Subscription Finance Loan Agreement Series, Part 7 — Sanctions

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An area of common interest to lenders, to the funds, GPs and managers to whom they make facilities available, and to the investors who invest in the funds and will ultimately be required to pay in their capital or loan commitments to repay any fund indebtedness is compliance with all applicable rules and laws covering sanctions. This is a sometimes controversial part of a Subscription Facility Agreement, not because the parties do not recognise or acknowledge the importance of compliance with sanctions but because of the difficulties of ensuring compliance with constantly changing – and sometimes contradictory – sanctions legislation and rules imposed by different national or supra national bodies.

This note does not attempt to analyse in detail all the relevant sanctions legislation or rules – and drafting and lender policies in this area often differ from lender to lender – but rather attempts to provide some brief background on some of the most commonly referenced sanctions authorities and sanctions rules and legislation, the possible effect of breaches of those sanctions, how these concerns are usually addressed in Subscription Facility Agreements, and some common areas of difficulty and contention.

The most common sanctions concerns in European Subscription Finance agreements are:

- U.S. sanctions (imposed by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury or by the U.S. Department of State). These sanctions are generally imposed on and in respect of "U.S. Persons" (which is widely defined particularly in the case of sanctions in respect of Cuba and Iran to include non-U.S. Persons in relation to transactions involving U.S. Persons or the U.S. financial system – referred to generally as "secondary sanctions"). Sanctions are applied both to specific countries and territories (and their citizens, residents and commercial enterprises) as well as to specific persons and entities listed on OFAC's Specially Designated Nationals and Blocked Persons list ("SDN List");
- EU sanctions imposed as part of the EU's Common Foreign and Security Policy and generally imposed on "EU Persons" (which generally includes EU nationals and any legal person, entity or body constituted in an EU member state or which conducts business in the EU). EU sanctions tend to be targeted more at designated individuals, groups or entities ("Designated Persons") or at specific industries or sectors. EU sanctions also generally prohibit EU Persons from making funds or economic resources available to or for the benefit of a Designated Person;
- Sanctions imposed by the United Nations Security Council ("UNSC") – note that these are often also reflected in both U.S. and EU (and other) sanctions legislation;
- Sanctions imposed by individual EU member states (including UK sanctions administered by HM Treasury);
- Sanctions imposed by the Swiss government (administered by the Swiss State Secretariat for Economic Affairs ("SECO"));
- Sanctions imposed by non-EU jurisdictions specifically requested to be included by non-EU lenders participating in the syndicate (in particular, references to Canadian, Australian, Singaporean or other sanctions regimes when lenders or borrowers from those jurisdictions are participating).

The above sanctions are of concern to lenders for a number of reasons, but most relevantly (i) lenders can be subject to civil or even criminal penalties if they breach, or through making a facility available, enable a borrower to breach certain sanctions; (ii) the imposition of sanctions on borrowers (or investors) can jeopardise the repayment of any indebtedness under a facility; and (iii) lenders can incur reputational risk if they (or borrowers or other parties to whom they make facilities available) breach sanctions. Equally, borrowers will share many of these concerns.

So, any lender will look to address these concerns in the terms of the facility agreement. In terms of investors, lenders, at a minimum, will want to exclude investors which may be subject to sanctions from their leverage or borrowing base calculations. In terms of the fund, the general partner, manager and other parties to the facility documentation lenders will look to include representations and covenants to the effect that those parties are not themselves subject to sanctions, that they are and will remain in compliance with any sanctions legislation or rules, that they will not utilise any facility proceeds in a way which breaches any sanctions legislation or rules, and that they will inform the lenders promptly if they (or any investors) are in breach or alleged to be in breach of any such legislation or rules. The purpose of all of these provisions is obviously to reduce the risk to lenders of either they or their counterparties being found to be in breach of sanctions, and to allow for quick action to be taken (by way of draw stops or even acceleration and/or enforcement) if there are breaches. But as with any terms of this type, they cannot remove the risks altogether.

