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# Westminster Meets Wall Street: U.S. Law Considerations in English Law Facilities Agreements

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Fund finance is and always has been by nature a cross border enterprise. While there are a number of lenders that we represent in the United States that lend to funds exclusively organized in the U.S.– typically in Delaware – that is as a general matter the exception rather than the rule. Given a confluence of factors, including  the home jurisdiction of certain investors, tax, and other legal and economic considerations, most fund structures also feature entities organized outside the U.S., most typically in Canada, Cayman, Ireland, Luxembourg, and other European jurisdictions. Therefore, there are cross-border considerations in almost every fund finance deal. Our wonderful stable of local counsel is a critical part of these transactions by drafting and negotiating provisions that are relevant to the legal constructs of the jurisdictions in question, in particular those that relate to the existence, power and authority of such entities, the grant and perfection of security interests, and advising on mechanics that may be unique to the account structure or depositary arrangements, in these jurisdictions.

While the paragraph above gives some perspective on our day-to-day U.S. practice, the subject of this article is slightly different in perspective. In deals originated out of our London fund finance practice, we frequently work alongside our London colleagues to act as their local counsel in connection with English law governed credit or facilities agreement featuring U.S. obligors.

Cadwalader is uniquely placed to advise on transactions of this nature, due to the depth and experience our market-leading teams on both sides of the pond,  both in fund finance and in more broader contexts.

The following is a high-level overview of some important U.S. law considerations for English, European, and other non-U.S. lenders in the context of a traditional subline deal.  There are principles of U.S. law that are quite different from those in other jurisdictions and being aware of them and integrating relevant provisions into your facilities agreement will provide important lender protections. This article does not provide an exhaustive list of potential issues and further structure-specific advice should be sought in each instance.

**(1) U.S. Bankruptcy Law.**

Perhaps the most important consideration for lenders under any English law governed facilities agreements featuring U.S. obligors are the implications of any bankruptcy proceedings under U.S. bankruptcy law.

The primary reason for this is that U.S. bankruptcy law features the ‘automatic stay’ which enjoins all judgment enforcement and collection activities, foreclosures, and repossessions of property from the date of filing of the bankruptcy petition, by creditors on account of any debt or claim that arose before the filing of the bankruptcy petition. In addition, the threshold for obtaining a bankruptcy order for relief is comparatively lower than in other jurisdictions, e.g., in a voluntary bankruptcy case, the commencement of the case constitutes an order for relief. This means that a debtor (i.e. a borrower) need not be insolvent to file a bankruptcy proceeding and, conversely, being insolvent does not mandate that a debtor file a bankruptcy proceeding.

Many of us view the automatic stay concern as the most important issue under U.S. law for us to address in a facilities agreement. Even where the parties are firmly wedded to their precedent, we view it as critical that this particular lender protection be included. The market standard approach is to include an automatic acceleration clause which provides for the automatic acceleration of the obligations under the facility upon an insolvency or bankruptcy-related event of default by a U.S. borrower. These provisions provide that if a proceeding is filed in respect of a U.S. borrower in a court of competent jurisdiction, that the commitments will be automatically terminated and obligations will be accelerated without any notice to the borrower, which is expressly waived.

We are of the view that in addition to including an automatic acceleration clause, it remains essential that the organizational and facility documents of any U.S. borrower include adequate lender protections as well. A non-exhaustive list of relevant lender protections is as follows (though any enforcement action may still require court ordered relief from the automatic stay):

- express provision permitting the assignation/pledge of the right to issue capital calls, and grant security over the account into which capital contributions are paid, to a lender;
- language clarifying that any U.S. entity has the right to issue capital calls in a default scenario;
- capital call rights (and the related obligation of limited partners to honor any such capital calls) should be irrevocable and without setoff, counterclaim, or material breach defense;
- express third-party beneficiary language running in favor of any lender/creditor should be included; and
- include an express waiver by limited partners of any benefit of Bankruptcy Code section 365 (see the Fund Finance Friday article prepared by Tim Hicks on January 31, 2020 for a discussion of this section with respect to the treatment of debt/equity commitments **here**).

It is essential that specialist advice is sought, and thorough diligence is conducted, on each transaction to ensure that appropriate lender protections are included in any finance/organizational documents.

**(2) Guarantee Limitation – Fraudulent Conveyance:**

'Constructively fraudulent transfers' also pose an area of concern for lenders, which we address with relevant drafting.

A 'constructively fraudulent transfer' is a transfer of assets or the incurring of obligations by an entity in exchange for less than a 'reasonably equivalent value' when the entity was (a) insolvent or undercapitalized at the time of any such transfer or obligation or (b) rendered insolvent or undercapitalized or unable to pay its debts as they become due as a result of any such transfer or obligation. In such circumstances, a trustee (or debtor in possession) may seek an order of the U.S. courts to avoid any such transfer and return the property to the debtor's bankruptcy estate for the benefit of its creditors or avoid the obligation incurred.

