FoHF Security

May 30, 2025

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A lot of attention and press has been given to market volatility this year, including its impact on the fund finance industry. There is at least one sector of the fund finance industry that stands to benefit from this volatility. Because their investment strategies involve taking both long and short positions, many hedge funds are poised to benefit from market volatility, regardless of the direction of the market.

This has played out recently, at least for several of the largest multi-strategy and global macro hedge funds, in their ability to turn much of the tariff- and geopolitics-driven sharp volatility in the markets into steady gains that have out-performed the broader equity markets year-to-date. A primary beneficiary of strong hedge fund performance is the fund of hedge funds industry, which seeks to provide its investors with improved risk-adjusted returns through exposure to a diversified pool of hedge funds. In order to take advantage of opportunities in high-volatility markets, funds of hedge funds may increase borrowings to leverage their investments in underlying hedge funds, and we have recently seen evidence of this through an increase in the use of leverage by these borrowers, presumably buoyed at least in part by this strong performance.

This article highlights some of the key features of financing structures used by funds of hedge funds.

One central element of fund of hedge funds financing transactions is the use of a third-party custodian to “hold” the borrower fund’s portfolio of hedge funds in an account that the borrower pledges to the lender as collateral for repayment of the loan. The custodian subscribes for, and becomes the legal, registered owner of, the hedge fund portfolio, for the benefit of the borrower. The use of a third-party custodian, or securities intermediary, to hold the hedge fund portfolio has a number of benefits:

Investor confidence. A fund of hedge fund’s investors may see the use of an institutional, third-party custodian to hold the fund’s investments as a mitigant against operational errors and/or potential fraud. Indeed, some funds are required pursuant to the Investment Advisers Act of 1940 to hold investor assets through a qualified custodian, primarily as a means to ensure their safekeeping and to prevent potential misuse.

Reporting. Because the custodian is the legal owner of the hedge fund portfolio, it receives investor reports and valuation statements. This provides the lender with a third-party source that is able to provide reports detailing transactions in the hedge fund portfolio and pass through valuation information regarding the individual hedge fund holdings (often through on-line, view-only access), rather than having to rely on the borrower to provide this information.

Control. Again, because the custodian is the legal owner of the hedge fund portfolio, the lender is able to exercise a great degree of control over, among other things, dispositions of the hedge fund investments and use of proceeds of investor redemptions, through a tri-partite control agreement entered into with the custodian and the borrower. This can include requiring lender approval for all transactions and/or restricting the types of transactions that the borrower is able to instruct the custodian to execute (either completely or without written approval of the lender). All cash proceeds from redemptions of hedge fund interests are also paid to the pledged account at the custodian. The lender is thereby able to rely on the custodian, as an independent third party, rather than just a covenant from the borrower, to prevent unauthorized dispositions.

Security Creation and Perfection. Whereas a pledge over a directly-held equity investment would look to the jurisdiction of formation of the equity issuer to determine the applicable law governing the creation and perfection of that pledge (which, for a diversified portfolio, could require multiple local-law collateral documents in multiple jurisdictions), holding the portfolio through a securities intermediary streamlines this analysis. Because the asset owned by the borrower is the custody account and a series of security entitlements with respect to the assets credited to the account (*i.e.*, rights against the custodian, rather than rights in respect of the actual hedge fund interests), the applicable law is the jurisdiction of the custodian (subject to the Hague Securities Convention, the applicability of which would require legal analysis of the specific circumstances). While it is common to also take New York law security over the custody account, in addition to local law security (for non-U.S. custodians), having one or two collateral documents versus one in every jurisdiction where a hedge fund investment is formed, and complying with the various security perfection requirements in those jurisdictions (which would require engaging counsel in each jurisdiction) can make a big difference from a documentation, timing and cost perspective. Subject to exceptions in some circumstances, lenders also won't typically require the borrower to obtain pledge consents from the hedge funds held in a securities account. For financings where interests in hedge funds are directly pledged (i.e. not held in an account), a pledge consent agreement must be negotiated with each of the funds being pledged, which can be a time consuming and expensive process. For these reasons, holding the hedge fund interests in a securities account greatly simplifies the necessary documentation.

