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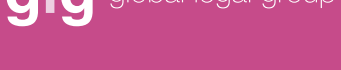

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Enforcement: Analysis of lender remedies under U.S. law in subscription-secured credit facilities

Ellen Gibson McGinnis, Erin England & Richard D. Anigian
Haynes and Boone, LLP

Introduction

Lenders must have a sound understanding of their legal rights regarding the process of enforcing remedies against a borrower and its limited partners[1] under a subscription-secured credit facility in order to assess risk, price the risk, and properly document the facility. Lenders who adequately plan for an event of default and exercise of remedies are more likely to prevail against the borrower and its investors when enforcing rights. Lenders must be prepared to execute every step of their enforcement strategy, beginning with the occurrence of an event of default, through the decision to accelerate the obligations, to the exercise of remedies and, finally, to recovery of payment.

Establishing an event of default; issues of jurisdiction and service of process

Before a lender can exercise its remedies, there must first be an event of default under the facility documents. In many cases, the occurrence and continuation of an event of default will be clear (e.g., failure to make payment or failure to timely act under the terms of the facility documents). However, if a borrower contests the existence of a default, the lender should consider immediately filing a declaratory judgment action in an appropriate court to establish that an event of default has occurred.[2] A declaratory judgment filing does not set forth a cause of action for damages, but instead seeks a declaration from the court establishing existing rights, status or other legal relationships under the terms of a contract. It provides a remedy to a party that is uncertain of its rights and wants an early adjudication without having to wait for its adversary to file suit.[3]

The court must have jurisdiction over the parties and the subject matter to issue a declaratory judgment. Typically, the borrower agrees to submit to jurisdiction in a particular forum in the facility documents, which establishes personal jurisdiction over the borrower.[4] Subject matter jurisdiction is the court's jurisdiction over the nature of the case and the type of relief sought. A U.S. federal court has the power to hear a declaratory judgment action under 28 U.S.C. § 2201(a)[5] if the case is within its subject-matter jurisdiction and involves an actual controversy.[6] A lender seeking a declaratory judgment has the burden of establishing,

by a preponderance of the evidence, that there is an actual controversy.[7] Similarly, under most state laws, a declaratory judgment is only proper when there is an actual controversy and the existence of the controversy is not "contingent upon the happening of future events which may never occur."[8]

In federal court, service of process on domestic entities is governed by the Federal Rules of Civil Procedure. Rule 4 provides that a corporation, partnership, or other type of business association may be served by delivering the summons and complaint to an officer, managing or general agent, or an agent authorised by appointment or law to receive service.[9] New York and Delaware courts have similar service of process rules.[10] If the borrower agrees in the facility documents that service of process may be effected by registered or certified mail sent to a specific address, the state or federal court will recognise such service as effective.[11]

Several additional issues must be considered when the defaulting borrower is a non-U.S. ("**foreign**") entity. First, lenders must decide whether to pursue the foreign entity in the United States or in its home country.[12] Several factors favour suit in the United States. First, a judgment from any American court, state or federal, is relatively easy to register and enforce throughout the United States. Second, a U.S. court will be more familiar with the contractual obligations at issue. Finally, depending upon the applicable foreign jurisdiction, there may be considerable local bias in the foreign jurisdiction in favour of the foreign defendant that must be overcome.

Establishing personal and subject matter jurisdiction over a foreign entity requires the same analysis.[13] Once jurisdiction has been established, the lender must effectively serve process on the foreign entity. If a foreign borrower has agreed in the facility documents to accept service of process by certified or registered mail, this manner of service will be enforceable unless the borrower demonstrates that such service is precluded by foreign laws.[14]

If the manner of service in the facility documents fails, is impractical, or is deemed unenforceable, the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents (the "**Hague Convention**") provides an additional method of service on a defendant residing in any nation that is a signatory to the Hague Convention,[15] such as the United States,[16] the United Kingdom, or the Cayman Islands.[17] Therefore, knowledge of the Hague Convention procedure for service of process is useful as it provides the most fool-proof manner of service in applicable jurisdictions.

The Hague Convention provides for formal service through the foreign defendant's government's designated "Central Authority", where the process is sent to the Central Authority with instructions to forward it to the defendant.[18] Alternatively, in Article 10(a), the Hague Convention states that, unless the foreign government has lodged an official objection, service by international registered mail directly to the defendant in the foreign nation is adequate.[19]

As a practical matter, lenders should seek the advice of local counsel in the applicable jurisdiction to confirm the best methods to effect service. The outcome may be simultaneous service by different methods. Full compliance with the formal Central Authority process under the Hague Convention may be slow and cumbersome, but it should yield nearly unimpeachable service. At the same time, service by registered mail should be attempted, as it does not add any significant cost and there is always the chance the defendant will respond to it and appear in the lawsuit.

Once jurisdiction has been established and the foreign entity has been properly served, the lawsuit may proceed just as any other, and a declaratory judgment may be obtained. Under U.S. law, a declaratory judgment issued by a court has the force and effect of a final judgment or decree.[20]

Recovery from borrower and investors

Once an event of default is established, lenders may either direct the borrower to make a capital call on the investors for repayment of the obligations or issue a capital call directly on the investors.[21] If the borrower files for bankruptcy, a motion to lift the stay will be required before the lender can proceed. In well-documented, subscription-secured facilities, the obligations of the borrower and the rights of lenders *vis-à-vis* the investors should be so well-defined that even if the borrower challenges the lender's right to call capital, the fundamental obligation of the borrower to repay the obligations, and the lender's rights to call capital, are likely to be resolved by summary judgment. By contrast, more complicated issues regarding recovery arise with respect to enforcement against the investors. Under most subscription-secured facilities, each investor enters into agreements or makes acknowledgments that run to the lender, either in an "**Investor Letter**" or in the partnership agreement, wherein the investor expressly acknowledges and confirms, inter alia, its obligation to make capital contributions without defence, setoff or counterclaim when called to repay the facility.[22] These agreements, together with the nature of the collateral securing subscription-secured facilities, constitute the foundation for recovery from the investors.

Legal theories of recovery against investors

If, after an event of default has occurred and has been legally established, any investor fails to pay a required capital contribution in response to a capital call, resulting in a payment deficiency, lender's recourse is to file a lawsuit against the defaulting investors to enforce remedies. The lender should consider its rights under statutory law, the facility documents, any Investor Letter, and the borrower's partnership agreement (collectively, the "**Relevant Documents**").

Depending on the language of the Relevant Documents and the factual circumstances, the lender should be able to establish liability against the investors for the capital contributions through claims of reliance, breach of contract, unjust enrichment or promissory estoppel.

Reliance claims arise out of statutory principles contained in the Revised Uniform Limited Partnership Act, as applied in each state, and are based on the lender's actions taken (e.g., to advance loans) in reliance upon any of the Relevant Documents.

Breach of contract claims may be based on:

- enforcement of lender's rights under the collateral documents, by which the rights of the partnership to demand capital contributions from investors were pledged to the lenders, and perfected in accordance with the Uniform Commercial Code (the "**UCC**");
- the agreements and acknowledgments made by investors in the partnership agreement or Investor Letters, in particular, the agreement to fund capital contributions for the purpose of repaying the facility without defence, setoff or counterclaim; and
- the lender's status as a third-party beneficiary of the partnership agreement.

