Fund Finance

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England & Wales

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What makes a fund finance transaction "English"?

There are a number of features of a fund finance transaction that can give it a significant nexus to England & Wales, including:

- the facility agreement being governed by English law;
- a lender or the arranger being incorporated in, operating from, or leading the transaction from England & Wales;
- the fund manager or fund vehicle being formed, incorporated in or operating from England & Wales (usually as an English limited partnership); or
- one or more investors being domiciled in England & Wales.

In practice, it is the first of these two factors that most clearly defines a fund finance transaction as "English", and it is the market of transactions with those two features that this chapter chiefly focuses on. However, these transactions are rarely domestic in nature. The location of the fund manager and investors varies significantly from transaction to transaction, and the fund vehicles used in these transactions are often domiciled in other jurisdictions, as explained in more detail below. Fund financiers operating from other jurisdictions (such as continental Europe and Asia) also use English law to govern some of their facilities, and so commentary below on English contractual matters is also potentially relevant to fund finance transactions that are not in other respects strictly "English".

When and why did the English fund finance market develop?

Outside North America, England & Wales is the most mature fund finance market, having its genesis in the early 2000s. The main drivers for its initial development were:

- a growing need and desire for fund-level liquidity from (principally) private equity managers; and
- the close relationship between the small group of financial institutions that first began to provide these types of products and the end-user PE managers (sometimes in an investor capacity), giving them access to fund-level information essential for the assessment of the credit quality of the collateral underpinning the financing.

Whilst many very large transactions were being carried out at this time (generally bilaterally), the size of the market was comparatively small as a result of:

- a limited number of financial institutions offering this type of product and offering it as a relationship-enhancing product in conjunction with more traditional credit lines, such as portfolio company leverage; and

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- a limited number of fund managers being considered an appropriate user of this type of financing – typically top-quartile European and global private markets managers with high-quality, diversified investor bases and underlying assets, and proven track records.

How has the English fund finance market changed since the early 2000s?

Fast forward to the end of 2019 and the English fund finance market has grown both in depth and breadth exponentially. Notwithstanding the continuing political and economic uncertainty characterising much of the last few years, in 2019 our team in London advised on new transactions totalling in excess of £30bn and, whilst there is no publicly available data for the English fund finance market, we believe the size of the English fund finance market to be in excess of £125bn.

In the past year, a significant number of these transactions have comprised non-subscription line facilities with hybrid, NAV-based (across all asset classes including primary PE), and GP-led financings, with a standout transaction for our team advising on a back-levered preferred equity transaction as further described in our earlier chapter on the secondaries market. The number of entrants into the fund finance market has increased by a staggering 48% as we've seen a growing trend in non-bank lenders in the fund finance space.

The main drivers of this growth have been:

- an increasing number of financial institutions, insurance companies and asset managers with capital to deploy looking to these products to deliver attractive risk-adjusted returns and, in the case of financial institutions, to facilitate a wider and deeper relationship with private markets fund managers;
- the attractiveness of the "low default" record of these transactions, with only one notable exception in 2018 in respect of the Abraaj group demise;
- as the products have become better understood and more widely used and recognised, a greater willingness and appetite to make these products available to managers across all asset classes and sizes and jurisdictions across Europe (including Germany, Spain and Italy) where English law generally remains the governing law of the financing;
- an increase in the prevalence of different types of fund finance products, as alluded to above, including an increase in the number of GP/Exec financings, umbrella and co-invest facilities and SMA financings; and
- as allocations to the private markets increase with dry powder sitting at over $2.2tn globally, the desire of fund managers to use fund finance products to facilitate the use of that capital as efficiently as possible. The efficient and intelligent use of fund finance facilities can provide this competitive edge.

A top-down analysis

The three most important shapers of the English fund finance market are:

- *Investor sentiment.* With prevailing low (albeit rising) interest rates, the private markets continue to play a crucial role in the investment strategies of institutional investors given the historically high levels of returns generated by alternative assets and several consecutive years of high distribution levels. Although at the time of writing this article, fund-raising figures for Q1-Q3 2019 are down on 2018, fund-raising is expected to match 2018, with 2019 being another successful year for fundraising globally. Similar to previous years, the fundraising market was again dominated by fewer and larger funds, as investors continued to concentrate their relationships in

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fewer managers, which in turn continued the bifurcation in the market in terms of capital-raising between the larger managers and the mid/small-cap managers. The 10 largest funds together raised more than 50% of the total capital raised in Q3 alone.

