

KEY DIFFERENCES IN THE US/EUROPEAN LEVERAGED TLB MARKETS

September 2020

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I. Pricing (current as of September 2020)

ISSUE		
Arrangement Fee	1L: 175 – 225 bps 2L: 200-225 bps	1L: 150-175 bps 2L: 175-200 bps
OID to the market	Pre-Covid: typically 50 bps Post Covid: 100-250 bps	Same
Opening Margin	3.125-4.75%	c. 0.15-0.25 bps higher
Margin Ratchet	1L: often 1 or no step down (occasionally up to 3), starting first full quarter after closing 2L: 1 or no step down	1L: often 3 or 4 step downs, starting 6-12 months after closing 2L: 1 or no step down
LIBOR Floor	0-100 bps	0
Pricing Flex	Often c. 150 bps; up to c. 1/2 OID on 4 yr convention	Often c. 150 bps; up to c. 1/2 can be OID on 3 yr convention
Default rate on overdue amounts	2.00%	1.00%

II. Market Conventions

ISSUE		
Currency requirement	US\$ only - US institutional investors have limited ability to fund other currencies	Different currencies available but liquidity varies: € (most liquid), £ (next), CHF, etc. (but US\$ tranche/placement generally would need to comply with US market requirements)
Withholding tax	Not a practical concern	Country of borrower specific issue – certain European countries require reliance on tax treaty networks to reduce withholding to zero, which practically excludes tax haven lenders (consider CLOs)
Permitted lender issues for non-banks	Can be a concern in certain states e.g. California particularly if active in the state	Varies per country but the issue arises more frequently – e.g. issue to consider/structure around in France, Germany, Italy, Norway; no issue in UK, Luxembourg, Netherlands, etc.
Co-borrower required for syndication purposes	Additional liquidity is available if there is a US borrower or co-borrower; when this becomes a pricing concern is a syndication judgment but kicks in when raising somewhere north of US\$700m	Not a requirement

II. Market Conventions (cont'd)

ISSUE		
Public/private side IM/information requirements	Required even for private companies; credit agreement is normally public side and often a public document	Not required for private companies; credit agreement is normally private side and not public
Amortisation requirement	1% per annum payable quarterly is norm as many US investors have increased ability to invest in amortising debt	Not a requirement
Change of Control	Event of Default	Mandatory prepayment (top tier standard is Lender put right at 100)
Repeating reps	Only when new funds are drawn	Also at the end of each Interest Period

II. Market Conventions (cont'd)

ISSUE		
RCF maturity (typically provided by banks, not institutional lenders)	5 years	Often 6 or 6.5 years in an acquisition financing
RCF sub-limits	Limit on LCs/Swinglines	Often none
RCF springing level	30% typical	35% or now increasingly 40% for top tier
Interest payments when Interest Period longer than 3 months	At end of Interest Period unless longer than 3 months, in which case also at 3 months (although this is often disregarded in US placements of European loans)	At end of Interest Period unless longer than 6 months, in which case also at 6 months

III. Structure

ISSUE		
Guarantees/Security cover substantially all assets and are relatively cheap to obtain	Yes	Often no
Corporate benefit and financial assistance limitations are a meaningful limitation	No	Often – depends on use of proceeds; corporate form of borrower/guarantor and jurisdiction – results in detailed “Agreed Security Principles”
Guarantor coverage test	No – as minimal on shore non-Guarantors; offshore entities may or may not be required, subject to tax issues	Yes – may be 80% of Group EBITDA or 80% of EBITDA in Agreed Security Jurisdictions/capital maintenance, usually excluding negative EBITDA companies and companies that can’t guarantee
Structural seniority results in favorable treatment in bankruptcy	No – outcome generally determined by which entities there is a claim against, and whether the claim is secured, not where the entity is in a structure	Often

III. Structure (cont'd)

ISSUE		
Bankruptcy laws deal with creditor standstills and releases of guarantees/security/debt claims when the operating business is sold	Yes	No – so replicated to a degree in ICAs
Limitation on debt at non-Guarantors	Yes	Yes increasingly (inherited from US)
Threshold above which lenders of debt to Group must accede to ICA	No	Formerly yes; now not always
Bankruptcy laws deal with each legal entity on an entity by entity basis	Usually	Usually
Debtor in possession financing or similar is available	Yes	Not often