If there is no express contract between the lender and the investors,[23] or if a contract between them is unenforceable or unproven,[24] the lender may be able to assert a claim for unjust enrichment on the equitable principle that the investors should not be permitted to enjoy the benefit of the lender's extension of credit if the lender is provided no remedy for an investor's subsequent default. The lender may also be able to assert a promissory estoppel claim based on the investors' capital commitment promise.[25,26]

Creditor enforcement under limited partnership law based on reliance

(a) *Rights of lenders*

In Delaware, the Revised Uniform Limited Partnership Act ("**DRULPA**") provides a statutory basis for asserting a reliance claim for the benefit of a lender.[27] Under DRULPA, unless otherwise provided in the partnership agreement, the obligation of investors to make contributions may be "compromised" only by the consent of all investors.[28]

The practical effect of DRULPA is to confer the benefit of the obligations of investors to a borrower on a lender who reasonably relied upon the capital call rights contained in the partnership agreement (i.e., the lender would not have extended credit to the fund but for the fund's right to call capital from its investors). There is limited guidance as to what constitutes reasonable reliance; however, some courts have found reliance simply because the capital contribution obligations were contained in a publicly-filed certificate of limited partnership.[29] It has also been suggested that evidence of reliance may include:

- references in the lenders' credit files to the capital contribution obligations as a source of repayment of the loan;
- references to the capital contribution obligations in the facility documents or solicitation materials;
- communications with the general partner and limited partners regarding the basis on which the loan will be repaid;
- review of the partnership's books and records, such as capital accounts and financial statements; and
- execution of an undertaking pursuant to which the general partner agrees to issue, and/or the limited partners agree to make, capital contributions to repay the debt.[30]

In re LJM2 Co-Investment, L.P. Ltd. Partners Litig., 866 A.2d 762 (Del. Ch. 2004), the Delaware Court of Chancery held that the bankruptcy trustee of the limited partnership adequately demonstrated that the bank creditors reasonably relied, for the purposes of DRULPA, on the limited partners' representations that they would honour their capital commitments, which allowed the creditors to enforce the capital commitments.[31]

Specifically, the trustee alleged that the bank creditors reasonably relied on *Section 3.1* of the partnership agreement to extend credit to LJM2 because: (i) under that section, the limited partners were obligated to contribute their commitments only when called for by the general partner; and (ii) the bank creditors removed this solitary condition by creating interrelated agreements compelling the general partner to make capital calls if LJM2 defaulted (through the combination of the Credit Agreement and the General Partner Undertaking to the effect that, if LJM2 defaulted on the Credit Agreement, the [general partner] would be bound to issue Drawdown Notices to the limited partners to the extent necessary to cure such payment default).[32]

(b) *Defences*

Generally, if a limited partner's obligation to make capital contributions is not subject to conditions in the certificate of limited partnership (or in Delaware, the partnership agreement),[33] the circumstances in which payment will be excused are few and narrow, because third parties and other limited partners have a right to rely on receipt of such capital contributions.[34] However, limited partners may be able to raise one or more of the following defences.

First, under Delaware law, a limited partner's obligation to make capital contributions to a limited partnership may not be enforced unless the conditions to funding obligations have been satisfied or waived.[35]

Second, one court applying a state analogue of *Section 502* of DRULPA has suggested that contribution obligations may be excused – even as to partnership creditors – where there has been a "profound failure of consideration such as repudiation of, or fraud incident to, the essentials of the venture to which the [partnership] was made."[36] The court provided two examples: (i) the general partner had absconded with the limited partners' initial contributions, without putting any money into the construction of a proposed apartment project; and (ii) a failure by the general partner to take any steps at all in furtherance of the apartment complex venture.[37]

However, a "material breach of the limited partnership agreement – including mismanagement, negligence, diversion of some assets, or unauthorized acts of the general partners, or disappointed expectations, or failure to perform certain elements of the agreement – would not excuse a limited partner's commitment to contribute additional capital", and thus would not constitute a valid defence to a *Section 502* claim.[38] One court held that proof of the general partner's fraudulent activities did not excuse the limited partners' capital contribution obligations and did not provide adequate defence to a creditor's claim under *Section 502* because the fraud had not resulted in a total failure of consideration.[39]

Third, another court has suggested that when loan proceeds are not used for partnership purposes, lenders may not be able to recover from those limited partners that lacked knowledge of such use.[40]

Finally, a limited partner may deny that it had the authority to execute a subscription agreement, partnership agreement, or Investor Letter as a defence to payment. However, the evidence of authority (in the form of an opinion of counsel or a secretary's certificate) that typically accompanies Investor Letters may estop the investor from asserting such a defence in transactions with Investor Letters.

Creditor enforcement based on breach of contract under a security agreement

Under typical facility documents, lenders may "step into the shoes" of the general partner to enforce rights under the partnership agreement.

(a) *Application of the UCC and right of recovery against investors*

Because the investors are obligated to make capital contributions under the partnership agreement, and the collateral pledged to the lenders constitutes general intangibles, investors are considered "*account debtors*" under the UCC.[41] Under UCC § 9-406, after a lender delivers notice to investors that the amount due or to become due has been assigned ***and*** that payment is to be made to the assignee,[42] the investors may discharge their obligations to make capital contributions only by paying the lender. If the investors fail to fund their capital contributions, the lender may assert a breach of contract claim against the investors as an assignee under the security agreement.[43]

While no particular form of notice is mandated under UCC § 9-406, other than that the notice must be authenticated,[44] notice will be effective so long as the lender's chosen method of notifying the investor is sufficiently specific and direct.[45] Conversely, if the notice of the assignment does not reasonably identify the rights assigned, then it will be deemed ineffective.[46]

The courts uniformly hold that, if the notice simply informed the investors that the right to payment has been assigned to the lender – without also informing the investors that future payments are to be made to the lender – then the investors, by paying the borrower, are discharged and need not pay the lender as well.[47] It is not clear whether the notice requirement is satisfied by delivery of notice to investors at the closing of a facility, which notice would presumably disclose that payments would be required to be made to the lender upon an event of default and issuance of a capital call notice by the lender, both of which are conditions subsequent that may never occur. Thus, the prudent lender will deliver a notice, upon an event of default, that the right to payment has been assigned and that future payments must be made to the lender, so that any payment by the investors to the borrower will not discharge any liability to the lender – investors must pay the lender directly.[48]

After sending notice, the lender may exercise remedies under the partnership agreement in lieu of the general partner.[49] Under UCC § 9-404(a) this means that, unless the investors have agreed to fund capital contributions without defence, the lender's rights are subject to any claims or defences the investors have against the borrower. This principle is an "application of the 'elementary ancient law that an assignee never stands in any better position than his assignor. An assignee is subject to all the equities and burdens which attach to the property assigned because he receives no more . . . than his assignor.'"[50]

(a) *"Waiver' of defences*

The key provision in any Investor Letter or partnership agreement addressing a subscription-secured facility is the agreement by investors to fund capital contributions to repay the facility without defence, setoff or counterclaim. This agreement is often referred to, in shorthand, as a "waiver of defences", but it is, in most cases, simply an agreement to fund capital contributions to repay the obligations under a subscription-secured facility, without raising, against the lender, any defences that may exist as between the investor and the borrower, while retaining rights to make claims against the borrower and the other investors.

Creditor enforcement based on breach of contract under an Investor Letter

In a facility with Investor Letters, the lender should also assert a breach of contract claim as a party to the Investor Letter.

In its Investor Letter, each investor will acknowledge and confirm that the lender, by extending the credit facility to the partnership, is relying on the obligation of the investor to make capital contributions to the partnership. Facility documents typically permit the lender to issue capital calls directly to the investors, and the investors will have agreed to fund capital contributions without defence, setoff or counterclaim. If any investor fails to fund its capital contribution when called by the lender, it will have breached the terms of its Investor Letter, and the lender may bring a breach of contract claim. After discovery, the lender may be able to move for summary judgment, since proof of the executed Investor Letter and its terms and provisions will likely eliminate many issues of fact that may otherwise prevent the lender from obtaining summary judgment against such investor. Even short of an actual agreement, if an investor, by execution of an Investor Letter, acknowledges and confirms its obligations under the partnership agreement, such acknowledgment and confirmation may constitute an enforceable contract.[51]

Creditor enforcement based on breach of contract under a partnership agreement

If the partnership agreement expressly grants the lender the right to directly demand payment of capital contributions from the investors, the lender will be an intended third-party beneficiary of the agreement; often, partnership agreements make the third party beneficiary status of the lenders explicit. The lender should then be able to enforce the investors' capital call obligations for its benefit. In *Chase Manhattan Bank v. Iridium Africa*, 307 F. Supp. 2d 608, 612 (D. Del. 2004), the limited liability company agreement at issue gave the lender the right to directly demand payment of the members' capital call obligations.[52] In that case, the court granted the lender's summary judgment request on its breach of contract claim (as a third-party beneficiary of the LLC agreement) based on the members' refusal to comply with the lender's demand for payment under the limited liability company agreement.[53] However, it appears the court granted summary judgment based solely on the relevant provisions of the limited liability company agreement (which gave the lenders the right to directly demand capital contributions from the members), without reviewing the lender's rights under the security agreement.[54]

Relevance of "waiver of defences"

Good litigation strategy often dictates that a lender should assert as many legitimate claims as possible against an obligor – in this case, the investors. Initial pleading requirements are, in most U.S. jurisdictions, liberal, and a lender is not limited to pursuing only its best claim. Any such strategy should also take into account, however, potential affirmative defences that may be asserted by investors, in the context of the "waiver of defences" discussed above.

