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The International Comparative Legal Guide to:

Lending and Secured Finance 2013

1st Edition

A practical cross-border insight into lending and secured finance

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EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Lending and Secured Finance 2013*.

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 two main sections:

Six general chapters. These chapters are designed to provide readers with a comprehensive 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 the laws and regulations of lending and secured finance in 35 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 Bingham McCutchen 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.co.uk

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Subscription Credit Facilities: Key Features, Documentation Issues and Credit Concerns

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A subscription loan or capital call lending facility is a loan facility provided to a private equity fund secured by the unfunded capital commitments of the fund's constituent partners or equity investors. These subscription loan facilities performed very well during the financial crisis, with notably few reported incidences of investor defaults. As a result, there continues to be both a strong demand for such facilities from private equity fund borrowers and a number of lending institutions willing to provide the necessary leverage to such funds. In 2012, there was a substantial increase in capital raised by private equity firms and all indicators point to investors continuing to have a desire for private equity. While there has been a mild tightening of spreads and pricing, the lack of transaction and investor defaults and the increase in investor equity has led to continued interest from funds and lenders.

Subscription loan facilities have been established for all types of private equity funds, including real estate, infrastructure, energy and buyout funds, and are generally used to bridge the time gap between a fund making an investment or needing capital for general working capital purposes and the fund either calling capital on its investors to pay for such investment or expense or accessing another source of capital that was unavailable at the time of such purchase or payment. Instead of immediately calling capital on its investors to make an investment or for other purposes, a fund will use the proceeds of a loan and will call capital on its investors at a later date to repay the related borrowing. Using leverage to bridge the gap enables a fund to make fewer capital calls on its investors, to avoid the need to call capital in advance of every investment or capital expenditure, to avoid issues with investors being late in funding capital contributions and to have longer term repayment options not linked to a particular investment or obligation.

Typically, loans and other obligations in a subscription loan facility are secured by a pledge by the fund (and, if applicable, the fund's general partner) of (i) the unfunded capital commitments of the fund's investors, (ii) the right of the fund to make capital calls upon such investors and to enforce the unfunded capital commitments against the investors, and (iii) the subscription accounts into which the capital contributions are funded. These loans may be funded either through a bank loan facility, or through a structured finance multiseller commercial paper conduit securitisation facility pursuant to which such conduit issues commercial paper notes to fund such loans. Generally, subscription loan facilities are committed facilities; however, certain facilities in the market are made by lenders on an uncommitted basis. The use of an uncommitted facility will depend on factors such as the creditworthiness of the fund sponsor, the make-up of the investor base, and the use of proceeds of the loan, including the composition of the underlying assets being purchased by the fund.

Eligible investors are frequently ascribed different advance rates based on their perceived creditworthiness

A lender's obligation to make a loan under a subscription loan facility is generally contingent upon the fund's compliance with an over-collateralisation or borrowing base test, which requires that the outstanding loans and other obligations under the facility not exceed the facility's borrowing base of eligible collateral.

The borrowing base for a subscription loan facility is typically derived by multiplying the unfunded capital commitments of the fund's investors who meet specified eligibility criteria by a specified percentage, known as the advance rate. Eligible investors are frequently ascribed different advance rates based on their perceived creditworthiness. For example, for many subscription loan facilities, an unrated investor will have a less favourable advance rate than a rated investor. In addition, the borrowing base will generally be reduced by certain investor concentration limits, which has the effect of limiting the lender's credit risk by increasing diversification and reducing its exposure to, among other things, obligor, country or unrated investor risk. As discussed in greater detail below, the borrowing base may be further reduced if certain investors are excused or excluded from participating in specified portfolio investments, or upon the formation by the fund or its general partner of certain alternative investment vehicles.

The failure of a fund to satisfy its borrowing base test will typically constitute a mandatory prepayment event, requiring the fund to prepay the outstanding loans in an amount sufficient to remedy the deficiency. It is important to note that while the borrowing base test may only take into account the unfunded capital commitments of eligible investors meeting specified criteria set forth in the facility documents, the lender's security interest will generally include the unfunded capital commitments of all investors in the fund, irrespective of their eligibility for inclusion in the borrowing base computation.