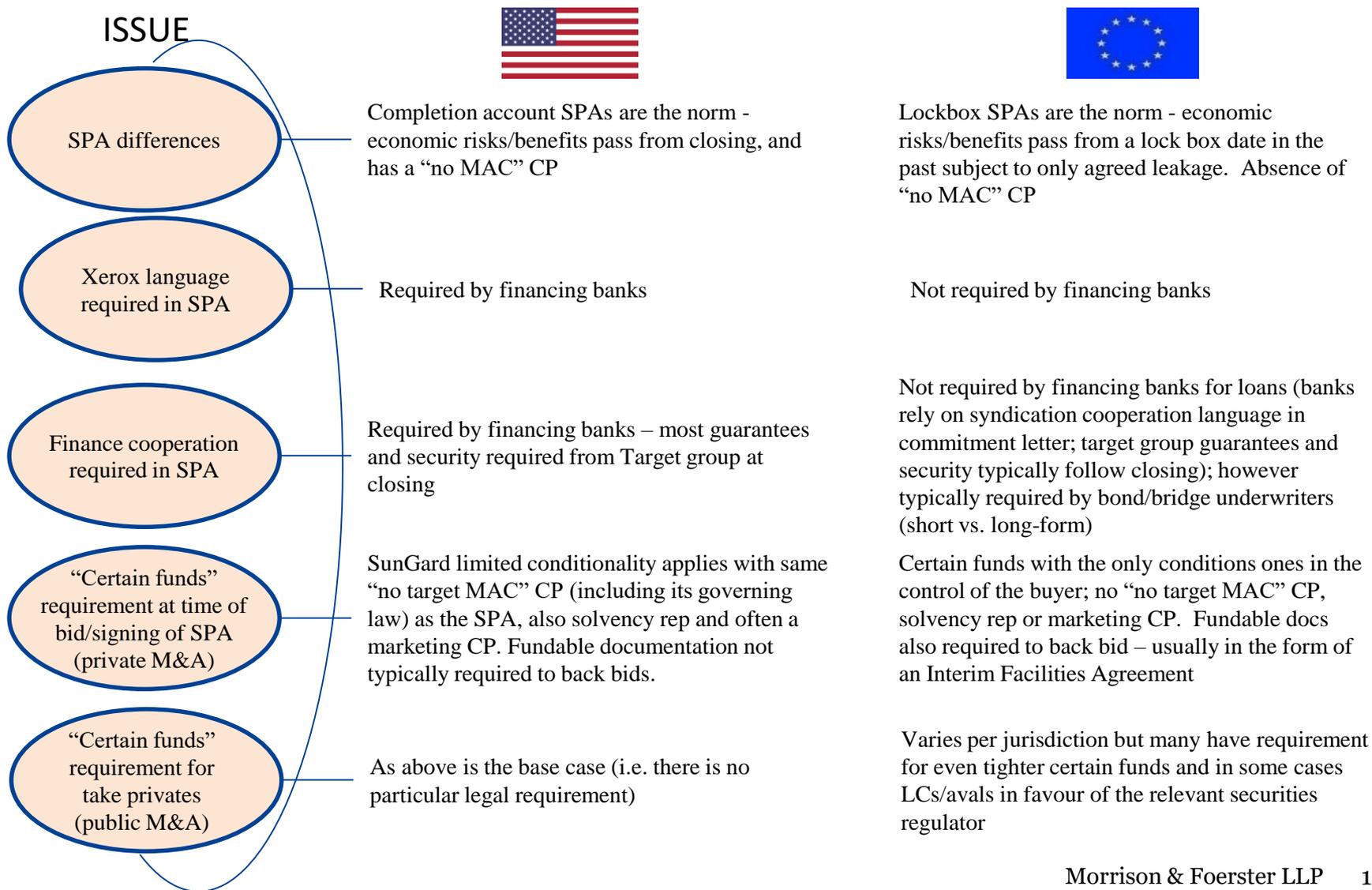
III. Structure (cont'd)

ISSUE		
Security is given to the hedging	Yes	Yes
Standstill applies to hedging	Yes (because provided for in Chapter 11)	Yes (because provided for in ICA)
Votes for hedging in security/security enforcement	No (except sometimes for certain commodity hedging)	Yes; may be limited to unpaid termination amounts or voting of mark to market, as negotiated
Option to purchase in favor of junior debt	Negotiated point	Yes
Enforcement of security	On an Event of Default	On an Acceleration
Ancillary Facilities (and similar) sharing in security	Yes: Cash Management Facilities	Yes: Ancillary Facilities

