IN-DEPTH

Acquisition And Leveraged Finance

EDITION 13

Contributing editor
Tracy Liu
Latham & Watkins LLP



LEXOLOGY

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In-Depth: Acquisition and Leveraged Finance (formerly The Acquisition and Leveraged Finance Review) provides a practical overview of the most common structures and methods used to finance acquisitions in major jurisdictions worldwide, along with the most salient features of the relevant legal and regulatory frameworks. With a focus on recent trends and developments, it offers incisive legal and commercial analysis for practitioners and market operators.

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Editor's Preface

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The first half of 2026 has followed a similar script to 2025. The leveraged finance market opened with strong issuance volumes, albeit still centred around opportunistic and refinancing-led transactions, as borrowers continued to chip away at the 2028–2029 maturity wall. There was, as ever, continued cautious optimism for an uptick in M&A activity, despite the false dawns of recent years, buoyed by a pipeline that included a few high-profile jumbo acquisitions underwritten at the end of last year and poised to come to the broadly syndicated loan market.

The encouraging start and hopes for a banner year for buyout and M&A activity were yet again stymied by volatility, which arrived in quick succession. Advances in AI led to a sell-off in software stocks and prompted a sharp reappraisal of software and technology-sector exposures, dubbed the "SaaSpocalypse". This was followed shortly by the outbreak of war in Iran, introducing fresh uncertainty into the global financial markets and stoking inflation concerns.

These developments stalled the momentum from the start of the year, with a notable slowdown in leveraged finance activity through March and April. In contrast to previous periods of dislocation, which favoured the private credit market, the AI-related volatility caused disruption across both the broadly syndicated loan and private credit markets. The private credit market, in particular, came under sustained scrutiny following the SaaSpocalypse, as concerns over portfolio quality and valuation in light of substantial software and technology-sector exposure triggered a sell-off in shares in publicly traded Business Development Companies and a surge in redemption requests across non-traded Business Development Companies.

The leveraged finance market, however, once again proved its resilience, closing the second quarter on a strong footing with robust issuance volumes. As market sentiment improved, the persistent supply-demand imbalance drove spreads tighter, and borrowers seized favourable market windows to reprice, refinance, extend maturities and launch opportunistic add-ons. There was no greater testament to the improvement in market sentiment and the depth of investor demand than the successful cross-border syndication processes backing a handful of jumbo leveraged buyouts and take-privates that were underwritten in late 2025. However, M&A-driven debt issuance volumes remained concentrated in a handful of mega deals, rather than spread across the broader sponsor universe.

Having navigated repeated bouts of macroeconomic and geopolitical volatility in recent years, market participants have become increasingly skilled at recalibrating in response to a shifting backdrop. This agility has allowed the acquisition and leveraged finance market to reopen swiftly on a solid footing after each period of dislocation, and continues to shape market dynamics today.

In an environment of elevated and sustained volatility, there is a sharpened focus on successful deal execution. Increasingly, pre-marketing periods are becoming longer to ensure sufficient investor take-up as syndication timelines compress, due to the preference for keeping transactions out of the market over weekends to avoid negative headlines impacting syndication. Although investor appetite remains strong overall and borrowers continue to benefit from demand outpacing supply, there is increasing bifurcation between top-tier credits, which attract fierce competition, driving down pricing and resulting in looser deal terms, and perceived weaker credits in less defensive sectors, which generally face greater execution challenges. Private equity sponsors and corporates alike are also increasingly seeking more deal optionality, driven by a demand for flexible and innovative capital solutions as transactions grow more complex. There is increased multi-track activity, with more transactions incorporating a mix of loans, high-yield bonds and private credit tranches.

The AI-driven reappraisal of software and technology exposures following the SaaSpocalypse has prompted a broader recalibration of portfolio strategies. Both direct lenders and participants in the broadly syndicated loan market have begun to rebalance their portfolios away from software and technology-sector names that are perceived to be vulnerable to AI disruption. Credits in "HALO" (hard assets and low obsolescence) sectors, backed by tangible assets and insulated from AI disruption, are attracting renewed interest. AI is also reshaping the financing landscape by creating new opportunities, with significant capital flows directed towards financing the build-out of AI infrastructure, such as data centres.

The pressure on private equity sponsors to deliver exits has also intensified considerably as holding periods have reached record highs amid persistent valuation gaps. In a constrained exit environment, sponsors have focused on optimising capital structures to ensure that portfolio companies are well positioned for exits. Refinancing and extension activity over the past 12 months has also increasingly included portability provisions, which effectively waive the change of control provisions in connection with a sale of a portfolio company where certain criteria are satisfied.

The momentum building in the acquisition and leveraged finance market looks set to carry through the remainder of 2026 and into 2027. As valuation gaps between buyers and sellers gradually narrow, sponsors position portfolio companies strategically for exits, and a resilient market continues to demonstrate its capacity to transact through periods of volatility, the stage is set for the M&A pipeline to open up in earnest.

Many thanks to everyone who contributed to this year's edition, and we extend a special thank you to Centellic (formerly Law Business Research). We sincerely hope that this edition of *Lexology In-Depth: Acquisition and Leveraged Finance* will be an interesting read for you in the current environment.

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Introduction

London remains one of the foremost markets for leveraged finance, with English law continuing to govern the finance documentation underpinning a substantial share of European and international transactions. Borrowers benefit from a broad and well-established array of financing instruments and capital sources, spanning high-yield bonds, syndicated loans, unitranche and direct lending facilities, second lien and super senior structures, payment-in-kind financings and preferred equity, each of which continues to see robust activity. The lender base is similarly diverse, encompassing commercial and investment banks, institutional investors and private capital providers.

Credit funds have steadily expanded their footprint in European leveraged finance, moving beyond their traditional mid-market focus to compete on larger transactions through unitranche, direct lending and holdco financings embedded in more complex capital structures. In the syndicated loan market, European covenant-lite structures (characterised by high-yield bond-style incurrence covenants and the absence of maintenance financial covenants) are now standard in large-cap sponsor-backed transactions. Although private credit financings have historically retained maintenance covenants, covenant-lite terms are gaining traction in unitranche and senior direct lending as private credit lenders capture a greater share of the large-cap segment. As competition between the syndicated loan and private credit markets intensifies at the upper end of the market, further convergence of documentary terms across these two channels is widely anticipated.

Year in review

A growing flow of M&A-driven issuance at the end of 2025 was expected to provide momentum for increased buyout and M&A activity this year. A more stable dealmaking backdrop in the UK and Europe underpinned by gradual interest rate cuts coupled with dealmakers' ability to successfully navigate fast-paced geopolitical and macroeconomic developments was expected to provide greater conviction for M&A dealmaking. Following the false dawns of recent years, however, optimism was tempered by concerns around inflation and economic growth, volatility stemming from unexpected geopolitical and macroeconomic shocks, and the stubborn valuation gap between buyers and sellers.

Positively, January got off to a roaring start with a huge repricing wave and robust issuance volumes. However, a sharp market slowdown followed as AI disruption fears triggered by advances in generative AI tools led to a sell-off in loans to certain software and technology credits, which prompted a broad reassessment of the sector and dampened transactional appetite. The outbreak of war in Iran further curtailed deal flow, leading to a slowdown in March and April. With market participants now adept at navigating volatility, the broadly syndicated loan market swiftly recovered and the second quarter of 2026 closed on a high note, with record issuance volumes in Europe.