The documentation establishing a subscription credit facility generally includes a revolving credit agreement pursuant to which the loans are made to the fund, a pledge and security agreement pursuant to which the capital commitments and related rights and accounts are pledged to the lenders, and a control agreement with the account institution that maintains the subscription account into which the capital contributions are funded, pursuant to which the lenders' security interest in the subscription accounts are perfected, and the account institution agrees that after it is notified by the lenders that an event of default has occurred under the loan documentation, it will only follow the lenders' direction with respect to the disposition of all amounts remitted to the subscription accounts. In addition, lenders also may require that the investors execute a so-called acknowledgment letter for the benefit of the lenders pursuant to which, among other things, the investors acknowledge the existence of the subscription loan facility and the pledge of the capital commitments, and confirm the amount of, and their obligations in respect of, their unfunded commitment.

The internal policies and credit criteria of various lenders have resulted in many differences in the terms and requirements for the subscription loan facilities in the market. These differences can be quite significant, particularly in respect of the criteria for determining eligible investors for the borrowing base, the nature of the events of default which could cause the termination of the lenders' commitment and the acceleration of all amounts due to lenders under the subscription loan facility.

Lenders have varied views regarding the requirement that investors execute investor acknowledgments and provide opinions of counsel

In addition, lenders have wide-ranging views regarding whether all investors, only eligible investors or no investors must provide executed investor acknowledgments and/or opinions of counsel. In addition, some lenders require that a borrower use commercially reasonable or good faith efforts to have such acknowledgments signed by the relevant investors. The requirement to have executed investor acknowledgments can also vary depending on the creditworthiness of the sponsor and/or the investor, and as a result of both the composition and concentration of investors. To the extent that similar provisions are included in the fund's underlying documentation and the lender receives a pledge of the fund's rights thereunder, a number of lenders take the position that obtaining a signed letter directly from the investor, while nice to have, is not essential to its credit determination. Lenders also vary on whether an investor providing an investor acknowledgment must provide a legal opinion or authority certificate regarding, among other things, its valid existence, power and authority, due authorisation, execution and enforceability of the investor acknowledgment and no violation of law or conflict with organisational documents. As with the investor acknowledgment, the obligation to provide an opinion or certificate can depend on the creditworthiness of the sponsor and/or the investor, and as a result of both the composition and concentration of investors. The opinion or certificate can provide comfort to credit analysis, but is not essential for the enforceability of the investor acknowledgment. In addition, a lender's credit analysis may be aided by the receipt of a comfort letter or keepwell agreement with respect to the investor from a parent, sponsor or related entity with a credit rating.

The establishment and structuring of a subscription loan facility requires a comprehensive legal due diligence review of the related fund's underlying documents

The capital commitments of the investors of a fund are contract rights arising from the limited partnership agreement, limited liability company agreement or similar constituent documents of the fund, as well as the subscription agreements executed by the fund's investors. As a result, the establishment and structuring of a subscription loan facility requires a comprehensive legal due diligence review of the related fund's underlying documents, including its constituent documents, investment management agreement, offering materials, subscription agreements and any relevant investor side letters. As a threshold matter, it is essential that these documents explicitly permit borrowing facilities and the ability to pledge the unfunded capital commitments of the fund's investors and the other collateral referred to above. For limited partnerships, the fund documents should also grant the fund's general partner the authority to enter into such facilities on the fund's behalf.

Other fund document provisions, the incorporation of which is of critical importance to a subscription loan facility lender, include:

- an irrevocable and unconditional obligation of the fund's investors to fund capital calls without any defence, counterclaim or offset;
- an agreement by the fund's investors to deliver to the lender an "investor acknowledgment" pursuant to which, among other things, such investors acknowledge the existence of the facility, the pledge of the fund's rights and remedies in respect of the unfunded capital commitments, including the right to receive all amounts in respect thereof, as well as opinions of counsel and certain essential financial information;
- if the fund utilises a master/feeder structure wherein the unfunded capital commitments are in the feeder funds, the feeder fund documentation must include express permission to pledge the unfunded capital commitments of the feeder fund investors to secure borrowings by the master fund; and
- a prohibition on transfer of any fund investor's interest in the fund without the consent of the fund (or the fund's general partner).

It is not uncommon for fund documents to contain an omnibus section which addresses many of the issues outlined above.