Enforcement. A universal feature of a tri-partite control agreement in this space is the ability of the lender upon the occurrence of a trigger event, such as the occurrence of an event of default under the credit agreement, to take control over the account, through the delivery of a notice of exclusive control (a "NOEC") to the custodian. Following delivery to the custodian of a NOEC, the lender is able to instruct the custodian to submit redemption notices to the hedge funds in the investment portfolio. As the custodian is the legal owner of the hedge funds, it can simply submit redemption requests to the underlying hedge fund administrations (*i.e.*, without having to find buyers or otherwise sell the hedge fund investments). The timing for payment of such redemptions depends on the terms specified in the offering memorandum for each fund being redeemed. Any cash redemptions will be paid to the pledged account and the custodian, where it can be applied by the lender to repay the outstanding loan.

While it is not always the case that a fund of hedge funds borrower will hold its investment portfolio through a custodian, it is the typical structure for a fund borrower holding a diversified portfolio of third-party managed hedge funds. We more often see hedge funds being directly held by the borrower where the hedge funds are affiliated with the borrower and/or managed by the same investment manager as the borrower (or an affiliate thereof). In these circumstances, we will often see a letter agreement entered into with the directly held fund, specifying the applicable liquidity of the hedge fund and including other protections for the lender (that are beyond the scope of this article to discuss).

While the indirect holding system provides a number of benefits, there are still issues that can arise under this security structure. One source of potential issues in the indirect holding system is the use by the custodian of a sub-custodian. Because the choice of law in the indirect holding system looks to the jurisdiction of the securities intermediary that is the legal owner of the hedge fund investments for the law governing creation and perfection of the lender's security interest, the use of a sub-custodian to hold legal title to the investments can raise questions regarding the applicable law for taking and enforcing security, especially where the custodian and the sub-custodian are located in different jurisdictions. As a result, it is not uncommon for the control agreement to prohibit the custodian from using a sub-custodian to hold hedge fund investments. And local counsel should be consulted whenever a non-U.S. custodian is involved in the structure, as the security creation and perfection requirements can vary greatly from jurisdiction to jurisdiction (and even within a single jurisdiction, as we recently came across an issue where the governing law regarding creation and perfection of a security interest over the securities account and the cash account were different, even though both accounts were held with the same custodian).

EU Jurisdictional-Clause Gymnastics – The Enforceability of Asymmetric Jurisdiction Clauses

May 30, 2025

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A recent decision of the Court of Justice of the European Union (the EU's highest court) has clarified some of its views on 'asymmetric jurisdiction clauses'. An asymmetric jurisdiction clause is one that allows one party (typically a lender) a greater choice of forum for initiation of legal actions and enforcement than another party (typically a borrower).

The CJEU decision is of course quite technical and touches upon a number of EU laws, conventions and regulations (avid readers of CJEU materials can find the full text under reference C-537-23). While this isn't the forum to explore its details in full, the decision has already begun to ripple into the fund finance world. This note explains why.

What did the CJEU find?

The case in question turned on whether a jurisdiction clause that allowed an open-ended choice of jurisdiction for one party (which in this case provided Party A with a choice of "*the court of Brescia… another competent court in Italy or elsewhere*") while limiting the other party's choice of jurisdiction (in this case limiting Party B to just the court of Brescia) was valid under EU law.

In summary, the CJEU's ruling confirmed that asymmetric jurisdiction clauses are valid and enforceable under EU law, but only if they meet certain conditions.

From the CJEU's perspective these conditions are met by the asymmetric jurisdiction clause specifying, for the party that will have the benefit of it, that proceedings can be initiated before: (i) a specified EU court, the courts of an EU member state or a state party to the Lugano Convention 2007; and (ii) that the clause is sufficiently objective and precise that it can be determined what court falls within its remit.

How does this affect Fund Finance?

The two primary areas that this has begun to materialise in are: (I) Luxembourg law governed security agreements; and (II) Luxembourg legal opinions.

Luxembourg Security Agreements

A common feature of almost all fund finance transactions with a Luxembourg nexus are Luxembourg law governed security agreements over: (i) capital call rights contained in Luxembourg law governed LPAs; or (ii) Luxembourg situated bank accounts. In Luxembourg law governed security agreements the choice of forum has typically been asymmetric in that the lender (or agent) may choose to enforce in Luxembourg or before any other court of its choice.

While it remains to be seen how the Luxembourg courts will interpret and apply the conditions set forth by the CJEU, we now expect (and are already seeing) lenders undertake a more detailed consideration of the choice of jurisdictions that they may wish to have access to in the event of a dispute or default – seeking to balance their commercial preferences with the certainty provided by falling within the guidance of the CJEU decision.

