PRAXIO
LAW & TAX

Fund Finance Security Guide

The main aspects of the security package, in the most common jurisdictions involved in fund finance transactions.

WITH THE CONTRIBUTIONS OF:

APPLEBY
BRODIES
CADWALADER
FRIED FRANK
HAYNES BOONE
MADDOCKS
MATHESON
MAYER BROWN
MOURANT
REED SMITH
STEPHENSON HARWOOD
WALKERS

praxiolegal.com | +352 27 779 700

Praxio Law & Tax 4a, rue Henri M. Schnadt L-2530 Luxembourg
Grand Duchy of Luxembourg

APRIL 2024

Praxio's Fund Finance Security Guide

PRAXIO
LAW & TAX

CONTENTS

- LUXEMBOURG 8
- AUSTRALIA.....13
- CAYMAN ISLANDS – SUBSCRIPTION FACILITIES.....21
- CAYMAN ISLANDS – NAV FACILITIES.....25
- ENGLAND AND WALES – SUBSCRIPTION FACILITIES.....32
- ENGLAND AND WALES – NAV FACILITIES.....35
- FRANCE.....38
- GERMANY.....44
- GUERNSEY.....50
- HONG KONG.....56
- IRELAND.....62
- JERSEY.....70
- MAURITIUS.....76
- SCOTLAND.....81
- SINGAPORE.....87
- UNITED STATES – SUBSCRIPTION FACILITIES.....91
- UNITED STATES – NAV FACILITIES.....94

INTRODUCTION

Dear Friends,

This is with a great pleasure that we release this Praxio's Fund Finance Security Guide.

We thought that it would be helpful for lenders, borrowers and lawyers to have a document describing the key aspects of the security package for the most common jurisdictions involved in fund finance transactions. Indeed one of the features which ensures a reliable fund finance transaction is the security package.

We want to thank all the contributors around the globe for joining us in this initiative.

Michael Mbayi

THANKS FOR THEIR CONTRIBUTIONS

APPLEBY

BRODIES

CADWALADER

Fried Frank

HAYNES BOONE

Maddocks

Matheson

MAYER | BROWN

mourant

ReedSmith
Driving progress through partnership

STEPHENSON HARWOOD

Walkers

ABOUT THE AUTHOR

Michael Mbayi

Michael Mbayi is the Head of Banking & Finance at Praxio Law & Tax. **Michael** is one of the most experienced fund finance lawyers and advises leading financial institutions, private funds sponsors and alternative lenders on a wide variety of transactions including subscription facilities, hybrid/NAV facilities, as well as GP and management fee facilities.

Michael was **awarded** in 2021 by **Fund Finance Association** for his contribution to the industry. **Michael** has been **recognised** in 2022 by "**The Drawdown**" as one of the most influential Fund Finance experts. **Michael** has been **quoted** by **Legal 500 EMEA 2022** as "very knowledgeable on Fund Finance matters", "responsive" and "particularly active on behalf of a lender-focused client base".

Michael is the author of various Fund Finance publications and a member of the Diversity Committee of the Fund Finance Association.

PRAXIO
LAW & TAX

We are an independent multi-service law firm in Luxembourg. As corporate, finance, investment funds and tax attorneys, we service clients in all matters related to business law and both direct and indirect taxation. We are able to handle the most complex cross-border legal, regulatory and tax structuring matters, along with any commercial or business litigation. Our senior professionals have significant experience in advising private equity houses, multinationals, family offices and high-net worth individuals during their entire business and private estate life cycle from initial acquisition structuring and financing through restructuring and refinancing to exit, disposals and estate transmission.

We advise the leading financial institutions acting as lenders, on a wide range of fund finance, real estate finance, leverage finance and structure finance transactions.

Our legal teams have longstanding expertise in helping clients to structure private equity and venture capital transactions within regulated and non-regulated investment vehicles. This support includes negotiating the acquisition and financing, and subsequently drafting the relevant documents. We also assist with the drafting and tax structuring of management incentive arrangements and their implementation. Our clients appreciate us for our clarity, practical solutions, timeliness and efficiency.

The members of our firm have completed high-level academic training in the Luxembourg, French and Anglo-Saxon legal systems and are able to work in a trilingual environment. Our business lawyers work closely with fellow professionals in key foreign jurisdictions, enabling us to coordinate investment and structuring/restructuring projects in Luxembourg and abroad. We see ourselves as business partners and not solely as lawyers.

We are committed to providing our clients with:

- A full understanding of their business and culture
- A thorough focus on their objectives, both short-term and long-term
- An unwavering commitment to helping them solve their problems in the most efficient and cost-effective way. If something does not make commercial sense to our clients, it does not make sense to us.

Highly committed to the fund finance industry, Praxio's fund finance team, led by our Head of Banking & Finance, Michael Mbayi, is involved on a wide range of transactions including subscription facilities, NAV facilities, hybrid facilities, and GP and management fee facilities.

CHOKRI BOUZIDI
Head of Tax
chokri.bouzidi@praxiolegal.com
T. +352 27 77 97 03
M. +352 691 555 675

FARUK DURUSU
Head of Legal (Corporate, M&A, Business Litigation)
faruk.durusu@praxiolegal.com
T. +352 27 77 97 05
M. +352 691 778 378

MARTIN HERMANNS-COUTURIER
Head of Investment & Asset Management
martin.hermanns@praxiolegal.com
T. +352 27 779 714
M. +352 691 35 40 01

MICHAEL MBAYI
Head of Banking & Finance
michael.mbayi@praxiolegal.com
T. +352 27 779 711
M. +352 621 722 090

LUXEMBOURG

Praxio's Fund Finance Security Guide

LUXEMBOURG

Contributed by **Michael Mbayi - Praxio Law & Tax**

Subscription Facilities

Description of the security package

One of the key elements that differentiates fund finance products is the credit underwriting process. On a subscription facility transaction, the lenders underwrite the credit of the investors of the fund. As a consequence, in the event of default, the lenders want to have the possibility to step into the shoes of the fund or its general partner and claim payment to the investors for their undrawn commitments.

This objective, from a Luxembourg perspective, is commonly covered by a **pledge over the claims** of the fund against its investors (*gage sur créances*). Furthermore, article 5 (4) of the Luxembourg law of 5 August 2005 on financial collateral arrangements ("**Luxembourg Collateral Law**"), states that "*the pledge of a claim implies the right for the pledgee to exercise the rights of the collateral provider linked to the pledged claim*". On such a basis, where a claim of the fund against an investor is pledged, it may be considered that it encompasses the right to claim payment to the investor as well (i.e. in practice the right to send a drawdown notice to an investor to claim such a payment).

The security package would be incomplete without a **pledge over the bank accounts** where the commitments of the investors are to be paid. Hence a Luxembourg pledge over the relevant Luxembourg bank account of the fund is as well required.

The standard Luxembourg security package includes then a pledge over undrawn commitments (technically a pledge over claims) and a pledge over bank accounts. However, in light of the fund documents or the fund structure, adaptations to the security package may be necessary (for instance "cascading pledges", additional guarantees, etc.).

To close this section, we may mention that Luxembourg collateral law is the most advanced implementation of the EU Financial Collateral Directive [1] and offers generally "bankruptcy remote" security interests for the pledges under its scope.

Perfection Formalities

Pledge over claims: Article 5 (4) of Luxembourg Collateral Law states that "the transfer of possession is effected as against the debtor and the third parties by the mere conclusion of the pledge contract".
Although, the debtor may be validly discharged if such a debtor pays the initial creditor as long as such debtor is not aware of the pledge.

Hence, from a strict Luxembourg law perspective, the perfection (*dépossession*), is effected by the mere execution of the pledge. However, a notification, should be considered so that the investors are aware of the pledge as from the outset.

This being said, an important caveat, is that fund finance transactions are generally global and involve investors located in a wide variety of jurisdictions. Consequently, Luxembourg specific conflict law rules concerning the enforceability of pledges over claims vis-à-vis third parties must also be taken into consideration. In this respect, there is a traditional view and a modern view.

According to traditional Luxembourg conflict law rules, the perfection formalities of the domicile of the debtor (i.e. the investor in the context of a subscription facility) are considered.

[1] *Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.*

According to the modern view, supported by a decision of the Luxembourg Court of Appeal of 18 February 2009, the perfection formalities of the law governing the claim (i.e. Luxembourg law, in the context of Luxembourg law investor commitments) are to be considered.

A route to address this is to require a notification of the pledge to the investors, since the notification is an appropriate perfection formality in many jurisdictions. The local Luxembourg counsel should be involved at the outset of the transaction to consider these questions and structure the security appropriately.

Pledge over bank accounts: the account bank takes generally a pledge over the accounts by virtue of the general terms and conditions concerning those accounts. Hence, the fund or its general partner send a notice to the account bank and the account bank send back an acknowledgment of the pledge whereby the account bank will release its pledge so that the lenders may have a pledge on those accounts.

● Fund finance provisions vs investor letters

One of the key assumptions of a subscription facility is that the investors will pay their commitments to the lenders without exercising any right of set-off, counterclaims or other type of legal defences, in the event of default under the facility agreement. Lenders also want that the investors commit to fund their commitments on the collateral account.

Nowadays, the typical way to cover these two elements is to have specific fund finance provisions, expressed for the benefit of the lenders, in the limited partnership agreement or in the subscription agreements or other contractual documents between the fund and the investors (depending on the type of fund, corporate form or fund structure). This is implemented technically using two concepts, one provided by Luxembourg collateral law in its article 2 (5) which provides *that:* "*the debtor of a claim provided as financial collateral may waive, in writing or in a legally equivalent manner, his rights of set-off as well as any other exceptions vis-à-vis the creditor of the claim provided as collateral and vis-à-vis persons to whom the creditor assigned, pledged or otherwise mobilised the claim as collateral*". The second concept is provided by the Luxembourg civil code and is the third party stipulation (*stipulation pour autrui*).

Where there is no waiver of defence, set off, counterclaims or others specific fund finance provisions in the contractual fund documents, a solution to address this, is to request investor letters issued to the lenders, where such waivers are provided. The legal due diligence will be an important step to determine whether this is requested. In addition, on separately managed accounts transactions or where there is an important concentration in terms of investors (for instance, for funds of one), investors letters are typically requested.

NAV Facilities

● Description of the security package

On a NAV facility transaction, the lenders perform the credit underwriting process considering the assets of the fund. This is a totally different exercise than for the subscription facilities since the focus is looking down in the structure towards the assets. This exercise may differ as well in light of the asset class concerned.

Therefore, understanding the fund structure, the underlying assets as well as undertaking a comprehensive legal due diligence are steps of paramount importance to determine the security package.

Luxembourg counsel is typically involved in NAV transactions where the borrower is a Luxembourg entity. Luxembourg counsel is as well involved when the borrower is not a Luxembourg entity but that the assets which are subject to the security are located or deemed to be located in Luxembourg.

For private equity funds, the holding company and the portfolio companies, down in the structure as well as the bank accounts where the proceeds of the investments are paid may be pledged. In practice, this means that Luxembourg **pledges over shares** are taken in respect of Luxembourg companies and Luxembourg **bank account pledges** for the accounts located in Luxembourg.

For debt funds, **pledge over receivables/claims** and **pledge over bank accounts** may be taken. Where there is a holding company in the structure possessing the assets, **a pledge over shares** may be taken as well.

For secondary funds, a pledge over the **limited partnership interests** owned by the secondary fund may be taken as well as a **pledge over the accounts** where the proceeds deriving from the investments are to be paid.

All the above is stated under the caveat that the security package may change in light of the relevant fund structure or the relevant assets, since NAV transactions tend to be bespoke.

● Perfection Formalities

Pledge over shares: In practice, a copy of the shareholders' register of the relevant company whose shares are pledged, is requested, with a mention of the pledge.

Pledge over limited partnership interests: a copy of the register of the limited partners, with a mention of the pledge, is requested.

A particular attention must be made where reviewing the relevant constitutional documents, to check whether there are particular transfer restrictions such as, typically, a consent from the general partner.

Where the relevant limited partnership is a fund, and depending of the type of fund, there may be as well legal transfer restrictions (in other words, investing into a particular fund may be limited by law to certain type of investors only).

Pledge over claims: we refer to the considerations developed under the section "Perfection formalities" of the section "Subscription Facilities", which applies *mutatis mutandis*, with the reference here to a debtor instead of an investor.

Pledge over bank accounts: we refer to the developments made under the section "Perfection formalities" of the section "Subscription Facilities".

The present does not constitute a legal advice and is provided for information purpose only. No one should act upon such information without appropriate advice after a detailed analysis of the particular transaction.

ABOUT THE AUTHOR

MICHAEL MBAYI

Michael Mbayi is the Head of Banking & Finance at Praxio Law & Tax. **Michael** advises leading financial institutions, private funds sponsors and alternative lenders on a wide variety of transactions including subscription facilities, hybrid/NAV facilities, as well as GP and management fee facilities.

Michael was awarded in 2021 by Fund Finance Association for his contribution to the industry. **Michael** has been recognised in 2022 by "The Drawdown" as one of the most influential Fund Finance experts. **Michael** has been quoted by Legal 500 EMEA 2022 as "very knowledgeable on Fund Finance matters", "responsive" and "particularly active on behalf of a lender-focused client base".

Michael is the author of various Fund Finance publications and a member of the Diversity Committee of the Fund Finance Association.

PRAXIO
LAW & TAX

michael.mbayi@praxiolegal.com
T. +352 27 779 711
M. +352 621 722 090

AUSTRALIA

AUSTRALIA

Contributed by **Colin Baker - Maddocks**

Subscription Facilities

Description of the security package

In Australia the unit trust is the most commonly used fund vehicle, as distinct from the limited partnership fund structure that is regularly seen in many other jurisdictions. The key parties involved in an Australian unit trust fund structure are: (i) the Trustee (who operates and manages the fund), (ii) the Unit Trust (which is the investment vehicle) and (iii) the Unitholders (who are the investors in the fund). The discussion below on subscription line financings is based on this structure, with a single Australian fund vehicle.

The typical security package for subscription line facilities in Australia is very much in line with that in other markets, comprising security over:

• the uncalled capital of the Unitholders, the rights to call capital and enforce such rights against the Unitholders; and
• a collateral account into which capital call proceeds are paid.

This security will be documented under Specific Security Deeds in respect of these assets. In addition, a power of attorney will often be included in these Specific Security Deeds, or documented separately, appointing the security trustee as attorney in order to exercise rights in respect of the relevant secured assets.

It is also common for the Trustee to delegate the power to call capital to a manager and/or appoint a custodian. In such circumstances, the manager and/or custodian will also need to be involved in the security arrangements.

When you are dealing with Australian fund vehicles, it will likely be advisable for a security trustee to take "featherweight" security. Featherweight security is all-assets security granted for a de minimis amount of debt and put in place to minimise moratorium risk on the administration of a security grantor (under Australian law, there can be a stay on rights such as enforcement of security unless the beneficiary of the security has security over all, or substantially all, of the assets of the security grantor, which the "featherweight" security provides). Without the presence of "featherweight" security in the security package, the security trustee may need the consent of the court or the relevant insolvency practitioner (appointed by a third party secured creditor) to enforce its security.

The need for "featherweight" security on any particular transaction can be influenced by the bargaining positioning of the parties and/or the credit requirements of the lender(s). Notwithstanding this, it is often the case that fund vehicles have few significant creditors beyond the provider(s) of the subscription facility, therefore this security may not be particularly problematic for fund vehicles to provide. The individual circumstances of each transaction will naturally prevail and the ability to provide "featherweight" security can be impacted by factors such as: (i) a Trustee being the trustee for more than one trust, (ii) the presence and nature of any third party creditors and/or (iii) the structure of any NAV financing the fund may have or intend to implement in the future.

Perfection Formalities

As a general principle under the Personal Property Securities Act 2009 (Cth), a security interest under Australian law can be perfected by either control or registration on the Personal Property Securities Register (**PPSR**). Security perfected by control has a higher priority than security interests perfected by other means (such as registration on the PPSR), which is an important consideration in structuring security packages under Australian law. For this reason, it is common practice in Australia to perfect security interests both by control and registration.

Security over the uncalled capital of the Unitholders

The security interests created by the Specific Security Deed over the uncalled capital of the Unitholders (and associated rights) should be registered on the PPSR. In addition, we will often see notices of the security given to the Unitholders, primarily to make them aware of the transaction and the security package. We don't typically request such notice be acknowledged by the Unitholders (or find lender(s) expect an acknowledgement), but acknowledgments can be sought if necessary for the transaction. For example, if the fund documentation is not comprehensive in terms of provisions supporting a subscription line financing (see further below in the "Fund finance provisions" section), then the obtaining of an acknowledgement to an investor notice could deal with such an issue, with this approach being "lighter touch" than a full investor consent letter.

Security over the collateral account

In order to provide for maximum lender protection, we would always expect the security interest created by the Specific Security Deed over the collateral account to be registered on the PPSR. In addition:

• if the collateral account is held with the security trustee, the security interest is likely also perfected by control; and
• if the collateral account is not held with the security trustee (but with another Authorised Deposit-taking Institution (**ADI**) i.e. a bank), lenders should look to have an Account Bank Deed in place with the ADI and the account holder in order to establish control over the secured account. If an Account Bank Deed is not able to be entered into on any given transaction, any security taken by the ADI over the collateral account will have priority (notwithstanding the registration of the security in favour of the security trustee on the PPSR), so the lenders should look to implement appropriate

Fund finance provisions vs investor letters

Compared to other markets, there is less prevalence of express provisions that contemplate a subscription line financing in constitutional documentation of Australian funds. Progress on this is being made and there is movement for documentation to contain tailored clauses dealing with the specifics of a subscription line financing loan and security structure, particularly if the fund sponsor has utilised subscription line financing on other funds it manages. In the absence of specific subscription line financing provisions, the fund documentation will still need to contain general borrowing, guaranteeing and grant of security powers in order to support the transaction (which are generally present in most unit trust deeds in the Australian market).

Investor letters are not expected on transactions, although - in line with other markets - there may be a lender credit requirement on given transactions (for example, from a significant cornerstone investor or from a concentrated investor base). In addition, if the fund documentation is not as robust from a financing perspective as the lenders need it to be, then investor letters may be an option to deal with such shortcomings, as an alternative to a full amendment of the fund documentation.

