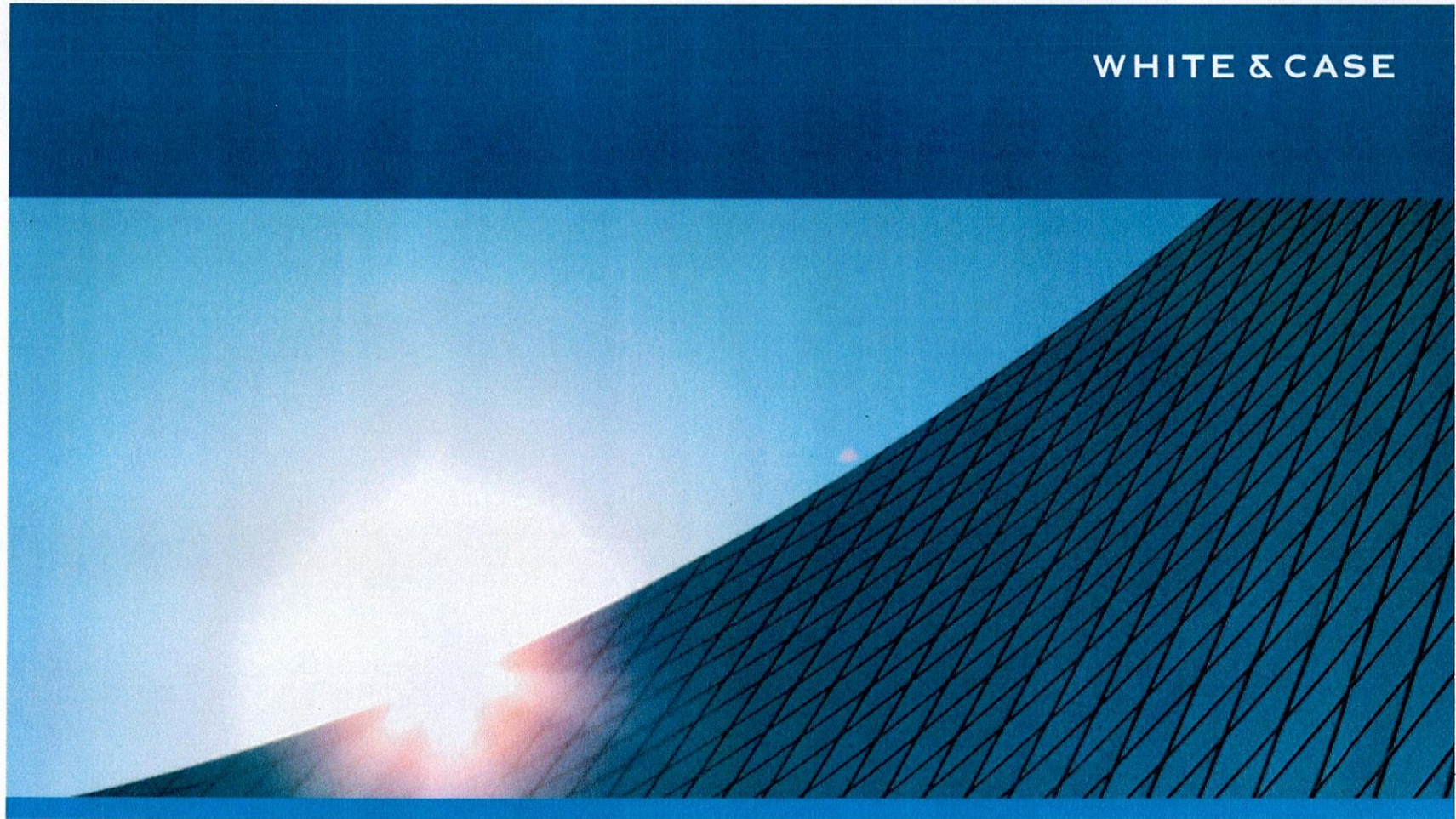


WHITE & CASE



Finance Documents in Project Finance

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The Core Finance Documents in a Project Finance

- **Loan Agreement**
- **Common Terms Agreement (CTA)**
- **Intercreditor Agreement (ICA)**
- **Accounts Agreement**
- **Security Trust Deed**
- **Sponsor Guarantee**
- **Security Documents**

Core Finance Terms

Standard Form Loan Agreement – Back to Basics!