Given that most fund finance transactions with a Luxembourg nexus are documented by New York or English law governed credit agreements, the obvious question is whether asymmetric jurisdiction clauses that allow the lender the option of one of those (non-EU) courts, in addition to the courts of an EU member state, are enforceable? Unfortunately, the answer to that question is not clear and, while inclusion of the courts of either New York or England as a choice of forum would not fall within the CJEU's view of an enforceable asymmetric jurisdiction clause, a national court could still seek to give effect to such a clause by declining jurisdiction in favour of a NY/English court which had accepted jurisdiction over proceedings or to enforce the foreign judgment.

Luxembourg Legal Opinions

In Luxembourg legal opinions it is now likely (and already the case in many instances) that legal opinions will include a legal reservation or qualification regarding asymmetric clauses. This reservation usually provides that a choice of forum may be deemed invalid by a Luxembourg court if the contract in question contains an asymmetric jurisdiction clause which does not follow the principles set out by the CJEU.

Does this affect Cayman Islands law governed agreements?

The Cayman Islands courts typically look to the courts of the UK and other Commonwealth nations in respect of precedent. As the UK is no longer part of the EU, and the CJEU ruling will be of limited (if any) precedential value in its courts, this ruling is unlikely to have any direct effect on Cayman law or legal practise. That said, if a party sought to enforce a Cayman law governed agreement in Luxembourg — for example, by initiating proceedings there or seeking recognition of a Cayman judgment — and the agreement contained an asymmetric jurisdiction clause, it is unclear how a Luxembourg court would view such a situation and whether it would accept jurisdiction and/or enforce the agreement.

Conclusion

While the increase in certainty as to the CJEU's approach is welcome, a number of grey or complex areas remain (most notably how the Luxembourg courts would treat a choice of non-EU courts in an asymmetric jurisdiction clause or a non-EU law governed contract containing an asymmetric jurisdiction clause). The additional reservations in Luxembourg legal opinions reflect this.

The solution that provides relative certainty of drafting of these clauses for Luxembourg law governed agreements is now clear and consists of ringfencing the choice of forum for the beneficiary of the asymmetric jurisdiction clause to the courts of Luxembourg, an EU member state or a state party to the Lugano Convention 2007 and specifying objective and precise factors enabling the court to determine its jurisdiction. For non-EU (notably New York or English) law governed contracts where a party wishes to have an asymmetric clause and may in the future foresee seeking a forum or enforcement in Luxembourg, the position is less clear and, as noted above, parties will now need to balance the benefits of falling within the certainty of the CJEU's position against that of any commercial desires to maintain a wider discretion of choice.

NLC Launch Evergreen Lux Fund for Sub-lines

May 30, 2025

NLC Capital Partners launches open-ended Luxembourg based fund designed to deliver premium risk-adjusted returns through investment-grade, short-dated subscription line financing.

This launch marks a pivotal milestone for NLC as the firm continues to redefine the landscape of fund finance with institutional-grade, capital-efficient private credit strategies. The fund offers investors exposure to a distinctive asset class characterized by short maturities, low volatility, and robust downside protection.

Read more about the launch **here**.

Still Time to Register for FFA U 1.0: EMEA!

May 30, 2025

Join the FFA for a two-day Fund Finance training designed for newcomers and experienced professionals. The program offers a comprehensive look at the Fund Finance landscape, with sessions led by many of the industry's leading senior practitioners including Cadwalader's own **George Pelling**.

Attendees will be able to attend in-person on June 2 and virtually on June 6.

Don't miss **George Pelling** teaching a session on the LPA with Simpson Thacher & Bartlett Partner Katie McMenamin on June 6.

Click **here** for a more detailed agenda and speaker profiles.

EMEA Annual Networking Drinks Reception

May 30, 2025

Women in Fund Finance EMEA is excited to invite you to an evening of networking over drinks and canapés in London.

We are excited to gather and celebrate the successes and collaboration amongst the Women in Fund Finance community to kick off the summer! This event is open to both men and women.

Drinks and canapés will be provided. Please note, registration is open on a first-come, first-served basis.

Event Details

Date: Wednesday, June 24th, 2025

Time: 6:30 PM - 10:30 PM BST

Location: Middle Temple Hall, Middle Temple Lane, London, EC4Y 9AT

Register **here**.

Less Than Two Weeks To Go: Future of Fund Finance | U.S.

