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Distressed Debt

Regulatory, Tax and Credit Documentation Factors Impacting Hedge Funds' Trade Risk in European Secondary Loans (Part One of Two)

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For the majority of 2011, European secondary loan markets had buy-side traders frustrated by low liquidity, volume and deal flow, and sell-side traders were left to wonder if and when they do source, will enough friends come out and play.[1] Is this the calm before the storm? We, along with many in the distressed community, believe it is, and that loans will play a significant role in the corporate distressed wave expected to hit shore in 2012 as part of €221 billion worth of European leveraged loans set to mature between now and through 2015.[2] The high yield market was a savior in 2011 for many borrowers whose loans were set to mature in 2013 and 2014. However, with some of these deals already having gone sour and the pool of remaining loans deteriorating, the high yield market is not likely to save the day again. Regardless of the capital market options, when the refinancing peak reaches its heights in Europe and the U.S. in 2014, bad loans will likely be left behind in droves. To assist investment funds in filling their proverbial sandbags and preparing to pick up potentially lucrative pieces in the aftermath, we are delivering a two part series on trade risk specific to loans in the European market.

Though similar in many of their underlying principles, the secondary markets for European distressed debt and claims trading differ in many important respects from the U.S. markets, including a much higher degree of trade risk. Investment funds looking to Europe must thoroughly review and consider these distinctions, and may also find that in many instances, and for a multitude of reasons, they are not welcomed into a credit or to the restructuring table. Until recently, many European jurisdictions had been closed off from external secondary debt financing as a result of an underdeveloped market, unsupportive regulatory regime or limited and illiquid "club deals" involving only a few select banks. Today, many jurisdictions and borrowers are still not rolling out the welcome mat and U.S. investors should recognize that investing in Europe is not as straightforward as copying U.S. strategies and procedures.

The elevated level of trade risk in Europe is due in no small part to the number of jurisdictions typically involved in any given trade. Although the Loan Market Association's ("LMA") English law governed documentation is used as a template for secondary market trades in over 40 different countries,[3] other jurisdictions often govern the underlying loan agreement or a borrower's insolvency proceedings and can also play a role in a trade. These variables – combined with the fact that a typical European secondary debt trade often includes a buyer, seller and one or more borrowers based in different jurisdictions (each administered by a different set of operational rules, customs and procedures) – require traders to dig deep into the details before they pull the trigger. Failure by investors to fully account for such risks before entering a trade can cause winning trades to quickly slip into losing territory.

While careful post-trade drafting can reduce certain trade risks after a deal is struck, investors should endeavor to

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address material trade risks before the trade is agreed. Timing is important because similar to the Loan Syndication and Trading Association's ("LSTA") protocol in the U.S. loan markets, the LMA operates in accordance with the principal of "a trade is a trade." As such, once a buyer and seller say "done," they will be contractually bound to settle the trade, even if they later discover a material issue affecting the trade that the parties failed to specifically address upfront. In order to reduce trade risk at the outset, the buyers and sellers should consider the following issues before entering into a trade:

1. Regulatory Lender Restrictions – what jurisdictions and applicable lender restrictions play into a trade;
2. Tax – will the debt purchase make an investor subject to a withholding tax, and, if so, can it obtain the benefit of an exemption or a reduced rate of withholding tax;
3. Loan Agreement Requirements – what are the requirements to accede as a lender of record under a loan agreement, including: (i) eligibility requirements; (ii) minimum thresholds; and (iii) borrower consent rights;
4. Transfer Perfections – any additional steps an investor must take to perfect its debt transfer and consequences for failing to take the requisite action;
5. LMA Transparency Guidelines – trading on the basis of Borrower Confidential Information versus Syndicate Confidential Information;
6. Trade Documentation – should the traded debt be documented on par, distressed or claims documentation;
7. Form of Transfer – is legal transfer preferable to an alternative form of settlement; and
8. Additional Terms of Trade – are additional modifications to the LMA standard terms and conditions required.

This first article will focus on certain macro issues arising in the context of European secondary loan trading, through analyzing regulatory, tax and credit documentation factors which can impact the success of a trade, as set out in topics (1) through (4) above. The second article, to be published in an upcoming issue of The Hedge Fund Law Report, will look at trade issues affecting an investor at time of trade and on a more micro level, covering the remaining topics (5) through (8) above.

