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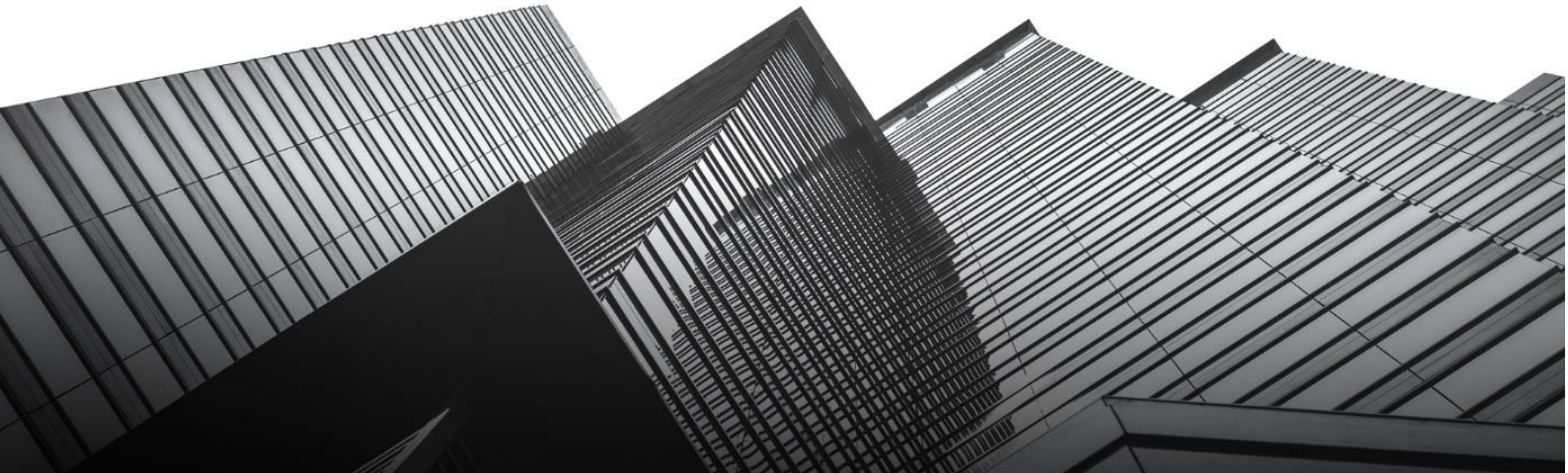
WILDGEN'S FUND FINANCE SECURITY GUIDE

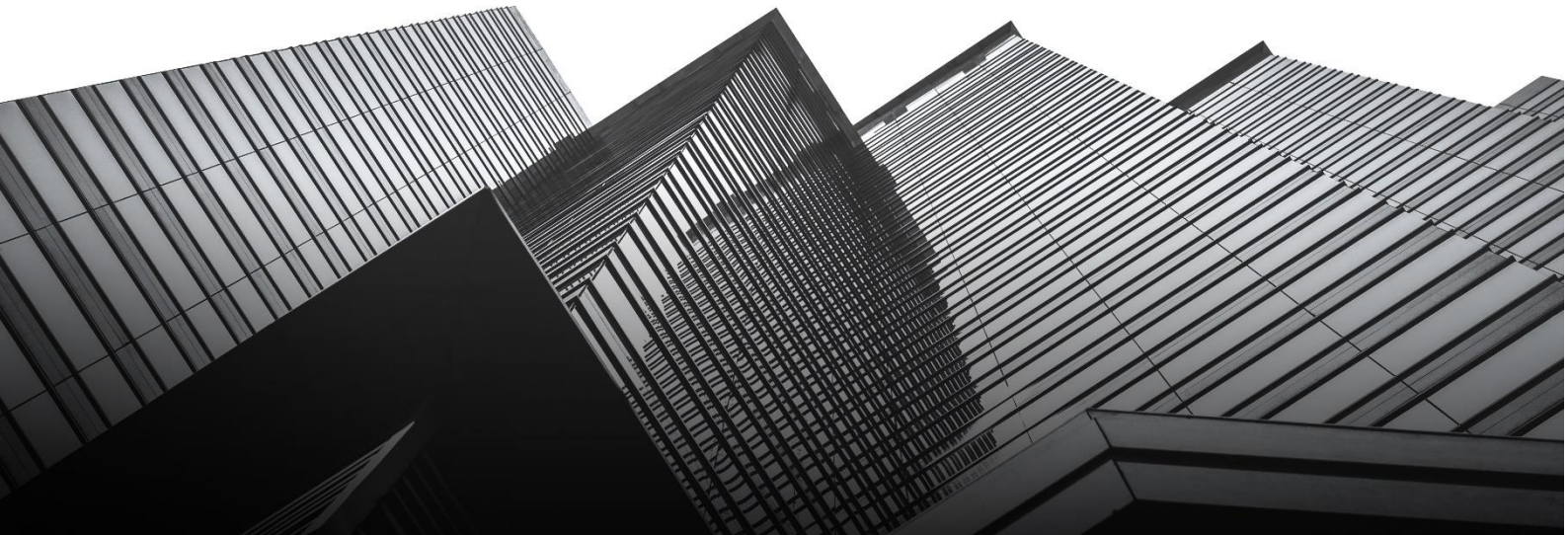
Discover the main aspects of the security package, in the most common jurisdictions involved in fund finance transactions.



Since 1923, **Wildgen** has been one of the best known and well-respected full-service business law firms in Luxembourg, possessing a strong track record and continuing to offer sound technical expertise. While fully independent, our firm boasts a wide-ranging and long-established network of experts worldwide, enabling us to select the best advice in each circumstance.

Wildgen's Practice Groups offer a complete range of legal, regulatory and tax services and a wealth of experience on domestic and cross-border transactions. They provide integrated services and work closely together so the firm can act as a one-stop shop.

Highly committed to the fund finance industry (the firm hosts the Fund Finance Series, the Fund Finance Experts Talks and contributes to renowned dedicated publications), Wildgen Fund Finance team, led by our internationally awarded expert, Michael Mbayi, is involved in a wide range of transactions, including subscription facilities, NAV facilities, hybrid facilities, and GP and management fee facilities.



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FUND FINANCE SECURITY GUIDE

INTRODUCTION

Fund finance operations are based on efficient and reliable processes, which ensure secured and robust business practices. This reliability is achieved through the credit underwriting process, the terms of the facility agreement and the security package.

We thought that it would be helpful to have a document available for lenders, borrowers and lawyers, describing the main aspects of the security package in the most common jurisdictions involved in fund finance transactions.

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

Michael Mbayi

LUXEMBOURG

Contributed by **Michael Mbayi** | **Wildgen S.A.**

Subscription Facilities

➔ Description of the security package

One of the key elements that differentiates fund finance products is the credit underwriting. 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 in the shoes of the fund or its general partner and claim direct payment from the investors for their undrawn commitments.

This objective, form a Luxembourg perspective, is commonly covered by a **pledge over the claims** (*gage sur créances*) of the investors vis à vis the fund. 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 an investor vis-à-vis the fund is pledged, it may be considered that it encompasses the right to claim payment (i.e. in practice the right to send a drawdown notice 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 but depending 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 interest for the pledges under its scope.

➔ Perfection formalities

Pledge over claims: Article 5 (4) of Luxembourg Collateral law states "*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 relevant creditor as long as such debtor is not aware of the pledge.

Hence, from a strict Luxembourg substantive 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 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

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

consideration.[2] In this respect, there is a traditional view and a modern view. According to traditional Luxembourg conflicts law rules, the perfection formalities of the domicile of the debtor (i.e. the investors in the context of a fund finance transaction) are considered. According to the modern view, the perfection formalities of the law governing the claim (i.e. Luxembourg law, in the context of investors commitments governed by Luxembourg law) is to be considered. A route to address this could be to require a notification of the security to the investors, since this is a perfection formality in many jurisdictions, but your Luxembourg counsel must be involved from the outset to discuss these questions and to structure the security appropriately in light of the particular transaction.

