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Don’t Look Back?

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Although Change Is Inevitable, Some Basics Remain Timeless

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By Kurt Oosterhouse
Partner | Fund Finance

With communication avenues evolving and remote options only increasing, we certainly aren't going back to the "good old days" of all-hands page flips and in-person closings. Combine that with Fax Rooms and FedEx deadlines, while certainly "old," were those days even "good"? Arguably, no – traveling across the continent to closings lugging file briefcases while worried that your documents (on disk) might be destroyed by airport metal detectors isn't something I want to go back to.

Don't worry. This isn't a collection of "Back in my day, I walked to the courthouse uphill, both ways – in the snow" stories. I'm not interested in going back to the "good old days." However, that isn't to say that there weren't some positives from those days that we should try and salvage or recreate that may make our jobs easier and even provide a smile later in our careers.

For me, there are a handful of transactions that I keenly remember. However, other than the obvious, big-ticket, multi-foreign jurisdictional deals, it's hard to figure out why certain transactions are easily recallable whereas others are a blur at best. Following a recent visit with a long-time counterpart of mine, I am finally able to put my finger on why certain transactions stand out more than others: it's because "back then," in addition to the documents, transactions had faces, literally and figuratively.

Transactions often had "kick-off" calls where all of the businesspeople and lawyers discussed the process, overall timing schedules, big-picture business points prior to drafting, etc. As lender's counsel, following the initial draft being sent to our client, we would often have in-person "page flips" to go over questions/issues with the draft. After a turn or two of the document with the borrower and counsel, we would almost always have the "all-hands" call where we would knock out the remaining issues – with time often measured by the number of bathroom breaks instead of hours. While the all-hands calls were mostly painful, they were, in their own way, extremely efficient. Within two to three bathroom breaks, real business issues were quickly separated from lawyer-generated business issues, and legal issues were often quickly dispensed with, since "it's market" and "we get that in every deal" simply wouldn't work. The businesspeople on the call needed to understand the point, so you needed to concisely explain the issue and why it really mattered to your client (and it really needed to matter, since your client − and your client's client − were on the call). Further, with everyone on the call, permanent impasses were rare, since as one of my clients once said to me, "At some point, all legal issues end up being business issues," and since the ultimate decision makers were on the same call (and nobody wanted an encore "all-hands" call), issues were decided sooner rather than later.

After the “all-hands” call, closings were mostly in person, so, ultimately, you would get to meet opposing counsel (and the borrower) face-to-face as the final issues were negotiated. While in-person negotiations presented their own set of challenges, the vast majority of the time, the opposing counsel you may have struggled with during the process didn’t seem so difficult once you were in the same room, eating from the same, picked-over fruit plate at 2:00 a.m., working toward the same goal of closing the transaction before the 9:00 a.m. funding deadline. Whether it was simply misery loving company or the fact that it is inversely harder to be unreasonable the closer in proximity the parties get to each other, I think it would be difficult to argue that these situations made it clear that our business is a relationship business.

I recently made this memorability of transactions correlation during a sit-down meeting with Tom Draper. Tom is a partner at Foley Hoag LLP and, before that, he organized Ropes & Gray’s finance group and was the long-time head of the firm’s finance group. He is a great lawyer and one of the great people in our business.

He called me to let me know he was going to be in town visiting clients and wondered if he could stop by and say hello to me and the team. Tom has done that before and, for those of you who don’t know Tom, you really should.

After making the rounds, we sat down and eventually talked about how long we had known each other and tried to remember our first deal together. We settled on it being around 1998: I represented a bank syndicate providing financing to Tom’s financial sponsor client that was buying an accessory business from its founders.

The point of detailing the transaction is to, admittedly, show off our collective memory of the deal and, more importantly, provide an outline for what I view as an “ideal transaction” – certainly ideal enough for two “adversaries” to not only remember it so well (25 years later), but also to appreciate the experience (and the subsequent professional experiences) enough to have us get together to spend an hour whenever one of us is town.

On the business side, the sellers were two brothers that started out with a small storefront in Times Square – long before the Disney Store would have been a neighbor. Their business model consisted of obtaining trademark licensing agreements with major league sports, Disney, Warner Brothers, etc. and putting those logos on hats, duffle bags, etc. – basically selling $30 products for what would have been $5, but for Mickey Mouse.

