

Fund Finance Friday



Around the (Fund Finance) World in Eight Topics!

February 7, 2025



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With just over two weeks to go until the global fund finance community gathers in Miami, the time seems apt to revisit some topics that bankers and attorneys encounter in some commonly seen non-US fund finance jurisdictions.

While times have changed since Jules Verne's adventure novel, and nobody will arrive by hot air balloon (we hope!), some things will always differentiate deals touching the jurisdictions that encompass the fund finance world. The following is a quick 'cheat sheet' for the next time you see some or all of the jurisdictions in a deal.

In the United States, security over capital commitments is typically taken by entering into a security agreement and filing a UCC Financing Statement listing the collateral. The equivalent in each of the jurisdictions is discussed below – whether the parties typically enter into parallel security agreements under local law, whether a public filing should be made, and whether priority over other creditors should be established by providing notice to LPs.

Local Security Agreements

Bermuda: Bermuda law governed security agreements are not required in order for valid security to be taken over rights contained in Bermuda LPAs (including capital call rights) or bank/securities accounts located in Bermuda. In most cases the security agreements granting security over such property are governed by the same governing law as the finance documents.

Cayman: Cayman law governed security agreements are not required in order for valid security to be taken over rights contained in Cayman LPAs (including capital call rights) or bank/securities accounts located in Cayman. In most cases the security agreements granting security over such property are governed by the same governing law as the finance documents.

Ireland: Irish law security is required when taking security over Irish law governed agreements (including subscription agreements) and rights (including capital call rights), bank/securities accounts located in Ireland and shares/limited partnership interests in Irish funds. Irish law security is commonly used in parallel with US security.

Luxembourg: To avail of certain protections for creditors under the Collateral Law, Luxembourg governed security agreements are required to be put in place for security over capital call rights contained in Lux LPAs or over Lux bank accounts. Lux law security agreements are commonly used in parallel with US security over the same property.

Registration of Security

Bermuda: Charges over the assets of Bermuda companies which are granted by or to companies incorporated outside of Bermuda, are capable of being registered in Bermuda in the office of the Registrar, pursuant to the provisions of Part V of the Companies Act 1981 (Companies Act). Registration under the Companies Act goes to priority and not enforceability, and there is no time limit within which registration of a charge must be effected.

Partnerships that have elected to have separate legal personality can also register with the Registrar and thereby ensure priority in a similar way to the regime for companies. In the event that a Bermuda partnership has not elected to have separate legal personality but has a Bermuda company as its general partner, the charge can be registered against the general partner acting in its capacity as general partner of the partnership. Additionally, in instances where the partnership has not elected to have separate legal personality, charges are capable of being registered in Bermuda against the partnership, in the office of the Registrar General pursuant to the provisions of the Mortgage Registration Act 1786 and regulations thereunder.

Cayman: There is no central register of security interests or requirement to register security in Cayman for validity or priority.

Ireland: Security granted by an Irish entity (including an Irish general partner) must be registered within 21 days with the Irish Central Bank or the Companies Registration Office, as applicable. There are exceptions to this requirement for security over bank accounts and shares, and financial collateral arrangements under the Financial Collateral Regulations do not require registration. Any fixed charges over book debts granted by an Irish company (for example, an Irish s. 110 designated activity company) should also be notified to the Irish tax authorities within 21 days.

Luxembourg: There is no central register of security interests or requirement to register security in Lux for validity or priority.

Require Investor notices (and why!)

Bermuda: To the extent that the grant of security is governed by the laws of Bermuda, notice of the assignment of capital call rights/commitments is required to be sent to the investors to ensure priority against subsequent security over the same collateral.

Cayman: Investor notices must be sent to the limited partners/shareholders of a Cayman party that grants security over its capital call rights in order to obtain priority against later security over the same collateral.

Ireland: To create a legal security assignment over capital call rights a notice of creation of security must be sent to the investor. The investor does not need to acknowledge the notice in order to perfect the security.

Luxembourg: Investor notices must be sent to the limited partners/shareholders of a Lux party that grants security over capital call rights in order to ensure that limited partners/shareholders may not claim a lack of knowledge of the security were certain scenarios to later arise.

What are some reps, warranties and covenants that you can expect to see in each jurisdiction?

Bermuda: It is typical to include representations in relation to Investment Funds Amendment Act 2006 (IFA) compliance and covenants in relation to security registration and investor notices.

Cayman: It is typical to include covenants in respect of: (i) investor notices; and (ii) registration of applicable funds under the Private Funds Act.

Ireland: It is typical to include representations and covenants on regulatory status and compliance, specific references to Irish insolvency law and processes and Irish law perfection concepts and, for section 110 vehicles, compliance and maintenance of tax status.

Luxembourg: It is typical to include representations on: (i) COMI (center of main interests) of each Lux party to ensure that from a lender's perspective Luxembourg rather than any other EU member state would be the forum for insolvency proceedings in respect of such party; (ii) the AIFM's status in order to ensure that it is duly authorized under Lux/ EU law to act as AIFM and remains validly appointed as AIFM of the relevant fund; and (iii) a covenant in respect of investor notices.

What opinion coverage is typical?

Bermuda: Either lender or borrower counsel may provide the full authority, capacity and enforceability legal opinion to the lender.