Although lenders may have the right to require investors to make capital contributions through the security agreement, partnership agreement or *Section 502* of DRULPA (as enacted in Delaware and many other states), the limited partners may have defences at their disposal.[55] However, if the partnership agreement, the subscription agreements or the Investor Letter contain the customary waiver of defences language,[56] the investors should be estopped from raising those defences and the lenders may be able to obtain summary judgment against the investors.[57]

(a) *Enforceability of waiver of defences under general contract law*

Parties to a contract may contractually agree to waive certain rights. A party may waive a defence to a contract,[58] and courts have enforced such waivers if the waiver language is manifested in some unequivocal manner.[59]

For example, in *Relational Funding Corp. v. TCIM Services, Inc.*, No. Civ. A. 01-821-SLR, 2003 WL 360255, at *2-3 (D. Del. Feb. 14, 2003), the Delaware District Court dismissed a lessee's counterclaims due to the following waiver in the lease agreement: "Lessee's obligation under the Lease with respect to Assignee shall be absolute and unconditional and not subject to any abatement, reduction, recoupment, defence, offset or counterclaim[.]"[60] The court held that this provision was enforceable based on the degree and specificity to which it explicitly waived the defendant's rights.[61]

As to whether fraud (especially, fraud in the inducement) as a defence is waivable, the Third Circuit in *MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d 204, 210 (3d Cir. 2005), noted that "[W]e predict that when sophisticated parties have inserted clear anti-reliance language[62] in their negotiated agreement, and when that language, though broad, *unambiguously* covers the fraud that actually occurs, Delaware's highest court will enforce it to bar a subsequent fraud claim."[63] However, the same court also pointed out

that the standards for effective waiver would be stricter, if waiver is possible at all, if fraud in the factum was raised as a defence.[64]

In 2007, the Sixth Circuit endorsed and adopted the MBIA court's analysis regarding waivers of defences.[65] In *Commercial Money Center, Inc. v. Illinois Union Insurance Co*., 508 F.3d 327 (6th Cir. 2007), the Court of Appeals for the Sixth Circuit, applying California law, enforced a contractual provision waiving an insurance company's right to assert the defence of fraud.[66] In doing so, the court noted that the parties had negotiated for and "sculpted" provisions containing anti-reliance language and explicitly waiving the right to assert defences relating to "all issues of fraud".[67]

An exception to the enforceability of a waiver of defences may exist when public policy concerns arise. Principally, some courts have refused to enforce a waiver of defences provision when the defendant was fraudulently induced to enter into the agreement.[68] Other courts have permitted waiver when sophisticated parties agree to clear any unambiguous waiver language covering the fraud that occurred.[69] Generally, courts will not permit waiver under any circumstances when a contract is procured by fraud in the factum, such that the waiving party does not even know the "true nature" of what it is signing.[70] If investors have not agreed to an enforceable waiver of defences, then the lender's breach of contract claim will be subject to any valid affirmative defences the investors can assert.

(b) *Enforceability of waiver of defences under the UCC*

If a lender is enforcing its rights under a security agreement, UCC § 9-403 provides guidance as to: (i) the enforceability of the investor's waiver of defences; and (ii) what types of defences may be waived, and what types of defences may not be not waived.[71]

Under UCC § 9-403, a waiver by an account party, in favour of an assignee, of defences that such account party may otherwise have against the assignor, is enforceable.[72] If a waiver of defence clause in favour of an assignee is recognised as enforceable under UCC § 9-403, the assignee will be subject to only those defences that could be asserted against a holder in due course (which are not waivable under the UCC),[73] which may include defences (among others less relevant) based on:

- duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor;
- fraud in the *factum* (i.e., fraud that induced the obligor to sign the instrument[74] with neither knowledge nor reasonable opportunity to learn of its character or its essential terms);[75] or
- discharge of the obligor in insolvency proceedings.[76]

On the other hand, the assignee will not be subject to the defence of:

- failure of consideration;[77]
- nondelivery of goods;
- fraud in the inducement;[78]
- breach of warranty; or
- the lack of a meeting of the minds between the parties and, accordingly, no valid contract.[79]

(c) *Lack of waiver of defences*

In the event that no waiver of defences has been entered into, the circumstances under which an investor's capital call obligation will be excused should still be few and narrow.

Courts are reluctant to excuse capital call obligations, because third parties and other investors generally rely upon them.[80]

(d) *Enforcing judgments*

The last step in the litigation process, after a judgment is obtained, is to enforce the judgment against the investors' assets.[81] This process can be time-consuming and difficult; however, Federal Rule of Civil Procedure 69 provides for very broad post-judgment discovery of a judgment debtor's assets. All of the discovery tools under the Federal Rules of Civil Procedure are available to locate a debtor's assets, including requests for documents, interrogatories, and depositions.[82] Federal courts have broad authority to sanction judgment debtors that refuse to comply with post-judgment discovery.[83] Once a judgment debtor's assets have been located, Federal Rule of Civil Procedure 69 provides that execution of those assets proceeds in the manner of the state where the federal court is located. Depending on the jurisdiction, common judgment enforcement mechanisms include garnishments,[84] attachments, turnovers, and execution on property.[85]

Moreover, transferring an American judgment from one U.S. jurisdiction to another so that it may be locally enforced is a relatively simple matter. Federal law provides for the registering of a federal judgment in a different federal district simply by filing a certified copy of the judgment.[86] In state courts, the Uniform Enforcement of Foreign Judgments Act ("UEFJA") has been adopted by every state except California (which has adopted a similar procedure).[87] The UEFJA allows enforcement of a judgment from another state upon the simple filing of the judgment with the clerk of court.[88]

(e) *Registering a U.S. judgment abroad against foreign investors*

Unlike many countries, the United States has no treaty or agreement with any other country respecting the enforcement of judgments.[89] Therefore, a country-by-country analysis is required to determine how to enforce a U.S. judgment against assets of an investor outside of the U.S., or against a non-U.S. investor. Common criteria to consider include the following:

- whether the court of origin had jurisdiction over the judgment debtor;
- whether the judgment debtor was properly served in the original action;
- whether enforcement of the judgment would violate local public policy; and
- whether the judgment is "final".[90]

As a practical matter, registration and enforcement of a judgment outside of the U.S. will involve collaboration with local counsel, who will be able to advise on strategies specific to each applicable jurisdiction.

Conclusion

Although material borrower defaults in the subscription lending universe have been rare, the few that have occurred are instructive. In each known case, a facility default has resulted in the borrower's full repayment of the facility, usually from proceeds of a capital call on the investors. In the *Chase Manhattan Bank v. Iridium Africa* case,[91] the lenders recovered from investors as well. However, the rarity of defaults means that there is little guidance from case law that confirms the legal analysis relating to enforcement and recovery. Thus, it is critical to a lender's adequate risk-management strategy and credit analysis to understand the issues and anticipate a strategy for enforcement of remedies against a borrower and its investors, should the need arise.