- **Governing Law Considerations**

The laws between States in Australia do not differ significantly in the areas of importance to finance transactions, so there is not a significant benefit or disadvantage in transacting under the laws of one State as compared to another. The most relevant consideration is therefore where the lender is based or has a significant office / presence (this is invariably one or both of New South Wales and Victoria). In addition, the Australian legalisation with regard to non-real property security – the Personal Property Securities Act 2009 (Cth) - is law at the Commonwealth level and therefore applies equally across all States and supersedes State law.

NAV Facilities

- **Description of the Security Package**

The security package for a NAV facility will depend on, amongst other things, the fund's corporate structure, how the fund holds its assets and the lender(s) credit requirements for the financing. As such, there is not a typical security package for a NAV facility, but there are certain types of security that are often seen in NAV financings:

• all-assets security;
• bank account security;
• security over shares / interest / units; and
• guarantees.

All-assets security

Often lender(s) seek all-assets security from the borrower of the NAV facility, whether this is the main fund vehicle or a SPV. This would be documented under a General Security Deed.

Bank account security

This is very similar to security over the collateral account in a subscription line financing, albeit over the account into which distributions are received from investments (rather than capital calls from Unitholders). It is more common in a NAV financing for the security trustee to have control / discretion over the account from financial close, so that there is no cash leakage and to ensure that cash sweeps and/or facility prepayments are made as required.

Security over shares / interest / units

This security may be sought in respect of the borrower of the NAV facility and/or certain of its subsidiaries. It will be documented by way of a Specific Security Deed from the relevant holder(s) of the shares / interest / units. For security over shares / interest / units, the constitutional documents of the entity whose shares / interest / units are being security will need to be reviewed

for any transfer restrictions or pre-emptive rights applicable to those shares / interest / units. In addition, the register of members and accompanying share certificates should be reviewed to make sure there are no discrepancies or uncertainty over which shares / interest / units will be subject to the security.

Often funds don't hold assets 100%, and therefore the position of joint venture counterparties, co-investors and/or management will also need to be understood and catered for in the security package, including the provision of any consents needed from such third parties for the entry into the intended security. Consents may also be needed in order for the security trustee to effectively enforce its security and it is beneficial to the lenders if this consent is able to be obtained upfront, rather than trying to obtain it as part of the enforcement process. The dynamics of each transaction will determine whether this is feasible or not.

Guarantees

Whilst not strictly security, guarantees can provide an important source of credit support to the lender(s) in a NAV financing, particularly from entities that are not the borrower, but whom hold significant assets of the fund. To the extent these entities are subsidiaries, the provision of upstream guarantees (and security) by such entities does not present any issues under Australian law, however financial assistance laws apply to private companies, so the parties to the transaction should remain cognisant of that and any potential need to undertake the whitewash procedure (and in particular, the process involved and timeframes associated with obtaining the necessary approvals).

● Perfection Formalities

Each of the General Security Deeds and Specific Security Deeds should be registered on the PPSR, and in addition:
• for any bank account security, the same considerations as above will apply for any secured bank accounts at an ADI; and
• for any security over shares / interests / units, the security trustee should also take possession of (i) the original certificates evidencing the ownership of the relevant shares / interests / units and (ii) signed but undated transfer certificates in respect of the relevant shares / interests / units.

It may well be the case that non-Australian fund entities to a NAV financing have Australian assets, and in that circumstance, security under Australian law over such assets is recommended. In this scenario, whether Australian law or the law of another jurisdiction will apply depends on the type and location of the collateral. For example, where collateral is classed as goods, a security agreement may specify that Australian law, or the law of a particular State or Territory in Australia, governs the security interest created by that agreement. Without this clear expression as to the governing jurisdiction, security interests in goods will be governed by the law of the jurisdiction in which the goods are physically located.

Security interests in intangible property are generally governed by the law of the jurisdiction in which the grantor is located at the time the security interest attaches to the collateral under that law. However, there are specific rules in relation to ADI accounts, as security interests in this type of collateral will be governed by the law of the jurisdiction that governs the ADI account. The parties to a security agreement creating a security interest in the ADI account may also agree in writing that the law of another jurisdiction will apply, provided the ADI consents in writing and "applying the law of that jurisdiction would not be manifestly contrary to public policy".

Specific advice in respect of the law of incorporation of the relevant non-Australian fund entities should also be sought as to any perfection requirements in such jurisdiction(s).

There are no perfection requirements for guarantees.

- **Governing Law Considerations**

Again, the laws between States do not differ significantly in the areas of importance to finance transactions, so there is not a significant benefit or disadvantage in transacting under the laws of one State as compared to another. In addition, the Australian legalisation with regard to security – the Personal Property Securities Act 2009 (Cth) - is law at the Commonwealth level and therefore applies equally across all States and supersedes State law.

Where security over shares / interest / units forms part of the transaction, it is standard for the law of the security document to align with the law of the constitution of the entity that is subject to the security over its shares / interest / units.

The information in this summary is provided for information purposes only, does not constitute and should not be relied on as legal advice. Specific guidance should be obtained from legal counsel in relation to your transaction.

ABOUT THE AUTHOR

COLIN BAKER

Colin is a Special Counsel and is an experienced banking and finance lawyer**.** He advises borrowers, lenders, sponsors and banks on the structuring, negotiation and documentation of debt financings, where he has particular expertise in funds finance. His practice has focussed on the financing of both domestic and international fund structures as well as associated hedging programmes and other structural indebtedness. He has also acted for private credit funds in deploying their capital, particularly in the real estate sector.

Colin joined Australian law firm Maddocks in 2023. Prior to that, **Colin** was a partner at Reed Smith in London. He practiced for over 15 years in London, working in European, US and International law firms. **Colin** was recognised as a Next Generation Partner in Fund Finance by The Legal 500 United Kingdom, in 2021 & 2022.

Maddocks

CAYMAN ISLANDS

CAYMAN ISLANDS

Contributed by **Georgina Pullinger and Ann-Alecia Duval - Appleby (Cayman) Ltd.**

Subscription Facilities

Fund Structures in Subscription Facilities

Cayman Islands private equity funds have historically been registered as exempted limited partnerships (**ELPs**), particularly for the North American and European markets. While other types of Cayman entities (such as exempted companies and limited liability companies **(LLCs))** are occasionally used as fund vehicles, the ELP is by far the most common type of entity used for closed-ended private equity funds. For this reason, this section primarily focuses on subscription facilities involving an ELP.

An ELP is not a separate legal entity; rather, it reflects a contractual agreement between the partners, where the general partner is vested with certain duties and powers with respect to the ELP's business and assets. Any rights and obligations of the general partner and the limited partners are therefore contractual in nature and will be governed by the provisions of the limited partnership agreement (**LPA**) and any subscription agreements (and/or side letters). The ELP's rights and property of every description, including all choses in action and any right to make capital calls and to receive the proceeds thereof, are held by the general partner in trust as an asset of the ELP.

Typical Security Package

The contractual obligation of a limited partner to fund capital, to the extent that it has not already been called **(Uncalled Capital)**, and the corresponding rights of the ELP to call for Uncalled Capital **(Capital Call Rights)**, together form the foundation of subscription facilities. Given that these rights (or choses in action) are contractual in nature, the appropriate form of Cayman Islands law security over such rights is an assignment by way of security.

The security over Capital Call Rights can be granted under a Cayman Islands law document, although the governing law of the security will generally depend on the market practice of the jurisdiction of the main transaction documents; for example, in facilities governed by English law, it is customary to enter into a separate Cayman Islands law security agreement creating security over such collateral, whereas it is unusual to take additional Cayman Islands law security in the US fund finance market, where facilities generally rely on security governed by the relevant US law. Assuming that the grant of security is permitted under the LPA, Cayman courts would generally recognise the grant of security even if such security were granted under a foreign law-governed security agreement.

The security package for subscription facilities also typically incorporates the grant of a security interest over a designated bank account under the control of the lender to which capital commitments are deposited; such security will typically be governed by the laws governing the bank account (e.g. US or English law). The applicable bank accounts are rarely located in the Cayman Islands, so it is fairly unusual to see Cayman account security in a subscription facility.

The security package will also be supported by an express irrevocable power of attorney in favour of the lender to exercise effectively the Capital Call Rights following the occurrence of an event of default.

Although not nearly as common as ELPs, we do occasionally see Cayman Islands exempted companies used as borrowers and/or feeders in subscription facilities, which gives rise to some additional considerations for a lender. In terms of the structural differences: while the governing agreement of an ELP is its LPA (which is a contract between the parties thereto with rights capable of assignment by the ELP), the governing agreement of a Cayman exempted company is its memorandum and articles of association (**M&As**), which are not of themselves capable of assignment by the company. This results in one of the fundamental differences in a corporate subscription facility, as a lender will essentially receive security over the subscription documents (which are then subject to the M&As), rather than over the actual governing document of the company. Unlike with ELPs, capital contributions are often linked to the obligation of the company to issue shares. Creation of an obligation on the investors in the company to purchase shares "to-be-issued" is different from the obligation of an investor in an ELP to fund the remainder of its capital commitment to the ELP as part of its existing interest and this difference can result in certain enforcement concerns, particularly on an insolvency of the company. As a result, additional care must be taken when structuring the security package for a subscription facility involving a Cayman exempted company.

Perfection Formalities

Where a security interest is granted over Capital Call Rights set forth in a Cayman Islands law governed LPA, priority of the security interest as against any competing security interest will be determined in accordance with Cayman Islands law. This stipulates that where successive assignments of a chose in action are concerned, priority as between creditors is determined (based on the English court decision in Dearle v Hall (1828) 3 Russ 1) according to the order in which written notice of such assignment (**Notice**) is given to a third-party obligor (i.e. the limited partners of an ELP), so priority is not established in accordance with the time of creation of the relevant security interests. Perfection (by which we mean, in this instance, that security interests over the encumbered property will be enforceable as against third parties claiming to have a security interest in the same property) and priority over the Capital Call Rights, therefore, are achieved through the delivery of written Notice of the grant of security to the ELP's limited partners. Delay in the delivery of the Notice will therefore expose a lender to the risk that a subsequent competing security interest, or even an absolute assignment over Capital Call Rights, might be granted to another secured party. In such an instance, if notice of the second security interest is given to the investors ahead of notice of the first security interest, the subsequent secured party will rank for repayment ahead of the first secured party.

The Notice should include a clear description of the security document, including the identity of the secured party, and a description of the secured property (i.e. the Uncalled Capital and the Capital Call Rights). It is also prudent for the Notice to instruct investors where to make all payments with respect to Uncalled Capital as this prevents investors from obtaining good discharge for their obligations to fund their Uncalled Capital in any manner other than as specifically indicated in the Notice.

Given the significance of delivery of the Notice, evidence of the Notice having actually been received by investors also assumes some importance. Although ultimately a commercial and negotiated point as to what evidence a lender will require to get comfortable that an investor received a Notice, we usually recommend that the general partner of the ELP sign and deliver the Notices to the investors in accordance with the provisions of the LPA governing service of Notices on the investors, with proof of delivery provided to the lender.

If the bank account into which capital commitments are deposited is located in the Cayman Islands, priority of the security over such bank account is achieved by giving notice of the creation of the security interest to the applicable account bank. It is also market practice to require the account bank to provide a written acknowledgement of such notice.

While there is no public registry relating to the grant of capital call security in the Cayman Islands, Cayman Islands exempted companies and LLCs are required to enter particulars of all security created over their assets (wherever located) in a register of mortgages and charges (**ROMC**) maintained at their registered office. Importantly, the Cayman Islands statute does not aim to impose perfection requirements and failure to enter such particulars will not invalidate the security; however, Cayman Islands exempted companies and LLCs are expected to comply with the requirement, and failure to do so will expose such companies to a statutory penalty. While there is no corresponding requirement for an ELP to maintain an ROMC with respect to security over its assets, where the general partner of an ELP is a Cayman Islands exempted company or LLC, then (i) the general partner is required to update its ROMC with details of security granted in its own right, and (ii) it is advisable for the general partner (or, if applicable, an ultimate general partner) to update its ROMC with details of the security granted on behalf of the Cayman ELP. In practice, this puts any person inspecting the ROMC on notice as to the existence of the security.

● Additional Considerations for Lenders - Cayman Islands Private Funds Act

The Private Funds Act, as amended **(PF Act)**, came into force on 7 February 2020 and requires "private funds" to apply to be registered with the Cayman Islands Monetary Authority **(CIMA)** within 21 days after accepting capital commitments from investors. Significantly for subscription facilities, an in-scope private fund must be registered by CIMA before it accepts capital contributions for investments, which is of course of primary importance for the security package of a subscription facility (i.e. the ability to call for Uncalled Capital following an event of default). It is therefore crucial that any Cayman Islands private fund that is party to a subscription facility be registered with CIMA ahead of the initial closing or if applicable, its joinder to an existing facility. Given the substantial impact PF Act registration (or lack thereof) has on a lender's ability to enforce the security, the transaction documents for a subscription facility will also look to include various conditions precedent, covenants and events of default tied to registration under the PF Act.

ABOUT THE AUTHORS

GEORGINA PULLINGER

Georgina is a Partner in Appleby's Corporate Practice Group in the Cayman Islands, who specialises in banking and finance and corporate matters. She has extensive experience in all aspects of finance and corporate transactions, with a particular focus on fund finance.

Georgina is ranked Band 3 in Corporate & Finance by Chambers and Partners and as a "Next Generation Partner – Banking, Finance & Capital Markets" by The Legal 500. She has spoken on numerous fund finance industry panels and has also lectured in the space.

ANN-ALECIA DUVAL

Ann-Alecia is a Senior Associate within Appleby's Corporate Practice Group in the Cayman Islands. She has experience across a wide range of practice areas, including fund finance, structured finance (predominantly involving CLOs), corporate finance, mergers and acquisitions and general corporate matters.

APPLEBY

CAYMAN ISLANDS

Contributed by **Alexandra Woodcock, Danielle Roman and Alicia Phang - Mourant**

NAV Facilities

Description of the security package

In the Cayman Islands, open-ended hedge funds are frequently established as exempted companies pursuant to the Companies Act (as amended, the **Companies Act**), whereas closed-ended private equity fund vehicles are often structured as exempted limited partnerships (**ELP**s) pursuant to the Exempted Limited Partnership Act (as amended, the **ELP Act**). An ELP is not a separate legal entity and must act through its general partner. The general partner of an ELP can be a Cayman Islands exempted company, a limited liability company, another ELP (which would in turn have its own general partner) or a foreign entity (which must be registered as such in the Cayman Islands). Often the foreign entity chosen for this purpose is a Delaware limited liability company.

In NAV facilities, the security package typically covers the fund's underlying investments and the secured party will have recourse to the value of the portfolio investments of the fund. NAV facilities are described as "downward looking financings" as opposed to "looking up" to the capital commitments of the fund's investors. Depending on how the fund holds the underlying assets and any restrictions relating to the granting of security and/or change of control in the underlying assets themselves, the collateral for NAV facilities is usually comprised of (i) distribution and liquidation proceeds from the fund's portfolio investments, (ii) bank account(s) into which the distributions made by the portfolio investments are received, (iii) shares, membership interests or limited partnership interests of the portfolio entities which sit underneath the fund and hold the underlying investments or assets and (iv) in some cases, security over the underlying investments or assets themselves.

The approach to NAV financings differs between transactions originating in the US market and those originating in the Europe or Asia. For US transactions, security agreements are typically governed by New York law, covering both US/Delaware and Cayman Islands assets, and the security will be recognised by the Cayman Islands courts. Whereas for European and Asian transactions, there tends to be a standalone Cayman Islands law governed security agreement in respect of any Cayman Islands sited assets (be they Cayman Islands law governed contractual rights, equity interests in a Cayman Islands entity and/or Cayman Islands bank accounts). Both market approaches achieve the same result.

Assignment and charge over distribution and liquidation proceeds and bank accounts

The security package may include an assignment and charge over distribution and liquidation proceeds from the fund's investment and the right to receive such amounts. A Cayman Islands fund's rights to distributions are assignable (subject to the terms of its constitutional documents or limited partnership agreement), but that assignment does not entitle the assignee to have any rights over the underlying asset, save for the economic rights to distributions which are the subject of the assignment. The security assignment may be governed by Cayman Islands law where the underlying agreement in which the fund derives its right to distributions is also governed by Cayman Islands law.

A secured party will take security over any bank account(s) into which distribution and liquidation proceeds from the fund's portfolio investments are paid into, together with any amounts standing to the credit of such accounts. Depending on the location of the accounts (typically outside Cayman Islands), the security agreement will be governed by the law of the jurisdiction where the accounts are located. However, if an account is in the Cayman Islands, then a Cayman Islands law governed charge over the account is granted by the fund in favour of the secured party.

Perfection formalities

There is no specific security registration regime for security taken over the rights to distributions or over bank accounts, nor for other types of Cayman Islands law governed collateral generally. However, section 54 of the Companies Act provides that companies must maintain a register of mortgages and charges **(ROMC)** containing details of all security interests granted by a Cayman Islands company. Where a Cayman Islands company is the general partner or ultimate general partner of an ELP market practice is to ensure that an entry is made in its ROMC. The ROMC is an internal statutory register and failure to make an entry has no effect on priority or validity of the security. However, given the role of notice in determining priorities between competing secured parties, and given that any well-advised secured party dealing with a Cayman Islands fund will review the ROMC as part of its standard diligence process, it is highly desirable (from the perspective of both an existing creditor and a new creditor) that any such person is put on notice of a prior interest. For this reason, it has also become routine for any security granted by the ELP alone (e.g. over its bank accounts) to be registered in the ROMC of any Cayman Islands general partner of an ELP.

No steps are required to perfect security interests except that in order to assign absolutely a debt or thing in action, notice of that assignment must be given to the applicable counterparty. Priority of security taken over a bank account holding distribution and liquidation proceeds (if located within the Cayman Islands) is achieved by giving notice of the creation of the security interest to the relevant account bank; while priority of an assignment over the right to distributions governed by Cayman Islands law is achieved by giving notice of the creation of the security to the relevant counterparty.

Cayman Islands share charge or mortgage

There is no requirement for security over shares of a Cayman Islands company to be governed by a Cayman Islands law security agreement. It is not unusual for such security to be documented under a foreign law agreement that has been amended to reflect certain technical references specific to Cayman Islands law. However, the forms of security over the shares of Cayman Islands companies that are governed by foreign law require careful adaptation to create a security interest that can be easily enforced without the Cayman Islands courts. Cayman Islands counsel therefore often advises that a separate Cayman Islands law governed security agreement (described as a “charge” or “equitable mortgage" as further detailed below) document the security so it can provide the requisite protections and practical ease of enforcement. A Cayman Islands share security document is often entered into alongside the overarching foreign law-governed security agreement to form part of the wider security package.

