The Acquisition and Leveraged Finance Review

Eighth Edition

Editor
Fernando Colomina Nebreda

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PREFACE

It is fair to say that the acquisition and leveraged finance industry has shown resilience in relation to the difficult global situation arising from the covid-19 pandemic, particularly in comparison to the previous global crisis in 2008. Generally speaking, while in the first semester of 2020 the deal flow slowed as a result of covid-19 as private equity (PE) houses were forced to shift their focus onto already existing portfolios, there was a noteworthy increase in the acquisition and leveraged market activity in the second semester, predominantly in the last quarter. The following defensive industries have demonstrated their ability to withstand the covid-19 crisis: pharmceuticals; bio sanitary; food; technology, media and telecommunications; and logistics, among others.

Covid-19 vaccines are providing confidence to market players, therefore facilitating the ability to agree on valuations, and also reducing gaps between the expectations of both seller and buyer. The result is more mergers and acquisitions (M&A) activity. Besides, it is reasonable to expect that the emergency measures taken by governments worldwide to address the hardships caused by covid-19 (such as state aid measures or public restrictions regarding foreign direct investment) will gradually be removed. This should, in principle, also lead to more deal flow in the M&A sector.

We are currently witnessing fierce competition in the acquisition and leveraged finance market due to the following factors: (1) an abundance of liquidity (perhaps even more than the previous year since some PE houses now hold additional 'dry powder' that was allocated to 2020 but which they could not use because of covid-19); (2) a low-interest-rate environment, which is likely to persist for several years; and (3) the fact that US investors are increasingly entering EU markets seeking a higher yield and vice versa.

The above is, in turn, resulting in more flexible terms for sponsors. It is also helping to consolidate the trend on convergence between both high-yield structures and loan structures and US and European markets in the world's most sophisticated financial hubs. Once again, this means that careful and thoughtful monitoring of domestic circumstances is imperative.

Finally, as indicated by the European Leveraged Finance Association, it is worth remarking that 'the leveraged finance market is undergoing a seismic shift in approach to ESG [environmental, social and governance] and sustainability'. Indeed, ESG has emerged dramatically in the acquisition and leveraged finance industry as evidenced by the blossoming of loans and bonds linked to sustainability in 2021. Terms will continue to unfold as market players intend to develop broadly ESG terms that go beyond pricing considerations. To this end, transparency will be a key factor in the success of the cross-border expansion tied to this nascent trend.

Many thanks to everybody who has participated in this publication, and a special thank you to Law Business Research.

We sincerely hope that this edition of *The Acquisition and Leveraged Finance Review* will be of assistance to you in this challenging era.

Fernando Colomina Nebreda
Latham & Watkins
Madrid
November 2021

Chapter 15

UNITED KINGDOM

Karan Chopra and Sindhoo Vinod Sabharwal[1]

I OVERVIEW

London continues to be a leading market for leveraged finance transactions, with English law frequently governing finance documentation for both European and other international leverage finance transactions.

There is continued diversity both in terms of the range of financial instruments that fund the relevant transactions (including high-yield bonds, syndicated loans, unitranche or direct lending financings, second lien and payment-in-kind financings and preferred equity), as well as the sources of financing available to borrowers (including commercial and investment banks, institutional lenders and funds). In more recent times funds have, through unitranche and direct lending financings, gained increased market share in mid-market transactions.

Historically, parties tended to use industry forms reflecting well-established market practices to document the relevant facility agreement such as the Loan Market Association forms. However, more recently, favourable borrowing conditions, in part driven by competition from the US loan and bond markets, have led to the continued adoption of US 'covenant-lite' and bond market terms into European loans, particularly in sponsor-led transactions.

II REGULATORY AND TAX MATTERS

i Regulatory matters

The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) are the financial regulators in the United Kingdom (UK). The PRA is part of the Bank of England and authorises and prudentially supervises banks, building societies, credit unions, insurers and major investment firms. The FCA is responsible for authorising and prudentially supervising other firms that undertake regulated financial services activities, and for supervising all regulated financial services firms from a conduct of business perspective.

