PANORAMIC

ACQUISITION FINANCE

United Kingdom



LEXOLOGY

Acquisition Finance

Contributing Editors

Alfred Y. Xue, Daniel C. Seale, Conray C. Tseng, Jason R Bosworth and Peter J Sluka

Latham & Watkins LLP

Generated on: June 13, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Explore on **Lexology**

Contents

Acquisition Finance

GENERAL STRUCTURING OF FINANCING

Types of debt and junior capital
Choice of law
Restrictions on cross-border acquisitions and lending
Certain funds
Restrictions on use of proceeds
Licensing requirements for financing
Withholding tax on debt repayments
Restrictions on interest
Indemnities
Assigning debt interests among lenders; syndication and distribution of debt
Requirements to act as agent or trustee
Debt buy-backs
Exit consents

GUARANTEES AND COLLATERAL

Related company guarantees
Assistance by the target
Types of security
Requirements for perfecting a security interest
Renewing a security interest
Stakeholder consent for guarantees
Granting collateral through an agent
Creditor protection before collateral release
Fraudulent transfer

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation
Level of commitment
Conditions precedent for funding
Flex provisions
Securities demands
Key terms for lenders
Take-private transactions
Public filing of commitment papers

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement
Debtor-in-possession financing
Stays and adequate protection against creditors

Clawbacks
Ranking of creditors and voting on reorganisation
Intercreditor agreements on liens
Discounted securities in insolvencies
Liability of secured creditors after enforcement

UPDATE AND TRENDS

Proposals and developments

LAW STATED DATE

Correct on:

Contributors

United Kingdom



Fried Frank Harris Shriver & Jacobson LLP

Neil Caddy	neil.caddy@friedfrank.com
Jons F Lehmann	jons.lehmann@friedfrank.com
Kris Paltoglou	kris.paltoglou@friedfrank.com

GENERAL STRUCTURING OF FINANCING

Types of debt and junior capital

What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt? Are the providers of such acquisition financing typically lead arrangers, commercial banks or private debt funds?

An acquisition financing will typically involve one or more newly formed special purpose vehicles (SPVs), funded by a mixture of debt and equity. Equity may be made available to the SPVs by means of share subscription or subordinated shareholder loans. The choice or split between pure equity and subordinated shareholder loans will be determined by a number of different factors.

Third-party debt financing can take the form of loans or bonds. There may be several layers of debt that are ranked in terms of priority (both in terms of payment and security). There could be senior loans with a combination of second lien debt, mezzanine debt, payment in kind debt at the holding company level and high-yield bonds beneath it, or there could be just senior debt (including senior secured high-yield bonds), or maybe senior or unitranche debt alongside a super senior revolving credit facility.

Acquisition financing is made available or arranged, or both, by a diverse range of lead arrangers, commercial banks and private debt funds. The involvement of each constituent has fluctuated over time and is generally driven by market conditions, buyer preference and the nature or jurisdiction of the target and/or the transaction. Over recent years the proportion of acquisition financing provided by private debt funds has increased substantially.

Law stated - 6 February 2024

Types of debt and junior capital

Are debt capital markets transactions (high-yield bonds) available to support acquisition financings in your jurisdiction? Are there restrictions applicable to such activities?

High-yield bonds can be made available to support acquisition financings and are often more prevalent in larger transactions where a combination of loan and bond finance is used and may be secured or unsecured, depending on the particular transaction. Typically, high yield bonds are arranged on a best efforts basis so will be coupled with an underwritten bridge financing, which will fund the acquisition if the bond is not placed in time and can be refinanced out of the proceeds of the bond issue once it is placed following closing. Relevant securities laws will impose various restrictions and requirements, in particular, in relation to which investors the bonds can be marketed to, the manner in which the offer is made, the form and substance of the documentation and the extent of disclosure of information.

Law stated - 6 February 2024

Types of debt and junior capital

Are private debt funds or direct lenders active in your jurisdiction to support acquisition financings? Do they provide unitranche debt facilities to buyers? Are there restrictions applicable to such providers and activities?

Yes, private debt funds and direct lenders remain an active and growing part of the acquisition finance market in the UK. Unitranche debt will typically be combined with a super-senior revolving credit facility to fund ongoing working capital for the underlying business. Private debt funds usually do not have the capacity to provide working capital facilities and these will be provided by a commercial bank with an intercreditor arrangement put in place. There are no specific additional restrictions that apply in relation to direct lenders in the UK.

Law stated - 6 February 2024

Types of debt and junior capital

Are private capital funds active in providing hybrid capital products (including debt-like preferred equity) in lieu of traditional subordinated or mezzanine debt? Are there restrictions applicable to such providers and activities?