Although periods of market volatility and the resulting dislocation have historically played to the strengths of private credit, the AI-driven turbulence earlier in the year had a dampening effect on sentiment within the private credit market, given that the software and technology sector, which is one of private credit's most favoured areas of exposure,

was at the centre of the disruption. This was compounded by intense competition from the broadly syndicated loan market in light of ever-tightening spreads amid the supply-demand imbalance and regulatory scrutiny faced by private credit lenders.[1-] Despite these challenges, private credit lenders remain ready to deploy capital, although with more underwriting discipline for software and technology credits. Demand for flexible and bespoke solutions that reflect business realities that private credit lenders can offer also remains solid. Underscoring the depth and versatility of the acquisition and leveraged finance market, there is also increasing collaboration between the broadly syndicated loan market, the high yield bond market and the private credit market as borrowers and issuers evaluate opportunities across the capital structure and asset classes to achieve the optimal blend of flexibility, cost and execution certainty best suited to their complex financing and strategic business needs. Sponsors continue to run dual-track processes to secure the most favourable financing terms.

With the better part of 2026 now behind us, the acquisition and leveraged finance market has followed a trajectory broadly consistent with 2025, characterised by fluctuating deal momentum. Refinancings, maturity extensions and repricings continue to account for the bulk of deal flow, as borrowers move to take advantage of favourable market windows while remaining acutely aware of how swiftly unexpected geopolitical or macroeconomic shocks can unsettle conditions. Beyond managing maturities and optimising capital structures in preparation for exits, sponsors facing longer holding periods have increasingly turned to dividend recapitalisations to return liquidity to investors. While a handful of high-profile M&A deals and corporate carve-outs were welcomed by the market, buyout and M&A-driven debt issuance volumes have yet to recover to the levels the market would hope to see.

Sponsors also continue to streamline and optimise their portfolios, pursuing add-on acquisitions and other synergy-driven strategies to maximise value in anticipation of a more favourable exit environment. Corporate carve-outs also continue to gain traction with larger corporates, as a means to de-lever balance sheets and unlock cash. On a more positive note, London-listed companies continue to attract significant interest from overseas investors, private equity sponsors and strategic corporate acquirers, drawn by attractive valuations relative to other major markets. This has sustained healthy levels of public-to-private activity, with several marquee take-private transactions this year. As UK targets provide compelling investment opportunities amid renewed investor confidence, proposed reforms to the National Security and Investment Act 2021 will be welcomed to provide greater clarity for M&A transactions involving in-scope sensitive sectors of the economy and to enhance the UK's reputation as a predictable, rules-based investment destination.[2]

Regulatory and tax matters

Regulatory matters

The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) are the financial regulators in the United Kingdom. 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 United Kingdom, 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 United Kingdom 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 and investment firms), there may be broader regulation impacting them that may impact the terms of any loan. Similarly, borrowers who are themselves regulated may have restrictions on the nature or scope of security they can offer owing to financial regulation affecting 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.

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

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.

Withholding tax

Payments of yearly UK-source interest are subject to UK withholding tax at the basic rate of 20% (set to increase to 22% on 6 April 2027). There are, however, a number of exemptions from the charge to withholding tax, with the following being the most commonly used:

1. Exemption from withholding tax relating to the nature of the lender: corporates and banks that are taxed in the United Kingdom may receive interest gross, given that the income of these lenders is taxable in the United Kingdom in any event. Advances from building societies are also generally free of withholding tax on interest.
2. 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 that certain requirements are met, including the term of the relevant security being less than 50 years and the security (or where a placement consists of several relevant securities, the total value of the placement) 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 is listed on a recognised stock exchange or is admitted to trading on a multilateral trading facility.

3. Exemption relating to double taxation treaties between the United Kingdom and other jurisdictions: the United Kingdom has entered into a number of treaties with other jurisdictions, which provide for a nil rate of withholding tax in the United Kingdom. Non-UK lenders tax resident in such jurisdictions are entitled to receive interest free of withholding tax. There is currently an administrative burden involved in relying on this exemption, since it must be claimed, and interest may only be paid free of withholding once a borrower has received an instruction from HM Revenue and Customs (HMRC). Furthermore, 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 UK government has published a consultation on simplifying treaty relief from withholding tax on interest paid overseas. The consultation proposes allowing taxpayers to self-assess whether treaty relief applies, thereby removing the need to seek advance HMRC approval to pay interest gross.

The broad nature of the above exemptions gives significant flexibility, enabling UK borrowers to raise funds from different types of lenders, and under different types of security. In particular, the "quoted Eurobond" exemption enables capital to be raised from offshore funds, which would often not be capable of benefiting from double taxation treaties with the United Kingdom, either because, in the case of a tax transparent fund, each investor would generally need to claim treaty relief depending on eligibility or, in the case of an opaque fund (where the residence of the fund itself will determine relief), most are not located in treaty jurisdictions.

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 relationship 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 relationship 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. Certain important examples are set out below, but there are other relevant restrictions beyond the scope of this chapter; for example, the unallowable purpose rule, hybrid and other mismatches and rules re-characterising interest as a distribution.

1. 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% 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.

2. 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. The UK updated its transfer pricing rules for financial transactions, including loan guarantees, starting on 1 January 2026. The changes align UK legislation more closely with international norms, adjusting how implicit support, guarantor liabilities and related-party financial securities are handled.
3. In circumstances where interest expense is deductible, corporate income loss restriction rules limit the amount of profits against which carried-forward losses incurred in any period can be relieved to 50% of profits over an annual allowance of £5 million. The relief provided by the £5 million annual allowance is shared between both carried-forward corporate income losses and carried-forward corporate capital losses. Tax grouping rules enable the surrender of losses between UK group members 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.

Enforcement of security

The UK tax consequences of enforcement of security by a creditor can be complex and will depend on the method of enforcement. A detailed discussion of the potential UK tax issues is outside the scope of this chapter but consideration will need to be given to, among other things, whether the method of enforcement gives rise to any transfer taxes, triggers any tax degrouping events or withholding tax on guarantee payments, or impacts on the availability of net operating losses.

Security and guarantees

Taking English law security is relatively straightforward and security can be taken over most asset classes. Security is granted to a security trustee (commonly also referred to as a security agent) to hold the security interests on trust for the secured creditors, allowing new lenders and other creditors 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. Until a floating charge crystallises into a fixed charge upon the occurrence of certain common law or contractually agreed events, the grantor of a floating charge is allowed to deal with the floating charge assets in the ordinary course of business. A floating charge will not "crystallise" on the occurrence of a moratorium under Part A1 of the Insolvency Act 1986.

Security over "financial collateral" such as shares and cash can also benefit from the Financial Collateral Arrangements (No. 2) Regulations 2003, which disapply certain statutory formalities and modify 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 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, subject to limited exceptions, security granted by English companies or limited liability partnerships (LLPs) must be registered at Companies House within 21 days of its creation or it will be void against creditors, administrators and liquidators of that company or LLP.

English law insolvency rules dealing with the priority of security interests are complex and depend on, among other factors, the 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 that company before the commencement of the insolvency process may be challenged by the insolvency officeholder. The period for reviewing such "antecedent" transactions ranges from six months to three 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, the board of directors of the guarantor must carefully consider the corporate benefit to the guarantor, keeping in mind the financial position of the guarantor. It is therefore not uncommon to obtain shareholder approval to support the giving of such upstream and cross-stream guarantees.

Priority of claims

In a corporate insolvency, creditors will be paid in accordance with the following "waterfall" of priority under law from proceeds of realisation of assets of the insolvent estate:[3]

1. First, creditors holding a fixed charge (but only to the extent of the value of the applicable secured assets): as discussed above, a fixed charge requires the lender to retain a level of control of such assets. If the chargor is authorised to deal

with the charged assets in the ordinary course of business, the charge could 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 a fixed charge will be paid to the holder of that fixed charge.