Regulatory

Regulations impact many aspects of an investor's loan portfolio. One such aspect is a possible prohibition on any lending to a European borrower without prior regulatory authorization. If indeed necessary, an investor who fails to obtain such authorization may face civil, and possibly criminal, sanctions for any unlawful lending conduct. An investor's violation and subsequent sanction could also preclude its ability to participate in future lending and investing activity in that country on different transactions vis-à-vis new borrowers.

Investors should not assume that they are beyond the scope of any lending regulations on the basis that primary syndication is completed and funding of the borrower has already taken place. Dismissing these regulations may have damaging consequences, as there can still be instances where a secondary lender will be called upon to fund. This situation can arise in the context of a revolving credit facility, and it may also be applicable for term loans where the underlying loan agreement enables a borrower to request additional funds. Additional money fronted to a borrower in connection with a refinancing or a restructuring, or the extension of the original maturity date may also be considered a lending activity. Funding under such circumstances could trigger breaches of regulatory restrictions in place if the relevant jurisdiction requires an investment fund to be licensed in order to lend.

Member states within the European Union all comply with Directive No. 2006/48/EC of 14 June 2006 (known as the "Banking Consolidation Directive"), which aims to harmonize and regulate banking activities within Europe. The Banking Consolidation Directive focuses on providing certain rules for banking activities within and between the European Union member states, with such member states then taking the requisite steps to implement and adopt the measures prescribed therein through their individual legislative systems. However, and as is the case with most European Union directives, member states are often granted a certain degree of flexibility and discretion in the implementation process. The Banking Consolidation Directive is no different, providing minimum standards for the conduct of certain banking activities, with member states being able to adopt more rigorous and conservative measures in their own home state.

The Banking Consolidation Directive covers different types of banking activities,[4] though it focuses chiefly on institutions engaged in the acceptance of deposits and other repayable funds from the public, with such institutions being defined as "credit institutions." Credit institutions are required to obtain prior regulatory authorization and a banking license to be able to accept deposits from the public. The remaining banking activities set out under the Banking Consolidation Directive, including commercial lending, can be undertaken by a "financial institution," an entity which is simply set up to carry on banking activities other than the acceptance of deposits from the public. Financial institutions do not require prior regulatory authorization or a banking license (unless they are conducting other activities which would require regulatory authorization under European Union law, such as providing investment advice or managing assets belonging to clients).

However, and in accordance with the leeway provided to member states under the Banking Consolidation Directive, certain member states have implemented a broader and more encompassing definition of a "credit institution," so that other banking activities, in addition to accepting deposits from the public, are captured within the definition and are required to be authorized and licensed. France is but one example of a member state which has decided to take advantage of this flexibility, requiring that any type of lending activity be undertaken by a credit institution and therefore have prior regulatory authorization. The definition of a "credit institution" under the Monetary and Financial Code in France adopts a broader definition than that set out within the Banking Consolidation Directive, incorporating legal entities whose customary business activity is the carrying out of banking transactions, comprising the receiving of funds from the public, credit transactions, and the provision to customers, or administration of, means of payment.[5] The result of this broad definition is that an entity will need authorization, via a banking license, in order to lend to a French borrower. Similar wide interpretations of the term "credit institution" are present in Germany under the German Banking Act[6] and Italy under the 1993 Banking Law.[7] Conversely, other countries such as the United Kingdom allow financial institutions to engage in commercial lending activities without any such authorization.

Consequently, an investor looking to buy into a facility under a loan agreement should undertake a regulatory analysis of the relevant borrower's jurisdiction and verify whether any lending restrictions exist, and what impact, if any, they may have on the investor's proposed trade. In addition to the due diligence undertaken on the current borrower of a particular facility, investors should take note that a syndicated loan agreement based on the LMA's recommended form allows other borrowers within a borrower's group to accede or resign under specific facilities during the life of the loan agreement. The investor's regulatory analysis should therefore also cover future borrowers who may be permitted to accede under the facility as new borrowers following completion of primary syndication. Investors should consult counsel to establish the scope of any lending restrictions in place and to ensure that the investor does not run afoul of such restrictions.