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* * *

Endnotes

1. We will refer to funds as "limited partnerships", and make corresponding reference to limited partners, partnership agreements and partnership-related terms, which may be read to also refer to limited liability companies, their members and corresponding organisational documents, or to other types of entities that may be borrowers under subscription-secured credit facilities. In addition, as to analysis of the application of Delaware law, the Delaware Limited Liability Company Act is generally similar to the Delaware Revised Limited Partnership Act.
2. The decision on whether to file in state versus federal court will depend on several factors, including the citizenship of the parties and the amount in controversy. One other consideration is the relative speed with which a judgment can be obtained. In some jurisdictions it is possible to obtain a quicker resolution in state court rather than federal court.
3. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).
4. *See In re Gantt*, 70 N.Y.S.2d 55 (N.Y. Sup. Ct. 1947) ("The parties to a contract may confer jurisdiction by consent." (citation omitted)); *see also Cambridge Nutrition A.G. v. Fotheringham*, 840 F. Supp. 299, 303 (S.D.N.Y. 1994).
5. Also known as "The Declaratory Judgment Act".
6. For an actual case or controversy to exist, the dispute must be definite and concrete (not hypothetical), between parties who have adverse legal interests of sufficient immediacy and reality. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).
7. *See Shell Oil Co. v. Amoco Corp.*, 970 F.2d 885, 887 (Fed. Cir. 1992).
8. *Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 858 (N.Y. App. Div. 1997); *see* N.Y. C.P.L.R. § 3001 (2009) (stating that the court may issue a declaratory judgment "as to the rights and other legal relations of the parties to a justiciable controversy") (New York law); *Burris v. Cross*, 583 A.2d 1364, 1371 (Del. 1990) (holding that an action under the Delaware Declaratory Judgment Act must meet the threshold requirements of an actual controversy) (Delaware law).
9. Fed. R. Civ. P. 4(h). The general test is that service on an organisation should be to someone at the organisation who stands in a position of authority so it would be reasonable to assume that person would know what to do with the papers. *See* 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1101 (4th ed. 2017); *see also Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.,* 840 F.2d 685, 688 (9th Cir. 1988). In practice, domestic organisations are required to maintain a registered agent for service of process, and service on this agent would be effective. *See*, e.g., 8 Del. C. § 132 (2017) (providing that every corporation shall maintain a registered agent that shall "[a]ccept service of process and other communications directed to the corporations for which it serves as registered agent and forward same to the corporation to which the service or communication is directed . . . ."). Note, however, that the lender may also obtain a waiver of formal service requirements from the defendant under the

federal rules. Fed. R. Civ. P. 4(d). The federal rules provide an incentive for a defendant to waive formal service in the form of 60 days to answer the complaint as opposed to 20. Fed. R. Civ. P. 12(a)(1). The option to seek a waiver is in the lender's discretion, however, and the lender may not wish to give the defendant more time to answer.

10. *See, e.g.,* N.Y. C.P.L.R. § 311 (2016) (service on a corporation may be made by delivering the summons to an officer or managing or general agent or other agent authorised by law to receive service); N.Y. C.P.L.R. § 310-a(a) (2016) (service on a limited partnership may be made by delivering the summons to any managing or general agent or general partner of the limited partnership). 8 Del. C. § 321(a) (2017) "Service of legal process upon any corporation of this State shall be made by delivering a copy personally to any officer or director of the corporation in this State, or the registered agent of the corporation in this State, or by leaving it at the dwelling house or usual place of abode in this State of any officer, director or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the corporation in this State."
11. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." (citations omitted)); *Comprehensive Merch. Catalogs, Inc. v. Madison Sales Corp.*, 521 F.2d 1210, 1212 (7th Cir. 1975) (applying New York law) ("It is well-settled that parties to a contract may agree to submit to the jurisdiction of a particular court and may also agree as to the manner and method of service."); *Greystone CDE, LLC v. Santa Fe Pointe L.P.*, No. 07 CV. 8377(RPP), 2007 WL 4230770 at *3 (S.D.N.Y. Nov. 30, 2007) ("The parties in this case agreed as to the methods by which service of process is valid and effective. Such agreements are permissible and upheld by courts in the event of litigation . . . . The parties' contractual language, and not the Federal Rules of Civil Procedure, governs what constitutes proper service in this case." (citations omitted)).
12. Note that this will likely necessitate retaining local foreign counsel.
13. The analysis will be the same as with a domestic entity. *See supra* notes 4-7 and accompanying text.
14. *See, e.g., Mastec Latin America v. Inepar S/A Industrias E Construcoes*, No. 03 Civ. 9892(GBD), 2004 WL 1574732 at *2 (S.D.N.Y. July 13, 2004) (Brazilian defendant specifically agreed by contract to service of process upon its designated agent in New York. Because New York law permitted such an agreement on service of process, the court held that the method of service was valid absent a showing by the defendant that such an agreement was precluded by Brazilian law.). It is interesting to note that New York courts hold that a New York plaintiff is not required to comply with foreign service of process requirements absent a treaty. *See Morgenthau v. Avion Res. Ltd*., 898 N.E. 2d 929, 11 N.Y.3d 383, 391 (N.Y. 2008). *See also infra* note 16.
15. *See* HCCH Members, https://www.hcch.net/en/states/hcch-members (last visited Nov. 29, 2017).
16. *See* Fed. R. Civ. P. 4(f)(1) (providing that service of process abroad is proper under the Hague Convention). Note that if the defendant or an agent (i.e. subsidiary) of the defendant can be found in New York, service under New York law may be effective against the defendant itself, with no need to resort to the Hague Convention. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) ("Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.").
17. The Cayman Islands are a British Overseas Possession, and as such are not an independent nation. However, they will be considered separately because certain

financial privacy legislation presents special difficulties with enforcing a judgment there. *See* Cayman to Welcome Third Party Rights Rules, Appleby (July 2014), http://www.applebyglobal.com/publication-pdf-versions/e-alerts/2014—-07—-update-changes-to-the-cayman-islands-exempted-limited-partnership-law—-bh-sr-jb-ig-bw.pdf; *see* also Changes to the Cayman Islands Exempted Limited Partnership Law, Appleby (April 2014), http://sites.appleby.vuturevx.com/18/2890/uploads/2014—-04—-changes-to-the-cayman-islands-exempted-limited-partnership-law-(bhunter—sraftopoulos—igobin—jblack).pdf; Changes to the Cayman Islands Exempted Limited Partnership Law, Appleby (May 2009), https://www.applebyglobal.com/publication-pdf-versions/e-alerts/changes-to-the-cayman-islands-exempted-limited-partnership-law-may-2009.pdf).