Pledge over bank accounts: for such a security, a notice is sent to the account bank and the account bank send an acknowledgment of the pledge to the parties. The acknowledgment is of particular importance since the account bank has generally a pledge over the accounts by virtue of its general terms and conditions and such a pledge must be released in the acknowledgment so that the lenders may have a perfected security over the bank account.

➔ **Fund finance provisions vs investor letters**

One of the key assumptions of the credit underwriting process is that in the event of default under the facility agreement, that the investors will pay their commitments to the lenders without exercising any right of set-off, counterclaims or other type of legal defences. Lenders also want that it is expressed for their benefit 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 in the limited partnership agreement or in the subscriptions agreements or other contractual documents between the fund and the investors (depending on the type of fund, corporate from or fund structure).[3] 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 and other specific fund finance provisions in the contractual fund documents, a solution to address this is to request investor letters where such waivers are provided. The 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), investor letters may be as well typically requested.

NAV Facilities

➔ **Description of the security package**

On a NAV facility transaction, the lenders underwrite 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 on the assets and the exercise may differ depending of the relevant asset class.

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

[2] We invite you to read our contribution to the GLI Fund Finance 2022: *More than a Decade of Global Fund Finance Transaction*s, if you want to further dig into these aspects.

[3] To dig more into the evolution of this practice, we invite you to read our contribution on the GLI Fund Finance 2022 mentioned above.

Luxembourg counsel is typically involved in NAV transactions where the borrower is a Luxembourg entity or for transactions where the borrower is not a Luxembourg entity, where the assets to be pledged 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 partnerships interests** owned by the funds may be taken as well as a **pledge over the accounts** where the proceeds deriving from the investments are 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 Luxembourg company recording the pledge granted is requested.

Pledge over limited partnership interests: a copy of the register of the limited partners mentioning the pledge granted 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). Depending of the form of the fund, there may be as as well legal transfer restrictions (in other words, investing into a particular fund may be limited by law to certain type of investors).

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 the section "Perfection formalities" of the section "Subscription Facilities".

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

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CAYMAN ISLANDS

Contributed by **Alexandra Woodcock, Marianne Wilson** and **Finn Howie** | **Mourant**

Subscription Facilities

➔ Description of the security package

In the Cayman Islands open-ended hedge funds are frequently established as exempted companies, whereas closed-ended private equity fund vehicles are often structured as exempted limited partnerships. The most commonly encountered vehicle in Cayman Islands subscription finance is a fund structured as an exempted limited partnership (**ELP**).

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.

The Exempted Limited Partnership Act (as amended) of the Cayman Islands provides that rights to make capital calls from investors (and recieve the proceeds) are assets of the ELP and held on trust for the ELP by its general partner. The security granted over an ELP's uncalled capital commitments and rights to call capital from its investors and to enforce associated remedies under the partnership documents is typically described as an "assignment by way of security" where the underlying rights are governed by Cayman Islands law. Notwithstanding the statutory rule described above, market practice is to include both the ELP (acting through its general partner) and the general partner (acting as general partner of the ELP) as party to the security document assigning these rights to a lender. Occasionally, rights to call capital are delegated to a fund's investment manager within the ELP's exempted limited partnership agreement (or investment management agreement). In these cases, the investment manager should also be party to the security document in order to grant security over the rights it has to call capital on behalf of the ELP, or alternatively the manager should provide an acknowledgment and agreement not to interfere with the exercise of such call rights by the general partner (or the lender as its assignee).

In a default situation, the secured party's enforcement remedies are usually set out in the collateral documents, and include the ability to make and enforce capital calls against the fund's investors. Accordingly, the primary remedies are 'self helf remedies' which do not require court action or appointment of a formal insolvency official (although the lender would typically also retain the ability to petition to wind up the ELP to recover any shortfall following a capital call).

Where there is a master/feeder structure, it is not uncommon for there to be restrictions on the feeder, limiting it to granting security to the master fund only. Even where threre are no such restrictions contained in the feeder fund's partnership documents, there may be onshore tax or regulatory reasons why the feeder should not have direct contractual privity with the lender or collateral agent. In this case, the security package would take the form of cascading security, where the feeder fund (and its general partner) assigns its rights to call capital from its investors to the master fund, which in turn grants to the lender (or collateral agent) security over (i) its rights to call capital from its investors (including the feeder ELP) and (ii) its rights under the security assignment granted by the feeder ELP.

The Private Funds Act (as amended) of the Cayman Islands (**PFA**) provides that a private fund (as such term is defined in the PFA) shall not accept capital contributions in respect of investments until it is

registered with the Cayman Islands Monetary Authority (**CIMA**). The vital element to security covering a subscription line is the ability of the general partner (as general partner to the ELP) (or lender/secured party) to draw down investor capital commitments. As the PFA is relatively recent, at the time of writing there have been no court decisions or published regulatory guidance dealing with the position where capital calls are made by a secured party creditor such as a subscription line lender exercising enforcement rights. The PFA itself is silent on this, and there is a perceived risk (open to interpretation) that an investor might refuse to fund capital contributions if the fund is not registered under the PFA (perhaps relying on a breach of a side letter representation as to compliance with all material laws). Accordingly, the market approach is that a lender should request evidence of registration of the ELP as a private fund with CIMA or, if the fund is not registered, confirmation from the borrower that the fund is not within scope of the PFA regime and providing the rationale for this.

Typically, security is also taken over the bank accounts of the ELP into which the capital calls will be made. In general these accounts are not located in the Cayman Islands. However, if they are located in the Cayman Islands then a charge over the bank accounts (together with any amounts standing to the credit of such accounts) is entered into by the ELP (acting through its general partner).

Approaches vary to subscription finance transactions originating in the US versus subscription financings originating in the European market. In US deals, security agreements are typically governed by New York law and cover both Delaware law rights and Cayman Islands law rights, whereas in European market transactions there tends to be a standalone Cayman Islands law governed assignment agreement (which, from a commercial perspective, achieves the same result).

➔ Perfection formalities

There is no specific security registration regime for security taken over capital call rights, nor for other types of Cayman Islands law governed collateral generally. However, section 54 of the Companies Act (as amended) of the Cayman Islands 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 that grants security over capital call rights, 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 lender 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.

Crucially, the priority of security over uncalled capital commitments is obtained by giving notice to the ELP's investors. This is usually achieved by a letter signed by the general partner of the ELP addressed to the ELP's investors informing them of the security agreement and assignment of the capital call rights. Depending on the specific requirements of delivery in an ELP's partnership agreement this notice can be emailed, posted or otherwise uploaded to an investor portal with an email notification sent to the investor. This notice will not only ensure priority (assuming no other prior ranking interests), but will also put the investor on notice (i) both of the security (which would assist with enforcement) and (ii) to the extent the partnership agreement of the ELP contains such provisions, that the investor will not be able to (among other things) (x) set off any amounts owed to it by the fund, or (y) rely on a release from its obligations to fund, in a situation where there is an unauthorised release of investor commitments in breach of the loan documents.

Priority of security taken over a bank account holding capital commitments (if located within the Cayman Islands) is achieved by giving notice of the creation of the security interest to the relevant bank.

NAV Facilities

In NAV facilities, typically the security package will cover the fund's underlying investments, as opposed to 'looking up' to the capital commitments of its investors. Depending on how the fund holds the underlying assets and any restrictions relating to the granting security and/or change of control in the underlying assets themselves, there may also be security granted over the shares, membership interests or limited partnership interests of the portfolio entities which sit underneath the fund and hold the underlying assets.

