

Private Equity

Recommandations et bonnes pratiques relatives au contrat de Nominee

Dans le cadre de leur collaboration cross-sectorielle, l'ACA et l'ABBL mènent depuis plusieurs années des réflexions sur les axes de développement souhaitables, afin de répondre au mieux à la demande croissante d'investissement en actifs illiquides ou semi-liquides (les « Actifs »), comme sous-jacents des contrats d'assurance-vie.

Au cours de ces travaux, un focus particulier a été porté sur le Nominee. Ce mode de détention largement utilisé répond à des besoins opérationnels et juridiques spécifiques.

À cette fin, l'ACA a mené des consultations avec des établissements bancaires par l'intermédiaire de l'ABBL.

Ces échanges ont permis d'identifier les principes fondamentaux qui sous-tendent le fonctionnement d'une structure de Nominee, tant du point de vue des assureurs que de celui des banques, et de les formaliser dans un cadre de référence commun. Ce cadre de référence est construit sous la forme de clauses à insérer dans un contrat de Nominee, sur la base de la pierre angulaire que constitue la Convention de dépôt et des exigences réglementaires actuelles qui en découlent à savoir :

- Propriété des actifs : quel que soit le mode de dépôt, l'assureur doit être reconnu comme étant le propriétaire des actifs logés sous un contrat d'assurance vie (CAV)
- Protection des actifs : la ségrégation des actifs ainsi que la traçabilité de la propriété des actifs doivent permettre à tout moment le gel des actifs en faveur des souscripteurs d'un CAV
- Absence de tout nantissement des actifs détenus sous un CAV
- Primauté de la Convention de dépôt sur toutes autres conventions conclues entre un assureur et une banque

L'objectif de ces recommandations et bonnes pratiques est de renforcer la sécurité juridique, de faciliter les interactions entre les différents intervenants et de contribuer à un environnement plus cohérent et prévisible pour l'ensemble des parties prenantes, et ce, au regard du développement de ce type d'actifs. En complément de chaque principe ou ligne directrice, est également suggérée une proposition de formulation en anglais.

Ces propositions sous forme de clauses individuelles ont été spécifiquement travaillées pour être facilement intégrables dans un contrat de Nominee existant ou futur, et sont destinées à favoriser une compréhension commune du mécanisme du Nominee ainsi qu'une harmonisation des attentes et des pratiques de marché. Un glossaire est adjoint afin de s'assurer d'une lecture harmonisée des termes employés et des concepts principaux qui soutiennent le contrat de Nominee.

Interrogé par l'ACA sur ces grands principes et de leurs propositions de formulations, le CAA a accueilli favorablement la démarche et surtout les conclusions, en ce que le mécanisme et le contenu des clauses spécifiques a répondu aux attentes actuelles en matière de contrat de Nominee. Il rappelle en outre qu'un tel contrat devrait être soumis à une loi applicable luxembourgeoise et prévoir que des différends/litiges soient traités par les juridictions luxembourgeoises.

I. GRANDS PRINCIPES ASSURANTIELS ET BANCAIRES, ET PROPOSITIONS DE FORMULATION :

1. Principes assurantiels

A. Référence et primauté de la convention de dépôt

Proposition :

“The Nominee Agreement is to be read in conjunction with the Deposit Agreement that was entered between the Principal and the Nominee whereby, under Art. 3 and Art. 5, the Nominee acknowledges and agrees the obligation of segregation and the restriction on encumbrances over the assets. The Nominee hereby agrees that the Deposit Agreement supersedes and prevails over any conflicting clauses or any other agreement or understandings, oral and written, between the Nominee and the Principal.

The Nominee also acknowledges and agrees to comply with the irrevocable instruction to freeze, without delay, the assets as soon as the Nominee is informed by the CAA that one of the situations described in Art. 123, 124 paragraph (5) and 125 of the Luxembourg Law of December 7, 2015 regarding the insurance sector (the “Insurance Law”).”

B. Reconnaissance par la banque dépositaire que l’assureur demeure propriétaire et bénéficiaire économique des actifs

Proposition :

“The Nominee expressly acknowledges and agrees that the Principal shall at all times remain the sole legal and beneficial owner of the assets held through the Nominee.

