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The International Comparative Legal Guide to:

Lending & Secured Finance 2014

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Country Question and Answer Chapters:

A Comparative Overview of Transatlantic Intercreditor Agreements

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Introduction

Intercreditor terms, or at least the accepted frameworks applicable to a given financing structure in a particular market, are often fairly settled, but where cultures collide, for example, in a U.S. syndicated bank loan financing for European borrowers, or other financings involving practitioners and business people in different parts of the world, deal parties may have very different expectations as to the key intercreditor terms that ought to apply.

In this article, we will compare and contrast the key terms in U.S. second lien and European mezzanine intercreditors and discuss the blended approach taken in some recent intercreditor agreements for financings of European companies in the U.S. syndicated bank loan markets. Similar dynamics may also be involved when documenting intercreditor agreements involving other non-U.S. jurisdictions, but for ease of reference we will refer to these intercreditor agreements as "Transatlantic Intercreditor Agreements".

Assumptions

U.S. second lien intercreditors are predicated on two key assumptions: *first*, that the business will be reorganised pursuant to Chapter 11 of the United States Bankruptcy Code (Chapter 11); and *second*, that the first lien lenders will receive the benefits of a comprehensive guarantee and collateral package (including shares, cash, receivables and tangible assets) pursuant to secured transactions laws that effectively provide creditors with the ability to take a security interest in "all assets" of the borrower and guarantors. European mezzanine intercreditors, in contrast, assume that (i) in all likelihood, not all assets of the borrower and guarantors will be subject to the liens of the first lien and second lien secured parties, and (ii) it is unlikely that the borrower and guarantors will be reorganised in an orderly court-approved process and more likely, since there is no pan-European insolvency regime (and so there is not a pan-European automatic stay on enforcement of claims), the intercreditor terms will have to work in the context of potentially multiple and disparate insolvency proceedings (and ideally avoid insolvency proceedings altogether). As a result one of the key goals that European mezzanine intercreditors seek to facilitate instead is a swift out-of-court, out-of-bankruptcy, enforcement sale (or "pre-pack") resulting in a financial restructuring where "out of the money" junior creditors' claims are removed from the financing structure by releasing or disposing of the liens and guarantees of the "out of the money" junior creditors.

Overview

The first lien/second lien relationship in the U.S. most closely resembles the senior/mezzanine relationship in Europe, where mezzanine financings are always second lien secured financings (unlike in the U.S. where "mezzanine financing" often connotes a senior unsecured or senior subordinated financing). Although first lien/second lien financings and senior/mezzanine financings are very similar, as highlighted above, the key terms of U.S. second lien and European mezzanine intercreditors have been constructed based on very different assumptions which therefore results in significant differences.

European mezzanine intercreditor agreements typically combine claim subordination, payment blockages, lien subordination, broad enforcement standstill provisions restricting the junior lien creditors' ability to take enforcement action (on debt and guarantee claims as well as collateral) and extensive release mechanics. U.S. second lien intercreditors establish lien subordination, which regulates the rights of the U.S. second lien creditors with respect to collateral only, and includes an enforcement standstill with respect to actions against collateral only. U.S. second lien intercreditors do not generally include payment subordination of the junior facility and they rely heavily on waivers of the junior lien creditors' rights as secured creditors under Chapter 11.

Within regions, the forms of intercreditor agreement can vary significantly. European mezzanine intercreditors are often based on the form promulgated by the Loan Market Association (the "LMA"), but are negotiated on a deal-by-deal basis. By contrast, there is no market standard first lien/second lien intercreditor agreement in the U.S. (The Commercial Finance Committee of the American Bar Association did publish a model form of intercreditor agreement in 2010, but it is not widely used.) As discussed below, recent intercreditors for financings of European companies in the U.S. syndicated bank loan markets vary even more significantly.

Key Terms of U.S. Second Lien Intercreditor Agreements and European Mezzanine Intercreditor Agreements

1. Parties to the Intercreditor Agreement

U.S. second lien intercreditors are generally executed by the first lien agent and the second lien agent and executed or acknowledged by the borrower and, sometimes, the guarantors. Depending on the flexibility negotiated by the borrower in the first lien credit agreement and second lien credit agreement, the intercreditor agreement may also allow for other future classes of first lien and second lien debt permitted by the credit agreements to accede to the intercreditor agreement. U.S. second lien intercreditors also typically allow for refinancings of the first lien and second lien debt.

