

Navigating Roadblocks to Success: Financing, Landlords, and Public Entities

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AGENDA

1. Landlords & Leases
2. Financing & Lenders
3. Public Entities
4. Term Sheets
5. Questions

DISCLAIMER

This presentation is intended to provide an overview of some common roadblocks you might encounter while negotiating contracts in a project context but is not intended to provide specific legal advice.

It is recommended you consult with a lawyer before negotiating any type of agreement for specific advice with respect to your legal matters and for any legal requirements specific to the jurisdiction you are located in.

Landlords & Leases

DO YOU NEED A LEASE?

- A lease is a contractual arrangement where a party owns property (the “Landlord”) and someone (the “Tenant”) wants to use some or all of the property (the “Leased Premises”) for a fee.
- A sublease is a contractual arrangement where a Tenant agrees to let another party (the “Sub-Tenant”) use some or all of the Leased Premises.
- Why do you need a lease or a sublease? To create a contractual arrangement to allow legal access and use to a property for your project.

CONSENT TO TRANSFER

What is a “Transfer”: assignment, sublet, sharing of possession, license, change of control, amalgamation, mortgage



Landlord: no
Transfer of Lease



Tenant: flexibility
for future plans

CONSENT TO TRANSFER

- Consent: does the Landlord have to act reasonably and without undue delay versus ability to act arbitrarily and sole discretion?
- Conditions to consent? Carve-outs to consent?
- Does the Tenant remain on the hook for the obligations of the Lease under a Transfer?

COMMON CLAUSES TO CONSIDER MORE CAREFULLY

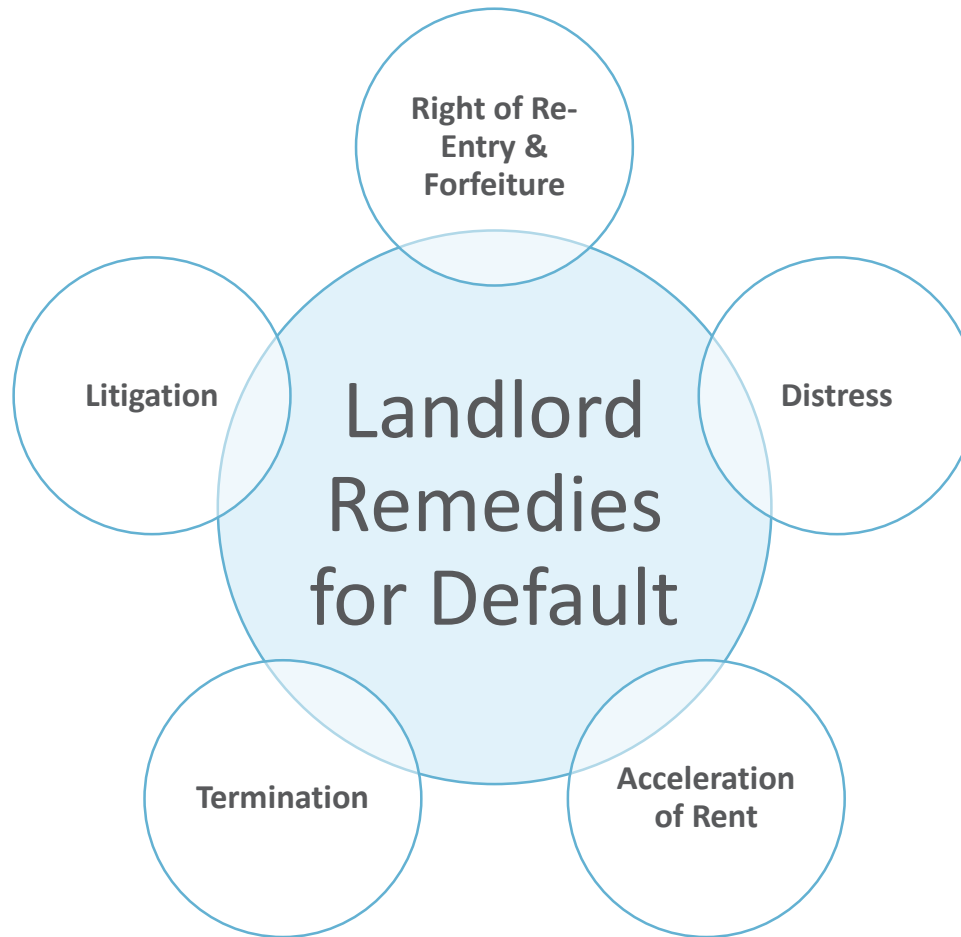
- **Additional Rent:** what are you paying for and does it make sense for your landlord to provide to you utilities and maintenance?
- **Utilities** – what happens to your operations if the landlord cannot provide you with utilities? What constitutes force majeure under the lease versus your contracts with your customers?
- **Overloading facilities:** “Tenant shall not bring or permit to be brought into any part of the Premises, any machinery, equipment, object or thing that by reason of its weight, size or use, might damage or endanger any part of the Premises or exceed or overload the capacity of any utility or mechanical facility or service.”
- **Access to other parts of the landlord’s premises that you are not leasing?**
- **Noise**

