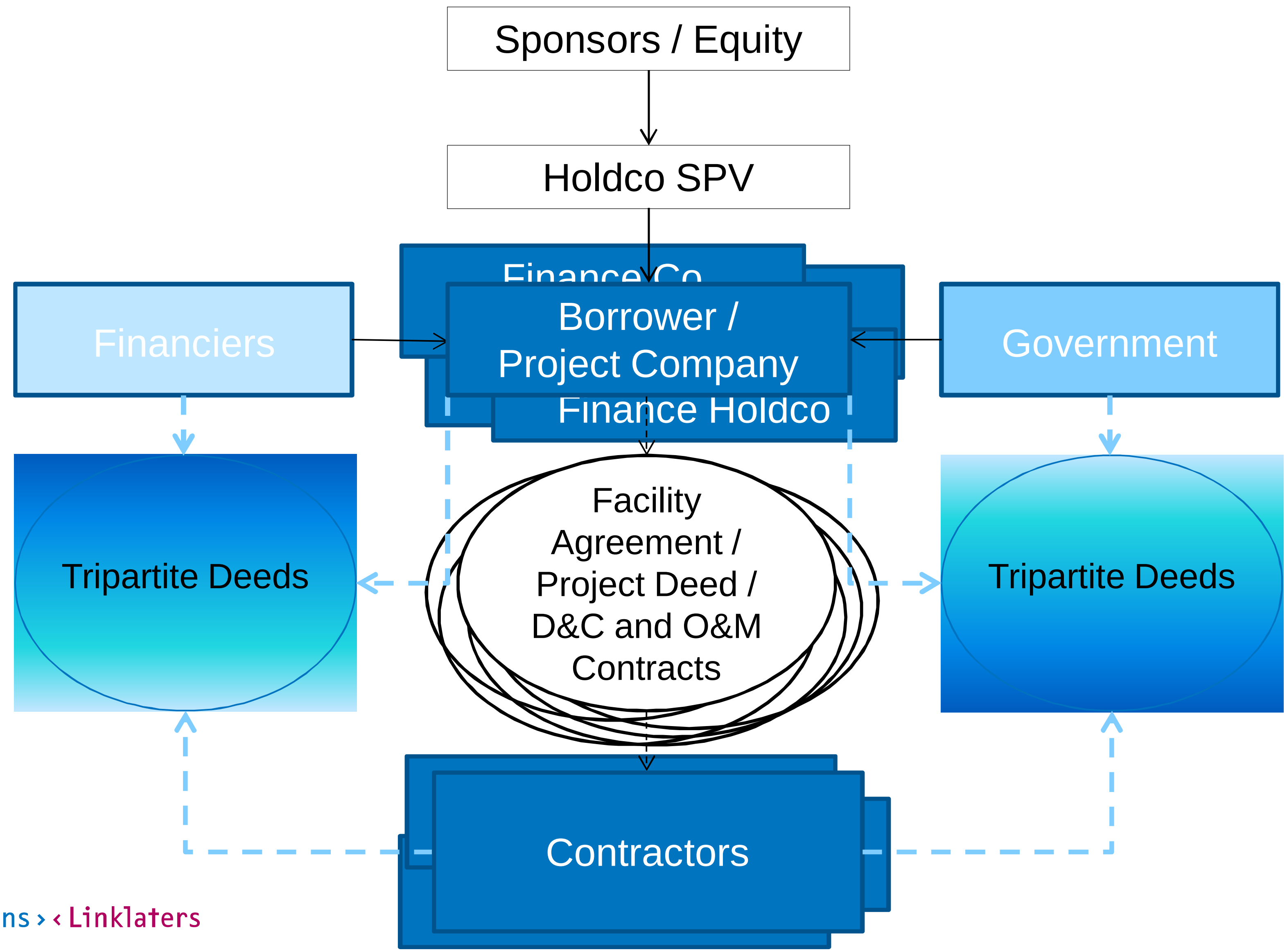
› Tripartite Agreements ï an overview

Å Why is a tripartite required?

Å Creates a direct contractual relationship between Financier(s) (or Government) and Key Contractor, and to ensure that:

- Key Contractor acknowledges and consents to security interest over Key Contract
- Financier / Government receives default notices and able to remedy default on behalf of Borrower
- rights of Key Contractor to terminate, suspend, vary or amend Key Contract are limited
- Financier (or Government) is able to enforce security over entire project, including assigning benefit of Key Contract

Project finance / PPPs



› Typical provisions in a tripartite agreement

Å Consent to Security

- Contractor consents to the creation of security and security over Key Contract
- Contractor acknowledges creation / exercise of security will not default Key Contract or entitle Contractor to terminate Key Contract
- Contractor acknowledges Enforcing Party may, on enforcement, exercise rights and perform obligations of Borrower under Key Contract

Typical provisions in a tripartite agreement

- Financier enforcement rights
  - right for financier or receiver etc under security (“Enforcing Party”) to step in to the Borrower’s position under Key Contract
  - confirmation of no personal liability for Enforcing Party [*]

    “Without limiting the liability of the Borrower (which continues to be responsible for performance of its obligations under Key Contract), no Enforcing Party will be liable, or taken to have assumed liability, for any liability of the Borrower under Key Contract by reason only of the enforcement of the Security or the exercise in accordance with the Security of any of the Borrower's rights, discretions, powers or remedies under Key Contract.”