➔ Cayman Islands share charges

Often in the context of NAV facilities, security over the shares of Cayman Islands exempted companies raise different issues from those encountered when dealing with security over the capital call rights of Cayman Islands funds as outlined above.

There is no requirement that security over shares of a Cayman Islands exempted company is granted by an agreement governed by Cayman Islands law. It is not unusual for security over Cayman Islands limited partnership interests or limited liability company interests 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 advise that a separate Cayman Islands law governed security agreement (described as a “charge” or “equitable mortgage") 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.

Restrictions on transfers are common in the memorandum and articles of association (the **Articles**) of Cayman Islands exempted companies, 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 lender. Certain other customary amendments are usually made to the Articles which are aimed at facilitating enforcement following a default. The register of members of the company should also be reviewed for any evidence of existing security over the shares.

Certain ancillaries should be delivered at closing to ensure a lender is in a strong position to enforce the share security upon a 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 shares in favour of a lender; (iv) signed notice of the share charge to the company and its registered office provider; and (v) shareholder resolutions approving any necessary amendments to the Articles to facilitate the share charge and its enforcement. These deliverables mean that upon enforcement the share transfer form can be dated and delivered to the registered office provider, which then updates the register of members to reflect the lender as the holder of the shares, with the ability to appoint directors and generally manage the company.

➔ Perfection formalities

There is no central or public register for the granting of security over the shares of a Cayman Islands exempted company and there are no perfection requirements for such a security interest. However, the register of members of the Cayman Islands company should be annotated to note the security interests of the lender. 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.

➔ Charges 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. There is no requirement that security over limited partnership interests of an ELP is granted by an agreement governed by Cayman Islands law. 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, practice does remain mixed and it is commonplace to document such security in a separate Cayman Islands law governed security agreement which provides the requisite protections and practical means of enforcement. A Cayman Islands law charge over limited partnership interests is often entered into alongside the overarching foreign law-governed security agreement to form part of the wider security package.

The Exempted Limited Partnership Act (as amended) of the Cayman Islands (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 partnership agreement to the contrary. The limited partnership agreement of the ELP should therefore be reviewed to verify whether this is the case and to 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 or such consent expressly obtained in writing. The register of security interests of the ELP should also be reviewed for any evidence of existing security over the limited partnership interests.

Certain ancillaries should be delivered at closing to ensure a lender is in a strong position to enforce the limited partnership interest security upon a 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 partnership agreement excludes this); (iii) a notice to the registered office of the ELP and (iv) an acknowledgement 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 lender as the holder of the limited partnership interests.

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 lender (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 lender (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 a Cayman Islands ELP and there are no perfection requirements for such a 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 lender 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.

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mourant

ENGLAND AND WALES

Contributed by Jons Lehmann, Kathryn Cecil and Graham Greenwood | Fried Frank

Subscription Facilities

➔ Typical security package

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; 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 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.

Due diligence is customarily carried out on the underlying constitutional and organisational documents of the fund to ensure that the ability to incur the relevant debt and to confirm the fund's ability to grant the security required for the transaction.

➔ Perfection formalities

Depending on the type of asset, perfection requirements will vary and will include registration 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.

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. As part of the due diligence of the underlying fund's organisational documents, lenders will look to ascertain whether the investor can be required to provide certain information and/or sign any acknowledgements, where applicable to the relevant transaction.

NAV Facilities

➔ **Typical security package**

NAV facilities are typically secured by:

Equity interests, related rights and investments

- distributions, dividends, interest and any insolvency or liquidation proceeds received from the fund's investments;
- the equity interests in the holding companies through which the fund holds its investments (or, if commercially acceptable, directly over the equity interests of the borrower (and its assets) if the borrower is the sole shareholder of the applicable holding companies);
- (in certain cases) direct security interests in respect of the underlying investments; and/or

Bank accounts

- the bank accounts into which the relevant cash proceeds, dividends, distributions or liquidation proceeds are to be deposited.

If the assets subject to security are situated in England, security is typically created pursuant to an assignment by way of security or charge over equity interests and bank accounts. Charges may be fixed or floating, depending on the level of control exercised over the assets subject to security.

As with subscription facilities, due diligence is often carried out on the underlying constitutional and organisational documents of the fund to ensure that the ability to incur the relevant debt and the ability to grant the applicable security required for the transaction is permitted. In addition, review of the constitutional documents of the entities subject to the share security would be conducted to ensure that the directors/board do not have the ability to refuse a transfer of the shares should an enforcement take place.

➔ **Perfection formalities**

Consistent with subscription facilities as noted above, perfection requirements will vary depending on the type of asset and in the case of an English company or limited liability partnership, will require registration of the security interest with the Registrar of Companies, or other specialist registries.

Perfection of security taken over the underlying fund investments (where applicable) will be subject to agreement between the parties on each particular transaction. In particular:

Equity interests and related rights

A charge over equity interests in shares issued by companies would customarily include a requirement to deliver to the lender the share certificates representing the equity interest subject to security and a corresponding signed and undated stock transfer form. Security over partnership interests would be perfected by a notice of assignment to the partnership.

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.

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FRIED FRANK

FRANCE

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Subscription Facilities

➔ **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 in 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.

Eventhough 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), 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 bank account holder to stop any debit entry on the pledged bank account, 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.

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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. His previous experience working as an in-house lawyer at CCF (now HSBC Continental Europe) has given **Yann** a particular insight on the issues his banking and institutional clients are facing.

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JERSEY

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Introduction

As a major international finance centre, Jersey is a popular choice as a fund jurisdiction and sees a significant number of fund finance transactions. There are a number of well-established fund structures. The most common structures are limited partnerships, unit trusts or companies (including protected cell companies and incorporated cell companies). In 2022 Jersey expects to see the introduction of limited liability companies (LLCs), which will offer additional flexibility.

Security in fund finance transactions is taken pursuant to the Security Interests (Jersey) Law 2012 ("**SIL 2012**"). SIL 2012 came into effect on 2 January 2014 and allows flexibility in the methods of taking and perfecting security and gives secured creditors greater enforcement rights (including appropriation and step-in). It is a familiar and stable security regime tailored to the needs of the industry.

In terms of perfection requirements, these vary depending on the type of collateral. A particular feature of SIL 2012 was the introduction of a public Security Interests Register ("**SIR**").

A discussion of the typical security package in subscription/capital call facilities and NAV facilities, together with details of the methods of taking and perfecting security interests under SIL 2012 is set out below.

Subscription Facilities

The typical Jersey security package consists of:

- security over capital call rights; and
- security over the bank account into which capital call proceeds are paid in to.

➔ Security over capital call rights

Perfection formalities

If the fund is a limited partnership, security is granted over the general partner's rights under the limited partnership agreement to request drawdowns of uncalled commitments from investors. If the fund is a company or other entity type, security is granted over the entity's right to call for capital from its investors under the fund's articles of association and subscription agreements or equivalent. In each case, security is granted by way of a grant of a security interest over the collateral pursuant to the SIL 2012.

Perfection formalities

Attachment and perfection (which is necessary for the purposes of priority) is achieved by registration of a financing statement on the Jersey SIR in favour of the secured party in respect of the secured collateral.

Investor notices

Investor notices are not necessary under Jersey law for the purposes of perfection or priority. However, there are good reasons why it remains market practice for lenders to require that investors are given

notice of the security, and that such notice is given at the time of the creation of the security and not at some later date.

Manager delegation

If the general partner has delegated capital call rights to a manager, then that manager will also need to grant security over those delegated capital call rights (in addition to the general partner).

➔ **Security over bank accounts**

Security is granted over the Jersey bank accounts into which capital call proceeds are paid into. Security is granted by way of a grant of a security interest and/or an assignment by way of security under the SIL 2012.

