

Who's calling the shots?

Differences between US and European finance documentation come to the fore in transatlantic deals. Here are the key distinctions on voting matters

Decision-making concerning amendments, waivers and enforcement is a key area of focus for borrowers and lenders under both loans and bonds.

The approach adopted in US loan markets tends to be more lenient than that adopted in the European market. However the differences are not fundamental nor

conceptual. US loans may be amended or accelerated, or collateral enforced, with the approval of a simple majority of lenders (by outstandings and commitments). The typical European position, however, is to require a two-thirds majority. In addition, European leveraged buyouts typically confer voting rights on hedge counterparties as part of a single senior

secured class with respect to enforcement of collateral. The US loan market is also more lenient with respect to changes to economic terms and maturity. These matters are dealt with by each affected lender (and the consent of a simple majority) rather than being subject to a unanimity requirement as is the case in Europe. It should be noted, however, that the position in Europe often gets to the same place as the US market via the so-called structural adjustment mechanism.

The US market is not always more borrower friendly. For instance, you-snooze-you-lose provisions are uncommon. Other differences, such as the additional documentary complexity seen in Europe, result from differences in underlying structure and intercreditor arrangements. This is particularly the case with respect to second lien debt and bond tranches in European bank-bond deals.

US and European bond terms can diverge on voting issues. In the US, the consent of each noteholder is generally required to amend certain economic terms. In Europe, a bond's so-called money terms can often be amended with the consent of 90% of noteholders.

The following tables summarise the position in both markets.

By Milbank's Subrud Mehta in London and Lauren Hanrahan in New York

Leveraged finance quarterly

In this quarterly feature, Milbank's leveraged finance group will distil, compare and contrast key features of the US and European leveraged finance markets.

It will shine a light on the legal blindspots that have arisen as markets and products converge, and as companies increasingly look to structure transatlantic deals.

Contributions from partners on both sides of

the Atlantic will look at loans and bonds, with large-cap or big sponsor-backed LBO documentation in mind.

Future contributions will focus on intercreditors, and ranking considerations when dealing with revolving credit facilities. Watch out for the next quarterly instalment in the September edition of *IFLR*.

LOANS	US	Europe
Amendment and waivers:		
• General	Greater than 50% of all outstanding loans and commitments required for most amendments/waivers (Required Lenders).	Greater than 66% of all outstanding loans and commitments required for most amendments/waivers (Majority Lenders). Lenders under second lien tranches do not have their own vote as a class, but their loans/commitments are included in the overall majority vote. Bond tranches benefit from an independent right (indirect) of bondholders to vote on amendments to their own bond covenants.
• Unanimity required	Not typically required. But the consent of all affected lenders (or all directly and adversely affected lenders), in addition to the consent of the Required Lenders, is needed for: an increase in commitments; reduction or deferral of scheduled amounts; reduction of interest rate, fees and premium; release of all or substantially all collateral/guarantees; and assignments of the obligations by borrowers/guarantor (the latter two amendments are effectively unanimous votes in most deals).	Increase in commitments, reduction or deferral of scheduled amounts/maturity, reduction of margin, change of currency and change to subordination terms (subject to structural adjustments provision - see below).
• Super majority required	Rare	Typically around 85% of outstanding loans and commitments. Applies to release of any guarantees/security. Possibly, for changes to the Change of Control provision.