- Amount of Loan
- Interest
- Bank Charges
- Repayment / Prepayment
- Illegality
- Conditions Precedent to Funding
- Increased Costs / Tax Gross Up
- Market Disruption
- Representations and Warranties, Covenants and Events of Default
- Indemnities
- Loan Transfers
- Agency
- Lender Sharing
- Governing Law/Dispute Resolution
- Intercreditor Decision-Making
- Account Controls
- Security Trust Arrangements
- Parent Guarantee

One Size Fits All!

Complex Nature of Project Finance

- **Same Core Finance Terms**
- **Complexity**
 - Multiple Risks
 - Big Ticket – Capital Intensive
 - Sources of Debt - Multiple Lending Groups
- **Usual Suspects**
 - Regional and national bank markets
 - International syndicated bank debt
 - Export Credit Agencies
 - Developmental Financial Institutions
 - Bond market
- **Different Motivations?**
- **Genesis**
 - Multiple stand-alone financings

Harmonised / Integrated Multi-Sourced Financings

- **Common Terms Agreement**
 - Conditions Precedent to Funding
 - Increased Costs / Tax Gross Up
 - Market Disruption
 - Illegality
 - Representations and Warranties, Covenants and Events of Default
 - Indemnities
 - Loan Transfers
 - Agency
- **Individual Loan Agreements**
 - Amount of Loan
 - Interest
 - Bank Charges
 - Repayment/Prepayment
 - Agency
- **Intercreditor Agreement**
 - Lender Sharing
 - Intercreditor Issues
- **Accounts Agreement**
 - Accounts Control
- **Security Trust Deed**
 - Security Trust Arrangements
- **Sponsor Guarantee**

One Size Fits
All!

Form Loan Agreements

- **Syndicated Bank Market - International /domestic**
- **Export Credit Agencies – SACE, Coface, JBIC, Hermes, USExim, OND, etc.**
 - Provision of goods and services sourced from home jurisdiction
 - Specific Conditions
 - Insurance / Guarantee – tied / untied
 - Political / Commercial Cover
- **Developmental Financial Institutions – IFC, EAIF, AFC, EBRD, ADB, AFDB, BSTDB, etc.**
 - Mission Statement – facilitate economic development in Emerging Markets
 - Specific Conditions / Exemptions
 - Environment / Corporate Governance / Transparency
 - A / B / C Loan Structure
 - Preferred Creditor Status
- **Project Bonds**
 - Intercreditor / Decisions making
 - Relaxation of controls
 - Disclosure / Confidentiality
 - Negative Carry

Standard Loan Terms (1)

- **Conditions Precedent (CPs)**
 - Commitment to fund
 - **MAC/Market Flex**
 - Ongoing CP Certifications – Drawstops
 - **Representations and Warranties**
 - **Covenants**
 - **EODs**
 - CPs for Individual Facilities
 - Debt: Equity Ratio – cost savings / true up
 - Sweet & Sour Ratio

Standard Loan Terms (2)

- **Interest**

- Interest During Construction (IDC)
- Floating Rate / Fixed Rate
- Hedging interest rates

- **Repayment/Prepayment**

- Amortisation post completion and tied to cashflow
- Cash Sweeps
- Deferral of Principal
- Lengthy tenors
- Pro rata treatment for prepayment

Standard Loan Terms (3)

- **Representations and Warranties – checklist of risks**
 - Statement of Fact – verification
 - Legal Representations and Warranties
 - Commercial Representations and Warranties
 - Remedies: Drawstop / Enforcement
 - Repetition of Representations and Warranties – approach

Standard Loan Terms (4)

- **Covenants**

- Lender Controls
- Three broad categories
 - **Protection of Assets**
 - **Information Covenants**
 - **Financial Covenants**
- Loan Life Cover Ratio (LLCR)
- Debt Service Cover Ratio (DSCR)