Any registration of the assets in the name of the Nominee is for administrative and operational purposes only and shall not transfer, limit, or otherwise affect the Principal’s ownership rights, title, or beneficial interest.

The Nominee shall not claim, acquire, or exercise any legal, beneficial, or security interest over the assets or any proceeds thereof, except as expressly instructed in writing by the Principal. The Nominee shall also ensure that any third party shall respect this interdiction.

In the event of the insolvency estate of the Nominee, Bankruptcy, administration, or similar proceedings, the assets and all proceeds thereof shall remain legally separated and excluded from the Nominee’s estate, and the Principal’s ownership and beneficial rights shall remain unaffected. These assets must thus be correctly booked in order not to fall into the insolvency estate of the Nominee in application of the Deposit Agreement.”

C. Reconnaissance par la banque que les ordres doivent être effectués en conformité avec les instructions d’investissement de l’assureur

Proposition :

“The Bank accepts to act as Nominee for the Principal in order to make and hold the assets in accordance with the instructions of the Insurer, in the Bank’s name but for the account of the Insurer and at the Insurer’s exclusive risk and profit.

The Nominee shall act in accordance with any such instructions as may be given at any time by the Principal.

In the event that the instructions are lacking clarity or otherwise contain any ambiguity, and that immediate action is required, the Nominee may take any measure it deems in its absolute discretion of being in the best interest of the Insurer (without incurring thereby any liability risk) and the Principal shall be notified of the measures taken immediately.”

D. Mention que la banque dépositaire agit bien « au nom et pour le compte » de l'assureur en toutes circonstances

Proposition :

"The Nominee shall act at all times in the name and on behalf of the Principal in the performance of its duties under this Agreement, and inform the issuer that it is acting on behalf and for the sole benefit of the Principal.

Any registration, execution, or transaction carried out in the name of the Nominee shall be for administrative purposes only and for the account of the Principal, without conferring any legal or beneficial interest on the Nominee."

E. Absence de gage possible sur les actifs

Proposition :

"The Nominee hereby undertakes and agrees that it shall not, under any circumstances, pledge, assign, transfer, encumber, or otherwise create or permit to exist any security interest, lien, or collateral arrangement over the assets held under the insurance policy for the benefit of the Principal, including but not limited to any arrangement intended to secure or cover the payment of the Principal's uncalled capital commitments or other obligations.

This restriction is in accordance with the depositary agreement executed between the Bank, the Insurer, and the Commissariat aux Assurances (CAA), and reflects the principles set forth in CAA Circular Letter 16/9, which governs the treatment of assets representing technical provisions."

Suggestion de note de bas de page, dans les juridictions où l'ajout serait nécessaire :

"Also, acting in its capacity of depositary Bank, the Bank shall ensure continued compliance with (1) the Deposit Agreement and (2) the related legal provisions and, in particular, the following:

- article 117 of the Insurance Sector Act 2015 (Article 55 of the CAA Regulation 15/3): rule of crediting the underlying assets to the unique corresponding IDF;*
- article 118 of the Insurance Sector Act 2015 (Article 56 of the CAA Regulation 15/3) – articles 2 & 3 of the Deposit Agreement: rule of segregation applicable to the underlying assets of the IDF;*
- article 37-1 of the law of 5 April 1993 on the financial sector as amended – article 6 of the Deposit Agreement: rule of booking the underlying assets of the IDF off balance.*

In case of discrepancy between this agreement and the Deposit Agreement, the provisions of the Deposit Agreement shall prevail.

Deposit aspects – main legal provisions

- article 117 of the Insurance Sector Act 2015 (Article 55 of the CAA Regulation 15/3): the shares or the underlying assets covering the technical provisions of the Principal shall be deposited with a credit institution having its registered office within the EEA or approved by the CAA. Therefore, any asset resulting from the Investments made under this agreement shall be credited to the IDF linked to the insurance policy.*
- article 118 of the Insurance Sector Act 2015 (Article 56 of the CAA Regulation 15/3) – articles 2 & 3 of the Deposit Agreement: the underlying assets of the Principal constitute a pool of assets separated from its other assets and shall preferentially secure the payment of insurance claims. As such, the said underlying assets (i) must be clearly segregated from all other assets and liabilities of the Principal, (ii) cannot be subject to an offset with such other liabilities and (iii) cannot be subject to any preferential rights or guarantees such as a pledge or assignment. This segregation must be ensured at all times.*
- article 37-1 of the law of 5 April 1993 on the financial sector as amended – article 6 of the Deposit Agreement: the underlying assets of the IDF shall be booked to separate accounts, off balance sheet, i.e. not be booked as part of the insolvency/Bankruptcy estate of the Nominee, and may not be claimed by other creditors of the Nominee."*