In general, all parties will accept that lenders generally need the sort of comfort that is provided by such terms, but there are issues that still cause difficulties. For borrowers, the primary concern is usually that the representations and covenants on sanctions are fairly wide-ranging and (particularly where lenders look as they often do – for example, for covenants or representations on the use of facility proceeds and/or to extend these covenants and representations to affiliates) difficult for borrowers to control (or, in some cases, even know about). For that reason, one of the principal areas of debate around these terms tends to focus on the degree to which borrowers are able to qualify these terms by reference to their degree of knowledge or control over events or entities which may breach sanctions. The other primary concern is that the sanctions regimes to which borrowers or lenders are subject can differ in different jurisdictions and, in some cases, be directly contradictory. The most well-known (but not the only) example of this is the contradiction between the EU Blocking Regulation and U.S. sanctions imposed by OFAC in respect of dealings with Iran. How to deal with this in the facility documentation needs to be carefully considered on a case-by-case basis.

The interaction of differing sanctions regimes, policy considerations and issues around ensuring compliance makes sanctions a difficult part of any facility terms for both lenders and borrowers and often requires both to live with some compromise that may not be entirely comfortable for either.

Player Profile: Edoardo Levy

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Player Profile

FFF: You had a great run at Investec. Tell us about your time there?

Investec has been transformational for me and for my career. Simon Hamilton, Global Head of its Fund Finance business, hired me and gave me a unique opportunity to develop the Investec U.S. Fund Finance activities. At the age of 31, I decided to take on the challenge. I had to learn everything from scratch. I was coming from a mixed background of experience in lev finance sales and advisory, some of which on private capital assets. But Investec is the type of firm and open environment which allows you to roll up your sleeves and to become an entrepreneur in finance, which was a dream come true for me.

I started at Investec in 2011 in London and landed in NY in October 2012, the same day that Hurricane Sandy hit the city. Not a great beginning! At the time we were only about 10 professionals in the Investec U.S. offices (compared to over 30 today). Of these, two were just hired to develop the U.S. project and infrastructure finance business, which grew to be a fantastic business for the bank. I was the only one on the Fund Finance side; however, I had lots of determination to rebrand myself and to achieve success. Initially, very few in the market knew who we were, so I was pushing out hundreds of emails and calls a week to get in front of folks to tell our story and understand if there was room for us to grow a business in the U.S. I was on my own for pretty much two years before I was joined by my long-time partner and dear friend, Gregg Kantor. That said, I was supported at the time by a smaller but tremendous fund finance team at Investec in London.

We finally bumped into Mike Mascia (at that time at Mayer Brown), and together we executed on our first dividend recap with a Secondary fund in 2014. That was a game-changer for us, as we understood we could be really relevant to the secondary and FoF client base. We since put in tremendous effort and resources to establish ourselves as a leading lender and a thought leader in the space, with tremendous success over time.

We were lucky and fortunate to get into the secondary market earlier on, whilst it was only a $20bn marketplace, and to see it develop to the $75bn+ marketplace it is today. The network was young and very open to innovation and ideas, a perfect place for us to develop our brand.

Over time, our U.S. team developed into six people, including a legal counsel at the desk. As a team, we got known as one of the key solution providers to GPs as well as LPs in private capital. We were running a business more like an asset manager rather than a bank. We created over time sophisticated modeling systems, as well as risk-monitoring systems, which I strongly contributed to building (as my first job on the team). This allowed us to always think about innovation and about creating the next new solution for our esteemed clients.

We were often first movers, venturing into some of the newest niches in the fund finance space, and we were very strict about offering clients a world-class service, which, over time, paid back.

The biggest gift from this experience has been the opportunity to get involved in an incredible network, where innovation was traveling faster than one could imagine.

Investec allowed me to develop a strong technical and entrepreneurial skill set in the fund finance market, and this put me in a great position to be prepared for my next career challenge as a full-time entrepreneur. More importantly, at Investec I created some of my closest and most important relationships, which I will carry with me during my professional and personal life. And, for that, I will be eternally grateful to the platform.

FFF: What did you do before Investec?

I graduated out of Bocconi University in Milan and started working right away for Goldman Sachs in London back in 2003, initially in the Leverage Finance division and subsequently in their credit derivatives trading and sales unit. Here, I was structuring and selling derivatives to Italian, UK and U.S. institutional investors. Right when GFC started, I decided to leave the bank to start a more entrepreneurial career. Not an easy choice, especially when you work for such a large player, but I always believed in my gut feel, and in 2009, I felt the time had come to make a move and to learn something new.

In 2009, I joined a new boutique investment bank, Stormharbour, launched to more closely service clients during GFC. There, I was working closely with UK institutional clients, advising them on private capital assets and structured products. Investec was one of my close clients, and that's how I started my conversation with them. At Stormharbour, I got closer to the illiquid world, for which I developed a passion.

FFF: Tell us about your new fund. What's the investment strategy?