Share security can be established through (i) a legal mortgage or (ii) an equitable mortgage or charge. A legal mortgage requires legal title in the shares to be transferred to the secured party, with an obligation to transfer them back once the underlying secured obligations have been discharged. However, the registration of shares in the name of the secured party or its nominee could potentially give rise to accounting, regulatory, tax and legal issues for the secured party and these issues therefore make the equitable mortgage or charge the more common form of share security.

An equitable mortgage or charge is an agreement to create a legal mortgage over shares. The legal title to the shares remains with the mortgagor/chargor, while the secured party receives the beneficial interests in the shares. Certain ancillaries should be delivered at closing to ensure the secured party is in a strong position to enforce the share security using 'self-help' remedies upon default, including (i) a signed, undated instrument of share transfer; (ii) signed, undated resignation letters of the directors of the company (together with authorisation letters to date the resignations

following an event of default); (iii) a signed proxy form to vote for shares in favour of the secured party; (iv) a signed irrevocable power of attorney in favour of the secured party to complete the instrument of share transfer; and (v) a signed notice of the share charge to the company and its registered office provider. These deliverables mean that upon enforcement, the instrument of share transfer can be dated and delivered to the registered office provider, which then updates the register of members to reflect the secured party (or its nominee) as the holder of the shares, with the ability to appoint directors and generally manage the company.

Restrictions on transfers of shares are common in the memorandum and articles of association of a Cayman Islands company (the **Articles**), so a shareholder resolution amending the Articles is often required to remove any such transfer restrictions on shares that are subject to the security interest in favour of a secured party. Certain other customary amendments are usually made to the Articles which are aimed at facilitating enforcement following a default. Under Cayman Islands law, the register of members of the company is prima facie evidence to the matters set out therein (i.e. a member registered in the register of members of a company shall be deemed to have legal title to the shares as set against its name in the register of members) and should therefore be reviewed for any evidence of existing security over the shares.

Perfection formalities

There is no central or public register for the granting of share security. If the mortgagor/chargor is a Cayman Islands exempted company, a limited liability company or an ELP, it will need to include details of the security interest in its ROMC (or the ROMC of the ELP's general partner, in the case of an ELP) as discussed above.

A legal mortgage is perfected by the registration of secured shares in the name of the secured party in the register of members of the Cayman Islands company. No purported disposition of the legal title to shares is effective until the register of members is updated. The procedure for the registration of secured shares in the name of the secured party will be set out in the Articles but usually involves providing the Cayman Islands company with an instrument of transfer duly executed by the mortgagor/chargor and, occasionally, by the secured party.

The register of members of a Cayman Islands company whose shares are being secured should be annotated to note the security interests of the secured party. Similar to the approach with the ROMC outlined above, this has the benefit of notifying any third party who inspects the register of the pre-existing interest in the shares.

Cayman Islands assignment and charge over limited partnership interests

In situations where portfolio entities (or their underlying assets) are held by ELPs rather than corporate entities, security can be taken over the limited partnership interests of those ELPs (if permitted by the applicable Limited Partnership Agreement). There is no requirement for security over limited partnership interests of an ELP to be governed by a Cayman Islands law security agreement. It is not unusual for security over Cayman Islands limited partnership interests to be documented under a foreign law agreement in the same manner as outlined above for security over shares in a Cayman Islands exempted company. However, market practice does remain mixed, and it is common to document such security in a separate Cayman Islands law governed security agreement which provides the requisite protections and practical means of enforcement.

If permitted under the applicable Limited Partnership Agreement, security over limited partnership interests can be granted in the form of either a legal mortgage or a fixed charge and assignment. In the former case, the limited partnership interest is transferred absolutely to the secured party (whose name is then entered on the register of limited partners) and is transferred back to the limited partner once the underlying secured obligations have been discharged (the so-called equity of redemption). In the case of an assignment and charge, the limited partner remains registered on the register of limited partners in respect of the limited partnership interest being secured, but it is transferable to the secured party or purchaser on enforcement.

Due to the similar issues faced by a secured party taking a legal mortgage over shares, it often renders it impractical and undesirable for the limited partnership interest to be transferred absolutely to a secured party prior to an enforcement scenario. It is therefore more common for a fixed charge and assignment to be taken. Certain ancillaries should be delivered at closing to ensure the secured party is in a strong position to enforce the limited partnership interest security upon default, including (i) a signed, undated instrument of assignment and transfer with respect to the limited partnership interest; (ii) signed, dated general partner consent to the transfer of the limited partnership interest (unless the limited partnership agreement excludes this); (iii) a notice to the registered office of the ELP and (iv) an acknowledgement from the general partner in relation to the notice of security. Upon enforcement, the registered office provider can update the register of limited partnership interests of the partnership to reflect the secured party as the holder of the limited partnership interests.

The ELP Act provides that the consent of the ELP's general partner is required before a limited partner may create a security interest over its limited partnership interest, subject to any provisions of the limited partnership agreement to the contrary. It is therefore imperative to review the limited partnership agreement of the ELP to verify whether this is the case and whether it contains additional provisions limiting the transfer of limited partnership interests (or the taking of any security over them) or the requirement for additional consents. If necessary, the limited partnership agreement should be amended and restated to remove these provisions or such consent should be expressly obtained in writing.

The register of limited partners of an ELP, which is prima facie evidence of the matters which are directed by the ELP Act to be inserted therein, must be reviewed to verify that the limited partner purporting to grant the security does in fact hold that interest. Additionally, the register of security interests over partnership interests should be reviewed for any evidence of existing security over the limited partnership interests. If the limited partner is a Cayman Islands exempted company or limited liability company, its register of mortgages and charges should also be reviewed to ensure that no prior encumbrances over the limited partnership interest have been granted.

Security can also be taken over the general partnership interests of ELPs. This can be achieved by way of a charge over the general partnership interest itself or a charge over the shares of the general partner. The charge details the rights for a secured party (or its agent) to receive the proceeds from the holding of such general partner interests (if any), along with the right to transfer the interests to the secured party (or its agent) upon enforcement. This will not be discussed in detail in this article (as such security is less common) but its potential as forming part of a security package is worth noting.

Perfection formalities

There is no central or public register for the granting of security over the limited partnership interests (or general partner interests) of an ELP. If the assignor/chargor is a Cayman Islands exempted company, a limited liability company or an ELP, it will need to include details of the security interest in its ROMC (or the ROMC of the ELP's general partner, in the case of an ELP) as discussed above.

There are no perfection requirements for the security interest. However, the general partner of an ELP must maintain, or cause to be maintained at the registered office of the ELP, a register of security over partnership interests. The ELP Act provides that written notice of the grant of a security interest (specifying the agreement pursuant to which the security interest is granted including the date and there parties thereto, the identity of the grantor and grantee of the security interests, and the partnership interest or part thereof that is subject to that security interest) is required to be given by the grantor or grantee to the ELP at its registered office in the Cayman Islands. Any security interest over the whole or any part of a limited partnership interest in the ELP shall have priority according to the time that the written notice is validly served at the registered office of the ELP in accordance with the ELP Act. The secured party should therefore ensure that valid notice is given to the ELP at its registered office and that the register of security over partnership interests of the ELP is subsequently updated.

Conclusion

The legal framework of the Cayman Islands supports the use of NAV financing, with robust regulations and well-established market practice. As the industry continues to evolve, NAV financing is expected to play a crucial role in meeting the needs of investment funds, fostering growth and enabling efficient management of portfolios. With the Cayman Islands' strong position as a leading offshore financial center, it is well positioned to remain at the forefront of NAV financing.

ABOUT THE AUTHORS

ALEXANDRA WOODCOCK

Alexandra is Partner in our Cayman Islands Corporate and Finance practice and specialises in banking and finance work.

She frequently advises many of the world's leading finance institutions and private fund sponsors on the structuring and execution of finance transactions and restructurings involving secured lending to Cayman Islands companies, partnerships and unit trusts (including hedge funds and private equity funds). She has extensive experience on fund finance matters and has worked on some of the largest and most high-profile cross-border consensual restructurings.

DANIELLE ROMAN

Danielle is a Partner at Mourant Ozannes (Hong Kong) LLP and the Practice Leader of our Hong Kong Banking and Finance team, having practised in Asia for over 17 years. She advises on a broad spectrum of cross-border transactions, including fund finance, asset finance (in particular aviation and shipping), acquisition and leveraged finance, debt restructurings and general corporate lending.

In fund financing, **Danielle** regularly represents private and commercial banks on subscription credit facilities, hybrids, NAVs and GP/Management facilities. She is on the global board of the Fund Finance Association and chair of the APAC Executive Committee, and also a board member of Women in Fund Finance.

ALICIA PHANG

Alicia is a Senior Associate at Mourant Ozannes (Hong Kong) LLP in the Finance and Corporate team. She has a broad range of banking and finance experience and advises on fund finance, acquisition finance, structured finance (including off-balance sheet structures), debt capital markets, general banking, syndicated and corporate lending.

mourant

ENGLAND AND WALES

ENGLAND AND WALES

Contributed by **Jons Lehmann, Kathryn Cecil and Manisha Sharma - Fried Frank**

Subscription Facilities

Typical security package

Security packages for subscription facilities governed by English law can vary depending on the structure of the fund and other tax and regulatory considerations. Subscription facilities entered into by English limited partnerships or limited liability partnerships are typically secured by:

Investor commitments and related rights

• the unfunded capital commitments of the fund's investors (irrespective of whether such investor's capital commitments qualify for inclusion in the calculation of the borrowing base / financial covenants);
• the rights of the fund to make capital calls and to receive from its investors the proceeds of such capital calls;
• certain other ancillary rights the fund may exercise against the investor related to the foregoing pursuant to the documentation evidencing such rights; and

Bank accounts

• the bank accounts into which the capital contributions made by the investors are deposited.

Security interests are typically created pursuant to an assignment by way of security or a charge over the contractual rights and bank accounts. Charges may be fixed or floating, depending on the level of control exercised over the assets subject to security.

The security package is often supported by a power of attorney granting the lender the right to make capital calls on behalf of the fund in circumstances when the security has become enforceable.

As the security is in respect of each investor's obligation to make capital contributions and the proceeds thereof (rather than the fund's underlying assets), lenders diligence the fund's investor base and the legal relationship between the fund and the investors as set out in the underlying constitutional and organisational documents of the fund and the subscription agreements and any side letters with the investors. In addition, diligence is undertaken to confirm the ability of the fund to incur the relevant debt and to grant the security required for the transaction.

The uncalled capital commitments of any investors that are not in the borrowing base are still included in the security package provided to lenders, typically leading to some degree of over-collateralisation.

Perfection formalities

Depending on the type of asset, perfection requirements will vary and will include registration of the security document with the Registrar of Companies where granted by an English company or limited liability partnership, or in other specialist registries. In particular:

Investor commitments and related rights

In the case of an assignment by way of security over the contractual rights of the fund against its investors, service of notice to each investor as counterparty is typically carried out to ensure the security qualifies as a legal rather than equitable assignment.

To manage the relationship and communications with investors, the fund often aims to negotiate the timeframe for delivery of the notices to investors. This approach is weighed against the lender's desire to achieve a perfected security interest reasonably promptly after the facility is signed.

Bank accounts

In the case of an assignment by way of security or a charge over the bank accounts, service of notice to the account bank, with a request to return an acknowledgment, would be typical. In some instances a tripartite control agreement between lender, fund and account bank may be used.

Role of the investor letters

Investor letters are rarely used in UK subscription facilities as the investors typically provide their consent under the fund's organisational documents to the fund's ability to incur debt and grant security.

In certain circumstances, such as for "funds-of-one" or "separately managed accounts", it may sometimes be agreed that a separate investor letter is entered into to provide additional comfort to the lender with respect to the investor's obligations to the fund.

Subscription facilities in 2023

While other fund finance products (for example, GP facilities and NAV facilities) have grown further in prominence in the last year, subscription facilities have continued to be in high demand. Investors and sponsors continue to value access to liquid capital and other related benefits in fund management and capital deployment. As such, they continue to utilise subscription facilities due to their flexibility and versatility as a liquidity tool.

The information in this summary is provided for information purposes only, it does not constitute and should not be relied on as legal advice. Specific guidance should be obtained from legal counsel in relation to your transaction.

ABOUT THE AUTHORS

JONS LEHMANN

Jons Lehmann is a Partner in the Finance Practice. He represents clients on a wide range of domestic and cross-border finance transactions across all levels of the capital structure.

KATHRYN CECIL

Kathryn Cecil is a Partner in the Finance Practice. **Ms. Cecil** has extensive experience acting for funds, lenders, borrowers and sponsors on a broad range of complex domestic and cross-border finance transactions.

MANISHA SHARMA

Manisha Sharma is an Associate in the Finance Practice. She advises a variety of borrowers, lenders, funds, sponsors, and other corporate clients on a range of domestic and cross-jurisdictional transactions.

Fried Frank

ENGLAND AND WALES

Contributed by **Leon Stephenson - Reed Smith**

NAV Facilities

Typical security package

The security package for NAV facilities can be quite varied depending on the amount of control and flexibility on enforcement the lender is looking for.

If the NAV facility is to a PE, credit or secondary fund, there will be security over some or all of the following assets.

Equity interests, debt interests and related rights

- Security over the right to dividends, distributions and any other proceeds coming from the underlying investments
- Share charges and security over equity interests in a single holding company or vehicle that holds all the assets directly or indirectly
- In some circumstances, charges and security over the shares or equity interests of each individual Topco that may hold each of the assets
- Direct security over the various assets, although this would be more typical in a NAV facility to a credit fund

Bank Accounts

- Charges or assignments by way of security over the bank accounts of the borrower or the accounts into which distributions are swept

For assets located in England, security may be taken by way of a fixed or floating charge or assignment by way of security over the equity interests, debt interests and bank accounts. Fixed charges will generally provide the lender with more control over the asset, whereas a floating charge will allow the charger or borrower to deal with the underlying assets that are subject to the security.

It is important for due diligence to be conducted on the constitutional and organisational documents of the borrower and the underlying companies or vehicles over which security will be taken, to ensure that the chargor has power to give security and to make sure that the underlying share, debt or equity interest does not have any restrictions on enforcement by the lender. In particular, the lender needs to be sure that the board of directors of the underlying company over which share charges are taken do not have to approve a transfer of the shares to the lender.

For NAV facilities provided to secondary funds against their limited partnership interests, taking security over the underlying limited partnership interests usually requires the general partner of the underlying fund to provide its consent to the creation of security and/or enforcement of such security.

For NAV facilities provided to direct lending and credit funds, careful diligence needs to be carried out over the terms of the underlying loan agreements. The provisions relating to transfers and assignments of the loans (typically entitled “Changes to the Lenders”) must be reviewed to see whether the underlying borrower has any consent or consultation rights prior to the fund transferring its loan to the lender on enforcement. In relation to facilities provided to private equity funds, if security has been granted over shares in a holding company that owns the underlying assets, it is important that no change-of-control provisions are triggered in senior facilities agreements or under material contracts entered into by the portfolio companies.

In relation to facilities provided to private equity funds, if security has been granted over shares in a holding company that owns the underlying assets, it is important that no change-of-control provisions are triggered in senior facilities agreements or under material contracts entered into by the portfolio companies, on creation or enforcement of the security.

Perfection Requirements

The type of security and the nature of the asset over which security is given will determine which perfection formalities will need to be carried out. For share charges and charges over other assets, registration of the security interest will need to be made at the Registrar of Companies. There may be other specialist registries in the UK where a filing is recommended if it's a specific type of asset over which security is taken (such are real estate or intellectual property).

A charge over shares issued by English companies, would typically include a requirement to also deliver to the lender the share certificates representing the shares, together with signed but undated stock transfer forms. A security interest over limited partnership interests would require a notice of assignment to be given to the underlying partnership for perfection.

If there is an assignment by way of security, then the underlying debtor will need to be notified of the assignment. For example, for an assignment by way of security of rights under a bank account, the account bank should be notified following creation of the security. Even for bank account charges in the UK (which will be subject to registration at the Registrar of Companies), it is advisable to also notify the account bank and to seek acknowledgements from such account bank that they do not have any rights that cut across the security given to the lender.

ABOUT THE AUTHOR

LEON STEPHENSON

Leon is a leading partner in Reed Smith's fund finance team which is one of the market leading global funds finance practices. He works with bank and non-bank lenders, managers, general partners and limited partners on fund financing transactions with private equity, secondaries, real estate, direct lending and infrastructure funds. He is also an elected member of the firm's Executive Committee.

He has a great deal of experience advising on Net Asset Value (NAV)/asset-backed and hybrid facilities, secondary funds facilities, capital call facilities, co-investment and GP/manager support facilities and other types of liquidity facilities provided to funds; and also represents a large proportion of lenders that provide fund financing, as well as a number of private equity and other funds on complex fund finance transactions.

Leon is recognized as a "Leading Individual" in Fund Finance by Legal 500 UK 2024 and the team is recognized in Band 1 in Fund Finance by Legal 500 UK 2024 and Band 1 of Chambers and Partners 2024. **Leon** was also recognized as "Partner of the Year for Banking" at the Client Choice Awards 2017.

ReedSmith
Driving progress
through partnership

FRANCE

FRANCE

Contributed by **Yann Beckers - Stephenson Harwood AARPI**

Subscription facilities

Typical security package

The security package for subscription facilities is focused on the investors' undrawn commitments and would normally encompass the following French law guarantees, security interests and legal recourses:

- Third-party drawdown rights by way of a *stipulation pour autrui* to be included in the LPA of the fund;
- Depending on the agreed financing structure, if the fund is not a direct borrower but a guarantor, a joint and several guarantee (*cautionnement solidaire*) from the fund in favour of the lenders to guarantee all the payment obligations of the borrower (i.e. a special purpose vehicule set-up by the fund);
- Bank account(s) pledge agreement over (i) the collection account of the fund (i.e the account into which the investors pay their capital contributions and (ii) if agreed, all other accounts of the fund, including its operating account and accounts on which distributions and temporary distributions are received;
- If the borrower is not the fund, bank account(s) pledge agreement over the accounts of the borrower; it being specified that the financing would not encompass security over the assets or rights of the borrower (unlike under NAV Facilities) but include negative pledge covenant;
- Rarely and depending on the form of the French fund (for instance a *Société en Libre Partenariat (SLP)*), receivables pledge agreement over the undrawn commitments of the investors.