Tax

Depending on the jurisdiction of the borrower and the investor, interest payments may be subject to withholding taxes levied by the jurisdiction of the borrower.[8] An investor should conduct a thorough tax analysis on any tax issues that may arise as a result of holding secondary debt under a loan agreement as the direct lender. Depending on its expected recovery, if an investor is aware at the outset that interest payments may be subject to a withholding tax, it may decide not to go through with the trade. However, if an investor does not appreciate the tax consequences until it agrees to trade, the investor will still be legally and contractually bound to settle. In that situation, an investor could possibly mitigate the tax impact by opting for a different form of settlement (for example, settlement by LMA funded participation).[9] Alternatively, if the investor is an investment fund manager, it may decide to allocate the debt to one of its funds that has the benefit of a withholding tax exemption under an applicable double taxation treaty, or the investor may also decide to purchase the debt and then sell it immediately onwards in a multi-lateral transaction, whereby the original seller transfers the debt directly to the ultimate buyer. However, in any event, each of these post-trade fixes may come with additional costs or may force the investor to sell at a loss.

Whether a withholding tax applies to interest payments will generally depend on the residency of a borrower and lender. If a withholding tax is applicable, whether taxes are withheld depends on if there are any double tax treaties or other exemptions in place that a lender can benefit from to obtain a partial or full exemption. For example, in the UK, HM Revenue and Customs imposes a 20% withholding tax on any UK source "yearly interest" payments made by a corporate borrower.[10] However, an absolute exemption from this withholding tax can apply in certain instances, which include: (i) if the person beneficially entitled to interest payable under a loan agreement is a company resident in the UK for UK tax purposes; or (ii) where HM Revenue and Customs has directed the borrower not to withhold taxes pursuant to an application under an applicable double tax treaty between the jurisdiction of the person beneficially entitled to the interest and the UK.[11] Generally, any borrower gross-up provisions under a loan agreement will not apply to secondary lenders if they are withheld against because of their tax status upon accession under the agreement.

Transfer Requirements Under the Loan Agreement

Once an investor has completed the background investigation of regulatory matters, it should conduct due diligence on the underlying loan agreement. This includes verifying whether the investor can meet any lender eligibility requirements, minimum transfer or hold requirements and borrower consent requirements. Failure to meet existing contractual requirements under a loan agreement may result in a buyer of debt being prohibited from acceding as a lender of record. Unlike in the U.S., these lender restrictions commonly vary between loan agreements and can set barriers to entry that are difficult for investment funds to surmount, effectively giving borrowers control over the makeup of their lending syndicate. This may force the buyer to hold the debt indirectly (for example, as a participant under a funded participation), without a clear and direct ability to influence any borrower restructurings and possibly without access to the borrower's confidential information. Alternatively, if indirect acquisition of the debt is not possible or feasible, the buyer will have to sell out, re-allocate or find some other settlement solution. Each of these alternatives brings additional administrative and legal costs, and can immediately put the overall success of the trade at risk.

Eligibility Requirements under the Loan Agreement

Loan agreements regularly contain language in their transfer provisions specifying the type of entity eligible to hold debt directly. While transfer provisions in loan agreements can be very specific, European loan agreements have traditionally been less clear on what requirements a buyer must meet to become an eligible lender.

While some U.S. borrower's loan agreements may reference the U.S. securities laws definitions of "accredited investor"[12] or "qualified institutional buyer"[13] to define eligible assignees, the language under the transfer provisions in older versions of the LMA form of loan agreement have historically been less specific, allowing existing lenders the ability to transfer debt only to "banks or other financial institutions," with neither term being defined. The LMA has sought to reconcile this ambiguity by updating its recommended form of agreement, expressly enabling a fund to become an eligible lender; transfers can now be made "to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets."[14]

That being said, not all loan agreements include this clarified language. In particular, older credit agreements still being traded or those where the borrower had more bargaining power when agreeing to the loan may lack specific language enabling an investment fund to hold debt directly. Yet not all is bleak for an investment fund, as even if transfer provisions restrict an entity to "banks or other financial institutions," recent case law in England has provided some interpretative guidance on what constitutes a "financial institution." In 2006, the Court of Appeal (Civil Division) England handed down judgment in the case of *Essar Steel Ltd v. The Argo Fund Ltd* [2006] EWCA Civ 241, giving a wide interpretation to the definition of a "financial institution" and stating the entity did not have to be a bank or even akin to a bank to satisfy this term.[15] While this case has provided comfort for investment funds, explicit language permitting investment funds to hold debt directly under a loan agreement is always preferable.

