

Fund Finance Friday



Be Literate, Be Numerate, Be Brave

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Fund finance lawyers live in a world full of documents and words. That is fairly obvious, and it sounds like it ought to be simple. But writing agreements and contracts clearly is actually harder than you might think. When it comes to choosing exactly the right word to use in an agreement, it is not a simple or easy task, either.

The English language has more than 180,000 words in current use. It is a very flexible language, adopting new words and phrases readily, and adapting existing words regularly. And, of course, words become obsolete and fall out of use. Most people do not know or use anywhere near all these words. The average English lawyer regularly may use around 30,000 words.

From all those words, a lawyer has to pick exactly the right one to use to unambiguously convey their intended meaning. And that intended meaning must be one which the reader of your words will unambiguously and immediately understand. Plus, whilst our clients are smart people, they don't read documents for hours each day for a living. This is where more pitfalls arise. Lawyers are trained to use words very precisely, but that is not always the case for the non-lawyer reader of a contract or other communication. So, in addition to being legally accurate and correct, a lawyer has to choose a word the reader of that contract or communication will understand in the way that lawyer meant.

Take the word "pledge," for example. That word has a precise and specific meaning under English law. But it is also frequently used by non-lawyers to mean a more general concept of having security over something. So, when a client tells us they want a pledge over, for example, the uncalled capital contributions of investors in a fund, how do we respond? My usual approach is to confirm that we will make sure they have security over the uncalled capital, and steer clear of using the word "pledge". I understood exactly what the client wanted to achieve, but in my reply I need to be very precise with my use of the word "security" rather than "pledge."

Similarly, the word "recourse" can come loaded with unspoken meanings. Does it mean that someone actually has security over the assets in question? Or does it mean that those assets are not secured in favour of someone else, so they should be available on an unsecured basis? Or does it mean something else, like some sort of contractual agreement relating to the assets, but falling short of security?

So my first message to young lawyers just starting out in the fund finance space (or any finance space) is this: Don't be afraid to ask your client, or your opposing counsel, questions. Be brave. At worst, it will sound like you are just double checking that you correctly understand your client's instructions. At best, it can flag a disconnect between what your client thinks is possible and what is actually possible.

My second message to young lawyers in the fund finance space is this: Don't be afraid of numbers and mathematics. Simple, uncomplicated calculations that are used well can really help everyone's understanding of legal and contractual consequences. For example, explaining what an "overcall" is and how it operates can be fiddly, so I always use a numerical example.

Say that a fund has four investors, each with equal commitments of 25% of the total commitments. Say there is a capital call for a total of £100, and say one investor fails to fund its £25 share. Then what happens? An unlimited overcall provision should allow the general partner to make a second call on investors for the shortfall. Here, £100 was originally called but only £75 was funded, so there is a £25 shortfall. Only the investors who funded the first call will be

asked for the second call, so the £25 shortfall is called from the three investors who funded the first time around. Their commitments are equal, so they will be called to fund a third each of the £25 shortfall (which by my maths is £8.33 each). Had I been smarter when I started this numerical example, I would have used 4 investors with equal commitments of £30 each If you can figure out why £30 each would have been a better example, you have got it. So, once you have got it, be brave and use it.

So, in summary, we live in a wonderful world of nuanced words, some of which have legal meanings, which means you need to think about every word you read or hear and double check that it is the best word to use. And sometimes round numbers and simple maths can be really helpful, instead of a lot of words.

Be brave enough to fully use these tools!