

Public Data in Cross-Border Lending

By Laura Jakubowski

Data and precedent play a key role in your ability to structure, negotiate and document lending transactions. In cross-border deals, access to this data is especially essential and can be more challenging to locate. Laura Jakubowski of Goldberg Kohn provides the information you need to arm yourself with vital information.



The ability to leverage key precedent and transaction data is essential to structuring, negotiating and documenting lending transactions. This is particularly true in the world of cross-border asset-based financing, where new transaction structures and jurisdictional arrangements continue to emerge as borrowers expand their operations to access new geographical markets. For a cross-border asset-based loan, it is essential to understand the nuances of the markets in which the company is operating, both from a practical and a legal perspective. This understanding is key both for lenders who are considering the overall lending landscape when initially considering a transaction, as well as for lawyers who are documenting a cross-border loan.

For cross-border transactions involving U.S. parent companies, lenders have the great advantage of access to a wealth of public information through filings made with the Securities and Exchange Commission (SEC). In most cases, such public companies that close new financing facilities or make significant amendments to existing facilities are required by U.S. law to disclose details about the transactions, which usually includes filing full copies of key credit documents. The filed credit documents are available to the public through the SEC's online database, EDGAR (Electronic Data Gathering, Analysis and Retrieval), which includes access to public company filings dating back to 1994.

A review of credit agreements that are publicly available through EDGAR can serve various key purposes for cross-border ABL lenders and the lawyers who represent them in these transactions, including the following:

- **Identification of key jurisdictions:** Data from public documents can show the jurisdictions that are most frequently part of a cross-border deal structure, how this has evolved over time, and whether any recent precedent exists for certain jurisdictions that are less frequently included in cross-border loans. It is often informative to investigate lending structures in certain countries, and in particular whether such entities are designated as borrowers or guarantors, and/or whether availability under the facility is predicated on such entity's assets.
- **Identification of key currencies:** There also may be operational and/or legal challenges posed by lending in a particular currency. Data from cross-border credit agreements is helpful in identifying the currencies that are most frequently used and ostensibly easier to administer and, for those that are less frequently used, whether there is any recent precedent for that currency and how the applicable provisions are drafted.
- **Borrowing base structures:** It is instructive to review any public precedent that exists for a particular jurisdiction to determine exactly how the borrowing base is structured. Is

the borrowing base fully consolidated across all jurisdictions, do the entities in each country have a separate borrowing base, or is the borrowing base consolidated for entities in some countries and not in others? There are often legal and practical limitations behind how the borrowing base is structured that are common across different transactions involving the same or a similar mix of jurisdictions, so reviewing borrowing base structures from precedent transactions can help to identify key structuring issues.



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- **Type of assets:** Reviewing borrowing base definitions from public documents can be helpful to determine what type of collateral in particular countries most often forms part of the borrowing base. While this commonly includes accounts receivable, legal and practical limitations in a given country may limit the inclusion of other assets in the borrowing base, including inventory, equipment, real estate and other types of assets.
- **Potential reserves:** A key feature of asset-based lending is the ability to address potential claims that may take priority over a secured loan by creating a reserve against the company's borrowing availability. While some loan agreements have a generic definition of reserves that relies on the administrative agent's discretion to impose reserves, many agreements list specific reserves on a country-by-country basis. Reviewing these specific lists can help provide a lender with a sense of what types of priority claims may require further diligence, or may otherwise need to be taken into account in a particular jurisdiction. In addition to the public data on this topic, SFNet has developed a detailed resource that provides helpful background to identify and structure around potential priority claims in specific jurisdictions. The resource is described in more detail below.
- **Guarantee limitations:** A review of public credit agreements and other key documents can also provide lenders an outline of specific legal limitations that may be required when dealing with a guarantor that is located in a particular country. The extent to which a lender can rely on the enforceability of a guarantee is one of the most challenging areas in documenting any lending transaction, and it is important to understand the legal limitations on

any guarantees arising from the laws of the guarantor's jurisdiction. These jurisdiction-specific limitations are often detailed in the cross-guaranty language in the applicable credit agreement.

While much of the key information described above is readily available in public credit agreements for U.S. public companies that have cross-border credit facilities, the process of searching for and focusing in on exactly the right information is often challenging and time-consuming. To assist lenders with this exercise to leverage precedent and answer basic deal structuring questions, SFNet has created two curated resources that can be helpful in locating the right data. These resources

include (1) a database with a summary of key documentation points for public precedent cross-border ABL transactions¹, and (2) a database with high level summaries of potential priority claims in specific jurisdictions provided by counsel experienced in the relevant jurisdictions². These resources are available on the SFNet International Finance Committee's website at [www.sfnets.com/home/industry-data-publications/industry-insights-trends/abl-cross-border-reserve-and-deal-data]. The databases provide a helpful overview of key considerations when structuring a cross-border transaction, as well as a source of public precedent documents that may be helpful in drafting and negotiating documentation for cross-border credit facilities. SFNet's deal database includes a comprehensive list of public credit agreements that fit the cross-border ABL structure going back to 2011 – a historical perspective that provides an interesting data snapshot of how the cross-border ABL lending market has changed over time. The database can

be used to observe market trends across multiple metrics, including the frequency of certain jurisdictions and currencies, as well as how borrowing base, guarantee and collateral structures have changed in response to market pressures and changes in local law.

The data that can be gleaned from public filings and other similar sources is critical to helping lenders make informed decisions about structuring cross-border transactions. It is particularly valuable at the outset of a transaction and when dealing with a new jurisdiction with which the lender may not be familiar. Being aware of cross-border precedent and potential deal structuring pitfalls not only helps lenders protect against undue legal and credit risk, but also assists in setting expectations early on with clients about potential challenges

to deal structures – and sets the stage for working together to come up with creative solutions to solve them. 📊



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1. The database includes the following documentation point for each transactions: (1) the name of the filing entity (usually also the U.S. borrower), (2) the name of the administrative agent, (3) the closing date of the facility, (4) the amount of the facility (including any separate tranches for different borrowers/currencies), (5) the jurisdictions where the borrowers are organized, (6) the jurisdictions where any other collateral is located, (7) the types of assets included in the borrowing base (8) any country-specific availability reserves, (9) detail on the structure of the borrowing base, (10) any country-specific guarantee limitations, (11) the currencies that are available for loan advances and (12) whether the facility is provided by bank or non-bank lenders. A link to the relevant agreement on the SEC website is also provided.

2. The database includes information for Australia, Belgium, Canada, Germany, Mexico, the Netherlands and the United Kingdom and covers the following information (1) type of potential priority claim, (2) scope of the claim and any conditions to exercising, (3) detail on how the amount of the claim is calculated, (4) how the claim is treated in the context of the borrowing base and (5) whether there are any workarounds other than an availability reserve.