I recently set up BZH Capital with the vision to help the democratization of the private capital asset class. BZH's mission is to create smart, institutional-like access, for investors of any size and sophistication level, to proprietary private capital opportunities – therefore, to make this a more accessible, transparent asset class for investors worldwide who for too long have been more removed from this tremendous asset class. These are typically HNWIs, Family Offices or even smaller institutional investors.

Investors who only want to invest a few USD hundred thousand/millions in private equity might have had so far a harder time figuring out how to allocate such capital, whom to allocate it to, and why to one manager vs. another or one strategy over another.

Even if such an investor ended up making an investment, the questions remain as to whether he will be relevant at all to some of the larger managers and what ongoing service and insights he might be getting. This often results in either no investment in the private capital space from such an investor base or in a less exciting investment experience.

We therefore recently launched BPEO1 (BZH Private Equity Opportunities Fund 1), a EUR225m fund targeting European professional investors and focused on generating a core allocation to private equity. This is done through investments across two core strategies: co-investments and secondaries.

We will be working closely with two of the most established funds of funds in the marketplace, who will help us in building the individual programs.

The fund aims at creating a super-diverse portfolio, featuring early cash flows, faster deployment of capital than classic fund of funds and a strong J curve mitigation.

The fund benefits from a very innovative and tax-efficient wrapping. Investors will be buying into a Luxembourg securitisation vehicle with as little as EUR 125,000 // USD 150,000 commitments. In exchange for their commitments, they will receive a listed certificate with ISIN code. The certificate can be held in a securities account and sold at any time (investors will not require our permission to sell).

All commitments will be funded Day 1, therefore getting around the capital calls issues, which has historically been more of a burden for smaller investors.

FFF: Will you be co-investing with sponsors you used to bank?

Yes, I will be working closely with some of the great managers I had the honor to bank over time. I always had a very strong desire to remain involved in this tremendous network, and I am glad to finally have the opportunity to do something different with the same people I worked with for so long.

FFF: How hard was it to pull the trigger and give up your day job?

This has been a very tough decision for me.

Financially, this meant not having the monthly safety net around me, and we all know that living in NY is not cheap! Obviously, I worked hard on a business plan and got comfortable in living "in the uncomfortable," which I believe is a rule of thumb for whoever looks at a more entrepreneurial career.

Emotionally, I was (and still am, to some extent) very attached and jealous of what I helped create at Investec, and giving it up wasn't easy. I am very happy, though, that I did all I could before departing to pass on the good legacy left at Investec to a great team of people.

All this said, I figured the upside of trying this new entrepreneurial avenue can be far greater than the potential downside for me, both financially but also from a personal perspective. And at this point in my career, this was becoming a must for me. I just had to try this out, and the timing in the marketplace and in my career I felt was just perfect.

I could not have done this if I were not encouraged by the most important person in my life, my wife, whom I thank very dearly for all the support in making such a hard step.

FFF: What is your fundraising strategy?

Our fundraising strategy is focused on very personal and deep relationships with our European network, which both myself (being Italian, and having lived in Europe for most of my life) and my partner (also Italian and based in London) have shaped over the years. Often, we are getting in front of investors who have been used to a 60/40 allocation to stocks and bonds, but now, having heard the merits of private capital assets, they want to learn more and are prepared to make an investment.

The hard work is to translate such an opaque and less transparent asset class to a less sophisticated investor base than your large institutional investor. The outcome of such meetings really depends on the sophistication level of the investor we are meeting, on the one hand, and, most of all, on our ability to immediately understand the type of language we need to use, to be as efficient as we can in getting the message across. This means we often need to use different linguistic and cultural skill sets in order to explain the product in a very easy and immediately understandable way. I guess we are a little lucky that we speak five languages between the two of us and can relate to various cultures in the European and Anglo-Saxon markets. We make a very good and complementary team, which is what one really needs when launching a new venture.

FFF: Are you using a placement agent?

We are not working with a single placement agent, but we are certainly levering various introducers to get to the final investors.

FFF: How is fundraising going? Is there a lead Investor?

Fundraising is going well so far. We have been on the road for only 14 business days since we launched the fund throughout the summer, and have soft circled around 20% of the fund to date, including our 1% commitment as the manager of the vehicle.

We have one larger investor and other smaller ones. We are very proud of the result achieved to date, which is an initial confirmation of our thesis around the democratization of private equity. That said, we are aware there is a lot more hard work to be done on the ground in the coming months, and we will take stock again at the end of our next round of fundraising throughout Q4.