Perfection formalities

Attachment and perfection (which is necessary for the purposes of priority) is achieved by:

- the secured party having "control" of the account; and/or
- registration of a financing statement on the Jersey SIR.

A secured party will generally take "control" of a bank account by:

- the account bank agreeing in writing to comply with the instructions of the secured party;
- assigning the account, by way of security, to the secured party in writing and giving written notice to the account bank; or
- by simply being the account bank.

Other points to note

Unless the account bank and the secured party are the same entity, a notice and acknowledgment will need to be agreed with the account bank in advance of completion. Jersey account banks often have their own form of notice and acknowledgement.

It is also necessary to review the account mandate and T&Cs relating to the secured account to ensure that:

- the bank account is in the name of the correct entity; and
- there are no prohibitions or restrictions on the creation of the security.

NAV facilities

The typical security package consists of:

- security over the fund's ownership interests in portfolio holding company vehicles; and
- security over the bank account into which investment distributions and proceeds are paid.

➔ **Security over ownership interests in portfolio holding company vehicles**

Security is granted over the borrower's ownership interests in Jersey portfolio holding entities. This is typically partnership interests in a Jersey partnership or shares in a Jersey company. Security is granted by way of a grant of a security interest under the SIL 2012.

Perfection formalities

Attachment and perfection (which is necessary for the purposes of priority) is achieved:

- where those portfolio company interests are shares in a Jersey company or units in a Jersey unit trust – by the secured party having possession of the original share/unit certificates and by registration of a financing statement on the Jersey SIR in favour of the secured party in respect of the secured collateral.

- where those portfolio company interests are partnership interests in a Jersey limited partnership - by registration of a financing statement on the Jersey SIR in favour of the secured party in respect of the secured collateral.

Other points to note

In the case of share and unit security, it is also customary for the grantor to:

- sign a blank share/unit transfer form to be provided to the lender for use on an enforcement; and
- provide a certified copy of the share/unit register with the secured party's interest noted.

In the case of security over limited partnership interests, a lender may sometimes require the grantor to provide a signed blank partnership interest transfer form, although this is not standard.

➔ **Security over bank accounts**

Security is granted over the Jersey bank accounts into which distributions from and proceeds of the underlying fund investments are paid into. Security is granted by way of a grant of a security interest and/or an assignment by way of security under the SIL 2012.

Please refer to the "security over bank accounts" paragraphs in the Subscription Facilities section above for details on perfection formalities and other points to note in relation to bank account security.

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Robin is Partner at Carey Olsen. He is consistently recognised for his ability to deal with a wide range of international corporate and finance transactions. He has acted on numerous significant portfolio acquisitions and disposals. He often acts for both lenders and borrowers on complex financings, refinancings and restructurings and has significant experience in relation to the financing of investment funds.

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CAREY OLSEN

GUERNSEY

Contributed by **Andrew Boyce** and **Allan Skirrow** | **Carey Olsen**

Introduction

As a major international finance centre, Guernsey is a popular choice as a fund jurisdiction and sees a significant number of fund finance transactions. There are several well-established fund structures which are familiar to the market and importantly to lenders. The most common structures are limited partnerships, unit trusts (particularly in the context of real estate investment established on "Baker trust" principles) and companies with limited liability (including protected cell companies and incorporated cell companies). Guernsey law is under constant review to ensure timely responses to the legitimate needs of industry participants.

Guernsey law security in the context of fund finance transactions is taken pursuant to the Security Interests (Guernsey) Law 1993 ("**SIL 1993**"). SIL 1993 provides flexibility in the methods of creating a security interest in intangible moveable property (including choses in action). It is a familiar and stable security regime tailored to the needs of the finance industry.

It is important to understand that SIL 1993 distinguishes (a) the act of entering into a security agreement between the security provider and secured party and (b) the act of "creation" of a security interest pursuant to a security agreement. A security agreement under SIL 1993 must contain key information set out in SIL but apart from that in may be in such form and may contain or refer to such matters as may be agreed between the parties. A security agreement under SIL 1993 is not of itself an instrument of "grant". Methods of creation of security interests are set out in SIL 1993 and these vary depending on the type of collateral.

A discussion of the typical security package in subscription/capital call facilities and NAV facilities, together with details of the methods of creation of a security interests under SIL 1993 are set out below.

Subscription / Capital Call Facilities

➔ Description of the security package

The typical security package consists of:

- a security interest in capital call rights; and
- a security interest in the bank account into which capital call proceeds are required to be paid.

➔ Methods of creation

Capital Call Rights.

The method of creation of security interests here differs according to the constitution of the fund. So if the fund is a limited partnership, a security interest is created in the general partner's rights under the limited partnership agreement to request drawdowns of uncalled commitments from investors. If the fund is a constituted as a limited company or other entity type security is created in the entity's right to call for capital from its investors under the fund's articles of incorporation or other constitutional document, via and subscription agreements or equivalent.

In each case, a security interest would be created pursuant to a security agreement by assignment of the security provider's interest in the collateral pursuant to SIL 1993 and the giving of a notice of such assignment to the investors.

Points to note

The security agreement will contain the necessary assignment provision which sets out the collateral to be assigned. A security interest is then created by the service of a notice of that assignment. Whenever a security interest in collateral is to be created by the method of assignment, there must be a notice of assignment. An acknowledgement of that notice is generally expected but is not a requirement for the creation of the security interest. It is though the duty of the recipient of the notice of assignment if he/he/it is aware that the assignment is disputed by the assignor or any person claiming under him, or (b) of any other opposing or conflicting claims to or rights in the collateral, he must give notice thereof to the assignee secured party, and may institute proceedings against the secured party, and against the assignor or person having the claim or right as the case may be, in respect of which the Court may make such order as it thinks fit.

The method of service of investor notices of assignment is a key point to be addressed. Often it is provided in fund documentation that a designated agent such as an administrator or a general partner of a limited partnership may accept the notice of assignment on behalf of investors.

However, it should also be noted that even if notice is given to a designated agent, lenders may require that investors are also given a separate form notice of the creation of the security interest, and that such notice is given at the time of the creation of the security interest and not at some later date. This is likely to be achieved by way of notification to investors via a portal on a website to which the investors are required to subscribe in relation to the particular fund.

If the general partner has delegated capital call rights to a manager, then that manager will also need to create a security interest in those delegated capital call rights (in addition to the general partner).

Security Interest in Bank accounts

A security interest is created in the Guernsey bank accounts into which capital call proceeds are paid. The methods of creation are by way of assignment and notice of assignment or control, in either case pursuant to a security agreement under SIL 1993. Which of the methods of assignment or control utilised depends on the position of the account bank i.e., whether the account bank is a third party (which is typically the case)) or where the secured party is also the account bank.

Where a security provider intends to create a security interest in a bank account in favour of the secured party by assignment of the fund's rights to an account with a third party account bank, the requirements of the third party account bank must be understood in advance. The desire to create security in a Bank account must be referred to the account bank in good time so that the necessary consents may be put in place. As part of the process, the account bank will agree the parameters of the operation of that account during the security period (locked or unlocked according to the requirements of the facility agreement) and the process by which an initially unlocked account might be locked following an event of default which is continuing. In practice this is achieved by service of notice and acknowledgement of notice which collectively serve to provide both notice of assignment required under SIL 1993 and a means by which to set out the agreed operating protocol. In Guernsey this process has been standardised by the co-operation of most of the leading banks so that each now have an established protocol for the creation of security in accounts by adoption of a prescribed form of notice and acknowledgement. This practice greatly assists in the timely creation of a security interest in accounts held with those banks.

