

# Fund Finance Friday



## The Irish ICAV – Key Features and Finance Considerations

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While there has been much industry focus on the re-energised Irish Investment Limited Partnership vehicle, (“ILP”) the ICAV remains the workhorse, or perhaps more accurately the stallion, of Irish Fund structures. We have set out a brief reminder of some of the ICAV’s key features and some points to remember for finance transactions.

### Key Features:

- The ICAV is a regulated fund vehicle established under the Irish Collective Asset-management Vehicles Act 2015 (the “ICAV Act”).
- It can be established as an umbrella fund with segregated liability between sub-funds, allowing for different investment strategies to be established within a single legal entity.
- The ICAV is eligible to elect to be treated as a transparent entity for US federal income tax purposes.
- The ICAV Act has a tried and tested mechanism for fund vehicles established in offshore jurisdictions to migrate or redomicile to Ireland as an ICAV.
- Unlike an ILP, the ICAV is a corporate entity and does not have a GP and its board of directors have management responsibility with delegated authority to key regulated service providers.
- It may amend its constitutional documents without shareholder approval in respect of changes that do not prejudice the interest of shareholders and do not come within certain categories of changes specified by the Irish Central Bank.

### Key Considerations for Finance Transactions:

In our work on fund finance transactions for Lenders and Borrowers the following are some of the key points and considerations which arise from an Irish perspective.

#### Power to borrow and give security:

ICAV’s are typically established to have broad powers to borrow and give security. The usual legal due diligence will identify any limitations in this regard. While there are restrictions on an ICAV giving security for the obligations of a third party, which for example could be relevant where the ICAV is a Feeder Fund for a Master Fund Borrower, cascading security can be used as a neat solution. In this example, the ICAV grants security to the Borrower over the relevant

secured assets as security for obligations arising under the subscription documents between the ICAV and the Borrower, and in turn the Borrower grants security to the Administrative Agent over the security granted to it by the ICAV.

### **Segregated Liability / Limited Recourse:**

Umbrella ICAV's as a matter of Irish law segregate liability between sub-funds, *i.e.*, one-sub fund cannot be held responsible for another sub-funds liabilities with some limited exceptions. There is standard wording which will need to be inserted into the loan documents to reflect this.

We are also seeing requests from some borrowers' counsel to insert limited recourse/non-petition clauses into loan documents. Such clauses can provide for example, that the lenders recourse to the party creating security is limited to assets over which it has granted security and that once realised that lenders recourse to such party is extinguished and with limited exceptions the lender cannot initiate or otherwise claim in any insolvency of the Fund. The requested language may also seek to restrict recourse to directors and shareholders of the Fund.

This type of language is quite common on securitisation and certain types of structured finance deals. If agreed to be included, it will need to be carefully reviewed and negotiated. For example, restricting recourse to shareholders for a subscription line does not work.

### **Waiver of Defences**

While in the more distant past the inclusion of "waivers of defences" language was not always included by fund counsel in the constitutional/subscription documents it is now rare to see a deal where this is not baked in on day one. Our review at the due diligence stage will identify any concerns. It can be difficult to get funds and limited partners to agree to necessary changes by way of amendment to signed fund or subscription documents but less difficult to reflect it in a side letter or in the notice/acknowledgment of the creation of security to/with the limited partner.

### **Service Providers and Side Letters**

As with any regulated Irish Fund vehicle it will appoint a Manager/AIFM, an Administrator and a Depositary (*i.e.*, a custodian rather than an account bank). What may be recommended to be obtained from such service providers (if anything) will be driven by the type of funding and the output from the due diligence process. For example, for a subscription facility one or more of the Manager/Administrator may have a role in the call process, which may necessitate the Lender obtaining direct covenant coverage from them by way of side letter. Importantly, there should be no need to require them to execute the security. A Depositary or other Service Provider may also have signing rights on bank accounts which may need to be controlled and this can be included in side letters and will also be dealt with in the loan documents. For an asset-level security package more detailed control arrangements may be required (*e.g.*, securities accounts held with the Depositary).

### **The Future**

While we are seeing traction on the uptake of the Irish ILP vehicle, the ICAV remains a vehicle of choice for many sponsors.

The Irish government is currently undertaking a public consultation and review of the Irish funds sector. Arthur Cox are actively contributing to this review with our own insights, on behalf of our clients and as part of our participation in industry bodies. This review is to be welcomed and is an opportunity to take stock, provide feedback on potential enhancements and future-proof Ireland's offering in the funds sector.