FFF: What are the challenges as a first-time manager?

There are many challenges as a first-time manager, as you can imagine, and here are some examples:

- First of all, credibility. Before being credible to investors, you have to be credible in front of all the other stakeholders working with you, starting from your partners/team members. Once you have their support, you can start building momentum with the origination side, the service providers and obviously with potential investors.
- Having the right partner/resources. Setting up a new business requires partners who have complementary skill sets, vision, culture and values. It is also important to have a real and complete alignment of interests, which also involves obviously the financial side. I was very fortunate that I could launch BZH with a dear friend of mine, with whom I grew up in Italy and who set up a tremendous distribution business in Europe in 2015 on structured products. His distribution capabilities, combined with specific my skill set in the private capital asset class, allowed us to launch BZH and BPEO1.
- At the same time, you need to start putting together a good pitch and a even better pitchbook. This is not an easy job, and you must have a very good support team to help you make sure the materials you are preparing are top notch. A good pitchbook requires having formalized thinking, access to information, and a business plan that is already in good shape (although it is to be expected you will probably update your pitchbook a few times during your roadshow before having a final output). In doing all of this, time pressure and budget are never your close allies.
- When presenting your thesis to investors, you don't have much time to get the right message across, and you have to be convincing, efficient, and super collaborative in answering their questions and perplexities. The reality is you will make mistakes initially and your pitch will improve over time (and so, too, your pitchbook!). The ability to learn and adapt quickly is probably one of the most important skill sets, especially for a first-time fund manager like me. Managers who have been on a fundraising effort multiple times have probably learnt their lessons earlier on and can surely be more efficient on many fronts than first-time fund managers. This is a strong competitive advantage.
- *Ca va sans dire*, as they say in French, that the limited budget is probably one of the biggest hurdles for a new manager. You have limited finances available and a lot of work to do in many directions: from origination, to setting up the platform, to obviously fundraising. All of this takes time, effort and money. Therefore, every minute, every call and every meeting counts and must lead to a step forward.
- Ultimately, I believe a strong positive energy and a commitment to work hard and to keep going, despite meeting hurdles on the way, is what differentiates a successful first-time fund manager from a non-successful one (obviously besides making sure your thesis is right and there is market appetite for it!). You need to have the ability to lead forward not just yourself (and there are down times for everyone!) but also, and especially, whomever is working with you. It does really feel like a start-up!

FFF: How can the fund finance community help you?

The fund finance community will be a key part of my network going forward. Although I will not adopt any leverage initially, I believe the use of mild leverage on our future funds will be part of the thinking we will need to do.

Questions around managing liquidity and bank accounts always come up, and the fund finance network has been instrumental in the PE space to help solve for some of these needs.

Also, in BPEO1 (our first fund) we will be committing 1% of the total funds raised all in equity. However, as a manager we might have to solve one day for commitments to our funds which might require us to think about utilizing some degree of financing at the management company level.

Finally, I am a firm believer in good karma: over time I got a tremendous amount from the fund finance industry, and I would like to make sure I can keep being involved and give back as much as I can, whether through business opportunities with the various active players or by providing thought and intel.

Judith Erwin, CEO of Grasshopper Bank, to Speak at Cadwalader Finance Forum on October 17

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Judith Erwin, the Founder and Chief Executive Officer of Grasshopper Bank, is a confirmed speaker for this year's Cadwalader Finance Forum in Charlotte, North Carolina on October 17.

Judith will discuss her career, including her experience co-founding Square 1 Bank in 2005 and the founding of Grasshopper Bank earlier this year, including her raising over $115 million in equity capital in a private placement in May and obtaining a charter for the bank from the Office of the Comptroller of the Currency. Grasshopper Bank plans to serve the innovation economy, including start-up entrepreneurs and the venture capital funds that finance them.

The Finance Forum, now in its fourth year, will take place on October 17 at the Ritz-Carlton Hotel. A detailed agenda will be forthcoming shortly. To register, click **here**.

Institutional Investor Article on Subscription Facilities

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Institutional Investor published an article earlier this week titled "The Faulty Metric at the Center of Private Equity's Value Proposition." The author, Amy Whyte, does a thorough job of summarizing the two recent academic studies of the impact on IRR from the use of subscription facilities. She also interviews and provides quotes from ILPA and private equity placement agents and advisors. The article does include some level of balance, explaining that subscription facilities can help investors by allowing sponsors to forecast the anticipated timing of future capital calls. The article is available **here**.

