

# European leveraged finance: funding structures transformed

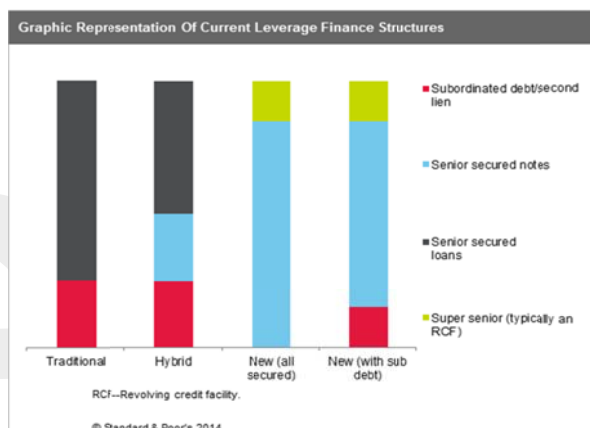
The 2007-8 financial crisis triggered a transformation of European leveraged finance funding structures. Senior secured high yield bonds (seldom seen pre-crisis<sup>1</sup>) now dominate the lending landscape. As a result, new intercreditor relationships have been forged as between bondholders (on the one hand) and loan providers (on the other hand) but remain untested.

This briefing looks at the legal issues behind the headlines. It examines the new types of funding structure, highlights some potential gaps and glitches, and considers where creditor power is likely to lie within those structures.

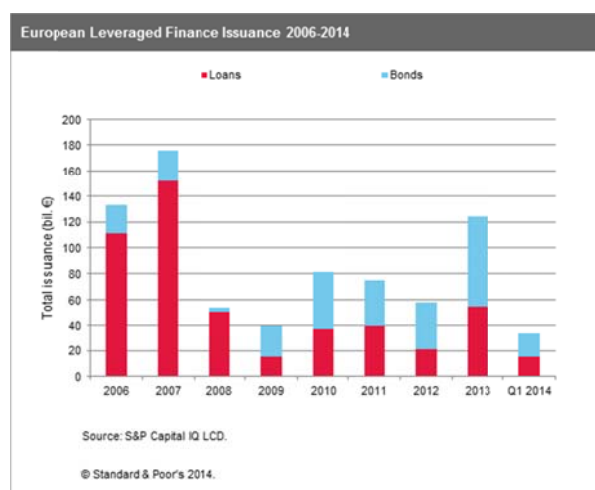
**Funding structures:** In its latest quarterly leveraged finance report (June 2014), Standard & Poor's (S&P) divides current financing structures into three categories as follows:

- **Traditional:** Senior secured loans ranking ahead of subordinated debt (whether mezzanine loans or unsecured<sup>2</sup> high yield bonds);
- **New:** Super senior revolving facilities ranking ahead of senior secured and/or unsecured high yield bonds; and
- **Hybrid:** Pari passu senior secured loans and senior secured high yield bonds both ranking ahead of subordinated debt.

S&P illustrates this categorisation in the graphic below:



Given that high yield debt has become the dominant funding component on European transactions (see the graphic below) this paper focuses on S&P's "New" and "Hybrid" categories and the intercreditor relationships inherent in these new funding structures.



## Overview

We start by describing the different funding instruments and our own categorisation of the structures now deployed on European leveraged financing transactions. We then:

- examine the relative rights of the creditor classes in those structures;
- consider the potentially anomalous position of super senior debt in relation to unsecured recoveries;
- identify which creditor classes will call the enforcement shots (and therefore control any restructuring process down the track);
- review the devices deployed to sidestep market standard senior bondholder intercreditor protections; and
- highlight some common intercreditor issues.

## Funding components

**Debt Instruments:** A number of different debt instruments may be used on a European leveraged finance transaction which features the issue of high yield bonds.

**Super Senior Revolvers:** Super senior revolving credit facilities (RCFs) provide working capital facilities to the borrower group. In the aftermath of the 2008 financial crisis, bank lenders largely withdrew (or at best severely curtailed) provision of term loans to fund or refinance leveraged buyouts. The high yield bond market stepped in to fill the vacuum. But high yield bonds cannot provide the short-term fluctuating finance which companies require to meet their day-to-day working capital requirements<sup>3</sup>. Banks will do so, but only on the basis they provide low risk funding. This is achieved in two ways. Firstly, banks lend a relatively modest amount under the super senior RCF – typically up to a maximum of 1 x EBITDA (earnings before interest, taxes, depreciation and amortisation)<sup>4</sup>. Secondly, they lend on a "super senior" or "first out" basis. We explore the nature of their super senior rights in more detail below. An overview of the typical features of super senior RCFs is given in Appendix 1.

**Senior Secured Notes:** Senior secured high yield notes (or bonds) now provide the majority of funding to the European leveraged finance market. Most European high yield bonds issued before 2008 were second priority subordinated bonds ranking behind first priority senior secured revolving and term loans (provided by banks, CLOs and/or credit funds). High yield bonds issued after 2008 are typically senior secured, occupying the same place in the capital structure as senior secured term loans occupied before 2008. The security and guarantees supporting the bonds will vary from deal to deal and the jurisdictions involved. But noteholders will expect to receive guarantees from the main holding companies and from operating companies representing (e.g.) 70 or 80 per cent of group EBITDA and gross assets. They will also typically receive security over group company shares, bank accounts and receivables and full asset security from companies incorporated in those jurisdictions (such as the UK) where such security is easy and inexpensive to grant.

**Senior Secured Term Loans:** If term loans feature in the financing structure they will have a typical maturity of six or seven years<sup>5</sup>. Term loans may be split between an amortising six-year A tranche and a bullet repayment seven-year B tranche. As markets recover and CLOs/credit funds provide additional demand and liquidity, a greater proportion of term loans are provided on a "tranche B only" basis (such

that all the term loans financing a particular deal are bullet repayment loans<sup>6</sup>). Most such loans will be documented under English law and (at least until very recently) benefit from maintenance financial covenants<sup>7</sup>. The security package will be as described for Senior Secured Notes above.

**Senior Notes:** Senior Notes (SNs) are high yield bonds with limited security (typically consisting solely of security over holding company shares and holding company intra-group receivables). They will rank second (third if there is a super senior RCF) behind any Senior Secured Notes and/or Senior Secured Term Loans. Any guarantees they receive from operating companies will be subordinated to the rights of the holders of Senior Secured Notes and Senior Secured Term Loans.

This means they have the same features and rights as high yield bonds used to have on the majority of pre-2008 European funding structures. The issuer of the Senior Notes may well be a holding company which sits above the companies which issue/borrow the Senior Secured Notes, Senior Secured Term Loans and any super senior debt. If so, Senior Noteholders will be structurally as well as contractually subordinated to the senior secured debt.

As a result, for all practical recovery purposes Senior Notes are not just second or third ranking but also "subordinated" to the rights and recoveries of the prior ranking senior creditors<sup>8</sup>. Labelling such notes as "senior" notes is perhaps a bit misleading. Labelling them as "senior subordinated"<sup>9</sup> is a more accurate description of their rights.

**Hedging Debt:** Borrowers may enter into interest rate swaps to convert all or part of their floating rate debt into fixed rate debt. They may also require currency hedging, whether for balance sheet or trading purposes. Hedge counterparties providing swaps to a leveraged group will expect their credit exposure under the swaps to be secured by first ranking security. This may be super senior alongside any super senior revolving facility or pari passu with any other senior secured debt. The total quantum of super senior status for hedging may be limited by reference to nominal amounts of hedging or close out amounts of hedging. The position varies from transaction to transaction. Nonetheless, hedge counterparties may be or become significant creditors of the business and their rights will be a specific feature of the intercreditor arrangements regulating the particular financing. (In the descriptions which follow, we do not separately address the position of the hedging debt.) The hedging debt will sit alongside

either the super senior revolving facility or the bank term facilities according to the particular deal structure.

**Second Lien:** Second lien loans (or notes) are second secured instruments which rank after first lien debt (RCFs, Senior Secured Term Loans and Senior Secured Bonds) but ahead of Senior Notes. They have been absent from the market since the credit crisis hit in 2008. That is, until the last few months. We reflect on the advent of a second generation of second lien loans elsewhere.<sup>10</sup>

### Deal structures

**Six structures:** We have identified six template loan and bond funding structures as being currently deployed in European markets. These six templates and their essential features are summarised in Part 1 of Appendix 2. A summary of a typical pre-financial crisis funding structure appears in Part 2 of Appendix 2.

**Simplified view – two structures:** For the purposes of this paper we can, however, simplify the picture into two basic funding templates.

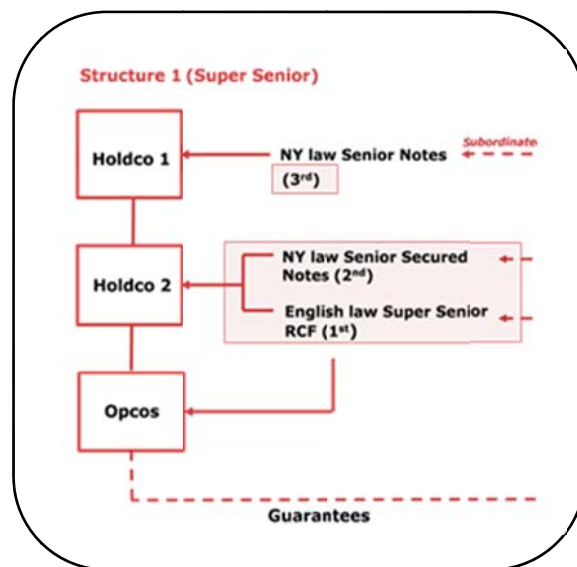
Virtually all structures are a combination or variant of these two basic structures (though this may change if second lien loans/notes enjoy a renaissance).

**Structure 1 (Super Senior):** This structure involves the following funding components:

- 1st: a super senior revolving credit facility (usually governed by English law);
- 2nd: senior secured notes (usually governed by New York law); and
- 3rd: senior notes (also usually governed by New York law).

The ranking of the above instruments is typically regulated by an English law governed intercreditor agreement.

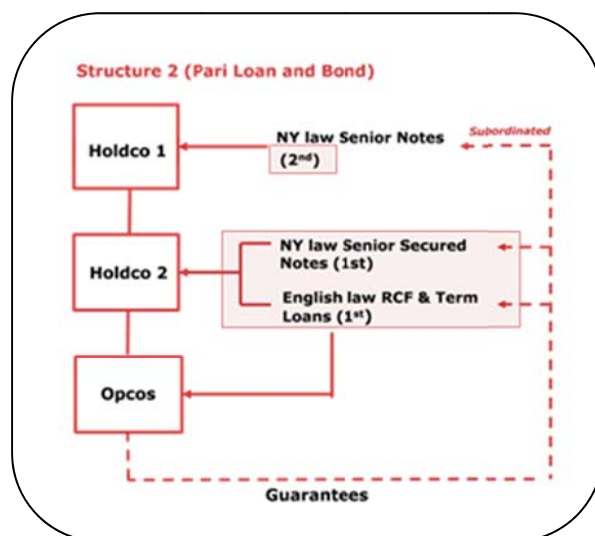
This funding structure is shown in the Structure 1 diagram below. The shaded areas on the diagram highlight the features which differ from Structure 2 (which then follows).



**Structure 2 (Pari Loan and Bond):** The funding components deployed on Structure 2 transactions are as follows:

- 1st: revolving credit and term loan facilities (usually English law), ranking pari passu with:
- 1st: senior secured notes (usually New York law); and
- 2nd: senior notes (usually New York law).

This funding structure is shown in the Structure 2 diagram below. The shaded areas show the differences from Structure 1.



### Relative creditor rights

**Relative rights:** Having identified the different debt instruments and summarised the main financing

structures, we now focus on the relative rights of the creditor classes within those funding structures.

**Old relationships:** The rights of Senior Noteholder debt relative to the other elements of the capital structure largely reflects the pre-2008 position. The financial meltdown in 2008 generated many restructurings which tested the relative rights of Senior Notes within those historic funding structures. We therefore have practical experience and a track record of how Senior Noteholders with these rights typically fare in European restructurings.

**New relationships:** We cannot say the same for Structure 1 relationships as between super senior debt providers and senior secured debt providers. We are similarly in uncharted waters in relation to how restructurings will unfold in Structure 2 transactions involving *pari passu* senior secured term loans (on the one hand) and senior secured notes (on the other hand). Provisions routinely included in intercreditor agreements in respect of the relative rights of these creditor classes remain untested.