Loan agreements loosely modeled on the LMA recommended form also occasionally restrict investors from becoming lenders if they cannot represent at the time of transfer that they are eligible to receive interest payments based on a withholding tax exemption (assuming a withholding tax issue exists). If the investor is an investment fund, it may not be able to obtain the benefit of any double taxation treaty, either due to its or its underlying beneficial investors' place of residence (e.g., Cayman Islands, British Virgin Islands, Jersey, Guernsey, Isle of Man) blocking it from satisfying the qualifying lender criteria. The loan agreement may also include other tailored restrictions depending on the jurisdictions involved, posing further barriers for an investor to accede as a direct lender.

Minimum Thresholds

Minimum thresholds can trip up investors when they allocate a traded amount to several funds, or when the investor's seller itself has yet to accede under the loan agreement and does not know the minimum threshold amounts. Assuming an investor is eligible to hold debt as a lender of record under a loan agreement and elects to hold the debt this way, it should ensure that the purchased amount meets any minimum transfer and/or minimum hold requirements. Miscalculations on minimum thresholds will result in the agent refusing a proposed transfer. Occasionally, a loan agreement may also restrict existing lenders by requiring them to transfer pro rata amounts of each facility under such agreement.

There are various reasons for loan agreements to require minimum transfers or holding amounts, including an administrative rationale of trying to limit the size of the lending syndicate and avoiding processing nominal transfers between parties. If the loan agreement contains a minimum transfer threshold but no minimum hold requirements, a quick fix to this problem may be to effect an "over-and-under." As an example, if an investor has purchased GBP1m of debt but the minimum transfer amount is GBP3m, the seller will increase the amount being transferred to GBP4m and the investor will simultaneously transfer GBP3m back to its seller. However, this solution depends on whether the investor's seller has sufficient inventory to implement the strategy and this option may not be suitable if there are minimum hold thresholds in the loan agreement that exceed GBP1m. If this solution is not feasible, an investor may have to increase the traded amount after the trade date, sell back the debt to its seller, or agree to some form of alternative settlement. Ultimately, a failure to meet the requirements under the loan agreement will require the parties to settle the trade by other means, as they will likely be unable to walk away from the trade.

Borrower Consent Requirements

A borrower's refusal to consent to a proposed transfer may impact a proposed lender's strategy, particularly a lender who expects to take on an active role in any restructuring. Investors should be wary of the scope of borrower consent rights, as borrowers may use such rights to block transfers in a loan agreement to investment funds, in order to retain existing relationships with their primary banks that may be viewed as a friendlier counterpart in anticipated restructuring discussions.

Borrower consent requirements became more common during the borrower friendly "covenant light" loans of the 2004 to 2007 credit boom period, effectively allowing a borrower to control the composition of its lending syndicate. The consent requirements commonly include carve-out language requiring consent not be unreasonably withheld. However, what constitutes "reasonable" grounds for the refusal of consent is unclear. The position under English law remains uncertain and English case law does not provide much guidance on the matter.

In 2008, UBS sued Terra Firma Capital Partners, the private equity owners of Tank & Rast Holding GmbH (a German infrastructure group), in the High Court of Justice in England for breach of contract under a loan agreement following

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the borrower's refusal to consent to a debt transfer. The underlying loan agreement provided that consent by the borrower could not be unreasonably withheld. The proposed transferee was a competitor of Terra Firma, and Terra Firma blocked the transfer on the grounds that it did not want the competitor to have access to its confidential syndicate information. While guidelines from the High Court would have been useful for assessing when an existing lender can be prevented from selling its debt, this case was ultimately settled in private, leaving market participants speculating on what position the court would have taken on this subject.

The standards under New York case law regarding reasonable grounds for withholding consent are similarly undetermined. At best, current New York case law suggests that it may not be unreasonable for a borrower to withhold consent when the buyer is a competitor of the borrower.[16] Under the current LSTA recommended form of loan agreement, the borrower has to affirmatively withhold its consent, as the relevant language deems the borrower to have consented to the transfer if it does not object within five business days.[17] Under loan agreements modeled either on the LSTA or LMA recommended form, the borrower's consent is generally not required after any borrower event of default has occurred and is continuing.

