



ICLG

The International Comparative Legal Guide to: **Lending & Secured Finance 2019**

7th Edition

A practical cross-border insight into lending and secured finance

Allen & Overy LLP
Anderson Mori & Tomotsune
Asia Pacific Loan Market Association (APLMA)
Astrea
Baker & McKenzie LLP
Bravo da Costa, Saraiva – Sociedade de Advogados
Cadwalader, Wickersham & Taft LLP
Carey
Carey Olsen Jersey LLP
Cordero & Cordero Abogados
Crales & Urcullo
Cuatrecasas
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Dechert LLP
Dillon Eustace
Drew & Napier LLC
E & G Economides LLC
E. Schaffer & Co.
Fellner Wratzfeld & Partners
Freshfields Bruckhaus Deringer LLP
Fried, Frank, Harris, Shriver & Jacobson LLP
Gonzalez Calvillo, S.C.

Haynes and Boone, LLP
Hogan Lovells International LLP
Holland & Knight
HSBC
IKT Law Firm
Jadek & Pensa
JPM Janković Popović Mitić
Kelobang Godisang Attorneys
King & Wood Mallesons
Latham & Watkins LLP
Lee and Li, Attorneys-at-Law
Lloreda Camacho & Co.
Loan Market Association
Loan Syndications and Trading Association
Loyens & Loeff Luxembourg S.à r.l.
Macesic & Partners LLC
Maples Group
Marval, O'Farrell & Mairal
McMillan LLP
Milbank LLP
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
Nielsen Nørager Law Firm LLP

Norton Rose Fulbright US LLP
Orrick Herrington & Sutcliffe LLP
Pestalozzi Attorneys at Law Ltd
Pinheiro Neto Advogados
PLMJ Advogados
Ploum
Proskauer Rose LLP
Rodner, Martínez & Asociados
Sardelas Liarikos Petsa Law Firm
Seward & Kissel LLP
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Škubla & Partneri s. r. o.
SZA Schilling, Zutt & Anschutz
Rechtsanwaltsgesellschaft mbH
Trofin & Asociații
TTA – Sociedade de Advogados
Wakefield Quin Limited
Walalangi & Partners (in association with Nishimura & Asahi)
Weil, Gotshal & Manges LLP
White & Case LLP





Contributing Editor

Thomas Mellor, Morgan, Lewis & Bockius LLP

Publisher

Rory Smith

Sales Director

Florjan Osmani

Account Director

Oliver Smith

Senior Editors

Caroline Collingwood
Rachel Williams

Editor

Sam Friend

Group Consulting Editor

Alan Falach

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
April 2019

Copyright © 2019

Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-65-2
ISSN 2050-9847

Strategic Partners



Editorial Chapters:

1	Loan Syndications and Trading: An Overview of the Syndicated Loan Market – Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association	1
2	Loan Market Association – An Overview – Nigel Houghton & Hannah Vanstone, Loan Market Association	6
3	Asia Pacific Loan Market Association – An Overview – Andrew Ferguson, Asia Pacific Loan Market Association (APLMA)	12

General Chapters:

4	An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP	15
5	Global Trends in the Leveraged Loan Market in 2018 – Joshua W. Thompson & Corey Fevzi, Shearman & Sterling LLP	20
6	Developments in Delayed Draw Term Loans – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP	26
7	Commercial Lending in a Changing Regulatory Environment, 2019 and Beyond – Bill Satchell & Elizabeth Leckie, Allen & Overy LLP	30
8	Acquisition Financing in the United States: Will the Boom Continue? – Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP	34
9	A Comparative Overview of Transatlantic Intercreditor Agreements – Lauren Hanrahan & Suhred Mehta, Milbank LLP	39
10	A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP	46
11	The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP	59
12	Recent Developments in U.S. Term Loan B – Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP	63
13	The Continued Growth of European Covenant Lite – James Chesterman & Jane Summers, Latham & Watkins LLP	70
14	Cross-Border Loans – What You Need to Know – Judah Frogel & Jonathan Homer, Allen & Overy LLP	73
15	Debt Retirement in Leveraged Financings – Scott B. Selinger & Ryan T. Rafferty, Debevoise & Plimpton LLP	82
16	Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions – Sandra Lee Montgomery & Michelle Lee Iodice, Proskauer Rose LLP	88
17	Secondments as a Periscope into the Client and How to Leverage the Secondment Experience – Alanna Chang, HSBC	95
18	Trade Finance on the Blockchain: 2019 Update – Josias Dewey, Holland & Knight	98
19	The Global Private Credit Market: 2019 Update – Jeff Norton & Ben J. Leese, Dechert LLP	104
20	Investment Grade Acquisition Financing Commitments – Julian S.H. Chung & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP	109
21	Acquisition Financing in Latin America: Navigating Diverse Legal Complexities in the Region – Sabrena Silver & Anna Andreeva, White & Case LLP	114
22	Developments in Midstream Oil and Gas Finance in the United States – Elena Maria Millerman & John Donaleski, White & Case LLP	121
23	Margin Loans: The Complexities of Pre-IPO Acquired Shares – Craig Unterberg & LeAnn Chen, Haynes and Boone, LLP	127
24	Credit Agreement Provisions and Conflicts Between US Sanctions and Blocking Statutes – Roshelle A. Nagar & Ted Posner, Weil, Gotshal & Manges LLP	132
25	SOFR So Good? The Transition Away from LIBOR Begins in the United States – Kalyan (“Kal”) Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP	137

