CADWALADER

FUND FINANCE FRIDAY

The Jersey LLC Has Arrived

November 11, 2022 | Issue No. 200

By James Gaudin
Managing Partner | Appleby (Jersey) LLP

By Daniel Healy
Associate | Appleby (Jersey) LLP

On 1 September 2022, the Limited Liability Companies (Jersey) Law 2018 (“LLC Law”) came into force, allowing limited liability companies (“LLCs”) to be established in Jersey. Jersey has introduced the LLC to attract U.S. investment by creating a vehicle familiar to U.S. clients. In October 2021, Jersey Finance published research showing that the assets managed by promoters with U.S. origin have increased by 230% in the last five years. Appleby’s experience would suggest that this figure has continued to grow since then.

We anticipate that the Jersey LLC will become an increasingly prevalent part of the fund (and, therefore, fund finance) landscape. We set out below some of the key features of the Jersey LLC so that lenders are able to familiarise themselves with these new vehicles.

Why use a Jersey LLC?

Current vehicles available in Jersey have tended to align with English tax treatment and are not compatible with the “check-box” election system seen in the U.S. As outlined in more detail below, LLCs combine the limited liability protection of a company with the constitutional flexibility and privacy of a partnership, whilst also offering flexibility as to its management structure and tax treatment. Readers will know that LLCs in other jurisdictions are common vehicles in fund structures.

A Jersey LLC should be treated in the same way as any other non-U.S. LLCs, and we expect the Jersey LLC to become an increasingly prevalent part of the fund (and, therefore, fund finance) landscape.

Jersey is not in the European Union and, therefore, the full scope of The Alternative Investment Fund Managers Directive need not apply. This means that a Jersey-based manager may not be required to comply with certain more onerous elements, such as reporting and disclosure of remuneration. To the extent a U.S.-based fund manager has European- or UK-based investors, then Jersey offers easy and relatively inexpensive access to the EEA through the National Private Placement Regimes (a well-recognised model).

Jersey has an excellent reputation as a well-regulated and transparent international finance centre. In addition, Jersey has a world-class professional infrastructure, with the numerous law and accountancy firms and corporate service providers. Managers will find that they receive robust and expedient advice based on a high degree of expertise and deep and broad experience.

Overview of the LLC

The main features of an LLC are:

- it has legal personality (so can contract and hold assets in its own right);
- it must have at least one member;
- it has limited liability for its members;
- an LLC can have managers to run it (similar to a general partner in a limited partnership but who need not be a member in the LLC) or the members can run the LLC themselves (like the partners in a general partnership);
- the LLC agreement (the key governing/constitutional document of the LLC) will remain a private agreement and not be publicly available;
- treatment of Jersey LLCs will follow the U.S.-style "check box," allowing a Jersey LLC to elect how it is to be treated for tax and accounting purposes, depending on underlying tax analysis and advice. Jersey LLCs will be treated as tax transparent for Jersey tax purposes;
- Jersey LLCs will be able to create separate series of members, managers, interests or assets, each of which will have separate legal personality, although, as noted above, such provisions are not currently in force. Such concept is similar to that already available in relation to Jersey cell companies (or the Irish ICAV or Luxembourg compartments);
- a manager of a Jersey LLC will not owe any fiduciary duties to the LLC or any other member in exercising its rights or performing its obligations other than to act in good faith with respect to the management of the LLC (similar to Delaware and Cayman LLCs). The LLC Law also allows such duty of good faith to be expanded or restricted by the express provisions of the LLC agreement (i.e., the parties can agree the relevant duties within the LLC agreement rather than have such duties imposed on them by law);
- there is no legal requirement for a member or manager to be resident in Jersey, but Jersey LLCs will be within scope of the Economic Substance regime and will need to consider this regime carefully;
- the accounts of a Jersey LLC are not required to be audited, unless:
    - the LLC agreement requires it; or

    - the LLC is circulating, or has issued, a prospectus inviting members of the public to become a member of the LLC (there are certain exemptions to this to allow an LLC to fit into the Jersey fund regime without the requirement for a prospectus to be issued);

- and similar provisions applicable to Jersey companies will also apply to Jersey LLCs (such as the ability to merge and demerge and the ability to continue overseas, and an overseas entity may continue into Jersey as a Jersey LLC).

As the LLC Law currently stands, a Jersey LLC will not be a body corporate. We are expecting an amendment to the LLC law shortly which will enable an LLC to elect whether or not to be a body corporate – giving even more flexibility.

In addition, the provisions of the LLC Law dealing with series LLCs are not yet currently in force and will come into force at a later date to be determined.

Considerations for lenders

For lenders, generally speaking there is no legal or regulatory impediment to lending to funds in Jersey, and this would apply equally where the fund vehicle is an LLC.

The due diligence a lender will need to undertake on a Jersey LLC will be mostly similar to that of a limited partnership (and as such we will not bother repeating here).

In addition, the Security Interests (Jersey) Law 2012 creates a simple security regime permitting security to be created over present and future intangible moveable property situate in Jersey. Security can be easily taken from an LLC, by way of a Jersey law security interest agreement over (amongst other things), the following assets of a Jersey LLC:

- bank accounts maintained in Jersey;
- call rights a party has under an LLC agreement (and rights of enforcement in connection with those call rights);
- shares in a Jersey company (or membership interests in a Jersey LLC); and
- contract rights under a Jersey law governed agreement.

The above list is not exhaustive but rather the more common security we see in fund finance deals. There are certain perfection requirements, but for the most part, perfection of the security will be achieved by way of the registration of a “financing statement” on the public Security Interests Register (which incurs a GBP 150 fee per registration).

In relation to security over call rights, as is currently the case when taking security over call rights in a Jersey limited partnership or company, notice of the security will not need to be given to the members of the LLC to perfect the security. However, we would expect the standard practice in Jersey of delivering such notice to investors to also apply to delivering a notice to the members of an LLC, as this can provide protections to the lenders that go beyond perfection.

Conclusion

The introduction of the LLC to Jersey is an exciting new development. Jersey will now look to build on the increasing attractiveness of Jersey to U.S. funds, fund managers and investors or to fund managers from outside the U.S. to attract U.S. investment.

For fund finance deals, given the familiarities with other LLCs globally, lenders should not be concerned with the use of a Jersey LLC in a fund structure.