By contrast, the parties to European mezzanine intercreditors generally include a longer list of signatories. In addition to the first lien agent and lenders, the second lien agent and lenders and the obligors, the obligors' hedge providers, cash management providers, ancillary facility lenders, the lenders of intra-group loans, the lenders of shareholder loans and the security agent will execute a European-style intercreditor agreement. The longer list of parties to European mezzanine intercreditors is largely driven by the senior creditors' need to ensure that after giving effect to the senior lenders' enforcement, the borrower group is free and clear of all claims (both secured and unsecured) against the borrower and guarantors and a desire to ensure that any enforcement action by creditors is choreographed in a manner which maximises recoveries for the senior secured creditors (and thus indirectly for all creditors). European mezzanine intercreditors do not typically expressly permit refinancings and traditionally did not include additional classes of first lien or second lien debt. (The LMA form of senior/mezzanine intercreditor agreement now includes a concept of "Qualifying Senior Facilities Refinancings", but this option in the form is not currently selected frequently because its utility is limited by the mezzanine facility's maturity date, typically expiring 12 months after the maturity date of the senior credit facilities. This maturity date effectively limits the maturity date of the new senior credit facilities, thereby necessitating the consent of the mezzanine creditors to refinance the senior facility.)

Hedge obligations are generally included as first lien obligations (and sometimes also as second lien obligations) under U.S. second lien intercreditors, but hedge counterparties are not directly party to U.S. second lien intercreditors. By accepting the benefits of the first priority lien of the first lien agent, the hedge counterparties receive the benefits of the first priority lien granted to the first lien agent on behalf of all first lien secured parties (including the hedge counterparties) and the hedge counterparties are deemed to agree that the first lien security interests are regulated by the intercreditor agreement and other loan documents. The hedge counterparties under U.S. second lien intercreditors in syndicated bank financings generally do not have the ability to direct enforcement actions and do not have the right to vote their outstanding claims (including any votes in respect of enforcement decisions).

Cash management obligations (e.g., treasury, depository, overdraft, credit or debit card, electronic funds transfer and other cash management arrangements) are often included as first lien obligations under U.S. second lien intercreditors on terms similar to the terms relating to the hedge obligations. By contrast, European mezzanine intercreditors do not typically expressly contemplate cash management obligations. In European financings, the cash management providers would typically provide the cash management services through ancillary facilities – bilateral facilities provided by a lender in place of all or part of that lender's unutilised revolving facility commitment. Ancillary facilities are not a common feature of U.S. credit facilities. The lenders of the ancillary facilities would generally become direct signatories of a European mezzanine intercreditor.

2. Enforcement

a. Enforcement Instructions

The first lien agent under U.S. second lien intercreditors takes instructions from a majority of the loans and unfunded commitments under the senior credit agreement, which follows the standard formulation of required lenders in U.S. senior credit agreements. (Note, however, that the vote required to confirm a plan of reorganisation in a Chapter 11 proceeding is a higher threshold – at least two-thirds in amount and more than one-half in number of the claims voting on the plan.)

The collateral agent under European mezzanine intercreditors, however, takes instructions from 66 2/3% of the sum of (i) the drawn and undrawn amounts under the senior credit agreement, and (ii) any actual exposure (plus any mark to market value if the senior credit agreement has been discharged) under any outstanding hedging arrangements.

b. Enforcement Standstill Periods

U.S. second lien financings involve lien subordination as opposed to payment (also referred to as debt or claim) subordination. The result of lien subordination is that only the proceeds of shared collateral subject to the liens for the benefit of both the first lien secured parties and second lien secured parties are applied to repayment in full of the first lien obligations before the second lien secured parties may receive any distribution on the proceeds of the shared collateral, but the second lien secured parties may receive other payments (such as payments of principal and interest and payments from other sources, e.g., *unencumbered property*) prior to the first lien obligations being paid in full. In the context of U.S. obligors, in practice, it is unlikely that there would be substantial property that is unencumbered since the security granted would likely pick up most assets – in contrast to certain European obligors whose unencumbered assets may be significant due to local law limitations.

Payment subordination requires the junior lien creditors to turnover to the first lien secured parties all proceeds of enforcement received from any source (including the proceeds of any *unencumbered property*) until the first lien obligations are paid in full. Consequently, the difference in recoveries between lien subordination and payment subordination could be significant in a financing where material assets are left unencumbered, as is likely in a financing in which much of the credit support is outside of the U.S.