2. Second, creditors of "moratorium debts" and "priority pre-moratorium debts": if a company goes into administration or liquidation, in each case within 12 weeks of the end of a moratorium under Part A1 of the Insolvency Act 1986, any debts that are incurred during the moratorium and certain debts incurred before the moratorium (such as the monitor's remuneration or expenses, rent during the moratorium or non-accelerated financial debt) (if the company is in liquidation, fees of the official receiver will take priority over these debts).
3. Third, fees and expenses of the insolvent estate incurred during the relevant insolvency proceedings (there are statutory provisions setting out the order of priority in which expenses are paid).
4. Fourth, ordinary and secondary preferential creditors: ordinary preferential debts include (but are not limited to) debts owed by the insolvent company in relation to: contributions to occupational and state pension schemes; wages and salaries of employees for work carried out in the four months before the insolvency date, up to a maximum of £800 per person; and holiday pay due to any employee whose contract has been terminated, whether the termination takes place before or after the date of insolvency. Secondary preferential debts rank equally between themselves for payment after the discharge of ordinary preferential debts and include claims by HMRC in respect of certain taxes including VAT, PAYE income tax (including student loan repayments), employee NI contributions and Construction Industry Scheme deductions (but excluding corporation tax and employer NI contributions) that are held by the company on behalf of employees and customers.
5. Fifth, 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") 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.
6. Sixth:

    - provable debts of unsecured creditors and any secured creditor to the extent of any remaining debt due to it (a shortfall), in each case, including accrued and unpaid interest on those debts up to the date of commencement of the relevant insolvency proceedings;
    - interest on the company's debts (at the higher of the applicable contractual rate and the official rate in accordance with the Judgments Act 1838, currently 8% per annum) in respect of any period after the commencement of liquidation, or after the commencement of any administration that had been converted into a distributing administration; and
    -

non-provable liabilities, being liabilities that do not fall within any of the categories above and therefore are only recovered in the (unusual) event that all categories above are fully repaid.

7. Seventh, 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 between various third-party creditors and also 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.

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) and Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II). Both of those pieces of legislation were assimilated into English law (by the Retained EU Law (Revocation and Reform) Act 2023), 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 assimilated into 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 contract 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, although in some cases, financing parties are given an option to refer disputes to arbitration. 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:

1. 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;
2. a non-exclusive jurisdiction clause enables either party to bring proceedings against the other in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided any alternative court has jurisdiction over the dispute under its own rules); and

3. an asymmetric jurisdiction clause permits one of the parties to sue the other party in any competent jurisdiction (or in certain specified jurisdictions) but restricts the other party to bringing proceedings in only one jurisdiction.

Brexit has had an impact on issues of jurisdiction, and on the enforcement of English judgments in Europe (arbitration clauses and proceedings are unaffected by Brexit). Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU member states, but no longer applies in the United Kingdom post-Brexit. That means that whether the English courts will take jurisdiction over cases with foreign defendants now depends on the satisfaction of one of the "jurisdictional gateways" set out in Practice Direction 6B of the Civil Procedure Rules (in practice, the English courts are now able to take jurisdiction in a wider set of circumstances than might have been the case under the Recast Brussels Regulation). That also means that the simple and convenient route to the enforcement of English judgments in EU member states that was provided by the Recast Brussels Regulation no longer exists.

The United Kingdom has acceded to the Hague Convention on Choice of Court Agreements 2005 (Hague 2005). Courts of the parties to the Hague 2005, including EU member states, will respect exclusive jurisdiction clauses and enforce judgments from courts selected pursuant to those clauses. Hague 2005 does not, however, cover non-exclusive jurisdiction clauses or asymmetric jurisdiction clauses (or judgments resulting from the operation of those kinds of clauses). To improve the position with regard to the enforcement of English judgments, the United Kingdom applied to re-join the Lugano Convention in early 2020, but the accession process has been blocked by the European Commission.

Following this, the United Kingdom ratified and brought into force the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 2019 (Hague 2019), which has a broader scope than Hague 2005. For proceedings that commenced on or after 1 July 2025, Hague 2019 provides uniform rules for the recognition and enforcement of civil and commercial judgments between the United Kingdom and other contracting state parties, which include the EU member states (except Denmark). While, unlike the Lugano Convention, Hague 2019 does not include jurisdiction rules, it applies to a wider range of judgments than Hague 2005 – not only judgments in proceedings arising out of exclusive jurisdiction clauses, but also those in proceedings stemming from non-exclusive and asymmetric jurisdiction clauses. This is a positive development for financing parties and others wishing to benefit from the flexibility of asymmetric and non-exclusive jurisdiction clauses.

Although Hague 2019 is not a perfect substitute for the framework existing under the Recast Brussels Regulation or the Lugano Convention, it offers more streamlined enforcement of judgments between the United Kingdom and EU member states, which is particularly important in light of the United Kingdom's blocked application to re-join the Lugano Convention.

In practice, English judgments may still be enforced with relative ease in EU member states, despite the various changes post-Brexit. That is either because there is a reciprocal relationship with the relevant country (especially, since 1 July 2025, pursuant to Hague 2019) or that country generally allows enforcement without significant hurdles.

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 Companies Act 2006 (CA 2006), which regulate the giving of financial assistance by public companies in relation to the acquisition of their own shares (as further described below), 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:

1. a contractual offer to all of a target's shareholders to acquire their shares; and
2. a court-approved scheme of arrangement, which is a statutory mechanism involving a target shareholder vote and court approval.

A significant majority of UK takeovers use the latter method.

The Takeover Code, which is administered by the Panel on Takeovers and Mergers (the Takeover Panel), applies to any takeover offer or scheme of arrangement to acquire a company registered in the United Kingdom, Channel Islands or the Isle of Man, if any of its securities are admitted to trading on a UK regulated market or a UK multilateral trading facility (such as the London Stock Exchange's Main Market and AIM) or any stock exchange in the Channel Islands or the Isle of Man.

The Takeover Code will also apply to any such company for two years following that company ceasing to be admitted to those trading venues.[4]

The Takeover Code 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 can differ from that taken on private acquisitions. If details of the bid leak to the market, the Takeover Panel may require the bidder to make an immediate holding announcement and to confirm within 28 days whether it intends to make a binding offer for the target. Where triggered, this 28-day "put up or shut up" period can limit the time a bidder has to undertake due diligence (although the 28-day period may be extended with the consent of the target). For hostile takeovers, lack of cooperation by the target will mean that the bidder's and lenders' due diligence 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, the related timetable pressures and the Takeover Code requirement that information provided to one bidder must, on request, be provided to other (potentially less welcome) bidders 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 the lender confirms in the relevant non-disclosure agreement that it has effective information barriers in place between the lender's debt and equities businesses or if the potential provider of debt finance represents that it does not hold any shares in the target (and undertakes not to acquire any shares in the target during the offer period, subject to technical exceptions to permit the acquisition of shares in client serving capacities or (with the consent of the Takeover 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 or scheme 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 that the financial adviser may be required by the Takeover 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 and largely unconditional debt and equity 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 (in relation to any debt funding) and an equity commitment letter (in relation to any equity funding) 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 syndication-related flex arrangements, the Takeover Panel will typically agree to a delay (by way of redaction) in disclosing the 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 (eg, because successful syndication has been achieved), the flex disclosure may be omitted. However, if the debt is not syndicated by that time, the flex arrangements must be described in the offer document and the full terms published on the target's website.

The Takeover Panel requires that, prior to announcement, a bidder may only impart confidential information in relation to a bid to another person "if it is necessary to do

so". The Takeover Panel interprets this requirement restrictively, and ordinarily a bidder must consult the Takeover 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 finance providers (whether equity or debt) and shareholders in the bidder or the target.

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% of the shares in the target. Provided that the bidder receives acceptances for 90% 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% threshold is not obtainable, provided the bidder acquires at least 75% 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 for the acquisition of its shares. Consequently, financing terms will often include a minimum acceptance threshold, usually ranging between 75% and 90%, to ensure that control or a minority squeeze-out can be achieved.