Continued Overleaf ➔

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

General Chapters:

26	Developments in the Syndicated Term Loan Market: Will Historical Distinctions from the High-Yield Bond Market Be Restored? – Joseph F. Giannini & Adrienne Sebring, Norton Rose Fulbright US LLP	141
27	Green Finance – Alex Harrison & Andrew Carey, Hogan Lovells International LLP	144
28	U.S. Tax Reform and Effects on Cross-Border Financing – Patrick M. Cox, Baker & McKenzie LLP	149

Country Question and Answer Chapters:

29	Angola	Bravo da Costa, Saraiva – Sociedade de Advogados / PLMJ: Bruno Xavier de Pina & Joana Marques dos Reis	159
30	Argentina	Marval, O'Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	165
31	Australia	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	174
32	Austria	Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter	183
33	Belgium	Astrea: Dieter Veestraeten	193
34	Bermuda	Wakefield Quin Limited: Erik L Gotfredsen & Jemima Fearnside	199
35	Bolivia	Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	207
36	Botswana	Kelobang Godisang Attorneys: Wandipa T. Kelobang & Laone Queen Moreki	214
37	Brazil	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	221
38	British Virgin Islands	Maples Group: Michael Gagie & Matthew Gilbert	230
39	Canada	McMillan LLP: Jeff Rogers & Don Waters	237
40	Cayman Islands	Maples Group: Tina Meigh	247
41	Chile	Carey: Diego Peralta	255
42	China	King & Wood Mallesons: Stanley Zhou & Jack Wang	262
43	Colombia	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	269
44	Costa Rica	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.	276
45	Croatia	Macesic & Partners LLC: Ivana Manovel	284
46	Cyprus	E & G Economides LLC: Marinella Kilikitas & George Economides	292
47	Denmark	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Peter Lyck	300
48	England	Allen & Overy LLP: David Campbell & Oleg Khomenko	307
49	Finland	White & Case LLP: Tanja Törnkvist & Krista Rekola	316
50	France	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	324
51	Germany	SZA Schilling, Zutt & Anschutz Rechtsanwalts-gesellschaft mbH: Dr. Dietrich F. R. Stiller & Dr. Andreas Herr	335
52	Greece	Sardelas Liarikos Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	344
53	Hong Kong	King & Wood Mallesons: Richard Mazzochi & Khin Voong	352
54	Indonesia	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	360
55	Ireland	Dillon Eustace: Conor Keaveny & Richard Lacken	366
56	Israel	E. Schaffer & Co.: Ehud (Udi) Schaffer & Shiri Ish Shalom	375
57	Italy	Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo	381
58	Ivory Coast	IKT Law Firm: Annick Imboua-Niava & Osther Tella	390
59	Japan	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	396
60	Jersey	Carey Olsen Jersey LLP: Robin Smith & Laura McConnell	404
61	Luxembourg	Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier-Grethen	414
62	Mexico	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere & Jacinto Avalos Capin	422
63	Mozambique	TTA – Sociedade de Advogados / PLMJ: Gonçalo dos Reis Martins & Nuno Morgado Pereira	430

Country Question and Answer Chapters:

64	Netherlands	Ploum: Tom Ensink & Alette Brehm	437
65	Portugal	PLMJ Advogados: Gonalo dos Reis Martins	445
66	Romania	Trofin & Asociații: Valentin Trofin & Mihaela Atanasiu	452
67	Russia	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	462
68	Serbia	JPM Janković Popović Mitić: Nenad Popović & Nikola Poznanović	470
69	Singapore	Drew & Napier LLC: Pauline Chong & Renu Menon	477
70	Slovakia	Škubla & Partneri s. r. o.: Marián Šulík & Zuzana Moravčíková Kolenová	487
71	Slovenia	Jadek & Pensa: Andraž Jadek & Žiga Urankar	494
72	South Africa	Allen & Overy LLP: Lionel Shawe & Lisa Botha	504
73	Spain	Cuatrecasas: Manuel Follía & Iñigo Várez	514
74	Sweden	White & Case LLP: Carl Hugo Parment & Tobias Johansson	525
75	Switzerland	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	532
76	Taiwan	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu	541
77	UAE	Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Amanjit K. Fagura	549
78	USA	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	564
79	Venezuela	Rodner, Martínez & Asociados: Jaime Martínez Estévez	576

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty-five general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 51 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

A Comparative Overview of Transatlantic Intercreditor Agreements

Lauren Hanrahan



Suhrud Mehta



Milbank LLP

Introduction

The intercreditor frameworks applicable to a given financing structure in a particular market are often fairly settled, but in cross-border financings for European borrowers or other financings involving practitioners and business people in different parts of the world, deal parties may have 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 second lien 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 be involved when documenting intercreditor agreements involving other non-U.S. jurisdictions as well, 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 second lien intercreditors, in contrast, (i) assume that it is unlikely that the borrower and guarantors will be reorganised in an orderly court-approved process and indeed more likely that, since there is no pan-European insolvency regime (and thus no pan-European automatic stay on enforcement of claims), the intercreditor terms will have to function in the context of potentially multiple and disparate insolvency proceedings (ideally outside of insolvency proceedings altogether), and (ii) contemplate that not all assets of the borrower and guarantors will be subject to the liens of the first lien and second lien secured parties. As a result, one of the key goals that European second lien intercreditors seek to facilitate is a swift out-of-court, out-of-bankruptcy, enforcement sale (or “pre-pack”) resulting in a financial restructuring where the business is sold as a going concern on a “debt free basis”, with “out of the money” junior creditors’ claims being released and so removed from the financing structure.

Overview

The first lien/second lien relationship in the U.S. closely resembles the senior/second lien relationship in Europe; however, for the reasons

stated above, the key terms of U.S. second lien and European second lien intercreditors have been constructed on the basis of different assumptions, which therefore results in significant intercreditor differences.

European second lien intercreditor agreements typically combine claim subordination, payment blockages, lien subordination, broad enforcement standstill provisions restricting the junior lien creditors’ ability to take enforcement action (not only with respect to collateral but also with respect to debt and guarantee claims) 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 include an enforcement standstill with respect to actions against collateral only. U.S. second lien intercreditors do not generally include payment or claim subordination and they rely heavily on waivers of the junior lien creditors’ rights as secured creditors under Chapter 11.

European second lien intercreditors are often based on the Loan Market Association’s form (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. As discussed below, recent intercreditors for financings of European companies in the U.S. syndicated bank loan markets vary even more significantly, but common themes are emerging.

Key Terms of U.S. Second Lien Intercreditor Agreements and European Second Lien 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 second lien 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, 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 second lien 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 coupled with 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). It has become fairly common for refinancing and incremental debt to be permitted in European deals. European intercreditors typically require such debt to be subject to the intercreditor agreement even if (above a certain threshold amount and subject to negotiation) it is unsecured.

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 have neither the ability to direct enforcement actions nor 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 second lien intercreditors typically do not 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 traditional feature of U.S. credit facilities, although increasingly common. The providers of ancillary facilities would be direct signatories of a European second lien intercreditor.

2. Enforcement

a. *Enforcement Instructions*

The first lien agent under a U.S. second lien intercreditor takes instructions from the lenders holding a majority of the loans and unfunded commitments under the first lien credit agreement, which follows the standard formulation of required lenders in U.S. first lien 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 actually voting on the plan.)