While not as common as typical debt instruments, use of hybrid capital products, such as preferred equity investments, remain an active part of the acquisition financing market, particularly where traditional liquidity solutions are limited. The terms applicable to these hybrid capital products are highly negotiated and can be more equity like than debt like and vice versa depending on the particular circumstances of the relevant transaction. There are generally no specific additional restrictions that apply in relation to providing hybrid capital products in the UK.

Law stated - 6 February 2024

Choice of law

What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Acquisition and finance documents in the United Kingdom are most commonly governed by English law (or the law of England and Wales) as opposed to Scottish or Northern Irish law, as the other territories of the United Kingdom have their own laws. There is no such thing as 'UK law'. High-yield bond documentation will be governed by New York law, following the custom in that market. If a loan deal adopts high-yield style covenants, the credit agreement may provide that those covenants are to be construed in accordance with New York law (although the obligation to comply can nonetheless still be governed by English law – contracts that actually split the governing law can be problematic from an enforcement perspective).

English courts will generally recognise and give effect to the choice of a foreign law to govern the terms of a contract. This is in line with article 3.1 of Regulation (EC) No. 593/2008 (Rome

I), which, following the United Kingdom's exit from the European Union (Brexit), has been adopted into domestic law by virtue of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019. However, there are circumstances where this will not be the case or that rule is overridden.

Following Brexit, the Brussels Regulation (Council Regulation (EC) 44/2001) and the Recast Brussels Regulation (Regulation (EU) No. 1215/2012), which governed the allocation of jurisdiction and the reciprocal enforcement of judgments between EU member states and Denmark, have ceased to apply as between the United Kingdom and the EU. Proceedings initiated before the end of the transition period (on or before 31 December 2020) are still subject to the EU jurisdictional regime. Proceedings issued after the end of the transition period (from 1 January 2021) are subject to the 2005 Hague Convention on Choice of Court Agreements (the 2005 Hague Convention) and English common law rules. The 2005 Hague Convention broadly requires the courts of the United Kingdom to uphold exclusive jurisdiction clauses nominating the courts of a Hague Convention state. Under the common law regime, jurisdiction is generally founded on service of process. English courts will generally accept jurisdiction if the proceedings can be served on a defendant within the jurisdiction, if there is an English non-exclusive jurisdiction clause or based upon one or more common law jurisdictional gateways.

For certain foreign judgments that fall outside the 2005 Hague Convention or common law rules there are additional statutes (eg, the Administration of Justice Act 1920, which recognises the enforcement of judgments in most commonwealth countries and British overseas territories, and the Foreign Judgments (Reciprocal Enforcement) Act 1933, which applies to judgments from courts in Australia, Canada (except Nunavut and Quebec), Guernsey, India, the Isle of Man, Israel, Jersey and Pakistan) that may ensure that foreign judgments are recognised.

Law stated - 6 February 2024

Restrictions on cross-border acquisitions and lending

Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

Until recently, there were no real legal or regulatory impediments to foreign entities acquiring English incorporated entities, other than customary antitrust regulation, sanctions regimes and approvals in respect of regulated industries. However, the National Security and Investment Act 2021 (the NSI Act), which came into effect on 4 January 2022, has introduced wide powers to investigate and block acquisitions of entities and certain assets on the basis of national security in the UK. The NSI Act extends to a broad range of sectors that are deemed strategically sensitive, including defence, artificial intelligence, robotics and transport.

The acquisition of public companies in the UK is regulated by the City Code on Takeovers and Mergers (the Takeover Code), which controls how and when a public offer must be conducted. The acquisition of companies that are regulated (eg, under the Financial Services and Markets Act 2000 (FSMA)) may also require approval from the relevant regulator (eg, the Financial Conduct Authority (FCA)).

In respect of cross-border lending activity, authorisation is required under the FSMA to carry out certain regulated activities, such as accepting deposits or making loans to individuals including consumer mortgage loans. Corporate lending is generally not subject to FSMA consents or licences.

Law stated - 6 February 2024

Certain funds

Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

Yes – the Takeover Code (rule 2.7) applicable to acquisitions of public companies requires 'certain funds'. The offeror must ensure it can fulfil any cash consideration, and must have every reason to believe that it will continue to be able to fulfil the cash consideration, when an offer is made. A financial advisor must also provide a 'cash confirmation' to give additional comfort that the cash consideration will be paid.

While not required by law, it has become common market practice for private acquisitions to have no 'financing out', meaning that well-advised buyers (and sellers) will require certain funds financing commitments to ensure that the buyer will have the financial wherewithal to complete the transaction (albeit that in the private context a cash confirmation from a financial advisor will not be required).