Private Funds Article on Preferred Equity

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Private Funds CFO recently published an article titled “Why preferred equity could be PE’s next battleground.” The article references subscription lines and the GP-led secondaries process as areas where Investors and Fund managers have had recent debate. It then forecasts that Funds’ use of preferred equity will be a source of potential conflict. The subscription-required article is available **here**.

On the Move — Fund Finance Tidbits

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On the Move

Catharina von Finckenhagen – Ogier

Ogier fund finance specialist Catharina von Finckenhagen has returned to the Cayman Islands as a dual-qualified Luxembourg advocate and Cayman attorney, providing combined Luxembourg law and Cayman law advice from a U.S. time zone. She has spent six months on secondment with the Ogier Luxembourg banking and finance team, led by finance partners Dan Richards and Fabien Debroise.

Catharina was recently admitted to the Luxembourg bar under List IV, which recognises dual-qualified practitioners. She has extensive corporate finance, banking and investment funds experience, and specialises in fund finance, advising global lending institutions and borrowers in relation to multi-jurisdictional subscription finance facilities.

Ogier's global head of Fund Finance James Heinicke said: "The Cayman Islands and Luxembourg are two of the world’s leading investment funds jurisdictions. As fund structures develop it is increasingly common to see structures that include parallel Cayman Islands and Luxembourg vehicles to address the needs of different global investor groups.

"For some time now our Cayman and Luxembourg teams have been regularly working alongside each other on fund finance deals. Ogier’s global fund finance team comprises experts located across all major international time zones but now, with Catharina returning to Cayman from Luxembourg, we are able to provide both Luxembourg and Cayman law advice in the U.S. time zone."

Catharina, who is fluent in English, French, Italian, Norwegian, Swedish and Spanish, is a member of 100 Women in Finance, Women in Fund Finance and the Cayman Islands Legal Practitioners Association.

James York – NatWest Markets

James York joined the NatWest Markets Funds Finance team as a Vice President earlier this month. Previously at HSBC, James will be focusing on the core funds business as well as helping to build out the team’s capabilities in asset-backed financing.

FFA's European Next Generation Fund Finance Event

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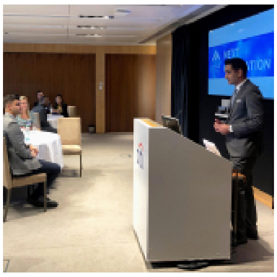


The Fund Finance Association Next Generation ("NextGen") initiative, established in 2018, brings together young professionals from funds, banks and law firms from within the fund finance market. The NextGen network was founded by Billal Malik (Citi), and previous events have included educational seminars, a speed networking event and industry panels.

Citi hosted the fourth European NextGen event, a problem-solving activity aimed at providing a local charity with workable solutions to a problem it is facing. The charity, Career Ready, connects employers with schools to open up the world of work to disadvantaged young people. The organization's CEO, Anne Spackman, presented the current challenge and requested that NextGen participants provide solutions.

Attendees from across the fund finance industry were split into teams and discussed solutions that were then presented to a judging panel, including Jane Sedgwick (EMEA Head of Investment Finance, Citi Private Bank); Anne Spackman (Career Ready CEO); Kamran Anwar (Head of Private Equity, SS&C); and Anthony Cockett (EMEA Head of Private Equity clients, Citi Private Bank). The panel provided feedback on the group's ideas and presentations. A number of great ideas were presented, leaving Career Ready with many takeaways. Participants enjoyed attending such an interactive event and having the opportunity to work with industry partners in a different way whilst giving back to the community.

FFA Asia-Pacific Conference Confirmed for September 25

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The FFA announced this week that the 3rd Annual Asia-Pacific Conference in Hong Kong scheduled for September 25 is proceeding as planned. The announcement indicated that keynote speaker Goodwin Gaw has reconfirmed his attendance. Registration remains open and information is available on the FFA website **here**.

Recommended Reading

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Below is a look at what we are reading this week outside of the four corners of Fund Finance:

Vista has closed on $16 billion of commitments for Vista Equity Partners VIII. [**Private Equity International**]

Larger-than-life oil man, activist investor and billionaire philanthropist T. Boone Pickens passed away this week at 91. [**CNBC**]

Globally, debt levels have increased materially over the last decade and may be weighing down meaningful economies. [**Wall Street Journal**]