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# Controlling the syndicate

## Syndicates are pushing harder on composition

The issue of a private equity sponsor's ability to exercise control over the composition of the banking syndicate is one of the hottest topics of debate in the market. Not too many years ago most private equity sponsors had total consent rights regarding assignments and transfers to new lenders, other than during an event of default. This is no longer the case. And there is no clear market position on this question.

## Assignments and transfers

The debate on assignments and transfers focuses on three distinct periods: (i) during the syndication process occurring on or before the closing date; (ii) during the process of general syndication after the closing date; and (iii) after the close of general syndication.

## Syndication on or before closing

Although the market is not settled on syndication on or before the closing date, the common positions are:

- No syndication before closing, so the sponsor only takes credit risk on the mandated lead arrangers (or a small group). This is different for transactions in the US, or for re-financings or non-acquisition financings, where the arrangers might seek a limited syndication at or immediately after closing;
- The borrower has consent rights to any assignments or transfers on or before closing;
- The borrower and the arranger agree a list of institutions that are acceptable to the borrower or agree a detailed syndication strategy. Consent is not required for assignments and transfers to these institutions (but is required for assignments or transfers to any other institution); or
- The borrower is only entitled to consultation with the arranger.

In general, arrangers and underwriters can sympathize with the argument that the borrower has paid a substantial fee for the facilities underwritten by particular institutions and wants to know that they will be there with 100% of the committed funds at closing. Having a number of other lenders involved in the documentation process will often lead to delays and difficulties in agreeing a final document. A larger number of lenders can also create difficulties on the closing date if the facility agent requires funding confirmation from all lenders before providing the funds to the borrower. If syndication is permitted before closing, it is not unusual to provide that the underwriter will not be relieved from its commitment to fund if the new lenders fail to fund at closing.

## General syndication after closing

The arranger might be even more concerned about granting consent rights during the general syndication. The positions most commonly seen in this situation are:

- The borrower and the arranger agree a list of institutions acceptable to the borrower. Consent is not required for assignments and transfers to these institutions (but it is required for any other institution);
- The borrower has consultation rights before any assignment or transfer; or
- The borrower has consent rights to any assignment or transfer.

These are sensitive provisions, both for borrowers and sponsors, and the agreed position varies from deal to deal. But both the arranger and the sponsor should focus on successful syndication – if for no other reason than to remove the possibility of triggering margin and/or structural flex of the facilities. A well-considered syndication strategy is a critical part of this process, and having an agreed list of institutions will help alleviate arrangers' and sponsors' concerns. After all, most sponsors are repeatedly in the market on financing transactions, have a good feel for institutions that have been (and continue to be) supportive and can play a big role in achieving a successful syndication.

## Assignments and transfers after closing

This is the most un-settled part of the assignment and transfer question today. Sponsors are increasingly seeking to regain their lost position of having consent rights to any assignments and transfers after the close of syndication. (There is a big difference between US and UK private equity loan practice. Borrower consent rights are standard in New York law loan documentation for most private equity sponsors.) Many positions are being discussed in this regard:

- The borrower and the arranger agree a list of institutions that are not acceptable, so no lender can transfer to these institutions;
- The borrower has consent rights before any assignment or transfer, except when an event of default is outstanding;
- The borrower has consent rights to any assignment or transfer, except during certain events of default (such as payment or insolvency defaults); or
- Lenders are absolutely restricted from transfers to any competitor institution or one that holds the debt on behalf of a competitor.

These are also sensitive provisions both for borrowers and sponsors, and the agreed position varies. In cases where lenders will not agree to the borrower having consent rights, even with the requirement to act reasonably, a number of other provisions are being seen, designed to give the borrower additional protection.

## Right to information

In many recent transactions, the borrower has had the right to request and receive reasonably detailed information of all the lenders' identities, commitments and principal amounts outstanding.