18. *See* 1965 Convention Outline, http://www.hcch.net/index_en.php?act=publications.details&pid=2765&dtid=28 (last visited Nov. 29, 2017) for a practical outline of service of process under the Hague Convention. Each participating government designates its own "Central Authority". For example, the United States' Central Authority is the Office of International Judicial Assistance, a part of the Justice Department. *See* U.S. Dep't of State, http://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html (last visited Nov. 29, 2017). England's Central Authority is the Senior Master of the Royal Courts of Justice, in London. *See* Central Authority, https://www.hcch.net/en/states/authorities/details3/?aid=278 (last visited Nov. 29, 2017).
19. Hague Convention art. 10(a), Nov. 15, 1965, 20 U.S.T 361, 658 U.N.T.S 163. Note that the United Kingdom and the Cayman Islands have made no objection to service by mail. *See McCarron v. British Telecom*, No. CIV A. 00-CV-6123, 2001 WL 632927, at *1-2 (E.D. Pa. June 6, 2001) (holding that mailing documents via certified mail to the defendant's business address in London, England was sufficient under the Hague Convention).
20. *See* 28 U.S.C. § 2201(a) (2010).
21. In some facilities, borrowers negotiate a short standstill period to permit time for the borrower to make a capital call before the lender may act. Lenders sometimes agree to this provision under the theory that the investors may be more inclined, as a practical matter, to respond to an "ordinary course of business" capital call than one issued by a lender. However, in most subscription-secured facilities, lenders have an immediate right to make capital calls upon a payment default or acceleration of the debt following an event of default.
22. Note that investors typically agree to fund capital contributions for the repayment of the facility without defence, setoff or counterclaim, whether called by borrower or the lender. Strictly speaking, they do not waive defences against the fund, but this mechanism minimises the risk of mistake, fraud or bad investments between the investors and the fund.
23. Many states and the District of Columbia preclude recovery for unjust enrichment if there is an express contract between the parties. *See, e.g., Nemec v. Shrader*, Nos. 3878-CC, 3934-CC, 2009 WL 1204346, at *6 (Del C. Apr. 30, 2009) ("Delaware courts, however, have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract."); Schiff v. American Ass'n of Retired Persons, 697 A.2d 1193 (D.C. 1997) (no claim for unjust enrichment when an express contract exists between the parties); *Marshall Contractors, Inc. v. Brown University*, 692 A.2d 665 (R.I. 1997) (same); *W&W Oil Co. v. Capps*, 784 S.W.2d 536 (Tex. App.—Tyler 1990) (same). Note that if there is only an express contract between the investors and the fund (such as the partnership agreement), this may not bar a claim for unjust enrichment between the investors and the lender. *See Leasepartners Corp. v. Robert L. Brooks Trust*, Dated Nov. 12, 1975, 942 P.2d 182 (Nev. 1997) (permitting claim for unjust enrichment by leaseholder against owner because the

only express written contract was between the owner and tenant).

24. *See, e.g., Shapiro v. Solomon*, 126 A.2d 654 (N.J. Super. Ct. App. Div. 1956) (New Jersey law) (permitting quasi-contractual recovery after action was brought on an unenforceable express contract); *Kennedy v. Polar-BEK & Baker Wildwood Partnership*, 682 So. 2d 443 (Ala. 1996) (noting the law may recognise an implied contract for the purposes of unjust enrichment when the existence of an express contract on same subject matter is not proven).
25. A common law promissory estoppel claim in most states is subject to the same requirement that there is no express or enforceable contract. *See*, e.g., *Tripoli Management, LLC v. Waste Connections of Kansas, Inc.*, No. 10-1062-SAC, 2011 WL 2897334, at *13 (D. Kan. July 18, 2011) (opining that "it is hornbook law that quasi-contractual remedies, such as unjust enrichment and promissory estoppel, are unavailable when an enforceable express contract regulates the relations of the parties with respect to the disputed issue").
26. Lenders may also consider recovery against limited partners pursuant to the so-called "control rule", which provides that limited partners can be liable for partnership obligations if they "participate in the control" of the business of the partnership. *Id*. Although the control rule was eliminated in the most-recent amendments to the Uniform Limited Partnership Act, it remains the law in many states, including the State of Delaware. *See* 6 Del. C. § 17-303 (2017). However, limited partners typically do not act in a management role, and participation in control may be difficult to prove.
    Limited partnership law also sometimes recognises lenders' rights to sue the limited partners to recover distributions that were made to such limited partners when the partnership was insolvent or in the zone of insolvency, or to recover returned capital contributions to the extent necessary to satisfy partnership obligations. Thomas J. Hall and Janice A. Payne, *The Liability of Limited Partners for the Defaulted Loans of Their Limited Partnerships,* 122 Banking L.J. 687 (2005). In jurisdictions that recognise this right, an action to recover such distributions or returned capital contributions may be asserted by the lenders themselves, obviating the need for the lenders to rely on the partnership to pursue such claims. *Id*.
27. The DRULPA is based on the 1985 version of the Revised Uniform Limited Partnership Act ("RULPA"), which was adopted in most states. Because the financial provisions of most limited liability company statutes have been modelled on the RULPA, lenders should also generally have the right to enforce contribution obligations against member investors. *See* 1 Ribstein and Keatinge on Ltd. Liab. Cos. § 5:7, 5:9 (2008).
    Hierarchically speaking, the court will first look to the unambiguous language of the contracts at issue to determine the parties' respective rights, before resorting to statutory law to fill in any gaps. As explained by the Delaware Court of Chancery:
    "Consistent with the underlying policy of freedom of contract espoused by the Delaware Legislature, limited partnership agreements are to be construed in accordance with their literal terms. 'The operative document is the limited partnership agreement and the statute merely provides the 'fall-back' or default provisions where the partnership agreement is silent.' Only 'if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory provisions, ... will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence." In other words, unless the partnership agreement is silent or ambiguous, a court will not look for extrinsic guidance elsewhere, so as to 'give maximum effect to the principle of freedom of contract', and maintain the preeminence of the intent of the parties to the contract. *Twin Bridges Ltd. Partnership v. Draper*, No. Civ. A. 2351-VCP, 2007 WL 2744609 at *12 (Del. Ch. Sept. 14, 2007) (internal citations omitted).

28. 6 Del. C. § 17-502(b)(1) (1995). The same holds true for creditors of limited liability companies. *See also* Ribstein and Keatinge, *supra* note 27 at § 5:8 ("The [LLC] statutes also generally provide that creditors who rely on the original contribution may enforce original contribution obligations notwithstanding an intervening compromise." (citing, *inter alia,* 6 Del. C. § 18-502(b) (1995), which says: "Notwithstanding the compromise, a creditor of a limited liability company who extends credit, after the entering into of a limited liability company agreement or an amendment thereto which, in either case, reflects the obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a member to make a contribution or return.")).
29. Hall & Payne, *supra* note 26 (citing *Partnership Equities, Inc. v. Marten*, 443 N.E.2d 134, 136 (Mass. App. Ct. 1982)). To the extent that there is an Investor Letter, the acknowledgment/agreement contained therein should substantiate the lender's reasonable reliance claim against the investors under 6. Del. C. § 17-502 (1995).
30. Hall & Payne, *supra* note 26.
31. 866 A.2d 762.
32. *Id*. at 781. Section 3.1, as part of the Partnership Agreement, was attached to the Confidential Information Memorandum given to the bank creditors. *Id*. It provided, *inter alia*:
    - that each limited partner made an initial capital contribution of 15% of its overall Commitment;
    - that the Commitment means "the aggregate amount of cash agreed to be contributed as capital to the Partnership by such limited partner as specified in such limited partner's Subscription Agreement...";
    - that the limited partners need to make additional capital contributions to the Partnership "at such times as the General Partner shall specify in written notices (each, a 'Drawdown Notice')";
    - that each partner's funding obligation would expire upon the "termination of the Commitment Period" but, nevertheless, required contributions thereafter "to pay or provide for payment of Partnership Expenses, including Partnership funded indebtedness"; and
    - that there is no obligation by the limited partners directly to creditors, as follows: (the provisions of this Agreement (including this Article III) are intended solely to benefit the Partners and, to the fullest extent permitted by applicable law, shall not be construed as conferring any benefit upon any creditor of the Partnership (and no such creditor shall be a third party beneficiary of this Agreement), and no limited partner shall have any duty or obligation to any creditor of the Partnership to make any Capital Contributions or to cause the General Partner to make a call for Capital Contributions. *Id*.
33. *Id*. at 762 ("To the extent a partnership agreement requires a partner to make a contribution, the partner is obligated, except to the extent such obligation is modified by the terms of the partnership agreement, to make such contribution to a limited partnership"); *see also* 6 Del. C. § 17-502(b)(1)(1995).
34. *Partnership Equities, Inc. v. Marten*, 443 N.E.2d 134, 136 (Mass. App. Ct. 1982); *see* also 59A Am. Jur. 2d Partnership § 871 (2003).
35. Conditional obligations include contributions payable upon a discretionary call of a limited partnership or general partner prior to the time such call occurs. *See* 6 Del. C. § 17-502(b)(2) (1995). *See also supra* notes 31-32 and accompanying text.
36. *Partnership Equities, Inc.*, 443 N.E.2d at 136.
37. *Id*. at 138-139.