Why memorable? First, it was the uniqueness of the collateral and the process to get to an acceptable closing. Tom and his team understood the collateral concerns of the lenders. They understood that without consents to assignments of the licenses and some ability for the lenders to theoretically liquidate the collateral with the trademarks, the lenders simply had a bunch of $5 generic hats and not $30 Mickey Mouse hats. While on opposite sides of the transaction, we worked as a team to secure as many consents as were possible.

Why memorable? Secondly, the visual aspect of the closing. The closing was in the Ropes & Gray “conference space” in New York – before Ropes had a New York office. At that time, they had three or four dedicated conference rooms (with staffing) for the purpose of closings. The acquisition transaction was in one room and the financing transaction was in another room, each with multiple, aluminum accordion file holders covering the closing tables.

Why memorable? Third, I remember working directly with Tom and his team in the same room. I remember how patient he was with me dealing with the usual 11th hour issues. He could have tried to use his greater experience and large, sponsor client leverage to push me (and the lenders) to get the best possible deal for his client. Instead, he would typically approach a discussion by mentioning what he believed our concerns to be so that there was a general understanding that we each were trying to find the answer that was in the best interests of our clients and the transaction as a whole. A great lesson was learned by me that day: Finding a mutually acceptable solution doesn't mean that your aren't getting the best possible deal for your client – often, the mutually acceptable solution is the best solution for your client.

Why memorable? Finally, understanding my role in the big picture of the transaction. After the closing, I was the only person left in the financing room when one of the brothers came in and started taking pictures of the completed accordion files with his disposable camera. He smiled at me and said, "Someday, I want to show my kids what this looked like." Having prepared the funds flow, I was aware of what he and his brother netted that day. But what has struck with me more was realizing that it wasn't *our* transaction; we each simply had a role in *his* transaction.

Communication avenues continue to evolve. Now we have remote work options plus who knows what is coming next? It's hard to say those are negatives, but the same way my mobile phone went from an unexplainable blessing allowing me to break the tether to my literal desk to, years later, becoming an unbreakable tether to my ubiquitous "desk," increased communication options have their pitfalls.

As communication options have increased, it seems as though that has caused an inverse impact on the ability to make personal connections with clients, opposing counsel, their clients, etc. As I look back, those personal, face-to-face connections over the years have resulted in holiday cards from borrowers (and, in some cases, they have become my clients years later), friendships with great lawyers and people like Tom and, perhaps most importantly, often transforming difficult working relationships with people "on the other side of the table" to more productive, enjoyable working relationships. Improved personal connections not only benefit our respective clients (since we all know those transactions go smoother), but also, they make our jobs easier and more enjoyable. Who doesn't prefer working opposite people they like?

The costs, the volume of paper and the various other inefficiencies of in-person closings is a history few would want to retain. The "good old days" of all-hands "page flips" have been replaced by phone calls, which have mostly been replaced by e-mails, the same way that in-person closings have been replaced by electronic closings. That is certainly progress, and there is no reason to look back. However, there are some remnants of the "good old days" transactional practice that are worth preserving.

Our business is a relationship business and, to quote my long-time partner and friend Mike Mascia, "Everyone is a potential referral." With that in mind, instead of emailing, sometimes pick up the phone. If you have a chance at a conference to talk with someone who you have worked opposite but have never met (especially someone who you might think is "difficult"), talk to them, ask them about things other than work. While you might not make a lifelong friend, you actually might. While that person might not become your new favorite person to work opposite, I suspect that, at a minimum, your next transaction with them will be a little smoother − resulting in your work experience being proportionally more enjoyable.

Rated Note Feeders and the Cayman Islands – Lender FAQs

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By Derek Stenson
Partner | Conyers

By Michael O'Connor
Partner | Conyers

We are often asked by our clients: "What are you seeing? Anything interesting in the market on your side?" Our answer, as Cayman counsel, is more often than not that we are a ship floating in a tide and what they see as trends in the U.S. fund structuring and fund finance market will (or already have) washed up on our shores. One such trend that we continue to see progress in the market is in the confluence of the private equity and insurance sectors. This courtship is taking a variety of forms, but as private equity sponsors continue to look towards the vast reservoir of investable capital available in the insurance market, and insurers look back across the river at the stellar returns of such private equity sponsors, we are increasingly seeing the use of rated note feeders established as Cayman Islands limited liability companies (LLCs) or exempted limited partnerships (ELPs) to bridge the accessibility gap between insurers and private equity funds.

