

Taking security over a BVI limited partnership interest – issues for lenders

We note that interest is growing in the new form of British Virgin Islands limited partnership that can be registered under the Limited Partnership Act 2017 (the “Act”). In the context of banking and finance transactions, there is increasing awareness among lenders of the ability to take security over limited partnership interests. Taking security over limited partnership interests can be useful in a variety of finance transactions, whether the security is being granted by the borrower or a third party. The Act contains a clear and simple framework that facilitates this. While not an exhaustive commentary, this article seeks to highlight some of the key issues for lenders and their counsel to be aware of.

Nature of a BVI limited partnership

A limited partnership registered under the Act may be formed for the purpose of carrying out any lawful business activity. The default position is that, unlike many other jurisdictions, it will be registered with legal personality unless the general partners elect on registration that it will not have legal personality (once the choice is made it is irrevocable – and there is no ability to make an election later after the initial registration process). A limited partnership must have at least one general partner and at least one limited partner. Each general partner is jointly and severally liable for the debts and liabilities of the limited partnership incurred while that person is a general partner, responsible for management matters, and the agent of the limited partnership for the purposes of the business of the limited partnership (e.g. including signing agreements). On the other hand, a limited partner is generally not liable for the debts and liabilities of the limited partnership. But this limited liability is subject, broadly, to two exceptions. First, a limited partner may in certain circumstances lose its limited liability if it takes part in the management of the limited partnership, which under the Act it is not permitted to do. Second, if it receives a return of its contribution or is released from an outstanding obligation to contribute capital while the limited partnership is insolvent, and the limited partner knew of such insolvency, it may in certain circumstances be liable in respect of such amounts.

Nature of a limited partnership interest

Under the Act, a limited partnership interest of a BVI limited partnership comprises the limited partner’s share of the assets of the limited partnership, including the right to receive distributions (if any), right to vote (if any) and right to any other benefit conferred by the limited partnership agreement. Importantly, a limited partnership interest also includes any liability of the partner in relation to the limited partnership. Accordingly, the terms of the limited partnership agreement will need to be carefully reviewed and the security agreement that is used to take security over such rights will need to be tailored appropriately to ensure the lender has a security interest

over all the desired assets. The Act states that a limited partnership interest is personal property situate in the British Virgin Islands.

Checking the limited partnership records

At the inception of a lending transaction involving security over a limited partnership interest of a BVI limited partnership, lenders will want to carry out basic due diligence on the BVI limited partnership. In this regard they should effect appropriate searches with the BVI Registrar of Limited Partnerships and the BVI courts. They should also obtain copies from the limited partnership of, among other things, the certificate of registration of the limited partnership, any certificates of change of registered name, the limited partnership agreement, the register of general partners, and the register of limited partners. The register of limited partners is particularly important as this register must set out the details of the limited partners and their partnership interests.

Checking the general partner records

Similar searches and documents in respect of the general partner will also need to be considered – in particular given that the active participation of the general partner will be required to consent to the grant of security (see below). We have mentioned above that the register of general partners should be checked to make sure that the correct entity has been identified. The other documents required in respect of the general partner will depend on the nature of the general partner. The Act provides that, subject to certain restrictions relating to age (in the case of an individual) and relating to insolvency matters, a general partner can be “any person”, including a body corporate or a partnership. If, for example, the general partner is a BVI business company, then it would be usual to require copies of, among other things, the certificate of incorporation, certificates of change of name, memorandum and articles of association, and certain statutory registers of the company. It would also be usual to carry out a court search, order a certificate of good standing, and perhaps a certificate of incumbency issued by the registered agent of the company.

Consent of the general partners

The starting point is that under the Act a limited partner is not permitted to assign, transfer, grant a security interest over or otherwise dispose of all or any part of its partnership interest except with the prior or simultaneous written consent of the general partners. However, the Act provides that this requirement can be modified or excluded under the limited partnership agreement. Accordingly, it is important to review the limited partnership agreement to see what consent, if any, is required from the general partners, and whether it must be given prior to the grant of the security interest. Assuming consent is required, it is important that the general partner gives consent not only to the initial grant of the security interest, but also to any enforcement action that the lender may decide to take (which may include an outright transfer of the limited partnership interest requiring the admission of a third party as a new limited partner).

Consent of other limited partners

The Act does not require consent of the other limited partners to the grant of a security interest by a limited partner over its limited partnership interest. However, the limited partnership agreement may contain such a requirement. For example, the terms of the limited partnership agreement may include rights of first refusal/pre-emption in favour of existing limited partners which are triggered on a “transfer” of a partnership interest.

Depending on how the relevant terms of the partnership agreement are defined, a limited partner may potentially need the consent of other limited partners prior to a transfer of its interest by way of security in favour of a lender. As a practical matter, if there are a large number of limited partners, the time it takes to obtain all relevant consents will clearly have an impact on how quickly the parties can proceed to funding.

Written notice to be given to the limited partnership

The Act provides that, subject to the limited partnership agreement, written notice of the grant of a security interest over the whole or any part of a limited partnership interest must be given to the limited partnership. The notice may be given by the grantor (limited partner) or grantee (lender) of the security interest. The notice must contain certain prescribed information: the date of the security agreement, the parties to the security agreement, the identity of the grantor and grantee, and the partnership interest (or part thereof) that is subject to the security interest. It is important to contain these details, as failure to do so will render the notice invalid. In addition, it would also be usual to set out in the notice a description of the security interest being granted and what happens on the occurrence of a default under the loan documentation.

Acknowledgement of written notice

Although not a requirement under the Act, it is advisable to require the limited partnership to acknowledge receipt of the notice referred to above. The form of acknowledgment of the limited partnership will often require various confirmations from the limited partnership concerning the limited partnership interest in respect of which the lender is taking security. These might include, for example, that the limited partnership has not received notice of any previous security interests over the same limited partnership interest, that the grantor is indeed the holder of the relevant limited partnership interest, and that the limited partnership will act on the instructions of the lender following notice of a default under the loan documentation.

Conclusion

With the entry into force of the British Virgin Islands Limited Partnership Act 2017, BVI limited partnerships are likely to feature more on the international legal landscape. Prudent lenders taking security over limited partnership interests should take note of the issues outlined above to ensure that they take valid and effective security over the correct assets with all relevant consents properly obtained and notifications made.

Please do not hesitate to contact the author of this article if you have any questions.



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