U.S. second lien intercreditors prevent the second lien agent from exercising any of its rights or remedies with respect to the shared collateral until expiration of the period ending 90 to 180 days after notice delivered by the second lien agent to the first lien agent after a second lien event of default or, in some cases, if earlier, second lien acceleration. The standstill period becomes permanent to the extent the first lien agent is diligently pursuing in good faith an enforcement action against a material portion of the shared collateral. An exercise of collateral remedies generally includes any action (including commencing legal proceedings) to foreclose on the lien of such person in any shared collateral, to take possession of or sell any shared collateral or to exercise any right of setoff with respect to any shared collateral, but the acceleration of credit facility obligations is generally not an exercise of collateral remedies.

European mezzanine intercreditors typically contain a much broader enforcement standstill provision than the U.S. second lien intercreditors. The scope of the enforcement actions is negotiated, but typically prohibits any acceleration of the second lien debt, any enforcement of payment of, or action to collect, the second lien debt, and any commencement or joining in with others to commence any insolvency proceeding, any commencement by the second lien agent or second lien creditors of any judicial enforcement of any of the rights and remedies, whether as a secured or unsecured creditor, under the second lien documents or applicable law. The enforcement standstill period typically runs for (i) a period of 90 days (in most cases) following notice of payment default under the senior credit agreement, (ii) a period of 120 days (in most cases) following notice of financial covenant default under the senior credit agreement, and (iii) a period of 150 days (in most cases) following notice of any other event of default under the senior credit agreement, plus (in some cases) 120 days if the senior lien agent is taking enforcement action. In European mezzanine intercreditors, the senior creditors firmly control enforcement. In addition, the senior agent can override the junior agent's instructions to the security agent, leaving the mezzanine lenders only able to influence the timing of enforcement action after the standstill period.

Because the enforcement standstill in U.S. second lien intercreditors is limited to enforcement against shared collateral, U.S. second lien lenders, unlike their European counterparts, retain during the standstill period the right to accelerate their second lien loans and to demand payment from the borrower and guarantors. However, in the event any second lien agent or any other second lien creditor becomes a judgment lien creditor in respect of the shared collateral as a result of enforcement of its rights as an unsecured creditor (such as the ability to sue for payment), the judgment lien would typically be subordinated to the liens securing the first lien obligations on the same basis as the other liens securing the second lien obligations under the U.S. second lien intercreditor agreement. This judgment lien provision effectively limits the effectiveness of the junior lien creditors' efforts to sue for payment, since the junior lien creditors ultimately will not be able to enforce against shared collateral, although the junior lien creditors could still obtain rights against any previously unencumbered assets of the borrower and guarantors.

3. Payment Blockages

U.S. second lien intercreditors do not generally subordinate the junior lien obligations in right of payment to the first lien obligations.

European mezzanine intercreditors do subordinate the junior lien obligations in right of payment to the senior lien obligations and include a payment blockage period that is typically permanent during a payment default under the senior credit agreement and 120 days during each year during any other event of default under the senior credit agreement. The mezzanine creditors may negotiate for exceptions to the payment blockage periods, e.g., payment of a pre-agreed amount of expenses related to the restructuring or a valuation of the borrower group (other than expenses related to disputing any aspect of a distressed disposal or sale of liabilities). In addition, separate payment blockage rules typically apply to hedge obligations, shareholder loan obligations and intragroup liabilities in European mezzanine intercreditors.

4. Releases of Collateral and Guarantees

In order to ensure that the junior lien creditors cannot interfere with a sale of the shared collateral, both U.S. second lien intercreditors and European mezzanine intercreditors contain release provisions in which the junior lenders agree that their lien on any shared collateral is automatically released if the first lien creditors release their lien in connection with a disposition permitted under both the first lien credit agreement and the second lien credit agreement and, more importantly, in connection with enforcement by the first lien creditors.

While important in U.S. second lien intercreditors, the release provisions are arguably the most important provision of European mezzanine intercreditors.