Law stated - 6 February 2024

Restrictions on use of proceeds

Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

The use of proceeds will be prescribed by a purpose or use of proceeds clause in the debt documentation. In the case of an acquisition financing the purpose usually includes funding the purchase price, refinancing any outstanding debt of the buyer or target and financing or reimbursing any associated fees, costs and expenses. Any related revolving credit facility will likely be available for working capital or general corporate purposes.

Otherwise there are not typically any prescribed or prohibited uses of proceeds save that there may be sanction or anti-bribery related covenants that will not permit proceeds to be used in a manner that will breach sanction or anti-bribery laws.

Law stated - 6 February 2024

Licensing requirements for financing

What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction? Are there licensing requirements for non-bank entities providing such financings? Are there

any exceptions that permit non-bank entities to provide financings on a limited basis?

Corporate lending by itself is not a regulated activity in the UK and therefore there are no requirements to hold a licence when making a loan to an English company. There is no distinction, from a licensing perspective, between bank and non-bank lenders in the UK.

Law stated - 6 February 2024

Withholding tax on debt repayments

Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes? Are there structures that facilitate lending to borrowers by non-bank lenders and funds?

Withholding tax can be applicable to interest payments that have a UK source for UK tax purposes. The current rate is 20 per cent. Certain exemptions may be available to the requirement to withhold; however, the availability of such exemptions will be transaction-specific and may also depend on completion of administrative formalities.

Where withholding tax is applicable, the borrower is responsible for deducting the applicable tax from any UK source interest payment it makes. Should withholding tax become applicable as a result of a change of law after the time the recipient became a lender, it is common for the loan terms to require the borrower to 'gross up' those payments to take account of any withholding, so that the recipient continues to receive the amount they were expecting to receive as if there was no withholding. However, lenders that are not entitled to an exemption at the time they become a lender are not typically entitled to a gross-up.

Law stated - 6 February 2024

Restrictions on interest

Are there usury laws or other rules limiting the amount of interest that can be charged?

There are no usury or similar restrictions on the amount of interest that can be charged on corporate loans that are governed by English law, save that in certain circumstances transactions requiring high rates of interest could be vulnerable to avoidance claims as an extortionate transaction under section 244 of the Insolvency Act 1986. In addition, terms of a document providing for the payment by a party of any additional amount (including interest) as a consequence of a breach or default may be held to be unenforceable on the grounds that it is a penalty if it imposes a detriment which is out of all proportion to the legitimate interest of the innocent party.

Law stated - 6 February 2024

Indemnities

What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

A typical suite of indemnities will cover costs and expenses incurred in connection with documenting the transaction, amendments to the finance documents and preservation or enforcement of rights in connection with the finance documents. There will also likely be indemnities granted in respect of taxes, stamp duty, increased costs, break costs, broken funding costs, investigation of defaults and receiving payments in different currencies. Lenders and creditors will also provide indemnities for any liabilities incurred by facility and collateral agents in performing their roles.

Law stated - 6 February 2024

Assigning debt interests among lenders; syndication and distribution of debt

Can interests in debt be freely assigned, participated in or transferred among lenders? Are there restrictions to the syndication and distribution of acquisition-financing related debt?

Interests in debt can be freely assigned, transferred or participated in as a matter of English law. While bonds are typically freely tradeable, loan agreements will often require borrower consent to an assignment, transfer by novation or granting of a voting sub-participation unless such assignment, transfer or granting of a voting sub-participation is to another lender or an affiliate or related fund of an existing lender or if the assignee is on a pre-approved list. The occurrence of an event of default (or increasingly the occurrence of a specified list of material events of default) will also typically provide an exception to the borrower consent requirement. Assignments to competitors, distressed investors or defaulting lenders can also be expressly prohibited and assignees for undrawn facilities may be required to have a minimum credit rating.

Law stated - 6 February 2024

Requirements to act as agent or trustee

Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent? Are there licensing requirements to act in such capacities?

Trust and agency concepts are recognised under English law and it will be typical for either one of the banks (if the financing is provided by a bank or banks) or an independent third-party provider to act as facility agent (ie, administrative agent) and security agent or trustee (ie, collateral agent). There are no licensing or regulatory requirements for entities to perform the typical facility agent and security agent or trustee roles; however, in practice the banks and many independent agency or trustee providers may be registered with the FCA.

Law stated - 6 February 2024

Debt buy-backs

May a borrower or financial sponsor conduct a debt buy-back?