- *The asset manager's perspective.* The robust levels of fundraising have surpassed many managers' expectations, with more funds reaching final close in the period Q1-Q3 and many exceeding their targets yet again. However, this brings with it significant pressure to deploy record levels of capital and deliver high returns, in a competitive market where entry prices for assets are high and managers must continuously differentiate themselves.
- *Debt focus.* There are approximately 46 providers of fund finance products in the English market. However, a number of those lenders have tended to occupy different niches within it, so the market overall is not particularly deep, although increasingly widening. The factors which have tended to differentiate lenders historically are:
  - **Sector:** e.g., venture, infrastructure, buy-out;
  - **Geography:** reflecting the preferred geographic focus of the lender;
  - **Cross-selling opportunities:** the potential to provide ancillary products including depositary services;
  - **Facility complexity/pricing returns and revenue levels:** some lenders favour more complex products and the returns that accompany them;
  - **Balance sheet capacity/facility size:** as private markets managers' requirements for the size, duration and type of facilities increases, lenders that previously have been able to meet all of the manager's financing needs now need to bring in other lenders to meet this high level of demand. Conversely, there are a number of newer entrants in the market with large balance sheets that are using this capacity as a market differentiator;
  - **Risk/capital limits:** this has resulted in some lenders focusing on key clients only and/or preferring to offer uncommitted facilities; and/or
  - **LP diversity:** some banks require greater LP/underlying asset diversity than others, although we have seen a trend of lenders moving to advance against increasingly concentrated LP bases and asset portfolios.

The number of lenders offering these facilities has increased significantly over recent years; as fund finance products have become more mainstream, the yields continue to be attractive compared to other debt products. These returns, coupled with some of the ancillary business opportunities that are available, continue to make fund finance in its various guises a compelling product for lenders. Nevertheless, with many lenders still tending to have their own niche, the lender market is a Venn diagram of appetite which can limit the numbers of lenders with the ability and desire to participate in any particular facility.

Following the general trend in debt capital markets products and fuelled by increasing levels of competition, we continue to see pricing on some subscription lines, and NAV-backed facilities in the private credit and secondaries space tighten. This has reduced the appetite of some lenders to provide this type of product, and is resulting in an increased focus on ancillary business and/or a move towards more bespoke fund financings. Yet despite the number of new entrants to the market in the past three years, it is interesting that the number of lenders with credit appetite to provide wholly or partially asset-backed fund finance products is significantly less than is the case for LP-backed facilities.

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Fund finance structures

Historically, subscription credit facilities advanced against diversified LP pools have been the most prevalent type of facility in the English fund finance market. However in the past eight years and particularly in the last three years, we have seen a significant increase in other types of fund finance products – mainly NAV-backed (whether hybrid or pure NAV-based), GP/Manager/exec financings, SMA financings, financings of GP-led transactions and umbrella facilities in their various guises. This has been driven in part by the increasing levels of competition in the subscription credit facility market, driving lenders to seek better returns, and private markets managers to be more creative in their usage of debt products at fund level. We have seen a number of trends emerge with each of these types of products in the English fund finance market as follows:

- *Secured or unsecured.* Prior to the global financial crisis, many subscription line facilities in the English market were provided on an unsecured uncommitted basis with a security power of attorney often being the only piece of (quasi-) security taken by the lenders. The rationale for this was:
  - the market at this point comprised only very high-quality experienced private markets managers with whom lenders had close institutional relationships;
  - importantly, the terms of the facilities precluded any other indebtedness within any fund vehicle sitting between the lender and the lender's ultimate source of repayment, i.e., the contractually committed and uncalled capital of the investors and very often, the underlying assets of the fund as well;
  - these facilities were niche bespoke products at that time and, whilst the fund documentation expressly contemplated the fund having the power to borrow, the security package that is now widely accepted as a staple part of these transactions was often not expressly contemplated;
  - these transactions were accompanied by a legal opinion from the fund's counsel confirming that the lender's claims under the finance documents ranked ahead of the claims of the investors (being the only other potential "creditors" of the fund); and
  - utilisation of these facilities was largely short-term, so the periods during which lenders were on risk was generally less than one year.

