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Proskauer Represents Private Credit Funds on New LMA Unitranche Intercreditor Agreement

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A new precedent unitranche intercreditor agreement was published by the LMA on 17 May 2018 for use on unitranche transactions where a private credit fund is providing a facility alongside a super senior RCF. Whilst it does not expressly contemplate first out / last out deals, it can also easily be adapted for these transactions. Proskauer was appointed as a member of the working party that was formed for the development of this new precedent. In this note, we explain the background to this development, how the new precedent works and how it may change the market.

Why has the LMA developed a new precedent unitranche intercreditor agreement?

With the growth of private credit financing, market participants (including credit funds, banks & advisers) had asked the LMA to develop a precedent intercreditor agreement for use on unitranche transactions. Previously, the LMA had precedent intercreditor agreements for use only on traditional senior/mezzanine and SSRCF/bond transactions, and therefore law firms had developed various bespoke forms for use on unitranche transactions. This new precedent will promote consistency of unitranche intercreditor documentation, provide for quicker processes and allow lenders to focus on key points of negotiation.

How was the new intercreditor agreement developed?

The LMA formed a working party comprising selected banks, credit funds & law firms. Proskauer, as representatives of the private credit community, were the only independent law firm to contribute to and attend each working party meeting throughout the process – this means that we have a unique insight amongst law firms into the meaning and background of this new precedent. The document was drafted by the LMA (& their external legal counsel) with the benefit of input from working party members. Whilst the LMA took into account the views of working party members, their approach was to retain consistency with their wider suite of documentation and to provide options where credit funds and banks took opposing views.

What has changed – and what has not changed?

In broad terms, the precedent follows the traditional approach to unitranche intercreditor agreements, with RCF providers being at the top of the enforcement waterfall and unitranche lenders driving the bus. However, the LMA were unable to provide standardised drafting for what they viewed as "commercial" aspects to unitranche intercreditor agreements (such as the 'Material Event of Default' definition and standstill periods) and they steered away from other points more typically set out in the facilities agreement. Therefore a number of points will remain to be agreed on a deal-by-deal basis. There have, however, been a number of helpful developments to provide standardised drafting and to set out certain options where credit funds and banks took opposing views in the working party discussions.

What do private credit funds need to watch out for in the new precedent?

The new precedent contains various drafting options on key points of negotiation (for example, the instructing group and the enforcement realisation period). These should be selected carefully by lenders to ensure the most appropriate options are used. There are also a number of other intercreditor provisions where (to ensure consistency with their other documentation) the LMA were not able to reflect market practice

How will this development affect new deals?

Whilst the new precedent does not cover every point, it should streamline processes on new unitranche deals, promote consistency across the market and facilitate review & negotiation. We anticipate that the market will adopt this new form of intercreditor agreement. In particular, we expect that this new precedent will facilitate intercreditor discussions and promote consistency in some continental European transactions (where the intercreditor position is less firmly established).

Proskauer have prepared a short form term sheet (available on request) that dovetails with this new precedent and will facilitate the negotiation of intercreditor terms on new deals.

What is the market position on unitranche intercreditor terms?

Proskauer collects market data on private credit transactions (our 2017 data survey looked at over 50 European deals) and our analysis of intercreditor terms can be shared with clients. We consider this to be the definitive guide to market practice.

If you have any questions regarding this bulletin, please get in touch with your usual Proskauer contact or one of the Private Credit Group partners.

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