CADWALADER

The Irish Collective Asset-Management Vehicle

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In the short period since their introduction in 2015, ICAVs have become the structure of choice for Irish funds. This is down to the flexibility they offer from both a tax and legal perspective. Somewhat inevitably, the increase in the use of these vehicles is now translating into the fund finance space, with an increasing number of borrowers in capital call facilities being ICAV entities.

What is an ICAV?

An ICAV may be established as a UCITS or an AIF. As they are regulated by the Central Bank of Ireland under the Irish Collective Asset-Management Vehicles Act 2015 (as amended) (the "ICAV Act"), they are not subject to the Irish Companies Act 2014. The ICAV Act was specifically designed for investment funds, with the intention to bypass the restrictions and reporting requirements applicable to funds structured as public limited companies under the Companies Act 2014 (such restrictions and reporting requirements not being relevant or appropriate for such funds).

Additonally, an ICAV can elect under the US “check-the-box” taxation rules to be treated as a transparent entity for US federal income tax purposes, which can be important for US tax payers and therefore enhance the attractiveness of Irish funds being marketed to the US.

Structure

A fundamental benefit of the ICAV is its operation as an umbrella fund and the specific legislative provisions which essentially ringfence the assets and liabilities of sub-funds. The ICAV Act explicitly addresses segregated liability of sub-funds of umbrella funds and implies limited-recourse language into every transaction entered into by an umbrella fund on behalf of a sub-fund. An umbrella fund cannot apply assets of one sub-fund against the liabilities of another sub-fund, and liabilities attributable to a sub-fund must be discharged exclusively out of the assets of that sub-fund. The ICAV Act provides protection for individual sub-funds by requiring any party who has had recourse to assets of a sub-fund in respect of liabilities not incurred by that sub-fund to hold those assets (or proceeds thereof) in trust for the umbrella fund.

The sub-funds may hold a wide range of assets, from publicly traded shares and bonds through to less liquid assets such as real property, and each sub-fund may have a different risk profile and investment policy. The umbrella ICAV may also prepare separate accounts for each sub-fund. As a result, investments across sub-funds can be treated and accounted for separately, and information relating to each sub-fund is disclosed only to relevant investors. As there is no risk-spreading requirement, ICAVs are useful for single-asset funds, funds with concentrated positions and funds which have prolonged "ramp-up" periods. This level of structural flexibility, together with the legislative protections and "light touch" regulation resulting in lower administrative costs, is attractive to investment funds and investors alike.

Capital Call Facilities, ICAVs and ICAV-Related Security

In an umbrella fund structure, the shares in the ICAV vehicle can be identified as being referable to a particular sub-fund (i.e., a legally segregated pool of assets and liabilities) through the entries in the shareholder register which is maintained by the ICAV's transfer agent (typically the administrator). ICAVs don't normally issue share certificates – they usually just issue confirmations of ownership in accordance with their offering documents.

The subscription agreement entered into with investors in a particular sub-fund would generally reflect a bespoke agreement but, from a lender perspective, it would be important to confirm that it contains an absolute commitment on investors to subscribe for shares on a fully paid up basis when called upon by the ICAV (or its manager). Capital commitments are normally drafted by reference to a monetary amount – i.e., the investor irrevocably undertakes to make aggregate payments up to a specified amount when called upon to do so. Due to the segregated nature of the sub-funds in an umbrella structure, the insolvency of a sub-fund does not result in the insolvency of the entire fund or prevent the ICAV from issuing further shares with respect to that sub-fund.

A lender would generally take a security assignment over the ICAV's rights under the subscription agreement as well a charge over the account into which the subscription monies are paid. The insolvency of an investor could impact on its ability to meet its obligations under the subscription agreement and consequently, of key importance is due diligence of the underlying fund documentation and subscription agreement. It is also important to ascertain from the underlying documentation whether the AIFM should be party to the security or facility documentation, as this will be dependent on the delegation of authority pursuant to the underlying fund documentation.

In an umbrella fund structure, there are multiple such pools within a single legal entity and, therefore, it is possible that the liabilities of one sub-fund within an umbrella could exceed its assets while other sub-funds within the same umbrella have positive NAVs. In theory, shares in a sub-fund could be issued with a zero NAV, although this is not a scenario that we have seen in practice.