The stipulation pour autrui, used in France in the context of subscription facilities, is granted in accordance with article 1205 of the French Code Civil in the LPA of the fund.

The fund, in its capacity as stipulator (*stipulant*) irrevocably stipulates in the LPA to the benefit of future lenders under any subscription facility to be entered after closing of the fund that the investors acting as promisor (*promettant*) shall pay their undrawn commitments (up to the amount owned by each investor to the fund as set out in its subscription agreement) into the fund's collection account, pledged in favour of the lenders in accordance with the drawdown notices to be sent by the agent on behalf of the lenders.

Each investor, acting as promisor (*promettant*), irrevocably promises in favour of the lenders and the agent acting as beneficiaries (*bénéficiaires*) to pay, upon receipt of such drawdown notice, its undrawn commitments into the pledged bank account.The fund acting as stipulator (*stipulant*) waives its right to revoke at any time such stipulation (*stipulation pour autrui*).

The *stipulation pour autrui* becomes irrevocable as from its acceptance by the lenders and the agent. Such acceptance occurs at the time the subscription facility is entered into and is formalised by an acceptance letter executed by the agent acting on behalf of the lenders and is addressed to the fund. The fund would usually inform its investors that a subscription facility has been entered into and that their *stipulation pour autrui* has been accepted and is now irrevocable in its next management report. However, if required by the lenders, such information could be provided earlier, for instance prior to any utilisation of the subscription facility.

The *stipulation pour autrui* is not *per se* an *in rem* security and as such does not grant any preference right to the lenders on the investors' undrawn commitments (as would a receivables pledge do). However, as from its acceptance, the lenders and the agent are vested with direct and irrevocable recourse rights against each investor. The absence of pledge over the undrawn commitments is also mitigated by the fact that the investors' commitments must be paid on a pledged collection account and that there is no additional indebtedness at the level of the fund.

- **The personnal joint and several guarantee in the form of a French cautionnement solidiaire to be granted in accordance with articles 2288 and subsequent of the French Code Civil by the fund in favour of the lenders in case the borrower is not the fund but a special purpose vehicule set-up specifically for the purposes of the financing.**

This *cautionnement* is usually directly granted in the subscription facility agreement by the fund (that is party to it) in its capacity as guarantor (*caution*) in favour of the lenders.

- **The bank account(s) pledge is governed by articles 2355 and subsequent of the French Code Civil, as in force since January 2022 following the Ordinnance n°2021-1192 dated 15 September 2021 that reformed the French law on securities (the "Reform").**

Pursuant to article 2361 of the French Code Civil, the pledge becomes effective (*opposable*) between the parties and third-parties on the date of signing of the bank account(s) pledge agreement without any further formalities to be required. In respect of the account bank, it needs to be either party to the bank account(s) pledge agreement or to receive a pledge notice for the pledge to become effective (*opposable*) against it. It is a common practice, if the account bank is not a party to the pledge, to (i) serve a pledge notice to the account bank on the signing date and (ii) to request an acknowledgment from the account bank confirming, amongst other things, that it will comply with any request of the lenders and agent after enforcement of their pledge, that its rights of set-off are waived and that no prior liens or security interests exist on the pledged account(s).

Prior to the effective enforcement of their pledge but after the occurrence of some specific trigger events (such as the occurrence of an event of default or potential event of default under the subscription facility), the secured creditors may decide to send a blocking notice to the account bank to stop any debit entry on the pledged account bank , it being specified that such blocking notice may be withdrawn at any time thereafter by the secured parties if the relevant trigger events have been cured or waived.

In addition, it is important to highlight that if the bank account(s) pledge is granted by the fund to secure the obligations of a third party (i.e. the borrower), it would be considered as 'third-party security interests' (*cautionnement réel*) (i.e., security interests granted by a third party on its assets or rights to secure the obligations of another obligor). Since the Reform, the information rights of the security provider have been strengthened and the later benefits from a great number of protective provisions before entering the pledge and during the security period (for instance, the secured creditors must inform annually the security provider on the amount of the secured obligations).

- **The receivables pledge over the undrawn commitments of the investors is rarely granted by a French Fund in the context of a subscription facility as it raises concerns with the depositary's duties but also complex legal issues to be anticipated in case of enforcement of that security. For these reasons, the lenders rely on the *stipulation pour autrui* and the bank account(s) pledge to enforce their rights and be repaid.**

If accepted, such pledge is granted in accordance with articles 2355 and subsequent of the French *Code Civil*, as in force since the Reform. It is validly created between the parties and is effective (*opposable*) against third parties (other than the debtor of the pledged receivables) upon the signing of the pledge agreement. To become effective (*opposable*) against the debtors (i.e.: the investors), they must either be notified of the pledge or become a party to it. In the absence of such perfection formalities, debtors may continue to validly discharge their payment obligations to the pledgor.

The timing when the pledge notice should be served to the investors is key. Indeed, it is important to note that once the pledge notice is served to the investors in accordance with article 2363 of the French *Code Civil*, the investors are no longer entitled to pay their undrawn commitments into the fund's account but must pay their commitment on the account provided by the agent and the lenders in their pledge notice. The fact that the investors' undrawn commitments are no longer paid into the account of the fund may raise concerns for the depositary and for the creation of fund's shares to be issued in consideration of the investors' contributions.

- **Notification of the security documents and the subscription facility to the investors**

There is no formal requirement to inform the investors of the entry into the subscription facility and related security documents (other than notifications required under the security documents or the LPA as described above). However, it is a market practice for the lenders to request the fund to notify the investors either in the fund's management reports, preferably prior to the first utilisation date, or on the signing date.

NAV Facilities

- **NAV facilities' security package**

NAV Facilities' security package is not focused on the investors' undrawn commitments (which have been all or in majority already drawn) but depends on the form of the funds and its class of underlying assets (private equity, secondary, debt, real estate, or infrastructure). Thus, before implementing any NAV Facility, the parties would have to carry out legal due diligences on the funds' assets and rights governed by French law (i) to check what kind of security interest could be granted in favour of the lenders (to the extent security interest can or should be taken) and (ii) to confirm that the implementation of the NAV Facility and related security interests would not trigger any detrimental consequences on the underlying portfolio, such as for instance would a change of control provision triggered by the taking of a security over the shares of a parent company. It is also key to check in the LPA of the relevant fund that the granting of security over its assets and rights is permitted and, if so, does not exceed any borrowing, guarantee or security limit set out in the LPA. For all types of NAV Facilities, a pledge over the bank account on which distributions are paid would be likely to be taken (see above 'The bank account(s) pledge'). In respect of the other security interests to be taken, this should be further assessed on a case by case basis.

Private Equity Funds
Private Equity Funds – the underlying assets and rights that could be pledged are (i) the shares held by the fund in its direct holding companies that have been set up to acquire the portfolio companies and (ii) the loans and other debt instruments made available by the fund to its holding companies or other affilitated entities. The security to be taken over such portfolio would be, if the relevant companies are incorporated in France, either a securities account pledge (see below 'The securities account pledge') or a shares pledge (see below 'The shares pledge') (depending on the corporate form of the company). From a NAV Facility lender's perspective, a single point of enfocement of its security at the level of a top holding company controlling all the portfolio companies would improve its security position, bearing also in mind that the granting of up- and/or cross-stream security and guarantees from group companies below in the group structure to secure the NAV Facility would raise French law corporate benefit issues to be considered and assessed on case by case basis.

Direct Lending Funds
Direct Lending Funds – as the underlying assets are loans (*prêts*) or bonds (*obligations*), the security to be provided would be (i) for loans either (x) a receivables pledge agreement or (y) an assignment of receivables by way of security (see below 'The assignment of receivables' by way of security'), provided, in each case that the underlying loan agreements is governed by French law and can be assigned and/or pledge, without consulting with or obtaining the prior consent from the borrower and (ii) for bonds, a securities account pledge agreement (see below 'The securities account pledge'). In addition, depending on the investment structure and the terms of the underlying financing, further security interests could be considered on shares or bank accounts.

- **The securities account pledge**

The securities account pledge is granted in accordance with articles L211-20 and D211-10 of the French *Code monétaire et financier*, over shares of French law joint stock companies (*a société anonyme, a société par actions simplifiée or a société européenne*) and covers both the securities account (*compte-titres*) into which the financial securities (*titres financiers*) being shares (*actions*) or bonds (*obligations*) are registered; and if any, a special cash bank account (*compte fruits et produits*) into which any cash proceeds (such as dividends or interests) relating to the securities are credited

- **The shares pledge**

The shares pledge is granted in accordance with article 2355 and subsequent of the French Code Civil, as in force since the Reform over civil or commercial companies such as *sociétés à responsabilité limitée, sociétés en nom collectif, or sociétés civiles immobilières*.

It becomes effective *(opposable)* between the parties as from its signing date and against third parties as from its registration with the competent trade and commercial registry.

- **The assignment of receivables**

The assignment of receivables by way of security is granted in accordance with articles 2373 and subsequent of the French *Code Civil*, as introduced by the Reform. It might, in our opinion, be used in the context of a NAV Facility to assign to the benefit of the lenders and the agent the fund's present or future receivables under its existing loan portfolio. The assignment becomes effective (*opposable*) against the parties and third parties (other than the debtors) on the signing date. To become effective (opposable) against the debtor (if the debtor has not granted its consent to it), the debtor must either be notified of the assignment or become a party to it.

The information above is provided for information purposes only, it does not constitute a legal advice and should not be relied on without specific guidance from legal counsel in relation to a particular transaction.

ABOUT THE AUTHOR

YANN BECKERS

Yann is a banking and finance partner with a focus on funds, acquisition and structured finance. He has also developed a strong expertise in alternative financings such as private placement (EURO PP, unitranche and mezzanine), factoring and leasing transactions.

Yann has extensive experience in a wide range of national and cross-border secured financing transactions. He has significant experience of both the negotiation of these transactions and their restructuring, he also advises on their transfer and related French regulatory issues.

He advises a large number of international banks and financial institutions, corporates, sponsors, private equity, private debt and investment funds.

Yann speaks French, English and German and is a member of the Paris bar since 1997. He is member of France Invest and the ANJB (Association Nationale des Juristes de Banques)

STEPHENSON HARWOOD

GERMANY

Praxio's Fund Finance Security Guide

GERMANY

Contributed by **Dirk Flor and Moritz Reinhard - Reed Smith LLP**

Subscription Facilities

German funds are often established in the form of a German limited partnership *(Kommanditgesellschaft)* with a German limited liability company (*Gesellschaft mit beschränkter Haftung*) as the sole general partner. Such a combination of a German limited partnership and a German limited liability company is typically abbreviated as a *GmbH & Co. KG*.

Unlike in some other jurisdictions German limited partnership are regarded to have an own legal personality by statutory law. They therefore can enter contracts, borrow money, hold assets and grant security over such assets on their own. Nevertheless, as certain rights, e.g. the right to make capital calls are typically expressly allocated to the general partner or a managing limited partner under the limited partnership agreement (hereafter also LPA), also such partners are typically made parties to the relevant finance documents. The investors typically join the German limited partnership as limited partners.

Typical Security Package

Subscription facilities entered into by a fund in the form of a German limited partnership are typically secured by

Investor commitments and related rights

consisting of

- the callable capital commitments of the fund's investors (regardless of whether those are included in the calculation of the borrowing base or the financial covenants);
- the right to make capital calls and to receive the proceeds of such capital calls from the fund's investors;
- other ancillary rights the fund, the general partner and/or the managing limited partner may have against the investors; and

Bank accounts

- i.e. the German bank accounts into which the investors' capital contributions are to be made.

Whilst the security over the investor commitments and related rights is typically created by way of a security assignment, the security over the bank account is taken by an account pledge under German law.

The security assignment over the investor commitments and related rights is typically supported by a power of attorney by the general partner and (as the case may be) the managing limited partner to make capital calls to the investors. Such power as well as the security granted may only be exercised upon the enforcement events agreed in the relevant security documents.

Perfection Requirements

Investor commitments and related rights

The security assignment of the investor commitments and related rights does not require any registration, notice to the investors or any other action to be perfected. The mere execution of the

security assignment by the relevant parties suffices. Such relevant parties are the fund, its general partner, - depending on the individual LPA - the managing limited partner and one representative of the finance parties (either a security agent in case of a syndicate or a single lender in case of a bilateral facility), but not the investors.

The security assignment of the investor commitments and related rights does not require any registration, notice to the investors or any other action to be perfected. The mere execution of the security assignment by the relevant parties suffices. Such relevant parties are the fund, its general partner, - depending on the individual LPA - the managing limited partner and one representative of the finance parties (either a security agent in case of a syndicate or a single lender in case of a bilateral facility), but not the investors.

However, also in German transactions notice of the security assignment is typically given to the investors. Under German law, debtors (here the investors) whose payment obligations have been assigned may make payments in good faith to the old creditor with redeeming effect, until they are notified of the assignment. Though the risk associated with such German law rule is limited for the subscription facility-lenders as investors will typically pay their contributions (even without notice) into an account of the fund pledged in favour of such lenders, lenders typically prefer to make the investors aware of the assignment.

Bank accounts

To perfect the pledge over the fund's bank account(s) the bank with which such account is held (hereafter account bank) needs to be notified of the pledge. The receipt of such notification will be typically confirmed in an acknowledgement letter by the account bank.

As German banks typically take a first ranking pledge under their General Terms & Conditions over each account which is held with them, subscription facility-lenders typically further require a waiver or a subordination of such first ranking pledge vis - à - vis their own pledge. This issue should be addressed and clarified with the account bank prior to entering the finance documents to avoid any issues in conjunction with the closing. The common agreement with the account banks is that they subordinate their pledges over the account subject to the exemption that they still may set off their fees for the management of the account and chargebacks from payment transactions against any amounts standing to the credit on the account. The relevant subordination wording will be typically included in the acknowledgement letter by the account bank.

Investor Letters

In subscription facilities involving a German limited partnership investor letters are rarely obtained. Only where one investor has a substantial commitment (exceeding 30 % or 40 % of the total commitments) or with regard to single management accounts, lenders may request investor letters from the relevant investors.

Equity Commitment Letters

Because of the particular tax treatment of private equity and venture capital funds by the German tax authorities, fund counsels sometimes propose equity commitment letters as security. According to such proposals the subscription facility should be taken out by a subsidiary of the fund which receives an equity commitment letter from the fund. This, however, leads to substantial structuring efforts to ensure that the relevant lenders benefit from an security assignment of the fund‘s commitments. Such proposals are therefore less frequently seen in recent times.

NAV Facilities

NAV facilities are not yet widely deployed in Germany. One main reason for this are the complex (and not always clear) rules set up by the German tax authorities on the tax treatment of private equity funds and venture capital funds. Those rules restrict the ability of private equity funds and venture capital funds to take out NAV facilities. Any NAV facility to a private equity fund or venture capital fund thus requires substantial structuring work.

Other types of funds like real estate funds or debt funds are not subject to the above-mentioned rules. But also for those funds the actual structure chosen for the individual NAV facility depends very much on the fund's structure and the nature of the investments held by the fund and its subsidiaries. Therefore, there is also no one size fits all-security package on German NAV facilities.

- **Security Package**

The security granted varies from deal to deal and includes typically combinations of the following:

Equity interests, related rights and investments

consisting of

- receivables from the investments of the fund, including distributions, dividends, interest and other proceeds;
- the equity interests in the holding companies through which the fund hold its investments; and
- direct security interests in the underlying investment; and

Bank accounts

- i.e. the banks accounts into which the distributions, dividends, interest and other proceeds from the investments are to be made.

Security over the equity interest in a holding company established or incorporated under German law will be taken by a pledge. The constitutional documents of the holding company should be reviewed regarding any approval requirements for such pledge. In addition, if the respective holding company is a German limited liability company *(Gesellschaft mit beschränkter Haftung)*, a notarisation of the relevant share pledge agreement will be required.

Unless the receivables from the investments are already pledged by the pledge over the equity interest in the holding company, the security is taken over German law receivables by way of security assignment or a receivables pledge.

The type of security interest used with regard to any direct security interests in an underlying investment depends on the nature of such investment. In rare cases where e.g. a real estate fund needs to grant security over part of its German real estate such security will be granted by way of a land charge *(Grundschuld)*.

Due diligence of the fund constitutional documents should be made to verify that the fund has the legal authority to take out a NAV facility and to grant security without the need of an approval by the investors.

Perfection Requirements

In case the pledge over the equity interests in the holding company encompasses a pledge of dividends and other distributions (as it is common), the holding company needs to be notified of such pledge as a perfection requirement. Such notification is made within the relevant pledge agreement if the holding company is party to such agreement.

The security assignment of any receivables does not require any registration, notice to the debtors or other action to be perfected. The mere execution of the security assignment by the relevant parties suffices. Typically, however, the debtors will be notified to ensure that they cannot make payments to the original creditor, i.e. the security grantor, in good faith with debt redeeming effect.

The perfection requirements for the bank account pledge are identical to those set out above in conjunction with subscription facilities.

ABOUT THE AUTHORS

DIRK FLOR

Dirk Flor is a founding partner of the Frankfurt office of Reed Smith and a member of the Financial Industry Group. He has substantial experience in advising on finance transactions and on banking laws and regulations. One particular focus of his practice is the representation of lenders and funds in fund finance transactions. He further advises domestic and international clients on real estate finance and on corporate finance transactions as well as on acquisition finance transactions.

MORITZ REINHARD

Moritz Reinhard is an Associate in the Financial Industry Group. **Moritz** also has experience in the field of Real Estate and Real Estate Finance.

ReedSmith
Driving progress
through partnership

GUERNSEY

GUERNSEY

Contributed by **Zoë Hallam and Camilla Hobbs - Walkers (Guernsey) LLP**

Funds can be structured in Guernsey in several ways, most commonly as a limited partnership, company or unit trust (the latter more prevalent in the real estate space). Guernsey closed-ended funds looking to avail themselves of subscription facilities are most commonly structured as limited partnerships, with a Guernsey corporate general partner and governed by a Guernsey law limited partnership agreement. The limited partnership itself has no separate legal personality and must act through its general partner.

In Guernsey, security in connection with fund finance transactions is provided pursuant to the Security Interests (Guernsey) Law 1993 (as amended) (the **"Guernsey Security Interests Law"**). A security interest over Guernsey situs assets must be created in accordance with the Guernsey Security Interests Law, which sets out the specific ways of creating security over different types of assets.

