Subscription Finance Collateral Package a Cayman Islands Luxembourg Ireland comparison

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In this briefing we look at the typical collateral packages provided in favour of a secured party in a subscription finance deal.

This briefing focuses on both the similarities and differences between the Cayman Islands, Luxembourg and Ireland in the context of a subscription finance collateral package and issues to be considered by a secured party when structuring a transaction.

Cayman Islands

Security over uncalled capital commitments and rights to call capital are generally expressed as an assignment by way of security and it is typical for a Cayman fund structured as an exempted limited partnership (which acts through its general partner) and its general partner to both be party to such security document. A key feature of a subscription finance collateral package involving a Cayman fund is that there is no reason why such security document needs to be Cayman law governed and in the majority of cases the security document will not be governed by Cayman law (even though the collateral will include rights arising under a Cayman law governed limited partnership agreement and related subscription documents).

Furthermore, it is not necessary to have a Cayman law governed security agreement to document security over the collateral account into which investors' capital contributions are deposited – the collateral account would not usually be located in the Cayman Islands so the collateral account security would be governed by the laws governing the account (typically US or English law).

Priority of the security over the uncalled capital commitments is achieved by giving notice of the creation of the security interest to the investors. Aside from establishing priority, giving notice to the investors has additional benefits for a secured party. After investors have been notified of

the security interest the investors will not be able to set-off against their uncalled capital commitments any amounts which become due and payable to the investors (from the Cayman fund) after they have received the notice. In addition until investors receive notice of the security interest they are entitled to treat the fund/its general partner as the person to whom they are liable and to obtain a good discharge by payment to, or settlement with, the fund/its general partner.

There is no central security registration regime in the Cayman Islands for security over uncalled capital commitments and rights to call capital. Cayman companies (including limited liability companies) are required under the Companies Act to maintain a register of mortgages and charges into which details of all security interests granted by a Cayman company need to be entered. The register of mortgages and charges is an internal register only and failure to make an entry does not affect priority or validity of the security. Where a Cayman company is the general partner or ultimate general partner of a fund that has granted security, it is common for the general partner or ultimate general partner to make an entry in its register of mortgages and charges in respect of security interests granted by it in its capacity as general partner or ultimate general partner (as the case may be), but there is no strict requirement to do this.

Luxembourg

Security over uncalled capital commitments and rights to call capital can be created in Luxembourg either by a pledge or an assignment by way of security, but the general preference is to use a pledge rather than an assignment by way of security. Both the Luxembourg fund and its general partner will typically be party to the security agreement, but it is usually only the Luxembourg fund that enters into the agreement as a pledgor. The general partner will enter into the security agreement in its capacity as general partner of the Luxembourg fund only, the reason behind this being that the rights to make capital calls, to receive capital contributions and all other rights relating to the uncalled capital commitments under the Luxembourg fund's partnership agreement are viewed as rights belonging to the fund itself and not the general partner.

A Luxembourg law governed collateral package is necessary, with either separate Luxembourg law governed security agreements or split jurisdiction and governing law provisions in the US law (or other non-Luxembourg law) security agreements. While the latter is an option, it is market practice (and highly recommended) to put in place separate Luxembourg law governed security agreements over the uncalled capital commitments and rights to call capital. Such security created under the Luxembourg law of 5 August 2005 on financial collateral arrangements (the **Financial Collateral Law**) ensures that the benefits and protection of the Financial Collateral Law apply to secured parties in relation to the perfection and enforcement of the security, in particular in the event of insolvency and bankruptcy proceedings (for further information on the benefits of the Financial Collateral Law, please see our earlier briefing here).

In US transactions, collateral accounts are usually maintained in the US, and therefore no Luxembourg law security is required in respect of such accounts. However, where a collateral account is located in Luxembourg, Luxembourg law security would be required on the basis that such accounts and the assets contained therein would be viewed as Luxembourg situs assets. Moreover, the account banks in Luxembourg may not be willing to acknowledge any US law governed security created over those Luxembourg situate accounts, thereby causing issues in the longer term in the event of an enforcement by a secured party.