**Evaluating creditor rights:** When we evaluate individual creditor rights under these "new/hybrid" instruments and their respective place in the "new/hybrid" structures, we do so against the backdrop of our post-2008 European restructuring experience. This experience teaches us three important lessons:

**Restructuring lesson one:** Lesson one is that the delivery mechanism of choice when restructuring European leveraged deals is some form of administration enforcement or security enforcement to eliminate out of the money creditors (which typically include Senior Noteholders)<sup>11</sup>.

**Restructuring lesson two:** Lesson two teaches us that the English law scheme of arrangement provides a vital restructuring solution which can force through a restructuring on a 75 per cent majority vote of the affected creditor classes<sup>12</sup>. What is not always fully appreciated, though, is that the overwhelming majority of cases the scheme is used to bind in 100 per cent of the senior secured fulcrum creditors and is **not** the mechanic for compromising or eliminating the out of the money creditors.

**Restructuring lesson three:** Lesson three is that the most powerful tool in the European restructuring toolkit is the security agent's authority (conferred by the English law intercreditor agreement) to release the security and guarantees enjoyed by all creditors party to that intercreditor agreement. It is this authority, more than any other device, which delivers the

elimination (or compromise) of out of the money creditors on European restructurings. This authority, and the terms upon which it can be exercised, invariably makes the intercreditor agreement the most important document in the entire financing structure in a distressed scenario.

**Key creditor issues:** Against this backdrop let's look at some important creditor issues:

- first, we reflect upon the often misunderstood and potentially anomalous position of super senior debt in relation to *unsecured* (versus *secured*) recoveries;
- second, we evaluate which creditor class(es) can dictate the security enforcement strategy (and will therefore likely control the restructuring process);
- third, we review whether the conditions to the exercise of the security agent's credit support release authority (see "Restructuring lesson three" above) adequately protect senior noteholders; and
- lastly, we identify certain potential anomalies in intercreditor agreements in common circulation.

## Not so super senior

**How super is your senior?** We have seen that in structure 1 financings the revolving credit facility and certain hedging debt will have super senior status. We will refer to this revolving and hedging debt as "Super Senior Debt". But what does this super senior status actually mean in practice?

You might expect Super Senior Debt to rank ahead of all other debt instruments and for all purposes. You might expect the intercreditor agreement to provide that all recoveries from members of the borrower group (whether *secured* or *unsecured* and whether primary claims or guarantee claims) should be put through the intercreditor waterfall and applied first<sup>13</sup> in paying down all Super Senior Debt before then being applied in meeting the claims of the holders of senior secured notes and other senior creditors according to the particular waterfall and the particular funding structure.

In fact, this is *not* what you typically find in European intercreditor agreements<sup>14</sup>. Instead the intercreditor agreement typically provides as follows:

- the Super Senior Debt is super senior (and first ranking) only in relation to *secured* recoveries (i.e. proceeds of enforcement of transaction security);

- the intercreditor waterfall only regulates the application of *secured* recoveries and (sometimes) the proceeds from distressed disposals;
- there is no waterfall regulating the application of *unsecured* recoveries;
- creditors must turn over *secured* recoveries to ensure they are correctly applied as per the intercreditor waterfall; and
- there is no turnover obligation in respect of *unsecured* recoveries.

Sample extracts from a typical super senior intercreditor agreement and a more detailed analysis of this feature appear in Appendix 3.

**Quasi super senior:** The net effect of this is that the Super Senior Debt is not super senior for all purposes. It is super senior only in respect of *secured* recoveries. Does this matter? Well, if post-event of default recovery action (or a distressed restructuring) is implemented through security enforcement, then the absence of super senior status for unsecured recoveries will have no impact at all. Super senior will mean super senior.

If, however, proceeds fall to be distributed otherwise than through a security enforcement (e.g. due to an uncontrolled liquidation of different members of the group) then:

- revolving facility lenders and hedging providers will rank *pari passu* with senior secured noteholders, senior secured lenders and other creditors of the relevant group company in liquidation;
- creditors with primary/direct claims against particular group companies will, in most continental European jurisdictions, enjoy higher recoveries (via their direct claims) than those creditors who only have secondary/guarantee claims; and
- revolving lenders lending direct to operating companies may therefore enjoy higher recoveries than hedging providers who have swap contracts with holding companies (supported only by "weak" guarantee claims against operating companies).

**Ranking puzzle:** This ranking construct as between super senior debt on the one hand and the senior secured claims on the other is curious. Why draw the distinction between secured and unsecured recoveries at all? It is hard to see the logic. Why not ensure the super senior debt is truly super senior and not

inconsistently super senior? And if we are to make secured recoveries super senior but have unsecured recoveries rank *pari passu*, it is odd that unsecured recoveries do not have their own waterfall (supported by turnover obligations) to ensure that unsecured recoveries do indeed rank *pari passu*. As already noted, this lack of an unsecured waterfall will have zero impact in the most likely recovery scenario (i.e. one that involves enforcing security over holding company shares)<sup>15</sup>. But the ranking of unsecured claims will have relevance in a liquidation scenario or if security proves voidable or unenforceable for some reason. Why should the parties choose to leave their relative recovery levels to the uncertainty of where the super senior lenders lend in the structure, the vagaries of bankruptcy regimes in different jurisdictions and the relative strength or weakness of the particular guarantees granted? Shouldn't we look for consistency from deal to deal and therefore include an unsecured recoveries waterfall in all our intercreditor agreements together with full turnover obligations?

## Calling the enforcement shots

**Controlling the enforcement process:** Security enforcement (or the threat thereof) is critical to most European restructuring solutions (see "Restructuring lesson one" above). The creditor class which controls enforcement therefore typically holds the strongest cards in the restructuring process. So we now turn to the all-important question – who calls the enforcement shots?

**Unsecured enforcement action:** Let us first consider unsecured enforcement action. If an event of default occurs, individual creditor classes (i.e. super senior RCF lenders, term loan lenders, senior secured noteholders etc) can usually each vote to take *unsecured* enforcement action as *independent classes*<sup>16</sup>.

So, for example, either super senior RCF lenders or Senior Secured Noteholders as an individual class can vote to accelerate the RCF debt or the Senior Secured Note (SSN) Debt (as the case may be) and seek to recover their respective debt claims by any means *other than* by enforcing security. So it's every class for itself when it comes to *unsecured* enforcement. In theory, each class can (by accelerating its debt and demanding repayment) force the borrower group into a liquidation process. Each creditor class can press this nuclear button. We will return to this in a moment.

**Secured enforcement action:** Decisions to *enforce security*, on the other hand, are usually subject to an enforcement protocol. The protocol typically provides for discussion before action and avoids a free-for-all.

The protocol varies according to the particular funding components involved. The protocols are summarised here. More detail is given in Appendix 4.

**Structure 1 - Super Senior Protocol:** On a super senior RCF/SSN transaction once an initial consultation period is over, the SSNs typically have the first shot at enforcement. The SSNs have the right to instigate security enforcement for an initial period of typically three to six months. If the super senior RCF has not been repaid in full within that period,<sup>17</sup> then control reverts to the super senior RCF lenders. Also worth noting is that many transactions provide for Security Enforcement Principles to be followed<sup>18</sup> in all security enforcement scenarios (see further below).

**Structure 2 - Pari loan & bond protocol:** On a pari passu loan and bond transaction once an initial consultation period has expired, security enforcement typically requires a vote of the "combined class" of lenders and bondholders. The voting majority is 50.1 per cent (or sometimes 66.6 per cent)<sup>19</sup>.

**Structure 1 & 2 - Senior Notes Protocol:** Where Senior Notes appear in the structure, they will typically be issued by a holding company sitting above all the other holding and operating companies which borrow senior secured loans or notes. Senior noteholders will be free to take security enforcement action against their particular issuer. However, any enforcement action against holding companies lower down in the structure or against operating companies (via the Senior Notes upstream guarantees) will be subject to a 179-day enforcement standstill (absent earlier insolvency events or senior secured enforcement action). This regime is summarised in the table below and the diagram in Appendix 4.

#### Senior Notes – payment blocks and enforcement standstill

Permanent payment block so long as there is a secured term loan or SSN payment default.

179-day payment block for other secured term loan or SSN defaults (served by either creditor class).

179-day enforcement standstill on subordinated guarantees (unless earlier insolvency event occurs).

Typically no standstill against SNs holdco issuer (as applicable).

**Security Enforcement Principles:** As already mentioned, Super Senior transactions more often than not require that security enforcement can only be

implemented (whether by the super senior lenders or the senior secured creditors) in compliance with certain Security Enforcement Principles. These enforcement principles are new and untested. The basic principles are summarised in the table below. A sample full definition appears in Appendix 5.

#### Security Enforcement Principles (summary)

Enforcement must maximise recoveries for secured creditors (to the extent consistent with expeditious realisation of value from enforcement) – the "Security Enforcement Objective".

Enforcement proceeds must be in cash (at least equal to the super senior debt amount).

Enforcement must be prompt and expeditious (acknowledging the timeframe for realisation will be determined by the Instructing Group<sup>20</sup> if consistent with the Security Enforcement Objective).

If enforcing over shares or assets above a threshold value (e.g. £5m) then Security Agent must appoint a financial adviser to act "as expert" and: (i) to opine on the optimum method of enforcing; (ii) to provide a fair value opinion; and (iii) to confirm compliance with the Security Enforcement Principles.

#### What impact will the Security Enforcement Principles have in practice?

It is difficult to know what impact the Security Enforcement Principles will have and whether they will provide opportunities for disaffected creditors to challenge a particular enforcement process.

The requirement for the consideration to be in cash (at least equal to the super senior debt) will inhibit (but not preclude) credit bidding of senior secured debt on enforcement (see further below).

But what about the valuation and related conditions? We have seen from the *IMO Carwash* and *Stabilus* cases that disaffected creditors will challenge valuations in court. On the face of it, the requirement to follow Security Enforcement Principles may give greater opportunity for challenge given that the financial adviser will have to opine not just on fair value but also upon: (i) the optimum method of enforcing; and (ii) that the sale is in accordance with the Security Enforcement Objective. This in turn requires that it is a process designed to maximise recoveries to secured creditors (to the extent consistent with expeditious realisation of value from enforcement). Does this place a higher standard than just obtaining fair value given the reference to

maximising recoveries? And how are we to interpret the requirement that enforcement actions are to be "prompt and expeditious" (on the one hand) yet at the same time "acknowledging that the timeframe for realisation will be determined by the Instructing Group if consistent with the Security Enforcement Objective" (on the other hand)?

Having said all this, the Security Enforcement Principles generally (though by no means always) specify that the Financial Adviser is appointed to act as "an expert". This may be critical. Where an English law contract appoints someone to make a determination as "an expert", the determination of that expert is pretty much bombproof and exceptionally difficult to successfully challenge<sup>21</sup>. So if the "as expert" formulation is included, in practice the net effect of the Security Enforcement Principles may be relatively limited beyond the need to employ a Financial Adviser (as defined) and follow that adviser's recommendations<sup>22</sup>. And it would be rare indeed for any security enforcement on a deal of substance to not involve such an adviser.

**The nuclear option:** We have already noted that there is typically no protocol (as between creditor classes) governing *unsecured* enforcement action. The working assumption is that using the nuclear option of forcing a debtor group into liquidation will be so value destructive relative to a controlled security enforcement it is not necessary to have an enforcement protocol on unsecured enforcement action. Put another way, the hypothesis is that it is safe to give each class access to the nuclear button because they are unlikely to use it. Yet it is surprising there is not more debate about this and that it is a default position so readily accepted by market participants. The market has gone in a different direction on investment grade infrastructure financings. *Pari passu* bank and bond financings of infrastructure assets<sup>23</sup> generally operate on the basis that both secured *and* unsecured enforcement action requires the approval of a majority of the secured creditors *voting together as a combined class*.

More detail on each of the enforcement protocols and the instructing group regimes is given in Appendices 4, 5 and 6.

## Senior Noteholder protections

**Security Agent release authority:** Intercreditor Agreements on transactions featuring Senior Notes generally allow the Security Agent to release guarantees and any security enjoyed by Senior Noteholders where the prior ranking creditors are enforcing their security. So, if the prior ranking senior

secured creditors instruct the Security Agent to enforce security over a holding company's shares, then the Security Agent is authorised to release all guarantee and other claims senior noteholders may have against that holding company and all its subsidiaries. This is shown diagrammatically in Appendix 7. Appendix 8 summarises the standard Loan Market Association (LMA) release authorities as applied to a Senior Note funding structure.