U.S. second lien and European intercreditors permit, in the ordinary course, the guarantees and collateral to be released in respect of any asset or any member of the group if the asset sale is permitted under both the first lien credit agreement and second lien credit agreement. However, under European intercreditor agreements, in connection with enforcement by the senior creditors (or a "distressed disposal"), the junior security and debt and guarantee claims can be released (or disposed of) subject to negotiated conditions. Market practice continues to evolve but the fair sale provisions are increasingly common, i.e., public auction/sale process or independent fair value opinion. The LMA form intercreditor agreement requires the security agent to take reasonable care to obtain a fair market price/value and permits the sale of group entities and release of debt and guarantee claims, plus the sale of mezzanine debt claims. Recent changes to the LMA intercreditor agreement provide that the security agent's duties will be discharged when (although this list is not exhaustive): (i) the sale is made under the direction/control of an insolvency officer; (ii) the sale is made pursuant to an auction/competitive sales process (which does not exclude mezzanine creditors from participating unless adverse to the sales process); (iii) the sale is made as part of a court supervised/approved process; or (iv) a "fairness opinion" has been obtained. Any additional parameters/conditions to the above will be hotly negotiated, particularly in deals where specialist mezzanine funds are anchoring the mezzanine facility. Typical points for discussion will be: (i) the circumstances in which/whether the senior creditors can instruct a sale in reliance on a fair sale opinion rather than a public auction; (ii) terms of any public auction (i.e. how conducted, on whose advice, who can participate, who can credit bid); (iii) any cash requirements; and (iv) any information/consultation rights.

In addition to the release provisions, European mezzanine intercreditors typically allow (subject to the fair sale provisions discussed above) the security agent to transfer the junior lien debt, intragroup liabilities and/or shareholder loans to the purchasers of the assets in an enforcement situation. The disposal of liabilities option will be, in many cases, more tax efficient than cancelling the subordinated debt in connection with enforcement.

Many of these conditions with respect to sales of collateral are absent in U.S. second lien intercreditors because meaningful protections are afforded by the Uniform Commercial Code requirement for a sale of collateral to be made in a commercially reasonable manner and, in the case of a 363 sale process, by a court-approved sale in Chapter 11, as discussed more fully below.

In addition, the release provisions in U.S. second lien intercreditors are also premised on the first lien and second lien security interests being separately held by the first lien collateral agent and the second lien collateral agent and documented in separate, but substantially similar, documents that are meant to cover identical pools of collateral. In European mezzanine intercreditors, the release provisions assume that one set of security interests are held by one security agent on behalf of all of the creditors (senior and mezzanine).

5. Limitation on First Lien Obligations

U.S. second lien financings include a "first lien debt cap" to limit the amount of first lien obligations that will be senior to the second lien obligations. The analogous provision in European mezzanine intercreditors is referred to as "senior headroom". Any amounts that exceed the "first lien debt cap" or "senior headroom" do not benefit from the lien priority provisions in the intercreditor agreement. The "cushion" under the first lien debt cap or "headroom" is meant to allow for additional cash needs of the borrower group as part of a loan workout or otherwise.

The "first lien debt cap" in U.S. second lien financings is typically 110% to 120% of the principal amount of loans and commitments under the first lien facilities on the closing date plus 100% to 120%

of the principal amount of any incremental facilities permitted under the first lien credit agreement on the closing date. The first lien debt cap is sometimes reduced by the amounts of certain reductions to the first lien commitments and funded loans (other than refinancings), e.g., mandatory prepayments. The first lien debt cap does not apply to hedging obligations and cash management obligations, which are generally included as first lien priority obligations without limitation. In addition, interest, fees, expenses, premiums and other amounts related to the principal amount of the first lien obligations permitted by the first lien debt cap are first lien priority obligations, but are generally not limited by the cap itself. The trend in U.S. second lien financings is to allow for larger "first lien debt caps"; some borrower-friendly U.S. second lien financings even allow for unlimited first lien obligations (subject of course to any covenants restricting debt in the applicable credit agreements and other debt documents, including the second lien credit agreement). Additional capacity is often also permitted in the case of DIP financings in the U.S. (as discussed below).

"Senior headroom" is typically set at 110% of senior term debt plus revolving commitments in European mezzanine intercreditors. Ancillary facilities that would be provided in European deals *in lieu* of external cash management arrangements would be naturally limited by the amount of the revolving commitments since they are made available by revolving credit facility lenders in place of their revolving commitments. Hedging obligations can be limited (by imposing maximum limits on the notional amounts hedged under the hedging transactions entered into) or otherwise can be left unlimited but naturally constrained to a degree by the fact that most credit agreements will restrict the borrower group from doing speculative trades.

6. Amendment Restrictions

In both U.S. second lien intercreditors and European mezzanine intercreditors, first lien lenders and second lien lenders typically specify in the intercreditor agreement the extent to which certain terms of the first lien credit agreement and second lien credit agreement cannot be amended without the other lien's consent. Amendment restrictions are negotiated on a deal-by-deal basis and may include limitations on increasing pricing, limitations on modifications of maturity date and additions of events of default and covenants. The trend in U.S. second lien intercreditors, in particular in financings of borrowers owned by private equity sponsors, is for few (or no) amendment restrictions; the inclusion of amendment restrictions in European intercreditors is reasonably well-settled at this point.