38. *Id*. *See also Stobaugh v. Twin City Bank,* 771 S.W.2d 282 (Ark. 1989); 59A Am. Jur. 2d Partnership § 871 (2003).
39. *In re Securities Group 1980*, 74 F.3d at 1108-09 (11th Cir. 1996) (holding that any fraud on part of Chapter 11 debtor-limited partnerships and their general partners based upon general partners' convictions for income tax fraud arising out of activities related to limited partnerships, including use of "rigged straddles" and "rigged repurchase agreements" to create fraudulent income tax losses, which were then passed through to investors such as limited partners and subsequently disallowed by IRS, was not sufficient to permit limited partners to avoid their liability, under New York partnership law, to make additional capital contributions to partnerships upon capital call by Chapter 11 trustee, given the strong statutory purpose of New York partnership law to favour creditors over limited partners).
40. Liability for contribution obligations – Liability to partnership creditors for unpaid contributions, *See* J. William Callison and Maureen Sullivan, Partnership Law & Practice § 24:4 (2006) (citing *Northwestern Nat. Bank of Minneapolis v. Swenson*, 414 N.W.2d 543 (Minn. Ct. App. 1987) (holding that evidence supported the trial court's finding that limited partner had no knowledge that his notes, which were given for his investment in limited partnership, would be used as collateral for loans to general partner, which were then used by a general partner for non-partnership purposes, and, therefore, the limited partner was not estopped from asserting defence that proceeds of loans were used for non-partnership purposes)).
41. *See* UCC § 9-102(a)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("account debtor" means a person obligated on an account, chattel paper, or general intangible).
42. Because the notice must recite that payment is to be made to the assignee, it is prudent to provide notice upon an event of default, which is the time after which a lender has the right to receive payment of the capital contributions, even if prior notice has been delivered or if Investors Letters are in the transaction.
43. *See, e.g., IIG Capital LLC v. Archipelago, L.L.C*., 36 A.D.3d 401, 404-05 (N.Y. Sup. Ct. 2007) (holding that the assignee properly asserted a breach of contract cause of action against account debtors under New York's version of UCC§ 9-406).
44. This requirement normally can be satisfied by the lender sending notification on its letterhead or on a form on which its name appears. *See also* UCC § 9-102(a)(7) (AM. LAW INST. & UNIF. LAW COMM'N 2010), (defining "authenticate" to mean "with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process").
45. *See e.g., Banque Arabe et Internationale D'Investissement v. Bulk Oil (USA) Inc.*, 726 F. Supp. 1411 (S.D.N.Y. 1989) (holding that notice of an assignment is effective when the debtor receives notice that the funds have been assigned and that payment is to be made to the assignee); *General Motors Acceptance Corp. v. Albany Water Bd.*, 187 A.D.2d 894 (N.Y. 1992) (no particular form of notice is necessary in order to require payment to the assignee; it is sufficient if information known to the debtor either apprises it of the assignment or serves to put it on inquiry).
46. *See* UCC. § 9-406(b)(1) (AM. LAW INST. & UNIF. LAW COMM'N 2010); *Warrington v. Dawson*, 798 F.2d 1533, 1536 (5th Cir. 1986).
47. *See 29 Williston on Contracts* § 74:56 at n.43 (4th ed. 2008). In this scenario, the lender would likely have alternative cause of action against the fund for unjust enrichment and/or *quantum meruit*. The existence of a valid and enforceable contract typically precludes recovery in quasi-contract for events arising out of the same subject matter, but if there is a *bona fide* dispute as to the existence of a contract or if the contract does not cover the dispute in issue, then the plaintiff may be able to proceed on an alternative

theory such as unjust enrichment or *quantum meruit*. *See IIG Capital*, 36 A.D.3d at 404-05 (citations omitted).

48. *See IIG Capital*, 36 A.D.3d at 402-03.
49. It is important to note that "[n]otification is for the benefit of the assignee, who would otherwise have no recourse against the account debtor if the assignor failed to forward payment that the account debtor made directly to the assignor." *Novartis Animal Health US, Inc. v. Earle Palmer Brown, LLC*, 424 F. Supp. 2d 1358, 1364 (N.D. Ga. 2006).
50. *GMAC Commercial Credit LLC v. Springs Industries, Inc.*, 171 F. Supp. 2d 209, 213-14 (S.D.N.Y. 2001) (quoting *Septembertide Publishing, B.V. v. Stein and Day, Inc.*, 884 F.2d 675, 682 (2d Cir. 1989)).
51. *See, e.g., C.H.I. Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762, 763 (9th Cir. 1991) (enforcing terms of contract confirmation form that was sufficiently specific and provided for mutuality of remedy).
52. (Iridium I), 307 F. Supp. 2d 608, 612 (D. Del. 2004); *see also Blair v. Anderson*, 325 A.2d 94, 96-97 (Del. 1974) (holding that a federal prisoner could enforce a contract between the United States and Delaware involving care for prisoners, and stating: "It is established Delaware law that a third-party beneficiary of a contract may sue on it."); *John Julian Constr. Co. v. Monarch Builders*, 306 A.2d 29 (Del. Super. Ct. 1973) (creditor of liquidated corporation could enforce the assumption of liabilities contract against the defendants as a third-party beneficiary). Note that the analysis provided in these cases should apply equally to the investors in a limited partnership.
53. *Iridium I* at 612.
54. "Accordingly, the Court will grant Chase summary judgment on its first claim for relief, breach of contract." *Id*. "It is undisputed that Iridium LLC defaulted on the Chase Loan and that Chase called the Members' RCC obligations pursuant to Section 4.02 of the amended LLC Agreement. The Members refused to comply with Chase's demand for payment in contravention of the amended LLC Agreement, thus compelling the Court to grant Chase summary judgment on its breach of contract claim." *Id*. at 612 n.1. *See also Chase Manhattan Bank v. Iridium Africa (Iridium II)*, 474 F. Supp.2d 613 (D. Del. 2007).
    "Based on the Court's conclusion that the Members may not deny the validity of the Certificate's representation that the amended LLC Agreement is "true and correct," the Court will not discuss the Magistrate Judge's Report and Recommendation on the issues of … 2) whether Chase is entitled to summary judgment on its first claim for relief due to the Security Agreement." *Iridium I* at 612 n.2.
55. For a highly publicised example, *see Wibbert Investment Co. v. New Silk Route PE Asia Fund LP*, case number 650437/2013, in the Supreme Court of the State of New York. Wibbert Investment Co., the investor, declined to fund a capital call after allegations of the general partner's gross negligence and/or wilful malfeasance and the conviction of a related person for insider trading. Wibbert alleges that the Fund has threatened to implement default remedies, and he was granted a preliminary injunction preventing the fund from declaring default. The case is still active.
56. When the partnership agreement and subscription agreements do not contain waiver of defences, the Partner Confirmations usually contain such language.
57. *See Iridium I* at 612-13 (where the LLC Agreement provided that each Member agreed that its duty to perform under the Reserve Capital Call (RCC) obligation was "absolute and unconditional" and each Member waived "any defence it may have or acquire with respect to its obligations under the [RCC]").
58. *See* 17B C.J.S. Contracts § 637 Waiver of Defences (2008).