› Typical provisions in a tripartite agreement

Å Contractor acknowledgment of restrictions on Borrower

- Contractor acknowledges that Borrower may not:
  - amend, terminate etc. Key Contract **[*]**
  - (developments) agree to variations which increase costs, change specs in ómaterialô way, delay practical completion **[*]**
  - grant any waiver or release under Key Contract
  - enter into side agreements in relation to Key Contract

  without the prior consent of Financier

Typical provisions in a tripartite agreement

Å Default and cure rights

- Contractor agrees to:
  - notify Financier of default by Borrower under Key Contract or other termination event
  - give Financier an opportunity to cure the default **[*]**

- no template for cure provisions
- appropriate cure depends on transaction / circumstances - can default be cured? deemed cure provisions?

› Typical provisions in a tripartite agreement

- Limited termination rights
- Contractor only entitled to terminate, suspend etc Key Contract if:
  - Contractor has given notice to Financier setting out full details of default (and appropriate remedy?) **[*]**
  - if default capable of remedy, default not remedied within specified period (after notice given to Financier) **[*]**
  - if default not capable of remedy, Enforcing Party has not:
    - ‘stepped-in’ to perform Borrower’s (future) obligations under Key Contract within specified period (or, having commenced to do so, fails to continue to do so) or **[*]**
    - paid reasonable compensation **[*]**
  - Lender notifies Contractor that it elects not to remedy default

Typical provisions in a tripartite agreement

- Assignability of Key Contract
  - Financier may assign rights of Borrower under Key Contract to purchaser
  - Contractor's right to assign or transfer/novate its obligations
  - Change in control of the Borrower
  - Pre-emptive rights clauses

› Typical provisions in a tripartite agreement

Å Payment directions

- Prior to enforcement, Contractor pays Borrower amounts due under Contract or direct payment to Project Accounts
- Contractor's right to payment for services in normal course of Key Contract not limited
- Bonus payments ï special treatment?

› Typical provisions in a tripartite agreement

Å Representations and warranties

- basic legal representations and warranties (eg legal capacity, binding contract) usually available
- potentially, some factual representations - eg no default under Key Contract (by Contractor or Borrower)
- Borrowerôs representations and warranties usually in loan documents
- on request, Financier usually able to give legal capacity representations. Limitation of liability language increasingly common

› Typical provisions in a tripartite agreement

Å Contractor undertakings

- to perform obligations under Key Contract.
- to not amend or vary Key Contract without Financierôs consent
- to not assign rights under Key Contract without Financierôs consent
- to give Financier copies of default notices and other material notices issued by Contractor to Borrower
- bespoke undertakings for transaction

Typical provisions in a tripartite agreement

- Confidentiality
  - Contractor consent to Financier disclosing information about Key Contract to Enforcing Party and potential buyers

› Panel perspectives

- Contractor perspective ï
  - Grant Ahearn, Norton Rose Fulbright
- Project Co / Sponsor perspective ï
  - David Mason, Ashurst
  - Geoff Busch, Russell McVeagh
- Financier perspective ï
  - James Darcy, Allens
  - Geoff Busch, Russell McVeagh
- Government perspective ï
  - Hugh Kettle, Bell Gully

›Panel Q&A

Å **Cure rights / step-in rights**

- When should cure rights be triggered?
  - initial default?
  - after equity cure period?
- How long should Financier have to cure a default?
  - default:
    - » non-payment
    - » insolvency
    - » breach of material/other undertaking (access, insurance)
  - 'cure plans' / 'diligently pursuing remedyó

Panel Q&A

Å **Cure rights / step-in rights (cont.)**

- Suspension versus termination rights
  - suspension for non-payment
  - suspension for other defaults
- What does a successful 'cure' look like?
  - remedy
  - payment of compensation
  - receivership or other óstep-inô
- What does 'step in' look like?

› Panel Q&A

Å **Cure rights / step-in rights (cont.)**

- Assumption of liability
  - Should Financier assume liability during the step-in period?
  - Should Financier be required to pay unpaid sums on step-in?
- Should Financier have a unfettered right to assign or novate finance and project documents?
- What does 'step out' look like?
  - Removal of receiver / notice of step-out
  - Novation of contracts to 'reputable counterparty'

›Panel Q&A

Å **Other issues**

- Is it reasonable (for Financiers or Govt) to require a counterparty to give 'no breach' and similar warranties?
- What constraint on óamendingô project documents is acceptable? òMaterial Adverse Effectô or other cross reference to finance documents?
- What degree of control should Financier (or Govt) have over insurance proceeds?
- BCIPA/SOPA ï what should people understand about rights under Security of Payment legislation?

Panel Q&A

Å **Project failure**

- How relevant are negotiated cure and step-in right regimes, once a project starts to fail or is in financial distress?

Questions?

Allens > < Linklaters