  As the market has grown and developed, with funds using fund finance products no longer having these relationships or features, so the emphasis on security has become greater, such that we now rarely see unsecured lines.
- *Umbrella facilities.* Designed to be a one-stop financing solution for private markets managers, these facilities can be used across a number of different funds (or entities within a fund structure) managed by the same manager (or, indeed, executives within a manager) at any time. We continue to see an uptick in volume of these types of facilities, as managers have become more creative and reliant on fund finance products and lenders look to differentiate themselves by offering bespoke financing solutions.
- *Defaults.* Whilst we continue to see fund finance as an industry with a very low default profile, the defaults associated with the Abraaj collapse continue to be a talking point in the market, with lenders taking a stricter view on a number of positions that had previously become more relaxed in the run-up to the Abraaj collapse. The Abraaj cases provided the only real opportunity the fund finance market has had to scrutinise our documentation and provisions in limited partnership agreements

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which had previously not been regarded as relevant, for example, jurisdiction clauses and how the language in these clauses can impact a lender's recovery. Whilst the specific features of the circumstances underlying these defaults allow it to be distinguished to a large extent in the fund finance market, it has allowed us to take a much-needed pause for thought. The market has developed at a rapid rate against a backdrop of low default and zero enforcement numbers, and these deals have not been tested in the same way as other types of facilities until now. Our view is that this is actually a welcome development in our market, offering us the opportunity to consider risks which may not have been immediately apparent with these types of facilities previously, and thus to approach the documentation with these risks in mind. As a result, we believe many areas of the facility and fund documentation should be revisited in the wake of these facilities.

- *Committed versus uncommitted.* Historically, many subscription line facilities were structured on an uncommitted basis, enabling lenders to benefit from favourable regulatory capital treatment under UK regulation. Private markets managers using these facilities had done so on a regular basis for many years, and took comfort from their experience with the lenders providing them over this time that they would not be withdrawn without serious cause. The size of these facilities ran into the hundreds of millions, if not billions, and the savings made by private markets managers on commitment fees were considerable, particularly given that historically, these facilities tended not to be heavily drawn. We still see a number of uncommitted transactions (or transactions with an uncommitted element) in the English market, but as the market has opened up to new entrants, some managers have become less confident with uncommitted lines, and many banks no longer have the ability to provide uncommitted lines.
- *Side letters.* As a result of fund finance facilities becoming better understood and more widely used across the private markets, the use of debt by fund managers has become a focal point for investors when negotiating the limited partnership agreement and side letters, and we are seeing more provisions in those documents which relate to, restrict and otherwise impact on a manager's use of these lines. We are increasingly seeing restrictions around who can serve drawdown notices on investors, and restrictions on the amount that can be called from investors by lenders providing subscription lines, including some provisions which may seem innocuous but which may have a material impact on a lender's recovery.
- *Increase in volume of hybrid and NAV facilities.* We have seen an increasing number of managers looking to both restructure their existing facilities and structure new facilities, in each case on a hybrid or NAV-only basis, allowing the manager to use the line through and beyond the fund's investment period. Although there are far fewer lenders with credit appetite to lend against the underlying assets of a fund – particularly outside of credit and secondaries – we are seeing an uptick in lenders either getting comfortable with this type of recourse or specifically targeting these more lucrative transactions, particularly in the primary PE space, where we expect to see a continued increase in volume, as the market is opened up by top-tier managers using these lines. True hybrids, i.e., where a lender is taking equal credit risk on the investor commitments and the underlying assets, continue to be a more difficult proposition, with few true hybrids being done in the market.
- *Single account financing.* Single account vehicle financings continue to increase as private markets managers respond to investor demand to invest significant amounts

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of capital through segregated accounts, and we are seeing a widening of the lender universe, getting comfortable with lending against highly concentrated LP bases.

- *Secondaries market.* The secondaries market has been one of the big success stories of the private markets over the past few years and this year has been no exception. In our earlier chapter, *The secondaries market: The rise of GP-led and preferred equity solutions*, we looked at the two biggest trends in the secondaries market – GP-led and preferred equity transactions – and how these are shaping the market. The secondaries market has evolved quickly in terms of capital-raising, deal volume and transaction complexity and innovation. This has given rise to a myriad of financing opportunities for lenders and fund managers.
- *GP/manager support facilities.* Whilst the increase in volume in these types of facilities has not been as material as other types of fund finance products, we are finding GPs and managers using these products more creatively, with many of the GP lines we have done this year involving umbrella frameworks, allowing execs to draw directly on these facilities, with lenders having little or no recourse to the management fee.
- *Open-ended structures.* We have advised on an increasing number of subscription lines where the end-user is a quasi-open-ended fund. Whether or not it is possible to work a subscription line around this type of structure will depend on the particular structure and documentation of the fund. On the whole, we have been able to navigate through the issues these types of vehicles give rise to in the context of a subscription financing, but early identification of issues is key.