Yes. Credit agreements will typically include controls and parameters around this to ensure equality of treatment among lenders. Buy-backs by borrowers of loans typically occur via a bilateral process, open order process or solicitation process and may result in the debt being extinguished and will often only be permitted to be funded from certain sources. Buy-backs by sponsors will also be permitted provided that, unless the entities buying the debt are independent debt fund affiliates, the sponsors holding the debt will be largely disenfranchised for voting purposes and will not be entitled to participate in lender meetings.

Law stated - 6 February 2024

Exit consents

Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Ostensibly yes: English law-governed credit agreements can be amended with the consent of the majority lenders (typically 66 and two thirds per cent or increasingly more than 50 per cent following the US model). However, changes to key economic terms will often require unanimous or at least affected lender consent, namely, the consent of each lender that is affected by the proposed amendment; and in certain circumstances an English court may uphold a challenge to a consent passed by the requisite majority if they conclude that the consent constitutes an oppression on the minority or an abuse of power.

Law stated - 6 February 2024

GUARANTEES AND COLLATERAL

Related company guarantees

Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

There are no costs or taxes in the UK that are applicable to the provision of a guarantee in respect of the obligations of another company in the same group.

Subject to financial assistance restrictions and, if the company operates in a regulated industry, any regulatory controls that might exist, any guarantee provided by an English company must be in the best interests of that company and promote the success of that company for the benefit of its members. This will typically be memorialised in board or shareholder resolutions. Another consideration is whether or not the guarantee would reduce the net assets of the company providing the guarantee and therefore potentially constitute an unlawful distribution as an English company must have sufficient distributable reserves in order to be able to make a distribution to shareholders.

There are no limitations under English law on foreign-registered related companies providing guarantees on both a secured and unsecured basis, but local law restrictions may apply.

Law stated - 6 February 2024

Assistance by the target

Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

Subject to limited exceptions, the Companies Act 2006 imposes prohibitions on financial assistance in the context of the acquisition of shares in a public company and in the context of the acquisition of shares in a private company if the private company has a public company subsidiary that is providing financial assistance.

Financial assistance includes the giving of guarantees or security, gifts or loans made by the target company to assist with the acquisition. In the UK, financial assistance by an English company in respect of the acquisition of shares in a foreign holding company would not be subject to the financial assistance rules.

Financial assistance restrictions only apply to companies that are public companies at the time such assistance is given. It is possible and common, therefore, to re-register a public company as a private company to enable it and its subsidiaries to give financial assistance for the acquisition of its shares.

Law stated - 6 February 2024

Types of security

What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant? Are there limitations on security granted by a target to support its acquisition?

English law permits all asset security agreements commonly referred to as debentures to be entered into. An English law debenture will typically contain a mixture of security interests: mortgages (over real property), security assignments (over receivables and certain contracts), fixed charges (over certain specified asset categories) and a floating charge over all the assets and undertaking of the chargor. An English law debenture will be set up to cover future acquired assets and will include perfection steps for those future assets such as notices, delivery of title documents and similar requirements. In the case of the acquisition of real property, if a legal mortgage is to be granted over such assets then a new mortgage will need to be granted as it is not possible to create a legal mortgage over after-acquired real property.

Unless the financial assistance rules mentioned above apply or the target is regulated or operates in a regulated industry, there are no generally applicable limitations on security that can be granted by a target to support its acquisition. It is, however, common to exclude from the all asset security certain assets that the chargor is not able or is not permitted to grant

security over. There may be other exclusions to reflect what is commercially agreed as being the security package.

Law stated - 6 February 2024

Requirements for perfecting a security interest

Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral? Do stamp duties or similar taxes apply to taking a perfected security interest?

In England, there is not (for example) an equivalent of the Uniform Commercial Code in the US. Rather, perfection of security occurs, depending on the type of security interest and asset, through registration at applicable registries and delivery of notices and acknowledgments. In general, most charges and mortgages created by an English company must be registered with Companies House within 21 days of the date of the creation of the security interest (regardless of where the secured assets are located or if the security is governed by English law or a foreign law). Failure to register results in the security being void as against other creditors in a liquidation or administration and will also result in the debt it secures becoming immediately due and payable. Security interests over certain classes of assets (such as land, intellectual property rights, ships or aircraft) should be registered on specific title registers. Otherwise, counterparties and other legal owners of the relevant assets must be given notice of security to preserve priority over subsequent security. No UK stamp taxes are payable on the grant or perfection of a security interest.

Law stated - 6 February 2024

Renewing a security interest

Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

In general, once a security interest is registered at the applicable registry (and provided the registration is completed correctly) there is no need to renew the registration for the particular asset or creditor in respect of which the registration was made.

