

CADWALADER

Getting All Your 'Lux' in a Row – a Lender Checklist!

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Every deal has its quirks but, as anyone who has done a deal with a Lux entity will know, the EU brings its own set of regulatory considerations to the table (primarily AIFMD). In many cases when compared with parallel Delaware and Cayman workstreams, Lux can seem like (and in some cases is) a much more involved process.

We thought the start of the new year might be a good time for a refresher on how the Lux workstream can best be managed, why additional tasks are required (when compared to equivalent Delaware and Cayman vehicles), what these tasks are, and the common deal points that can pop up and give rise to negotiation. In short, how a lender and their counsel can best get their 'Lux' in a row to ensure a deal runs as smoothly as possible.

Why Lux?

Luxembourg is by far the leading EU jurisdiction for the formation of closed-ended fund structures typically seen in fund finance deals. It provides a regulated and familiar jurisdiction for global sponsors and investors alike and has a diverse and well-crafted stable of vehicles to choose from – the most common of which, an SCSp, allows for the creation of a limited partnership with the same concepts as are seen in common-law jurisdictions like Delaware and Cayman. The easiest line to draw is that, although not always the case, U.S. sponsors use U.S. and Cayman vehicles for U.S. limited partners and Lux vehicles for EU and Rest of the World limited partners (benefiting from the cross-border marketing aspects of AIFMD for EU investors).

Security Squared

One aspect that commonly sets Lux apart on U.S.-originated deals is the necessity for Lux-governed security agreements over capital call rights contained in Lux-governed LPAs. Lux has specific and modernized legislation to govern the granting of security interests and provide certain benefits to secured parties (the Collateral Law). In order to benefit from the provisions of the Collateral Law a Lux-governed security agreement which aligns with its provisions must be executed. Accordingly, it is common to have parallel U.S.-governed security and Lux-governed security over the same capital call and enforcement rights allowing the secured parties to benefit from both regimes as they see fit in the event of an enforcement.

Where a fund has Lux-based bank accounts that capital contributions are funded into, then Lux-governed security also needs to be taken over these accounts (and it's always worth checking the IBAN of such accounts to ensure they are in fact Lux based!). In many cases a Lux-based bank will require their own forms of notice and acknowledgement of security to be used. While this is not problematic in theory, it can be time-consuming and is not in the direct control of the borrower, so early engagement with the bank is important.

By contrast, Cayman does not have a security interest law and so separate Cayman-governed security over capital call rights is not required, nor is it market practise to obtain it. It's also very rare for Cayman-based bank accounts to be used and so local account security is not a common deal feature.

It's important to know from the outset who is going to draft the Lux security documents. In some cases a protracted negotiation can be avoided by certain forms being used as a base and, given this is the most significant documentation being drafted on the Lux side, time efficiencies here can be considerable.

The AIFM of the Game

AIFMD primarily regulates *managers* of Lux funds rather than the *funds themselves* but almost every Lux fund that pops up in a fund finance transaction will be required to appoint an "AIFM". While an AIFM is in essence the same role as a 'manager' of a Delaware or Cayman fund may undertake, its obligations under AIFMD are much more wide-ranging and the terms of the AIFM agreement may be much more detailed.

Even if the right to call capital from investors has not been delegated to the AIFM (which would of course necessitate its involvement in the security documents) the AIFM may be required to consent formally to the transaction and if this is the case early attention should be dedicated to ensuring that the AIFM has been provided with sufficient information and a form of consent is agreed in this regard.

A Depositary of Knowledge

For most Lux funds the AIFMD also requires that they appoint a depositary that is independent of the AIFM function. This concept (which is more familiar to the hedge fund world where a custodian often holds assets of a fund) is designed as an investor protection. The depositary plays a key role in safeguarding the assets of the AIF and ensuring compliance with applicable laws and regulations.

For fund finance deals in Lux, this introduces an additional hurdle to closing that would not be required in Cayman or Delaware – being notification to or consent by the depositary to the transaction (depending on the terms of the depositary agreement). Early outreach to the depositary is important in order that it has time to review, comment on and line up a signatory for any applicable consents or acknowledgements.

The Split Opinion

The most common arrangement in Lux deals sees a 'split' opinion approach where the lender's counsel gives an enforceability opinion and the borrower's counsel provides the capacity opinion. While there is no specific reason this has to be the case (either side could and sometimes does provide an opinion covering both points) it leads to a slightly more involved process and so needs to be managed closely.