III. Structure (cont'd)

ISSUE		
<p>“Qualifying Listing” i.e. specified covenant fall away on IPO</p>	<p>No</p>	<p>Yes</p>
<p>Anti-tying limitations apply</p>	<p>Yes but an offshore exemption may apply</p>	<p>UK has a limited one; not Europe; rare in other non-US jurisdictions</p>
<p>Usury Limitation</p>	<p>Varies state by state; New York has an exemption for most corporate loans</p>	<p>Some jurisdictions have e.g. France, Italy but otherwise not in many cases (e.g. not a practical concern in UK); PIK can raise particular issues needing to be dealt with e.g. in Luxembourg, Spain and Italy</p>

IV. M&A/Syndication Process



IV. M&A/Syndication Process (cont'd)

ISSUE		
Certainty of achieving 100% in public M&A if closes	Normally 100% certainty	Varies per jurisdiction but minimum acceptance condition often must be lower than that required for minority squeeze out
Margin loan limitations need to be considered/structured around in public M&A	Yes	No unless shares or ADRs of the foreign issuer trade on a US exchange, but additional offshore exemptions often then can also apply
Lender reliance on buy-side diligence reports	None; lender counsel also typically conducts limited due diligence on the target	Historically yes other than for the commercial due diligence report; now it is as negotiated (common outcome is reliance on a tax structure memo and can be a reasonable efforts undertaking to seek reliance for the balance, but not as a CP). Typically no lender law firm diligence
Timing of debt syndication	Typically timed to price shortly before closing; bridges typically don't fund (take out bond issue takes place pre-close)	Often post-closing but increasing pressure to be before closing. Not unusual for bridges to fund.

V. Commercial Terms

ISSUE		
Acceptability in commitment letter of documentation standards (1) “updated for recent top tier sponsor precedent” or (2) providing override that terms will be “no more restrictive than the bonds”	No	1. Yes 2. Yes where there is an upfront issue; a point for negotiation if bonds issued subsequently
Sanctions wording limited to Restricted Group	No	Often
Solvency rep included as CP	Yes	No
Soft call sunset	6-12 mths or no sunset	6-12 mths
Freebie basket sizing	Typically 0.50-0.75x	Typically 0.75-1.00x
EBITDA cures	Accepted subject to a capped amount	Accepted; uncapped overcures often accepted
IPO/Illegality/Reports/SPA recovery mandatory prepayments	No (and illegality results in a change in the interest measure e.g. LIBOR to base rate)	Yes (through top tier slot)
Information undertaking time periods	90 days post year end for annuals typical/45 days post quarter end for quarterlies typical	120/150 for annuals; 60/90 for quarterlies

V. Commercial Terms (con't)

ISSUE		
Amendments releasing all or substantially all collateral/guarantees	100%	80%-90%
Transferees	Black list construct; consent deemed given if no response within 5 Business Days of request; often restriction on transfers to competitors is dealt with by borrower ability to add competitors to blacklist	White list construct; consent deemed given if no response within 5-10 Business Days of request; often a separate restriction on transfers to competitors
Snooze you lose	Uncommon	Standard
Set off	Following an Event of Default	Following an acceleration

**MORRISON
FOERSTER**

**LONDON ACQUISITION FINANCE TEAM
PARTNERS/COUNSEL**



Of Counsel

London

+44 (0)20 7920 4156
jburge@mofo.com

Education

- University of Bristol (LL.B., 2001)
- Oxford Institute of Legal Practice (L.P.C., 2002)

John Burge

John Burge is Of Counsel within the Banking and Finance Group and he is based in the London office of Morrison & Foerster.

John has extensive experience as a finance lawyer advising both lenders and borrowers on their investment grade, leverage and restructuring transactions. His role involves assisting lenders and borrowers with transactions and negotiating and settling commitment, loan and associated documentation both in London and overseas.



Partner

London

+44 (0)20 7920 4105
mdunlap@mofo.com

Education

- University of Richmond
(B.A., 2003)
- University of Texas
School of Law (J.D.,
2011)

Matthew Dunlap

Matthew Dunlap is a partner of Morrison & Foerster (International) LLP, based in the London office. His practice focuses on complex cross-border transactions, including high yield and crossover debt offerings, acquisition financings and liability management exercises.

Matthew has significant experience advising both issuers and investment banks, primarily representing private equity and corporate issuer clients. Before joining Morrison & Foerster, Matthew practiced in Houston and London at another international U.S. firm.