59. *See Wells Fargo Bank Minnesota Nat. Ass'n v. Nassau Broadcasting Partners, L.P.*, No. 01 Civ 11255(HB) 2002 WL 31050850, at *2 (S.D.N.Y. Sept. 13, 2002) ("The hell or highwater provisions at issue, especially in light of the degree in which they explicitly waive [defendant's] right to assert setoffs, defences or counterclaims, are generally enforceable.") (citations omitted).
60. No. Civ. A. 01-821-SLR, 2003 WL 360255, at *2-3 (D. Del. Feb. 14, 2003).
61. *Id.* at *3, n.1.
62. It appears by "anti-reliance language", the court refers to broad waiver of defence language that is clearly inconsistent with reasonable reliance on extracontractual representations (and therefore the defence of fraud in the inducement). In particular, the court refers as "anti-reliance language" the following language (emphasis added): "The right of the beneficiary to receive payment for losses under this policy shall be absolute, continuing, irrevocable and unconditional irrespective of … *(c) any other rights or defences that may be available to the insurer to avoid payment of its obligation under this policy (all of which rights and defences are hereby expressly waived by the insurer)...." MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d 204, 210 (3d Cir. 2005) (emphasis added) (Wells Fargo (and others) as beneficiaries under credit risk insurance policies insuring payment of principal and interest in the event of defaults on underlying student loans brought action against Royal Indemnity Company ("***Royal***"), as insurer, to recover under the policies. Royal defended on the ground that the lender of the underlying student loans fraudulently induced it to issue the policies and that this fraud in the inducement entitled it to rescission. The court held that Royal's policies unambiguously and effectively waived defences to its obligations, even if induced by fraud.)
    The court pointed out that, to establish fraudulent inducement, the defendant insurer must show *reasonable and detrimental reliance* on a misrepresentation intentionally or recklessly made to induce action or inaction. *Id*. at 212. The court thought it was unfathomable that an insurer that intended to rely on extracontractual representations would agree that its obligations are "absolute, continuing, irrevocable and unconditional irrespective of ... any other rights or defences that may be available to the insurer ... (all of which rights and defences are hereby expressly waived by the insurer)." *Id*. Thus, according to the court, the defendant insurer could not possibly claim that its reliance on those representations was reasonable when it waived all defences based on reasonable reliance. *Id*. Thus, an agreement may foreclose a fraud defence not only by waiving "fraud" but also by setting forth terms clearly inconsistent with reasonable reliance on extracontractual representations. *Id*. at 213.
63. *Id.* at 218 (emphasis added). The court acknowledged that a line of New York cases had referred to "*specificity*" (of the waiver language) as a test for the enforceability of waiver of defence language. However, the court then rejected such test and predicted that the Delaware Supreme Court would adopt the "*clarity*" (of the waiver language) test.
64. *Id*. at 217. Fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents", and the party does not even know the "true nature" of what it is signing. Id.; *see also supra* note 62 and accompanying text.
65. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327 (6th Cir. 2007).
66. *Id*. Commercial Money Center, Inc. (CMC) was an equipment leasing business allegedly engaged in a Ponzi-type scheme. When CMC collapsed, numerous creditors and insurance companies filed claims and counterclaims related to credit transactions to which CMC was a party. One such transaction was a surety agreement between CMC (principal), Illinois Union (surety) and JPMorgan Chase (creditor, as trustee of Citibank). Under the surety agreement, Illinois Union was obligated to "answer for the debt, default, or miscarriage" of CMC notes purchased by Citibank. When CMC filed for

bankruptcy, Illinois Union sought rescission of the surety agreement, arguing, *inter alia*, that CMC fraudulently induced Illinois Union to provide surety coverage through various material misrepresentations. In discussing Illinois Union's waiver of the right to assert fraud as a defence under the surety agreement, the court explicitly followed the *MBIA* opinion, ultimately finding that the allegations against CMC did not rise to the level of fraud in the factum (which is discussed below).

67. *Id.* at 344.

68. *See Eureka Broadband Corp. v. Wentworth Leasing Corp*., 400 F.3d 62, 69-70 (1st Cir. 2005); *Computer Sales Intern., Inc. v. Lycos, Inc.*, No. Civ. A. 05-10017 RWZ, 2005 WL 3307507 at *5 (D. Mass. Dec. 6, 2005) ("[U]nder Massachusetts law, it is well settled that clauses 'attempting to protect a party against the consequences of his own fraud are against public policy and void where fraud inducing the contract is shown'." (citations omitted)); *see also F.D.I.C. v. Borne*, 599 F. Supp. 891, 894 (E.D.N.Y. 1984) ("A waiver of the right to assert a setoff or counterclaim is not against public policy and has been enforced by this court. However, such a waiver will not be enforced so as to bar a viable setoff or counterclaim sounding in fraud." (internal citations omitted)).

69. *See MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d 204, 210 (3d Cir. 2005). Wells Fargo (and others) as beneficiaries under credit risk insurance policies insuring payment of principal and interest in the event of defaults on underlying student loans brought action against Royal Indemnity Company ("***Royal***"), as insurer, to recover under the policies. Royal defended on the ground that the lender of the underlying student loans fraudulently induced it to issue the policies, and that this fraud in the inducement entitled it to rescission. The court held that Royal's policies unambiguously and effectively waived defences to its obligations even if induced by fraud. The court pointed out that, to establish fraudulent inducement, the defendant insurer must show *reasonable and detrimental reliance* on a misrepresentation intentionally or recklessly made to induce action or inaction. *Id*. at 212. The court thought it was unfathomable that an insurer that intended to rely on extracontractual representations would agree that its obligations are "absolute, continuing, irrevocable and unconditional irrespective of ... any other rights or defences that may be available to the insurer ... (all of which rights and defences are hereby expressly waived by the insurer)." *Id*. Thus, according to the court, the defendant insurer could not possibly claim that its reliance on those representations was reasonable when it waived all defences based on reasonable reliance. *Id*. Therefore, an agreement may foreclose a fraud defence not only by waiving "fraud" but also by setting forth terms clearly inconsistent with reasonable reliance on extracontractual representations. *Id*. at 213. *See also Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 316-17 (2d Cir. 1993) (comparing New York state law waiver cases and concluding that "[w]here the fraud claim has been dismissed, the disclaimer has been sufficiently specific to match the alleged fraud [,]" but that "the mere general recitation that a guarantee is 'absolute and unconditional' is insufficient . . . to bar a defence of fraudulent inducement, and that the touchstone is specificity.").

70. For further analysis of the distinction between fraud in the factum and fraud in the inducement, *see infra JPMorgan Chase Bank v. Liberty Mutual Insurance Co.*, in which the surety was asked to insure the delivery of a commodity when, in fact, it was guaranteeing a loan. 189 F. Supp. 2d 24, 28 (S.D.N.Y. 2002); *see also MBIA Ins. Corp.*, 426 F.3d at 217 (describing JPMorgan Chase Bank as an "unusual and extreme case" and questioning whether waiver would even be possible when a contract is procured through fraud in the factum).

71. In a capital commitment facility, the collateral granted by a limited partnership borrower to the lender falls under "general intangible" as defined in Article 9 of the UCC and the security agreement is governed by Article 9.