Fund domicile in English law fund financings

Whilst Guernsey, Jersey and the Cayman Islands continue to be popular when it comes to fund domiciliation in English law fund financings, over the past six years we have seen funds domiciled in Luxembourg (particularly in the credit fund space) and Ireland feature increasingly.

Comparatively few English fund finance transactions involve English-domiciled funds. This is at least in part because, until relatively recently, the law governing English limited partnerships was antiquated with the key statutes, the English Limited Partnership Act 1907 and the Partnership Act 1890, having changed little since they were originally introduced.

However, on 6 April 2017, the Legislative Reform (Private Fund Limited Partnership) Order 2017 came into force, with the specific purpose of making English limited partnerships more attractive to private equity, venture capital funds and other private funds. In particular, it introduced the concept of "private fund limited partnership". Some of the usual rules, restrictions and administrative burdens that previously applied to all limited partnerships and their limited partners do not now apply to these "PFLPs".

Following other jurisdictions, such as Cayman and Guernsey, the Legislative Reform Order also seeks to add certainty for investors by introducing a non-exhaustive white-list of activities that a limited partner can undertake without "taking part in the management of the business" and thereby losing its limited liability status, which is likely to be helpful particularly for single-account structures. Despite these efforts, we have not seen any material increase in the number of funds choosing to domicile in England & Wales over the past 12 months, perhaps because English limited partnerships still do not provide all of the advantages of limited partnerships in some other jurisdictions.

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With the rise of these non-traditional jurisdictions over the past few years, we have seen an increasing number of different types of vehicles being used as fund-raising vehicles – particularly corporate structures – which can present challenges in terms of putting a subscription or hybrid line in place. The challenges depend on the structure, jurisdiction and terms of the fund documents, but include addressing and providing the lender with control over any additional steps that need to be taken in order to complete the call-down process on investors.

The outlook for 2020 – some crystal ball gazing…

At the time of writing this chapter, the market saw the Conservatives win a clear majority in the December 2019 election, breaking the political deadlock of the last few years, which now means that the Prime Minister should be in a position to transition the UK out of the European Union. Whilst this has provided some relief to the markets that we appear now to be on course for an orderly departure from the EU and a withdrawal agreement signed imminently, there is still no trade deal with the EU, which may continue to hamper appetite for UK assets. For now, however, the short-term economic outlook is improved and the markets have initially responded favourably – a clear majority for the government placing it in a better position to do what it needs to do to "get on with Brexit".

It is interesting that despite the continued political and economic uncertainty we have again seen this year, there has been no decline in the number of English fund finance transactions, and in fact we have seen a significant increase in deal volume. This is not to say that the fund finance industry is immune to a politically and economically challenging environment, but whether we are in a time of record fundraising or a downturn, fund finance plays a pivotal role in creating liquidity in all types of situations for managers, and we expect to see demand for these products continue to grow, particularly on the NAV-based lending side.

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Samantha Hutchinson advises both financial institutions and private markets managers on the full range of fund finance products across all asset classes. She has advised on some of the largest subscription and leverage deals in the market, including a €7bn secondary financing for a leading primary PE manager, a €105m back-levered preferred equity financing, a €150m GP financing to a leading primary PA manager, as well as numerous secondary and GP-led financings. In the last 12 months she has advised on over 55 new fund financings, exceeding $23bn in value. Sam has been advising financial institutions and private markets managers for over 17 years, and her practice covers the full range of fund lending products, delivered via a number of different structures including framework and umbrella facilities.

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Jeremy Cross is a vastly experienced loan finance lawyer with particular experience in funds finance and real estate finance as well as more general experience in acquisition, leverage and general corporate finance.

Jeremy acts for lenders, borrowers and sponsors on a wide range of domestic and international financing transactions. His clients include the Royal Bank of Scotland, Lloyds Banking Group, Barclays Bank, Wells Fargo and National Australia Bank along with a number of other banks, non-bank financial institutions and funds.

Chambers UK lists Jeremy as a leader in the field of Banking & Finance, described as "a highly intelligent and commercial figure". *The Legal 500* has recommended the "very commercial [Jeremy Cross]". He is also recommended in Bank Lending, noted as "very commercial and has the ability to explain in simple language often difficult concepts". Jeremy was included among the "Hot 100"' Lawyers by *The Lawyer* in 2013.

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