7. Purchase Options

Both U.S. second lien intercreditors and European mezzanine intercreditors contain similar provisions whereby the second lien creditors can purchase the first lien obligations in full at par, plus accrued interest, unpaid fees, expenses and other amounts owing to the first lien lenders at the time of the purchase. A purchase option gives the second lien creditors a viable alternative to sitting aside during an enforcement action controlled by the first lien creditors by allowing the second lien creditors to purchase the first lien obligations in full and thereby enabling the second lien creditors to control the enforcement proceedings themselves.

The European version of the purchase option includes a buyout of the hedging obligations, which may or may not be included (or clearly included) in U.S. second lien intercreditors.

The triggering events for the purchase option in U.S. intercreditors vary. The trigger events generally include acceleration of the first lien obligations in accordance with the first lien credit agreement and the commencement of an insolvency proceeding. Other potential trigger events include any payment default under the first lien credit agreement that remains uncured or not waived for a period of time and a release of liens in connection with enforcement on common collateral. The triggering event for the European version of the purchase option also varies and may include acceleration/enforcement by the senior, the imposition of a standstill period on mezzanine enforcement action or the imposition of a payment block.

8. Common U.S. Bankruptcy Waivers

First lien secured parties in the U.S. try to ensure that the first lien secured parties control the course of the Chapter 11 proceeding to the maximum extent possible by seeking advanced waivers from the second lien secured parties of their bankruptcy rights as secured creditors (and in some cases, unsecured creditors) that effectively render the second lien secured parties "silent seconds". These waivers are often hotly negotiated. However, U.S. second lien intercreditors routinely contain waivers from the second lien secured parties of rights to object during the course of a Chapter 11 proceeding to a debtor-in-possession facility (or "DIP facility"), a sale by the debtor of its assets free of liens and liabilities outside of the ordinary course of business during Chapter 11 proceedings, with the approval of the bankruptcy court (a section 363 sale) and relief from the automatic stay, which automatically stops substantially all acts and proceedings against the debtor and its property immediately upon filing of the bankruptcy petition.

The enforceability of the non-subordination related provisions in U.S. second lien intercreditors is uncertain because there is little (and conflicting) case law in this area. However, subordination-related provisions are regularly enforced by U.S. bankruptcy courts to the same extent that they are enforceable under applicable non-bankruptcy law pursuant to section 510(a) of the Bankruptcy Code.

The second lien creditors in U.S. second lien intercreditors provide their advanced consent to DIP facilities whereby, subject to certain conditions, the second lien creditors agree not to object to the borrower or any other obligor obtaining financing (including on a priming basis) after the commencement of a Chapter 11 process, whether from the first lien creditors or any other third party financing source, if the first lien agent desires to permit such financing (or to permit the use of cash collateral on which the first lien agent or any other creditor of the borrower or any other obligor has a lien).

In the U.S., second lien claimholders expressly reserve the right to exercise rights and remedies as unsecured creditors against any borrower or guarantor in accordance with the terms of the second lien credit documents and applicable law, except as would otherwise be in contravention of, or inconsistent with, the express terms of the intercreditor agreement. This type of provision, for the reasons articulated above, does not have a counterpart in European mezzanine intercreditors.

9. Non-cash Consideration / Credit Bidding

Recent changes to the LMA intercreditor agreement include explicit provisions dealing with the application of non-cash consideration (or "credit bidding") during the enforcement of security. Credit bidding facilitates debt-for-equity exchanges by allowing the security agent, at the instruction of the senior creditors, to distribute equity to senior creditors as payment of the senior debt or to consummate a pre-pack where the senior debt is rolled into a newco vehicle.

In the U.S., the term "credit bidding" refers to the right of a secured creditor to offset, or bid, its secured allowed claim against the purchase price in a sale of its collateral under section 363(b) of the Bankruptcy Code, thereby allowing a secured creditor to acquire the assets that are subject to its lien in exchange for a full or partial cancellation of the debt. In U.S. second lien intercreditors, the second lien creditors consent to a sale or other disposition of any shared collateral free and clear of their liens or other claims under section 363 of the Bankruptcy Code if the first lien creditors have consented to such sale or disposition of such assets. However, the second lien creditors often also expressly retain the ability to credit bid their second lien debt for the assets of the borrower and guarantors so long as the sale proceeds are used to repay the first lien obligations in full. In European intercreditor agreements, the second lien creditors would not typically have the right to credit bid their second lien debt.

