



## FUND FINANCE FRIDAY

# Liquidity, Luxembourg, ESG — Must Be Fund Finance

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## Women in Fund Finance (WFF): Fund Liquidity Solutions – Part II

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**By Leah Edelboim**  
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Women in Fund Finance (WFF) this week hosted a second installment of its “Fund Liquidity Solutions” virtual event, which was a follow-up to the first liquidity solutions panel that took place in July. This second panel brought together industry experts who have been at the forefront of structuring alternative liquidity solutions for private market managers. The panel continued a conversation about how funds, their lenders, and investors are thinking outside the box to unlock value for their constituents.

The panel consisted of industry experts who are leading the charge in this rapidly growing and evolving segment of the fund finance market. The panelists included: Andie Goh, a Principal in the Alternative Credit Group at Ares; Helen Griffiths, Head of Structuring and Strategic Solutions at Investec; James Lumby, an Executive Director in the Alternative Capital Solutions Group at Goldman Sachs; Donna Yip, a Managing Director at Antares Capital LP; and Patricia Teixeira, counsel at Ropes & Gray, whose practice focuses on fund finance and largely borrower-side representations. The panel was moderated by Cadwalader fund finance partner Samantha Hutchinson.

It is an exciting time to be in the fund finance market, as investors search for yield and market participants are thinking creatively and innovating from a liquidity-raising perspective. The panelists agreed that one of the most exciting aspects of the market right now is appetite from all players to explore creative thinking in structuring transactions. There is a real increase in the products available in the market, some of which include variations of existing products.

The discussion kicked off with the panelists discussing what they are seeing as the most prominent of these innovations. The first item that the panelists discussed was the use of securitization technology in the fund finance market, and how it allows companies to participate in a capital-efficient manner. Some market players are finding comfort in the increasing guidance on what structures are acceptable.

Rated note structures are a key innovation in the market, and they play an important role from a number of angles. In the first instance, insurers are coming into those transactions as the structure allows better treatment from a regulatory and capital requirement perspective. These innovations around rated feeder structures are attracting long-duration insurance capital, bringing new and increased sources of liquidity into the market. Alternative managers are also considering other roles for insurers, and some are looking at ways to bring insurers into deals at the management company level.

NAV facilities are hot and getting hotter. Demand is growing on a number of levels. In our own practice, we are seeing new players coming into the product and getting excited about that line

of business. The panelists discussed how NAV facilities give funds new sources of liquidity and make a lot of sense as funds hold assets longer and seek to leverage those investments in seeking additional liquidity. There is also room in the market for new players to participate in the syndicate, such as insurers, which can make additional pockets of capital available to borrowers. Having insurers as members of the syndicate allows some arrangers to provide borrowers with an increased facility size without having to sit shoulder-to-shoulder with their competitors in the syndicate.

There are also developments and variations within the NAV product itself. These include hybrid structures and deals that have concentrated investment portfolios. Lenders are also branching out and offering these facilities to funds other than strictly private equity funds – for example, private credit funds. Credit providers are digging in on their diligence process and considering other categories of funds and thinking creatively about different assets and how these assets can be used as collateral to secure different loan structures. These lenders are not afraid to get technical and carefully examine the details of the potential collateral. They are also taking the time to understand the business, the fund structure, how each asset is held, and how they would realize on the collateral in the event of a meltdown.

The panelists wrapped up by discussing what they are expecting to see in the year ahead. Continued innovation in structures was chief among the predictions. ESG also featured prominently. The panelists discussed how regulators, investors, and debt holders are each looking to ascertain the veracity of any ESG-focused metrics. These parties want accountability for KPIs and want to understand the details of how they are being measured. The panelists noted that diligence is really digging into how these items are measured and quantified on both quarterly and annual bases. There is a real focus on legitimacy in reporting and an expectation that parties use third-party auditors in the process. There is also a critical eye towards how an entity matches up against its competitors.

The discussion made clear that innovation and growth will be key themes in the fund finance market for 2022. From creativity in structures, new sources of capital, larger facilities, new and different players on both the lender and the borrower sides, and a willingness to finance different types of funds and other types of collateral, the fund finance market is expected to get even more interesting and exciting as we start to look into a new year ahead.

# Fund Finance Transactions and Enforcement of Foreign Judgments in Luxembourg

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**By Michael Mbayi**  
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Luxembourg is a centre of excellence for investment funds and the second-largest fund domicile in the world after the U.S. As such, it is a great place to observe the evolution of fund finance globally, since Luxembourg funds are commonly involved in fund finance transactions.

One of the typical questions asked by lenders and lead counsel in a fund finance transaction involving Luxembourg-based investment funds concerns the enforcement of foreign judgments in Luxembourg.

In Luxembourg, regarding subscription facilities, we see generally three types of transactions:

- purely domestic fund finance transactions, where the facility agreement is governed by Luxembourg law with a Luxembourg law-governed security package;
- US-Lux cross-border transactions, where the credit agreement is governed by New York law with a Luxembourg law-governed security package (Transactions US-Lux); and
- English-Luxembourg cross-border transactions, where the facility agreement is governed by the laws of England and Wales with a Luxembourg law-governed security package (Transactions England-Lux).