**Release conditions:** However, senior noteholders are not left entirely naked on this. They have some measure of protection. This comes in the form of provisions which only authorise release of their guarantees and security if certain conditions are satisfied. These conditions are summarised in the table below. Their purpose is: (i) to ensure that fair value is obtained on an enforcement sale; (ii) to inhibit a sale at an undervalue to a vehicle controlled by the senior secured creditors; and (iii) to substantially inhibit prior ranking secured creditors from credit bidding their debt as part of any enforcement strategy.

Release conditions	
<b>Sale proceeds:</b>	Cash (or substantially in cash) <sup>24</sup> .
<b>Senior claims released:</b>	Senior secured creditor claims against members of the group sold are: <ul style="list-style-type: none"> <li>(i) unconditionally released and discharged (or sold or disposed of concurrently with the sale); and</li> <li>(ii) <i>not</i> assumed by the purchaser or one of its affiliates<sup>25</sup>.</li> </ul>
<b>Sale process</b> <sup>26</sup> :	<ul style="list-style-type: none"> <li>(i) the enforcement sale is implemented pursuant to a public auction (or similar competitive process); or</li> <li>(ii) an opinion is obtained from an investment bank or international accountancy firm that the amount received is "fair from a financial point of view taking into account all relevant circumstances including the method of enforcement and the circumstances giving rise to such sale"<sup>27</sup>.</li> </ul>

The dual requirements of having sale proceeds in cash (or substantially in cash) and all senior claims released (and not assumed by a purchaser) are designed to inhibit credit bidding by prior ranking senior secured creditors. But do they work? Well, they have not

proved a complete impediment. While they undoubtedly make credit bidding more difficult, restructuring strategies have been found to sidestep the conditions and implement credit bidding.

**Sidestepping the release conditions:** The *Truvo* restructuring and the *Wind Hellas* second round restructuring both saw Senior Noteholders left empty-handed (or, in the case of *Truvo*, largely empty-handed) in circumstances where senior secured creditors enforced and credit bid their senior secured debt as part of the enforcement process. On *Truvo*, the release conditions were sidestepped by a combination of: (a) a daylight facility; and (b) "forced" senior secured creditor transfers imposed by a Chapter 11 reorganisation plan. On *Wind Hellas*, the conditions were sidestepped by a combination of: (a) a daylight facility; and (b) "forced" senior secured creditor transfers imposed by a UK scheme of arrangement.

In fact, looking forward to future restructurings, in relation to transactions documented after 2008, the second component of these sidestepping techniques (i.e. forcing senior creditor transfers via Chapter 11 or a UK scheme) may no longer be required. The reason for this is as follows. Since 2008, European intercreditor agreements are mostly based upon the new LMA standard form intercreditor agreement. Pre-2008, the LMA standard form had not established itself as the market template. The LMA form contains provision for a Security Agent to *transfer* creditor claims as well as release creditor claims. So a Security Agent may be able to transfer senior creditor claims to a Newco (see further below) relying on its intercreditor authority – avoiding the need to go to the trouble and expense of a Chapter 11 plan or UK scheme to achieve such transfers<sup>28</sup>.

In any event, we will now examine what happened in *Truvo* and *Wind Hellas*.

Both restructuring processes were complex. However, the devices employed which enabled senior secured noteholders to: (i) roll part of their existing senior secured note debt into the post-restructured group; (ii) satisfy the senior note release conditions; and therefore (iii) effectively eliminate the senior note claims, were essentially the same on both restructurings.

The simplified restructuring steps are described below and in the diagram in Appendix 9.

**Step 1:** Senior secured creditor claims are first transferred to a Newco<sup>29</sup> (which becomes the purchaser of (and new holding company for) the operating companies in step 3 below). This transfer

was implemented pursuant to a US Chapter 11 reorganisation plan (on *Truvo*) and by a UK scheme (on *Wind Hellas*). In return, Newco issues new shares and senior secured debt to the transferring senior secured creditors (and partially releases the existing senior secured debt). This operates to give the old senior secured creditors ownership of Newco and new debt claims against Newco.

**Step 2:** Newco borrows a daylight loan.

**Step 3:** The share security is enforced, Newco purchases the Opcos' holding company<sup>30</sup> and pays the Security Trustee in cash. This therefore satisfies the requirement in the Senior Notes release conditions for the consideration to be in cash.

**Step 4:** The Security Trustee applies the cash through the intercreditor waterfall (again, as required by the Senior Notes release conditions). As Newco is the holder of the old senior secured debt, Newco receives those cash proceeds.

**Step 5:** Newco uses the cash proceeds to repay its daylight loan.

**Step 6:** The Senior Notes release conditions have now been satisfied. The consideration was in cash, was applied through the waterfall, and all senior claims have been released and have not been transferred or assumed by the Newco purchaser<sup>31</sup>. The Security Trustee therefore releases the Opcos from all guarantees and security supporting the old Senior Notes and the old senior secured debt.

How has the market reacted to these sidestepping devices? Have intercreditor release authorities been amended as a result? To our knowledge there has been no such reaction. Of itself this may not be a bad outcome. If the Senior Notes are out of the money and the business can no longer sustain a level of debt (including the Senior Notes) then elimination of those notes via a *Truvo* or *Wind Hellas*-style restructuring may be the only feasible option. Changes to the release conditions which counter the sidestep mechanics outlined above may ultimately prove value destructive and seriously hinder survival of the business concerned.

**Release conditions – a related puzzle:** We have just considered the release authorities conferred by Senior Noteholders in favour of the Security Agent on Senior Note transactions and the conditions for their exercise. Exactly the same issues arise on transactions involving mezzanine funding. Mezzanine lenders (as second ranking subordinated creditors) confer similar release authorities on the Security Agent for the

benefit of the senior secured creditors which, again, can only be exercised if certain conditions are satisfied. These conditions were extremely limited (indeed, often virtually non-existent) in pre-financial crisis transactions, leaving mezzanine lenders particularly vulnerable to being left empty-handed on senior-led enforced restructurings. Post-2008, "big ticket" mezzanine transactions<sup>32</sup> have evolved a modified set of release conditions, but they are somewhat different to those which benefit senior high yield bondholders. For example, they do *not* usually require that senior creditor claims against companies sold must be released in full or disposed of. Nor do they stipulate that senior creditor claims cannot be assumed by the purchaser. Mezzanine lenders therefore typically enjoy less protection than senior secured noteholders, albeit that the protections actually required are identical. It is hard to find coherent reasons why the release conditions protecting senior noteholders should be different from those protecting mezzanine lenders. Logically, they should be the same but the market has yet to converge around a common position. Further details are given in the comparative table in Appendix 10.

## Intercreditor issues

**Complexity:** European intercreditor agreements are complex documents. The LMA senior and mezzanine intercreditor agreement runs to some 140 pages. Its super senior equivalent weighs in at 120 pages. Neither document matches the complexity and sophistication of the intercreditors required for market leading European transactions executed in 2013 and 2014. Pre-credit crunch intercreditors catered for a largely static funding structure. Any material changes necessitated a wholesale refinancing and a brand-new intercreditor accompanying the new financing. Today's intercreditors are infinitely more flexible. They contemplate the full suite of funding instruments which may be deployed, even though not all of them are used initially. They also contemplate refinancings, reschedulings and extensions of each layer of the capital structure. Each intercreditor has its own nuances and can produce different results. We look at some potential nuances below.

**Super senior quantum:** Most super senior transactions contemplate an absolute fixed amount of super senior revolver (or equivalent). Senior secured noteholders, senior secured lenders and other lower ranking creditors take comfort from an absolute cap on the amount of super senior debt ranking in priority. Yet this is not always the case. Careful analysis of the myriad of interconnecting definitions between the intercreditor agreement and the bond indenture may allow super senior credit facilities to be interposed by

reference to a ratio debt test linked to EBITDA multiples rather than an absolute cap.

**Drafting tension:** There are often awkward drafting tensions between the general priority descriptions at the beginning of the intercreditor agreement relative to the actual position which flows from the security enforcement, turnover obligations and the intercreditor waterfalls recorded later in the document. The general security ranking clause (at the beginning of the document) often records a statement that "the Transaction Security...shall rank and secure the Super Senior Liabilities and...the Senior Secured Note Liabilities...*pari passu* and without preference between them". Yet, of course, the waterfall provides for proceeds of enforcement from the security to be applied first to the super senior liabilities and then second to the Senior Secured Note Liabilities<sup>33</sup>.

**Hedging:** The market is yet to fully resolve the preferred mechanic for computing super priority hedging debt. Should this be calculated by reference to notional or close out amounts? Calculation by reference to notional amounts gives hedging providers certainty their hedging will have super priority status – irrespective of the quantum of the eventual close out net amount. But this then leaves the other secured creditors uncertain as to the total quantum of super senior debt. Calculating super senior hedging by reference to close out amounts leaves hedge counterparties uncertain as to what part of their hedging debt will be super senior and what part will be *pari passu* with senior secured creditors if and when close out actually occurs.

**Purchase options:** Senior secured creditors will typically be given an option to purchase the super senior debt following a distress event. Some intercreditors fail to distinguish between super senior hedging (on the one hand) and *pari passu* hedging (on the other hand) for this purpose. This in turn compels senior secured creditors wishing to exercise the purchase option to purchase not just the super senior revolver and the super senior hedging. They must also purchase the *pari passu* hedging. Such a result is rarely intended.

**Hidden intercreditors:** Perhaps the most curious puzzle of all is why bondholders have such a hard time gaining access to a copy of the intercreditor agreement itself. The intercreditor provisions will be summarised in the offering memorandum. However, even the most diligent summary struggles to effectively summarise in a few pages the full complexity and consequences enshrined in a 150-page intercreditor agreement. The terms of the intercreditor agreement are critical to an evaluation of bondholder

rights in a distressed situation (see above). Yet the intercreditor agreement is seldom readily and publically available. This means bondholders worry that if they request and receive the intercreditor agreement they may be in receipt of inside information, in turn prejudicing their ability to buy and sell the issuer's bonds in the future. Surely this is an entirely unsatisfactory position and should not be tolerated? The fix is relatively straightforward. Bond terms could simply provide for an issuer to make available a copy of the intercreditor agreement in the investor section of its website. Intercreditor terms would then be freely available to all.

## Conclusion

The leveraged debt market is booming again. High yield bonds (which so successfully stepped into the loan void of 2009 through 2012) remain dominant. Yet leveraged loans surged back somewhat in 2013 and issuance has been strong in 2014. Even second lien loans (in hiding since 2008) have re-emerged.

Rigid "Traditional" funding structures feel like a relic of the pre-crisis past. Today's "Hybrid" and "New" funding structures (call them what you will) are altogether more flexible and refinancing friendly (designed, as they are, to accommodate myriad debt classes which can come and go with the requirements of the business and the ebb and flow of the debt markets).

Yet such fine flexibility brings with it considerable legal and drafting complexity, particularly on financings supporting pan-European multi-jurisdictional groups<sup>34</sup>. Time will tell how well our new era structures and documents cope when interest rates normalise, the credit cycle turns and default rates pick up. In the meantime, we should continue to stress test intercreditor conventions as they develop and resist the temptation to slavishly follow precedent. If a financial crisis teaches us anything at all, it is this – not all precedent is good precedent.