U.S. bankruptcy law generally looks at whether the liabilities of an entity are greater than the fair saleable value of its assets, with any failure of this test rendering any such entity insolvent. Therefore, if a U.S. entity guarantees the obligations of other borrowers under a facilities agreement, there is a risk that any such guarantor would be rendered insolvent if the guarantee were enforced.

Solvency for these purposes is tested at the time the guarantee is entered into and centers on whether the guarantor has sufficient assets to cover the obligations which are being guaranteed.

The market standard approach to ensuring that lenders can recover the maximum amount possible in any such circumstances is to include customary 'saving language'. This language is intended to 'save' any guarantee provided by a U.S. guarantor from any 'constructively fraudulent transfer' limitations/reversals. Essentially this language limits the size of the guarantee to an amount that would not render the relevant obligator insolvent.

It is also critical to obtain a certification of solvency from any U.S. guarantor (in addition to the U.S. borrowers, of course). This can be by means of a specific representation and warranty in the facilities agreement or via a solvency certificate delivered as a condition precedent to closing of the facility.

In additional to the usual mandatory health warning set out above, specific advice should be sought depending on whether any such guarantee is downstream, cross-stream or up-stream, as the analysis and implications may differ by the type of guarantee.

**(3) Perfection of Security Interests**

The perfection of security interests under New York law are governed by the Uniform Commercial Code as adopted in New York (the "UCC"). In a typical subline transaction, the collateral package consists of the right to call for and collect the proceeds of capital calls, and security over the collateral accounts into which those capital calls are deposited. This collateral package is perfected pursuant to a UCC filing in respect of the capital call rights and generally a deposit account control agreement, though other forms of perfection exist for bank accounts and are used as well.

A UCC filing provides public notice of the creation of a security interest over the relevant collateral, similar to the notice requirements under English law. In the U.S., this public filing system governs the priority of the lien and it is of critical importance that UCC financing statements are properly filed immediately at closing. This is very different from the notice requirements under English law, which are often actioned as a post-closing matter.

A deposit account control agreement affords lenders perfection via 'control' of the collateral account and is the market standard for perfecting security interests over collateral accounts, though there are alternative means to perfect such security interests which are less commonly seen in the market.

For further details regarding the creation and perfection of security interests under New York law, please refer to Fund Finance Friday article prepared by Chris Van Heerden dated April 2, 2021 **here**.

**(4) Waiver of Jury Trial:**

As the name suggests, this language requires borrowers to waive their right to trial by jury such that any litigation pertaining to the subject matter of the facilities agreement may be heard by a judge sitting without a jury.

This serves to expedite the enforcement process and is beneficial to the interest of the lenders (not least from a cost perspective) should any enforcement proceedings require to be initiated in the U.S.. The idea here is that a more sophisticated judge will hear the case rather than a less predictable jury. These provisions came into the market following large and unpredictable jury awards in "lender liability cases."

The right to trial by jury is a fundamental right under the U.S. constitution, as well as under a number of state constitutions and statutes. For a waiver of jury trial to be enforceable, the provision in the facilities agreement must meet certain criteria. For example, federal courts and courts in the state of New York will generally uphold this arrangement between sophisticated parties who are represented by counsel. Other U.S. states may impose additional requirements, or bar the effectiveness of any waiver of the right to a jury trial altogether.

It is critical that the parties to English law governed facilities agreements are advised by sophisticated U.S. counsel with knowledge of the particular state's laws to ensure that any agreement between the parties will be upheld in court.

Another feature to consider is whether just the borrower is waiving its right to a jury trial or whether all of the parties to the facility are doing so. In general, we consider the waiver of this right as a mutual agreement between the parties to the facility and this important provision (which can be found the back of facilities agreements) is set out in capitalized BOLD text- not because someone inadvertently hit the caps-lock-key but because New York law and U.S. federal law, require this waiver must be conspicuous.

**(5) Statutory Considerations:**

Naturally, there are also a plethora of US statutes which lenders should be aware of when contracting with U.S. entities and which necessitate suitable drafting to be included in the representations, covenants, events of default KYC and increased costs clauses.

These include, to name but a few: the margin stock regulations, ERISA, the Investment Company Act, Dodd-Frank Wall Street Reform Act and USA Patriot Act. These are likely to be relevant, but are beyond the scope of this article.

For more details regarding the margin stock regulations, please refer to the Fund Finance Article written by Joe Zeidner on April 5, 2024 **here**.

For more details on ERISA considerations, please see the Fund Finance Friday article produced by James Frazier dated February 1, 2019 **here**.

For a discussion on the Investment Company Act, please refer to the Fund Finance Friday article written by Brian Foster on January 29, 2021 **here**.

For more details concerning the Dodd-Frank Wall Street Reform Act, please refer to the Fund Finance Friday article written by Mercedes Tunstall and Katie McShane on December 6, 2024 **here**.