Cash loans to businesses are largely unregulated in the UK, unlike consumer lending or residential mortgages. Therefore, providing a secured or unsecured loan to, or subscribing for a secured or unsecured debt instrument issued by, an entity that is incorporated or tax-resident in the UK is not considered a regulated activity and does not require any kind of banking or similar licence or approval. It is important to note, however, that because much of this activity is carried out by businesses that are regulated for other purposes (banks, investment firms), there may be broader regulation impacting them that may impact the

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terms of any loan. Similarly, borrowers who are themselves regulated may have restrictions on the nature or scope of security they can offer as a result of financial regulation impacting their business (in particular, regulatory capital requirements). More complex forms of lending, such as arranging the issuance of, or transacting in, debt instruments that embed derivatives or underwriting a bond issuance would constitute regulated activities, requiring the financial institutions offering those services to comply with regulatory obligations.

The UK left the EU on 31 January 2020 (Brexit), and the transition period during which EU legislation continued to apply in the UK ended on 31 December 2020. Finance providers in the UK previously relying on EU passporting rights to provide financial services in the EU by being a regulated entity in the UK now have to analyse if they require any local licences for financial transactions into the EU.

Borrowers and lenders are subject to the anti-money laundering and sanctions regimes in the UK and will also need to take into account anti-corruption legislation.

ii Tax matters

Three areas of taxation are particularly significant in the context of leveraged finance transactions: (1) withholding tax on payments of interest to the lender; (2) the deductibility of interest for the borrower; and (3) tax issues on the enforcement of security.

iii Withholding tax

Payments of yearly UK source interest are subject to UK withholding tax at the basic rate of 20 per cent. There are, however, a number of exemptions from the charge to withholding tax, with the following being the most commonly used exemptions:

a Exemption from withholding tax relating to the nature of the lender: Corporates and banks that are taxed in the UK may receive interest gross, given the income of such lenders is taxable in the UK in any event. Advances from building societies are also generally free of withholding tax on interest.

b Exemption relating to the nature of the security: The 'private placement' exemption entitles the holder of privately placed securities to interest free of withholding tax, provided the requirements are met, including the term of the security being less than 50 years and the security having a minimum value of £10 million. Additionally, the 'quoted Eurobond' exemption enables the holder of a security to receive interest free of withholding tax, provided the security is issued by a company and listed on a recognised stock exchange or admitted to trading on a multilateral trading facility.

c Exemption relating to double taxation treaties between the UK and other jurisdictions: The UK has entered into a number of treaties with other jurisdictions, which provide for a nil rate of withholding tax in the UK. Non-UK lenders tax resident in such jurisdictions are entitled to receive interest free of withholding tax. There is an administrative burden involved in relying on this exemption, given it must be claimed, and interest may only be paid free of withholding once a borrower has received an instruction from Her Majesty's Revenue and Customs (HMRC). Further, a claim under the normal certification process can take several months. The double taxation treaty passport scheme, however, grants certain lenders a 'passport' thereby streamlining the otherwise lengthy certification process.

The broad nature of the above exemptions gives significant flexibility, enabling UK borrowers to raise funds from different types of lenders, and different types of security. In particular, the quoted Eurobond exemption enables capital to be raised from offshore funds, which would usually not be capable of benefitting from double taxation treaties with the UK, as the UK will generally not provide for a nil rate of withholding tax in treaties with tax haven jurisdictions.

