



FUND FINANCE FRIDAY

Another Capital Call Enforcement Proceeding???

November 9, 2018 | Issue No. 3

Table of Contents:

- **Another Capital Call Enforcement Proceeding???**
- **That's Perfect – Proposed EU Legislation to Harmonize Perfection of Security**
- **New or Just New to Me? Barron's on Fund Finance**
- **Also in This Issue**

Another Capital Call Enforcement Proceeding???

November 9, 2018 | Issue No. 3



By Eric Starr
Associate | Fund Finance

A case of interest to the fund finance market is proceeding in the Northern District of California. In summer of 2015, Indian IT firm Tech Mahindra Ltd. committed \$40 million of capital to a private equity fund established by California-based Northgate Capital. A little over a year later, Northgate issued the initial capital call for the purpose of paying \$1.04 million in management fees. Tech Mahindra declined and Northgate responded by dragging its investor before an arbitrator.

Tech Mahindra claimed it was not properly notified of managerial departures that would trigger a key person event clause in the fund's LPA. In April 2016, former NFLers Brent Jones and Tommy Vardell left the fund they had co-founded in 2000. Their departures left the fund with no remaining key persons (the only other key person had already left). Tech Mahindra points to these intervening events and a lack of corresponding notice for its refusal to honor the September 2016 capital call. Northgate pointed instead to statements made two days prior to the due date of the capital call in which the investor allegedly claimed it had been unable to secure the required regulatory approvals from the Royal Bank of India – an assertion Northgate believes to be untrue. Northgate believes the investor did not want to fund for other, unexpressed reasons that would not justify a refusal to fund and that the investor is grasping at straws to find a reason not to honor its commitment.

The day that the arbitration was set to begin, Tech Mahindra was informed that a key witness – recently departed CEO of Northgate Dr. Hosein Khajeh-Hosseiny – would not be available, had left the country, and had no immediate plans to return. Tech Mahindra took its grievances to a federal judge in California and the dispute became public. According to the pleadings filed by the litigants, Tech Mahindra asserts that Dr. Hosseiny's absence would significantly prejudice its case; the company contends that Dr. Hosseiny never intended to comply with the order to appear on November 2, 2018, having left the United States for London in early September. In response, Dr. Hosseiny claims that visa issues have prevented his return, despite his best efforts, including informing U.S. immigration officials in London of his scheduled arbitration appearance. In lieu of an in-person appearance, Dr. Hosseiny has offered to appear via videoconference from London – an offer that was not immediately accepted by Tech Mahindra, but ultimately was the remedy granted by the Northern District of California.

The enforceability of capital calls plays a prominent and critical role in the world of subscription finance, which makes cases such as this one of particular interest to professionals working in the industry. As this case progresses, Cadwalader will monitor the proceedings and provide updates here as developments warrant.

Tech Mahindra Limited v. Khajeh-Hosseiny, Docket No. 5:18-cv-06613 (N.D. Cal. October 30, 2018).

That's Perfect – Proposed EU Legislation to Harmonize Perfection of Security

November 9, 2018 | Issue No. 3



By Nathan Parker
Special Counsel | Fund Finance

During the first quarter of this year, the EU proposed a new regulation to harmonize the perfection of assignments of claims and bank accounts. As with the U.S. market, the European subscription fund financing market has two key pillars of security: an assignment of rights to call capital under the fund documents and an assignment or pledge of the bank account into which such capital call proceeds are deposited. The EU regulation will impact both of these security instruments.

The EU regulation has been proposed to reduce the conflict of law issues that surround perfection of such security (which may, in a funds financing context, require a lender to have regard to the perfection requirements in the jurisdiction of each individual investor to ensure that the security is enforceable).

The EU regulation provides that, with respect to an assignment of claims, the local law of the assignor (*i.e.*, the fund and/or general partner) will apply to determine the steps to perfect the security. In general terms, where the assignment is in respect of a bank account held with a EU bank or branch, the applicable law of the assigned claims in respect of the account governs the perfection rules (usually, but not always, the location of the account). As such, funds may start to see requests for bank account mandate documents or changes to the account security documentation to provide sufficient comfort that the location and governing law of the account are the same.

If passed into law, the regulation will provide increased certainty with respect to the enforceability of a typical European fund finance security package and remove the potential for time-consuming and costly debates around the perfection of security against LPs.

The EU regulation claims to have universal application and, in doing so, attempts to regulate perfection of assignments against LPs located both inside and outside the EU.

New or Just New to Me? Barron's on Fund Finance

November 9, 2018 | Issue No. 3



By Trent Lindsay
Senior Attorney | Fund Finance

A *Barron's* article published this week, titled "A New Form of Private-Equity Financing Is Starting to Take Off," is not really news to those who do subscription finance work every day. To be fair, the article looks back at the development of the fund finance market over two decades and particularly focuses on the role of relationships among fund principals and the private bank and wealth management arms of financial institutions. The article notes the continuing distinction between lenders who cover the sector out of the wealth management side of the business and those that operate out of the investment bank. The full article is available by subscription [here](#).

Also in This Issue

November 9, 2018 | Issue No. 3

- Attorneys at Troutman Sanders published a nice [review](#) of the basic LPA prerequisites to lining up a subscription credit facility.
- Ogier published a helpful [primer](#) on subscription facility due diligence.
- The Alternative Reference Rates Committee extended the comment deadline for two consultations on U.S. dollar LIBOR fallback contract language for floating rate notes and syndicated business loans. More from *The Cadwalader Cabinet* on this [here](#).