NON-DISTURBANCE AGREEMENT

A non-disturbance agreement is an agreement between the tenant and the landlord's lender which provides that in the event that the lender should come into possession of the leased premises, as long as the tenant continues to pay its rent and perform its obligations under the lease, the tenant may remain in occupation of the leased premises and not be disturbed by the lender.

LANDLORD WAIVER

- Notwithstanding your lender's security interests in your assets, your landlord may have the right to seize (known as "landlord distress rights") and sell your personal property as a tenant in satisfaction of rental arrears
- A lender will request a Landlord Waiver to (a) subordinate the landlord's distress rights and (b) gain access rights to the leased premises to seize the assets
- Issues:
 - Does your landlord have an obligation to deliver a waiver to your lender?
 - Cure rights of your lender?
 - What kind of access?



- Consider your cure periods
- What if the landlord defaults under the lease?

Financing & Lenders

WHAT CAN YOU GIVE AS SECURITY?

- What have you already given as security to another lender
- Security interest in real or personal property
- Guarantees
- Share pledges
- Assignments & Third Party Documents
- Negotiating limitations in your security: limited to a specific asset-based portfolio, limitation in amounts

CREDIT AGREEMENT

- Commitment Letter vs Credit Agreement
 - Have you read it?
- Prepayment privileges
- What is a covenant, representation, and warranty?
- What is a condition precedent?
- Reporting obligations
- Insurance requirements
- Indemnification
- Defaults

INTERCREDITOR AGREEMENT

- An agreement between two or more lenders each having security in the same collateral but different debt obligations of the same borrower
- Issues:
 - Have the lenders agreed to the key terms before an agreement is drafted?
 - Do they have credit approval?
- Topics covered in such an agreement: consents, subordination of payments, standstills, amendments to debts in the future, waterfall provisions

ASSIGNMENT DOCUMENTS

- Examples: Assignment of material contracts or Assignment of insurance
- Can you assign these documents / policies and what consents are required?
- How long does it take the third party to approve such assignment?
- Is your insurance coverage sufficient?
- Due diligence by the lender of the material contracts

Public Entities

INTERESTS OF THE PUBLIC ENTITY

- Why is the public entity getting involved with the project?
 - Satisfying a public interest
 - Ensuring adequate safeguards or the project operates in a particular manner
 - Reduction of capital outlay
 - Lack of expertise

PUBLIC PERCEPTION

The public entity will negotiate with public perception and public interest at mind which can lead to:

- “Unusual” clauses needed in your agreement because of public perception
- Shift of allocation of risk for potential future event from public entity to you
- Public entity will want broad, all-encompassing provisions whereas supplier will want narrower clauses
- How do the parties envision a potential future event?

AUTHORITY

- Understand at the very beginning of your negotiations with a public entity:
 - What kind of approvals the public entity needs in order to enter into an agreement?
 - Timing for approvals?
 - Limitations that a public authority specifically cannot agree to (i.e., contingent liabilities)

CONFIDENTIALITY / FREEDOM OF INFORMATION

- Is your agreement subject to being part of the public record or a freedom of information request?
- Marking documents “CONFIDENTIAL”
- What kind of confidentiality arrangements can the governmental entity agree to?



GENERAL

- Who has to approve the particular arrangement / agreement within the public entity? Are they involved in the negotiations or being briefed as the negotiations proceed?
- Does the public entity need to engage technical independent advisors and do these advisors understand the business or project?
- Public entities are very risk averse and will shift all risk to you
- A public entity may need a termination right of your agreement at its convenience and discretion

Term Sheet?

TERM SHEET

- A term sheet / letter of intent is a non-binding document entered into by parties to set out the key business terms for a transaction or arrangement

Benefits	Disadvantages
<ul style="list-style-type: none">• Certainty of Terms• Costs	<ul style="list-style-type: none">• Costs• Time to Negotiate

- Recommendation: have legal counsel review your term sheet

Questions?