With respect to the withholding tax position of any group company that on-lends external funds within its group, Council Directive 2003/49/EC (the Interest and Royalties Directive) exempts interest and royalties from source state taxation (typically withholding tax) where the payer and payee are associated companies of different EU member states. Following the end of the Brexit transition period, the UK is no longer treated as an EU Member State for the purpose of this Directive. The relevant UK legislation implementing the Interest and Royalties Directive has been repealed for payments made on or after 1 June 2021 (or, in certain circumstances, for payments made on or after 3 March 2021). Therefore, this exemption no longer applies to payments subject to UK withholding tax.

iv Deductibility of interest

As a starting point, interest incurred by a UK corporate borrower is, under the loan relationship rules, deductible in calculating taxable profits. The loan relationships provisions, as a general rule, follow the accounts. This means that the amounts recognised in determining a company's profit or loss under generally accepted accounting practice will usually constitute credits and debits under the loan relationships rules. Interest on a loan is a debt service cost to the borrower, and this classification is the starting point for interest-related tax deductions. There are, however, rules that can restrict or prevent the deductibility of interest to be borne in mind, as interest deductibility is often a key commercial driver of debt financings. The below sets out three important examples, but there are other relevant restrictions beyond the scope of this chapter; for example, the unallowable purposes rule, the targeted anti-avoidance rule and rules re-characterising interest as a distribution.

Corporate interest expense restriction rules limit the amount of interest expense large businesses can deduct when calculating their profits subject to corporation tax. Broadly, the rules place a cap to limit deductions to 30 per cent of a group's UK 'tax EBITDA', or alternatively a modified debt cap is imposed that ensures that a group's UK interest deductions cannot exceed the total net interest expense of the worldwide group. Net interest expenses under the *de minimis* allowance of £2 million will not be restricted by the rules.

Where transfer pricing rules apply to a loan (particularly relevant in the context of related-party borrowing arrangements), they operate to deny the borrower a tax deduction for any part of the interest that exceeds an arm's length rate of interest. The terms, amount and availability of the debt will be readjusted (for tax purposes) to those of an arm's-length transaction.

Corporate income loss restriction limits the amount of post-1 April 2017 profits against which carried-forward losses incurred in any period could be relieved to 50 per cent of profits over an annual allowance of £5 million. Since 1 April 2020, however, the relief provided by the £5 million annual allowance is shared between both carried-forward corporate income losses and carried-forward corporate capital losses.

v Enforcement of security

Tax grouping enables UK group members to allocate gains and surrender losses as between members of the group on a current year basis. This enables deductible interest to be set off against the income generated by another group member, meaning borrowing need not be engaged in by an income-generating company within the group. Further, the group rules allow for assets to be transferred within the group on a 'no gain, no loss' basis. Where these assets are transferred outside of the group (for example, upon the enforcement of security by a lender), de-grouping charges may arise to tax any latent capital gains realised prior to the external transfer.

III SECURITY AND GUARANTEES

Taking and perfecting English security is relatively straightforward. It is common to see security over shares, real estate, bank accounts, receivables and other choses in action. Security is granted to a security agent to hold the security interests on trust for the various secured parties. The main advantage of a trust structure is that it allows new lenders coming into the transaction to continue to benefit from the security without the risk of restarting hardening periods associated with taking new security.

The nature of the security taken (whether charge, mortgage or pledge) is a function of the asset in question and the commercial agreement as to the security package. Security in leveraged finance transactions is typically created either by way of a 'charge', which is an equitable interest in the asset, or by way of a mortgage, which involves transfer of title. A charge can be either 'fixed' or 'floating', depending on the degree of 'control' that the lenders have over the assets, with 'control' being a fact-specific assessment of the lenders' ability to prevent the security provider from dealing with the charged asset. A fixed charge can be taken over specific assets, whereas a floating charge is taken over a fluctuating pool of assets. The grantor of a floating charge is allowed to deal with the floating charge assets in the ordinary course. A floating charge is a popular method of taking security over the business generally given the ease of granting such charge and the lack of adverse impact it has on the business from an operational perspective. The floating charge will 'crystallise' (i.e., become 'fixed') on the occurrence of certain common law as well as contractual crystallisation events. However, it will not 'crystallise' on the occurrence of a moratorium under the Corporate Insolvency and Governance Act 2020.