The security agent under European second lien intercreditors, however, takes instructions from creditors holding 66⅔% of the sum of (i) the drawn and undrawn amounts under the senior credit agreement, and (ii) any actual outstanding liabilities (plus any mark to market value if the senior credit agreement has been discharged) under any 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) and lien 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 are entitled to receive any distribution of 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, it is unlikely, in practice, that there would be substantial property that is unencumbered since the security granted would likely pick up substantially all assets – in contrast to a number of 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. In consequence, 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 the U.S.

U.S. second lien intercreditors prohibit 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 second lien agent's lien in any shared collateral, to take possession of or sell any shared collateral or to exercise any right of set-off with respect to any shared collateral, but the acceleration of credit facility obligations is generally not an exercise of collateral remedies.

European second lien intercreditors typically contain a much broader enforcement standstill provision than U.S. second lien intercreditors, principally because there is no pan-European equivalent of the Chapter 11 stay. The scope of the restricted enforcement actions 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 under the second lien documents or applicable law, whether as a secured or an unsecured creditor. The enforcement standstill period has traditionally run 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 security agent is taking enforcement action. However, the enforcement standstill period is now often subject to negotiation. In European second lien intercreditors, the senior creditors firmly control enforcement. In addition, the senior agent is entitled to override the junior agent's instructions to the security agent, leaving the second lien 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 the right (subject to the Chapter 11 stay) to accelerate their second lien loans and to demand payment from the borrower and guarantors during the standstill period. 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 precipitate a bankruptcy filing and/or 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 second lien 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 co-extensive with a payment default under the senior credit agreement and of a duration of 150 days during each year whilst certain other material events of default under the senior credit agreement are continuing. The second lien 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 second lien intercreditors.

4. *Releases of Collateral and Guarantees*

In order to ensure that the junior lien creditors are unable to interfere with a sale of the shared collateral, both U.S. second lien intercreditors and European second lien intercreditors contain release provisions whereby 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 second lien intercreditors. 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 fair sale provisions are increasingly common, i.e., public auction/sale process or independent fair value opinion. The LMA 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, and, in addition, the sale of second lien debt claims. European intercreditor agreements typically 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 second lien 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 negotiated, particularly in deals where specialist second lien funds are anchoring the second lien facility. Typical points for discussion will be: (i) the circumstances in which/whether the senior creditors are entitled to 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 requirement for cash consideration; and (iv) any information/consultation rights.

In addition to the release provisions, European second lien 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 could be 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 second lien 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 second lien).

5. *Limitation on First Lien Obligations*

U.S. second lien financings typically 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 second lien intercreditors is referred to as "senior headroom". Amounts that exceed the first lien debt cap or senior headroom will not benefit from the lien priority provisions in the intercreditor agreement. The "cushion" under the first lien debt cap or senior headroom is meant to allow for additional cash needs of the borrower group, whether 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 the loans and commitments under the first lien facilities on the closing date plus 100% to 120% of the principal amount of any incremental facilities (or equivalent) 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 (although the amounts are regulated by the covenants in the credit agreements). 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 second lien intercreditors, although the headroom concept is of limited relevance where (as is now common on top-tier sponsor deals) it has not been extended to cover incremental and other additional senior debt. 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 are typically 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 second lien intercreditors, first lien lenders and second lien lenders typically specify the extent to which certain terms of the first lien credit agreement and the second lien credit agreement may not be amended without the consent of the holder of the other lien. Amendment restrictions are negotiated on a deal-by-deal basis and may include limitations on increasing pricing and limitations on modifications of maturity date and the introduction of additional 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. European second lien intercreditors now tend to follow this U.S. approach.

7. *Purchase Options*

Both U.S. second lien intercreditors and European second lien intercreditors contain similar provisions whereby the second lien creditors are granted the right to 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. This 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 them to purchase the first lien claims in full and thereby acquire the ability to control the enforcement proceedings themselves.

The European version of the purchase option is similar but also includes a requirement to buy out the hedging obligations, which may or may not be included in U.S. second lien intercreditors.

The triggering events for the purchase option in U.S. intercreditors vary. They 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 and unwaived for a period of time and a release of liens in connection with enforcement on shared collateral. The triggering event for the European version of the purchase option also varies and may include acceleration/enforcement by the senior creditors, the imposition of a standstill period on second lien 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, as unsecured creditors) that effectively render the second lien secured parties “silent seconds”. These waivers can be highly 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. (The automatic stay 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 conflicting case law in this area. However, garden-variety 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 by agreeing that, subject to certain conditions (including a monetary limit), they will not 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 often 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 and would be inconsistent with the underlying rationale of European second lien intercreditors.