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 (regardless of whether 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 an English incorporated public limited company. These principles do not, however, restrict the bidder's ability to grant security over any shares in the target that it holds, provided that security 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. 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.

Special considerations

With expectations for a resurgence in M&A dealmaking moving into next year, there has been a notable uptick in private equity sponsors requesting the inclusion of portability provisions in their loan documents, particularly in conjunction with a refinancing or extension of their debt beyond the initial investment horizon. Portability provisions (sometimes called a "specified change of control") allow a private equity sponsor to sell its interest in a group it owns to a third party without triggering a "change of control" and therefore a mandatory prepayment of the loan.[5] Instead, the debt transfers with the borrower to its new owner, provided the new owner is on a pre-agreed whitelist or meets certain criteria. The inclusion of portability provisions provides flexibility for private equity sponsors to exit any investments of theirs that are nearing the end of the investment hold

periods in an efficient manner with reduced execution risk when the M&A environment is more favourable.

While lenders may be happy to agree to the inclusion of a portability feature to maintain exposure to certain good credits, there is focus around the conditions to accessing portability. At times, private credit lenders are more accommodating to portability provisions to ensure their investment horizon is achieved.

Outlook and conclusions

Looking ahead to 2027, there is considerable optimism that the acquisition and leveraged finance market can build on its current momentum, with the sustained pace of take-private activity expected to catalyse a broader recovery in M&A-driven deal flow.

Dealmakers have emerged from an extended period of heightened uncertainty, marked by successive economic, market and geopolitical headwinds that weighed on M&A activity in recent years, with a greater capacity to navigate disruption. The acquisition and leveraged finance market has demonstrated remarkable resilience, absorbing repeated shocks through successive bouts of volatility. With an improving dealmaking environment underpinning renewed investor confidence, the conditions are firmly in place for the M&A pipeline to be fully unlocked.

Endnotes

1 Following an inquiry into the growth of private markets in the UK launched last year, the House of Lords Financial Services Regulation Committee published a report in January 2026. The report included recommendations that the UK financial services regulators should continue to monitor developments in the private credit markets closely. The Bank of England also launched a system-wide exploratory scenario exercise at the end of 2025 to explore how private credit markets might respond to a severe downturn, and any wider financial stability implications. ^ Back to section

2 A detailed overview of the National Security and Investment Act 2021 (NSIA) regime is beyond the scope of this chapter. The government has extensive powers under the NSIA to scrutinise and intervene in certain transactions involving sensitive sectors of the economy to protect national security. The implications of the NSIA regime will need to be considered in acquisition financings of qualifying entities or qualifying assets to which the NSIA regime applies, or when taking or enforcing security over shares or assets that are in scope of the NSIA regime. Following a consultation launched last year, the government published a response in March 2026 in relation to reforms to the NSIA regime. The proposed reforms to the NSIA regime (which will come into force once secondary legislation is passed) are intended to ensure the screening rules remain current, provide greater clarity and predictability for businesses, and reduce administrative friction. ^ Back to section

3 The insolvent estate of a company does not include property in which the company does not have a beneficial interest. Therefore, 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. ^ Back to section

4 From 3 February 2025 to 2 February 2027, transition arrangements apply to certain unquoted public or private companies subject to the Takeover Code immediately prior to the implementation date. For these companies, broadly, the Takeover Code would continue to apply during this transition period provided that the company meets the "residency test" (ie, having their place of central management and control in the UK, the Channel Islands or the Isle of Man) at the time of the transaction. ^ Back to section

5 A detailed overview of portability provisions in loan agreements is beyond the scope of this chapter. ^ Back to section

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Introduction

Historically, leveraged acquisitions were typically financed through a mixture of high-yield bonds and syndicated term loans, with ongoing working capital requirements provided through cash flow or asset-backed revolving facilities entered into concurrently with the acquisition. More recently, we have also seen private credit options up and down the capital structure, with unitranche term loans and hybrid solutions, including preferred equity, now common sources of financing for acquisitions. Financings utilising term loans and revolving facilities are typically guaranteed by each material wholly owned domestic subsidiary of the borrower and secured by substantially all of the assets of the borrower and each guarantor. For syndicated transactions, the sources of funding are broad, including collateralised loan obligations and other institutional lenders, retail loan funds, direct lenders and commercial banks. According to the *LSEG Global Syndicated Loan Review*, US syndicated loan market volume in 2025 was US$4.1 trillion, an increase of 11% compared with 2024's US$3.7 trillion. Leveraged loans increased slightly to US$1.68 trillion of syndicated volume in 2025, a 1% bump year on year. *KBRA DLD* reported that the total volume of sponsored, cash-flow-based direct lending in 2025 was US$326.5 billion, surpassing the previous US$302 billion record in 2024.

Year in review

The loan market was resilient in 2025 – despite uncertainty driven by tariff policy, persistent geopolitical tensions and a slowdown following Liberation Day tariffs, the loan market recovered amid rate-cutting by the Federal Reserve Board. Refinancing and repricing volume propelled the syndicated market, alongside a slight increase in M&A activity during the second half of the year. The private credit market sustained its strong trajectory, with direct lending issuance and overall M&A activity, including leveraged buyouts (LBOs) and add-ons, continuing to expand, even as the broadly syndicated and private credit markets converged with aggressive dual-track processes for top-tier credits. Dividend recapitalisations reached near-record levels, with sponsors increasingly turning to dividend recaps to return capital to investors amid limited exit opportunities.

Regulatory and tax matters

Regulatory issues

Regulatory concerns for debt finance in the leveraged acquisition context typically arise under regulations related to authorisation and sanctions. Certain types of collateral may also be subject to special regulations. In addition, there are regulatory limitations applicable to certain leveraged finance activities of banks.

Required authorisation

Assuming the lender conducts no other business in the United States, being a lender of record for commercial lending generally does not subject the lender to licensing or other qualification requirements to conduct business in the United States, although there are exceptions to this rule in certain states. Collection and enforcement activities are more likely to require an entity to obtain a licence and qualify to carry out business within a state. However, in almost all leveraged acquisition financing, only the administrative agent (or collateral agent) will be acting in the capacity of the collecting or enforcing bank, and these restrictions are generally not a concern for specific syndicate members.

Sanctions

Federal sanctions and anti-money laundering laws require financial institutions to implement due diligence procedures with respect to their customers to prevent the transfer of cash to certain prohibited countries and persons.

Collateral-related regulations

Margin loans

If the collateral for the loan consists of securities that are traded on an exchange in the United States, or "margin stock", the loan may be subject to additional restrictions. These restrictions, often referred to as the "margin regulations", limit the amount of a loan that can be collateralised by margin stock. The US margin regulations can also be implicated by the existence of arrangements that constitute indirect security over margin stock, such as through negative pledge provisions or other arrangements that limit a borrower's right to sell, pledge or otherwise dispose of margin stock.

Government receivables

With respect to collateral consisting of receivables, if the debtor under such receivable is the US government or one of its agencies or instrumentalities, the federal Assignment of Claims Act will apply to an assignment of receivables and the right of the federal government to exercise set-off. A minority of states have similar laws that apply to obligations of the state or agencies or departments thereof, and a few states extend these rules to municipalities and other local governmental entities.

Regulatory developments – leveraged lending guidance

In March 2013, the three US federal banking agencies, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve) and the Federal Deposit Insurance Corporation (FDIC) jointly issued updated supervisory guidance for financial institutions engaged in leveraged lending activities, including acquisition financing. The leveraged lending guidance sets forth enhanced expectations in a number of areas and cautions banks to strengthen their risk management of loans to highly leveraged borrowers. In December 2025, the OCC and the FDIC announced their withdrawal from the leveraged lending guidance and will instead expect OCC- and FDIC-regulated banks to manage leveraged lending exposures in accordance with their

own risk management practices and in alignment with broader principles of safety and soundness. The withdrawal may bring more leveraged lending back into the traditional banking system, potentially intensifying competition with private credit firms. The Federal Reserve has not yet announced its withdrawal from the leveraged lending guidance.