Floating charges have been an area of focus recently, with the increase in the 'prescribed part' for unsecured creditors from £600,000 to £800,000 for floating charges created on or after 6 April 2020, as well as the partial return of HMRC as 'preferential creditor' from 1 December 2020. This has the effect of reducing the proceeds available to floating charge holders as they rank behind 'prescribed part' creditors and preferential creditors on an insolvency.

Security over 'financial collateral' such as shares and cash can also benefit from the Financial Collateral Arrangements (No. 2) Regulations 2003, which disapplies certain statutory formalities and modifies certain insolvency law provisions in respect of such a 'security financial collateral arrangement' and the lender can 'appropriate' the secured asset if the security becomes enforceable.

Depending on the asset and the nature of security interest, certain additional steps may need to be taken to perfect the security. English law perfection and registration steps are fairly straightforward, inexpensive and help to protect the priority of the secured creditors. Additionally, security granted by an English company or an English LLP entity must be registered at the UK Companies House within 21 calendar days of the date of the charge under Part 25 of the Companies Act 2006 (CA 2006). Failure to register the security results in the security being void against creditors, administrators and liquidators of the company.

English law insolvency rules dealing with the priority of security interests are complex and depend on, among other factors, nature of security interest (whether a fixed or floating charge or legal or equitable security), timing of security (second in time, second ranking) and whether security has been perfected. In addition, where an English company has entered into a formal insolvency process, certain types of 'antecedent' or 'reviewable' transactions entered into by the company before the commencement of the insolvency process may be challenged by the insolvency officer. The period for reviewing such 'antecedent' transactions ranges from 6 months to 3 years, although there is no time limit within which a challenge to a transaction defrauding creditors may be brought, which, in short, requires the purposeful alienation of assets from creditors.

Upstream, downstream and cross-stream guarantees are generally available under English law. When dealing with upstream and cross-stream guarantees in particular, the board of directors of the guarantor must consider carefully the corporate benefit to the guarantor, keeping in mind the financial position of the guarantor. In light of this, it is not uncommon to obtain shareholder approval to support the giving of such upstream and cross-stream guarantees.

IV PRIORITY OF CLAIMS

In a corporate insolvency, creditors will be paid in accordance with the following 'waterfall' of priority from proceeds of realisation of assets of the insolvent estate of the relevant company:[2]

a creditors holding a fixed charge: as discussed above, a fixed charge refers to a security interest with respect to which the lender retains a level of control of such assets. If the chargor is authorised to deal with the charged assets in the ordinary course of business, it is likely that the charge would be re-characterised as a floating charge (notwithstanding any designation of the charge as 'fixed' by the parties), and the priority of the lender's claim will be affected accordingly. The proceeds of the realisation of the assets subject to the fixed charge will be paid to the holder of a fixed charge;

b creditors of 'moratorium debts' and 'priority pre-moratorium debts': if a company goes into administration, or proceedings for the winding-up of a company are begun, in each case, within 12 weeks of the end of a moratorium under Part A1 of the Insolvency Act 1986, official receiver fees and expenses, debts that are incurred during the moratorium and certain debts that are incurred before the moratorium (such as the relevant monitor's remuneration or expenses, rent during the moratorium or non-accelerated financial debt) will have priority over the claims below;

c fees and expenses of the administration or liquidation;

d preferential creditors: for example, employees with unpaid wages (up to a maximum of £800) and, for insolvencies commencing on or after 1 December 2020, as mentioned above, HMRC with respect to VAT, PAYE and certain other outstanding taxes deducted by a debtor;

e creditors holding a floating charge: the proceeds of the realisation of the assets subject to the floating charge will be paid to the holders of the floating charge. Where the floating charge was created after 15 September 2003, a portion (or 'prescribed part' as

2 The insolvent estate of a company does not include property in which the company does not have a beneficial interest. So, for example, assets subject to a valid retention of title claim or which the company holds on trust for a third party will not fall within the insolvent estate.

discussed above) of the charged assets is made available for the satisfaction of unsecured creditors' claims, subject to a cap of £800,000 where the floating charge is created on or after 6 April 2020 or £600,000 if created before then;

f unsecured creditors: unsecured creditors' claims will be paid from any funds remaining following the satisfaction of claims higher in the order of priority. Such creditors may include trade creditors, employees owed wages in excess of £800 and secured creditors with claims exceeding the proceeds of realising their security; and

g shareholders: members of the company may receive any surplus funds following the satisfaction of all creditors' claims.