If the secured party and the account bank are the same SIL 1993 provides that a security interest is created by the account bank having control of the relevant account pursuant to a security agreement. Care must be taken where the lending bank and the account bank are the same, but operate out of different branches, or different teams within such bank deal with account management and lending. It is important to establish which department and who in that department deals with which aspect and to liaise sensibly and appropriately to make sure the necessary instructions are implemented and for control to be established.

Points to note

It is necessary in all cases to review the account mandate and T&Cs relating to the account to be secured to ensure that the bank account is in the name of the correct entity; and there are no prohibitions or restrictions on the creation of security interests in that account.

NAV Facilities

The typical security package consists of:

- a security interest in the fund's ownership interests in portfolio holding company vehicles; and
- a security interest in the bank account into which investment proceeds are paid.

Security is provided by way of creation of a security interest in the relevant ownership interests and account by the methods prescribed under SIL 1993.

➔ **Methods of creation**

Security interest in the ownership of the portfolio holding vehicle.

SIL 1993 has particular rules for the method of creation of security interests in "securities" – which includes shares and units in a unit trust scheme. So where the relevant ownership interests are securities - typically certificated shares issued by a Guernsey company or units issued by the trustee of a Guernsey unit trust, the method of creation of security interests in such securities is where (pursuant to a security agreement) the secured party has possession of the original certificates of title to securities (i.e. share/unit certificates).

Where those portfolio company interests are partnership interests in a Guernsey limited partnership, by assignment and notice of assignment.

Points to note

It is good practice the appropriate registers, e.g. register of members or unit holders to be annotated to the effect that the relevant securities are subject to security interests. This serves to put future purchasers of investor's interest on notice of the security. There is no public register of security interests to be inspected.

Where portfolio company interests are held in a securities account via third party portfolio holder and are uncertificated, the method of creation of security by assignment of all rights to the securities account and notice of assignment in the manner described to the creation of security interests by assignment above in relation to Subscription Facilities.

The method of creation of security interests in relevant bank accounts is as described in the context of Subscription Facilities.

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Andrew, is a Partner at **Carey Olsen**. He has significant experience in and is recognised both locally and internationally for investment and finance transactions across all entity types.

Andrew has specialist experience in the structuring and establishment of open and closed-ended investment funds and the credit and structured finance products related to them. In particular he has built an enviable reputation in his core expertise of private equity fund formation having advised a range of global investment houses as well as new managers on fund establishment, investment structuring, asset acquisitions and disposals and regulatory issues.

Andrew's banking and finance expertise compliments his investment funds core practice and covers a range of credit types including capital call facilities, leveraged financing and asset finance. He has acted for global banking institutions and alternative credit providers as well as institutional borrowers.

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Allan is a Senior Associate in the corporate and finance group and has a particular interest in real estate financing in general and Guernsey law unit trusts in particular. Prior to relocating to Guernsey **Allan** practiced as a solicitor in the City of London advising institutional investors, banks and insolvency practitioners principally in the real estate sector.

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CAREY OLSEN

HONG KONG

Contributed by **Doos Choi** and **Adrian Chiang** | **Mayer Brown**

Hong Kong SAR

➔ 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 call capital from the investors, rights over proceeds of the capital call and other rights exercisable by the fund against the investors under the partnership documents ("**Security Assignment**") and (2) security over the bank account into which the capital contributions are paid ("**Account Security**"). It is common for the lender (in bilateral deals) or the agent (on multi-lender deals) to also be the account bank. The Security Assignment and/or facility terms will stipulate that 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 into a specified (blocked, segregated) collection account (which itself will be subject to the charge under the Account Security).

- In order to perfect the Security Assignment as a statutory (legal) assignment, certain requirements under s9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) 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. Otherwise it will only take effect as an equitable assignment which will be subject to prior equitable rights. One of the advantages of an assignment that qualifies as a statutory assignment is that the assignee can take action against the debtor (of the assigned debt or receivable) in its own name without having to join the assignor as a party to the action. A notice of charge or assignment should always be given in order to establish priority of claims.

- The perfection of the Account Security is achieved by giving notice of the security interest to the account bank. Whilst it is desirable (from an evidential and practical perspective) to obtain an acknowledgement back from the account bank, this is not strictly necessary for perfection.

- In order to avoid discussions on whether or not the security interest created under an Account Charge is registrable under the Companies Ordinance (Cap. 622), it is customary to also insist on a floating charge.

- Under the Companies Ordinance (Cap. 622), Hong Kong companies creating certain specified charges must be registered with the Companies Registry. This obligation extends to non-Hong Kong companies that are registered with the Companies Registry pursuant to Part 16 of the Companies Ordinance (Cap. 622). Failure to register the particulars of specified charges within 30 days of creation of such charges would result in (1) the Hong Kong company or registered non-Hong Kong company, and every responsible person of the Hong Kong company or registered non-Hong Kong company, being deemed to have committed an offence; and (2) the specified charge being void against any liquidator and creditor of the Hong Kong company or registered non-Hong

Kong company so far as any security on its undertaking or property is conferred by the charge. It is therefore in all parties' interests to ensure that any specified charge is duly registered.

- On multi-investor subscription facilities, investor letters may be required where the due diligence bears out one or more issues with respect to a particular investor whether under the terms of the side letter applicable to such investor, or otherwise. Investor letters will usually be required on SMAs or other situations where there is a high concentration risk. Areas typically covered by investor letters include: express acknowledgement of the subscription facility and the security over fund's right against the relevant investors under the LPA (including the right of the lender to make capital calls), express acknowledgement that the fund has authority under the fund documents to enter into the subscription facility and to give security over the fund's rights against the relevant investors, confirmation of the relevant investors' commitments to the fund and the remaining callable capital, and express agreement that all capital contributions would be transferred directly to the designated deposit account (which is subject to security created under the Account Security) and confirmation of the lender's rights to information pertaining to the relevant investor.

➔ 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 in question. Generally speaking, we would expect a typical NAV security package to at least include 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 investment holding company ("**Holdco**") which may or may not be an aggregator vehicle ("**Share Security**") and (3) an all assets security granted by Holdco ("**Debenture**").

- Depending on the structure, the charge over the distributions account may be included in the Debenture and similar considerations will apply as set out above with respect to Account Charges under a subscription facility.

- Similar to the position for Security Assignments, Share Security 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 agent) would become the legal owner of the shares and entered into the register of members of the relevant company from the outset. A number of ancillary documents and steps will be required as part of Share Security: (a) the delivery by the chargor of the original share certificate(s) in Holdco, (b) the delivery by the chargor of pre-executed but undated instrument(s) of transfer and contract notes (c) (if the due diligence bears out the need) amendments to the constitutional documents of Holdco (d) pre-signed but undated letters of resignation signed by each of the directors of Holdco and (e) pre-signed but undated written resolutions of the directors of Holdco approving the transfer (and registration of such transfer in its books) of the shares in Holdco. These title and ancillary documents are retained by the chargee to facilitate enforcement action.
- Depending on the nature of the assets charged under the Debenture, other perfection and registration steps may be necessary.

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.

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IRELAND

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Irish Fund Structures – A Brief Introduction

Ireland is a leading jurisdiction for investment funds and fund service providers with 17 of the top 20 global investment managers having Irish domiciled funds. At the end of December 2021, there were over 8,300 Irish-domiciled investment funds (including sub-funds) with over €4 trillion in total assets.