Subscription Facilities

Typical security package

Typically, in connection with a subscription line facility, Guernsey law governed security is provided over (i) contractual rights, i.e. the right to call capital from investors (and ancillary/related rights) set out in the Guernsey law governed limited partnership agreement or other constitutive document and (ii) the Guernsey bank account into which the called capital is paid.

Depending on the structure and regulatory or tax considerations, the collateral package may include cascading pledges where certain feeders or blockers provide security (ultimately) to the borrower, and security over the borrower's contract rights under such 'cascading security agreements' is then provided by the borrower in favour of the lender/security agent (the **"Secured Party"**).

(i) Capital Calls and Related Rights: the grantor and the precise scope of the security will of course depend on the underlying fund documentation, however broadly speaking the key points are:

- Security to be provided by the fund and, where applicable, its general partner and/or investment manager (see below) in favour of the Secured Party over their rights as against the investors to call for, and receive, capital contributions pursuant to the applicable constitutive documents of the fund.
- Security usually also includes the right to exercise any remedies in respect of the right to call capital, for example, against a defaulting investor.
- If capital call rights have been (or may be) delegated by the general partner to an investment manager, then the investment manager should also be a party (in addition to the general partner) to the security agreement in order to ensure the Secured Party has security over the rights of the investment manager that have been delegated to it.
- If dealing with a corporate fund, capital call rights will usually be set out in the subscription documents, if those are not Guernsey law governed then security over the call rights will fall to be governed by another law.

(ii) Bank Accounts:

- Assuming the bank account of the fund is in Guernsey, there will also be a local law bank account security interest agreement to create a security interest over the account where capital contributions are to be paid.
- It is key to ensure that the grantor is the party in whose name the account has been opened (e.g. the fund, the general partner or a manager). As capital contributions are an asset of the fund we would expect the bank account to be opened in the name of the fund.

Formalities

(i) Capital Calls and Related Rights:

- ***Creation:*** a security interest over capital call rights (or other contract rights) is created by way of an assignment of such rights, pursuant to a security interest agreement, to the Secured Party and by the giving of notice of the assignment to each of the investors in the fund (or the contract counterparty, in the case of cascading security). The giving of notice is key to creating the security interest and no security interest is created until such notice is given.
- ***Priority:*** priority between security interests in the same collateral is determined by the order of creation of those security interests. There is no public register of security in Guernsey (save for limited asset classes not usually applicable to fund finance transactions) nor is any internal security register required to be maintained by Guernsey companies or partnerships.
- ***Notices:*** as noted above the giving of the notice of assignment to investors is key to the creation of the security interest. A written notice, signed by the general partner in its own capacity and on behalf of the fund, should be delivered in accordance with the fund's constitutional documents, and is usually delivered via email or investor portal. An acknowledgement of notice is not required to be obtained as a matter of law and is not always a practicable thing to obtain given there are often a large number of investors. However, Guernsey limited partnership agreements may sometimes provide that the fund's administrator in Guernsey is authorised to accept and acknowledge notice for the purposes of the Guernsey Security Interests Law and it is a common ask of lenders' counsel for the administrator to provide evidence that the notice has been sent and that no delivery failure reports or "bounce-backs" have been received.

(ii) Bank Accounts:

- ***Creation:*** a security interest over a Guernsey situs bank account is created in one of two ways under the Guernsey Security Interests Law: where the bank account is held with a bank other than the Secured Party, security is created (pursuant to section 1(6) of the Guernsey Security Interests Law) by way of assignment pursuant to a security interest agreement. As is the case with taking security over capital calls, the security interest is only created when a notice of assignment is given to the account bank; and where the bank account is held by the Secured Party then security is taken pursuant to section 1(5) of the Guernsey Security Interests Law. In this instance security is created by the execution of the security interest agreement and the Secured Party having control of the account.
- ***Priority:*** priority between security interests in the same collateral is determined by the order of creation of those security interests. There is no public register of security in Guernsey (save for limited asset classes not usually applicable to fund finance transactions) nor is any internal security register required to be maintained by Guernsey companies or partnerships.
- ***Notices:*** as noted above, in the case of a section 1(6) security interest, the giving of notice of assignment to the account bank is key to the creation of the security interest. An acknowledgment of notice is not required to be obtained as a matter of law but is common practice in the Guernsey market. Guernsey account banks each tend to have their own standard form notice and acknowledgment that must be used and any amendments to these are strongly resisted and rarely accepted. Consideration should also be given to the underlying account terms and, in particular, whether these contain any restriction on the creation of security interests over the account. If this is the case prior written consent should be obtained before any security interests are granted pursuant to the Guernsey Security Interests Law.

NAV Facilities

Description of the security package

Unlike a subscription facility, which 'looks up' to the capital commitments of the investors in the fund as credit support, a NAV facility will 'look down' and the Secured Party will have recourse to the value of the portfolio investments of the fund.

Typically we see Guernsey law security taken over both or either of (i) the Guernsey situs bank account into which proceeds and/or distributions made by the portfolio investments are made, and/or (ii) the equity interests in a portfolio company, limited partnership or unit trust.

• (i) Bank Accounts*:* as above.

• (ii) Equity Interests:

- Security is created pursuant to a security interest agreement under the Guernsey Security Interests Law.
- We have seen NAV facilities agreed both with and without share or equity interest security over a portfolio company, limited partnership or unit trust. This is ultimately a commercial call and depends on how the fund holds the underlying assets.
- Constitutional documents of an underlying issuer will need to be reviewed to check for any restrictions on the grant of security, and may need to be amended to build in market standard creditor protections.
- In the case of security over limited partnership interests, the prior written consent of the general partner may be required.
- It may not be possible to take security where the underlying issuer is a regulated entity.

Formalities

(i) Bank Accounts: as above.

(ii) Equity Interests:

- ***Creation:*** a security interest over shares, units or other equity interests is created in one of two ways under the Guernsey Security Interests Law: (i) by physical possession of share/unit certificates or other certificates of title under section 1(3) pursuant to a security interest agreement; and/or (ii) by way of assignment pursuant to a written security agreement and notice of such assignment being given to the underlying company/unit trust/limited partnership under section 1(6). It is accepted practice by both borrower and lender counsel in Guernsey that original certificates, signed blank transfer forms and a certified register of members/limited partners/unitholders of the underlying issuer will all be delivered to lender counsel in Guernsey (or onshore) shortly in advance of completion to be held to order.
- ***Priority:*** priority between security interests in the same collateral is determined by the order of creation of those security interests. There is no public register of security in Guernsey (save for limited asset classes not usually applicable to fund finance transactions) nor is any internal security register required to be maintained by Guernsey companies or partnerships.
- ***Notice:*** it is necessary, from a Guernsey perspective, for the creation of a security interest under section 1(6) for the security grantor to give notice of the assignment to the underlying entity whose equity interests are being secured. An acknowledgment of notice of assignment is

- not required under Guernsey law, however, it is standard market practice that this is usually obtained. It is also market practice, although not required by the Guernsey Security Interests Law, that the register of members of an underlying corporate issuer is annotated to record that its shares are the subject of a security interest.

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.

ABOUT THE AUTHORS

ZOË HALLAM

Zoë Hallam is a Group Partner in Walkers' Guernsey Banking & Finance team leading the Guernsey Fund Finance practice and co-heading the Channel Islands team alongside Julia Keppe.

Zoë's broader finance practice also encompasses real estate finance, leveraged finance, restructuring / special sits and corporate finance, representing financial institutions, sponsors and alternative lenders.

She has been practising since 2005 in London and the Cayman Islands, and Guernsey, and is recognised by Legal 500 as a Next Generation Partner.

CAMILLA HOBBS

Camilla Hobbs is a Senior Associate in Walkers' Guernsey Banking & Finance practice group acting for a wide range of financial institutions, sponsors and corporate borrowers, with particular experience in fund finance, asset finance and real estate finance matters.

Camilla is part of Walkers' Global Fund Finance team and advises on all aspects of fund financing matters, including subscription lines, NAV and hybrid facilities.

Walkers

HONG KONG

HONG KONG

Contributed by **Doos Choi and Ester Chow - Mayer Brown**

Subscription Facilities

In the Hong Kong market, the security package for a subscription facility typically consists of (1) security granted over the uncalled capital commitments of the investors and related rights, including rights to make capital calls on the investors of the fund, rights to the proceeds of capital calls and rights to enforce payments of such calls ("**Capital Call Security Assignment**") and (2) security over the bank account into which the proceeds of the capital calls are paid (**"Collection Account Security"**).

Capital Call Security Assignment

It is market practice to include in the Capital Call Security Assignment a power of attorney granted by the fund and the general partner in favour of the lender (in bilateral deals) or the security agent (in multi-lender deals), where the lender or, as the case may be, security agent can act as the attorney of the fund and the general partner on their behalf and in their names to, among other things, issue capital call notices to, and enforce payments of such calls against, the investors, pursuant to the partnership documents. Such power of attorney is typically executed as a deed (which is one of the reasons for the Capital Call Security Assignment to be in the form of a deed), and execution formalities applicable to a Hong Kong law deed should be observed.

The Capital Call Security Assignment may be a legal or equitable assignment. In order to qualify as a statutory (legal) assignment, certain requirements under section 9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23 of the Laws of Hong Kong) must be met: (a) the assignment must be in writing; (b) the assignment must be absolute; (c) the assignment must be notified in writing to the counterparty against whom the assigned rights would be enforced; (d) the assignment must not purport to be by way of charge only and (e) the intention of the assignor to transfer ownership rights to the assignee must be clear. If any of these requirements is not met, the security assignment would only take effect as an equitable assignment which will be subject to prior equitable rights.

One of the advantages of taking a statutory legal assignment (vs. an equitable assignment) is that the assignee (being the lender, or as the case may be, the security agent in the case of a subscription facility) can take action against the debtor of the assigned debt or receivable (being the investors in the fund) in its own name without having to join the assignor (being the fund or the general partner) as a party to the action. It is a market practice in Hong Kong to require a notice of charge or assignment to be given to the investors for perfection in order to establish priority of claims. Although not required for security perfection as a matter of Hong Kong law, it is also common to require the fund/general partner to use reasonable endeavours to obtain acknowledgements from the investors to such notice of charge or assignment.

Lenders may also require a letter from particular investor(s) (an **"Investor Letter"**) to provide certain confirmations and undertakings relating to their capital commitments. In a typical Investor Letter (but subject to the circumstances and negotiation of each deal), the investor would expressly (a) acknowledge the relevant subscription facility and the security over the fund's capital call rights (including the right of the lender to make capital calls on behalf of the fund and general partner when enforcing its security), and the fund's authority under the partnership documents to enter into such subscription facility and to give such security, (b) confirm the amount of its capital commitments to the fund and its uncalled capital, (c) agree to pay capital contributions directly to the collection account (which is subject to the Collection Account Security), (d) confirm the lender's rights to information pertaining to that investor, and (e) agree not to transfer its limited partnership interest without the lender's consent. Investor Letters may be required in multi-investor subscription facilities where the due diligence bears out one or more issues with respect to such investor (whether under the terms of the side letter applicable to such investor or otherwise), and is commonly required on SMA funds or where there is a high investor concentration risk with respect of the fund.

Collection Account Security

The facility terms will stipulate that the general partner, on behalf of the fund, must make capital calls in accordance with the partnership documents and that it must pay the capital call proceeds directly into a specified (segregated) collection account (which itself will be subject to the Collection Account Security).

It is common in the Hong Kong market to permit the fund to withdraw capital call proceeds from time to time deposited in the collection account for permitted purposes under the partnership documents, unless and until an event of default has occurred.
If the collection account is opened in Hong Kong, Hong Kong law should be used the governing law of the Collection Account Security.

The Collection Account Security can be perfected by giving notice of the charge to the relevant account bank. Whilst it is desirable (from an evidential and practical perspective) to obtain an acknowledgement from the account bank to such notice, this is not strictly necessary for perfection purposes under Hong Kong law. That said, it is common in practice for the lender or,as the case may be, the security agent to be the account bank itself, in which case, an acknolwedgement would usually be obtained.

Hong Kong charge registration requirements

Part 8 of the Companies Ordinance (Cap 622 of the Laws of Hong Kong) imposes registration requirements in respect of certain types of security interests created by companies registered in Hong Kong. That Part 8 also imposes matching registration requirements in respect of certain types of security interests created over property situated in Hong Kong by registered non-Hong Kong companies (being companies incorporated outside Hong Kong which have established a place of business in Hong Kong and registered in the Hong Kong Companies Registry (**"HKCR"**) as "registered non-Hong Kong companies") (a "**Registered Non-HK Company"**).

Registration of the charge is made by the delivery of a certified copy of the charge instrument and a specified HKCR form (Form NM1) to the HKCR within one month of the date of creation of the charge or, where the charge is created outside Hong Kong comprising property situated outside Hong Kong, one month after the date on which a certified copy of the charge instrument could, if despatched with due diligence, have been received in Hong Kong in due course by post.

Failure to make such registration by the relevant Hong Kong company or Registered Non-HK Company will render the security interests void (so far as the creation of security over its property is concerned) against any liquidator or creditor of such company.

This registration requirement could, therefore, be applicable to security granted for a subscription facility by a non-Hong Kong entity if it is a Registered Non-HK Company.

In order to avoid discussions on whether or not the security interest created under a Collection Account Security is registrable under the Companies Ordinance, it is recommended for the lenders to include a floating charge (in addition to the typical fixed charge) over the collection account.

NAV Facilities

The market for pure NAV facilities in Hong Kong is still developing and relatively nascent when compared to the US and European markets. The security package is determined following due diligence and based on the asset class and nature in question. For example, where the fund is a private equity fund with relatively illiquid portfolio of investments, the NAV facility may be secured by the shares of the various holding companies which hold the relevant investments and/or accounts into which the investment distributions are paid. Where the fund is a private credit fund with portfolio of investments being primarily loans, lenders may require direct security over the underlying loans. Where the fund is a secondary fund which acquires and holds limited partnership /equity interest in other funds, the NAV facility may be secured against the limited partnership/equity interest held by the secondary fund.

Generally speaking, we would expect a typical NAV security package to include security over the bank account into which distributions from the underlying investments are paid ("**Distribution Account Security"**) and (subject to local law consideration, any existing debt or security restrictions and the nature of the investment assets) share security granted by the fund over its shares in an investment holding company (the **"Holdco"**) which may or may not be an aggregator vehicle ("**Holdco Share Security**") and potentially, an all-asset security granted by the Holdco (**"Holdco Debenture"**).

Depending on the structure, the NAV facility may be borrowed at the fund or the Holdco level. Distribution Account Security may be included in the Holdco Debenture (if one is provided). Similar considerations will apply to Distribution Account Security as set out above with respect to the Collection Account Security under a subscription facility.

If the Holdco is a Hong Kong incorporated entity, the Holdco Share Security needs to be governed by Hong Kong law. It can be either legal or equitable in nature. In practice, it is more common for lenders to take share security by way of an equitable charge as otherwise the lender (or the security agent) would become the legal owner of the shares upon creation of the share security (subject to a right of redemption) and its name would be entered into the register of members of the Holdco as a shareholder from the outset.

Where the shares subject to the Holdco Share Security are Hong Kong shares, a number of title and ancillary documents and steps will be customarily required to be delivered or taken.

These include: (a) the original share certificate(s) in the Holdco, (b) pre-executed but undated instrument(s) of transfer and contract notes of the shares, which can be completed and put into effect by the lender to transfer the shares to it or its nominee or purchaser upon security enforcement, (c) letters of resignation of each director of the Holdco and written board resolutions of the Holdco approving such resignation and share transfer at enforcement, each pre-signed but undated, together with signed and dated authorisation letters from each director authorising the lender to complete and put into effect such resignation letters and board resolutions at security enforcement, and (d) (if the due diligence bears out the need) amendments to the articles of association of the Holdco to remove any potential impediment to share security enforcement (e.g. to remove any directors' discretion under the articles not to register a share transfer as a result of or in connection with security enforcement). The originals of these title and ancillary documents are typically required as conditions precedent and will be retained by the lender throughout the security period.

- Depending on the nature of the assets charged under the Debenture, other perfection and registration steps (such as perfection notice to counterparties) may be necessary.
- The charge registration requirements under the Companies Ordinance as outlined above also apply to any Distribution Account Security, Holdco Share Security and Debenture granted by a Hong Kong company or a Registered Non-HK Company.

This summary is intended to provide information and commentary on the Hong Kong fund finance market. It is not a comprehensive treatment of the subject matter concerned and is not intended to provide legal advice as to Hong Kong law. The reader should retain Hong Kong counsel with respect to each and every matter.