Contractual subordination via the use of intercreditor or subordination agreements to govern claims as between various third-party creditors and also as between third-party creditors and any intra-group creditors (including shareholder claims) is commonplace, and case law has held that they do not inherently offend the above rules of priority or other English insolvency principles of distribution.

V JURISDICTION

Prior to Brexit, the law governing contractual and non-contractual obligations arising out of and in connection with a particular contract was, as a matter of English law, ascertained pursuant to Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I) or Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II). Both of those pieces of legislation were retained as part of English law following Brexit (by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) such that, in essence, the Rome I and Rome II Regulations provide a governing law playbook of near universal application in the context of claims in the English courts.

In very broad terms, both the Rome I and Rome II Regulations (as retained in English law) allow parties to choose freely the law applicable to their contractual obligations and their non-contractual obligations. Where no choice is made, contractual obligations are generally governed by the law of the country where the party required to effect the characteristic performance of the contact has their habitual residence and non-contractual obligations are generally governed by the law of the country in which damage occurs.

As to jurisdiction, in the context of the leveraged finance market in England and Wales, disputes between the parties are typically referred to the courts. Whether a court has jurisdiction can be decided by the courts themselves, although contracting parties almost always include a jurisdiction clause in their agreement that allows them to choose which court has jurisdiction (and such provisions will be given effect by the English courts).

There are three principal types of jurisdiction clauses:

a an exclusive jurisdiction clause specifies a jurisdiction in respect of disputes and prevents either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified in the contract;

b a non-exclusive jurisdiction clause enables either party to bring proceedings against the other, either in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided that court has jurisdiction over the dispute under its own rules); and *c* an asymmetrical jurisdiction clause permits one of the parties (party A) to sue the other party (party B) in any competent jurisdiction but restricts party B to bringing proceedings in only one jurisdiction.

Brexit has impacted the approach to non-exclusive and asymmetric jurisdiction clauses (arbitration clauses and proceedings are unaffected by Brexit). Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU Member States, but no longer applies in the UK post-Brexit. This has created some issues for the enforceability of jurisdiction clauses (notably non-exclusive and asymmetric jurisdiction clauses) and the enforcement of English court judgments across the EU.

As to jurisdiction clauses: the UK government took steps in December 2018 to accede to the Hague Convention on Choice of Court Agreements 2005 and this accession is now effective. Courts of the parties to the Hague Convention, including EU Member States, will respect exclusive jurisdiction clauses. The Hague Convention does not, however, cover non-exclusive jurisdiction clauses or asymmetric jurisdiction clauses. These clauses may not be respected by the Courts of EU Member States post-Brexit (and that will remain the position until the UK signs up to the Lugano Convention, another development that is being pursued by the UK government: the UK applied to join the Lugano Convention in early 2020, but the accession process has not been completed at time of writing and faces strong opposition from some of the remaining EU Member States).

As to enforcement: English judgments may, in practical terms, be enforced with relative ease in EU Member States, even absent the Recast Brussels Regulation. That is either because there is a reciprocal relationship with the relevant country or that country generally allows enforcement without significant hurdles.

VI ACQUISITIONS OF PUBLIC COMPANIES

Where the City Code on Takeovers and Mergers (the Takeover Code) applies to the acquisition of a UK public company, there are additional considerations for lenders. The provisions of the CA 2006, which regulate the giving of financial assistance by public companies in relation to the acquisition of their own shares, and which contain the requirements in relation to the compulsory acquisition of minority interests, can also be relevant.

There are two principal mechanisms to effect a takeover of a UK public company: a contractual offer to all of a target's shareholders to acquire their shares, and a court-approved scheme of arrangement, which is a statutory mechanism involving a target shareholder vote and court approval.