Tax issues

Withholding taxes

The United States generally imposes a 30% federal withholding tax on interest paid to a non-US lender on a debt obligation of a US person (and certain non-US persons engaged in a trade or business in the United States). This withholding tax may be eliminated (or reduced to a lesser amount) pursuant to an applicable income tax treaty between the United States and the country in which a lender receiving interest is resident.

Alternatively, a non-US lender may qualify for an exemption from US federal withholding on interest under the "portfolio interest exemption". To qualify for the portfolio interest exemption:

1. the debt obligation must be in "registered form" for US federal income tax purposes;
2. the lender must not be a controlled foreign corporation related to the borrower or a bank receiving interest on an extension of credit entered into in the ordinary course of its trade or business; and
3. the lender must not own, directly, indirectly or by attribution, equity representing 10% or more of the total combined voting power of all voting stock of the borrower (or, if the borrower is a partnership, 10% or more of capital or profits interest of the borrower).

In addition, the portfolio interest exemption does not apply to certain contingent interest, such as interest determined by reference to any receipts, sales, cash flow, income or profits of, or the fluctuation in value of property owned by, or dividends, distributions or similar payments by, the borrower or a related person.

The beneficial owner of interest generally must submit a properly completed Internal Revenue Service (IRS) Form W-8BEN-E (or, if an individual, IRS Form W-8BEN) to claim an exemption or reduction available under an applicable income tax treaty or the portfolio interest exemption. If the lender is (or is treated as) a non-US partnership, the lender generally must submit IRS Form W-8IMY with required attachments.

If interest paid to a non-US lender is effectively connected with the lender's trade or business in the United States, the interest will not be subject to US federal withholding as long as the lender submits a properly completed IRS Form W-8 ECI (or other applicable form), but generally will be subject to net income tax in the United States and, for foreign corporations, branch profits taxes.

Additionally, withholding taxes may arise in other circumstances, including the payment of various fees (such as letter of credit fees), modifications to debt obligations and certain adjustments to conversion ratio on debt obligations that are convertible into stock.

An applicable withholding agent, generally the US borrower or the administrative agent under the financing, must collect such IRS tax forms (or other required documents) as a basis for not withholding. A withholding agent who fails to withhold may be liable for any under-withholding as well as interest and penalties related to such failure.

Foreign Account Tax Compliance Act

Under provisions in the Foreign Account Tax Compliance Act (FATCA), a 30% withholding tax may be imposed on interest on and, subject to the proposed Treasury Regulations discussed below, gross proceeds from the sale, redemption, retirement or other disposition of a debt obligation of a US person (and certain non-US persons engaged in a trade or business in the United States) paid to a foreign financial institution or to a non-financial foreign entity, unless:

1. the foreign financial institution enters into an agreement with the IRS and undertakes certain investigation, reporting and other required obligations;
2. the non-financial foreign entity either certifies it does not have any substantial US owners or furnishes identifying information regarding each substantial US owner; or
3. the foreign financial institution or non-financial foreign entity otherwise qualifies for an exemption from these rules.

Foreign financial institutions located in jurisdictions that have an intergovernmental agreement with the United States governing these rules may be subject to different rules. FATCA withholding tax generally applies to payments of US-source interest made on or after 1 July 2014, and to payments of gross proceeds from a sale or other disposition of debt obligations producing US-source interest on or after 1 January 2019. However, proposed Treasury Regulations eliminate FATCA withholding on payments of gross proceeds entirely. Taxpayers generally may rely on these proposed Treasury Regulations until final Treasury Regulations are issued.

Deductions

Interest or original issue discount accruing on an obligation properly treated as debt for US federal income tax purposes will be deductible as interest or original issue discount accrues, subject to applicable limitations.

The US tax reform at the end of 2017 enacted a new limitation on interest expense deductions for most businesses under which, in general, net interest deduction is limited to 30% of "adjusted taxable income" of the relevant taxpayer. For this purpose, US corporations filing a consolidated return for US federal income tax purposes may be treated as a single taxpayer. For tax years beginning after 2021 but before the end of 2024, adjusted taxable income was largely similar to earnings before interest and taxes. For tax years beginning after 2024, under the One Big Beautiful Bill Act (OBBBA) legislation, adjusted taxable income is largely similar to earnings before interest, taxes, depreciation and amortisation (ie, as it originally had been under US tax reform prior to expiration

in 2021). The OBBBA also now applies the limitation on interest expense deductions to capitalised interest (subject to certain exceptions).

If a debt obligation is issued by a corporation with a "significant original issue discount" for US federal income tax purposes, matures more than five years after the issue date and its yield exceeds certain thresholds, the debt would be treated as an "applicable high-yield debt obligation", in which case the original issue discount may not be deducted until paid and the deduction of a portion of the original issue discount on the debt may be permanently disallowed. These limitations can be avoided if the debt obligation provides for adequate partial prepayments after the fifth year (AHYDO catch-up payments).

There could be other limitations on deductions if the lender is related to the borrower, or if the debt obligation is convertible or payable in equity (or equity-like) instruments.

Credit support

Historically, non-US affiliates that are treated as controlled foreign corporations for US federal income tax purposes have not provided guarantees to support the debt obligations of a US borrower, because such a guarantee would result in a deemed dividend of earnings of such controlled foreign corporations to its direct or indirect US shareholders. In addition, to avoid a deemed dividend, no assets of a controlled foreign corporation must be pledged to support the debt obligations of a US borrower related to the controlled foreign corporation, and only up to two-thirds of the voting stock of a first-tier controlled foreign corporation should be pledged in support of such debt obligations. A controlled foreign corporation generally means a foreign corporation that is directly or indirectly or by attribution owned, in the aggregate, by more than 50% (based on vote or value) by US shareholders. A US shareholder in this context generally means a shareholder who is a US person and owns at least 10% of the foreign corporation (by vote or value).

The US tax reform at the end of 2017 and subsequent guidance issued by the Treasury, however, opened possibilities for obtaining credit support from a controlled foreign corporation without causing material adverse tax consequences arising from a deemed dividend (discussed above). More specifically, Treasury Regulations issued in May 2019 effectively turned off the deemed dividend rule in respect of earnings of a foreign subsidiary that is a controlled foreign corporation (CFC) when the foreign subsidiary guarantees or provides certain pledges in support of debt of a related US borrower, to the extent any deemed dividend could have qualified for deductions for foreign-source dividends allowed under the US tax reform. Such deductions generally may be allowed provided that the following conditions are met:

1. the US corporate borrower (or its US corporate affiliate that owns the relevant foreign subsidiary) satisfies a one-year holding period requirement (and this requirement may be satisfied retrospectively, by continuing to own the CFC after the date of the deemed dividend);
2. the dividend is not a "hybrid dividend" (generally, a dividend for which the foreign subsidiary would receive a deduction or other tax benefit with respect to taxes imposed by a foreign country had the foreign subsidiary paid an actual dividend); and
3.

the dividend is foreign source (generally meaning the foreign subsidiary does not own a US business or US assets).