9. *Non-cash Consideration/Credit Bidding*

The LMA intercreditor agreement includes explicit provisions dealing with application of non-cash consideration (including “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(k) of the Bankruptcy Code, thereby allowing the 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 the sale or disposition. 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 first lien obligations are paid in full in cash. In European intercreditor agreements, the second lien creditors would not typically have an explicit right to credit bid their second lien debt.

10. *The Holders of Shareholder Obligations and Intragroup 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, 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. The treatment of intragroup liabilities is often negotiated by the borrower and arrangers in U.S. syndicated credit agreements and, although results differ, the intragroup liabilities are often required to be documented by an intercompany note and made subject to an intercompany subordination agreement. The intercompany subordination agreement would subordinate the intragroup liabilities to be paid by the loan parties to their credit facility obligations and would generally include a payment blockage in relation to intragroup liabilities payable by borrowers and guarantors under the credit facilities during the continuation of an “acceleration event”.

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 organisation of the borrower; (3) the likelihood of the borrower group filing for U.S. bankruptcy protection; and (4) the relative negotiating 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 intercreditor agreement; and still other similar financings have sought to blend the two approaches or to adopt an 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 is to be pursued. Given all of these various considerations, Transatlantic Intercreditor Agreements remain varied. 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 under certain circumstances;
- the enforcement instructions are typically required to come from a majority of the first lien loans and unfunded commitments in the U.S.-style while the actual exposures of hedge counterparties (plus mark to market positions post-credit agreement discharge) are 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), rather than just relating to collateral enforcement actions;

- claim subordination of the second lien debt has typically *not* been included;
- the full suite of U.S. bankruptcy waivers from the second lien creditors generally have been included; and
- it is sometimes the case, based on the underlying rationale of European intercreditors, that secured or (above an agreed threshold amount) unsecured incremental and refinancing debt (whether *pari passu* or subordinated) is required to be subject to the intercreditor agreement, primarily to ensure it can be released upon an enforcement of this group.

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), expanded 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. Whilst there is not a standard or uniform approach to documenting such intercreditor terms, there is now a broad understanding on both sides of the Atlantic in relation to the different provisions and their underlying rationale. Accordingly, most transactions are implemented on a blended basis, combining many of the above-mentioned European or US elements into a US or European intercreditor, respectively. Having said this, as was the case with European second lien intercreditor agreements, a uniform approach is unlikely to emerge until the new forms of Transatlantic Intercreditor Agreement are stress tested in cross-border restructurings.

For further information, please contact:

Lauren Hanrahan at lhnanrahan@milbank.com, or Suhrud Mehta at smehta@milbank.com. The authors' views are their own.

Summary of Key Terms of U.S. Second Lien Intercreditor Agreements and European Second Lien Intercreditor Agreements			
Key Terms	Traditional U.S. Second Lien Approach	Traditional European Second Lien Approach	Hybrid/Transatlantic Approach
Parties to the Intercreditor Agreement	The first lien agent and the second lien agent and executed or acknowledged by the obligors.	The first lien agent and lenders, the second lien agent and lenders and the obligors, the obligors' hedge providers, ancillary facility lenders, the lenders of intra-group loans, the lenders of shareholder loans and the security agent.	Generally follows the European approach, except with respect to each lender executing the intercreditor agreement.
Enforcement Instructions	First lien agent takes instructions from lenders holding 50% of the loans and unfunded commitments under the first lien credit agreement.	Security agent takes instructions from creditors holding 66 ⅔% of the sum of (i) amounts under the senior credit agreement, and (ii) any actual exposure under hedging agreements.	Generally follows the U.S. approach, but may include hedge counterparties.
Scope of Enforcement Standstill Provisions	Only applies to enforcement against shared collateral (i.e., lien subordination).	Fulsome enforcement standstill including payment default and acceleration (i.e., payment subordination).	Generally follows the European approach, but depends on negotiation.
Length of Enforcement Standstill Provisions	Typically 180 days but could be from 90 to 180 days depending on negotiation.	Typically (i) 90 days (in most cases) following notice of payment default under the senior credit agreement, (ii) 120 days (in most cases) following notice of financial covenant default under the senior credit agreement, and (iii) 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 security agent is taking enforcement action.	Generally follows the U.S. approach, but depends on negotiation.
Payment Blockages	None.	Included.	Generally not included.
Releases of Collateral and Guarantees	Releases of collateral included.	Releases of claims included.	Generally follows the European approach.
Limitation on First Lien Obligations	Typically 110% to 120% of the principal amount of the loans and commitments under the first lien facilities on the closing date plus 100% to 120% of the principal amount of any incremental facilities (or equivalent) permitted under the first lien credit agreement on the closing date plus secured hedging and other secured obligations.	Similar to the U.S. approach.	Similar to the U.S. approach.
Amendment Restrictions	May be included depending on negotiation.	Typically included but limited to day-one senior credit agreement.	Generally follows the U.S. approach.
Second Lien Purchase Options (to purchase the First Lien Obligations)	Included.	Included.	Included.
Common U.S. Bankruptcy Waivers	Included.	Not included.	Included.
Non-Cash Consideration/Credit Bidding by First Lien Lenders	Included.	Included.	Included.
Shareholder Obligations	Not included.	Included.	Often included.
Intragroup Obligations	Not included. Often covered by a separate subordination agreement.	Included.	Often included.
Material Unsecured Debt	Not included.	Often included (above a threshold).	Similar.