The Takeover Code, which is administered by the Panel on Takeovers and Mergers (the Panel), applies to any takeover offer or scheme of arrangement to acquire: (1) a public company registered in the UK, Jersey, Guernsey or the Isle of Man, which has shares admitted to trading on the London Stock Exchange's Main Market, AIM or certain other regulated markets and (2) in certain situations set out in the Takeover Code, any private company registered in the UK, Jersey, Guernsey or the Isle of Man that has had its shares admitted to trading on those markets in the past 10 years. It sets out detailed rules on the process and timetable for conducting UK takeovers. In particular, it requires strict secrecy concerning any potential offer and also provides that a bidder must announce a bid only after ensuring that it has the funds to meet in full any cash consideration offered.

The Takeover Code's strict requirements in relation to secrecy and bid confidentiality mean that the bidder's approach to sharing information with its advisers and other third parties and due diligence on the target company can differ from that taken on private acquisitions. If details of the bid leak to the market, the Panel may require the bidder to make an immediate holding announcement and to confirm within 28 days whether or not it intends to make a binding offer for the target. Where triggered, this 28 day 'put up or shut up' period can limit the due diligence a bidder will be able to undertake. For hostile takeovers, lack of cooperation by the target will mean that the bidder's due diligence, as well as the lender's will be limited to information available from public sources or third parties. For bids that are expected to be recommended by the target board, more extensive due diligence may be carried out. However, sensitivity around potential leaks, as well as the related timetable pressures and the information sharing obligations under the Takeover Code (described below) can mean that due diligence for public company acquisitions may not be as extensive as for private acquisitions.

Rules that require equality of information between target shareholders can also give rise to issues where a lender is also, or could become, a shareholder in the target; for example, where a bank has a trading desk or a fund has an equities business. These issues can be addressed if effective information barriers are put in place between the lender's debt and equities businesses or if the potential provider of debt finance undertakes not to acquire equity in the target company during the offer period, subject to technical exceptions to permit the acquisition of shares in client serving capacities or (with the consent of the Panel) as security for a loan made in the normal course of business.

In the case of any bid including a cash consideration element, the announcement must include a confirmation by the bidder's financial adviser or by another appropriate third party that, so far as they are reasonably able to ensure, resources are available to the bidder sufficient to satisfy full acceptance of the offer (including any cash consideration to be paid to option and warrant holders in the target). This 'cash confirmation' is also required to be repeated in the subsequent offer document when it is made available to shareholders, normally required to be within 28 days after the firm offer announcement. This is driven by a fundamental tenet of the Takeover Code that there is maximum certainty an announced bid will go ahead.

Because there is a theoretical risk the financial adviser may be required by the Panel to fund the offer if the bidder does not have sufficient resources and the financial adviser has not exercised the appropriate standard of care required by the Takeover Code in giving the 'cash confirmation', the bidder's financial adviser will generally require fundable credit agreement documentation to have been signed before the announcement is made. Financial advisers are normally willing to provide a cash confirmation on the basis of short-form interim loan agreements put in place at announcement, with the long-form documentation to be negotiated and entered into subsequently. The financial adviser will also be concerned with ensuring that the bidder's financing is available for a sufficient period to cover the range of possible closing dates for the transaction. Following amendments to the Takeover Code that took effect in July 2021, it has been suggested that the relevant periods should extend to the date falling eight weeks after the transaction long stop date in the case of a contractual offer, and six weeks after the transaction long stop date in the case of a scheme of arrangement.

The Takeover Code requires the disclosure of any debt facility documentation (including fee letters) at the time a firm intention to make an offer is announced. When published, the offer document must include details of the terms of any financing arrangements. Where a bidder's financing includes market flex arrangements, the Panel will typically agree to a delay in disclosing flex terms until the offer document is posted to shareholders. If the flex terms are no longer capable of being exercised at that point in time (e.g., because successful syndication has been achieved), the flex disclosure may be omitted entirely. However, if the debt is not syndicated by that time, the market flex arrangements will have to be described in the offer document and the full terms published on a website.