Perfection of Transfer

Even if an investor has received sign-off on a transfer by the agent and has complied with the transfer mechanics for acceding under a loan agreement as a lender of record, if it failed to properly perfect the transfer under the law of the borrower's jurisdiction, it may not be recognized as the legal owner of the debt should it ever have to enforce its rights as a lender. While perfection issues can arise in the context of trading U.S. loans, jurisdictions in Europe may have additional formalities that need to be complied with for a legal transfer to be perfected. Whether these are necessary will depend on a number of factors, including location of the borrower, location of any collateral, governing law of the loan agreement and the form of legal transfer agreed between the parties. Perfection of a legal transfer is separate from any perfection requirements necessary to obtain the benefit of the security package pledged by the borrower, and investors should conduct due diligence on what steps may be required to perfect their transfer in each applicable jurisdiction. Given the severe consequences of potentially not being recognized as the legal owner of the debt, the advice of counsel should be sought to confirm adherence to country-specific procedures.

Failure to perfect a transfer becomes particularly problematic in the context of a borrower's insolvency. Prior to any default or insolvency of the borrower, the governing law of the loan agreement and contractual provisions outlining interest repayments will apply; the agent will record the transfer on its books and make interest distributions to the lending syndicate upon receipt of repayments by the borrower. However, if the borrower enters into insolvency, the laws of the jurisdiction governing the borrower's insolvency will apply. Typically, though not all of the time, this will be the jurisdiction where the borrower is registered.[18] In the context of the borrower's insolvency, an insolvency officer or trustee will seek to ascertain the borrower's total number of existing creditors. The officer or trustee may scrutinize the manner in which a buyer purchased debt on the secondary market to ensure legal ownership was effectively transferred and the buyer has a valid claim in the borrower's estate. For example, the laws of the relevant jurisdiction may require a buyer to take additional steps to perfect a transfer by notifying the borrower of the transfer. The creditor's failure to fulfill any of these steps can result in the officer's or trustee's successful challenge to a buyer's legal ownership of the debt.

A successful challenge under such circumstances means that the seller will remain the true legal holder of the debt in the eyes of the third party administering the insolvency and the buyer will not be recognized as having an interest in the borrower's estate. In such circumstances, the buyer will either be required to join proceedings with its seller against the borrower, or seek understanding with the seller that it will pass along any proceeds or distributions received relating to the purchased debt. If the former, the buyer may be faced with resistance as the seller may no longer hold any position in the underlying loan agreement and may not want the burden of getting involved in any insolvency proceedings. Additionally, relationship issues between the borrower and seller may be another reason for resistance from the seller to getting involved. If the latter, the buyer will have to rely on the seller identifying the proceeds relating to the buyer's position and passing these onwards. Not only does this expose the buyer to delays in recouping payment, but this also exposes the buyer to additional credit risk against the seller in the interim. Either situation is unfavorable for the buyer.

Therefore, it is important that once an investor agrees to purchase debt by way of legal transfer, it should verify if it has to take any additional steps to perfect the transfer. In England, if a legal transfer under an English law governed loan agreement is done by novation, no further steps are required for the transfer to be perfected. However, if a legal transfer is done by assignment, the underlying borrower needs to be notified of the transfer regardless of whether or not consent is required.[19] While the relevant loan agreement may include provisions for giving notice, this must be verified on a case-by-case basis. For example, in certain instances where the underlying borrower is French, a transfer between the trade parties may require them to notify the borrower via a bailiff (huissier) for it to be effective against third parties. Where the underlying borrower is Spanish, the parties may need to notarize the transfer document in front of a Spanish notary for it to be elevated to public status and enforceable against third parties.

Conclusion

The above represents certain salient points investors have to consider at the outset of a European distressed debt trade. These points do not represent an exhaustive list of topics but are meant to give investors some background on potential trade diligence required by European secondary loan market participants. Given the complexity of legal issues involved, investors should seek the support of legal counsel to help navigate through the regulatory, tax and credit documentation issues that arise in the context of secondary trading in the European loan markets. The following article, to be published in an upcoming issue of The Hedge Fund Law Report, will discuss some of the more trade-specific issues that arise in the context of a bank debt trade and outline the main points for consideration prior to committing to a binding agreement.