Slightly more aggressively, some deals are also requiring lenders to notify the facility agent and the borrower in writing if it sub-participates any of its commitments or participates any of its loans, providing details of the entity to which the sub-participation was made.

## Confidentiality undertaking

Another provision seen recently is that the borrower must be notified in advance of each potential assignment, transfer or sub-participation, and receive a copy of the executed confidentiality undertaking from any person to which any finance party distributes information about the acquisition, the group or the facilities. This links to the borrower's requirement regarding information about the lender group's composition (including sub-participants).

## Specific exclusions

A concept recently introduced provides for an absolute prohibition on assignments, transfers and sub-participations to industrial competitors (or anyone acting on behalf of a competitor, because a competitor might involve an investment bank for this purpose). This provision is designed to prevent industrial competitors from becoming lenders to obtain financial and other information about the group. This would also extend to purchases by another private equity sponsor that has a portfolio company that would be a competitor.

Where the borrower already has (at all times) consent rights (not to be unreasonably withheld or delayed), the new provision can state that it would not be unreasonable for the borrower to withhold its consent regarding any proposed assignment, transfer or sub-participation, if the proposed transferee, assignee or sub-participant: (i) has refused to consent to any matter in any transaction sponsored by the relevant sponsor, where the majority lenders in that transaction did consent; (ii) has refused or failed to fund an advance in any transaction sponsored by the sponsor; (iii) has invoked or sought to invoke any obligation on a borrower to pay additional amounts in respect of tax gross-up, tax indemnity or increased costs provisions in any transaction sponsored by the sponsor; or (iv) is an industrial competitor of any member of the group or the target group.

## Majority lenders definition

In senior facilities, it is standard for the definition of majority lenders to refer to 66.6% of the senior lenders' loans or commitments. But it is becoming increasingly common to include a snooze-and-lose provision. This provides that, if a

### Structural adjustments

Structural adjustments clauses allow increases to the size of the facilities to, for example, finance an acquisition without needing unanimous bank consent or worse, a refinancing of the entire facilities. Typically each of the following changes to

finance party does not accept or reject an amendment or

the finance documents would be a structural adjustment:

- the introduction of any additional tranche or facility under the finance documents (whatever its ranking);
- any increase in any commitment, any extension of maturity or availability, any redenomination into another currency and any extension of the date for the payment of any amount under the facilities; and
- any changes to the finance documents consequential on, or required to implement or reflect any of the foregoing.

The clause allows any structural adjustment subject only to (a) the consent of each lender participating in the additional tranche or facility or increasing, extending or redenominating its commitments or extending a scheduled payment due to it and (b) the consent of the majority senior lenders (based on their commitments prior to the adjustment). This consent may be set at a higher threshold of a 75% or 80% super majority. Care must also be taken to ensure that such adjustment fits within any senior headroom concept in the intercreditor agreement, or at least that amending the amount of senior headroom requires only the majority mezzanine lenders.

waiver consent request within, say, 15 business days of it being made, that lender's commitment and/or participation is not counted in the total commitments or participations under the relevant facility when ascertaining whether a certain percentage has been obtained to approve an amendment or waiver consent request.

In some transactions, amendments and consents relating to specific provisions (for example permitted acquisitions) have only required the consent of a simple majority of lenders (that is, 50.1%). Sponsors are expected to continue to try to expand the number of provisions that only require simple majority consent.

With respect to mezzanine facilities, it is now quite regular to see the majority lenders definition having a 50.1% threshold. A helpful twist on this is to have a 50.1% threshold except in relation to enforcement and acceleration, which requires 66.6% of the lenders to vote in favour. As with the senior facilities, snooze-or-lose provisions are becoming common in mezzanine facilities.

## Unanimous consent matters

The scope of matters requiring the consent of all of the lenders is now fairly standard, with perhaps the exception of a carve-out for structural adjustments (see Structural adjustments box).

Typically, unanimous decisions are limited to:

- a reduction in margins (other than under applicable margin ratchets), fees (other than ar