The Panel requires that a bidder may only impart confidential information in relation to a bid to another person 'if it is necessary to do so'. The Panel interprets this requirement restrictively and ordinarily a bidder must consult the Panel before disclosing the possibility of a bid beyond a very limited number of parties, usually no more than six entities outside of the bidder's advisory team, including potential providers of finance (whether equity or debt) and shareholders in the bidder or the target company.

While a scheme of arrangement will be binding on all target shareholders if approved by the requisite majority, with a takeover offer the bidder may receive acceptances for less than 100 per cent of the shares in the target. Provided that the bidder receives acceptances for 90 per cent of the shares to which the offer relates, it will usually be able to utilise the minority squeeze-out procedure under Section 979 of CA 2006 to compulsorily acquire the remaining shares.

Where the 90 per cent threshold is not obtainable, provided the bidder acquires at least 75 per cent of the target's voting shares, it would be able to pass the special resolutions of the target necessary to cancel the target's listing, re-register it as a private limited company and cause it to give financial assistance in relation to the acquisition of its shares.

Under CA 2006, public limited companies incorporated in England are restricted from giving financial assistance for the acquisition of, or (re)financing the acquisition of, shares in the company. The subsidiaries of such companies are also restricted (whether or not they are public limited companies) from giving such financial assistance. This prohibition on financial assistance includes upstream guarantees and security from the target and its English incorporated subsidiaries to secure the bidder's financing for the acquisition of shares in a public limited company incorporated in England. These principles do not, however, restrict the bidder's ability to pledge any shares in the target that it holds, provided that pledge does not involve any element of assistance by or from the assets of the target. In addition, they do not restrict the ability of the target to give guarantees and security for the portion of the financing that is to be made available to the target. Importantly, these financial assistance limitations do not apply to private limited companies. Accordingly, lenders financing a UK takeover will typically require that once the offer has successfully completed, the target will have its listing cancelled and be re-registered as a private limited company.

VII THE YEAR IN REVIEW

2020 ended on a strong note despite the onset of covid-19 in early 2020 and the resulting lockdowns in Europe and across the world that had seen market participants struggle with the impact on supply chains and earnings. The momentum has carried on, with 2021 being an exceptionally busy year for the European loan and bond markets as private equity sponsors shifted focus from the balance sheets of their existing portfolio companies during the pandemic to new opportunities, resulting in a flurry of market activity that has surpassed pre-pandemic levels. The UK has continued to be an attractive destination for investment, Brexit notwithstanding, as evidenced by offers for UK listed groups including ASDA and Morrisons. 2021 has also been a critical year in the roadmap to the end of LIBOR, especially for sterling-denominated financings. The UK market moved to compounded SONIA sterling loans from Q2 with relative ease and is now preparing to transition away from LIBOR completely by the end of 2021. We have also seen an increase in environmental, social and governance (ESG) linked principles in leveraged loans and bonds, including ESG-linked pricing structures.

VIII OUTLOOK

There is less uncertainty, and even a degree of optimism in the markets, having passed the twin uncertainties of Brexit and the pandemic at the start of 2021. The pace of leveraged finance activity in 2021, coupled with low interest rates and dry powder in the market, suggests that we are likely to continue to see high levels of primary market activity into 2022. The winding down of LIBOR by the end of 2021 will be a key area of focus in the months ahead. Market participants across LIBOR jurisdictions have shown willingness to work towards the agreed replacement rates for LIBOR, suggesting that it is unlikely that the end of LIBOR will cause any shockwaves in the leveraged finance market.

Appendix 1

ABOUT THE AUTHORS

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Karan Chopra is a partner in the London office of Latham & Watkins and a member of the banking practice. He advises clients on a range of domestic and cross-border leveraged, investment grade and fund finance transactions at all levels of finance capital structures including senior, super senior, second lien, mezzanine and PIK debt, direct lending, and bank/bond financings.

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