Ireland offers flexibility to establish fund vehicles under a range of regulated or unregulated structures which allow for funds to borrow under subscription backed and asset backed facilities. The fund structure chosen by a fund plays a role in determining the type of collateral granted on fund finance transactions. This section will provide a brief overview of the structures encountered on fund finance transactions before turning attention to the typical security packages granted by Irish funds in respect of subscription facilities and net asset value (or asset backed) facilities**.**

➔ **Regulated funds and segregation of liabilities**

Regulated structures in Ireland include the following:

- **Irish Collective Asset-managed Vehicles** ("**ICAVs**"): incorporated under the ICAV Act 2015 (as amended) with a bespoke corporate structure.
- **Variable capital investment companies:** incorporated as a public limited company under the Irish Companies Act 2014 (as amended).
- **Investment Limited Partnerships** ("**ILPs**"): constituted under the ILP Act 1994 (as amended) as a partnership with a general partner (responsible for the management of the ILP and liable for its debts) and limited partners (the investors) with limited liability.
- **Unit trusts**: constituted by contract under a trust deed with a trustee (who holds legal title to the fund's assets) and a management company responsible for the management of the fund.
- **Common contractual funds**: an unincorporated body constituted under contract law that provides investors with rights as co-owners of the fund's assets.

ICAVs and investment companies have in recent years been the most common structure encountered in fund finance transactions. ILPs are also gaining in popularity following the enactment of the Investment Limited Partnerships (Amendment) Act 2020, which modernised and amended the Investment Limited Partnership Act 1994 to, amongst other changes, permit ILPs to establish umbrella structures.

The regulated structures above may be established as alternative investment funds ("**AIFs**") or undertakings for the collective investment in transferable securities (or UCITS) – other than ILPs, which can be established as AIFs only. Irish regulated funds encountered in fund finance transactions are most commonly qualifying investor AIFs ("**QIAIFs**"). Regulated funds may also be established as standalone funds or take the form of umbrella funds with one or more sub-funds, each sub-fund having segregated liability.

In the context of secured facilities, it is important to note that there are certain limitations on the ability of QAIFs to grant security in respect of the obligations of third parties, including the obligations of other obligors under a credit facility (other than obligors that are wholly owned subsidiaries of the QIAIF).

Similar limitations apply to the ability of a sub-fund under an umbrella structure guaranteeing or granting security in respect of the obligations of third parties, including other sub funds of the same umbrella. In light of these considerations, the credit support provided by Irish funds and, as applicable, sub-funds on fund finance facilities is carefully structured to preserve the principal of segregated liability.

➔ **Unregulated Funds**

Unregulated fund vehicles are often established as (i) limited partnerships under the Limited Partnership Act 1907 or (ii) "section 110" companies (a reference to section 110 of the Taxes Consolidation Act 1997 (as amended), which provides for a specific tax regime for certain qualifying companies).

Unregulated funds can grant security in respect of their own obligations and, unlike regulated funds, can generally guarantee and grant security in respect of the obligations of third parties.

Section 110 companies are often established as bankruptcy remote vehicles. Lenders will commonly be asked to agree to limited recourse and non-petition undertakings in respect of section 110 companies. It is important that the borrower raises this request at the term sheet stage

Subscription Facilities

➔ **Typical security package**

The security package granted by an Irish fund in respect of its obligations under a subscription backed facility typical includes the following:

- **Security over uncalled capital**

  The Irish fund will grant security over its rights to call capital from investors and related rights. Under Irish law, this security will typically take the form of a fixed charge or an assignment by way of security over the contract containing the fund's rights to call capital from investors. For example, for an ICAV, security will be granted over the equity or debt subscription agreement under which investors have subscribed for capital in the ICAV; and, for an ILP, security will be granted over capital call rights under the limited partnership agreement and related subscription agreements.

  A lender will perform due diligence on the relevant fund documents to confirm that the fund is not prohibited from granting such security interests to the lender (or its security agent or trustee) and that investors will be required to fund a call on capital for the purposes of repaying the facility. See section 2(d) (Role of investor letters) below for further details.

- **Security over collection accounts**

  The Irish fund will grant security (either a fixed charge or assignment by way of security) over each account into which capital call proceeds are deposited ("**capital call collection accounts**"). Typically, Irish funds will ensure that the capital call collection accounts are not used for other purposes or comingled with other cash held by the fund in order to ensure that security is only granted over capital call collections (and not, in particular, the proceeds from underlying investments).

  For regulated funds, these cash accounts may be held by the fund directly or by a Depositary (or Trustee, in the case of a Unit Trust) on behalf of the fund. The security package will often be coupled with a control agreement entered into by the fund, the Depositary and an account bank under which the Depositary/account bank agrees to give the lender (or its security agent

or trustee) control over the cash account either on “day one” or, more commonly, on a “springing” basis (so that control of the account only transfers to the lender (or its security agent or trustee) upon the occurrence of an enforcement event or “cash trap” event). Alternatively, we also see these control arrangements covered by the fund serving a notice of charge or assignment to the Depositary/account bank which is appropriately acknowledged in return by the Depositary/account bank.

Lenders will review any relevant bank mandates (and, where necessary, request that such mandates are amended) to ensure consistency with the terms of the control agreement. Where Irish law security is to be granted over the account, it is also important to verify that the account is located in Ireland – this can be determined by checking that the account’s IBAN or Swift includes the Irish designator “IE”. We have seen cases where the fund or the Depositary for an Irish fund is located in Ireland and holds one or more cash accounts for the fund outside of Ireland – in such cases, account security will be governed by the law of the jurisdiction in which such account is held. In circumstances where an account is held with a sub-custodian, consideration should also be given as to whether the sub-custodian should be a party to any account control arrangements.

- **Powers of attorney**

  An Irish fund will usually provide a power of attorney appointing the lender (or its security agent or trustee) to act on behalf of the Irish fund as its attorney. The power of attorney will usually allow the lender (or its security agent or trustee) to, amongst other things, issue capital calls on behalf of the Irish fund. The power of attorney is typically incorporated into the security documents rather than being a standalone document.

- **Side letters from service providers**

  Lenders will perform due diligence on an Irish fund’s constitutional documents, prospectus, administration agreement and, as applicable, other agreements appointing the fund’s service providers to establish which entities have a role in issuing and administering capital calls. For example, the directors of an ICAV or general partner on behalf of an ILP will usually have the right to make a call on investors, but it is common for such rights (and other roles in the administration of a capital call) to be delegated to an administrator, investment manager or other service provider.

  To the extent that rights in respect of the capital call process have been delegated, a lender may consider taking a fixed charge or assignment by way of security over the rights of the Irish fund in respect of the relevant agreement so that the lender (or its security agent or trustee) has the right to “step in” and enforce such rights following an enforcement event. However, this is not common. Typically, the administrator, manager or other service provider will provide a side letter to the lender (or its security agent or trustee) agreeing, amongst other things, to act on the instructions of the relevant finance parties in respect of issuing or administering capital calls. This side letter is often governed by Irish law or, alternatively and less frequently, the governing law of the finance documents (usually being the laws of England and Wales or New York).

➔ **Feeder structures and cascading security**

Irish funds (and particularly ICAVs) often feature in feeder fund structures. In cases where the master fund and/or the feeder fund is a borrower under a subscription facility, lenders will commonly require security from both the master fund and the feeder fund (which, in each case, will typically include the security described in paragraph (a) above where these funds are Irish funds).

As noted above, regulated Irish funds cannot guarantee or grant security in respect of the obligations of another fund or sub-fund (other than where such fund or sub-fund is a wholly owned subsidiary). Depending on the structure, the use of "cascading pledges" can be very useful in providing a lender with recourse to the uncalled capital and collection accounts of both the feeder fund and the master fund. Alternatively, the fund could also apply for an exemption from the Central Bank of Ireland (although this has timing implications for a transaction), and other structuring solutions may also be available. Irish counsel will be able to advise on the structuring solutions that are available under particular structures. This is an important consideration at term sheet stage.

➔ **Perfection formalities**

The execution of an assignment over capital call rights (as outlined above) will create an equitable assignment as a matter of Irish law. It is preferable from a lender's perspective to improve their priority by converting this equitable assignment into a legal assignment by notifying the relevant counterparty.