Law stated - 6 February 2024

Stakeholder consent for guarantees

Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No – unless a company has entered into contractual arrangements that would require it (which would be unusual) there would be no requirement to obtain consents, or consult with, any works council, trade union or other employee or equivalent representative body for the provision of guarantees or security by an English company.

Law stated - 6 February 2024

Granting collateral through an agent

Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

Under English law a security agent can hold security over the borrower's assets on behalf of multiple lenders. The security agent will usually be appointed to hold the benefit of the security on trust for the lenders. As such, existing lenders can assign or transfer their interest under the facility, and the incoming lender, subject to complying with the requisite transfer formalities, should be able to benefit from the existing security and guarantees without amending the underlying documents.

Law stated - 6 February 2024

Creditor protection before collateral release

What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

There are no particular creditor protections before security can be released under English law. The release of English law security will typically be documented by a deed of release. The underlying security document may provide that if the payment that has been made to discharge the debt is subsequently clawed back then the released security will be reinstated.

Law stated - 6 February 2024

Fraudulent transfer

Describe the fraudulent transfer laws in your jurisdiction.

Under section 423 of the Insolvency Act 1986, transactions can be set aside at an undervalue (see also 'Clawbacks' below for further details) if they have the effect and purpose of defrauding creditors. This could be by way of either: (1) putting assets beyond the reach of a person who may, at some time, be entitled to make a claim against the person transferring the asset; or (2) otherwise prejudicing the interest of such person in relation to the claim they are entitled to make. Section 423 has a broad application and there is no requirement that the debtor be insolvent or in any formal insolvency proceedings for relief to be sought.

Whether the 'purpose' test has been met is a subjective question and the burden of proof is placed on the claimant. There is no prescribed time limit specified for bringing a claim under this section (barring the usual statutory limitation periods) and certain bodies (including the Financial Conduct Authority and the Pensions Regulator) are also permitted to bring an action under this section.

Section 425 of the Insolvency Act 1986 sets out the types of orders that the court may make in respect of a transaction defrauding creditors and includes, among other things, requiring any property transferred as part of the transaction to be vested in any other person.

Law stated - 6 February 2024

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

What documentation is typically used in your jurisdiction for acquisition financing? Are short-form or long-form debt commitment letters used and when is full documentation required? Are there market practices that require the use of particular types of documents or forms in your jurisdiction?

In a typical certain funds acquisition financing the suite of commitment documentation will consist of: commitment letter, term sheet, fee letter, syndication letter (if a syndicated deal and syndication or flex terms are not covered in the fee letter), mandate letter (mandating the bond takeout if the financing package includes a bridge to bond) and interim facilities agreement (an abbreviated form of bridge loan agreement that may be used if long-form documentation has not been agreed prior to closing). Long-form documentation is not strictly required, although some market participants prefer long-form documents in place of an interim facilities agreement. Since most acquisition financings will call for 'certain funds' commitments to be in place when the relevant purchase agreement is signed, most if not all relevant conditions precedent will also have been satisfied or at least be in agreed form. Whilst the Loan Market Association has published certain recommended template forms that market participants will often refer to in negotiations, no particular types or forms of document are required. However , market participants often do have their own preferred forms that they will seek to use on each of their transactions.

Law stated - 6 February 2024

Level of commitment

What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

In an acquisition finance context, commitment letters will typically need to provide for fully underwritten commitments on a 'certain funds' basis, namely, with very limited conditionality.

Law stated - 6 February 2024

Conditions precedent for funding

What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Conditions precedent in a commitment letter for an acquisition financing will typically be limited to illegality, a limited suite of 'certain funds' drawstops and limited documentary conditions precedent such as constitutional documents, corporation authorisations,

formalities and closing certificate, executed finance documents and legal opinions. The commitment letter will typically also confirm sign-off on the commercial conditions precedent, namely, the form of acquisition agreement, the due diligence reports, tax structure memorandum, financial statements for the target and all know your customer requirements.

Law stated - 6 February 2024

Flex provisions

Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Yes, if the underwriters intend to syndicate their commitments, market flex provisions will be included in the fee letter or sometimes a separate syndication letter. Market flex provisions will typically allow the underwriters to increase margin or fees in order to make the commitments more attractive to prospective participants, up to an agreed cap. There may also be specific terms that have been underwritten but that can be changed to again make the overall package more attractive to prospective lenders. The scope of the list of terms that can be changed is negotiable on a case-by-case basis but will often include items like: debt, restricted payment or investment capacity; most favoured nation (MFN) terms; alteration or removal of step-downs in margin ratchet or prepayment requirements; and EBITDA add-backs.