72. "Except as otherwise provided in this section, *an agreement between an account debtor and an assignor* not to assert against an assignee any *claim or defence that the account debtor may have against the assignor* is enforceable by an assignee that takes an assignment:
(1) for value;
(2) in good faith;
(3) without notice of a claim of a property or possessory right to the property assigned; and
(4) without notice of a defence or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under UCC § 3-305(a)." UCC § 9-403(AM. LAW INST. & UNIF. LAW COMM'N 2010) (emphasis added)); *see also Id*. at Comment 2 ("However, this section expands former Section 9-206 to apply to all account debtors; it is not limited to account debtors that have bought or leased goods.")
73. *See* 68A Am. Jur. 2d Secured Transactions § 485 (2017).
74. Since UCC § 9-403's scope is not limited to waiver of defences in negotiable instruments, it appears that when applying UCC § 9-403, one should read the word "instrument" in UCC § 3-305 as referring to whatever agreement or document which contains the waiver of defences language in question. And presumably, it is regarding the same agreement or document the account debtor is raising a fraud in the factum defence. *See generally Chase Manhattan Bank, N. A. v. Finger Lakes Motors, Inc.*, 423 N.Y.S.2d 128 (N.Y. Sup. Ct. 1979); *MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d at 217 ("Royal does not seriously question the nature of the transactions covered by its policies").
75. This defence is most frequently referred to by the courts as fraud in the factum, but is also sometimes denominated fraud in the essence or fraud *in esse contractus*, among other terms. *See* Milton Roberts, Annotation, Fraud in the Inducement and Fraud in the Factum as Defences under UCC § 3-305 Against Holder in Due Course, 78 A.L.R.3d 1020 § 2 (1977); *see also supra* at notes 69-70 and accompanying text.
76. *See* UCC §§ 9-403, 3-305 (AM. LAW INST. & UNIF. LAW COMM'N 2010).
77. *Supra* note 73 (citing *Equico Lessors, Inc. v. Mines*, 148 Cal. Rptr. 554 (Cal. Ct. App. 1978) (lessees refused to pay rent to lessor's assignee; court rejected as a valid defence against the assignee lessees' defence of failure of consideration – that the equipment had not been delivered); *Stenger Industries, Inc. v. Eaton Corp.*, 298 S.E.2d 628 (Ga. Ct. App. 1983) (lessee refused to pay rent to lessor's assignee; court rejected as a valid defence against the assignee lessee's defence – that machinery was defective); *Washington Bank & Trust Co. v. Landis Corp.*, 445 N.E.2d 430 (Ill. App. Ct. 1983) (lessee refused to pay rent to lessor's assignee; court rejected as a valid defence against the assignee lessee's defence – that the machine under the lease never worked and it was taken from the lessee to make room for a replacement which the lessee never accepted)).
78. *See F.D.I.C. v. Kassel*, 421 N.Y.S.2d 609 (N.Y. App. Div. 1979) (lessee refused to pay rent to the successor in interest of the lessor's assignee; court rejected as a valid defence against the successor in interest of the lessor's assignee lessee's defence – that the lessee was fraudulently induced to enter into the lease arrangement); 68A Am. Jur. 2d Secured Transactions § 485 (citing *Chase Manhattan Bank, N. A. v. Finger Lakes Motors, Inc.*, 423 N.Y.S.2d 128 (N.Y. Sup. Ct. 1979) (lessees refused to pay rent to lessor's assignee; court rejected as a valid defence against the assignee lessees' defence – that the lessor entered into the contract for the express purpose of fleecing the lessees, assigning the paper to the assignee, taking the money and not performing)).
79. *Supra* note 73 (citing *Compton Co. v. Minolta Business Systems, Inc.*, 319 S.E.2d 107 (Ga. Ct. App.1984) (lessees refused to pay rent to lessor's assignee; court rejected as a valid defence against the assignee lessees' defence – that there had been no meeting of

the minds with respect to certain terms of the contract and thus no contract was formed between the lessor and lessee).

80. *See Partnership Equities, Inc. v. Marten*, 443 N.E.2d 134, 136 (1982). However, one court has suggested a possible defence to a capital call contribution obligation, where "a profound failure of consideration such as a repudiation of, or fraud incident to, the essentials of the venture to which subscription was made." *Id*. The example provided by the court of this possible defence was a general partner who absconded with all of the initial contributions and did nothing at all in furtherance of the partnership's goals. *Id*. Notably, a material breach of the partnership agreement, negligence, mismanagement, or disappointed expectations do not constitute defences to capital call obligations. *Id*. at 138.
81. *See British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90 Civ.2370 (JFK)(FM), 2000 WL 713057, at *5 (S.D.N.Y. Jun. 2, 2000).
82. *See Greyhound Exhibit Group, Inc. v. E.L.U.L. Realty Corp.*, No. 88 Civ.3039 (ILG), 1993 WL 50528, at *1 (E.D.N.Y. Feb. 23, 1993).
83. *See Banco Central de Paraguay v. Paraguay Humanitarian Fund*., No. 01 Civ.9649 (JFK), 2006 WL 3456521, at *9-10 (S.D.N.Y. Nov. 30, 2006).
84. *See, e.g.*, N.Y. C.P.L.R. § 5201 (2017).
85. *See, e.g.*, N.Y. C.P.L.R. § 5230 (2017).
86. 28 U.S.C. § 1963 (2017).
87. Uniform Law Commissioners, Uniform Enforcement of Foreign Judgments Act Legislative Fact Sheet, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act (last visited Nov. 29, 2017). California has a similar statute in place that accomplishes the same basic objective. Cal. Civ. Proc. Code §§ 1710.10-1710.65 (1974, 1977, 1982, 1983, 1984, 1985, 2003).
88. UEFJA § 2 (UNIF. LAW COMM'N 1964). Recall that domestic state pension plans with Eleventh Amendment immunity must be sued in the courts of their own state, and that there will be statutory requirements particular to each state that must be followed. *See* supra notes 23-24 and 26 and accompanying discussion.
89. U.S. Dep't of State, Enforcement of Judgments, http://travel.state.gov/content/travel/en/legal-considerations/ judicial/enforcement-of-judgments.html (last visited Nov. 29, 2017).
90. Philip R. Weems, *Guidelines for Enforcing Money Judgments Abroad*, https://www.adraonline.co.za/file/0ec97674ebb638f67ba20e9774d2761c/guidelines.pdf (last visited Nov. 29, 2017).
91. 307 F. Supp. 2d 608 (D. Del. 2004).

Ellen Gibson McGinnis
Tel: +1 202 654 4512 / Email: ellen.mcginnis@haynesboone.com

Ellen McGinnis is recognized for critical thinking in structuring, and practical advice in execution of, subscription-secured credit facilities, having worked on the product since its initial development in the late 1980s. Ellen co-leads Haynes and Boone's Fund Finance practise, for which the firm is known globally as go-to lenders' counsel. She also works on hybrid collateral facilities, and many of the practice's international and multi-currency transactions.

Ellen is the Chair of the firm's Admission to Partnership Committee and is a member of the Board of Directors. Ellen is active in the firm's diversity efforts and issues relating to women in the workplace both at and outside the firm, being a member of the Women's Planning Committee of the FFA, and of the Council of YaleWomen, which works to promote equity and bring women's voices to the table in business, academia, government and the media.

Erin England
Tel: +1 214 651 5749 / Email: erin.england@haynesboone.com

Erin England has represented some of the world's largest financial institutions in connection with structuring, negotiating and documenting domestic and international financing transactions, including capital commitment subscription financing, merger and acquisition financing and a variety of real estate-secured financings. Erin represents individual banks as well as lead agents and arrangers in syndicated credit transactions. Erin navigates her clients through the complexities of commercial lending, including revolving credit facilities, term loans, letters of credit, acquisition financings, and multicurrency and multi-jurisdictional facilities to U.S. and non-U.S. borrowers.

Erin has worked on billions of dollars of credit facilities to private equity funds, real estate development companies, and real estate investment trusts (REITs), secured by the capital commitments of fund investors. Erin also advises lenders in connection with construction loans and permanent real estate-secured loans involving virtually every type of property use – raw land acquisition, industrial properties, hotels, and office and retail space.

Richard D. Anigian
Tel: +1 214 651 5633 / Email: rick.anigian@haynesboone.com

Rick Anigian is a trial lawyer and department chair of the firm's Litigation Practise Group. Rick has become a trusted business advisor by providing practical and efficient counseling and advice to implement clients' business strategies while solving their complex business disputes. Rick concentrates his practice on a wide variety of complex commercial disputes in federal and state courts, as well as arbitral proceedings. Rick has extensive experience in commercial and financial transactions litigation, real estate and oil and gas disputes, has handled complex disputes among partners and business owners, as well as a wide range of business torts litigation. Rick has passed all sections of the examination to become a Certified Public Accountant.

Rick is very active in the community in a wide range of activities including public education, the assistance of at risk children and their families, and youth sports.

Haynes and Boone, LLP

800 17th Street, NW, Suite 500, Washington, D.C. 20006, USA
Tel: +1 202 654 4500 / Fax: +1 202 654 4501 / URL: www.haynesboone.com

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