F. Ségrégation des actifs

Proposition :

"In accordance with the law and the dispositions of the Deposit Agreement, the Nominee further confirms that it shall not take any action that would compromise the segregation and availability of these assets."

G. Procédure de changement de banque dépositaire

Proposition :

"In the event that the Principal appoints a new depositary Bank as Nominee, the current Nominee shall fully cooperate to ensure the timely, orderly, and complete transfer of all the assets, records, documents, and related information at no additional cost to the Principal."

The current Nominee shall provide all necessary assistance, execute any documents, and take all actions reasonably requested by the Insurer to effect the transfer, including the re-registration of assets in the name of the new Nominee."

The transfer process shall be completed as soon as reasonably practicable, taking into account any applicable regulatory, contractual, or operational restrictions, and the current Nominee shall remain liable for the proper handling of the assets until the transfer is fully completed."

H. Transfert de toutes communications, notices, documents et informations à l'assureur

Proposition :

"The Principal acknowledges and agrees that the Nominee's sole role, obligation and responsibility under this Agreement shall include without limitation:

(A) subscribing and holding the Investments as representative (agent) on behalf and for the account of the Principal;

(B) dealing with all administrative matters relating to the Investments in accordance with the Principal's instructions (subject to the provisions of this Agreement);

(C) disclosing to the Principal any information issued by the investee company or its administrative, registrar and transfer agent of the Investments and provide all necessary information a first demand of the Principal; and

(D) providing all necessary pricing information and annual financial statements of the investee company."

I. Reconnaissance par la banque que les droits de vote s'exercent conformément aux instructions de l'assureur

Proposition :

"The Nominee acknowledges and agrees that all voting rights, consents, approvals, and other decision-making powers attached to the assets shall be exercised strictly in accordance with the written instructions of the Principal. The Nominee shall not, under any circumstances, exercise any voting rights, attend meetings, or make decisions relating to the assets on its own initiative. The Nominee shall promptly notify the Principal of any upcoming meetings, votes, or corporate actions and provide all relevant information necessary for the Insurer to exercise its rights."

As regards any circumstance or scenario giving rise to a vote in relation to an Investment, the Nominee shall follow the voting instructions, if any, received in writing in due time from the Principal."

2. Principes bancaires**A. Engagements et appels de fonds**

Proposition :

"The Principal undertakes and agrees to transfer, upon first request of the Nominee, to the Nominee any amounts necessary to fund any Commitment. Investments registered in the Nominee's name are

carried out for the Principal's account and at the Principal's exclusive risk, cost and benefit. Consequently, the Principal confirms and agrees that the Nominee will not assume any responsibility whatsoever, with regard to, and may not be held liable for, the funding of any Commitment. It is the sole responsibility of the Principal to finance the Commitment and to provide sufficient funds to meet Drawdowns (the "Principal's Obligations").

For so long as any Investment is outstanding, the Principal shall manage the level of liquidity of the overall assets on the Principal's Bank account held in the books of the Nominee on a discretionary basis but in such a way that it will be able to meet Drawdowns at any moment. In case of liquidity shortfall, the Principal undertakes to provide the missing funds be it (i) by selling part of the overall assets held on the accounts with the Nominee or (ii) by way of a cash contribution, as the case may be."

B. Absence de gestion de l'investissement ou de rôle de conseiller pour le Nominee (dans le cas où la banque agit uniquement en tant que dépositaire, et non en tant que gestionnaire)

Proposition :

"The Principal hereby acknowledges and confirms that the Nominee does not, and shall not, provide any form of investment management, investment advice, or discretionary portfolio services in relation to the assets deposited under the Nominee agreement. The Nominee's role is strictly administrative and custodial in nature, limited to holding and processing assets in accordance with the instructions received from the Principal.