Law stated - 6 February 2024

Securities demands

Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

A securities demand will be a key feature in an acquisition financing where all or part of the term debt is in the form of a bridge loan that bridges to a high-yield bond. The securities demand will require that if takeout bonds have not been issued by a certain point, the proposed issuer will be forced to issue securities on pre-agreed terms. As to what these terms are, and crucially what the coupon for those securities will be, is subject to negotiation (and anticipated market conditions at the time).

Law stated - 6 February 2024

Key terms for lenders

What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

A lender will want to understand the long-stop date and associated conditions that must be met before closing can happen as this will determine how long a lender's commitments will need to be available. Any financing cooperation language should ensure the lenders will

receive sufficient assistance from the target to assist with any syndication or fundraising process they would like to undertake ahead of closing. Finally, the assignment provisions will be reviewed to make sure that they permit the taking of security over the purchaser's rights under the acquisition agreement.

Provisions that protect against lender liability (ie, 'Xerox provisions') are not needed in English law purchase agreements but they are nonetheless sometimes included where US-based parties are involved.

Law stated - 6 February 2024

Take-private transactions

In the context of take-private transactions – what are the common issues relevant to acquisition financings in your jurisdiction?

The Takeover Code requires that a bidder for a public company may only announce their firm bid once they have a certainty of funds available for the acquisition. Such 'certain funds' requirement also requires a financial adviser to provide a 'cash confirmation' indicating that sufficient funds are available to satisfy the proposed bid. Financial advisers will, therefore, need to perform due diligence on the providers of the financing and ensure that the drawstops under the terms of the financing are as limited as possible.

In the UK, a take-private transaction can be consummated through a contractual takeover offer or through a court approved scheme of arrangement. There will be different rules, timetables and processes to be followed depending on which route is selected by the bidder.

Law stated - 6 February 2024

Take-private transactions

What are the rules and procedures for 'squeeze-outs' in your jurisdiction? Before a 'squeeze-out', are there permissible restrictions on acts by the target? Is it possible to obtain security pending the completion of a 'squeeze-out'?

In connection with a takeover offer, if the bidder acquires at least 90 per cent in value of the shares of the target or 90 per cent of the voting rights, the bidder can force the remaining minority shareholders to transfer their shares to the bidder. The bidder can trigger the squeeze out period within three months from the last day on which the takeover offer can be accepted and the offer for the squeeze-out shares must be the same consideration as was offered under the terms of the takeover offer. If the bidder proceeds with a scheme of arrangement to consummate the take-private however, the bidder need only secure acceptances from 75 per cent in value of the shares and the majority in number and the rest of the shareholders would be bound to also accept (without the need to 'squeeze-out').

The bidder and target may grant security over its assets pending completion of the squeeze-out procedure.

Law stated - 6 February 2024

Public filing of commitment papers

Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

There is no requirement to make acquisition agreements or commitment letters public save that finance and offer documents must be made public in the context of a public takeover where the City Code on Takeovers and Mergers (the Takeover Code) is applicable.

Rule 24.3 of the Takeover Code requires that certain details about the terms of the financing are included in the offer document and that the finance documents themselves must be publicly available by no later than 12pm on the business day following the bidder's announcement of a firm intention to make an offer.

Law stated - 6 February 2024

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

What restrictions are there on the ability of lenders to enforce against collateral? Can lenders engage in self-help through foreclosure or the exercise of remedies under stock pledges or control agreements?

As a contractual matter, lenders will need to respect the enforcement trigger in the finance documents, whether that is the occurrence of an event of default or the taking of additional steps or giving notice. In taking enforcement action, there may also be prescribed procedures and requirements set out in the security documents or intercreditor agreement, or in the applicable law.

Lenders enforcing security (or more likely the security agent on their behalf) will also need to ensure that the legal duty to obtain the best price reasonably obtainable is complied with or else risk liability to other creditors or the debtor. This will typically result in a marketing or at least valuation exercise being undertaken before enforcement action is undertaken.

Control agreements are not customary or required in the UK, but lenders will likely have certain self-help remedies available to them under security documentation such as the ability to appropriate financial collateral assets, exercise voting rights under share charges, exercise rights under powers of attorney and issue directions to account banks or other counterparties that have been provided with notice of security interests.

Law stated - 6 February 2024

Debtor-in-possession financing

Does your jurisdiction allow for debtor-in-possession (DIP) financing?

No, UK legislation does not support DIP financing. A form of DIP financing may occur in insolvency scenarios as an administrator or liquidator has the power to borrow and such borrowings will have super priority ahead of creditors secured by a floating charge. A

fixed-charge holder will still maintain their priority over the fixed security and an administrator can only sell assets that are subject to a fixed charge with the consent of the fixed-charge holder.