## Ashurst LLP September 2014

*Postscript: this paper was researched and written by Nigel Ward. The views expressed in this paper are his and his alone. While every effort has been made to ensure the accuracy of the information in this paper, no responsibility is accepted by its author, any of his partners or Ashurst LLP for its contents. Copyright reserved – September 2014.*

## Notes

- 1 The overwhelming majority of European high yield bonds issued on leveraged loan transactions pre-crisis were senior notes with subordinated upstream guarantees and no security from operating entities.
- 2 In fact *unsecured* high yield bondholders often benefit from a limited security package, usually consisting of security over a proceeds loan and the shares in a holding company. More detail on this appears in Part 2 of Appendix 2.
- 3 High yield bonds are typically seven- to ten-year bullet repayment instruments with restrictions on prepayment for the first three years (for a seven-year bond) or five years (for a ten-year bond).
- 4 Senior secured term debt or senior secured bond debt will typically fund European group up to a Leverage of (e.g.) four to six times EBITDA (depending on the industry sector and market conditions).
- 5 In and around a financial crisis, maximum durations reduce to five or (possibly) six years. In boom times, they may stretch out to nine years.
- 6 Or amortise in very small amounts each year (e.g. one per cent of the original amount advanced).
- 7 A full suite of maintenance covenants typically comprises leverage (debt:EBITDA), interest cover (EBITDA:interest), capital expenditure and cash flow covenants. Stronger credits can now obtain loans with just two covenants: (i) leverage; and (ii) interest cover. A number of European borrowers have, however, accessed the US market and borrowed US dollar term loans with only incurrence based covenants (as per high yield) New York law finance documents. This year, Ceva Sante Animale became the first European issuer to borrow euros under an English law documents with B lenders only benefiting from incurrence financial covenants (RCF lenders benefit from a single leverage maintenance covenant). Since Ceva Sante, a number of other borrowers have also borrowed B loans on this basis.
- 8 If you are a second ranking secured creditor, you are only entitled to receive proceeds of enforcement of your security after the first secured creditor has been paid in full from those proceeds. However, if the debtor has sufficient funds to pay you off (without recourse to the security) the debtor is free to do so. If, on the other hand, your debt is "subordinated", you are not entitled to have your debt repaid unless and until the first ranking creditor has been paid in full. If your subordinated debt is repaid before the first ranking creditor is paid, you are typically obliged to hand back (turnover) the monies you have received to the first ranking creditor until such time as the first ranking creditor has been paid in full.
- 9 As is the case on, for example, the ista funding.
- 10 See our July 2014 briefing "*European second lien – it's back*".
- 11 The security enforcement may itself eliminate the out of the money creditors. Alternatively, the *potential* use of the security enforcement for this purpose may force the out of the money creditors into an agreed compromise restructuring in which they receive a modest junior stake in the restructured business.
- 12 Technically approval by a majority in number and 75 per cent by value of the compromised class(es).
- 13 After enforcement costs and expenses and agent, trustee and security agent fees etc.
- 14 This includes the Loan Market Association recommended form of super senior intercreditor agreements.
- 15 Since all recoveries will be secured recoveries.
- 16 Subject, in the case of senior notes, to a 179-day enforcement standstill.
- 17 Or earlier if an insolvency event occurs. Also the period specified is sometimes three rather than six months.
- 18 As between: (a) holders of super senior debt; and (b) holders of senior secured debt.
- 19 While it is hard to discern any logic to this, until relatively recently a two-thirds majority of the banks would control the security enforcement until the bank debt had reduced to a certain percentage of the combined bank and bond debt (often between 25 per cent and 33 per cent).
- 20 Majority of SSNs (then 66.6 per cent of RCF + Hedging debt after six months).
- 21 In *Owen Pell Limited -v- Bindi (London) Limited* (2008), the High Court held that an expert's determination was binding, even if he/she made errors in reaching his/her conclusions. The court would only intervene if the expert answered the wrong question, not if the expert addressed the right question but got the answer wrong.

- 22 The LMA form of super senior intercreditor agreement does not use the "expert" formulation, instead preferring to record that the parties agree the Financial Advisers' determination will be "conclusive". This may prove less robust.
- 23 BAA, Solveig, NATs, and Eversholt Rail are all examples of this.
- 24 Some transactions also allow for non-cash consideration if supported by a valuation.
- 25 Where claims are sold (instead of released or discharged), the relevant Senior Representative acting reasonably and in good faith must determine this will result in higher recoveries than if the claim was released or discharged.
- 26 Contrast with alternative formulations, for example: (i) public or private auction or other competitive process; or (ii) court supervised process and there is a court determination of value; or (iii) opinion from accountants or investment banks or professional valuers that the amount received is "fair from a financial point of view, taking into account all relevant circumstances, including the method of enforcement".
- 27 Opinion provider can limit its liability to the amount of its fees.
- 28 The important point to appreciate here is that the use of a Chapter 11 reorganisation plan or scheme of arrangement (or the use of contractual authorities in an LMA-based intercreditor) are provisions which force all senior lenders to transfer (roll into) the restructured senior financing. They are therefore techniques to avoid leakage of value to senior lenders who do not vote in favour of the particular reorganisation plan. They are a technique for binding in all of the senior secured lenders/noteholders. They are not the device by which more junior ranking creditors are compromised or eliminated.
- 29 Newco NV on *Truvo* and SSN Holdco on *Wind Hellas*.
- 30 Or the Opco itself in *Wind Hellas*.
- 31 Instead, Newco has issued new debt claims in favour of the old secured debt holders.
- 32 The "market standard" has evolved through a series of transactions which started with WorldPay and then evolved through BSN, CPA, Wood MacKenzie, Aenova, CCM Pharma and Douglas Holdings.
- 33 Further detail and analysis on this is set out in Appendix 3.
- 34 Given Europe's patchwork of wildly different security and bankruptcy regimes.

## Appendix 1 – Super senior RCFs – overview of main features

Super senior revolving credit facilities are now a common feature of leveraged finance transactions. Historically, the revolving credit facility (RCF) was provided alongside senior term loan facilities. The RCF ranked equally (*pari passu*) with those term loan facilities. Following the onset of the financial crisis in 2007 and 2008, a majority of transactions are funded using high yield bonds subscribed by bond investors (rather than term loans provided by banks, credit funds and the like). The RCF provides for the group's fluctuating working capital needs and is provided by banks on a super senior basis. This means the RCF has a priority position in relation to the proceeds of enforcement of security. It typically enjoys that super senior position alongside interest rate hedging (up to an agreed limit).

The table below summarises certain key provisions typically encountered on super senior RCF<sup>i</sup>:

Feature	Commentary
Quantum	RCF is usually limited to 1 x EBITDA.
Ranking	<p>The RCF will rank on a super senior basis <i>in respect of secured recoveries</i> alongside super senior hedging (up to a limit) and (possibly) other super senior debt (up to a limit).<sup>ii</sup></p> <p><i>Note: the RCF is super senior as to recoveries from enforcement of security. Unsecured recoveries will be applied pari passu with the senior secured bonds etc.</i></p>
Financial covenants	<p>Often limited to a single financial covenant. Typically, either: (i) a Leverage (net debt: EBITDA); or (ii) a minimum EBITDA covenant. The headroom provided will be significant (e.g. 40 or 50 per cent to the levels forecast in the financial model)<sup>iii</sup>.</p> <p>There may also be: (i) a secured debt leverage covenant; and/or (ii) a super senior debt leverage covenant<sup>iv</sup>.</p> <p>On some transactions, breach of the financial covenant is not an event of default. Instead, it acts as a drawstop to prevent drawdowns of the RCF if it is breached. Alternatively, it may result in an event of default but only if the RCF is drawn as to (e.g.) more than 25 per cent at the time the breach occurs.</p>
Business restrictions	The business restrictions will take the form of the incurrence covenants imported largely verbatim from the bond indenture (and included as a schedule to the RCF). In addition, there will be separate undertakings in relation to provision of information, <i>pari passu</i> ranking, insurance and provision of guarantees and security etc. On some transactions there may be additional maintenance covenants depending upon the requirements of the particular lender.
Financial reporting	Financial reporting may be on a quarterly basis (in line with the bonds) rather than the more typical monthly reporting on a leveraged loan transaction.
Portability (change of control)	Many sponsor-led high yield bond transactions contain an exemption from the obligation to make an offer to repurchase the bonds at 101 if a third party obtains control of the borrower (or its parent). The exemption applies if there is no event of default and the leverage level is below an agreed

	ratio. Sometimes this can only be used on one occasion. In any event, super senior RCF facilities often incorporate the same flexibility.
Restriction on bond purchases	The RCF may limit the total quantum of redemptions/purchases of bonds the borrower group can undertake before having to pay down the RCF on a pro rata basis along with the bond prepayments/repurchases. Early super senior RCF transactions set the limit at 30 per cent. We now see this increased to 50 per cent. Redemptions/purchases also used to be limited in that they could only take place once leverage was below a certain level. More recent transactions do not include this additional restriction.
Enforcement action	<p>RCF lenders typically will remain free to take unsecured enforcement action following an event of default.</p> <p>Secured enforcement action will normally be reserved to the majority secured bondholders for an initial agreed period. Typically there will be a consultation period (15-20 days) during which RCF lenders and bondholders will consult as to whether enforcement action will be taken. If there is disagreement then the wishes of the majority bondholders prevail. If, however, the RCF has not been paid off within an agreed period (typically six months) or if no enforcement action has been taken for (e.g) three months or if an insolvency event occurs then a two-thirds majority of the RCF (and any super senior hedging or other super senior debt) can instigate security enforcement.</p> <p>As indicated above, the super priority relates to the application of secured recoveries (not unsecured recoveries).</p>
Intercreditor and new debt	The intercreditor will typically make provision for the borrower to introduce new senior secured debt. This may be super senior hedging or other super senior debt (up to certain limits). It will also allow for refinancing of the secured bonds and for other secured debt to be introduced subject only to accession to the intercreditor.
Restricted Subsidiaries/Unrestricted Subsidiaries	A high yield bond will allow a group to designate companies as Unrestricted Subsidiaries which then cease to be bound by the high yield covenants. They are then effectively treated as third parties and any dealings with those Unrestricted Subsidiaries are subject to third party and affiliate dealing restrictions. The RCF typically makes provision for notification of any designation of an Unrestricted Subsidiary and places limits on dealings with the Unrestricted Subsidiary such that no financial support can exist from Restricted Subsidiaries in favour of Unrestricted Subsidiaries.
Events of default	On some transactions, the events of default are conventional leveraged loan events of default. Others adopt the high yield events of default but add in a financial covenant breach, intercreditor breach, cross-default to the bonds, inaccuracy of representations, unlawfulness, repudiation, rescission or invalidity of finance documents etc.

## Appendix 2 – Loan & Bond Funding Structures

### Part 1 – Post-2008 structures

Our review of post-financial crisis European leveraged transactions indicates there are six template funding structures in use where both loans and bonds feature in the financing (as shown in the table and graphics below).<sup>v</sup>

**Structure 1:** super senior revolving credit facility<sup>vi</sup> (RCF) and hedging (both 1st ranking) together with senior secured notes (2nd ranking). This is a "New" structure (using S&P's categorisation).

**Structure 2:** revolving and term loan facilities and hedging ranking pari passu with senior secured notes (i.e. all 1st ranking). This is a "Hybrid" structure (using S&P's categorisation).