Standard Loan Terms (5)

Events of Default

- **Health Warning**

- Three broad categories

- Non Payment

- Non Compliance with Reps & Warranties and Covenants

- Early Warning/Anticipatory Events

- Cross default

- Breach of Financial Ratios

- Insolvency and Creditor Executions

- MAC – “any change occurs, financial or otherwise, which affects the Borrower in a manner which is materially adverse”

Standard Loan Terms (6)

- **Additional Events of Default**

- Expropriation
- Moratorium
- Change of Control
- Failure to Complete

- **Qualifications**

- Cure Periods
- Material Qualifications
- Thresholds
- Reasonableness

Standard Loan Terms (7)

- **Tax Gross-Up**

- Withholdings/Deductions at source
- Gross up
- Double taxation treaties
- Tax relief certificates

- **Increased Costs**

- Bank's Return: Cost of Funds + Margin + Mandatory Costs
- Protection against cost of future regulatory changes

- **Basel II implications / Treatment of Basel III**

- Minimum capital requirements linked to actual economic risk
- Change in borrower's credit quality
- Changes in bank's method of assessment

Standard Loan Terms (8)

- **Market Disruption**
 - Two main scenarios
 - **Screen rate not published – a likely scenario!!**
 - **Cost of funds in excess of LIBOR**
 - Mitigation
- **Illegality of Loans**
 - Buy down of illegal debt
 - Exception to rule on pro rata prepayment
 - Mitigation
- **Transfer of Loans**
 - Syndication
 - Borrower's consent?
 - No Additional Increased Costs arising from Loan Transfer

Intercreditor Agreement (1)

- **Regulation of Decision Making**
- **Categories of Decisions**
 - Approvals of certain controlled actions (Project Expansion, Additional Debt)
 - Acceleration and Enforcement
 - Amendment and/or Waivers
- **Do the Maths!**
- **Quick and Efficient Decisions – it's a democracy**
 - Bilateral Loan Agreement
 - Syndicated Loan Facility
 - Majority (50%/66²/3%)/Super Majority (75%)

Intercreditor Agreement (2)

- **Multi-Sourced Financings – what democracy?**
 - Veto for Minority Lender Group for certain decisions
 - Unilateral Right of Enforcement
 - **Step-Down Enforcement Regime**

0 – 30 days – 75%

31 – 60 days – 50%

61 – 90 days – 30%

91+ days – any one Facility

Intercreditor Agreement (3)

- **Decisions within Lender Groups**
 - Commercial Bank Syndicates
 - ECAs
 - Developmental Financial Institutions
- **Lender sharing – Preferred Creditor Status**
- **Intercreditor Arrangements in separate Stand-Alone Document**
 - Optical
 - Borrower must retain involvement in negotiation of terms
 - No amendment of Intercreditor Agreement without consent of Borrower

Accounts Agreement

- **Monitor and control of Project's Revenues**
- **Loan Covenants impose contractual controls; accounts regime seeking to impose physical controls:**
 - Pooling of Revenues into Restricted Secured Accounts
- **Funds in Project Account applied in order of priority to ensure core costs are met – the waterfall:**
 - Taxes
 - CAPEX
 - OPEX
 - Debt Service
 - Distributions

Accounts Agreement (2)

- **Distribution Controls**
 - Post Completion
 - No Default
 - Financial Ratio compliance
 - Repayment Date
- **Debt Service Reserve Account**
- **Debt Service Accrual Account**
- **Restricting Accounts following Event of Default**
- **Other Offshore Accounts**
- **Investing Account Deposits**

Security Trust Deed

- **Establishes trust regime for the Security Documents**

- **Advantages**
 - Trustee holds Security Interests on Trust for all Lenders
 - Trust Structure facilitates Loan Transfers
 - Bankruptcy remote

- **Disadvantages**
 - Trust arrangements invalid in certain civil law jurisdictions
 - Alternatives
 - Conduit Financing
 - Parallel Debt

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