Security and guarantees

Guarantees

Guarantees of obligations are typically provided by all material wholly owned domestic subsidiaries and the direct parent (if any) of the borrower. Depending on the business deal, non-wholly owned subsidiaries also may serve as guarantors, though that is less common. While there are corporate limitations on the value of guarantees by subsidiaries of the obligations of their parent entities, these limitations typically do not affect the taking of guarantees, only potentially the value thereof in an enforcement or bankruptcy proceeding. Nevertheless, particularly in the case of non-wholly owned subsidiaries, the organisational documents of guarantors should be reviewed to ensure that any guarantees are within the legal capacity of the guarantor. In the case of a guarantee that is required by the principal obligation and is being issued contemporaneously with the principal obligation, separate consideration to the guarantor is not required under New York law nor the law of many other states, although law on this matter varies among the states. Where the guarantee is not contemporaneous with the principal obligation, New York law provides that such guarantee is enforceable so long as any consideration is recited in the guarantee and proven to have been given, and would be valid consideration but for the time that it was given or performed.[1] The Restatement of the Law (Third), Suretyship and Guaranty takes a similar position, but not all states follow this approach and in some states separate consideration may be required for a guarantee, particularly one executed after the primary obligation. For example, section 2792 of the California Civil Code provides that:

> Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

In addition, as noted above, the guarantees of obligations of a US borrower provided by subsidiaries organised outside of the United States may result in adverse tax consequences, although the tax consequences are mitigated following the 2017 US tax reform. Regardless, as a matter of market practice, subsidiaries outside of the United States typically do not provide guarantees of obligations of a US borrower unless such guarantees are considered to be an important business condition that outweighs the potential cost and time of the diligence required to confirm that any resulting tax consequences are sufficiently limited.

Whether the guarantee is immediately enforceable would depend on the terms of the guarantee. A guarantee of collection (which is uncommon) would generally require the holder of the guaranteed obligation to first exhaust its remedies against the principal obligor prior to seeking payment from the guarantor (unless the principal obligor is

insolvent or the subject of an insolvency proceeding). In contrast, guarantees of payment, which are much more typical, do not require the holder of the guaranteed obligation to pursue its remedies against the principal obligor prior to seeking to enforce the guarantee. In most leveraged finance transactions, the guarantee is intended to be absolute and unconditional, which means that the guarantor waives all possible suretyship and other waivers to enforcement. If the secured obligations include hedging obligations, the guarantor must qualify as an eligible contract participant (ECP) to guarantee the hedging obligations. An ECP includes a corporation, partnership or other entity that:

1. has total assets exceeding US$10 million; or
2. has a net worth exceeding US$1 million and enters into a swap in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business.

Typically, both the guarantee and the security agreement will exclude any swap obligations of any person that is not an ECP.

Security

Security interests are most commonly taken over substantially all assets (other than real property, which is separately negotiated) in a single security agreement. These assets may include:

1. general intangibles, including contract rights and intellectual property;
2. accounts receivable;
3. goods, including equipment, movable assets and inventory;
4. securities and securities accounts; and
5. cash deposits.

The single security agreement typically is governed by the law of the same state that governs the loan agreement, although under the law generally applicable to security interests in personal property in the United States – article 9 of the Uniform Commercial Code (UCC) – the assets intended to be covered by the security agreement may be located outside of the state or owned by entities organised under the law of another state, or both. Such security interests can, and typically do, also extend to after-acquired assets. Interests in real property, whether owned or leased, need to be addressed in separate mortgage agreements (or their local law equivalent) enforceable under the state in which such real property is located.

Regardless of the type of security interest, the scope of the secured claim or guaranteed obligation can be a single claim, or a multitude of present or future claims, or both. To specify future secured claims or guaranteed obligations, a general description would suffice provided that these claims are reasonably identified and determinable. A security interest in personal property is said to have “attached” when it becomes enforceable against the grantor; it is “perfected” when it is enforceable against third parties, such

as other secured parties, lienholders or the grantor's trustee in a US bankruptcy. The perfection method for each type of these security interests is discussed in more detail below.

It is essential to bear in mind that certain transactions, collateral and grantors are excluded from the UCC either in whole or in part. For example, in most cases, perfection of a security interest in titled motor vehicles will require compliance with the applicable state motor vehicles laws. With respect to motor vehicles titled in New York, a lien may be noted on the title by filing the appropriate documents with the Commissioner of the New York State Department of Motor Vehicles.

Creation and perfection

To create a valid security interest in those categories of collateral governed by the UCC, a grantor must execute or authenticate a written or electronic security agreement that provides an adequate description of the collateral. The grantor must have rights in the collateral or the power to transfer such rights, and value must be given. A security interest in most types of collateral governed by the UCC may generally be perfected by the filing of a notice filing under the UCC, referred to as a UCC-1 financing statement. Although, as described below, certain assets may require actions beyond the filing of a financing statement, in many large transactions borrowers are able to limit the lender's ability to perfect the security to the filing of UCC financing statements, domestic intellectual property filings and the possession of certain equity interests and perhaps large dollar instruments.

Receivables

In addition to the general rules set forth above, if the receivable is evidenced by an instrument or chattel paper (a receivable secured by a specific good, such as a loan secured by a particular automobile, or a lease of specific goods, such as a lease of an automobile), perfection by possession or control of the instrument or chattel paper is preferable to perfection by a UCC financing statement as possession or control may entitle the secured party to higher priority and protect the secured party from third parties acquiring better rights in the collateral. Possession means physical possession of the original instrument or tangible written chattel paper by the secured party or an agent of the secured party (the grantor cannot be the agent of the secured party for purposes of perfection by possession). In the case of a chattel paper that exists solely in electronic form, an electronic equivalent of possession known as "control" is legally possible; however, the rules are complex and counsel should be consulted if this method of perfection is desired. As noted earlier, if the underlying obligor is a federal, state or local governmental entity, compliance with various special laws applicable to these obligors may be necessary or advisable. Recent revisions to the UCC discussed below, which are currently in effect in roughly three-quarters of states and pending in several others, also permit the creation of controllable accounts receivable and controllable payment intangibles, which may be perfected by control.

Movable assets and inventory

Consistent with the general rule, a security interest in inventory and equipment generally is perfected by the filing of a UCC financing statement. For most US corporations, limited liability companies and limited partnerships, the UCC financing statement would be filed in the jurisdiction in which that entity was formed, although there are exceptions for certain entities and collateral.

Securities and securities accounts

Unlike most other collateral, an oral security agreement with respect to securities and securities accounts can be sufficient in certain circumstances; however, such agreements are exceedingly rare, and in leveraged finance transactions a written or electronic security agreement is customary and advisable. The UCC provides separate perfection rules for each of the three methods by which a grantor may hold securities. A grantor may hold securities in the form of certificated securities issued directly to the grantor by the issuer of the security. This is a common way for a parent corporation to hold shares in a subsidiary corporation. Perfection of a security interest in a certificated security can be accomplished by either the filing of a UCC financing statement or by the secured party taking physical possession of the original share certificate either directly or through an agent of the secured party (the grantor cannot be the agent of the secured party for purposes of perfection by possession). Perfection by possession of the share certificate is preferable to perfection by a UCC financing statement as possession entitles the secured party to higher priority, and may protect the secured party from third parties acquiring better rights in the collateral. Although an endorsement is not required for perfection, there can be additional priority advantages from obtaining an endorsement, and the endorsement can help facilitate any disposition of the security upon foreclosure. It is customary in leveraged finance transactions for the share certificate to be delivered to the secured party and accompanied by a stock transfer power duly executed in blank.

Another method of holding securities is in the form of uncertificated interests registered directly on the books and records of the issuer of the security or a transfer agent on behalf of the issuer. Perfection of a security interest in uncertificated securities can be accomplished by either the filing of a UCC financing statement or by the secured party obtaining control thereof. Control can be achieved by the secured party entering into an agreement with the issuer whereby the issuer agrees that it will comply with the instructions originated by the secured party directing the transfer or redemption of the security without further consent by the grantor. Control can also be achieved by the secured party becoming the registered owner of the uncertificated securities, although as a method of perfection that is less common. Perfection by control is preferable to perfection by a UCC financing statement as control entitles the secured party to higher priority than a secured party that is perfected solely by the filing of a UCC financing statement, and may protect the secured party from third parties acquiring better rights in the collateral.