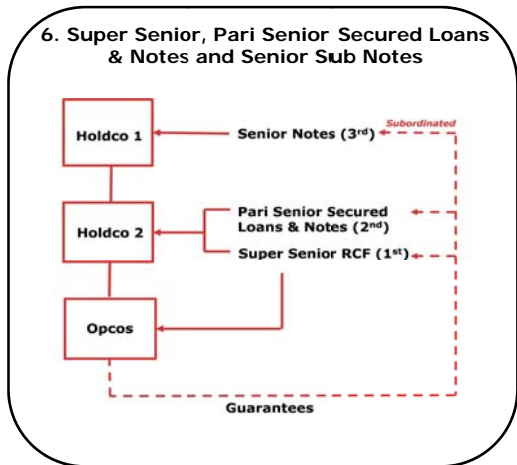
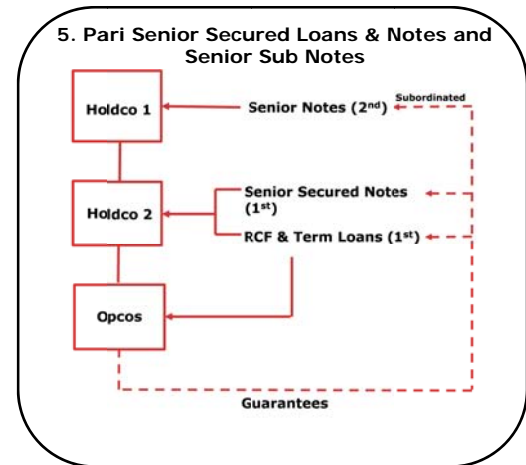
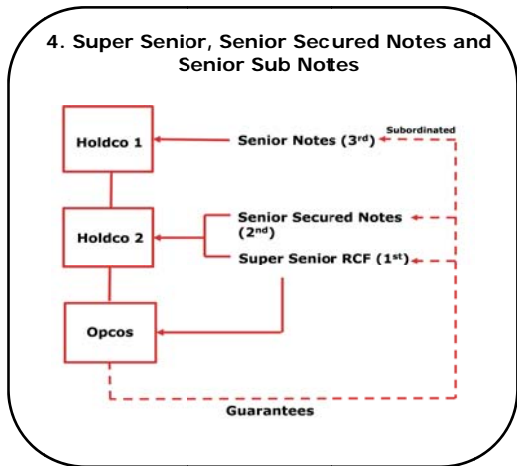
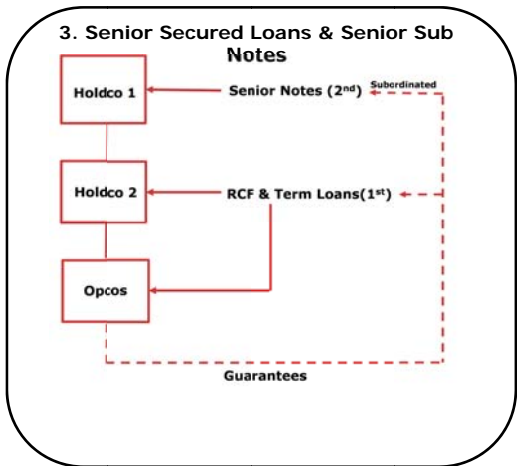
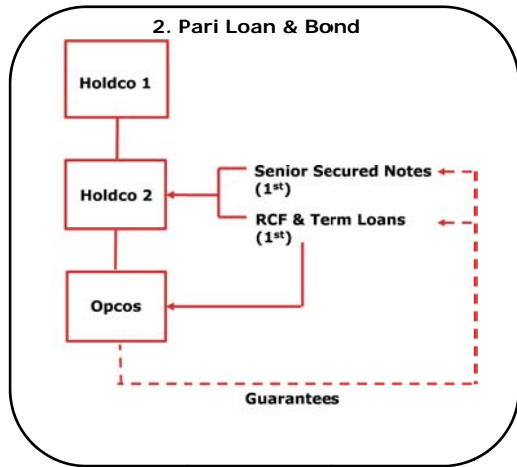
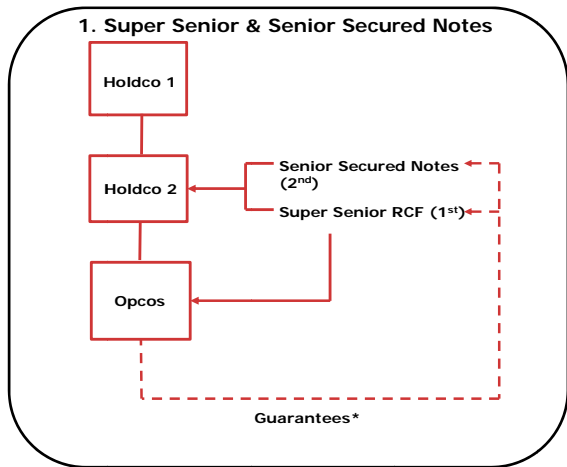
**Structure 3:** RCF and term loan facilities and hedging (all 1st ranking) together with senior notes (2nd ranking with subordinated upstream guarantees). This is a "Traditional" structure (using S&P's categorisation).

**Structure 4:** super senior RCF and hedging (1st ranking), senior secured notes (2nd ranking) and senior notes (3rd ranking). A variant of the "New" structure.

**Structure 5:** RCF and term facilities ranking pari passu with hedging and senior secured notes (so all 1st ranking) together with Senior Notes (2nd ranking). A variant of the "Hybrid" structure.

**Structure 6:** super senior RCF and hedging (1st ranking), pari passu senior secured loans and senior secured notes (2nd ranking) and senior notes (3rd ranking). A variant of the "New" and "Hybrid" structures.

	Bank		Bond		Sample Deals
1	Super Senior RCF & Hedging	1st	Senior Secured Notes	2nd	DFS, New Look, Hastings
	RCF ranks 1st and SSNs 2nd for <i>secured recoveries</i> . RCF and SSNs <i>pari passu</i> for <i>unsecured recoveries</i> .				
2	RCF, Term Loans & Hedging	1st	Senior Secured Notes	1st	Ineos, Towergate
	RCF, Term Loans and SSNs rank <i>pari passu</i> for <i>secured and unsecured recoveries</i> .				
3	RCF and Term Loans	1st	Senior Notes	2nd	Picard
	RCF and Term Loan rank 1st for <i>secured and unsecured recoveries</i> . Senior Notes 2nd ranking and upstream guarantees subordinated.				
4	Super Senior RCF & Hedging	1st	Senior Secured Notes Senior Notes	2nd 3rd	Ontex, Gala Cora, Priory, Quick, Guala Closures, Cerved
	RCF & Hedging ranks 1st and SSNs 2nd for <i>secured recoveries</i> . RCF and SSNs <i>pari passu</i> for <i>unsecured recoveries</i> . Senior Notes 3rd ranking and upstream guarantees subordinated.				
5	RCF, Term Loans & Hedging	1st	Senior Secured Notes Senior Notes	1st 2nd	Sunrise, ista
	RCF, Term Loans and SSNs rank <i>pari passu</i> for <i>secured and unsecured recoveries</i> . Senior Notes 2nd ranking and upstream guarantees subordinated.				
6	Super Senior RCF & Hedging	1st	Senior Secured Term Loans Senior Secured Notes Senior Notes	2nd 2nd 3rd	Numericable
	RCF & Hedging ranks 1st and Term Loans and SSNs rank 2nd for <i>secured recoveries</i> . RCF, Hedging, Term Loans and SSNs rank <i>pari passu</i> for <i>unsecured recoveries</i> . Senior Notes rank 3rd and upstream guarantees subordinated.				

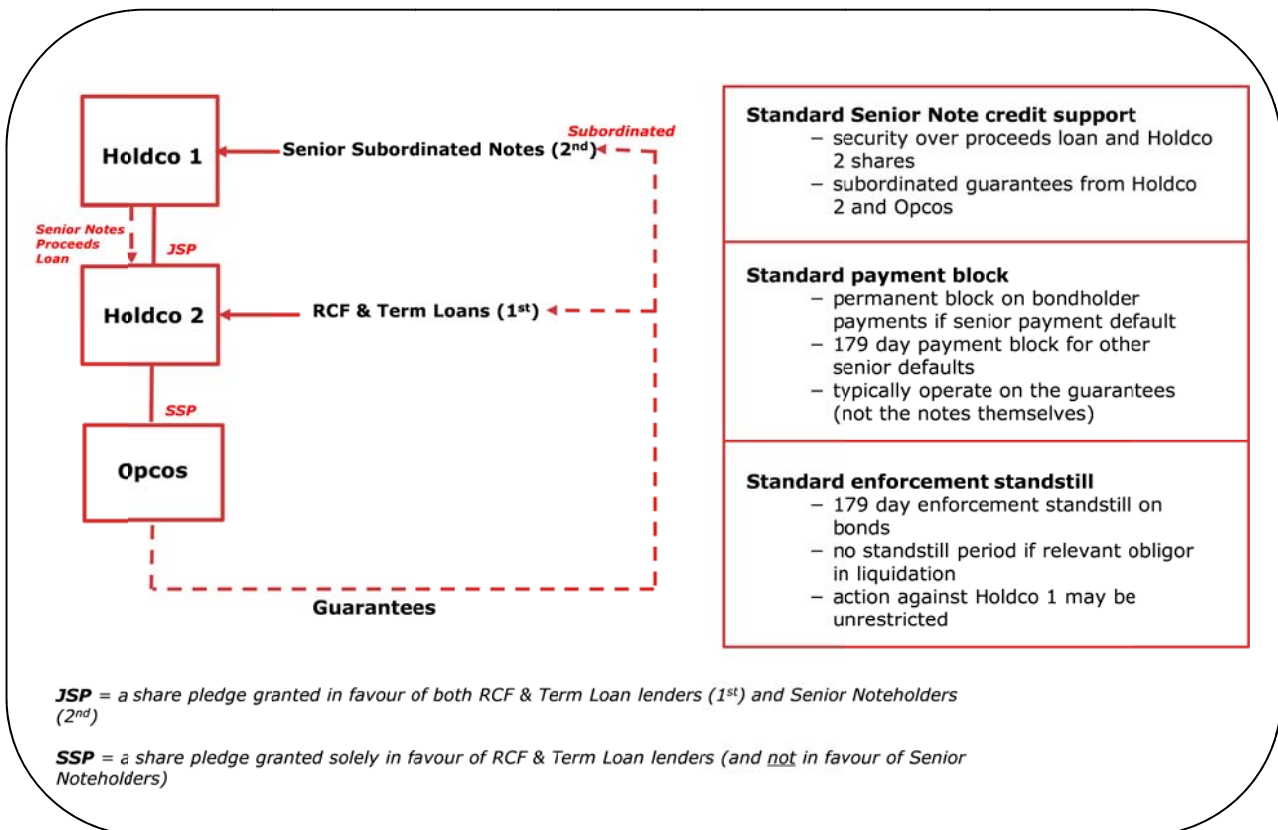


\* The Opcos guarantees granted in support of the RCF, Term Loans and Senior Secured Notes will typically be secured guarantees. Those granted in support of the Senior Notes will typically be unsecured guarantees.

## Part 2 – Pre-2008 structures

Prior to the 2007-08 financial crisis, high yield bonds were typically junior components of a given leveraged funding structure. The bonds would typically be issued by a holding company (Holdco 1) at the top of the group. Revolving and term loans will be provided to its immediate subsidiary (Holdco 2) and various operating subsidiaries (Opcos). Bondholders would generally benefit from a very limited security package. This would typically comprise security over: (i) the benefit of the loan of the high yield proceeds by Holdco 1 to Holdco 2; and (ii) security over the shares in Holdco 2 (second ranking behind the revolving and term loan lenders). While bondholders would receive upstream guarantees from Holdco 2 and the Opcos, these guarantees would typically be unsecured and subordinated to the revolving and term loan lenders.

Bondholders in these structures would be subject to standard payment blockage and enforcement standstill restrictions. These and the guarantee and security position described above are illustrated in the simplified diagram shown below<sup>vii</sup>:



### Appendix 3 – Super Senior intercreditor extracts

**Extracts from market precedent:** the extracts below are taken from a form of intercreditor agreement (ICA) in common use in the European market:

*"General ranking clause: Unless expressly provided to the contrary in this Agreement, the Liabilities shall rank in right and priority of payment in the following order...first, the Super Senior Liabilities, [and] the Senior Secured Note Liabilities<sup>viii</sup>, pari passu and without any preference between them..."*

*"Security ranking clause: Each of the Parties agrees that the Transaction Security...shall rank and secure the Super Senior Liabilities,...[and] the Senior Note Liabilities, pari passu and without preference between them (but only to the extent that such Transaction Security is expressed to secure those Liabilities)"*

*"Waterfall clause: ...amounts from time to time received or recovered by the Security Agent in connection with the realisation or Enforcement of all or any part of the Transaction Security or otherwise paid to the Security Agent for application pursuant to [this clause]":*

- (i) first, Security Agent enforcement costs etc;*
- (ii) second, Super Senior Creditor enforcement costs etc;*
- (iii) third, towards discharge of the Super Senior Liabilities;*
- (iv) fourth, towards payment of the Senior Secured Note Liabilities.*

#### Commentary and analysis

General ranking clause: As indicated above, this clause records that "*Unless expressly provided to the contrary..., the Liabilities shall rank...first, the Super Senior Liabilities and the Senior Secured Note Liabilities<sup>viii</sup>, pari passu and without any preference between them...*". This is not really what we were expecting. Super senior liabilities are supposed to be super senior, i.e. ranking ahead of other creditor claims. Yet this "general ranking clause", (typically, the first operative clause in the ICA) is telling us the super senior liabilities are to rank pari passu with the other creditor liabilities. That said, it does record that the super senior liabilities rank alongside the senior secured notes "*unless expressly provided to the contrary in [the ICA]*". So we assume as we read on to the next clause that the exception contemplated must relate to *secured* recoveries with the "general ranking clause" setting out the ranking in relation to *unsecured* recoveries.

Security ranking clause: The Security ranking clause says "*Each of the Parties agrees that the Transaction Security shall rank and secure the Super Senior Liabilities [and] the Senior Secured Note Liabilities, pari passu and without preference between them*". This starts to get confusing. We were expecting the ICA to tell us that in respect of secured recoveries the Super Senior RCF and hedging would rank *in priority* to the Senior Secured Notes (and any debt ranking pari passu with the Senior Secured Notes). Instead, clause 3.1 is telling us that they rank pari passu. There is no mention of clause 3.1 being subject to any other provision of the ICA.

Waterfall clause: Yet when we turn the pages of the intercreditor agreement and get to the "Waterfall clause" this tells a different story (and in fact the one we were expecting all along).