Fighting for your right to Priority

Perhaps the point that gives rise to most dialog in Lux deals is the question of how the parallel U.S. and Lux security agreements are described when it comes to their priority against each other (which is senior). While both are ultimately in favour of the same party, a number of technical legal arguments arise which sometimes see a divergence of opinion as to how the matter is documented. The scope of those arguments, the risk (if any) attached to the issue in real-world scenarios and which is ultimately correct is worthy of a note in its own right (watch this space!) but when it comes to getting your Lux in a row the main point is for the parties to engage early to ensure alignment so that the issue does not become a drag on timing.

Quelle heure est-il? (What time is it?)

Lastly, it is worth remembering that Lux is usually six hours ahead of the U.S. The main issue this can cause is availability of opinions for early-morning or late-evening U.S. closings and prior agreement on how an opinion can be released can save lots of stress on the day of closing as a wire cutoff approaches!

KBRA Reviews the Role of Ratings for Subscription Facilities

January 17, 2025

Credit ratings have traditionally been viewed as a tool to aid distribution of fund finance facilities. The role of ratings may be broadening, however, particularly in Europe under the next iteration of risk based capital standards.

The full KBRA report is available [here](#).

LMA Fund Finance Insights

January 17, 2025



The Loan Market Association has published January 2025 Fund Finance Insights highlighting a brief history and the evolution of Fund Finance in Europe.

The document discusses topics such as the emergence of subscription facilities, the fund and financing lifecycle and more.

Read it [here](#).

Future of Fund Finance | Europe

January 17, 2025



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The Future of Fund Finance | Europe

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LMA | Loan Market Association

28 January 2025
The Landmark Hotel | London, UK

We're looking forward to The Future of Fund Finance | Europe, on 28 January at The Landmark Hotel in London. Cadwalader is proud to be a lead sponsor and have Partners [George Pelling](#) and [Nick Shiren](#) speaking at the conference, sharing their insight on key industry topics.

The full-day conference will provide the chance to gain the latest insights from leading issuers and investors as they examine how alternative funding structures are reshaping the fund finance market.



THE FUTURE OF FUND FINANCE | EUROPE

George Pelling

The Spectrum of Structures in Fund Finance
Tue Jan 28, 9:45 AM - 10:30 AM GMT



George Pelling will be a panelist on "The Spectrum of Structures in Fund Finance." Learn more about what he plans to cover [here](#).



THE FUTURE OF FUND FINANCE | EUROPE

Nick Shiren

Comparing Fund Finance Technology Under Different Regulatory Regimes
Tue Jan 28, 10:30 AM - 11:15 AM GMT



Nick Shiren will be a panelist on "Comparing Fund Finance Technology Under Different Regulatory Regimes." Learn more about what he plans to cover [here](#).

With only three weeks to go, stay tuned for updates on the agenda and confirmed speakers.

View the agenda [here](#).

View speakers [here](#).

Thirteen Cadwalader Partners Named to 2025 Lawdragon 500 Leading Lawyers in America

January 17, 2025



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C A D W A L A D E R

LAWDRAGON

Thirteen Cadwalader partners have been selected to the 2025 *Lawdragon* 500 Leading Lawyers in America. Each Cadwalader lawyer was selected based on journalistic research, submissions and vetting.

Cadwalader lawyers earning a spot in the 2025 guide include (with *Lawdragon's* categories):

Stuart Goldstein - Structured Finance

Nicholas Gravante - Litigation, esp. White Collar

Phara Guberman - White Collar

Ellen Holloman - Litigation

Phil Iovieno - Litigation, esp. Antitrust

Wes Misson - Fund Finance

Bonnie Neuman - Real Estate

Sean O'Shea - Litigation, esp. White Collar

Laura Perkins - Global Litigation, Investigation, Enforcement

Lary Stromfeld - Capital Markets

Danielle Tully - IP Litigation

Neil Weidner - Structured Finance

Martin Weinstein - White Collar

For details and a complete list of 2025 honorees, read the announcement [here](#).

Fund Finance Hiring

January 10, 2025

Fund Finance Hiring

Here is who's hiring in Fund Finance:

MUTB-NY is seeking an Fund Finance Account Officer- VP to join its office in New York. The VP will work through all aspects of the transaction lifecycle to help the team originate fund finance transactions, including both subscription finance and NAV based facilities. Learn more [here](#).