Law stated - 6 February 2024

Stays and adequate protection against creditors

During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

If a debtor goes into administration a statutory moratorium takes effect that: (1) prevents the issuing or continuation of proceedings against the debtor (including alternative insolvency proceedings); and (2) prevents the enforcement of security by a creditor against the debtor. In certain circumstances, a debtor may also benefit from an interim moratorium before it enters administration. This will be the case where a notice of intention to appoint administrators over a debtor is filed at court, or an application to appoint administrators is made.

Security interests that constitute a financial collateral arrangement under the Financial Collateral Arrangements (No. 2) Regulations 2003 are exempted from the statutory moratorium. If voluntary liquidation of a debtor is commenced, there is no automatic stay on enforcing security; however, related parties can apply to the court for a moratorium to be imposed.

There is no concept under English law that is equivalent to adequate protection.

Outside of formal insolvency processes, the Corporate Insolvency and Governance Act 2020 introduced a standalone moratorium procedure for companies (aside from insurance companies, banks, electronic money institutions, investment banks and firms and parties to capital market arrangements) that are, or are likely to become, insolvent but which are seeking to facilitate a rescue plan. This can be initiated by the directors of the debtor making a court filing. Once approved, the period of the moratorium will last 20 business days (beginning with the business day after the day on which the moratorium comes into force). However, this can be extended for another 20 business days (without the need for any particular creditor or court consent). Further extensions are then permitted with creditor consent or the consent of the court. Companies already subject to an insolvency procedure and those that have been in a moratorium, company voluntary arrangement or administration in the previous 12 months are not eligible.

The moratorium can only be used where it is likely that it will result in the rescue of the debtor as a going concern.

Law stated - 6 February 2024

Clawbacks

In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous

> payments to lenders. What are the rules for such clawbacks and what period is covered?

The Insolvency Act 1986 provides that certain transactions will be vulnerable to being unwound.

Transactions at an undervalue entered into within two years prior to the onset of insolvency can be challenged under section 238 of the Insolvency Act 1986 if, at the time the transaction was made, or as a result, the debtor was unable to pay its debts and the defences provided under section 238(5) do not apply. A transaction at an undervalue is one whereby a debtor: (1) made a gift or otherwise entered into a transaction on terms that the debtor received no consideration; or (2) entered into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the debtor. If the transaction was with a connected party, there is a presumption that the debtor was unable to pay their debts at the time the transaction was made. A defence is available to the debtor under section 238(5) if it can be shown that the transaction was entered into in good faith for the benefit of the debtor (and for the purpose of carrying on its business) and that there were reasonable grounds to believe that the transaction would benefit the debtor.

Transactions that constitute a preference, in other words, that place creditors in a better position than they otherwise would be in the event of the debtor going into an insolvent liquidation, are also liable to being set aside (section 239 of the Insolvency Act 1986). For these transactions to be set aside, they must have occurred within six months (or two years for connected parties) prior to the onset of insolvency. The debtor must also have been unable to pay its debts at the time of the transaction, or as a result of entering into the transaction, and in entering the transaction the debtor must have been influenced by a desire to prefer the relevant creditor. Where there is a transaction with a connected party, there is a rebuttable presumption that the debtor was influenced with a desire to prefer.

The grant of a floating charge may also be invalidated (section 245 of the Insolvency Act 1986) if granted within 12 months (or two years for connected parties) prior to the onset of the debtor's insolvency and (unless granted to a connected party) the debtor was unable to pay its debts at the time of the transaction, or as a result. If new consideration was provided for the floating charge, for example, by way of a new advance of funds, then that can provide a defence to a claim under section 245. This ‘new money’ consideration requirement can also extend to the advance of goods and services supplied to the debtor at the same time as, or after, the creation of the charge, but this will be a question of degree.

Extortionate credit transactions (section 244 of the Insolvency Act 1986) are ones that require exorbitant payments to be made (whether unconditionally or in certain contingencies) in exchange for credit or that grossly contravene principles of fair dealing. The vulnerability period for such transactions is three years.

There are also other common law rules, such as the anti-deprivation rule and the pari passu principle, which can be applicable to certain transactions. These rules are designed to ensure that assets are not put beyond reach of creditors in an insolvency and that the rules on how assets are to be distributed on an insolvency are not frustrated. These rules typically do not capture normal commercial arrangements within their scope.

