

The Growth of European Covenant Lite

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In 2016, global sponsors and their advisers were successful in continuing to export their experiences from financing transactions in the US leveraged loan and global bond markets to the European leveraged loan market and this continued apace in 2017 and into 2018. Momentum behind the continued adoption of US covenant-lite terms into European loans is strong as there is now a growing body of European “cov-lite” precedents, demonstrating a growing and now deep market acceptance of cov-lite. This convergence brings a number of documentation issues to consider.

Covenant-lite Loans

In a covenant-lite loan, either there is no financial maintenance covenant or there is a single financial covenant solely for the benefit of the lenders under the revolving credit facility with no financial maintenance covenant for the term lenders. The covenant benefitting the revolving lenders typically is a “springing” covenant, i.e., tested when the revolver is drawn and such usage exceeds a certain percentage of the revolving credit commitments, often 25–35%, with the applicable levels set with significant EBITDA “cushion” or “headroom” of around 30% or more and no or very few step downs. Associated provisions customary in US covenant-lite structures are also now being adopted in Europe and in some cases are being made even less restrictive in Europe. For example, the US-style equity cure, with amounts being added to EBITDA and no requirement for debt pay-down, is now being regularly accepted in European covenant lite, but the US approach of limiting EBITDA overcures currently is a point for negotiation in Europe.

Documentation

In the past there was a ‘battle of the forms’ in relation to documenting European covenant-lite loans, with the first covenant-lite loans emerging in Europe in 2013 being documented under New York law. The next generation were governed by LMA-based credit agreements, stripped of most financial covenants and otherwise modified in certain respects to reflect “looser” US practice on terms for covenant-lite deals, including primarily leverage or coverage based incurrence style ratio baskets rather than traditional loan market baskets fixed at a capped amount. We now also regularly see LMA-based loan agreements that in addition to the absence of financial covenants for the term loan adopt bond-like covenant schedules, sometimes paralleling a bond in the borrower’s debt capital structure but also increasingly frequently, on a standalone basis. A number of the other features of current covenant-lite European leveraged loans are considered below.

Increased Debt Baskets

Limitations on borrowings often have US-style characteristics, so rather than a traditional debt basket with a fixed capped amount, we now see permitted debt limited solely by a net leverage or senior secured leverage test with a separate fixed (“freebie”) basket alongside. This debt can be raised through an incremental “accordion” feature and increasingly separate “sidecar” financings. This style of covenant leads to far greater flexibility for a borrower to raise additional debt as pari secured, junior secured, unsecured or subordinated loans or bonds. In some financings, reclassification is permitted so that the “freebie” basket can be used if the ratio basket is unavailable, and then subsequently moved into the ratio basket once the ratio is met, thus freeing up the “freebie” basket.

Builder Baskets

Another trend from the US covenant-lite loan market (which is also a feature of the high yield bond market) that is being adopted in European loan deals is a “restricted payments builder basket,” where the borrower is given “credit” as certain items “build up” to create dividend capacity, starting with the borrower’s retained portion of excess cashflow (“ECF”), IPO and other equity proceeds, and unswept asset sale proceeds, usually subject to a net leverage ratio governor as a condition to usage. In many cases there may be no limit on distributions if a lower leverage ratio test is met. There is a trend towards an even more aggressive variant based more closely on the high yield bond formulation, which credits a percentage of consolidated net income (“CNI”) (usually 50%) rather than retained excess cashflow, with the disadvantage for lenders in that CNI is not reduced by the deductions used to calculate ECF and because the build-up may begin for years prior to the onset of the ECF sweep.

US-style Events of Default

US loan or high yield bond-style events of default can be controversial with European loan syndicates, but we have seen more loan financings that include defaults more akin to the US loan approach, e.g., removal of material adverse change default; no audit qualification default or even the high yield bond approach (more limited defaults, including cross acceleration rather than cross default, with longer remedy periods and the longer periods for bankruptcy defaults that are standard in the US but historically unusual in Europe).