The final method of holding securities is through a securities account maintained by a financial institution referred to as a securities intermediary. This is the most common method of holding investment securities (whether debt or equity). The interest of the grantor in the securities maintained in a securities account is referred to as a security entitlement. Perfection of a security interest in these security entitlements can be accomplished by either the filing of a UCC financing statement or by the secured party obtaining control thereof. Control can be accomplished by the secured party entering into

an agreement, commonly referred to as a securities account control agreement, with the securities intermediary whereby the securities intermediary agrees that it will comply with the instructions originated by the secured party directing the transfer or redemption of the underlying security without further consent by the grantor. Control also can be achieved by the secured party becoming the owner of the security entitlement on the books and records of the securities intermediary. As with other methods of holding securities described above, perfection by control is preferable to perfection by a UCC financing statement, as control entitles the secured party to higher priority and may protect the secured party from third parties acquiring better rights in the collateral. The United States is a party to the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Convention). The Hague Convention contains choice of law rules applicable to the law governing, among other things, perfection of a security interest in securities held in a securities account, and contains limitations on the parties' ability to select the law governing security interest. If the relevant securities intermediary does not maintain a qualifying office in the United States, the choice of US law or the law of a US state will not be respected.

Many US companies are not organised as corporations, but rather as limited liability companies or limited partnerships. Interests in most limited liability companies and limited partnerships – even if constituting "securities" under other applicable law, such as the United States Securities Act of 1933 – would not be classified as securities under the UCC unless the issuer makes a voluntary election to so treat the membership interests or partnership interests, or the interests are publicly traded. If the interests are not securities and are not credited to a securities account, they will be viewed as "general intangibles", which can only be perfected by the filing of an appropriate UCC financing statement.

Cash deposits

Except as proceeds of other collateral, a security interest in deposit accounts can only be perfected by control, and the filing of a financing statement under the UCC would not perfect such security interest.

There are several methods of obtaining control. If the deposit bank that establishes and maintains the deposit account is the same legal entity as the secured party, then the secured party is deemed to be in control of the deposit account and thus perfected automatically. Historically, there has been a question as to whether this automatic perfection was available where the secured party is acting in a representative capacity (eg, as an agent for its affiliates or a group of lenders). Amendments to the official comments of the UCC support the proposition that automatic perfection should be available even where the secured party is acting in a representative capacity. However, even in these cases, it is common for there to also be a deposit account control agreement both as "belts and suspenders", and also because a deposit account control agreement has other provisions beyond mere control that may be helpful (clear choice of law rules, rules on set-off, subordination of the deposit bank's security interest and so on).

The more common method for most types of financing transactions would be control by agreement, commonly referred to as a "deposit account control agreement", whereby the debtor, the secured party and the deposit bank enter into a written agreement pursuant to which the deposit bank agrees to comply with all instructions issued by the secured party directing disposition of funds in the deposit account without further consent of the debtor.

Another method of control would be by the secured party becoming the deposit bank's customer with respect to the deposit account. This method is not commonly used for operating accounts, but it is more common for special accounts to which the borrower is not intended to have access, such as an account cash collateralising a letter of credit.

Recent amendments to the UCC provide two additional methods of control:

1. if the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest in the deposit account; or
2. if another person (other than the debtor) has or obtains control of the deposit account and acknowledges that it has control on behalf of the secured party.

Intellectual property

A security interest in US-registered copyrights may be perfected solely by filing a copyright mortgage or copyright security agreement with the US Copyright Office. For patents and trademarks, although there is some lingering historical uncertainty as to the extent to which the UCC is pre-empted by federal law as to perfection, it is increasingly clear that these interests are perfected by the UCC financing statement. However, it is nonetheless customary to file a short-form security agreement with the US Patent and Trademark Office, both because of some lingering uncertainty and because these filings may help protect against a buyer of the patent or trademark taking free of the security interest.

Controllable electronic records

A new article 12 to the UCC and conforming amendments to the other articles of the UCC has now been enacted in roughly three-quarters of states and is pending in several others. These revisions create new methods of perfection for many digital assets that are in the form of controllable electronic records, such as cryptocurrencies and NFTs, as well as controllable accounts receivable and controllable payment intangibles. "Controllable electronic record" means a record stored in an electronic medium that can be subject to control under section 12-105. While the control rules are too complex for detailed discussion here, in general a secured party must have the power to avail itself of substantially all the benefits of the electronic record and, subject to certain exceptions, the exclusive power to prevent others from availing themselves of such benefits, as well as the power to transfer control of the record to another person.

Enforcement

Security interests are immediately enforceable upon the occurrence of an enforcement event (commonly an "event of default" under the loan documentation), subject to any automatic stay if the grantor is subject to a bankruptcy proceeding. Although a secured party has the option of seeking judicial enforcement of its security interest, there are a variety of "self-help" remedies available under the UCC without the necessity of judicial action, and self-help would be much more common than resorting to judicial remedies. Any enforcement action by a secured party must be executed without a breach of the peace, and any sale of collateral by the secured party must be commercially reasonable. Various

notices are required in connection with any enforcement action. In addition, if the security interest at issue is securities or securities accounts, or both, it is advisable to review the organisational documents of the issuer of the securities as well as the applicable corporate or other law pursuant to which the issuer of the pledged securities was organised to determine whether there are any prohibitions, restrictions or consent requirements applicable to the creation of the security interest or the exercise of remedies by the secured party. Enforcement of security interests are, more often than not, accomplished in connection with a proceeding under the US Bankruptcy Code.

Bankruptcy and preference concerns

In the event of an insolvency proceeding over a guarantor or the grantor of a security interest, treatment of the guarantees and security interests will depend on various considerations. Importantly, if the security interest is not properly perfected, it will be set aside. Even if the security interest is properly perfected, guarantees and security may be subject to avoidance by the bankruptcy trustee on a number of theories.

Upstream and cross-stream credit supports consist of guarantees and security created by a subsidiary to support the obligations of its parent company or of an affiliate controlled by the common parent company. Both forms of credit support are common in the market and, subject to any restrictions in the organisational documents or under the law under which the entity was formed, such guarantees and security interests are permissible. Despite their widespread use, upstream and cross-stream credit supports are subject to certain potential vulnerabilities. The biggest potential vulnerability is that these guarantees or security interests may be invalidated under federal or state fraudulent conveyance laws. Under the fraudulent conveyance provisions of the Bankruptcy Code and similar state fraudulent conveyance laws, even absent fraudulent intent, an upstream or cross-stream guaranty, as well as any security interest securing such guaranty, may be voidable as a fraudulent transfer if the provider of the guarantee or security interest:

1. receives less than "reasonably equivalent value" in exchange for taking on the credit support obligations and the provider was insolvent at that time or as a result of the transfer (the incurrence of an obligation, including subsequent extensions of credit, is treated as a transfer);
2. was engaged in a business for which it had unreasonably small capital; or
3. intended to incur or believed it would incur debts beyond its ability to repay.

Certain transfers made or obligations incurred with actual intent to hinder, delay or defraud creditors may be avoided regardless of whether the transferor received reasonably equivalent value or fair consideration for the transfer or obligation. Additionally, New York and other state laws contain fraudulent conveyance provisions that are very similar to those under the Bankruptcy Code. While federal fraudulent conveyance law covers transactions that occurred up to two years prior to the date on which the bankruptcy case was commenced, if state law is applicable many states have a longer look-back period.