Partner

London

+44 (0)20 7920 4036

cjury@mofa.com

Education

- University College (LL.B., 1987)
- College of Law (1988)

Caroline Jury

Caroline Jury is a Partner of Morrison & Foerster LLP in the Finance and Projects Group, based in the London office. With more than 25 years of experience, Ms. Jury's practice focuses on cross-border leveraged acquisitions, corporate lending, restructuring and structured debt.

Ms. Jury acts for private and public companies, major banks, corporate borrowers and private equity firms on their financing requirements including assisting them with the negotiation of unsecured and secured syndicated and bilateral loans; acquisition and IPO financings (including senior and mezzanine, unitranche and term loan B facilities); corporate bonds; funds finance; margin loans and tax driven structured finance transactions. Additionally she is involved with regulatory advice.

Ms. Jury has been instrumental in formulating new market standards and headed the team that led the drafting of the first LMA Intercreditor Agreement in Europe and, whilst based in Sydney, she was responsible for drafting the new suite of unsecured and secured documents for the Australian branch of the APLMA.

Prior to joining Morrison & Foerster in 2018, Ms. Jury was a partner at an international law firm. After spending several years in the London office, she undertook postings to their Amsterdam office and subsequently to Frankfurt and, most recently, Sydney offices where she built market-leading finance practices.

RANKINGS

Legal 500 UK 2020

Recommended: Finance:

Bank Lending: Investment
Grade Debt and Syndicated

Loans

Chris Kandel



Partner

London

+44 (0)20 7920 4145

CKandel@mfo.com

Education

Yale University (B.A.
magna cum laude with
distinction)

Cornell Law School (J.D.
cum laude)

Chris has extensive experience leading leveraged, special situations, and acquisition finance and restructuring matters under English and U.S. law and is considered one of the leading acquisition finance lawyers in London. Significantly, he brings to bear an unusually broad depth of experience beyond his core focus area, having had experience over the years in high-yield and debt capital markets, mergers and acquisitions, securitization, derivatives, margin loans, fund finance, investment grade, pre- and post-IPO financings, banking regulation, and other related areas, having spent a good part of his career in the London offices of U.S. law firms before they became large.

Perhaps, as a result, he has also advised on many landmark and innovative matters, including numerous European acquisition financings, an unusually large number of take privates and bridge loans, the largest LBO financing in Asia, the second-ever high-yield issue in Japan, the first international syndicated loan to a corporate in Turkey, the first super-senior revolver in Europe, the first pari passu secured bank/bond issue in Europe, and the first Western-sponsor-style leveraged buyout financing in Russia. He was also commended in the Financial Times 2016 European Innovative Lawyers report for his innovative work on the Pirelli take-private financing.

Chris is qualified as a solicitor in England and Wales and is admitted to the bar in California, the District of Columbia, and Maryland.

RANKINGS

Best Lawyers in the United Kingdom 2020-2021
Recommended for Banking & Finance Law

Chambers UK 2020
Ranked Band 1: Banking & Finance

IFLR1000 2020
Market Leader: Banking, Financial Restructuring

Legal 500 UK 2020
Recommended for Finance:
Acquisition Finance & Finance:
Bank Lending: Investment Grade
Debt and Syndicated Loans

Chambers UK 2017
“One of the very best...an outstanding lawyer, absolutely top notch. He has superb technical knowledge, excellent deal experience and a great ability to get to a mutually agreeable solution on key issues.”



Partner

London

+44 (0)20 7920 4062
blavigne@mofo.com

Education

University of Victoria, BC
(LL.B., 2003)

University of Ottawa (LL.L,
2002)

Benoit Lavigne

Benoit Lavigne is a Partner of Morrison & Foerster LLP in the Finance and Projects Group, based in the London office.

Mr Lavigne advises both underwriters and borrowers and has vast experience in various complex finance matters including acquisition finance, general corporate lending, asset-based lending, restructurings and workouts. He has extensive experience advising on complex, cross-border finance matters. He has advised on unique and innovative financing transactions including the first European super senior facility coupled with a US term loan B, Europe's first margin loan to IPO financing and Europe's first quadruple Luxco acquisition financing structure.

Prior to joining Morrison & Foerster in 2018, Benoit Lavigne worked at three other international U.S. firms in London.