LOANS	US	Europe
<ul style="list-style-type: none"> Structural adjustments (also known as facility change provisions) 	<p>Creation of a new tranche typically implemented with the consent of the Required Lenders.</p> <p>Extension of maturity typically now permitted with the consent of extending lenders only, subject to certain terms and conditions.</p> <p>Reduction of the interest rate permitted with only the consent of consenting lenders in rare cases only.</p>	<p>Increase in commitments, reduction or deferral of scheduled amounts/maturity, reduction in margin, change of currency and creation of a new tranche (typically ranking pari passu or junior to existing tranches) may be implemented with the consent of Majority Lenders and each directly affected/participating lender.</p>
<p>Acceleration and enforcement of collateral</p>	<p><i>Acceleration:</i> Upon any bankruptcy event of default, acceleration occurs automatically. Upon occurrence and continuation of any other event of default, the written notice of the Required Lenders is needed to accelerate.</p> <p><i>Enforcement:</i> The Required Lenders control enforcement actions.</p>	<p><i>Acceleration:</i> As for amendments/waivers. Special approach to:</p> <ul style="list-style-type: none"> Second lien tranches, which carry an independent right to accelerate following certain events of default (ie non-payment, insolvency, cross-acceleration), subject to applicable standstill periods (60 or 90 day-periods following a second lien payment default are common.) 'Bond tranches', whereby: (i) if only the non-bond tranches are accelerated, the bond tranches may require comparable action to be taken with respect to the bond tranches; and (ii) each bond tranche has an independent right to accelerate following events of default in relation to that bond tranche's specific bond covenants. <p><i>Enforcement:</i> As above, but also including exposures of secured hedge counterparties (possibly limited to crystallised exposures) and:</p> <ul style="list-style-type: none"> Second lien tranches are typically subject to applicable standstill periods on enforcement but thereafter may instruct the Security Agent to take enforcement action (subject to the first lien being able to assume control). Bond tranches' votes are often, but not always, capped at about 25% of senior secured debt until the bond component in the capital structure represents about 66% of the senior secured debt, after which there is no cap (ie \$ for \$ voting). Note that certain recent bond issues, however, have been awarded uncapped (ie \$ for \$) voting rights.
<p>You-snooze-you-lose</p>	<p>Typically not included</p>	<p>Lender commitments/participations are disregarded (numerator and denominator) for voting on all matters if no response (positive/negative) for a specified time (eg 10/15 business days) following a request from Agent for a vote.</p>
<p>Yank the Bank</p>	<p>If Required Lender consent has been obtained with respect to any amendment requiring the consent of all, or all affected, lenders, non-consenting lenders may be replaced with a consenting eligible assignee.</p> <p>The non-consenting lender receives payment of all outstanding principal, interest, fees and other amounts owed to it (including possibly premium, if applicable) from the assignee.</p> <p>Prepayments or revolving commitment termination are allowed in rare cases.</p>	<p>If consent of a significant majority (eg 80%) of lenders has been obtained with respect to any amendment requiring the consent of all lenders or of a Super Majority, non-consenting lenders may be replaced by a transfer of their drawn and undrawn commitments to a new lender.</p> <p>The transfer must be in cash at par, plus accrued interest, break costs and other amounts payable.</p> <p>Prepayments in lieu of a transfer are allowed in some limited cases, often subject to restriction on the source of funding (eg new equity or cash which may be distributed).</p>

BONDS	US	Europe
Amendments/waivers	Greater than 50% of the principal amount of notes, although: (i) without any consent, ambiguities and defects may be rectified, covenants for the benefit of holders added, rights or powers of the issuer surrendered and changes not adverse to the holders made; and (ii) amendment of certain economic terms require the consent of each affected holder.	Generally, the amendment of certain economic terms can require the consent of each affected holder, as in the US or, more typically, the consent of 90% of holders.
Acceleration	Upon any bankruptcy event of default, acceleration occurs automatically; and upon any other event of default, the written notice of at least 25% in aggregate principal amount of notes is needed to accelerate, which acceleration can be rescinded upon notice from at least 50% in aggregate principal amount of notes.	As in US market
Enforcement of collateral	<ul style="list-style-type: none"> • First lien bonds or sole collateral: trustee or at least 50% in aggregate principal amount of notes. • Second lien bonds or shared collateral: defer control to first lien holder or at least 50% aggregate principal amount of all debt secured by collateral. 	<p>Depends on class/ranking in capital structure (assuming typical European LMA-based intercreditor arrangements. Where bonds (including bond tranches) are <i>pari passu</i> with term/bank debt the position may be as described under the Loans section):</p> <ul style="list-style-type: none"> • Senior secured bond structures: greater than 50% of outstanding principal/exposures (drawn/undrawn) of all senior secured debt (including hedging). • Senior unsecured bonds and sole collateral: to the extent permitted by the intercreditor agreement greater than 50% of outstanding principal of the bonds.

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