Law stated - 6 February 2024

Ranking of creditors and voting on reorganisation

In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

In an insolvency, the priority of claims is complex but, generally speaking, they will rank as follows:

- costs of preserving and realising the fixed charge assets (including the office holder's costs relating to those assets);
- fixed charge creditors;
- priority pre-moratorium debts and moratorium debts;
- costs and expenses of the office holder;
- preferential creditors (eg, unpaid wages of employees and pension contributions);
- secondary preferential creditors (eg, unpaid VAT and PAYE income tax owed to HMRC);
- payments to unsecured creditors from the prescribed part (calculated as a percentage of the value of the debtor's property that is subject to floating charges, subject to a cap of £800,000);
- floating charge creditors;
- unsecured creditors; and
- shareholders of the debtor.

Plans of reorganisation in the UK are divided into two main categories: schemes of arrangement (implemented via Part 26 of the Companies Act 2006) and restructuring plans (implemented via Part 26A of the Companies Act 2006). Both procedures require sanction by the court. These are standalone processes, but can be utilised within formal insolvency proceedings, although this is rare.

In each scenario, creditors are divided into classes for voting purposes. A class of creditors will generally be those creditors whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (eg, secured lenders will form a separate class to unsecured creditors).

A scheme of arrangement will be approved by the consent of each class of creditors voting in favour, with a statutory majority of 75 per cent in value and a majority in number of each class present and voting being required. Assuming these thresholds are met (and the court sanctions the scheme), any dissenting creditors will also be bound.

Voting in a restructuring plan is similar in that 75 per cent in the value of the class present and voting is required to vote in favour (but no majority in number is required). However, some notable differences exist between a restructuring plan and a scheme of arrangement:

- a restructuring plan is only available where a debtor encounters or is likely to encounter financial difficulties that are affecting, or will or may affect its ability to carry on business as a going concern and the purpose of the restructuring plan is to eliminate, reduce, prevent or mitigate the effects of, any of the debtor's financial difficulties; and

- the restructuring plan features a cross-class cram-down. This means that the plan may be sanctioned by the court even if not every class approves the plan, provided that the plan is approved by one 'in the money' class and the court is satisfied that none of the members of the dissenting class or classes would be any worse off than they would be in the relevant alternative (ie, whatever the court considers would be most likely to occur if the plan was not sanctioned).

Law stated - 6 February 2024

Intercreditor agreements on liens

Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

English courts ought to recognise contractual subordination arrangements provided they do not contravene any competing insolvency laws or public policy.

Law stated - 6 February 2024

Discounted securities in insolvencies

How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

There are no particular concerns or issues with respect to OID claims under English law.

Law stated - 6 February 2024

Liability of secured creditors after enforcement

Discuss potential liabilities for a secured creditor that enforces against collateral.

As well as potential liability if steps are not taken to obtain the best price reasonably obtainable, creditors could also potentially incur liability as mortgagee in possession with respect to environmental claims that might arise in connection with real property.

Law stated - 6 February 2024

UPDATE AND TRENDS

Proposals and developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? If so, please give a reference to any written material, whether official or press reports. Are there any other current developments or trends that should be noted?

LIBOR for sterling and dollar-denominated financings has been completely phased out now, with LIBOR being replaced by Sterling Overnight Index Average or Secured Overnight Financing Rate (as applicable) based interest rates instead.

There has been a heightened focus on 'defaulting lender' and related provisions in debt documentation following the difficulties experienced by Silicon Valley Bank and others. These provisions were rarely addressed or considered since they were introduced following the global financial crisis but we anticipate parties will look again to address any concerns with an unstable lender market.

Environmental, social and governance (ESG)-linked financings continue to be in ascendency, with many more financings considering the benefit of margin ratchets based on attaining improvement in certain key performance indicators or ESG ratings.

Over the past couple of years the UK (inter alia) has imposed, continuous rounds of sanctions, targeting various designated persons and affecting various sectors connected to Russia. These sanctions affect various and the types of restrictions vary too. This is a fast-moving area of law, and the scope of sanctions and list of individuals and entities designated is frequently updated. Due to their differences in scope and application between jurisdictions, sanctions have raised various concerns for lenders, particularly for new financings that may have a Russian nexus, resulting in a heightened focus on sanction and anti-money laundering provisions in the debt documentation as lenders try to introduce further protections to mitigate associated compliance risk.

The authors would like to thank Tobias Caspary (partner), Paschalis Lois (associate), James Kitching (partner), Nick Thornton (partner), Mandip Englund (partner) and Ewan Gardner (associate) for their contribution to this chapter.

Law stated - 6 February 2024

LAW STATED DATE

Correct on:
Please state the date on which the law stated here is accurate.

6 February 2024

Law stated - 6 February 2024