Under the Financial Collateral Law, the security agreement over uncalled capital commitments and rights to call capital is perfected by the simple execution of the security agreement identifying such contractual rights as between the parties. While not strictly necessary for perfection, notice of the creation of the security interest should nevertheless be given as under the Luxembourg civil code (and reiterated in the Financial Collateral Law), if an investor (debtor) is unaware of the security interest created over its obligation to pay (the pledged claim), the investor may validly discharge that obligation directly to the Luxembourg fund. Although this is likely to be contractually agreed in relation to times when no default has occurred, this could become problematic (if not notified) following the occurrence of a continuing event of default.

In respect of security created over collateral accounts, perfection (and priority) of that security can only be achieved through the giving of notice to the account bank of the creation of the security interest over the collateral account and, crucially, the receipt of an acknowledgement from the account bank in which it agrees to relinquish any rights of set off, combination of accounts or first ranking pledge in respect of the collateral account which would otherwise apply in standard account bank terms and conditions.

There is also no central security registration regime in Luxembourg for the registration of security interests. There is therefore no way of determining if there is prior security granted over the uncalled capital commitments, rights to call capital and collateral accounts of a Luxembourg fund other than through due diligence and reliance on the representations given by the Luxembourg fund and the general partner in the finance documents.

Ireland

Security over uncalled capital commitments and rights to call capital can be created in Ireland by an assignment by way of security. The lex situs (law of the location where the assets are situated) of the assets to be secured should be taken into account. It is recommended and is market practice to require Irish security over the relevant assets located in Ireland (for example, where the rights to call capital are contained in an Irish law governed subscription agreement, limited partnership agreement or note purchase agreement or where the bank accounts into which capital commitments are deposited are located in Ireland). In US transactions, collateral accounts are usually maintained in the US, and therefore no Irish law security is required in

respect of such accounts. However, where a collateral account is located in Ireland, Irish law security would be required on the basis that such accounts and the assets contained therein would be viewed as Irish situs assets.

Perfection and priority of a security interest under Irish law is a practical matter involving the registration of the security and the delivery of notices of assignment. Under Irish law, notices of assignment must be served in order achieve a legal assignment of security (rather than an equitable assignment only). There is no prescribed timeframe within which the notices must be served, although they are typically and most commonly delivered as soon as possible following creation of the security to perfect and to ensure priority. In relation to the perfection of the bank account security, the account bank must be notified of the account charge and asked to relinquish any rights of set off, recoupment or debit in respect of the account collateral which would otherwise apply in standard account bank terms and conditions.

Irish security registration requirements will depend on the type of the Irish chargor entity:

- Irish Collective Asset Management Vehicle (**ICAV**): a form CH1.1 must be lodged with the Central Bank of Ireland against the ICAV within 21 days from the date of creation of the relevant security. In practice, these are filed as soon as possible following closing to ensure priority.

- Special Purpose Vehicle: a form C1 must be lodged with the Irish Companies Registration Office against the company within 21 days from the date of creation of the relevant security. In practice, these are filed as soon as possible following closing to ensure priority. A section 1001 notice in relation to book debts must also be lodged with the Irish Revenue Commissioners within 21 days from the date of creation of the relevant security.

- Investment Limited Partnership (**ILP**): if the general partner of an ILP is an Irish company, a form C1 must be lodged with the Irish Companies Registration Office against the general partner within 21 days from the date of creation of the relevant security. In practice, these are filed as soon as possible following closing to ensure priority. A section 1001 notice in relation to book debts must also be lodged with the Irish Revenue Commissioners within 21 days from the date of creation of the relevant security.

How Ogier can help

Ogier's fund finance team is ideally placed to assist clients and their international transaction counsel on fund finance transactions involving funds domiciled in the Cayman Islands, Luxembourg and Ireland.

Our multi-jurisdictional team includes Luxembourg legal capability in the Cayman Islands and therefore within US time zones and Cayman legal capability from Europe, in addition to their

respective home jurisdiction. Our fund finance team provides one port of call for all Cayman, Luxembourg and Irish fund finance matters. We provide a "transatlantic standard" of client service and responsiveness regardless of which jurisdiction is used and the time zone in which the deal takes place.

Find out more about our Fund Finance team.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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