In the case of security over capital call rights and subscription documents, notices to investors would be required to convert the security to a legal assignment. There can be reluctance on the part of the fund to have notices of assignments sent to investors and the relevant acknowledgements obtained, particularly where there is a large number of investors or other commercial sensitivities. Some lenders will agree that notices are not served until the occurrence of a future trigger event like an Event of Default. Alternatively, a possible compromise is that the relevant notice of creation of security is communicated in the next investor communication.

As referred to in section 2(a) above, control agreements are also commonly put in place with the fund, Depositary and/or the account bank.

Once the security has been created, lenders will need to ensure that the security (whether governed by Irish law or otherwise), if created by an Irish entity or by an entity required to be registered in Ireland as a branch, is registered against the correct entity in the appropriate Irish registry.

Security filings outlining particulars of the security which has been created must generally be filed within 21 days of the date of the creation of the security (limited exemptions can apply in the case of security over bank accounts and shares) and if this deadline is not met, the security is void against a liquidator and any creditor. Examples of the different filings required by the different entity types are:

- security created by an Irish company (whether governed by Irish law or non-Irish law) is generally required to be registered on the file of the company in the Irish Companies Registration Office (the "**CRO**");
- security created by a trustee or its nominee as part of a Unit Trust structure (whether governed by Irish law or non-Irish law) is generally required to be registered on the file of the trustee/its nominee in the CRO;
- security created by a general partner as part of an Investment Limited Partnership structure (whether governed by Irish law or non-Irish law) is generally required to be registered on the file of the general partner in the CRO; and
- security created by an ICAV (whether governed by Irish law or non-Irish law) is generally required to be registered on the file of the ICAV with the Central Bank of Ireland rather than the CRO as ICAVs are established under the ICAV Act rather than the Companies Act.

If the security document contains a fixed charge over book debts and is created by an Irish company a notification is also required to be made to the Revenue Commissioners under Section 1001(3)(c) of the Taxes Consolidation Act 1997. This requirement does not apply to ICAVs.

➔ Role of investor letters

As part of the due diligence on the fund's constitutional documents, an analysis of the subscription agreement and any side letters will be needed to ensure that:

- the fund is able to incur debt under a capital call or bridge facility;
- there are no prohibitions or restrictions on the fund's ability to assign or create security over its rights in the relevant document; and
- the investor has given an irrevocable and unconditional commitment to fund and does not benefit from rights of set off, defence, counterclaim or subrogation against the fund which may mean that an investor does not fund a capital call to repay the faciltiy in cash.

Ideally, lenders will also expect to see an express agreement from investors that they will fund a capital call if the fund is insolvent and to meet a call by the lender (or its security agent or trustee) following an enforcement event.

The items above are usually covered in the fund's consitutional documents. However, if any of these elements are missing, an investor letter can be obtained from the investor to the fund to remedy the absence/presence of any of the points set out above.

➔ A note on governing law

It is typical for the credit agreement entered into by an Irish fund to be governed by English or New York law. However, the law of the location (or deemed location) of an asset (the *lex situs*) is usually chosen to govern the security and collateral arrangements on fund finance transactions. As such, the security over assets located in Ireland (such as bank accounts) or contractual rights governed by Irish law (such as the right to call capital from investors) will usually be governed by Irish law.

It is not uncommon, however, for security over such assets to also be granted under the law governing the credit agreement (particularly, where the law governing the credit agreement is New York law), in addition to security being granted under Irish law.

NAV Facilities

➔ Typical security package

The security granted by an Irish fund borrower on an asset backed facility will depend on the nature of the underlying investments held by the fund and the fund's structure. It is common for the collateral held by an Irish fund to be located in or subject to the laws of a number of jurisdictions (including, as applicable, Ireland) and, in such cases, lenders will often seek to take a general security interest either under the laws of Ireland or under the law of the credit agreement (often, this is the laws of England and Wales or New York). Where particular assets are located in Ireland or are subject to Irish law, for example a securities account in Ireland maintained with the Depositary, or where there is a particular concentration of the borrowing base assets in Ireland, it is common for lenders to require Irish law governed security over such assets (either in place of, or in addition to, the security created under the law of the credit agreement).

There is no "one size fits all" security package on NAV facilities. It is therefore helpful that the security interests available under Irish law provide flexibility to structure the collateral on a NAV facility in a way which suits the lender and Irish fund, and robust Irish security can be created over the typical assets that are secured on NAV facilities (including bank accounts, shares in special purpose vehicles and

equity, limited liability or other partnership interests, and capital markets instruments such as shares and bonds).

➔ **Guarantees and security in respect of third party debt and feeder structures**

The considerations noted above in respect of the limitations on the ability of QIAIFs and sub-funds to guarantee or grant security in respect of third party obligations also apply in the context of NAV facilities. Where an Irish fund or sub-fund is involved in a structure as a borrower or proposed guarantor or security provider, Irish law advice should be sought to ensure that the collateral package is in line with applicable rules in Ireland.

➔ **Securitisation**

The European Securitisation Regulations (2017/2402) came into force in Ireland on 1 January 2019. If a section 110 company is in the deal structure, it is important that an analysis is carried out at the beginning of the deal as regards whether the financing could be considered to be a securitisation and if the Regulations are applicable. As part of this analysis, it will be important to determining whether there is tranching of debt and if the lender is relying, partly relying, or not relying on the underlying cash flows or assets of the section 110 company. The Securitisation Regulations are complex and the analysis is likely to differ based on whether under the underlying facility is a subscription facility, a NAV facility or a hybrid.

➔ **Perfection formalities**

The same perfection formalities which apply to subscription facilities apply to NAV facilities. The required formalities in Ireland depend on the nature of the security interest being created rather than the nature of the facility itself.

Conclusion

Ireland offers a range of regulated and unregulated structures and solutions to meet the needs of all sponsors and their investors, and institutions providing secured debt to funds. The Arthur Cox team have extensive experience advising sponsors and lenders on fund finance facilities and would be delighted to assist you in any way we can. Special thanks goes to Michael Mbayi and the Wildgen team for providing the opportunity to contribute to this security guide.

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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. 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 less commonly seen in the Singapore market. 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. 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 a holding company ("Holdco") and (3) an all assets security granted by Holdco.

- Security perfection would involve registration of the security with ACRA as specified in paragraph 1 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.

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Subscription Facilities

➔ Security package

A traditional U.S. facility is defined by its collateral package, which will typically include a pledge by the borrower fund, guarantor fund and/or feeder funds (each, a "Fund") and its general partner (each, a "GP") of all rights, titles and interests in and to (i) the unfunded capital commitments of the Fund's investors, (ii) the right to make capital calls upon the Fund's investors, (iii) the right to collect the proceeds of, and enforce the making of, such capital calls, and (iv) the deposit account (the "Collateral Account") into which the Fund's investors will fund their capital contributions when called (collectively, the "Facility Collateral").

➔ Perfection formalities

The Facility Collateral is characterized as a "general intangible" or "payment intangible" under Article 9 of the Uniform Commercial Code (the "UCC"). A security agreement and/or series of pledges and security agreements are used to create the lender's security interest in the Facility Collateral. With respect to each pledging Fund and its GP, a UCC filing pursuant to Article 9 of the UCC is the method by which lenders perfect such security interest. The applicable filing office is dependent upon the jurisdiction of formation of such pledging Fund or its GP, as applicable. The Collateral Account is perfected via an account control agreement entered into by and among the pledging Fund, the depository bank holding such account and the lender. These accounts are typically "springing" whereby the lender will obtain exclusive control by way of presenting the depository bank with notice upon the occurrence of a certain event under the facility (typically, borrowing base deficiencies, pending defaults and ripened events of default). In addition to pledging the Facility Collateral, the GP also grants the lender a power of attorney to issue capital calls in the GP's name during a default.