Cayman: Either lender or borrower counsel can provide the full opinion to the lender. The opinion is typically provided by just one firm covering due capacity, authority and enforceability.

Ireland: Either lender or borrower counsel can provide the full legal opinion to the lender but typically opinion coverage is split. Borrower counsel typically provide an opinion on due incorporation, capacity, authority and due execution and lender counsel cover enforceability.

Luxembourg: Either lender or borrower counsel can provide the full legal opinion to the lender, but typically opinion coverage is split. Borrower counsel typically provide an opinion on due incorporation, capacity, authority and due execution and lender counsel typically cover enforceability.

Are there any special regulatory regimes that apply in these jurisdictions?

Bermuda: Closed-ended Bermuda investment funds and overseas (non-Bermuda) funds managed or carrying on promotion in or from within Bermuda are subject to the IFA. If the general partner of a Bermuda limited partnership carries on investment business in or from Bermuda, in accordance with the Investment Business Act 2003 it may require a licence issued by the BMA.

Cayman: Closed-ended Cayman funds are typically registered with the Cayman Islands Monetary Authority pursuant to the Private Funds Act and are subject to the requirements of such law.

Ireland: Irish funds can be set up as either regulated or unregulated funds. Regulated funds will be ICAV's, Investment Limited Partnerships, PLC investment companies, Unit Trusts and Common Contractual Funds. Unregulated funds will be 1907 Limited Partnerships and Section 110 companies. While the fund may be unregulated, if it constitutes an AIF for the purposes of AIFMD as in Luxembourg the managers of such funds are regulated by AIFMD.

Luxembourg: Lux funds used in private equity structures are typically governed by the Law of 10 August 1915 on commercial companies but are not subject to any prior authorisation and are not directly supervised by the CSSF. If any such fund constitutes an AIF for the purposes of AIFMD the manager of such fund is regulated by AIFMD and the Lux AIFM Law.

Share/Partnership Interest Security

Bermuda: Security over shares/LP interests in a Bermuda entity commonly occurs in NAV or hybrid deals. Generally the governing law of such security arrangements follows the governing law of the finance documents, with Bermuda specific provisions added to deal with local law points.

Cayman: Security over Cayman shares/LP interests commonly occurs in NAV or hybrid deals and, while local security is helpful over Cayman shares or partnership interests, the most common approach is a New York governed security agreement with added language and appendices to cover Cayman 'self help' remedies and legislative requirements (in the case of security over partnership interests).

Ireland: Security over Irish equity/debt or partnership interests commonly occurs in NAV or hybrid deals and Irish security is required in respect of security over Irish equity/debt or partnership interests.

Luxembourg: Security over Lux shares/LP interests commonly occurs in NAV or hybrid deals and Lux law governed security agreements are required in respect of security over Lux equity or partnership interests. Lux share pledges are perfected with the registration of the pledge with the relevant share register (such register being kept in-house at the registered office of the company whose shares are pledged).

Most Common Legal Structures/Entities

Bermuda: Investment funds are typically formed as limited partnerships or companies incorporated with liability limited by shares. The partnership is a popular vehicle largely because it is generally regarded as a fiscally transparent structure. In Bermuda, a partnership may elect to have a separate legal personality. If such election is not made, the partnership is not a legal entity and does not have a separate legal personality. Bermuda exempted partnerships may be resident in Bermuda and can only carry on business from Bermuda in connection with activities external to Bermuda. The partnership agreement is private except for limited information in the Certificates of Exempted and Limited Partnership which are registered with the Registrar of Companies.

Cayman: The most commonly utilized Cayman fund vehicle is the Exempted Limited Partnership (ELP). The general partner of an ELP can be a Cayman vehicle (frequently another ELP or an exempted company/LLC) or a foreign vehicle registered in Cayman (most commonly a Delaware LLC). A Cayman ELP does not have separate legal personality and acts through its general partner. Cayman exempted companies are also frequently seen in fund finance transactions in various capacities

Ireland: Ireland offers a broad selection of regulated and unregulated fund vehicles to meet investor needs. The most commonly used is the ICAV. It acts through its board of directors, with delegated authority to fund service providers. The regulated Investment Limited Partnership ("ILP") is also growing in popularity with Sponsors. It acts through its general partner and also delegates authority to fund service providers. On Fund Finance transactions the most relevant service providers will be the AIFM, Manager, Depositary and Administrator. Both the ICAV and ILP can be established as an umbrella or single fund vehicle. Segregated liability exists between sub funds. On the unregulated side the most popular vehicles are the section 110 company and the unregulated limited partnership vehicle. The section 110 vehicle acts through its board of directors. The unregulated limited partnership acts through its general partner.

Luxembourg: The most popular unregulated Luxembourg structure for private equity is the special limited partnership (SCSp) with a Luxembourg company (S.à r.l.) acting as its general partner. If the SCSp is formed as an AIF it will have to comply with the AIFMD. Other popular Luxembourg unregulated vehicles are (i) the common limited partnership (SCS); and (ii) the partnership limited by shares (SCA), where the shares are freely transferable and there is the advantage of confidentiality of its shareholding. Both such vehicles would also have another Luxembourg entity, normally in the form of an S.à r.l., acting as their (managing) general partner.