Issues that arise in the due diligence review of a fund's underlying documents can often be addressed in the loan documentation for the subscription loan facility. As noted previously, the borrowing base is typically computed solely by reference to "eligible" fund investors. As such, the loan documentation will often be tailored to restrict the ability of the fund (or its general partner) to consent to transfers of the interests of investors in the fund in order to maintain the quality of the collateral pool securing the loans. The loan documentation may also set forth negative covenants and other provisions relating to the use of proceeds of borrowings by the fund, existence and fundamental changes to the fund, limitations on distributions, amendments to the fund's organisational documents and limitations on the incurrence of additional indebtedness or liens.

In many cases, the fund's constituent documents will permit capital calls for new portfolio investments only during a specified investment period, after which capital calls can only be made for limited purposes, such as certain specified fund expenses or follow-on investments. If the fund documents do not expressly allow capital calls after the investment period for the purpose of repaying principal, interest, fees, expenses and other liabilities arising under the subscription loan facility, the loan documentation will have to be drafted to ensure that the final maturity date of the loans precedes the expiration of the investment period by a sufficient margin of time to enable at least two capital calls to be made for the repayment of all amounts owing under the subscription loan facility. Furthermore, if the fund documents provide for the early termination of the investment period upon the occurrence of certain acts or events, such as "key man events", covenant breaches or at the election of a requisite percentage of investors, the fund documents should be drafted such that either the permitted timing of the effectiveness of such termination ensures that the unfunded capital commitments will remain available for a sufficient period of time to satisfy the fund's obligations under the subscription loan facility in full or to clarify that even after a termination of the investment period capital calls may be made to pay all obligations owing under the subscription loan facility.

Other fund document provisions that may significantly impact the structure and terms of a subscription loan facility include provisions:

- limiting the amount of loans or indebtedness that may be incurred by the fund to a percentage of the fund investors' aggregate unfunded capital commitments;
- restricting the purposes for which loan proceeds may be used;
- in connection with the timing, manner, mechanics and permitted uses of capital calls;
- limiting capital calls to be made on non-defaulting investors as a result of defaults by other investors;
- relating to the ability of the general partner or an investor in the fund to transfer or assign its interest; and
- limiting the tenor of loans, thereby effectively enabling short-term bridge financing, but prohibiting long-term substitutes for making capital calls, such as subscription loan facilities.

When evaluating fund documents in the context of a subscription loan facility, however, the devil is in the details

The issues outlined above are only a representative sample of threshold legal due diligence concerns. When evaluating fund documents in the context of a subscription loan facility, however, the devil is in the details. The discussion below is intended to address several less obvious, but no less important, fund document provisions that can significantly impact a lender's rights and remedies.

Fund documents will generally empower a fund or its general partner to determine (for legal, tax, regulatory or other reasons) that it is in the best interest of the fund or its investors to effect all or a portion of a portfolio investment through an alternative investment vehicle, or AIV. Should such a determination be made, fund investors will be required to contribute capital directly to the AIV to the same extent, for the same purposes, and on the same terms and conditions governing capital contributions to the fund. However, while capital contributions made to an AIV effectively reduce the unfunded capital commitments of the fund investors to the same extent as if such capital contributions were made to the fund itself, such capital calls are not made by the fund or its general partner and such capital contributions are typically funded not to the fund subscription account pledged for the benefit of a subscription facility lender, but to a separate account of the AIV. Such capital calls made by an AIV effectively diminish the lender's collateral while providing such lender with neither cash control over the contributed funds nor contractual control over the ability to make such capital calls.

The foregoing risk can be mitigated by careful drafting of the loan documentation. One approach is to prohibit the establishment of any AIV unless such AIV (i) is made a party to the loan documentation and pledges to the lender both the subscription account into which the proceeds of the capital calls will be remitted and its rights and remedies in respect of the unfunded capital commitments, and (ii) enters into a control agreement with the lender and the account institution that maintains the AIV's subscription account, pursuant to which the lender's security interest in such account is perfected, and the account institution agrees that it will only follow the lender's direction with respect to amounts maintained in such account should an event of default occur under the facility documents.

Alternatively, the parties to the loan documentation can agree to (i) prohibit the establishment by the fund (or, if applicable, its general partner) of any AIV unless the borrowing base test would be satisfied after deducting the aggregate maximum capital commitments of the investors of the fund which are also investors of the AIV from the borrowing base computation, and (ii) correspondingly reduce the borrowing base by such aggregate maximum capital commitments.