As one would expect, even though there are obvious structural differences between a "standard" feeder fund (where limited partners (LPs) hold equity interests in the feeder rather than debt instruments issued by the feeder) and a rated note feeder, sponsors still expect such feeders and their respective noteholders to be included in the borrowing base for subscription facilities and be treated to the extent possible as if they were a normal LP.

This note addresses some lender FAQs that we have encountered where a rated note feeder is a Cayman vehicle and is a potential credit party to a fund finance facility.

What is a rated note feeder?

The features of a rated note feeder formed in the Cayman Islands will in most cases be very similar to that of an equivalent Delaware vehicle other than the overlay of local law considerations discussed further below and will involve: (i) an LLC agreement or ELP LPA to form the vehicle; (ii) a note purchase agreement (NPA) pursuant to which the notes are constituted (and an associated offering memorandum for rating agency purposes in some instances); and (iii) a subscription agreement for notes (and, in some cases, a hybrid form allowing for part note and part ELP interest subscriptions). The overall goal and purpose of the documents, however, is to re-create to the extent possible the capital commitment and capital call mechanics of a standard private equity vehicle except constituted in this case as a commitment to fund advances for the issuance of notes.

Is there any material difference from a Cayman perspective between: (i) taking security over call rights pursuant to the NPA (the right to call for advances from a noteholder) and (ii) taking security over capital call rights under the LPA?

In short – no. Outside of the various tweaks to the security documents to appropriately reference and capture the specific rights in question, the Cayman analysis for taking security over rights emanating from a Cayman law-governed NPA is the same in all material respects to a grant of security over capital call rights contained in a Cayman law-governed LPA. As a result of this, the assignment by way of security of such rights is typically captured in a New York law-governed security agreement (for North American-based deals).

Are there any specific Cayman legal requirements in respect of taking security over rights emanating from a NPA?

As mentioned above, the Cayman classification of such security is materially similar to that of security over capital call rights, and this rings true also for the question of how the secured party can perfect or gain priority of such security. For security over capital call rights, as most readers will be aware, a notice is commonly required by lenders to be sent to LPs post-closing to notify them of the security (which, from a Cayman perspective, obtains priority of the security interest for the secured party). The same analysis applies in the context of security over call rights contained in a Cayman law-governed NPA, and notice should be served on the noteholders post-closing in order to obtain priority of such security in the same fashion.

Are Cayman rated note feeders caught within the scope of the Private Funds Act (PF Act) and required to register with the Cayman Islands Monetary Authority (CIMA)?

Most of the Cayman rated note feeders that we have encountered to date have been created with one investor in mind and so, as a result, end up being single investor vehicles and not a "private fund" for the purposes of the PF Act. In other instances, however, we have seen note issuance feeders that have been a hybrid model of capital commitment and note commitments by multiple investors and, in these circumstances, the applicable vehicle has fallen within scope of the PF Act and, accordingly, the usual considerations (*i.e.*, registration, appropriate covenants in the transaction documents, etc.) would apply. Rated note feeders are by their very nature bespoke, and so careful analysis of the PF Act position is necessary in each case.

ARRC Publishes LIBOR Legacy Playbook

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On July 11, the Alternative Reference Rates Committee (the “ARRC”) published a “Playbook” to assist market participants in transitioning their legacy LIBOR contracts to an alternative rate by June 30, 2023. Cadwalader's LIBOR transition team attorneys summarize **here** the steps that the ARRC recommends for the successful implementation of fallbacks in legacy LIBOR contracts.

Capital Relief Trades Webinar Series Replays

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Cadwalader's financial services team hosted Part 3 of its four-part series on capital relief trades earlier this week. You can access webinar replays here:

- Part 1: **CRT Overview and Regulatory Capital Basics**
- Part 2: **Unpacking Regulation Q: CRT Structuring**
- Part 3: **U.S. Legal and Regulatory Considerations**

Registration details on Part 4 will follow.

Fund Finance Hiring

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Fund Finance Hiring

ANZ is seeking both a Director and an Associate Director of Research & Analysis to cover the Funds sector within its Financial Institutions Group. Learn more about the New York-based roles **here** and **here**.