➔ Governing law considerations

For most U.S. Facilities, New York law will govern the loan and related security documentation. If one or more Funds are formed or secured accounts are held in non-U.S. jurisdictions, then local counsel should be consulted regarding any local law requirements for perfecting security and recognition of a U.S. judgment.

➔ Structuring considerations

Facilities are full recourse to the Fund, and typically underwritten with borrowers on a joint and several basis. This is to provide full cross-collateralization across any parallel funds and alternative investment vehicles in the structure, which is a necessity in deals with a single borrowing base comprised of investors that commit to multiple Funds within the structure. Sometimes, due to U.S. law concerns under ERISA or the tax code, Facilities will be structured via "cascade" pledges that utilize a series of security grants to indirectly pledge certain Fund interests to the lender. Where several liability is an option, cross-secured or cross-collateralized structures may be used to effectively link the ability to call from all investors in each Fund during an enforcement scenario. Additionally, Facilities may be structured via separate "Onshore" and "Offshore" facilities or "umbrella" style silos (the former being utilized where no cross-security or linkage across parallel funds is permitted and the latter for efficiency sake where it makes sense to document multiple Facilities, each for a separate vintage or fund series with respect to a single sponsor, in one set of transaction documents). Whether or not a particular approach will work

for a lender will ultimately depend upon its underwriting criteria as applied to the given Fund, including, but not limited to, the composition of the Fund's investors and whether one or multiple borrowing bases is feasible to achieve the desired facility size and usage.

NAV Facilities

➔ **Security package**

For our purposes, "NAV facilities" refers to loans to private equity funds where the value of the portfolio companies comprising the investment assets of the fund support the private equity fund borrower's loan obligations. NAV facilities take on different structures and serve a variety of purposes for the private equity funds using this form of financing. While some lenders 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 (in the form of interest, dividends, IPO proceeds or sale proceeds)), most NAV facilities 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 a Fund's assets and facilitating easier enforcement of remedies and recovery of loan obligations 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 requirements and/or other perfection or foreclosure issues 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.**

- 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 (as described above). 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 financial institution maintaining the account, and that agreement will provide the lender with "control" over the account in order to perfect the lender's security interest therein. The account control agreement may provide for "springing" control over the account (as described above for subscription facilities) or may provide for the account to be "blocked" (Fund does not have access to the account without lender consent) depending on the structure and purpose of the NAV facility.

- Similar to a pledge of capital commitments, Investment Proceeds Collateral is characterized as a "general intangible" or "payment intangible" under the Article 9 UCC. With respect to each pledgor, a UCC filing pursuant to Article 9 of the UCC is the method by which lenders perfect such security interest. The applicable filing office is dependent upon the "location" of the applicable Fund, as determined pursuant to Article 9 of the UCC.

- 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 "general intangibles" 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, a UCC filing pursuant to Article 9 of the UCC is the method by which lenders perfect such security interest. The applicable filing office is typically dependent upon the "location" of such Fund, as determined pursuant to Article 9 of the UCC. Notwithstanding the foregoing, in certain cases the Pledged Equity Collateral may be perfected by control or possession (*e.g.*, in circumstances where: (a) the equity interests are issued in the form of certificated securities for equity interests, (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.

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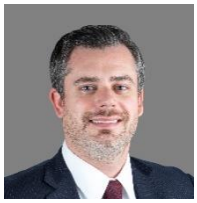

Wes Misson is Head of Fund Finance in the U.S. and co-chair of **Cadwalader**'s Finance Group. He leads the largest and most experienced team in the U.S. market, which collectively with **Cadwalader**'s UK Fund Finance practice represents credit providers on Subscription Credit Facilities, NAV-Facilities, Hybrids, Pref Equity Structures, GP Financings, Venture Debt and Capital Relief and Risk Transfer Trades for private equity, real estate and other investment funds of all sizes and vintages sponsored by many of the world's preeminent fund sponsors. **Wes** has represented financial institutions as lenders and lead agents in hundreds of Subscription Credit Facilities, Hybrid Facilities, NAV Facilities and other types of fund financings during the course of his career. His experience also encompasses being a market leader on ESG facilities while serving on the firm's ESG Task Force and being a problem solver for more than a decade-plus working with fund-related borrowers on the negotiation of third-party investor documents with institutional, high net worth and sovereign wealth investors.

BRIAN FOSTER

Brian Foster is a partner in **Cadwalader**'s Finance Group and a member of **Cadwalader**'s market leading fund finance team. **Brian** 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).

PATRICK CALVES

Patrick Calves is a special counsel in the firm's Finance Group. He 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's practice includes work on structures involving a variety of non-standard collateral, such as hedge fund interests, private equity fund interests, capital contribution obligations and restricted stock positions.

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NOTES

CONTACT

Don’t hesitate to contact our expert, **Michael Mbayi**, for any information about fund finance.

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THANKS TO ALL THE CONTRIBUTORS AROUND THE WORLD WHO PARTICIPATED IN THE REDACTION OF THIS FUND FUNANCE SECURITY GUIDE.

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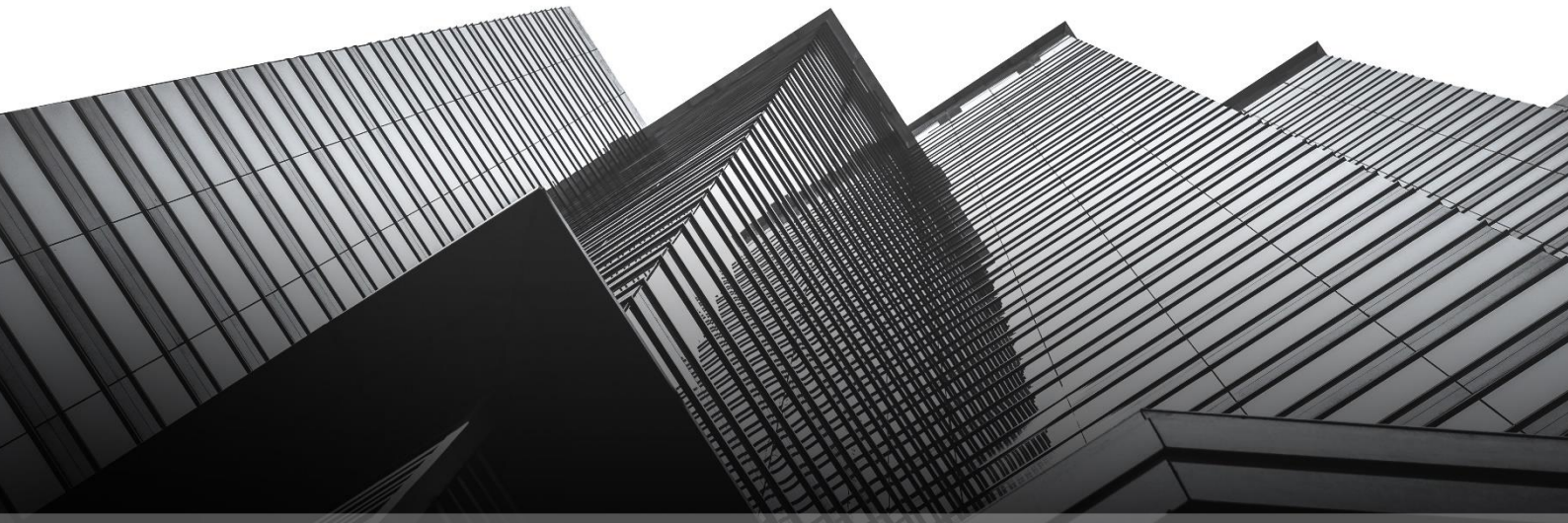

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