Fund documents may also permit an investor to exercise an "excuse right" in order to opt out of funding a capital call relating to a particular portfolio investment under certain discrete circumstances, including if participation in such investment would violate any applicable law, rule or regulation, or result in an ERISA "prohibited transaction". In addition, fund documents may also permit the fund or its general partner to excuse or exclude an investor from its obligation to fund capital calls relating to a particular portfolio investment under certain circumstances, such as if such investor's participation in such investment would cause the fund to violate any applicable law, rule or regulation, to incur significant increased tax liability or to cause an investor to invest in an asset which is contrary to such investor's policies. Typically in the context of a subscription loan facility, an investor who is excused or excluded from funding a capital call to acquire a portfolio investment cannot be called upon to fund a capital call to repay the loan utilised to fund the acquisition of such portfolio investment. As a consequence, these excuse and exclusion mechanisms effectively operate to reduce the unfunded capital commitments securing the facility, thereby causing the amount of the borrowing base available to repay facility obligations to be overstated.

Complicating matters even further, in many instances investors are notified of a prospective portfolio investment when a capital call is made to fund the acquisition of such investment, at which time such investors are afforded a specified period during which to exercise their excuse right. The terms of a subscription loan facility are at odds with this practice since capital calls are made not at the time a portfolio investment is acquired, but rather when the loan used to finance such portfolio investment is repaid.

Lenders must carefully review the excuse provisions to ensure that the circumstances for which an investor may be excused from funding a capital call are not overly broad

Lenders must carefully review the excuse provisions to ensure that the circumstances for which an investor may be excused from funding a capital call are not overly broad. In addition, the ability of an investor to exercise its excuse right should be conditioned upon the relevant investor providing the fund with certain verifying opinions and/or certifications. Ideally, sufficient advance notice of any portfolio investment should be given to investors such that the period of time in which an investor can exercise its excuse right shall expire prior to the date such investment is acquired. The facility loan documentation should account for excuse risk by reducing the borrowing base to reflect the exercise of any excuse rights, and prohibiting the fund from acquiring a portfolio investment if the resulting borrowing base reduction would cause a borrowing base test violation. It may also be advisable to build threshold limitations into the facility documentation to ensure that the portion of the aggregate unfunded capital commitments relating to excused investors remains at acceptable levels.

Fund documents may in some cases allow a fund to utilise all or a portion of the proceeds or distributions from a portfolio investment that would otherwise be distributed to fund investors to fund certain reserves, costs, expenses, fees and follow-on investments, and to treat such amounts as having been distributed to the fund investors and immediately recontributed to the fund as capital contributions.

These deemed capital call provisions reduce the unfunded capital commitments with no corresponding contributed cash being remitted to the lender-controlled subscription account. Such provisions can thus have the effect of decreasing the borrowing base without providing the lender the ability to take control over any related contributed cash.

It is imperative that a lender have both a perfected first priority security interest in fund investors' unfunded capital commitments and control over the subscription account into which the related capital contributions are funded

To address this risk, the loan documentation should limit the circumstances under which a fund can avail itself of the right to make deemed capital contributions. It is further advisable that the fund documentation provide that no such deemed capital contribution shall be effective until the related proceeds or distributions from the portfolio investments are remitted to an account which is pledged to the lender.

Since facility lenders rely upon the cash flow from capital calls of fund investors to retire subscription loan facility indebtedness, it is imperative that a lender have both a perfected first priority security interest in fund investors' unfunded capital commitments and control over the subscription account into which the related capital contributions are funded.

Fund documents will commonly allow for an investor's capital call obligations to be satisfied "in-kind", by securities or other assets valued at fair market value. Because such non-cash capital contributions are not funded to the pledged subscription account and are thus not readily available to repay outstanding loans, the loan documentation must be drafted to carefully limit the circumstances in which a fund has the discretion to accept in-kind capital contributions.

Fund documents typically contain a boilerplate provision to the effect that such documents are not intended (and shall not be deemed) to create or confer any rights for the benefit of any third party who is not a party thereto, and such third parties shall have no rights thereunder. Since a lender under a subscription loan facility is granted a security interest in the unfunded capital commitments of the fund investors, including the right to make capital calls and enforce remedies against breaching investors, provisions of this nature conflict with the fundamental premise of a subscription loan facility.