ABOUT THE AUTHORS

DOOS CHOI

Doos Choi is a Partner in the Banking and Finance practice. **Doos** has a wealth of international experience in banking and finance gained across three continents having worked in London, Sydney and Hong Kong. He has deep experience across a wide range of products including fund finance, leveraged and acquisition finance, investment grade lending, private credit, real estate finance, distressed portfolio sales and work-outs.
Highly Regarded - Banking, Hong Kong – IFLR1000
Leading Individual - Banking & Finance: Hong Kong-based, China (International Firms) – Chambers Global
Leading Individual - Banking and Finance, Hong Kong – The Legal 500 Asia Pacific

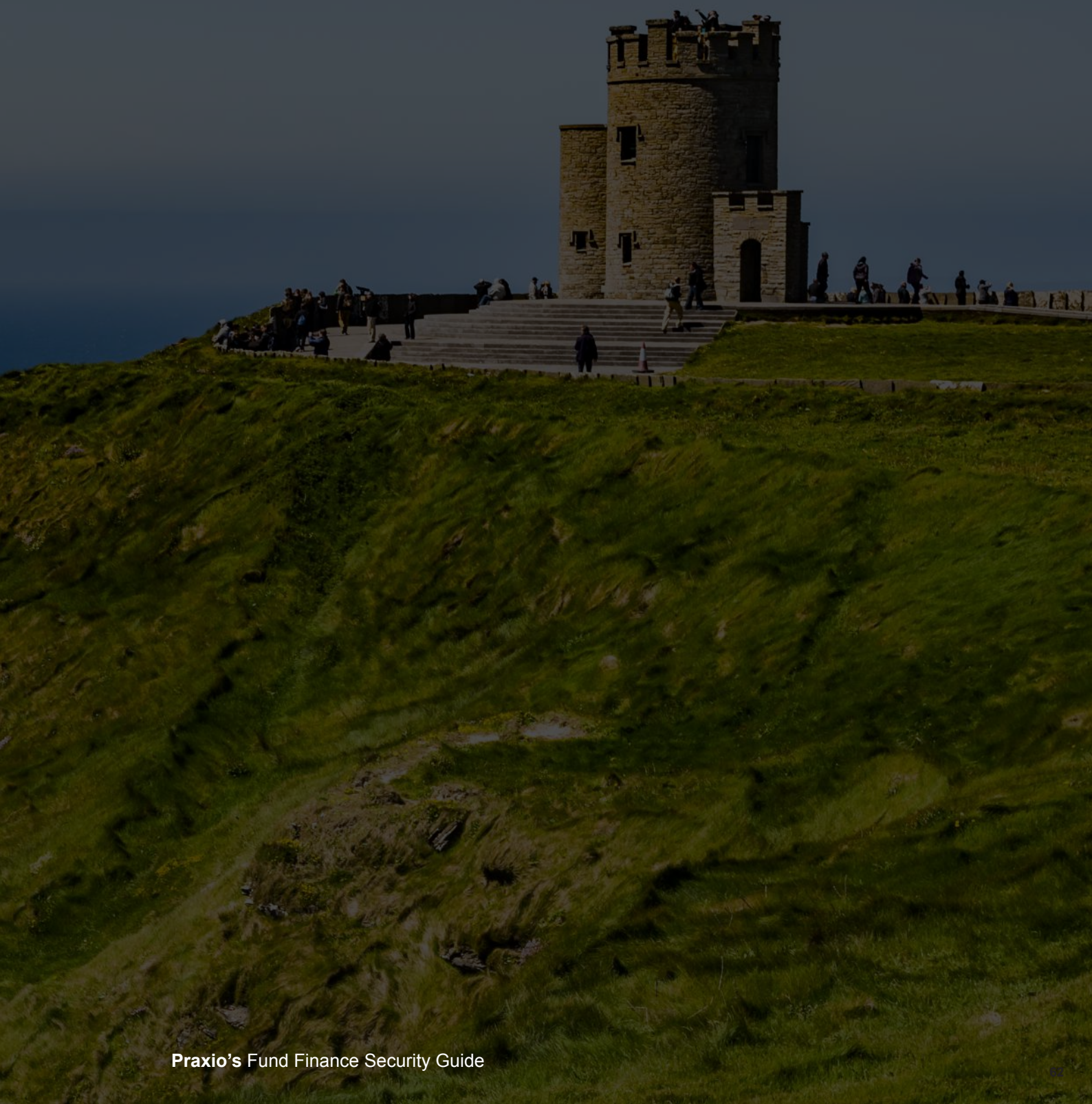
ESTER CHOW

Ester Chow is a Counsel in the Banking and Finance practice with over 10 years of experience in the financing space.

She advises both lenders and borrowers across the full spectrum of banking and finance matters, with a focus on private credit and fund finance, including capital call facilities to multiple-investor funds and SMA funds, GP lines, NAV financing.
Rising Star - Banking, Hong Kong – IFLR1000
Recommended - Banking and Finance, Hong Kong – The Legal 500 Asia Pacific

MAYER | BROWN
好 士 打

IRELAND



IRELAND

Contributed by **Finnbahr Boyle, Turlough Galvin, Alan Keating, Conor Lynch and Sherilyn Deane - Matheson LLP**

Introduction and overview of Irish Funds

Ireland is the third largest global centre for investment funds and an important jurisdiction in the context of both the European and global investment funds industry. Based on the most recently published statistics (November 2023), 8,813 Irish investment funds or sub-funds had been established holding net assets of approximately EUR 4 trillion. In addition, Ireland is also the largest European SPV domicile with more than 3,300 SPVs holding in excess of EUR 1 trillion in assets. These statistics have been obtained from the Irish Funds website and the Irish Debt Securities Association website respectively. For the purposes of this article, we focus predominantly on key considerations when structuring fund finance deals involving Irish domiciled investment funds.

Regulated Fund Structures

Irish regulated fund structures include the following:

- Irish Collective Asset-management Vehicles (**"ICAVs"**);
- Investment Limited Partnerships (**"ILPs"**);
- Investment Companies;
- Unit Trusts; and
- Common Contractual Funds (**"CCFs"**).

ILPs (particularly after the passing of the Investment Limited Partnerships (Amendment) Act 2020), ICAVs and Investment Companies are currently the most common Irish regulated fund structures featured in fund finance transactions. Unit Trusts are less prevalent, and CCFs rarely feature in fund finance transactions.

Two key considerations that market participants should keep in mind when structuring fund finance deals involving Irish-domiciled regulated funds are as follows:

- There is a regulatory restriction on Irish-domiciled regulated funds giving guarantees / security in respect of the obligations of third parties (an exception being where the third party is a wholly owned subsidiary). See below for how market participants address this in terms of cascading security packages.
- There is a concept of segregated liabilities which implements an automatic ring fencing of liabilities between one sub-fund and the other sub-funds in an umbrella regulated fund structure. Accordingly, there is by virtue of regulation and legislation no scope for "cross-contamination" or “dipping into" the assets of one sub-fund to discharge the liabilities of another.

Unregulated Fund Structures

There are two main categories of unregulated investment entities in Ireland:

- Limited Partnerships established pursuant to the Limited Partnership Act 1907 (which are different to ILPs); and
- Irish SPVs (known as "section 110" companies) (which are companies afforded a certain tax treatment provided they meet certain criteria).

These entities are not subject to the same restrictions on giving guarantees and security outlined above.

Subscription Facilities

- **Typical Security Package**

(i) Security over right to call capital

Irish-domiciled funds party to subscription facility financing arrangements will grant a security interest over their right to call and receive unfunded capital commitments from their investors. This security is usually documented as a security assignment and/or a fixed charge over the documentary right of the Irish-domiciled fund to make such calls. For example, in the context of an ILP, this will be achieved via a security assignment and/or fixed charge over the contractual call rights in the ILP's limited partnership agreement.

Given the importance of the fund documents to the taking of good and effective security, it is paramount that lender counsel diligence the fund documentation to ensure lenders do not face impediments to enforcement and realising the security assets (in this case, the ability to step in and issue capital calls and receive capital commitments).

A power of attorney is typically included within the relevant security document, which would allow the relevant secured party to issue drawdown notices on investors in an enforcement scenario.

(ii) Security over subscription accounts

Lenders will also take security over the subscription accounts into which the capital calls are funded, which are either in the name of the fund or held by the fund's depositary or equivalent service provider on its behalf. Security would be achieved by way of a fixed charge and/or an assignment by way of security over such accounts.

It should be determined at term sheet stage at what point the accounts would become exclusively controlled by the lender / security agent. This could be either a requirement from the outset of the transaction, or more frequently control is given to the lender / security agent upon it giving a notice of an event of default (or an equivalent event). The mechanism for documenting this control is usually achieved via an account control agreement, or by a notice and acknowledgment arrangement between the account bank and the fund (and its depositary/trustee, if applicable). As part of their diligence, lender counsel should also ensure the signing rights in respect of the relevant accounts accord with the relevant account control documentation.
To the extent subscription accounts are not located in Ireland, non-Irish security is likely to be the more appropriate choice of governing law.

- **Service Provider Side Letters**

It is frequently the case that certain functions of an Irish-domiciled fund have been delegated to fund service providers. For example, a general partner of an ILP may delegate its right to call capital from investors to an administrator (or investment manager acting on its behalf pursuant to an investment management agreement).

Lender counsel should ensure that any such delegation is appropriately addressed in the primary finance documents which usually necessitates engagement with the relevant fund service provider. The most common approach to ensuring delegation does not encroach on a lender / security agent's ability to realise assets on enforcement is to have a side letter put in place with the relevant fund service provider confirming they will comply with the lender / security agent's instructions in an enforcement scenario. We have also seen instances of the relevant service provider charging the rights that have been delegated to them. This approach is less common, and usually only taken where the relevant service provider is an affiliated entity of the relevant fund.

- **Investor Side Letters**

As with other jurisdictions, it is imperative that lender counsel conduct a thorough review of the fund formation documentation including investor side letters. Investor side letters may vary terms of the fund formation documentation in a way that can impact on a lender's collateral support. For example, if there are carve outs to an investor's obligation to fund capital calls (such as in an insolvency scenario), then lender counsel should ensure this is appropriately addressed in the primary finance documents.

- **Cascading security**

As mentioned above, there is a regulatory restriction on Irish-domiciled regulated funds giving guarantees / security in respect of the obligations of third parties (an exception being where the third party is a wholly owned subsidiary). In master-feeder fund structures, this restriction will generally preclude an Irish feeder fund giving a guarantee and security directly to lenders to a master fund borrower (or a security agent on behalf of such lenders), and vice versa. A typical approach to accommodating the restriction in subscription facility transactions is to implement cascading pledges, whereby (i) the non-borrower fund grants a pledge in favour of the fund into which it invests, (ii) that pledge is over the non-borrower's capital call rights and bank accounts into which such capital calls are paid, (iii) that pledge secures the non-borrower fund's obligation to fund capital commitments into the fund in which it invests, and (iv) that fund on-pledges its benefit to the pledge in favour of either the lender / security agent (if that fund is the borrower) or the fund into which it invests (if it is not the borrower). Counsel should be alive to these structuring considerations when documenting term sheets at the outset of subscription line transactions.

- **Perfection requirements**

With respect to filings, the below table sets out the general position; however, it should be noted, that certain assets (such as cash or shares) are not in all circumstances required to be registered at the relevant registry.

Filings required	
ICAVs (and their sub-funds)	Filings with the Central Bank of Ireland.
Unit Trusts and CCFs	This is determined by the identity of the entity who, pursuant to the trust deed, is capable of granting security over the relevant assets, eg if the trustee / manager has this ability and is an Irish company, filings with the Irish Companies Registration Office against the trustee / manager will be required.
Investment Companies or PLC	Filings with the Irish Companies Registration Office. To the extent a fixed charge is created over book debts, a notification should be made to the Irish Revenue Commissioners.
ILPs and Limited Partnerships	Filings with the Irish Companies Registration Office if the GP is (a) Irish or (b) non-Irish but has a branch, establishment or place of business in Ireland.

In addition:

- assignments of contractual rights are perfected under Irish law by serving notice on the counterparties. Accordingly, lenders will typically require either contemporaneously with closing or at a specified time (such as a crystallisation of a floating charge or an event of default) that notices be served on investors; and

- charges over bank accounts are "perfected" by giving notice to the account bank. In practical terms and given the importance of subscription bank accounts to a lender's credit support package, lenders also typically seek contractual account control mechanisms (by way of an account control agreement or a notice and acknowledgment arrangement), as outlined above.

The information in this summary is provided for information purposes only. It does not constitute and should not be relied on as legal advice. Specific guidance should be obtained from legal counsel in relation to your transaction.

NAV Facilities

Typical Security Package

The Irish nexus to a NAV financing would usually arise where (a) an obligor is Irish-domiciled and / or (b) the assets are held in Ireland. Where the nexus is only that there is an Irish-domiciled obligor who is not charging any assets in Ireland, there would usually not be any need for Irish law security. However, in such circumstances, it should be noted that the restrictions on Irish regulated funds giving guarantees / security in respect of third party obligations as mentioned above will apply equally in the context of a NAV facility.

Where there are assets held in Ireland, Irish law should be the governing law of any security documents. Frequently we would see a NAV facility involving assets located in Ireland including the following:

- security over the depositary account held by the depositary on behalf of the fund, as this is where the various securities, cash, investments and other assets attributable to the fund are held; and

- an account control agreement in respect of the depositary account.

Depending on the deal and fund structure, it may also be worthwhile taking security over any relevant SPVs incorporated in Ireland. However, unless the commercial agreement specifies otherwise, taking security over the actual individual assets themselves is less common (as it is seen as time and cost consuming).

Perfection Formalities

The perfection formalities noted above in respect of subscription facilities are also applicable in respect of NAV facilities.

ABOUT THE AUTHORS

FINNBAHR BOYLE

Finnbahr Boyle is a partner in Matheson's Finance and Capital Markets Department, is based in the firm's London office and heads Matheson's Fund Finance practice. **Finnbahr** specialises in a range of lending and restructuring transactions, with a special focus on fund finance, leveraged finance and general corporate lending, as well as debt restructuring transactions.

TURLOUGH GALVIN

Turlough Galvin is the Co-Head of the Finance and Capital Markets Department at Matheson. He advises international corporations, investment banks and financial institutions doing business in and from Ireland. He specialises in fund finance and all forms of structured finance, securitisation, financial services tax, loan portfolio and debt capital markets advice

ALAN KEATING

Alan Keating is a partner in Matheson's Finance and Capital Markets Department and heads the firm’s New York office.

Alan advises international companies and financial institutions, asset managers, private equity firms, hedge funds, investment banks, alternative lenders, arrangers, issuers, rating agencies, trustees and investors on all aspects (including restructuring) of debt capital markets, securitisation (cross-border and domestic), structured finance and fund finance transactions.

ABOUT THE AUTHORS

CONOR LYNCH

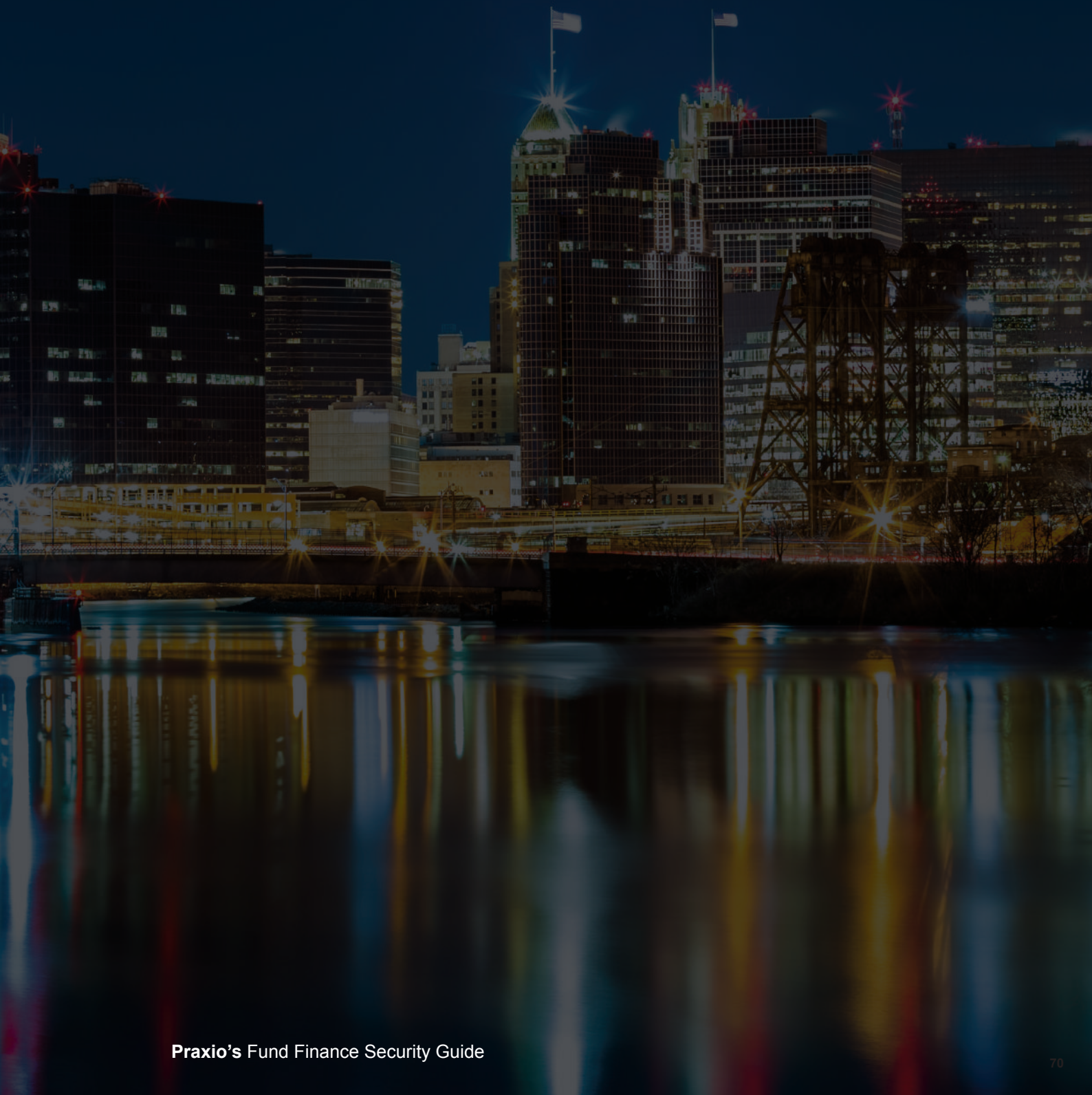
Conor Lynch is a senior associate working in the Finance and Capital Markets Department of Matheson and advises on all aspects of lending transactions, with a particular focus on fund finance, project finance and leveraged acquisition financings. **Conor** acts for a range of domestic and international fund sponsors, corporate borrowers and financial institutions lending into such borrowers.

SHERILYN DEANE

Sherilyn is a senior associate in Matheson's Finance and Capital Markets Department, and specialises in a range of lending transactions, with a special focus on fund finance, acquisition finance and general corporate lending.

Matheson

JERSEY



Praxio's Fund Finance Security Guide

JERSEY

Contributed by **Julia Keppe and Alice Wight - Walkers (Jersey) LLP**

Funds can be structured in Jersey in several ways, most commonly as a limited partnership, company or unit trust (the latter more prevalent in the real estate space). Jersey closed-ended funds looking to avail themselves of subscription facilities are most commonly structured as limited partnerships, with a Jersey corporate general partner and governed by a Jersey law limited partnership agreement. The limited partnership itself has no separate legal personality and must act through its general partner.

In Jersey, security in connection with fund finance transactions is provided pursuant to the Security Interests (Jersey) Law 2012 (as amended) (the **"Jersey Security Interests Law"**). Security interests are created, as applicable, by way of grant of security interest or an assignment by way of security over different types of assets.

Subscription Facilities

Typical security package

Typically, in connection with a subscription line facility, Jersey law governed security is provided over (i) contractual rights, i.e. the right to call capital from investors (and ancillary/related rights) set out in the Jersey law governed limited partnership agreement or other constitutive document and (ii) the Jersey bank account into which the called capital is paid.