For the rest of this article, we will be focusing on cross-border transactions.

## **Transactions US-Lux**

The point here is to determine under which conditions a final judgment rendered in the courts of New York in relation to the credit agreement would be recognized and enforceable in Luxembourg.

An enforcement procedure, established namely by the Luxembourg Code of Civil Procedure (*Nouveau Code de Procédure Civile*) is necessary. Moreover, Luxembourg case law provides specific requirements for the recognition of foreign judgments in Luxembourg.

First, the judgment must be final and duly enforceable in the courts of New York.

Furthermore, according to Luxembourg conflicts of jurisdiction rules as well as in light of New York law, the courts of New York must have jurisdiction.

In addition, the proceedings in New York must have been held in compliance with New York law rules.

Also, the so-called rights of defense (*droits de la défense*) must have been respected.

Another requirement is that the New York courts have applied the law designated by the Luxembourg conflict law rules to the case.

Finally, the content of the judgment may not conflict with Luxembourg international public policy nor be rendered in the context of an evasion of law (*fraude à la loi*).

### **Transactions England-Lux**

Since the United Kingdom left the European Union, the reciprocal recognition principle and the simplified execution process does not exist any more.

Therefore, there are typically two situations that arise. The first is where the facility agreement does not contain an exclusive jurisdiction clause. In this occurrence, what we have described above concerning the judgments of the courts of New York applies *mutatis mutandis* to the English judgment.

The second situation is where the facility agreement contains an exclusive jurisdiction clause. In such instance, the judgment would be recognized and enforceable in Luxembourg in accordance with the provisions of the Hague Convention of 30 June 2005 on choice of court agreements (the "Hague Convention").

### **Conclusion**

The regime for the enforcement of New York judgments has been consistent. Regarding the judgments of the English courts, since Brexit, we have observed more exclusive jurisdiction clauses in the English law facility agreements in order to benefit from the regime of the Hague Convention and fewer asymmetric jurisdiction clauses (*i.e.*, where a party may decide to designate another court than the one expressly determined in the facility).

## Wes Misson on ESG Fund Finance, Part Two

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Understanding and applying either a use-of-proceeds or a performance-based structure is essential to originating an ESG fund finance facility. (Experienced counsel, we've heard, also helps.) In the [second installment](#) of its ESG fund finance primer, *Private Equity Law Report* explores the practical implementation of both approaches, with the help of Cadwalader's Wes Misson and other market participants. Getting the performance objectives right and steering clear of greenwashing fall within the terrain covered.

## WFF & DFF Fireside Chat with Carla Harris

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Join Women in Fund Finance (WFF) and Diversity in Fund Finance (DFF) for a fireside chat with Carla Harris, Vice Chairman of Wealth Management, Managing Director and Senior Client Advisor at Morgan Stanley, as well as gospel recording artist and author of *Expect to Win* and *Strategize to Win*, to discuss maximizing success and leadership in your career. The program will be moderated by Deborah Montaperto, Managing Director and Private Wealth Advisor at Morgan Stanley. To register, click [here](#).

## FFA Mentorship Program Open for 2021-2022 Applicants

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### 2021-22 US Mentorship Program

After a successful conclusion to the Fund Finance Association's first annual U.S. Mentorship Program, the Fund Finance Association is now recruiting mentors and mentees for the 2021-2022 program. [Download](#) an application, and have it completed and sent to [mentoring@fundfinanceassociation.com](mailto:mentoring@fundfinanceassociation.com) by October 22. For any questions regarding the program, reach out to the [Mentoring Program Team](#).



## WFF Europe Event

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WFF will host a night of networking and drinks in partnership with Allen & Overy and Clifford Chance at the Tate Modern, London, on November 2. The event will feature two of Yayoi Kusama's Infinity Mirror Rooms – Infinity Mirrored Room and Chandelier of Grief – immersing attendees into a night of endless reflections. Attendance is currently limited to WFF members and European sponsors. For more information, please click [here](#).

## Brickfield Interviews JPMorgan's Julie Thick

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This edition of Brickfield's *Fund Finance Voices* features Julie Thick, Managing Director and Director of the National Subscription Lending Platform at JP Morgan Chase & Co. in Chicago. Julie provides insight on the importance of the fund structure in the real estate industry and the growth that it has caused over the last 25 years. Julie explains how the subscription business has been a game changer in the real estate industry as it has created economies of scale and speed of execution. Additionally, Julie speaks on her role in the growth of the fund finance operations at JPMorgan and the qualities which she believes are most important when looking to add new members to her team.

Click [here](#) for the interview.

## The Legal 500 UK Recognition

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The Cadwalader London Fund Finance team has continued its impressive record of awards, award nominations and other recognition for its outstanding work in the market. Recently, *The Legal 500 UK* recognized London practice head Samantha Hutchinson as a “Leading individual,” and also recognized partner Nathan Parker and associate Mathan Navaratnam in the Fund Finance arena.

For more information, please visit [here](#).