This inconsistency can be easily remedied by adding a carve out to the "no third party beneficiary" provision that clarifies that such provision does not apply to the lender's rights and interests contemplated by the other terms of the fund documents.

In order to maximise optionality, investment opportunities and tax treatment for investors, funds can be structured a multitude of ways, including a master/feeder structure, parallel funds, alternative investment vehicles, series limited partnerships, tax blockers, sidecar funds, multiple offshore jurisdictions and co-investment funds. Each of these structures may raise issues in the underlying fund documents which should be addressed in the loan documentation. For example, if the borrower is not an entity with direct capital commitments from investors, the entities that have such privity with the investors will need to be added to the loan documents in order to pledge their unfunded capital commitments to secure the loan or to guarantee the obligations of the borrower thereunder. In addition, if there are multiple borrower or pledging entities, the underlying fund documentation should include provisions clarifying that each entity is jointly and severally liable for the obligations of each other entity, that the entities have the ability to be cross-collateralised and that the capital commitment of an investor in one entity can be called upon in connection with the loan obligations of another entity notwithstanding if the entity in which it has a subscription participated in the investment purchased with such loan. To the extent that such cross-collateralisation and joint and several indemnification is not possible, separate borrowing base calculations would be required for each such entity based on its own separate collateral pool of unfunded capital commitments. Fund structures could also lead to documentation complications relating to ensuring lender control of cash flow and accounts at multiple points in the fund structure. There could also be added complexity as a result of structures utilising multiple jurisdictions, including perfection and security interest complications and added mechanics based on unique jurisdictional laws and requirements and mechanics for capital calls.

Investors will commonly negotiate special terms as a condition to their investment in a fund. As a result, funds will often enter into side letters with their investors that effectively override various provisions of the fund documents and/or confer upon the investor additional rights. Modifications to fund documents imposed by side letters that may have critical implications to subscription loan facility lenders include the following:

- provisions affording an investor additional rights to excuse itself from participating in a portfolio investment;
- provisions relating to an investor's express retention of sovereign immunity;
- provisions relating to an investor's right to cease making capital contributions or withdraw from the fund as a result of the fund or its general partner breaching placement agent disclosure representations and warranties;
- provisions that would require disputes relating to such investor's capital commitment to be subject to arbitration;
- provisions that affect the termination of an investor's commitment or the fund's investment period;
- provisions which may have the effect of reducing an investor's capital commitment; and
- provisions precluding a fund from pledging an investor's unfunded capital commitment.

In addition, if other investors are provided with "most favoured nation" clauses in their side letters, which provide the related investor with the benefit of any applicable favourable terms provided to any other investor, the effect of any problematic language in a given side letter may be greatly magnified.

Side letters must be carefully reviewed to determine if the terms provided to a particular investor should be addressed in the subscription loan facility documents, whether by excluding the unfunded capital commitment of the applicable investor from the borrowing base calculation or otherwise.

The popularity of subscription loan facilities is on the rise and showing no signs of slowing down. Due diligence in the context of establishing these facilities must be performed with great care, as the devil is in the details.

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Greg is also one of the leading practitioners in the secondary market trading of distressed debt and trade claims. Greg has been actively involved in the development of numerous innovative transactions, including the establishment of the first loan-backed SIV and the first securitisation of mutual fund distribution fees.

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Jeff Berman is a partner in Seward & Kissel's Corporate Finance Group, specialising in corporate finance and asset securitisation. Jeff regularly represents funds and financial institutions in subscription loan facilities secured by the unfunded capital commitments of the fund's investors. He has extensive experience representing participants in multi-seller commercial paper conduit transactions, distressed debt transactions, CLO and CDO facilities and syndicated secured revolving credit and term loan facilities. Jeff also advises clients in workouts and restructurings in asset-based financing transactions and secured lending facilities and advises clients relating to TruPS CDO disputes and RMBS put-backs. Jeff regularly represents dealers, placement agents, underwriters and issuers in a variety of asset-backed, market value and synthetic securitisation programmes. Jeff also frequently advises investment funds and managers in connection with transactions, financings and general corporate matters.

Jeff received a B.A. from the University of Pennsylvania and a J.D. from Cornell University School of Law.

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