This clause sets out the waterfall of payments in relation to "*amounts from time to time received or recovered by the Security Agent in connection with the realisation or Enforcement of all or any part of the Transaction Security or otherwise paid to the Security Agent for application pursuant to [the waterfall]*". The waterfall then duly prioritises the Super Senior RCF and hedging *ahead* of the senior secured notes in respect of *secured* recoveries.

**Observation:** It is at best curious (and at worst positively unhelpful) that we have apparently contradictory provisions in the General ranking and the Security ranking clauses as compared to what then appears in the Waterfall clause. Yet the "market" continues to churn out documents perpetuating these drafting inconsistencies.

## Appendix 4 – Security enforcement protocols

### Structure 1: Super Senior enforcement protocol

**Super Senior Instructing Groups:** Instructions to the Security Agent to enforce security on a Super Senior transaction will typically be given by an "Instructing Group". The Instructing Group will comprise a majority (normally 66.6 per cent) of the RCF lenders *and* a majority (typically a simple majority) of the Senior Secured Noteholders (SSNs). However, if the RCF lenders and the SSNs give conflicting instructions, then it is the SSNs who determine the enforcement decision and the SSNs alone who form the Instructing Group. This regime prevails for the next (typically) six months (or until an insolvency event occurs)<sup>viii</sup>. Thereafter, unless the RCF (and usually any super senior hedging) have been fully repaid, the Instructing Group switches and becomes a majority (usually 66.6 per cent) of the super senior RCF and super senior hedging voting as a combined class.

**Super Senior consultation period:** The ICA will normally specify that prior to enforcement action being taken the agent for the RCF lenders and the trustee for the senior secured noteholders must consult together for an agreed period (typically 20 days). That 20-day period usually starts five to ten days after the relevant lender class has served a notice indicating an intention to issue enforcement instructions. The consultation obligation does not apply in certain circumstances. Further details and a summary of the Instructing Group regime on a Super Senior transaction are set out in the table below.

Super Senior – Instructing Group	Consultation
<p><i>If RCF and SSNs give conflicting instructions, SSNs form Instructing Group (&gt;50 per cent by outstandings).</i></p> <p><i>But RCF banks and hedging (66.6 per cent vote) become Instructing Group if: (i) RCF and hedging not fully repaid within six months from issue of instructions; or (ii) insolvency event occurs and no enforcement action.</i></p>	<p><i>20 days (after ten-day enforcement instruction notice served).</i></p> <p><i>Consultation does not apply if: (i) the security is enforceable due to an insolvency event occurring in relation to any group company; or (ii) the relevant creditors (or their agent) determine in good faith that delay would reasonably be expected to have a material adverse effect on ability to enforce or upon realisation proceeds; or (iii) six months has expired post-enforcement instruction and no enforcement is being effected by Security Agent; or (iv) the class representatives agree no Consultation Period is required.</i></p>

**Conflicting instructions:** In Appendix 6 you will see that an Instructing Group definition typically used on Structure 1 (Super Senior) transactions<sup>x</sup> has three limbs. Limb (b) (security enforcement and related matters) contains a mechanic for resolving what happens when contradictory instructions are given by the majority super senior versus the instructions given by majority SSNs. *However*, limbs (a) (general decisions) and (c) (post-security enforcement decisions) *do not*. So if contradictory instructions are given you have paralysis. It is odd that the typical Super Senior ICA does not attempt to address this potential for stalemate.

### Structure 2: Pari passu enforcement protocol

Security enforcement decisions on Pari Loan & Bond transactions are taken by a vote of the *combined* loan and bond class (after an initial consultation period). Until relatively recently<sup>xi</sup> pari loan and bond ICAs were drafted to ensure bank lenders continued to control the security enforcement decision until the loan debt fell below a given proportion of the total loan and bond debt. This position is summarised in the table below.

Instructing Group – pre-ista	Consultation – pre-ista
<p><i>Banks/lenders usually control security enforcement until the total quantum of loan debt falls below a specified percentage of the total loan and bond debt. The percentage is typically in the 33.33 to 25 range.</i></p>	<p><i>15-20 days' consultation between bank/loan agent, bond trustee and security agent.</i></p> <p><i>Consultation Period does not apply if the security has become enforceable due to an Insolvency Event affecting a group company or if the relevant agent determines in good faith that delay would reasonably be expected to have a material adverse effect on: (i) ability to enforce; or (ii) upon realisation proceeds.</i></p> <p><i>Consultation is between the bank/loan agent, SSN trustee and Security Agent, trustee and security agent.</i></p>
Instructing Group – post-ista	Consultation – post-ista
<p><i>&gt;50 per cent of Senior Secured Credit Participations of lenders, bondholders and providers of closed out hedging.</i></p>	<p><i>As above, i.e. 15-20 days consultation between bank/loan agent, bond trustee and security agent.</i></p> <p><i>Consultation Period does not apply if the security has become enforceable due to an Insolvency Event affecting a group company or if the relevant agent determines in good faith that delay would reasonably be expected to have a material adverse effect on: (i) ability to enforce; or (ii) upon realisation proceeds.</i></p> <p><i>Consultation is between the bank/loan agent, SSN trustee and Security Agent, trustee and security agent.</i></p>

It is something of a mystery as to why bondholders accepted their role as second class voting citizens for so long. Why should they have ever been put in a position where lenders get to call the enforcement shots until the loan debt was a mere 25 per cent of the total senior secured debt claims? Yet, of course, there are a host of historic deals out in the market place where this is exactly the position. The market has now reached a more balanced position and security enforcement is now in the hands of a combined vote of lenders and bondholders voting together.

### **Structures 1 & 2: Senior Notes enforcement protocol**

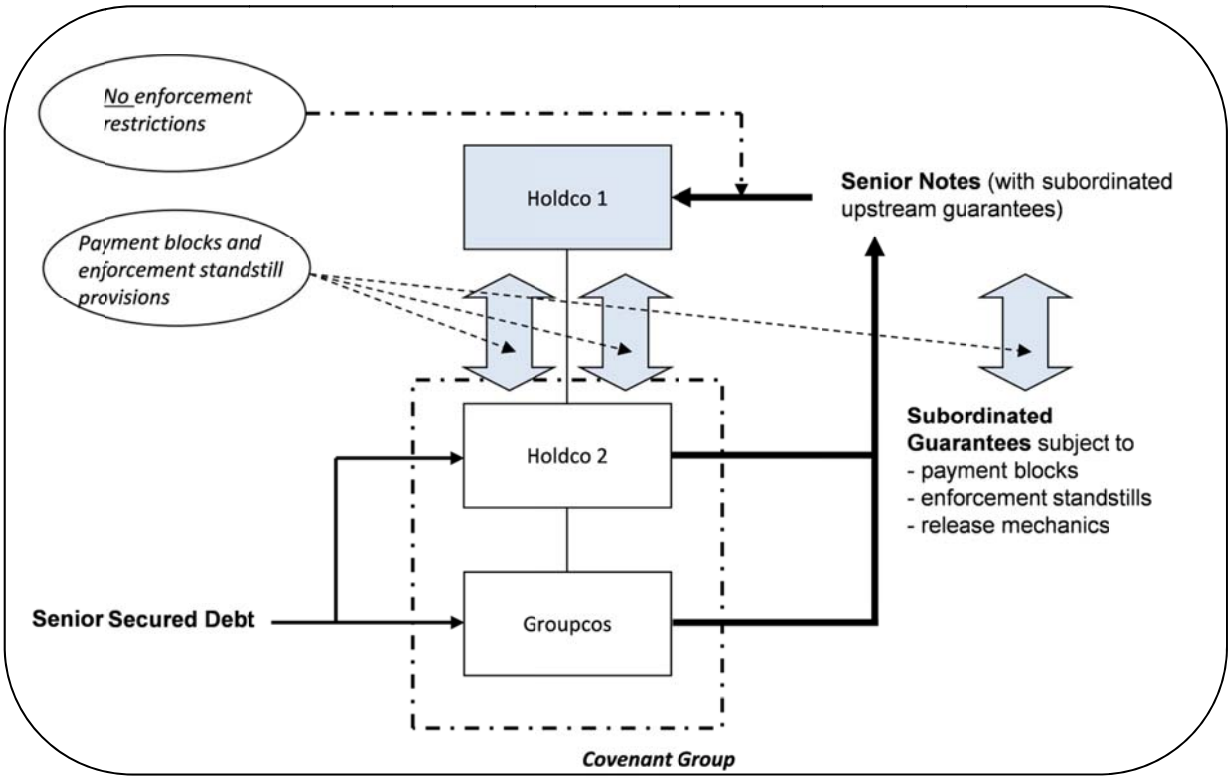
**Enforcement standstill:** Senior Notes are usually free to take action against their holdco issuer (see diagram below). But this will not get them very far. It may trigger a change of control and the need to pay off all the senior secured debt downstairs. More meaningful action will require enforcement action against companies lower down the group, and any such action will be subject to enforcement standstills. To take such action, Senior Noteholders must first give notice of the relevant Senior Note default to the agents/trustees acting for the prior ranking creditors<sup>xiii</sup>. Senior Noteholders will then be restricted from taking any enforcement action against companies other than their particular holdco issuer for a period of 179 days. The standstill will only terminate earlier if the particular company against which they wish to take enforcement action suffers an insolvency event (otherwise than due to the actions of the senior noteholders)<sup>xiii</sup>.

**Payment blocks:** Senior Noteholders will also be subject to payment blockage provisions. If there is a payment default in respect of the senior secured loans or bonds, then for so long as that continues payments cannot be made on the senior notes<sup>xiv</sup>. If there is a senior secured default (other than a senior secured payment default) the prior ranking creditors can serve a notice blocking payments to the senior noteholders (for 179 days).

**Summary:** This payment blockage and enforcement standstill regime affecting Senior Notes is summarised in the box and diagram below.

Senior Notes – payment blocks and enforcement standstill
Permanent payment block so long as there is a secured term loan or SSN payment default;
179-day payment block for other secured term loan or SSN defaults (served by either creditor class);
179-day enforcement standstill on subordinated guarantees (unless earlier insolvency event); and
typically no standstill against SNs holdco issuer (as applicable).

**Payment blocks and standstill regime:** The above payment blockage and enforcement standstill regime which affects Senior Notes is illustrated below:



**Main threat to Senior Noteholders:** The payment blockage and standstill regimes described above reflect the junior status of Senior Notes in the overall funding structure. But the feature of ICAs which is most threatening to Senior Noteholders (and the feature which is and should be most heavily focussed upon by Senior Noteholders) is the authority granted to the Security Agent to release and/or transfer Senior Noteholder claims in an enforcement scenario (see Appendices 7 and 8).

**Overall summary:** Here is a summary of the security enforcement protocols analysed in this Appendix.

Deal structure	Security enforcement protocol
<b>Super Senior</b>	Consultation regime pre-security enforcement  Security Enforcement Principles apply  Instructing Group controls (SSNs for first six months, then RCF lenders)
<b>Pari loan and bond</b>	Consultation regime pre-security enforcement  Instructing Group controls (majority of <i>combined</i> loan and bond)
<b>Senior Notes</b>	No consultation  179-day enforcement standstill <sup>xv</sup>  Payment blockage provisions  Credit Support release conditions apply

## Appendix 5 – Security Enforcement Principles (Super Senior transactions)

A typical definition of "Security Enforcement Principles" adopted on super senior structures is as follows:

- (a) The primary and overriding aim of any enforcement of the Transaction Security is to achieve the Security Enforcement Objective (i.e. "to maximise so far as is consistent with prompt and expeditious realisation of value from enforcement of the security the recovery by the secured creditors");
- (b) Transaction Security will be enforced such that all proceeds of enforcement are in cash (or sufficient cash to pay out super senior debt);
- (c) Enforcement actions must be prompt and expeditious (acknowledging the timeframe for realisation will be determined by the Instructing Group if consistent with the Security Enforcement Objective);
- (d) If the security being realised exceeds £5m or is enforcement over shares, then unless "incompatible with or unnecessary in respect of enforcement proceedings in the relevant jurisdiction", Security Agent to appoint a big four accounting firm or other reputable and independent international investment bank or professional services firm (a "Financial Adviser") to opine as expert: (i) on the optimum method of enforcing to achieve the Security Enforcement Principles and maximise recoveries; (ii) that the proceeds are fair from a financial point of view after taking into account all relevant circumstances; and (iii) that the sale is otherwise in accordance with the Security Enforcement Objectives;
- (e) A Financial Adviser's opinion will be conclusive evidence that the Security Enforcement Objective has been met;
- (f) Enforcement over shares or assets greater than £5m which is conducted by way of public auction must allow equity investors to participate;
- (g) Absent objections from creditor classes, the Security Agent can assume enforcement is in accordance with the Security Enforcement Objective. If the Security Agent receives an objection, a Financial Adviser's opinion that the action could reasonably be said to be aimed at achieving the Security Enforcement Objective will be conclusive.