May 30, 2025

DealCatalyst - The Future of Fund Finance

June 9, 2025

Angie Batterson
Partner

Gregg Jubin
Partner

CADWALADER

We're looking forward to **DealCatalyst Future of Fund Finance Conference** on June 9 at the New York Marriot Downtown in Manhattan.

Cadwalader is proud to be a lead sponsor and have Partners **Angie Batterson** and **Gregg Jubin** speaking at the conference, sharing their insight on key industry topics.

This one-day event will explore how alternative funding structures have grown in popularity thanks to their dual nature as both a financing tool for fund managers and as an attractive alternative asset investment opportunity for institutional investors alike.

Angie Batterson will be a panelist on "Fit for Purpose - Insurance Company Participation in Fund Finance." Learn more about what she plans to cover **here**.

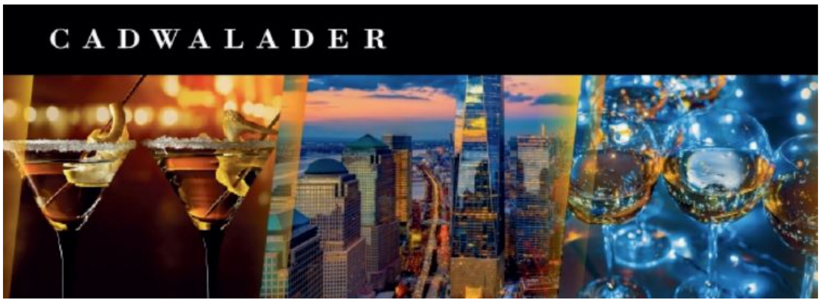
Gregg Jubin will be a panelist on "How Securitization is Playing an Increasingly Larger Role in Fund Finance." Learn more about what he plans to cover **here**.

With less than two weeks to go, stay tuned for updates on the agenda and confirmed speakers.

View the agenda **here** and speakers **here**.

Cocktails With Cadwalader - RSVP Now!

May 30, 2025



Join your friends at Cadwalader and fellow industry peers for cocktails on our outdoor terrace following the **DealCatalyst Future of Fund Finance Conference**.

Our office is conveniently located across the street from the conference venue. We would love the opportunity to spend time with you after the event!

Monday, June 9
5:30 PM – 7:30 PM

Cadwalader, Wickersham & Taft
200 Liberty Street
New York, NY 10281

RSVP **here**.

For more information about this event, please contact Cori Niemann or your Cadwalader contact.

Fund Finance Hiring

August 22, 2025

Fund Finance Hiring

Capital One is seeking a highly motivated and experienced Director to join its growing Fund Finance team in the Financial Institutions Group (FIG) in Mclean, VA, Chicago, IL, Charlotte, NC, or New York, NY. This individual will be responsible for the origination, structuring, and execution of subscription lines of credit and general partner lines of credit for middle-market and large asset managers, including private equity and private credit firms. The Director will play a key role in expanding Capital One's market presence and building strong, long-lasting relationships with asset managers. Learn more **here**.

DBS Bank is seeking a Vice President - Financial Sponsors Relationship Manager in London. This role will be focused on building and managing a portfolio of European Financial Sponsor clients. The primary responsibilities will be to originate new Subscription Loans for new and existing clients, develop cross sell and manage the day to day risks of the portfolio. For more information and to apply, click **here** or reach out to **Alex Leech.**

Huntington is seeking an Analyst - Fund Finance, supporting the CSG Credit Products team and ongoing portfolio management and underwriting activities in Charlotte, NC or Manhattan, New York. In this entry level role, the analyst will develop skills in credit and market analysis including cash flow analysis and modeling, capitalization, industry research, credit policy and legal documentation, among others, in analyzing and summarizing the creditworthiness of clients and prospects. The Analyst - Fund Finance will generally support the Credit Products Portfolio Management team and will also collaborate with internal partners including Relationship Management, Credit Administration, Capital Markets and others in creating such analysis. Learn more **here**.

SMBC is seeking an Originations Analyst and an Originations Associate within the Fund Finance Solutions team based in New York. The roles will report to senior front office members of the Fund Finance team and responsibilities will include assisting in deal origination and pitching, debt arranging, deal monitoring and supporting the bank's syndication department. These roles will specifically contribute to the preparation of credit applications, reviewing quarterly loan reports, conducting regular credit reviews of loans in the portfolio and assisting marketing staff in preparing client materials. Learn more about the Associate role **here.** Learn more about the Analyst role **here**.