Other Provisions

There are a few other provisions we are seeing migrate from the US covenant-lite (or high yield) market to Europe and becoming well-established, including:

- “Permitted Acquisitions” controlled by the overall leverage test rather than by imposing absolute limits – and generally fewer controls on acquisitions.
- “Permitted Disposals” similarly trending towards a high yield formulation that does not impose a cap and has varying requirements for reinvestment/prepayment and cash consideration.
- Guarantor coverage ratios are trending towards an EBITDA test only (at 80–85%).
- Change of control mandatory prepayment being adjusted to allow individual lenders to waive repayment (becoming effectively a put right).
- Increased use of general “baskets” (as distinct from and in addition to ratio-based incurrence tests) with a soft dollar cap that increases as total assets or EBITDA grows.
- Provisions that state that if FX rates result in a basket being exceeded this will not in and of itself constitute a breach of the debt covenant (or other limitation).
- Use of the concept of a “Restricted Group” and ability to designate subsidiaries as “Unrestricted” and therefore outside the representations and covenants.

Economic Adjustments

Economic adjustments such as a 101% soft call for six months, (sometimes) a positive EURIBOR floor, and nominal (0.25%) quarterly amortisation are also often introduced to make loans more familiar to US loan market participants.

Structural Consequences – The Intercreditor Agreement Revisited

Adopting products from other jurisdictions brings with it the risk of unintended consequences. US terms and market practice have developed over decades against a background of the US bankruptcy rules and US principles of commercial law. The wholesale adoption of US terms without adjustment to fit Europe’s multiple jurisdictions can lead to a number of unintended consequences.

A good example of this relates to European intercreditor agreements, which have over time developed to include standstills on debt claims and release provisions. At heart is the continuing concern that insolvency processes in Europe still, potentially, destroy value and often do not automatically impose creditor standstills while matters are being sorted out. Although significant steps have been taken in many jurisdictions to introduce more restructuring friendly and rescue-driven laws, it remains the case that in Europe there is a far greater sensitivity to the ability creditors may have in times of financial difficulty to force an insolvency filing by virtue of putting

pressure on boards of directors through the threat of directors’ liability under local laws. A significant feature of the restructuring market in Europe for many years has been the use of related techniques that creditors, particularly distressed buyers, adopt to get a seat at the table by threatening to accelerate their debt claims. Intercreditor standstill provisions evolved to prevent creditors from using this type of action to disrupt a restructuring without having to resort to a bankruptcy proceeding to provide a stay and thereby obtain increased recoveries.

Another intercreditor provision of great focus over the years has been the release provision, which provides that in the case of distressed asset sales following default and acceleration, the lenders’ debt and guarantee claims against, and security from, the companies sold are released. In some deals from the last decade, these protective provisions had not been included, with the result that junior creditors could gain significant negotiating leverage because their approval was needed for the release of their claims and security, without which it is not possible to maximise value in the sale of a business as a going concern.

The potentially significant debt baskets referred to above become relevant in this context. In the US, where this flexibility originated, debt baskets do not legislate as to where in the group debt can be raised as long as the borrower is also a guarantor of the primary debt – structural subordination does not often play a significant role in a US bankruptcy because of the way that regime deals with competing claims. In Europe, structural subordination can have a dramatic effect on recoveries (as suffered by the first wave of European high yield bonds in the 1990s, which were structurally subordinated). Even if those subsidiaries have granted upstream guarantees, the value of the claims under such guarantees are often of limited value. Until recently, most provisions allowing the incurrence of third party debt did not require the debt providers to sign up to the intercreditor agreement unless they were sharing in the security package – this was on the basis that the third party debt was limited in amount. With more flexibility to incur third party debt it is very possible that an unsecured creditor under a debt basket can have a very strong negotiating position if the senior secured creditors are trying to sell the business in an enforcement scenario, given the lack of standstill and release provisions. The degree to which third party debt (including unsecured debt) over a materiality threshold is required to become subject to the main intercreditor agreement is very much a point of negotiation in the loan but not bond market at the moment.

What Does This Mean for the Rest of 2018?

While some tightening has already occurred in the US and may be followed in Europe during 2018, nonetheless it seems likely that low interest rates by historical if not recent standards may well prevail in the Eurozone for some time, and a relative shortage of deals compared to the depth of the investor base looking both to deploy capital and seeking yield will continue to permit significant flexibility in covenant and documentation issues. Further loosening of terms will likely continue if this environment continues.

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Ms. Summers has been active in the syndicated lending market since its infancy in the mid-1980s, including serving as Deputy General Counsel for Barclays in the Americas, and from 2000 to 2005 acting as the LSTA's first General Counsel where she led the efforts to develop the organisation's legal, documentation and regulatory strategies for key industry issues that established standard market practices and procedures. She is recognised as a noted practitioner in her field by *Chambers USA 2017*.

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