Powers of attorney supporting the typical security package: a Cayman/Luxembourg/Ireland comparison

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In this briefing we examine the role that a power of attorney plays in supporting the typical security package held by a secured party in the context of a subscription line finance transaction.

There are notable differences between the Cayman Islands, Luxembourg and Ireland which should be borne in mind by a secured party when structuring a transaction.

Cayman Islands

In a typical subscription finance transaction, the assets over which security is taken from a Cayman fund comprise contractual rights held by the Cayman fund and its general partner under the fund's limited partnership agreement and each subscription agreement. This vests an interest in such contractual rights in the secured party, which are exercisable by the secured party should an enforcement scenario arise.

In order to support the secured party's security interests in such contractual rights, an express irrevocable power of attorney is usually granted to the secured party by the Cayman fund and its general partner. This allows the secured party to step into the shoes of the Cayman fund or the general partner and call capital from investors in the name of the Cayman fund or general partner.

It is prudent to have the Cayman fund and its general partner execute the security agreement as a deed where the governing law of the security agreement is not Cayman Islands law. This is aimed at ensuring the power of attorney contained within the security agreement constitutes a power of attorney for the purposes of the Cayman Islands' Powers of Attorney Act. Other than that, there are no formalities that need be observed with respect to execution of the power of attorney by the Cayman fund or its general partner (assuming the general partner is not an individual person).

Key to a power of attorney granted by a Cayman fund and its general partner is that it is expressed to be irrevocable. Under the Powers of Attorney Act a power of attorney granted by or on behalf of a Cayman fund that is expressed to be irrevocable and which is granted to secure the performance of an obligation owed to a secured party: (a) cannot be revoked without the consent of the secured party; and (b) would survive the winding-up or insolvency of the Cayman fund, in each case for as long as the obligation to the secured party remained undischarged.

It should also be noted that failure to constitute a power of attorney as a power of attorney for the purposes of the Powers of Attorney Act would not detract from the power of attorney's validity or enforceability as a matter of the governing law of the document in which the power of attorney is contained. Whilst security interests over Cayman assets are regularly governed by Cayman Islands law, they are also frequently captured in foreign law documents with little to no detriment to the secured party.

The issues described above remain relevant where the Cayman fund is a limited liability company or an exempted company, adapted to the prevailing structure as necessary.

Luxembourg

Similarly to a Cayman fund, the security granted by a Luxembourg fund involved in a subscription finance transaction is generally over the contractual rights held by the Luxembourg fund and its general partner under the limited partnership agreement and each subscription agreement. In a US context, the security interest granted by the Luxembourg fund over the limited partners' uncalled capital commitments will typically be created pursuant to a first ranking security agreement governed by the same governing law as the loan documents and a second ranking pledge agreement governed by Luxembourg law.

In order to support the secured party's security interests over such contractual rights, an express irrevocable power of attorney is generally granted to the secured party enabling it to serve capital call notices to the limited partners of the Luxembourg fund on its behalf. However, under Luxembourg law certain limitations arise in relation to powers of attorney.

Under Luxembourg law a power of attorney (a) will terminate by operation of law and without further notice on the commencement of any bankruptcy (faillite) or judicial winding-up (liquidation judiciaire) of the grantor of the power; (b) will become ineffective upon the grantor of the power entering suspension of payments (sursis de paiement); and (c) may be revoked voluntarily by the grantor despite being expressed to be irrevocable. Judges will confirm whether the opening of a judicial reorganisation (as recently introduced by the Luxembourg law dated 7 August 2023 on business preservation and modernisation of the insolvency law) should impact the enforceability of a power of attorney.

Any such termination, ineffectiveness or voluntary revocation causes the cessation of all power on

the part of the attorney to act on behalf of the Luxembourg fund's general partner, although a voluntary revocation of a power expressed to be irrevocable may result in the grantor being liable for damages resulting from the breach of contract. This principle is considered to be a mandatory rule under Luxembourg law. Therefore, as well as applying to Luxembourg law governed powers of attorney, there is also a risk that the Luxembourg courts could consider it a matter of Luxembourg international public policy, which could also lead them to set aside the application of a foreign law governed power of attorney purporting to be irrevocable in all circumstances.

As a result it is common practice for a Luxembourg fund and its general partner to grant a power of attorney to the secured party in the Luxembourg law security agreement collateralising the investors' undrawn commitments and to express it as being irrevocable. In addition, the Luxembourg fund and its general partner will specifically confirm that the power of attorney is granted jointly in their interests as well as in the interest of the secured party for the proper management of the secured collateral and that it constitutes a mandate of mutual interest (mandat d'intérêt commun). Finally, in accordance with the provisions of article 2003 of the Luxembourg civil code, a provision will also be included that provides that the power of attorney granted does not terminate upon the occurrence of bankruptcy (faillite) or similar Luxembourg or foreign law proceedings affecting the rights of creditors generally in respect of the Luxembourg fund and its general partner.

While the above is likely to improve the lender's protection, this would still not be sufficient to make a power of attorney irrevocable in all circumstances. However, Luxembourg market practice generally acknowledges that the right to serve capital call notices is an ancillary right to the secured collateral. Luxembourg security interests survive the insolvency / bankruptcy of the grantor and so upon an enforcement event, a secured party would remain entitled to exercise the right of the fund and its general partner to call and receive the collateralised capital commitments of the limited partners, and so to issue and deliver the related capital call notices to the limited partners, despite the power of attorney having been terminated or having been revoked. This would be done by the secured party acting in its own capacity as secured party under the security agreement and not in its capacity as attorney of the general partner pursuant to the power of attorney.

Ireland

Similarly, in a typical subscription finance transaction, the assets over which security is taken from an Irish fund (Irish Collective Asset Management Vehicle (ICAV), Investment Limited Partnership or Special Purpose Vehicle (SPV) for the purposes of this article) comprise contractual rights held by the Irish fund (and its general partner if applicable) under the limited partnership agreement, each subscription agreement or note purchase agreement (as applicable). This vests an interest in such contractual rights in the secured party, which are exercisable by the secured party should an enforcement scenario arise.

In order to support the secured party's security interests in such contractual rights, an express irrevocable power of attorney is usually granted to the secured party by the Irish fund (and its general partner if applicable). This allows the secured party to step into the shoes of the Irish fund (or the general partner if applicable) and call capital from investors in the name of the Irish fund or general partner as applicable. The power of attorney may be a stand-alone document or form part of the relevant security agreement. If a stand-alone power of attorney is granted, it is not required to be given under seal. Pursuant to the Powers of Attorney Act 1996, where a power of attorney is expressed to be irrevocable and is given to secure (a) a proprietary interest of the donee of the power, or (b) the performance of an obligation owed to the donee, then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked by (i) the donor without the consent of the donee, or (ii) the winding-up or dissolution of the donor. It is market practice to include this wording in the power of attorney clause or stand-alone power of attorney. The Irish Collective Asset-management Vehicles Act 2015 also states that notwithstanding anything in its instrument of incorporation, an ICAV may empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in any place whether inside or outside the state.

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Find out more about our CAYLUX fund finance team.

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