Significant risks to be aware of are the facts that could cause the security interest to be viewed as a preference. In general, a security interest that is granted in respect of antecedent debt (ie, debt that precedes the creation of the security interest) or that is

granted substantially simultaneously with the incurrence of the debt being secured, but not perfected within 30 days of the creation of the security interest, would be at risk of being set aside as a preference if, in either case, the grantor filed for bankruptcy within 90 days of the security interest becoming perfected (or one year if the beneficiary of the security interest is an "insider" of the grantor). If the security interest in question is granted substantially contemporaneous with the incurrence of the debt being secured and is perfected within 30 days of its creation, it is generally exempt from attack as a preference.

Priority of claims

Priority generally

Assuming that the security interest is properly perfected and is not avoided (eg, as a preference), the secured party will be entitled to receive the value of its interest in the collateral up to the amount of its secured obligations. The value of a secured party's interest in its collateral is generally the value of the collateral less the amount of any obligations secured by a security interest or lien that is senior in priority under applicable state law. All properly perfected secured claims would be paid (up to the value of the collateral securing such claims) prior to the payment of any unsecured claims or claims secured by a security interest that is junior in priority either under applicable law or by contract. In addition, various administrative and other claims given priority by law may need to be satisfied prior to the payment of any claims. The status and priority of secured creditors are determined almost exclusively by reference to applicable non-insolvency law, and the Bankruptcy Code generally does not affect status and priority. Under the Bankruptcy Code, the bankruptcy court may grant a security interest with priority over all other security interests to a lender providing new financing to the borrower; however, such security interests may only be granted if either the lenders being primed by the new security interest consent, or if the bankruptcy court decides that the terms of the transaction provide the lenders being primed with adequate protection – a judicial determination that the recovery of the lenders being primed on the secured claims should not be negatively affected by the new financing and security interest.

Equitable subordination

Equitable subordination is generally not an issue except under specific fact patterns. These facts usually include a lender with an equity or other position that allows the lender to exercise some level of control over the borrower, with the borrower using the position to the detriment of other creditors. The facts supporting equitable subordination can also include other inequitable conducts that the bankruptcy court determines are sufficiently extreme and have caused damage to the borrower sufficient to warrant an equitable remedy; for example, where a competitor of the borrower acquires the loan and then deliberately obstructs the reorganisation process in the hopes of forcing the borrower to liquidate.

Treatment of intercreditor or subordination agreements

Section 510(a) of the Bankruptcy Code specifically provides for the enforceability of "subordination agreements" during a bankruptcy case. Thus, intercreditor and subordination agreements are generally enforceable in bankruptcy to the same extent that they are enforceable under state law. A bankruptcy court will generally enforce the parties' agreement as to the priority of their respective claims (whether secured or unsecured). A bankruptcy court will also enforce many (although not all) of the waivers of rights under the Bankruptcy Code that junior secured parties typically agree to in second-lien transactions.

Jurisdiction

The United States is a multi-jurisdictional country, and the loan agreement needs to select the law of a particular US state (rather than federal law) as the governing law. The choice by the contractual parties of a particular state's law to govern a contract may not be given effect if it does not bear a reasonable relationship with the transaction or parties. A few states, such as New York, permit the choice of their law to govern a contract even in the absence of any contacts if the contract satisfies certain dollar thresholds; however, another US state may not respect this choice of law if litigated in the other US state in the absence of a reasonable relationship.

Each state has somewhat different considerations in determining whether to give effect to a choice of law (other than the law of the applicable state). Typically, a choice of law will be given effect if:

1. the chosen law has a reasonable and substantial relationship and sufficient contacts with the underlying agreement, or the transaction contemplated thereby, and the chosen law has the most significant contacts with the matter in dispute;
2. application of the chosen law does not violate or contravene, nor is contrary or offensive to, a public or fundamental policy of the state or of another jurisdiction whose law would apply in the absence of an effective choice of law by the parties to the underlying agreement (which may be another US state or a foreign jurisdiction);
3. the chosen law was not induced or procured by fraud; and
4. the matter of law for which the chosen law is to be applied has been previously addressed by the chosen law, and the chosen law differs from the law that would be applied in the absence of the chosen law.

Under the Restatement (Second) of Conflicts of Law, a court may decline to apply the law of a jurisdiction chosen by the parties to a contract (which may be another US state or a foreign jurisdiction) when it is necessary to protect the fundamental policies of the state, the law of which would otherwise apply; and the state has a materially greater interest in the determination of a particular issue than the state of the chosen law. Regardless of which state's law governs a security interest, the UCC contains mandatory choice of law rules for perfection and priority that will frequently result in the law of a different state governing some or all of the perfection or priority of any security interest.

Acquisitions of public companies

Methods of acquisition

Acquisitions of public companies are generally accomplished through one of two methods. Either a consensual process by which the board of the target and the acquirer approve the acquisition and then solicit approval of the transaction by a majority vote of shareholders or through a direct tender offer for the shares followed by a squeeze-out merger of any remaining minority holdings (which may or may not be consensual at launch). While there are considerable federal regulatory requirements relating to public company takeovers as well as significant state laws that will affect the structuring of the acquisition, other than the margin regulations mentioned earlier, these rules are not directed at the financing. Acquisition financing typically has highly limited conditionality driven not by statute, but by both the competitive dynamics among potential bidders and the fiduciary duties of the board to approve the "most certain" transaction.

Disclosure of financing terms

As part of the public disclosure required for the solicitation of votes on a merger agreement or the solicitation of shares pursuant to the tender offer, generic sources and uses, which would include fees, must be provided; however, market flex terms generally do not need to be disclosed. To the extent the borrower or the target have publicly traded securities, the securities rules that apply to material non-public information (MNPI) apply, and syndication processes are generally structured to allow lenders who do not wish to receive MNPI to have access only to materials that do not contain MNPI.

Margin regulations

Financing of acquisitions of public companies, including take-private transactions, can often raise issues under the US margin regulations discussed above. Even in the absence of a pledge of publicly traded securities, certain transaction structures can create indirect security over such securities. The existence of indirect security can trigger the margin regulation restrictions on the amount of credit that can be extended, either as loans or debt securities.

Special considerations

Given the competitive loan environment, some sponsors and borrowers have pursued a dual track, negotiating terms in both the broadly syndicated loan (BSL) and private credit markets. A number of borrowers refinanced their private credit deals in the BSL market due to lower borrowing costs and a growing number of BSL deals were refinanced with private credit deals to extend out tenor. Private credit responded with lowering spreads, and continuing to offer flexible terms, such as delayed draw term loans and PIK loans. Direct lenders also partnered with banks to create joint ventures around both sourcing and funding, underscoring the interconnection between the two types of lenders. Though competition has received much of the attention, the partnerships allow bankers a broader

set of tools that can include private credit as an option. Ultimately, the strength in both markets in 2024 demonstrate they are able to coexist successfully.

Outlook and conclusions

Market sentiment headed into 2026 continued to be extremely positive after the strong performance of the loan markets in 2025. Market participants entered the year hopeful that M&A/LBO volume would pick up due to lower anticipated base rates, but unforeseen geopolitical risk resulted in slower M&A/LBO activity. Continued and evolving competition between the broadly syndicated and private credit markets is expected, with spreads reflecting that competition. In private credit, concerns around AI impacts and software exposure have led to some short-term stress and redemptions, but overall the best asset managers have been able to differentiate themselves and manage redemptions. The market continues to be focused on terms that have been utilised in certain liability management transactions over the past few years, with documentation attempting to keep pace with dynamic and creative new liability management tactics. In those transactions, borrowers and a subset of lenders have utilised the basket capacity and voting provisions of various financing agreements in a manner both adverse and unexpected by a material portion of the market participants. Borrowers have used new and creative structures to address maturity wall issues and create liquidity using flexibility in documentation, and lenders in turn have renewed focus on the provisions that enabled them.

Endnotes

1 Section 5-1105 of the New York General Obligations Law. ^ Back to section

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