RANKINGS

Legal 500 UK 2020
Recommends Mr. Lavigne

Legal 500 UK 2019
Recommends Mr. Lavigne

MoFo At A Glance

A GLOBAL FIRM

Globally we have more than **1,000 lawyers across 17 offices**, and together with our best-friends network of 125+ relationship firms worldwide, this means that we are a one stop shop on cross-border transactions.



THE FACTS

1,000+
lawyers globally

We emphasize
**A PROACTIVE,
CLIENT-CENTERED
APPROACH**

**LEADING
GLOBAL
TECH FIRM**

**65 PhDs &
100+** advanced
degree Patent lawyers

Ranked among
TOP 10 FIRMS
in *American Lawyer's*
Diversity Scorecard

Founded in
1883

17 Offices
in **7** countries

200
lawyers in Asia

Global reach of
125+ countries
worldwide

Finance Overview

We offers clients the experience and skills to handle their most strategic needs. Clients take advantage of the knowledge and capabilities of our banking and finance practice, across all areas of business restructuring and insolvency, derivatives and structured products, financial services and financial transactions, project finance, real estate finance, securitization, and tax.

Breadth of Finance Knowledge

Morrison & Foerster's 95+ finance lawyers, including over 20 London-based lawyers, represent public and privately held companies, major private credit lenders and banking institutions, as well as non-bank lenders, private equity, and corporations, developers and sponsors, on a full range of financial and capital markets transactions globally. Our team includes lawyers with expertise in the areas of banking, securities, structured finance, project finance, private placements and derivatives.

Extensive Experience

We have an experienced, full-service team that represents banks, asset managers, hedge funds, and other market participants in every type of finance transaction. MoFo's market-leading financial transactions practice is global in scope, with offices in key financial centers and lawyers closing deals worldwide, including Europe, Asia, Latin America, and Africa.

Highly Ranked

We collaborate with our highly ranked corporate, M&A, and venture capital practices that have been recognized for their work in industries such as financial institutions, life sciences, IT, energy, telecom, and technology, and for their experience with cross-border transactions.

Recognized Debt Finance Capabilities

Our lawyers are among the most experienced and creative lawyers for leveraged, asset backed and structured debt products in the London market, with specific experience in all kinds of senior, ABL/borrowing base, mezzanine and second lien (both European and US), high yield, PIK, preference share and other junior debt financings, as well as financings based on portfolio equity values such as "margin loans" on unlisted shares and financings of minority stakes. Members of our London finance team are regularly ranked among the best lawyers in their field, including commendation from the Financial Times in the 2016 European Innovative Lawyers report, and have been personally involved in many of the market-moving developments of the past periods including developing the first European super senior revolver alongside a senior secured bond issue, the first pari passu bank/bond deal and arguably the first European unitranche terms.

Legal 500

"Pragmatic and experienced" advisers, who are "very commercially astute."



Chambers & Partners

"The team provides good, intellectual, strategic analysis in developing solutions to difficult and complex problems."



Morrison & Foerster (UK) LLP

Chambers Global and Chambers Asia Pacific

Ranked as a leading international firm for Banking & Finance in Japan



A Note on Diversity

Diversity has long been a core value of Morrison & Foerster.

We made history in 2001, by becoming one of the first global law firms to elect an openly-gay person to serve as Chair of the firm. More than 20 years ago, we formally implemented our diversity mission statement, which continues to define the firm's cultural values today. We understand that fostering an environment of inclusion enables us to offer a wide range of perspectives to provide exemplary services to our clients. In short, we aim to make our firm a model of diversity that others will follow.

- When we announced our partner class of 2020, almost half of our 18 newly promoted partners are women.
- This is not just a 2020 phenomenon. In the last five years, we have promoted 32 women to partner, which represents 46% of our total partner promotions. Fourteen of those people promoted were working on a reduced-hours schedule the year prior to promotion (20% of our total partner promotions).
- 40% of the members on our board of directors are women.
- Women chair or co-chair approximately 20 of our practice groups.

We take pride in our diverse workplace. We believe that lawyers with different backgrounds, interests and experiences working together arrive at better answers and offer fresher perspectives.



In 2019, MoFo achieved "Mansfield Certification Plus" status, indicating that we met or exceeded the consideration requirements of the Mansfield Rule and reached at least 30 percent women, minority and LGBTQ+ lawyer representation in a notable number of current leadership roles and committees.



Ranked among the top 10 firms in American Lawyer's Diversity Scorecard



100 percent ranking on Human Rights Campaign's Corporate Equality Index report for 17 years in a row

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