Depending on the structure and regulatory or tax considerations, the collateral package may include cascading pledges where certain feeders or blockers provide security (ultimately) to the borrower, and security over the borrower's contract rights under such 'cascading security agreements' is then provided by the borrower in favour of the lender/security agent (the **"Secured Party"**).

(i) Capital Calls and Related Rights: the grantor and the precise scope of the security will of course depend on the underlying fund documentation, however broadly speaking the key points are:

- Security to be provided by the fund and, where applicable, its general partner and/or investment manager (see below) in favour of the Secured Party over their rights as against the investors to call for, and receive, capital contributions pursuant to the applicable constitutive documents of the fund.
- Security usually also includes the right to exercise any remedies in respect of the right to call capital, for example, against a defaulting investor.
- If capital call rights have been (or may be) delegated by the general partner to an investment manager, then the investment manager should also be a party (in addition to the general partner) to the security agreement in order to ensure the Secured Party has security over the rights of the investment manager that have been delegated to it.

(ii) Bank Accounts:

- Assuming the bank account of the fund is in Jersey, there will also be a local law bank account security interest agreement to create a security interest over the account where capital contributions are to be paid.
- It is key to ensure that the grantor is the party in whose name the account has been opened (e.g. the fund, the general partner or a manager). As capital contributions are an asset of the fund we would expect the bank account to be opened in the name of the fund.
- Bank account agreements and/or general terms and conditions governing the bank account need to be obtained from the account bank at the outset of the transaction and reviewed to ensure there is no prohibition on creating security over the account, or bank consent required to the creation of such security.

Formalities

(i) Capital Calls and Related Rights / Cascading Security Agreements

- ***Creation:*** a security interest over contract rights is created on execution of the relevant security interest agreement.
- ***Perfection and priority:*** perfection and first priority is achieved by registering a financing statement on Jersey's online security interests register (the **"SIR"**). Such registration includes details of the grantor, the Secured Party and a summary of the security interest agreement, and is publicly available.
- ***Competing priority:*** priority between registered security interests in the same collateral is determined in relation to the timing of the registration on the SIR. In Jersey it is typical to preregister the security interest to avoid any potential gap in time between creating the security interest and perfecting the security interest by way of registration.
- ***Notices:*** it is not necessary, from a Jersey perspective, for the creation or perfection of such security to give notice to the limited partners or counterparty/ies to the applicable contract, but there may be advantages to doing so (e.g. if practical, acknowledgement may be sought in order to ensure investors are aware of the security interest being granted and to provide "self-help" for the Secured Party upon an enforcement).
- ***Acknowledgements:*** an acknowledgement of any notice is also not required, and is not always practicable to obtain from investors in a fund. However, as a commercial matter and if available, other forms of confirmation of receipt by investors may be required by a Secured Party, such email read receipts or screen shots from investor portals.

(ii) Bank Accounts:

- ***Creation:*** a security interest over bank accounts is created on execution of the relevant security interest agreement.

- ***Perfection:*** a security interest over accounts situate in Jersey may be perfected by registration (as above) or by the Secured Party having "control" of the account pursuant to the Jersey Security Interests Law (which confers 'super' priority status). By way of summary:

    - It is standard practice in Jersey to (pre-)register the account security interest agreement on the SIR, which ensures a valid and perfected security interest exists on closing.
    - The Secured Party can obtain 'control' of a Jersey bank account in a number ways. (i) the account is transferred into the name of the Secured Party, (ii) a tripartite written agreement is entered into (effectively, a notice and acknowledgement) between the grantor, the Secured Party and the account bank confirming that the account bank will comply with instructions of the Secured Party, (iii) the account is assigned by way of security to the Secured Party in writing and a notice is served on the account bank by the grantor or (iv) the Secured Party is the account bank.
    - Market practice is to use (ii), i.e. a notice and acknowledgement. Jersey account banks each tend to have their own standard form that are typically used without amendment.
    - For the avoidance of doubt, if the account bank and the Secured Party are the same entity, there is no need to obtain a notice and acknowledgement.

- **Priority:** assuming that a security interest is perfected by way of a notice and acknowledgement, even if created later in time, a Secured Party that has such "control" of a bank account will rank ahead of any other secured party with a security interest in the same account that does not have such "control". Where conflicting security interests exist whereby more than one secured party has "control" of a bank account, such security interests will rank according to the order in which "control" was acquired (i.e. the date of the notice and acknowledgement).

NAV Facilities

Description of the security package

Unlike a subscription facility, which 'looks up' to the capital commitments of the investors in the fund as credit support, a NAV facility will 'look down' and the Secured Party will have recourse to the value of the portfolio investments of the fund.

Typically we see local law security taken over both or either of (i) the Jersey situs bank account into which proceeds and/or distributions made by the portfolio investments are made, and/or (ii) the ownership interests in a holding and/or portfolio company.

(i) Bank Accounts: as above.

(ii) Ownership Interests:

- Security is created pursuant to a security interest agreement under the Jersey Security Interests Law.
- We have seen NAV facilities agreed both with and without share or equity interest security over a portfolio company, limited partnership or unit trust. This is ultimately a commercial call and depends on how the fund holds the underlying assets.
- Constitutional documents of an underlying issuer will need to be reviewed to check for any restrictions on the grant of security, and may need to be amended to build in market standard creditor protections.
- In the case of security over limited partnership interests, the prior written consent of the general partner may be required.
- It may not be possible to take security where the underlying issuer is a regulated entity.

Formalities

(iii) Bank Accounts**:** as above.

(iv) Ownership Interests:

Creation: a security interest over shares or other ownership interests is created on execution of the relevant security interest agreement.
Perfection and priority: a security interest over Jersey situs "investment securities" may be perfected by registration on the SIR or, if applicable, by the Secured Party having possession and/or "control" (which confers 'super' priority status). By way of summary:

- It is standard practice in Jersey to (pre-)register the security interest agreement on the SIR, which ensures a valid and perfected security interest exists on closing.
- "Control" (and 'super' priority) in relation to shares (or other certificated ownership interests) is typically achieved by taking possession of the original certificates of title (achieving both possession and control).
- It is accepted practice by both borrower and lender counsel in Jersey that as well as original certificates, signed blank transfer forms and a certified register of members relating to the underlying issuer will all be delivered to lender counsel in Jersey shortly in advance of completion to be held to order.

Priority: even if created later in time, a Secured Party that has possession or control of the certificated investment securities will rank ahead of any other secured party with a security interest in the same securities that does not have such possession or control. It is unlikely to occur, however where conflicting security interests exist whereby more than one secured party has possession or control of a certificated investment security, such security interests will rank according to the order in which possession or control was acquired.

Notice and acknowledgement: it is not necessary, from a Jersey perspective, for the creation or perfection of such security to give notice to the underlying entity whose ownership interests are secured or to obtain an acknowledgement. However, for completeness, or where such entity is not an obligor under the relevant financing, lenders may insist on this as a commercial matter.

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.

ABOUT THE AUTHORS

JULIA KEPPE

Julia Keppe is a Partner of Walkers (CI) LP, based in the Jersey office in their Banking & Finance practice group. **Julia** leads the Jersey Fund Finance practice and co-heads the Channel Islands team alongside Zoë Hallam.

Julia's broader finance practice also encompasses leveraged acquisitions, corporate lending, direct lending, debt capital markets and restructurings / special sits, representing corporations, private equity sponsors and financial institutions. She has been practising since 2006 in London, New York and offshore, and is recognised by Legal 500 and Chambers.

ALICE WIGHT

Alice Wight is a Senior Associate in Walkers' Jersey Banking & Finance practice group acting for a wide range of financial institutions, sponsors and corporate borrowers, with particular experience in fund finance, leveraged finance and real estate finance matters.

Alice is part of Walkers' Global Fund Finance team and advises on all aspects of fund financing matters, including subscription lines, NAV and hybrid facilities.

Walkers

MAURITIUS

MAURITIUS

Contributed by **Malcolm Moller and Karishma Beegoo - Appleby**

Subscription Facilities

Fund structures in subscription facilities

Mauritian funds are often structured in the form of Mauritian limited partnerships (**LPs**) governed under the Mauritius Limited Partnerships Act (**LPA**). Forming a limited partnership in Mauritius is relatively straightforward which explains its popularity in subscription facilities. Each LP consists of one or more general partners who are jointly and severally liable and one or more limited partners whose liability is limited to the amount contributed or agreed to be contributed to the LP.

A person may be a general partner and a limited partner at the same time in the same LP. Subject to the partnership agreement, no partner can contribute to the LP or vary the amount of his/her capital contribution to the LP unless he/she and all the general partners agree. Where a partner pays an amount to discharge the whole or part of his/her personal liability for a partnership obligation, the partnership obligation is discharged to the extent of the amount paid. Unless at least one general partner of the LP is resident in or incorporated, formed or registered under the laws of Mauritius, every LP is required to at all times have and maintain in Mauritius a registered agent. The investors typically join the LPs as limited partners.

Typical Security Package

Subscription facilities entered into by a fund in the form of an LP are typically secured by:

Capital commitments and related rights

consisting of

- All capital commitments, capital contributions, capital contribution proceeds, capital calls, and all other proceeds and rights to payment , whether as a result of capital calls, or otherwise, and all general intangibles related thereto;
- All rights to (a) make capital calls and request capital contributions (b) exercise and enforce every right, power, remedy, authority, option and privilege and take all steps, actions, suits or proceedings necessary to make capital calls and to receive capital contribution proceeds and any other rights to call for additional capital contributions with respect to the capital commitments as contemplated by the constitutional documents of the chargor and (c) enforce the payment thereof and the related terms of the constitutional documents of the chargor;

Bank accounts

- i.e. the Mauritian bank accounts into which the investors‘ capital contributions are to be made.

Security over the investor commitments and related rights is typically created by:

(a) fixed and/or floating charge
(b) an assignment agreement

Security over the bank account is taken by way of:

(a) fixed and/or floating charge
(b) pledge agreement

The fixed and/or floating charge typically include a provision enabling any receiver appointed at enforcement to require the directors of the chargor to call up unpaid share capital and to take action to enforce payment of unpaid calls.

The security assignment over the capital commitments and related rights is typically supported by a bordereau (*Acte de Cession de Créances à titre de garantie*) in accordance with articles 82 to 90 of the Mauritius Code de Commerce issued by the general partner acting for and on behalf of the LP. A notice of assignment is also sent by the general partner to any counterparty.

Due diligence of the fund constitutional documents should be carried out to verify that the fund has the legal authority to take out a subscription facility and to grant security.

● Perfection formalities

Fixed and/or Floating Charge

A fixed and/or floating charge is typically granted over (i) the bank accounts to which the capital commitments are paid (ii) the capital commitments and (iii) the right to make calls on the capital commitment (by serving drawdown notices on the limited partners) and the right to receiving such capital commitments.

Under the laws of Mauritius, a charge granted by a Mauritian chargor is required to be registered and inscribed in order to be perfected. Whilst registration of a charge provides a *date certaine* as regard the date of the charge document in the event there is a dispute, inscription confers priority to the charge holder. Such priority is relevant in the event the Mauritian chargor goes insolvent since the chargeholder will then have priority over the proceeds of claims.

Where a charge is granted over bank accounts, the terms and conditions of the bank account with the account bank shall need to be verified as most terms prohibit the creation of any charge over the bank account without the prior consent of the account bank.

Once the fixed and/or floating charge has been entered into, the register of charges of the LP will have to be updated.

Assignment Agreement

An assignment is granted over all of the LP's rights, title and interest from time to time in and to:

(i) the capital commitments, arising under and/or in connection with the assigned agreements (including, without limitation the rights to call for the capital commitments);

(ii) the right to make capital calls for the capital commitments and to deliver drawdown notices to each of the limited partners calling for capital commitments pursuant to the terms of each assigned agreement;

(iii) the right to receive all money and proceeds payable in connection with the capital commitments;

(iv) the right to enforce payment of capital commitments and exercise any remedy with respect thereto pursuant to the terms of each assigned agreement;

(v) any and all other claims or rights on any account whatsoever which the LP may have under or in connection with the capital commitments and all related rights thereto.

Perfection of the assignment is completed where details of the assignment are entered into the register of charges of the LP as assignor, the bordereau as referred above is completed and delivered to the assignee and the notice of assignment is issued to the counterparties.

Pledge

An account pledge is typically granted over (i) the bank accounts to which the capital commitments are paid (ii) the capital commitments and (iii) the right to make calls on the capital commitment (by serving drawdown notices on the limited partners) and the right to receiving such capital commitments.

To perfect the pledge over the fund's bank account(s) the bank with which such account is held (account bank) needs to be notified of the pledge. The receipt of such notification will be typically confirmed in an acknowledgement letter by the account bank.

It is not necessary to register a pledge over bank account under the laws of Mauritius and therefore, a fixed and/or floating charge (which provides priority to the chargeholder) is usually preferred over the pledge over bank account although enforcement under the pledge is easier and more straight forward. The register of pledges of the LP will need to be updated immediately after the pledge is entered into.

ABOUT THE AUTHORS

MALCOLM MOLLER

Malcolm Moller, Group Managing Partner – Mauritius, Seychelles and Shanghai, is a member of both the Insurance and Structured Finance Teams of Appleby.

He specialises in advising financial institutions on financial regulation, regulatory capital issues, financial institution M&A, and insurance-related transactions. **Malcolm** advises on private equity funds, hedge funds, derivatives transactions and securities offerings, as well as a range of corporate and corporate finance transactions. **Malcolm** has extensive experience representing corporations, financial institutions and other principals.

His experience spans public and private M&A, subscription credit facilities, restructuring, bankruptcy, capital markets, fund formation and winding up, and a variety of strategic and advisory corporate assignments. As a regular contributor on Mauritius-related articles, **Malcolm's** writings have been featured in numerous publications, including The Lawyer, The American Lawyer, International Investment and the Investor Services Journal.

KARISHMA BEEGOO

Karishma Beegoo is a Senior Associate within the Corporate department in Mauritius. **Karishma** practises in the areas of corporate and commercial laws and has extensive experience in advising corporations, financial institutions and other entities. She specialises in securities offerings, capital markets, restructuring and insolvency as well as a range of corporate advisory and corporate finance transactions.

APPLEBY

SCOTLAND

Praxio's Fund Finance Security Guide

SCOTLAND

Contributed by **Alan Knowles and Lindsay Lee - Brodies LLP**

Unlike limited partnerships constituted elsewhere in the UK, Scottish limited partnerships (SLPs) have separate legal personality. This means that SLPs can own assets, enter into contracts, borrow money and be sued all in their own name.

Subscription facilities

Typical Security Package

Subscription facilities entered into by SLPs or Scottish limited liability partnerships (LLPs) are typically secured by:

Investor commitments and related rights

- The unfunded capital commitments of the fund's limited partners (investors) regardless of whether or not these can be included in the borrowing base calculation or financial covenants.
- The right of the general partner or the manager (depending on the terms of the limited partnership agreement) to make capital calls and to receive from the fund's limited partners (investors) the proceeds of such capital calls.
- Other ancillary rights which the general partner or manager may exercise against the limited partners (investors) relating to the above.

Bank Accounts

- The Scottish bank accounts into which the limited partners' (investors') capital contributions are deposited.

Security interests in relation both to the investor commitments and the bank accounts are created by assignation in security.

In relation to the investor commitments and the rights of the general partner or manager, care must be taken to ensure that the lender does not inadvertently take on the whole role of general partner or manager, and thereby assume additional substantial liabilities. Careful consideration of the terms of the fund's constitutional documents, the limited partnership agreement and any amendments thereto, is required.

In relation to the bank accounts, fixed security interests can only be created where the security holder has sufficient control of the accounts, which will depend on the nature of the accounts and how the security is to operate in practice. Unlike in England and Wales, where there is insufficient control no security interest will be created at all unless a separate floating charge has been granted (where competent to do so).

The security package is typically supported by a power of attorney giving the lender the right to issue drawdown notices and make capital calls to limited partners post-enforcement. A power of attorney granted by an SLP or other Scottish entity general partner or manager will fall on the insolvency of the grantor.

Due diligence is typically carried out on the fund's constitutional documents (the SLP's limited partnership agreement) to ensure that the fund has legal capacity to borrow and to grant the security required for the transaction.

Perfection formalities

Assignations in security require to be intimated (notified) to the relevant counterparties in order to perfect the security right. Without intimation no security right is created by the assignations in security; unlike in England and Wales, there is no concept of an equitable assignment.

Where the assignations in security are granted by Scottish LLPs or Scottish companies registration at the Registrar of Companies is also required.

Investor commitments and related rights

In the case of assignations in security of the rights of the general partner or the manager in relation to investor commitments and related rights this requires notice to each limited partner (investor) and practice is for this to be done by recorded delivery post.

Bank accounts

In the case of assignations in security over the bank accounts, intimation is made to the account bank, typically with a request to return an acknowledgment. In some transactions a control agreement between the lender, fund and account bank is put in place.

Role of investor letters

In subscription facilities involving SLPs investor letters are rarely obtained from the limited partners (investors) as consent to the fund's ability to borrow and grant security is captured by the limited partners' signing up to the limited partnership agreement.

New security legislation

Once the Moveable Transactions (Scotland) Act 2023 (MTA 2023) is in force (expected in the second half of 2024) assignations in security will be capable of being perfected by registration (without notice) in a new public register of assignations, as an alternative to intimation.

Where assignations in security are perfected by intimation notice will be capable of being effected by email.

Assignations in security will also be capable of securing future rights so these will be able to cover drawdown notices and capital calls to future limited partners (investors) and in relation to changed limited partner commitments without the need for supplemental assignations and registration or intimation.

It is anticipated that once secondary legislation relative to the MTA 2023 is put in place (also expected in 2024), if bank accounts meet clarified control requirements security can be taken over the accounts by a new fixed security called the statutory pledge, perfected by registration in a new public register of statutory pledges.

Companies House registration requirements will remain unaffected by the new legislation.

NAV Facilities

Typical Security Package

NAV facilities entered into by SLPs or Scottish LLPs are typically secured by:

Equity interests, related rights and investments

- Receivables from the investments of the fund including distributions, dividends, interest and proceeds arising on insolvency;
- General partner rights;
- Equity interests in the companies through which the fund holds its investments;
- Direct security interests in the underlying investments of the fund.