## Appendix 6 – Instructing Group Regimes

### Structure 1: Super Senior RCF and Senior Secured Notes

A typical definition of what constitutes an Instructing Group (for security enforcement and other purposes) on a Super Senior structure transaction is as follows:

"Instructing Group" means at any time:

- (a) subject to paragraphs (b) and (c) below, the Majority Super Senior Creditors<sup>xvi</sup> (other than Priority Interest Rate Hedge Counterparties<sup>xvii</sup>) and the Senior Secured Note Required Holders<sup>xviii</sup> (in each case acting through their respective Creditor Representative)...; or
- (b) in relation to instructions with respect to Enforcement, the Majority Super Senior Creditors and/or the Majority Senior Secured Creditors<sup>xix</sup> provided that:
  - (i) in the case of an Insolvency Event... the instructions...from the Majority Super Senior Creditors will prevail provided further that such instructions are consistent with the Security Enforcement Principles;
  - (ii) if the Security Agent has received Conflicting Enforcement Instructions then:
    - (A) ...the instructions...from the Majority Senior Secured Creditors will prevail<sup>xx</sup>; and
    - (B) in the event that the Super Senior Liabilities have not been fully discharged within six months of the date the first Enforcement instructions were issued, the instructions with respect to Enforcement from the Majority Super Senior Creditors will prevail;
- (c) in relation to any instructions following Enforcement, the Majority Super Senior Creditors and the Majority Senior Secured Creditors<sup>xxi</sup>.

### Structure 2: Pari passu loan & bond (post-ista)

A typical definition of what constitutes an Instructing Group (for security enforcement and other purposes) on the latest pari passu loan and bond structures is as follows:

"Instructing Group" means at any time:

- (a) prior to the Senior Secured Discharge Date, the Majority Senior Secured Creditors<sup>xxii</sup>; and
- (b) on or after the Senior Secured Discharge Date but before the Senior Subordinated Discharge Date, the Majority Senior Subordinated Creditors.

The Security Agent may refrain from enforcing the Transaction Security unless instructed otherwise by the Instructing Group.

### Consultation Period

- (a) Subject to paragraph (b) below, before giving any instructions to the Security Agent to enforce the Transaction Security or to take any other Enforcement Action, the Agent(s) of the Creditors represented in the Instructing Group concerned shall consult with each other Agent and the Security Agent in good faith about the instructions to be given by the Instructing Group for a period of up to 15 days (or such shorter period as each Agent and the Security Agent shall agree) (the Consultation Period) and only following the expiry of a Consultation Period, the Instructing Group shall be entitled to give any instructions to the Security Agent to enforce the Transaction Security or take any other Enforcement Action.

- (b) No Agent shall be obliged to consult in accordance with paragraph (a) above and the Instructing Group shall be entitled to give any instructions to the Security Agent to enforce the Transaction Security or take other Enforcement Action prior to the end of a Consultation Period if:
  - (i) the Transaction Security has become enforceable as a result of an Insolvency Event; or
  - (ii) the Instructing Group or any Agent of the Creditors represented in the Instructing Group determines in good faith (and notifies each Agent and the Security Agent) that to enter into such consultations and thereby delay the commencement of enforcement of the Transaction Security could reasonably be expected to have a material adverse effect on:
    - (A) the Security Agent's ability to enforce any of the Transaction Security; or
    - (B) the realisation proceeds of any enforcement of the Transaction Security.

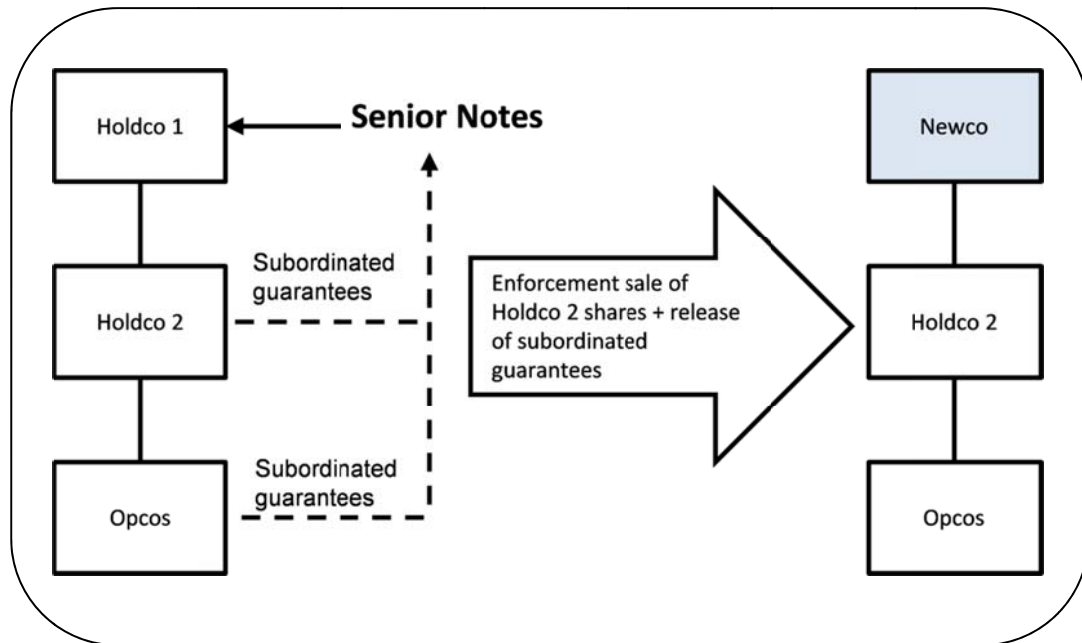
#### **Structure 2: Pari passu loan & bond (pre-ista)**

A typical definition of what constitutes an Instructing Group (for security enforcement and other purposes) on pari passu loan and bond structures prior to the ista financing (May 2013) is as follows:

"Instructing Group" means at any time:

- (a) (where the outstanding principal amount of the Senior Lender Liabilities and the undrawn uncanceled commitments of the Senior Lenders under the Senior Finance Documents are, in aggregate, greater than or equal to 25 per cent of the aggregate principal amount of the Senior Lender Liabilities, the undrawn uncanceled commitments of the Senior Lenders under the Senior Finance Documents and the Senior Secured Notes Liabilities) the Majority Senior Lenders<sup>xxiii</sup>; and
- (b) (otherwise) the Majority Senior Secured Creditors<sup>xxiv</sup>.

## Appendix 7 – Release Mechanics

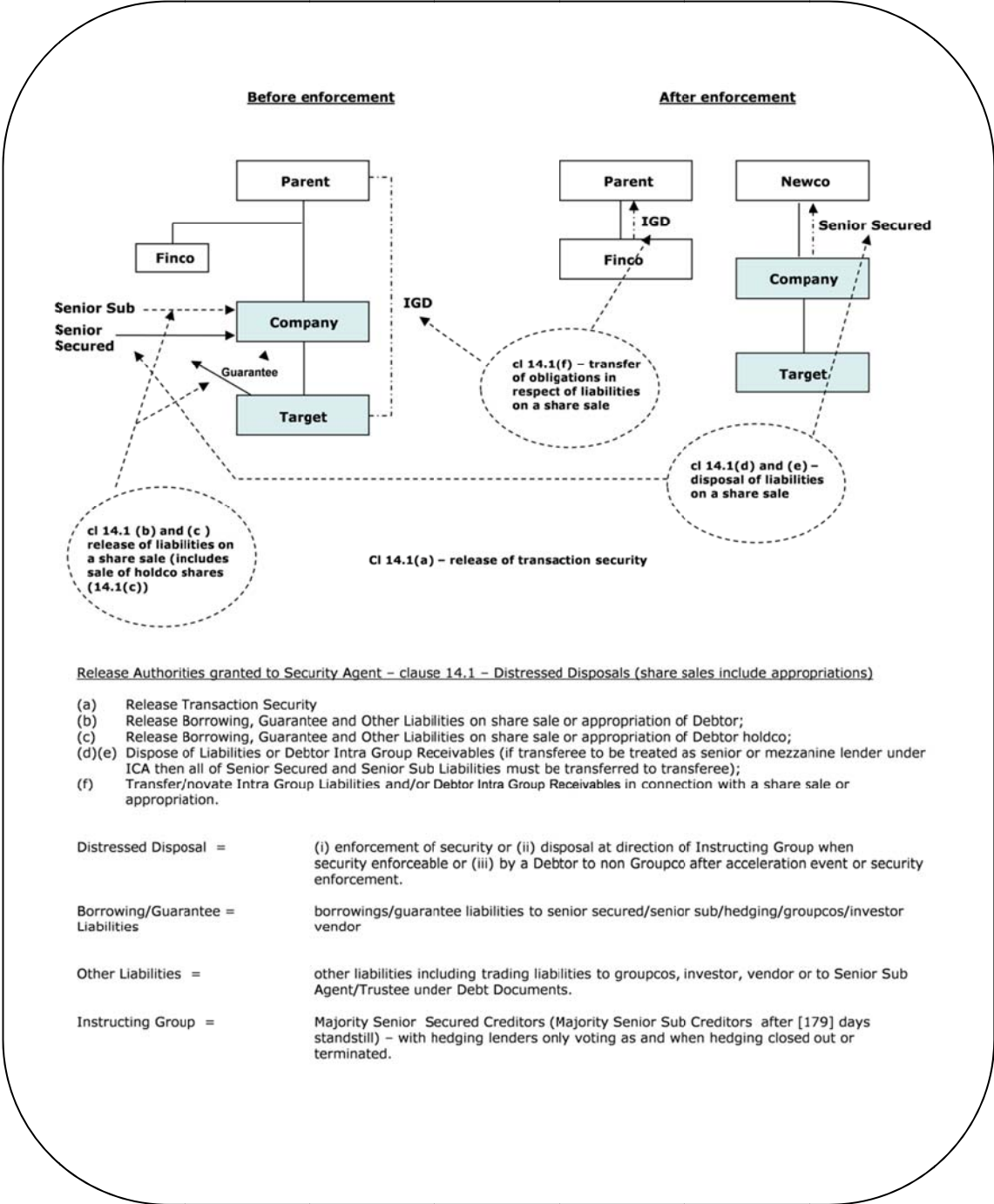


**Commentary:** Intercreditor Agreements on transactions featuring Senior Notes will generally authorise the Security Agent to release upstream guarantees (and any security) granted in favour of Senior Noteholders in circumstances where the prior ranking senior secured creditors are enforcing their security. So, for example, if the senior secured prior ranking creditors instruct the Security Agent to enforce the security over the shares owned by Holdco 1 in Holdco 2 (see diagram above) then the Security Agent is authorised to release the upstream guarantee and any other claims which the holders of the Senior Notes have against Holdco 2 and Holdco 2's subsidiaries. This enables Holdco 2 and its subsidiaries to be sold to a purchaser (Newco in the above diagram) free and clear of any claims of the Senior Noteholders. If the price paid for the shares in Holdco 2 is less than the total of senior secured claims, then Senior Noteholders are left empty-handed.

## Appendix 8 – Security Agent release authorities in the LMA Leveraged Intercreditor Agreement (ICA)

The table and diagram below summarise the authority granted by lenders, bondholders, hedging providers and group companies in favour of the Security Agent if the Loan Market Association's Leveraged Intercreditor Agreement (2013) form is adopted for the purpose of a particular financing transaction.