The Principal further agrees that all investment decisions, including asset selection, allocation, and strategy, are made independently by the Principal or its appointed advisors, and that the Nominee shall bear no responsibility or liability for the performance, suitability, or outcome of such decisions."

C. Absence de responsabilité du Nominee sur la valeur des actifs

Proposition :

"The Nominee hereby represents and warrants that any valuation information it may provide in relation to the assets held under the Nominee deposit is furnished strictly on a best effort basis and for informational purposes only. Such valuations are based solely on data and reports received from the designated corporate service provider or other third-party sources responsible for the valuation of the underlying assets.

The Nominee does not assume any responsibility or liability for the accuracy, completeness, timeliness, or reliability of such valuation data, nor does it provide any assurance or guarantee regarding the fair value or market performance of the assets."

Suggestion additionnelle :

"The Principal acknowledges that all investment decisions and reporting obligations remain its sole responsibility and that the Nominee's role does not include independent verification or professional valuation services."

D. Absence de responsabilité du Nominee sur les déclarations fiscales

Proposition optionnelle suivant la situation :

"The Nominee hereby represents and warrants that it shall not be responsible for any tax filing obligations, declarations, or liabilities arising in connection with the assets held under the insurance policy or Nominee arrangement. The Principal acknowledges and accepts that all such tax-related responsibilities, including, but not limited to, income tax, capital gains tax, withholding tax, and any reporting obligations to domestic or foreign tax authorities shall be borne exclusively by the Principal. The Principal further undertakes to comply with all applicable tax laws and regulations in the relevant jurisdictions and to ensure timely and accurate fulfilment of any tax-related duties associated with the ownership, transfer, or income derived from the assets."

E. Absence de responsabilité du Nominee sur les performances financières des actifs et les rendements

Proposition :

“The Nominee hereby expressly disclaims any responsibility or liability for the performance, return, or market value of the assets held under the Nominee deposit. The Nominee does not, and shall not, provide any form of guarantee, assurance, or representation, whether express or implied, regarding the financial results, investment outcomes, or future value of such assets.

The Principal acknowledges that all investment risks, including market fluctuations, credit risk, liquidity risk, and any potential loss of value, are borne exclusively by the Principal.”

Suggestion additionnelle :

“The Nominee’s role is strictly administrative and depositary role, and does not include any advisory obligations in relation to asset performance.”

II. GLOSSAIRE

Afin de s'assurer d'une compréhension uniforme des termes et expressions employées dans les grands principes et leurs propositions de formulation, le glossaire suivant est suggéré.

Assets held in Nominee position: Assets registered in the name of the Financial intermediary acting as Nominee on behalf and for the sole benefit of the Principal who is the Legal and Beneficial owner / Investor.

Commitment: In Private Equity, a capital commitment refers to the total amount of money that an investor agrees to contribute to a Private Equity fund over time, which is called upon by the fund manager as needed.

Deposit Agreement: Under Luxembourg life insurance regulation, a depositary agreement (or deposit agreement) is defined as a mandatory, binding tripartite contract concluded between an insurance undertaking, an approved Custodian Bank, and the regulatory authority—the Commissariat aux Assurances (CAA). Its legal purpose is to establish the conditions for the safekeeping, segregation, and monitoring of the covering assets that back the Insurer's technical provisions, serving as the foundation for Luxembourg's asset protection mechanism known as the "Triangle of Security."

Depositary Bank or Custodian Bank: Under Luxembourg insurance regulation, a Depositary Bank is a credit institution that has entered into a depositary agreement with an Insurer and the CAA (the Commissariat Aux Assurances) and who is appointed to safeguard assets under a life insurance contract. Unlike a pure "Custodian," the Luxembourg Depositary Bank has a dual mission: the safekeeping of assets and a broader regulatory oversight role to protect the policyholders in case of Bankruptcy of the Insurer by requesting the freezing of the assets upon injunction of the CAA.

Nominee: Financial intermediary holding a power of representation for investing on behalf of and holding the assets for the exclusive risk and benefit of the Principal who is the Legal and Beneficial owner / Investor.

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