

WHITE & CASE



Bankability Issues – Core Commercial Contracts

ESQ LEGAL – POWER / PROJECT FINANCE WORKSHOP

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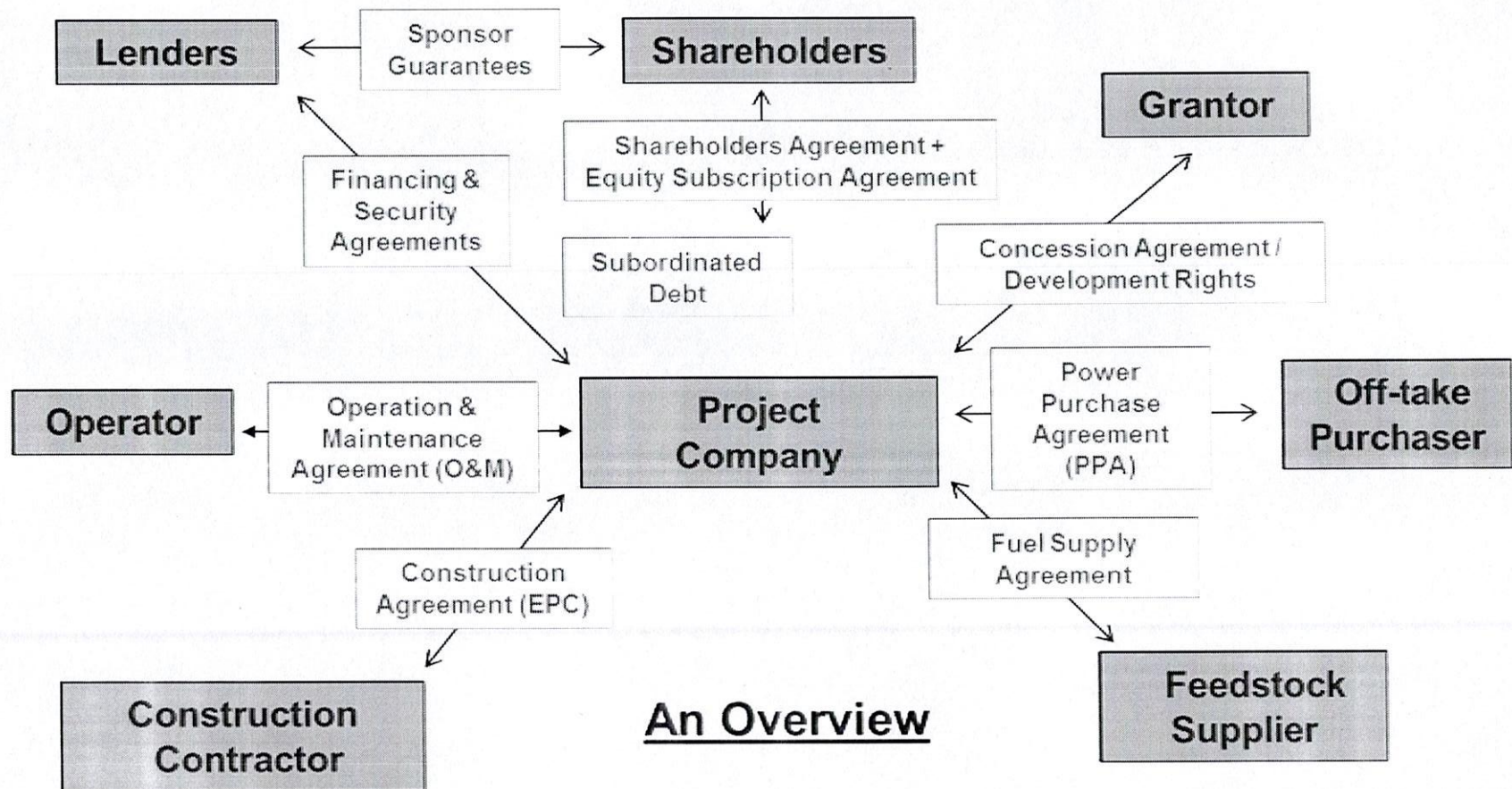
Kirsti Massie



Bankability - Introduction

- **What is a Bankability Review?**
- **Understanding the complete Contractual Framework**
 - “Back to Back” Concept
- **Identifying, allocating and mitigating/managing risk**
- **Lenders will not take**
 - Unlimited Liability
 - Unquantified Risk

Project Finance: The Contractual Framework



Project Issues: Licences/Consents

- **What Consents/Licences are needed?**
 - Local Counsel input needed

- **Responsibility for obtaining and maintaining Consents**
 - Concession arrangements?

- **Timing**
 - Conditions Precedent/Conditions Subsequent

- **Ability to transfer or assign Consents**

Project Issues: EPC Arrangements (1)

- **Full Turnkey/Wrapped EPC/Individual Contracts**
 - Interface Issues
- **Identity of Contractor**
- **Pricing Structures**
 - Milestone Payments
 - Spare Parts
 - Cost Overruns/Construction Budget Controls/Reporting Requirements
 - Sponsor Support?
- **Variations**
 - Change in Law/Force Majeure
 - Delays
 - Requested by Offtaker?
 - Lender Controls/Reserved Discretions?

Project Issues: EPC Arrangements (2)

- **Timetable and Delays**

- Realistic Timetable
- Pricing Implications
- Tie-in with Milestones

- **Delay LDs**

- Quantum
- Caps on Liability – are they sufficient?
- Force Majeure

- **Security to be provided by EPC Contractor**

- **Completion Guarantee/Longstop Date/Other Sponsor Support?**

Project Issues: Offtake Arrangements (1)

- **Key Revenue Stream**

- **Creditworthiness of the Offtaker**
 - Payment security?

- **Sale and Purchase of Energy and Capacity?**
 - Tariff Structure
 - Ancillary Services?
 - Green Certificates?

Project Issues: Offtake Arrangements (2)

- **Commercial Operation Date (COD)**
 - How determined?
 - Timing

- **Liquidated Damages Regime**

- **Force Majeure**

- **Termination Rights**

Project Issues: Fuel Supply Agreement

- **Adequate to meet PPA obligations?**

- **Term**

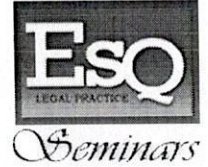
- **Take or Pay Obligations?**

- **Failure to Deliver**
 - Liquidated Damages
 - Alternative supply of fuel available?

- **Force Majeure**

- **Termination/Step In Rights**

Project Issues: Operation and Maintenance Agreement (O&M) (1)



- **Key areas of Operation Risk**
 - Availability
 - Efficiency
 - Dispatch Schedules under PPA
 - Long Term Expense
 - Operator Experience

- **Lenders will not take Operation Risk**

Project Issues: O&M (2)

- **Term**
- **Fixed Cost?**
- **Guaranteed Performance Levels**
- **Fees – Bonus/Penalty Structure**
- **Force Majeure**
- **Termination**

Project Issues: Final Thoughts

- **Contractual Matrix – “Back to Back” concept**
- **Identification of Risk**
- **Allocation of Risk – Party best able to manage risk?**
- **Certainty v Flexibility**

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