Wells Fargo, CIB Fund Finance Group is seeking an Investment Banking Program Associate to join its Charlotte or New York office. The Investment Banking Program Associate on the Fund Finance Group will cover a portfolio of existing and prospective clients (fund sponsors) and will be part of lean deal teams that include senior and junior team members within the assigned portfolio. The Program Associate role includes both (i) structuring, credit analysis, and execution of new subscription facilities and (ii) maintenance (including ongoing credit and legal work), collateral analysis, and monitoring of existing Fund Finance credit facilities. Learn more **here.**

U.S. Bank is seeking two Analysts to join the Subscription Finance origination team. These roles will support the bank's growing sub line portfolio by underwriting and constructing complex borrowing bases, preparing pitch materials, partnering across internal banking teams, and helping to build and enhance processes and controls. Analysts will also work directly with leading U.S.-based private capital firms across private equity, private credit, secondaries, and more. Candidates should have at least one year of finance or banking experience (internship experience may qualify), strong Excel skills, and the ability to contribute meaningfully to high-value deals under tight timelines. FINRA licenses (SIE, Series 63, Series 79) will be required after hiring. Qualified candidates are encouraged to reach out directly to Managing Director, Michael Henry, **here**.

State Street is seeking a Vice President– Private Equity/Debt and Structured Products – Head of Private Equity Credit Risk in Boston. This role will manage credit risk for a portfolio of private equity products by overseeing a portfolio and associated team whose primary responsibility is to conduct credit reviews, perform risk ratings, continuously monitor the portfolio, and provide ad-hoc analyses. They will be required to lead strategic initiatives associated with a growing sector working closely with business partners within both lending and trading activities. They will also oversee a team of credit officers and have broad responsibility for sector reviews as well as leading the input into model development, regulatory requests and in portfolio stress testing. Learn more **here.**

State Street is also seeking a Fund Finance EMEA, Vice President in Munich, Luxembourg or Frankfurt. This role will support the Global Credit Finance (GCF) division. The Vice President will contribute to the origination, structuring, underwriting, and ongoing management of credit facilities, helping to grow and maintain strategic client relationships. The ideal candidate will have a strong foundation in credit analysis and legal documentation, including experience with

LMA-style loan agreements. The role requires collaboration across internal teams and external stakeholders, and a focus on participations in syndicated, bilateral, and agented credit facilities. Learn more **here**.

Juniper Square is seeking Account Executives in New York, Boston, Chicago, and Miami to join the private equity sales team. This team is primarily focused on selling fund administration solutions to PE investment managers. Juniper Square is already one of the fastest-growing administrators in real estate and venture capital, and private equity is the company's next area of focus. Learn more **here**.

Goldman Sachs is seeking an Asset & Wealth Management, Private Bank, Capital Call Finance, Associate in New York. This position is responsible for applying strong analytical and technical skills to evaluate the credit and risk implications of complex lending transactions, advising clients and structuring tailored credit solutions that align with the Bank's risk parameters, performing in-depth due diligence on private equity sponsors and funds, maintaining accurate financial models and borrowing base certificates, and ensuring underwriting standards and documentation align with internal policies. Through close coordination with Credit Risk Management, Private Wealth Management teams, and banking regulators, this position will help manage a high-quality loan portfolio while ensuring compliance with all monitoring and reporting requirements. Learn more **here**.

Apollo's AASP Risk team is seeking an Associate or Director (depending on experience) to report to the Head of Counterparty & Fund Finance and act as one of the primary risk managers for the Private Credit Finance business ("**PCF**") and Fund Finance transactions. This will include supporting the buildout of the PCF portfolio by partnering closely with the PCF team on all stages of the investment and ongoing portfolio monitoring process, building out second-line risk management reporting and monitoring, and forming credit recommendations on new and existing opportunities. This unique role requires a credit investor mindset as the team evaluates transactions. Learn more **here**.

Cadwalader, Wickersham & Taft LLP is seeking associates with three to six years of relevant experience for its Fund Finance practice in New York, Charlotte or London. Qualified candidates will have experience in syndicated lending, commercial lending, leverage finance, fund formation, CLOs, asset-based lending, NAV financings or acquisition financings. Candidates must possess excellent academic credentials and solid legal experience. Selected candidates will get extensive interaction with preeminent bank, asset manager and lending clients. If interested, please reach out to Margaret Cart at **Margaret.Cart@cwt.com**.