**Lauren Hanrahan**

Milbank LLP
55 Hudson Yards
New York, NY 10001
USA

Tel: +1 212 530 5339
Fax: +1 212 822 5339
Email: lhhanrahan@milbank.com
URL: www.milbank.com

Lauren Hanrahan is a partner in the New York office of Milbank, Tweed, Hadley & McCloy and a member of the firm's Leveraged Finance Group. A partner since 2010, Ms. Hanrahan's practice centres on representing banks and other financial institutions in debt financing transactions. Recognised as a leading lawyer for bank lending and finance in *The Legal 500*, *IFLR* and *Chambers USA*, she has significant experience in representing lenders in acquisition financings, recapitalisations, bridge and mezzanine financings, debtor-in-possession, exit facilities, special situation financings and other complex secured lending transactions. She has a broad range of financing experience in both US and international transactions. She also devotes a portion of her practice to acting as agents' counsel or lead investor's counsel in connection with amending and restructuring troubled loans and negotiating workouts.

**Suhrud Mehta**

Milbank LLP
10 Gresham Street
London EC2V 7JD
United Kingdom

Tel: +44 20 7615 3046
Fax: +44 20 7615 3100
Email: smehta@milbank.com
URL: www.milbank.com

Suhrud Mehta is a partner in the London office, leads the firm's European Leveraged Finance Group and is also a member of the Financial Restructuring Group. Suhrud focuses mainly on leveraged finance and restructuring transactions. He has advised on some of the most significant cross-border, public to private, leveraged, infrastructure and investment grade financings in the London/European market. His leveraged and restructuring expertise focuses on multi-tiered capital structures: bank and bond and bank and mezzanine, in particular. Suhrud has been recognised as a leader in his field by a number of journals, among them: *Chambers UK* (which designated him among the 1st tier of banking lawyers in London), *Chambers Global*, *The Legal 500*, *Who's Who Legal*, *Super Lawyers* and *Legal Business* (where he was named as one of the leading finance lawyers/rainmakers in London). He is the author of a number of articles published in *International Financial Law Review* and regularly speaks at conferences.

Milbank

Milbank LLP is a leading international law firm providing innovative legal solutions to clients throughout the world for more than 140 years. Milbank is headquartered in New York and has offices in Beijing, Frankfurt, Hong Kong, London, Los Angeles, Munich, São Paulo, Singapore, Tokyo and Washington, D.C.

With one of the largest and most experienced teams in this field, Milbank's Banking and Leveraged Finance group assists clients on some of the most advanced and complicated leveraged finance transactions in the world. They represent underwriters, lenders, private equity sponsors, strategic investors, issuers and borrowers on a broad array of financings, including:

- First and second lien loans, bridge loans, secured and unsecured high-yield bonds and mezzanine financing.
- Leveraged buyouts, other acquisition financings, leveraged recapitalisations and going-private transactions.
- Working capital and letter of credit facilities.
- Financings for investment-grade and sub-investment-grade borrowers.
- Debtor-in-possession financings and exit financings.
- Restructurings.
- Vendor financings.
- Structured financings.
- Asset-based lending and securitisation.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com