Bank accounts

- The Scottish bank accounts into which the distributions, dividends, interest and insolvency proceeds are deposited.

Security interests in relation to the receivables from the investments of the fund and in relation to the bank accounts are created by assignation in security.

Security interests in relation to the general partner rights will depend on the type of entity of the general partner and where it is incorporated. Where the general partner is an SLP or Scottish LLP an assignation in security of the rights under the relevant general partner partnership agreement will typically be taken. Where the general partner is a company security over the shares in that company may be taken. A floating charge might also be taken if the general partner is either a corporate or a Scottish LLP.

Where the investment-holding companies are Scottish companies security over the equity interests in those companies is taken by share pledge.

Security interests in relation to the underlying investments will depend on the underlying assets type and where they are situated. If the assets comprise land and buildings in Scotland standard securities can be taken over those assets.

In relation to the bank accounts fixed security interests can only be created where the security holder has sufficient control of the accounts, which will depend on the nature of the accounts and how the security is to operate in practice. Unlike in England and Wales, where there is insufficient control no security interest will be created at all unless a separate floating charge has been granted (where competent to do so).

Due diligence is typically carried out on the fund's constitutional documents, principally the SLP's limited partnership agreement, to ensure that the fund has legal capacity to borrow and to grant the security required for the transaction. A similar due diligence exercise will be undertaken on the constitutional documents of the general partner where the general partner entity is granting security. Where share security is granted the constitutional documents of the companies in which the shares are secured will be checked to ensure that the directors may not refuse the transfer of the shares to the security taker, and that the shares are fully paid up and not subject to any liens.

Perfection formalities

As for subscription facility security, assignations in security require to be intimated (notified) to the relevant counterparties in order to perfect the security right. Without intimation no security right is created; unlike in England and Wales, there is no concept of an equitable assignment.

Where the assignations in security are granted by Scottish LLPs or Scottish companies registration at the Registrar of Companies is also required.

Equity interests, related rights and investments

The assignations in security of the rights to the receivables must be notified to the relevant counterparties and practice is for this to be done by recorded delivery post.

Typically security interests in relation to the general partner rights are not perfected until an event of default has occurred to avoid the risk to the security holder of incurring the liabilities of the general partner.

Security over shares in Scottish companies, effected by a share pledge, requires to be perfected by transfer of ownership in the shares to the security holder. Signed and dated stock transfer forms and accompanying share certificates must be delivered to the security holder, the security holder's name must be entered in the register of members of the relevant company and share certificate(s) in the security holder's name must be issued.

Where the share security is granted by Scottish LLPs or Scottish companies registration at the Registrar of Companies is also required.

Bank accounts

In the case of assignations in security over the bank accounts, intimation is made to the account bank, typically with a request to return an acknowledgment. In some transactions a control agreement between the lender, fund and account bank is put in place.

New security legislation

As for subscription facilities, the MTA 2023 and relative secondary legislation will create a new regime allowing for assignations in security of existing and future rights to be effected by registration as an alternative to intimation. It is anticipated that bank account security may be effected by a new statutory pledge where clarified control requirements are met.

It is also anticipated that security over equity interests in Scottish companies will be capable of being effected by the new statutory pledge, without the need for ownership of the affected shares being transferred to the security holder.

Companies House registration requirements will remain unaffected by the new legislation.

ABOUT THE AUTHORS

ALAN KNOWLES

Alan Knowles is a Partner in the Banking and Finance practice. He has specialised in fund finance work for over 20 years.

Alan is recognised as a market-leader for his technical excellence and commerciality in the fund finance space and is instructed as go-to principal advisor to banks and financial institutions in high value investment fund deals involving some of the largest and most successful UK investment trusts.

LINDSAY LEE

Lindsay Lee is a Senior Associate in the Banking and Finance practice. She has written widely on the Moveable Transactions (Scotland) Act 2023, including the impact of these legislative reforms on taking security in Scotland in fund finance deals, and has co-authored guides on the financing of Scottish limited partnerships.

SINGAPORE

SINGAPORE

Contributed by **Soumitro Mukerji - Mayer Brown**

Subscription Facilities

In the Singapore market, the security package for a subscription line facility typically consists of (1) security granted over the uncalled capital commitments of the investors and related rights ("Security Assignment") and (2) security over the bank account into which the capital contributions are paid ("Account Security"). It is common for the lender to also be the account bank.

In Singapore, the perfection of the Security Assignment is achieved by giving notice of the security interest to the investors. It is customary to receive acknowledgements back from the investors although strong sponsors will push back on this. The perfection of the Account Security requires giving notice of the security interest to the account bank. It is also customary to receive an acknowledgement back from the account bank. Depending on the nature of the security interest, security granted by a Singapore company or a foreign company registered in Singapore would be registrable with the Accounting and Corporate Regulatory Authority ("ACRA") in Singapore.

On multi-investor subscription line facilities, investor letters are rarely seen in the Singapore market, unless there are anchor investors or concentration risk. It is more customary to receive investor letters on SMA facilities.

NAV Facilities

The market for NAV facilities in Singapore is still developing and compared to the US and European markets, there is less appetite amongst lenders to provide pure NAV facilities although we are starting to see more deals in this space recently, especially around hybrid facilities. The security package is determined following due diligence and based on the asset class in question. However, a typical NAV security package would consist of security granted over (1) the bank account into which any distributions are paid, (2) share security granted by the fund over its shares in an intermediate holding company ("Holdco") and (3) an all assets security granted by Holdco.

Security perfection would involve registration of the security with ACRA as specified above. Security over shares would also attract stamp duty.

This summary is intended to provide information and commentary on the Singapore fund finance market. It is not a comprehensive treatment of the subject matter concerned and is not intended to provide legal advice as to Singapore law.

ABOUT THE AUTHOR

SOUMITRO MUKERJI

Soumitro Mukerji is a Partner in the Banking & Finance practice in Mayer Brown's Singapore office. In his professional career spanning nearly 20 years, he has advised banks, financial institutions, funds, corporates and financial advisors across the credit and geographic spectrum, including the Asia-Pacific (APAC) and UK/European markets.

His practice covers leveraged and acquisition financing, fund-level financing, structured lending and general corporate finance. He has in-depth knowledge of fund-level finance and routinely advises financiers and fund managers on a wide range of fund financing transactions across all asset classes, including subscription line financings, umbrella facilities, NAVs, hybrids, GP facilities and other forms of liquidity solutions.

Since 2019, he has advised on fund finance matters exceeding US$8 billion in value. **Soumitro** is an active member of the fund finance community and sits on the APAC Advisory Council of the FFA, where he supports the investment funds market within the APAC. He also sits on the FFA's APAC Diversity Committee and is a vocal advocate for Diversity & Inclusion initiatives within the APAC finance community.

MAYER | BROWN

UNITED STATES

Praxio's Fund Finance Security Guide

UNITED STATES

Contributed by **Monika Sanford and Camille Gibeault - Haynes Boone LLP**

Subscription Facilities

Security Package

A typical US subscription facility incorporates a pledge by a fund (e.g., a borrower, guarantor, blocker, and/or feeder), along with a pledge by the general partner of such fund. This pledge broadly covers all rights, titles, interests, powers, and privileges associated with:

(i) making capital calls on the fund's investors, the proceeds of capital calls and the enforcement of capital capitals;

(ii) the capital commitments and the capital contributions; and

(iii) the bank account(s) where investors are required to deposit capital contributions.

The documentation securing this collateral may consist of a security agreement and collateral account pledge, or an agreement combining both.

Perfection Formalities

Perfection of the collateral described above is governed by Article 9 of the Uniform Commercial Code (or, in the case of a collateral account characterized as a securities account, Articles 8 and 9 of the Uniform Commercial Code) adopted in the state governing the relevant collateral documentation. While most US subscription facility documentation falls under the law of the State of New York, all 50 states and the District of Columbia have adopted analogous versions of Articles 8 and 9 of the Uniform Commercial Code in all respects relevant to perfecting this collateral.

UCC Financing Statement

The collateral outlined in (i) and (ii) above is categorized as a general intangible or payment intangible under the Uniform Commercial Code. A lender's security interest in this collateral can be perfected by filing a UCC financing statement in the appropriate jurisdiction, determined by the debtor's location according to Article 9 of the Uniform Commercial Code. For funds organized under the laws of a certain state, the proper jurisdiction is their state of organization. For foreign funds, it is the jurisdiction of their place of business or, if multiple places exist, their chief executive office. If a foreign fund lacks a place of business or chief executive office in the United States, the proper jurisdiction is the District of Columbia.

The form of UCC financing statements adopted by each state varies. The International Association of Commercial Administrators drafts forms that states may adopt. Recently, various states, including Delaware and the District of Columbia, adopted IACA forms with a revision date of July 1, 2023. Some states only allow e-filing, while New York continues to use an older IACA form revised on May 22, 2002. It is essential to use the correct form as a filing jurisdiction may reject a UCC financing statement filing if administrative requirements are not met.

UCC financing statements lapse five years after their original filing date. Therefore, a UCC continuation statement must be filed prior to lapsing, and no more than six months in advance. UCC financing statements may also be amended, assigned and terminated by filing the appropriate form with the filing jurisdiction.

Control Agreements

The collateral outlined in (iii) above may be considered a deposit account or both a securities account (with respect to property other than cash) and a deposit account (with respect to cash). A lender's security interest in a securities account can be perfected by filing a UCC financing statement in the appropriate jurisdiction. Concerning cash in the collateral account and deposited capital contributions, perfection requires control. Control can be attained if the lender is the bank holding the control account or through an account control agreement executed by the lender, the fund, and the account bank. Although not obligatory, some lenders prefer and require an account control agreement even when the collateral account is held with the lender.

To adhere to the Uniform Commercial Code, an account control agreement must stipulate the account bank's compliance with instructions originating from the lender regarding the disposition of funds in the account without further consent from the fund. Consequently, account control agreements typically provide for the lender gaining exclusive control of the collateral account following notice of certain events, such as a default under the subscription facility.

Cascading Security

In certain cases, the fund to which investors commit capital may be unable to directly pledge security to the lender due to ERISA, tax, or other US legal considerations. In such instances, the security package may be structured as a "cascade", where the fund indirectly pledges collateral to the lender through other funds in its structure.

ABOUT THE AUTHORS

MONIKA SANFORD

Monika Singh Sanford is the co-chair of the Finance Practice Group of Haynes and Boone. **Monika** has extensive experience in the funds finance industry, and routinely represents financial institutions with respect to capital call lines and subscription secured revolving credit facilities.

CAMILLE GIBEAULT

Camille Gibeault is an associate in the Finance Practice Group in Haynes Boone's Austin office. **Camille** has broad lending experience, including in subscription finance, syndicated lending, acquisition finance and leveraged finance.

HAYNES BOONE

UNITED STATES

Contributed by **Brian Foster and Patrick Calves - Cadwalader**

NAV Facilities

Security Package

For our purposes, a "NAV facility" refers to a loan to a private equity fund (a "Fund") where the loan is underwritten based on the value of the portfolio companies comprising the investment assets of the Fund (which may or may not be pledged as collateral). NAV facilities take on different structures and serve a variety of purposes for the private equity funds using this form of financing.

- While we are increasingly seeing lenders that will provide NAV facilities where the security is limited to a pledge of the cash account to which a Fund's investment proceeds are paid, which is often coupled with a pledge of such investment proceeds (which take the form of interest, dividends, IPO proceeds or sale proceeds)), a significant number of NAV facilities will still provide for more fulsome security over the Fund's investment assets. This more fulsome approach has a number of benefits to lenders, including crystallizing the priority of the lenders' interest in the Fund's assets and facilitating easier enforcement of remedies against the assets of the Fund after a default. However, taking a pledge directly over a Fund's investment assets isn't without its challenges given potential pledge and transfer restrictions, third-party consent rights, change of control triggers, rights of first refusal and rights of first offer of other equity holders, legal and regulatory restrictions and/or other perfection or foreclosure requirements or obstacles that are common with private equity investments. Lenders must be careful to address these issues in structuring their security.
- Consequently, the collateral for NAV facilities (the "Facility Collateral") varies widely from deal-to-deal and generally includes some combination of the following: (a) the cash account to which the Fund's investment proceeds are paid (the "Investment Collateral Account"), (b) the Fund's investment proceeds (the "Investment Proceeds Collateral") and/or (c) the Fund's investments themselves, which may take the form of a pledge of the Fund's equity interests in special purpose vehicles and/or holding companies via which the Fund owns such investments (the "Pledged Equity Collateral").

Perfection Formalities

A security agreement and/or series of pledges and security agreements are used to create the lender's security interest in the Facility Collateral. In order for that security interest to be enforced, it must also be perfected.

- The method of perfecting the security interest the Fund's Investment Collateral Account is the same as perfecting the security interest in the Fund's account that receives capital contributions from investors in a traditional U.S. subscription facility. Such distributions and proceeds are directed and/or swept into the Investment Collateral Account and, assuming the account is located in the U.S., the Fund and the lender will enter into an account control agreement with the depository account maintaining the account. The account control agreement will require the depository maintaining the account to comply with instructions originated by the lender directing disposition of the funds in the account without further consent by the Fund, which provides the lender with "control" over the account in order to perfect the lender's security interest over the account and the assets held therein.

- Depending on the structure and purpose of the NAV facility, the account control agreement may provide for either (i) "springing" control over the account whereby the ability to instruct the depositary as to the assets in the account shifts from the Fund to the lender after the lender delivers a notice of the occurrence of specified events under the NAV facility (typically, a borrowing base deficiency, curable default or ripened event of default)) or (ii) "blocked" control where all actions in respect of the assets in the account require Lender consent.

- Investment Proceeds Collateral (similar to a pledge of capital commitments) is characterized as a "general intangible" or "payment intangible" under the Uniform Commercial Code (the "UCC"). A lender may perfect its security interest in Investment Proceeds Collateral by filing a financing statement in the appropriate filing office. The appropriate filing office for a financing statement is dependent upon the "location" of the applicable Fund, as determined pursuant to Article 9 of the UCC. For non-U.S. Funds, the most typical filing office is the Recorder of Deeds in the District of Columbia, while for U.S. funds, it is most often the office of the Secretary of State in the state in which the Fund is domiciled. Financing statements are filed publicly and can be searched by other creditors looking to extend credit to the Fund.

- Pledged Equity Collateral (which is typically in the form of limited partnership interests, limited liability company membership interests and/or shares) will generally be characterized as a "general intangible" under Article 9 of the UCC (unless the issuer thereof has elected for such interests to be treated as securities). With respect to each pledging Fund, the filing of a UCC financing statement in the appropriate filing office is the method by which lenders perfect such security interest. Notwithstanding the foregoing, in certain cases, the Pledged Equity Collateral may be perfected by control or possession (e.g., most commonly, in circumstances where: (a) the equity interests are certificated, (b) the governing documents for such equity interests specify that such interest are to be treated as securities or (c) the equity interests are custodied in a securities account).

● Governing Law Considerations:

For our purposes, we have assumed that New York law will govern the loan and related security documentation and perfection. However, if any pledging Fund or any component of the Facility Collateral includes non-U.S. entities or non-U.S. accounts, then local counsel should be consulted regarding any local law requirements for perfecting and enforcing security, including recognition of a U.S. judgment. By way of example, some non-U.S. jurisdictions provide for pledge by title transfer, which may not be practical for a NAV facility. A title transfer may create tax complications or may require the pledgee to assume any outstanding financial commitments associated with the pledged interests, even prior to formal foreclosure on the asset. In some non-U.S. jurisdictions, this issue may be addressed by bifurcating the pledge between a pledge of receivables with respect to the asset and a springing pledge that takes effect upon default with respect to the ownership rights of the pledgor.

In addition, in some non-U.S. jurisdictions, it may be necessary to register the pledge, submit regulatory filings detailing the pledge, or satisfy various other legal or regulatory requirements.

ABOUT THE AUTHORS

BRIAN FOSTER

Brian Foster focuses on financing, derivatives and structured products transactions involving financial institutions and investment funds. His experience covers a broad range of derivatives (including OTC trades, structured notes, options, forwards and swaps, with particular focus on equity- and fund-linked derivatives) and financing arrangements (including secondaries financing, fund of hedge fund and single manager hedge fund leverage, management company loans, dividend recapitalizations, NAV facilities, subscription lines, hybrid transactions, preferred share issuances, collateralized fund obligations, margin loans, securities lending and repo facilities and prime brokerage arrangements).

Brian is recognized as a leading lawyer in Derivatives and Structured Products by Legal 500 USA and is ranked Tier 2 for Capital Markets: Structured Products in Chambers USA. In the Chambers USA 2023 edition, clients note Brian is “respected for his ability and depth of knowledge” and “valued and respected by clients for his effective and commercial approach.” In 2024, Brian was recognized by Lawdragon as one of the “500 Leading Dealmakers in America.”

PATRICK CALVES

Patrick Calves counsels clients on a variety of bilateral and syndicated financing structures, including term loans, liquidity lines, NAV facilities, subscription facilities, hybrid facilities, margin loans and repurchase, securities lending and prime brokerage facilities. Patrick advises on structures involving a variety of collateral, such as hedge fund interests, private equity fund interests, capital contribution obligations and restricted stock positions.

Patrick counsels financial institutions on regulatory and compliance issues relating to securities and derivatives trading. He also has substantial experience in the structuring and trading of complex derivatives and structured financial products, as well as drafting and negotiating trading and collateral documentation for both buy-side and sell-side clients, including prime brokerage agreements, ISDA Master Agreements, Credit Support Annexes and more. Patrick was included in the 2024 Best Lawyers: Ones to Watch in America for his work in Securities Regulation. In 2023, he was named to the Lawdragon “500 X – The Next Generation” list.

CADWALADER

NOTES

PRAXIO
LAW & TAX

PRAXIO LAW & TAX

THANKS ALL THE FIRMS AND AUTHORS AROUND THE WORLD FOR THEIR CONTRIBUTION TO OUR GUIDE

APPLEBY
BRODIES
CADWALADER
Fried Frank
HAYNES BOONE
Maddocks
Matheson
MAYER | BROWN
mourant
ReedSmith
Driving progress through partnership
STEPHENSON HARWOOD
Walkers

CONTACT

Don't hesitate to contact our Head of Banking and Finance, **Michael Mbayi**, for any information about Fund Finance.

MICHAEL MBAYI
Head of Banking & Finance

michael.mbayi@praxiolegal.com
T. +352 27 779 711
M. +352 621 722 090