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[1] Current European loan market participants believe one reason that loans remain a smaller portion of new issuance is the lack of investors. It is not possible to raise a retail loan fund in Europe because current regulation does not allow retail investors to invest in loans. See *Trends in Leveraged Finance*, Standard & Poor's Leveraged Matters, Issue 19 (Autumn 2011).
[2] See *Managing the European LBO Refinancing Wall–Some Progress but Material Challenges Remain*, Moody's Investors Service Global Corporate Finance, June 16, 2011.
[3] This includes debt where the underlying borrower is resident in Asia, Africa or Australia. While the Asia Pacific Loan Market Association produces its own documentation to govern secondary debt trades in this region, the documentation is less widespread than the LMA documentation and heavily based on the LMA form.
[4] A full list of the banking activities covered is set out in Annex 1 of the Banking Consolidation Directive: "List of Activities Subject to Mutual Recognition."
[5] See Article L 511-1 of the Monetary and Financial Code.
[6] See Part 1, Section 1 "Definitions", German Banking Act (*Kreditwesengesetz*).
[7] See Legislative Decree 385 of September 1, 1993, as amended in 1997, 2000 and 2007.
[8] This article does not address any issues under U.S. tax law or regulations relating to owning or holding an interest in loans to European borrowers or other debt instruments issued by European issuers. We note, however, that the LMA submitted a comment letter, dated October 4, 2011, to the Internal Revenue Service concerning the impact of the recently enacted Foreign Account Tax Compliance Act (FATCA) on the syndicated credit market. The specific regulations promulgated under FATCA have not yet been finalized, accordingly the ultimate impact of FATCA is still undetermined
[9] Settlement via LMA funded participation results in the existing lender retaining its direct lender position under the loan agreement. Assuming it is receiving interest payments without any withholding tax, it will generally be able to pass onwards the total amount to the investor (i.e., participant), notwithstanding the fact that the investor would not benefit from any withholding tax exemptions if it were the direct lender. Part II of this article will discuss risks relating to English law governed participations.
[10] Pursuant to Section 874(2) of the Income Tax Act 2007. There is no statutory definition of "yearly interest" but it is

generally understood that if a loan extends beyond a year, the interest will be considered as yearly interest.

[11] Such a direction is only applicable for the beneficial owner in respect of which it is made and cannot be carried over on transfer of that beneficial ownership to another party, even where that party is resident in the same country as the transferor (subject to certain exceptions).

[12] As defined in Rule 501 of Regulation D Rules Governing the Limited Offer and Sale of Securities Without Registration under the Securities Act of 1933 (17 CFR 230.501).

[13] As defined in Section 7(a) of 17 CFR 230.144a.

[14] See clause 24.1 in the LMA Multicurrency Term and Revolving Facilities Agreement, the LMA Multicurrency Term Facility Agreement, the LMA Multicurrency Revolving Facility Agreement, and Clause 23.1 in the LMA Single Currently Term and Revolving Facilities Agreement and the LMA Single Currency Term Facility Agreement, all in effect as of April 8, 2009.

[15] The only relevant requirements were that: (i) it was an entity having a legally recognized form of being; (ii) it carried on business in accordance with the laws of its place of incorporation; and (iii) its business concerned commercial finance.

[16] See *Empresas Cablevison, S.A.B. DE C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625 (S.D.N.Y. 2010) (granting preliminary injunction in favor of borrower (Empresas) enjoining JPMorgan from selling a 90% participation interest with broad information and other rights in a $225 million loan to the affiliate of a competitor of borrower, even though the Empresas had no contractual consent right under the loan agreement), aff'd in part remanded in part, 381 Fed. Appx. 117 (2d Cir. 2010). See "In a Significant Decision for Hedge Funds that Trade Bank Debt, Federal Court Holds that JPMorgan Breached the Implied Covenant of Good Faith and Fair Dealing it Owed to Cablevisión Pursuant to a Credit Agreement When JPMorgan Sold a Loan Participation in Cablevisión's Debt to an Entity Affiliated With Cablevisión's Primary Competitor," The Hedge Fund Law Report, Vol. 3, No. 17 (Apr. 30, 2010).

[17] "The consent of Borrower (such consent not to be unreasonably withheld) shall be required . . . provided that the Borrower shall be deemed to have consented to any such assignment unless it shall object thereto by written notice to the Administrative Agent within [5] Business Days after having received notice thereof."

[18] A borrower resident in a European Union member state will begin insolvency proceedings in its centre of main interest (COMI), pursuant to the EC Regulation on Insolvency Proceedings adopted by the EU Council on May 29, 2000. The aim of the regulation is to simplify the process of dealing with cross-border insolvencies and the regulation states that there can only be one set of main proceedings opened in the state where a borrower has its COMI. The presumption is that the COMI will be where a borrower's registered office is situated, though this can be rebutted in certain instances, the scope of which is beyond this article.

[19] Section 136 of the Law of Property Act 1925.