10. The Holders of Shareholder Obligations and Intragoup Obligations

In addition to direct equity contributions, shareholder loans are often used in European capital structures. Shareholder loans are less common in U.S. capital structures and if present in the capital structure, shareholder loans would likely be subordinated to the credit agreement obligations under a separately documented subordination agreement (i.e., not included as part of the typical U.S. second lien intercreditor agreement). Similarly, holders of intragroup liabilities would also not be included in U.S. second lien intercreditor agreements. However, the treatment of intragroup liabilities is often negotiated by the borrower and arrangers in U.S. syndicated credit agreements and results differ, but often the intragroup liabilities are required to be documented by an intercompany note and subject to an intercompany subordination agreement. The intercompany subordination agreement would subordinate the intragroup liabilities to be paid by the loan parties to the credit facility obligations and would generally include a payment blockage of amounts to be paid by each intragroup payor that is a borrower or guarantor under the credit facilities during the continuation of an event of default.

Blended Approach Taken in Recent Transatlantic Intercreditor Agreements

Recent intercreditor agreements for financings involving primarily non-U.S. companies in U.S. syndicated bank loan financings, and using NY-law governed loan documents, have taken different approaches to the intercreditor terms, which seem to be determined on a deal-by-deal basis depending on several considerations: (1) the portion of the borrower group's business located in the U.S.; (2) the jurisdiction of the organisation of the borrower; (3) the likelihood of the borrower group filing for U.S. bankruptcy protection; and (4) the relative negotiation strength of the junior lien creditors and the borrower, who will be inclined to favour future flexibility and lower upfront legal costs. For these and other reasons, seemingly similar financings have taken very different approaches. Some intercreditor agreements ignore the complexities of restructuring outside of the U.S. and simply use a U.S.-style intercreditor agreement; other similar financings have been documented using the opposite approach – by using a form of intercreditor agreement based on the LMA form of senior/mezzanine intercreditor agreement; and still other similar financings have sought to blend the two approaches or to draft the intercreditor agreement in the alternative by providing for different terms (in particular different release provisions) depending on whether a U.S. or non-U.S. restructuring will be pursued. Given all of these various considerations, Transatlantic Intercreditor Agreements are often quite *à la carte*. We have highlighted below some of the more interesting points:

- the parties typically have included the holders of intra-group liabilities and shareholder loans, following the European approach, and have embedded restrictions on payment of the intra-group liabilities and shareholder loans in certain circumstances;
- the enforcement instructions typically have come from a majority of first lien creditors (*vs* 66 2/3%) in the U.S.-style but the loans and unfunded commitments under the senior credit agreement and the actual exposures of hedge counterparties (plus mark to market positions post-credit agreement discharge) have been taken into account in calculating that majority in the European-style;
- the European-style release provisions discussed above generally have been included either as the primary method of release or as an alternative method in the event that a U.S. bankruptcy process is not pursued;
- in certain deals, enforcement standstill and turnover provisions have been extended to cover all enforcement actions and recoveries (broadly defined), not just relating to collateral enforcement actions;
- payment subordination of the second lien facility typically has not been included; and
- the full suite of U.S. bankruptcy waivers from the second lien creditors generally have been included.

In addition, other provisions appear in Transatlantic Intercreditor Agreements that will not be familiar to those accustomed to the typical U.S. second lien intercreditors, such as parallel debt provisions (a construct necessary in certain non-U.S. jurisdictions in which a security interest cannot be easily granted to a fluctuating group of lenders), agency provisions for the benefit of the security agent and special provisions necessitated by specific local laws to be encountered (or avoided) during the enforcement process (e.g., French *sauvegarde* provisions and compliance with U.S. FATCA regulations).

Conclusion

As the number of financings that touch both sides of the Atlantic continues to rise and the complexity of such financings increases, the intercreditor arrangements for multi-jurisdictional financings will continue to be important and interesting. Although trends are emerging, it is too soon to say that there is a standard or uniform approach to documenting such intercreditor terms. Indeed, as was the case with European mezzanine intercreditor agreements, this is unlikely to occur until the new forms of Transatlantic Intercreditor Agreement are stress tested in cross-border restructurings – which, thankfully, seem a remote prospect at present.

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