Feature	Commentary
Security Agent's release authority (LMA clause 14.1)	<p>This authority granted in favour of the Security Agent applies in relation to Distressed Disposals.<sup>xxv</sup> The authority extends to releasing security and releasing borrowing liabilities, guarantee liabilities and other liabilities of the various Debtors and their respective subsidiaries to the senior lenders, mezzanine lenders, hedge counterparties, intra-group lenders etc (Liabilities).</p> <p>The Security Agent's authority extends to cover:</p> <ul style="list-style-type: none"> <li>(a) release of transaction security/provision of non-crystallisation certificates;</li> <li>(b) release of Liabilities and transaction security on a share sale or appropriation of a Debtor and its subsidiaries;</li> <li>(c) release of Liabilities and transaction security of a Holdco and its subsidiaries on disposing (or appropriation) of shares in a Holdco of a Debtor;</li> <li>(d) facilitative disposal of Liabilities when selling (or appropriating) shares in a Debtor or a Holdco [to a third party<sup>xxvi</sup>] when the Liabilities cease to be governed by the ICA;</li> <li>(e) sale of Liabilities when selling (or appropriating) shares in a Debtor or a Holdco [to a lender controlled vehicle<sup>xxvii</sup>] when the Liabilities continue to be governed by the ICA;</li> <li>(f) novation of intra-group obligations.</li> </ul> <p>Net proceeds must be applied in accordance with the ICA waterfall. Non-cash consideration is specifically contemplated.</p> <p>The Security Agent must take "reasonable care to obtain a fair market price in the prevailing market conditions" but is under no obligation to postpone any enforcement or sale (14.4). This requirement is deemed conclusively satisfied if the enforcement:</p> <ul style="list-style-type: none"> <li>(i) is pursuant to a court approved or supervised process;</li> <li>(ii) is made by a liquidator, receiver, administrator or similar;</li> <li>(iii) is pursuant to a Competitive Sales Process<sup>xxviii</sup>; or</li> <li>(iv) a financial adviser confirms the proceeds realised are fair from a financial point of view taking into account all relevant circumstances.</li> </ul>

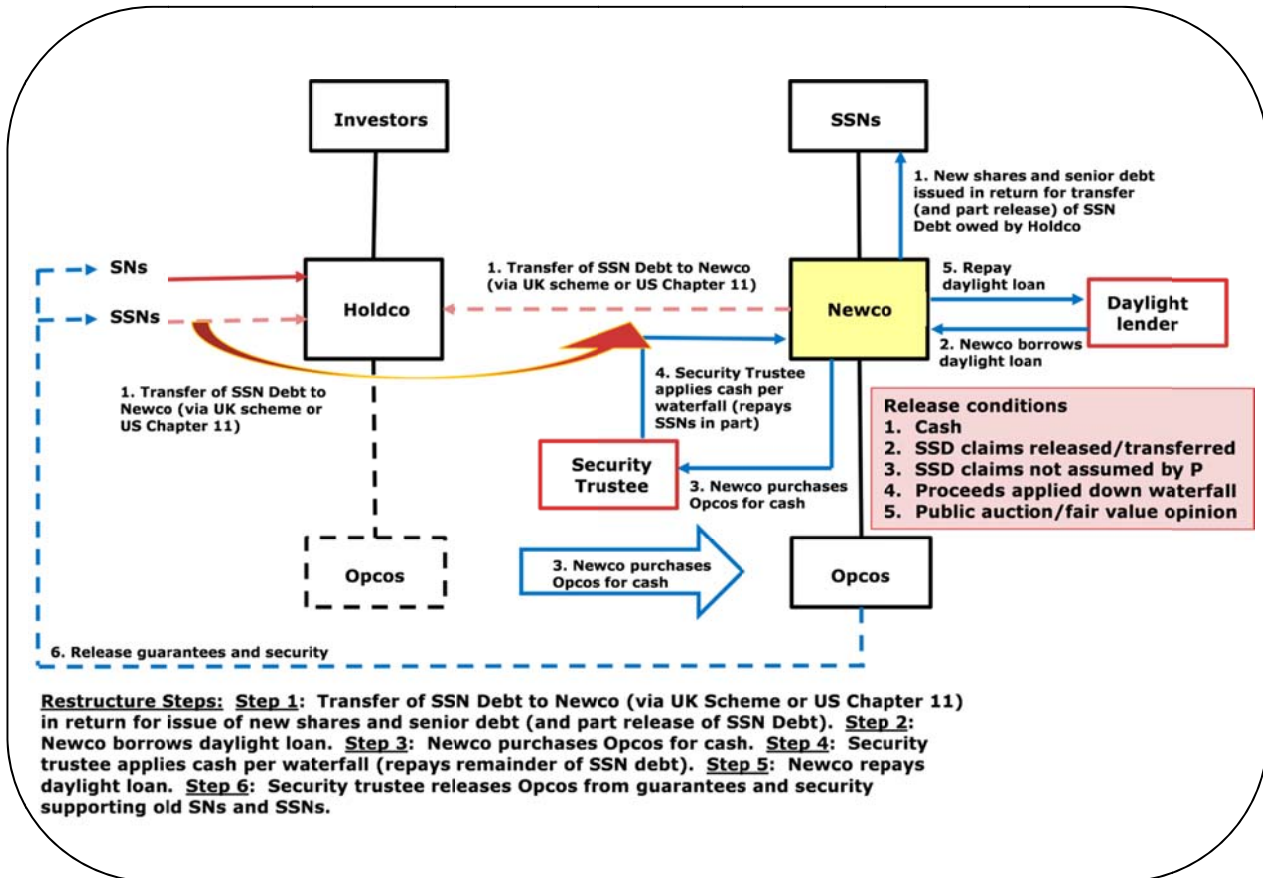


Release Authorities granted to Security Agent – clause 14.1 – Distressed Disposals (share sales include appropriations)

- (a) Release Transaction Security
- (b) Release Borrowing, Guarantee and Other Liabilities on share sale or appropriation of Debtor;
- (c) Release Borrowing, Guarantee and Other Liabilities on share sale or appropriation of Debtor holdco;
- (d)(e) Dispose of Liabilities or Debtor Intra Group Receivables (if transferee to be treated as senior or mezzanine lender under ICA then all of Senior Secured and Senior Sub Liabilities must be transferred to transferee);
- (f) Transfer/novate Intra Group Liabilities and/or Debtor Intra Group Receivables in connection with a share sale or appropriation.

- Distressed Disposal = (i) enforcement of security or (ii) disposal at direction of Instructing Group when security enforceable or (iii) by a Debtor to non Groupco after acceleration event or security enforcement.
- Borrowing/Guarantee = borrowings/guarantee liabilities to senior secured/senior sub/hedging/groupcos/investor vendor Liabilities
- Other Liabilities = other liabilities including trading liabilities to groupcos, investor, vendor or to Senior Sub Agent/Trustee under Debt Documents.
- Instructing Group = Majority Senior Secured Creditors (Majority Senior Sub Creditors after [179] days standstill) – with hedging lenders only voting as and when hedging closed out or terminated.

## Appendix 9 – Senior Notes Cram Down (*Truvo* and *Wind Hellas* Mechanic)



## Appendix 10 – ICA Release Conditions (comparative table)

The table below lists in column 1 the various conditions which may need to be satisfied in order for a Security Agent to be able to release or transfer the liabilities owing to (or security held for the benefit of) the relevant creditors. Columns 2, 3 and 4 indicate the conditions typically applicable on "big ticket" mezzanine, senior (subordinated) bond and super senior RCF & Senior Secured Note transactions respectively.

(1) Release Condition	(2) Big Ticket Mezzanine	(3) Senior (Subordinated) Notes	(4) Super Senior RCF & Senior Secured Notes
1. <b>Cash consideration</b> only	Non-cash permitted if all the cash bids received are at a value less than the senior secured debt	Yes – usually cash or substantially all cash	Yes – at least equal to super senior debt amount
2. <b>Senior creditor claims</b> against companies sold must be <b>released</b> in full <b>or disposed of</b>	No requirement	Condition applies	n/a
3. <b>Senior creditor claims cannot be assumed by purchaser</b>	No requirement	Condition applies	n/a
4. <b>Auction</b> or competitive process required	Condition applies – "with a view to obtaining the best price reasonably obtainable in all the circumstances" <b>unless</b> Security Agent considers in good faith an auction/competitive bid process is not reasonably practicable	Condition only applies if neither condition 5 nor condition 6 is satisfied	Indirectly/potentially – see release condition 9
5. <b>Court supervised process</b> required	No requirement	Condition sometimes applies but only if neither condition 4 nor condition 6 is satisfied	n/a
6. <b>Fair value opinion</b> required	Required where: (i) no competitive bid process; or (ii) if senior secured creditors bid highest but that bid is less than par value of senior secured creditor claims	Condition only applies if neither condition 4 nor condition 5 is satisfied	Yes – if enforcing over shares or assets > £5m
7. <b>All security</b> granted by companies sold must be <b>released</b> and discharged	No requirement	Condition applies	No requirement
8. Mezzanine/High yield entitled to bid	Yes – if an auction is held	Yes – if condition 4 applies	n/a
9. Enforcement must <b>maximise recoveries for senior creditors</b>	n/a – but Security Agent must take reasonable care to obtain the best price reasonably obtainable	n/a – but English law implies a duty on Security Agent to take reasonable care to obtain a fair price	Yes – this is the Security Enforcement Objective (see Appendix 5)
10. Enforcement must be <b>prompt and expeditious</b>	n/a	n/a	Yes
11. <b>Authority to release borrower claims</b> as well as guarantor claims	Security Agent is not usually authorised to release borrower claims	Not usually	No – super senior debt has to be discharged in full in cash

## Notes

- i Note that super senior RCFs are also found in financings which involve unitranche facilities. Unitranche facilities are made available by credit funds (rather than banks) by way of "blended" term loans. RCFs on unitranche facilities share some of the characteristics of those which are used alongside high yield bonds. There are divergences, most notably as a result of "Unitranche RCFs" being loaned under a common facility agreement alongside the unitranche lenders whereas the "Bond RCFs" are advanced under a separate independent facility.
- ii The other super senior debt may be in respect of (e.g.) an accordion facility.
- iii This compares to typical headroom of (e.g.) 30 per cent for standard leveraged loan financial covenants.
- iv i.e. a limit on the ratio of secured debt or super senior debt measured as a multiply of EBITDA (e.g. 1.2x).
- v The six templates shown represent the basic template structures. Individual transactions will be subject to their own structuring constraints which will produce variations to these basic templates.
- vi The quantum of the Super Senior RCF is usually equal to up to one turn of the Group's EBITDA. An overview of the key provisions of a Super Senior RCF is set out in Appendix 1.
- vii The description here is a considerable simplification of the various pre-2008 funding structures. However, it describes the basic components. More detail on pre-crisis structures can be found in section 5 (Bond Structures 2004 to 2006) of the paper we published in April 2006 titled "*Legal & Structural Risk in the European Leverage Finance Market*".
- viii The Super Senior Liabilities are the revolving credit facility and certain hedging. The Senior Note Liabilities are the liabilities under the senior secured notes.
- ix The LMA form of super senior intercreditor agreement also envisages control passing back to the super senior creditor class if the senior secured bondholders have not notified the Security Agent how they wish the security to be enforced (or appointed an adviser to assist in making such determination) within a shorter timeframe (e.g. three months),
- x Which is a typical version of the definition used on Super Senior deals.
- xi We believe the ista transaction may have marked the turning point.
- xii i.e. Senior secured lenders and noteholders.
- xiii There are also other limited exceptions which allow senior noteholders to take equivalent enforcement action, e.g. if the prior ranking senior secured creditors are also taking action against that particular entity.
- xiv Subject to minimal exceptions relating to trustee fees, costs and expenses, and similar.
- xv Against operating companies etc (no standstill against the issuer).
- xvi At least two-thirds majority of the super senior RCF lenders.
- xvii The Super Senior Hedging Counterparties.
- xviii The principal amount of Senior Secured Notes required to vote in favour of the relevant decision (usually 50.1 per cent for security enforcement).
- xix Majority Senior Secured Creditors means Senior Secured Noteholders and Non-Super Senior Hedge Counterparties whose credit participations total more than 50 per cent of all the Senior Credit Participation of those creditors.
- xx Provided the relevant consultation periods have been observed.
- xxi Note – no procedure for how to resolve conflicting instructions.
- xxii Defined as Senior Secured Creditors (lenders, bondholders and hedging counterparties) whose Senior Secured Credit Participations exceed 50 per cent of the total Senior Secured Credit Participations. Senior Secured Lenders score their undrawn as well as drawn commitments. Hedging included at close out amount (even if not actually closed out).
- xxiii A two-thirds majority of senior secured lenders and hedge counterparties (whether or not closed out).
- xxiv A simple majority of the senior secured lenders, senior secured noteholders and hedge counterparties (whether or not closed out) voting as a combined class.
- xxv A disposal effected at the request of an Instructing Group where security enforceable, by enforcement of the security or after the occurrence of acceleration event/enforcement of any transaction security by a Debtor to a third party.
- xxvi This is not explicitly stated but is the likely scenario in which this power would be used.
- xxvii This is not explicitly stated but is the likely scenario in which this power would be used.
- xxviii Competitive Sales Process means: (a) any auction or other competitive sales process conducted with the advice of a financial adviser; and/or (b) enforcement of security by way of auction or other competitive sales process pursuant to requirements of applicable law.

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