



Conyers Dill & Pearman

Securitization in the Cayman Islands

Foreword

This memorandum has been prepared for the assistance of those who are seeking information on securitization or structured finance transactions in the Cayman Islands.

It deals in broad terms with the establishment and operation of special purpose vehicles. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in the appropriate jurisdiction on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of an offshore company as part of a securitization transaction, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

This memorandum has been prepared on the basis of the law and practice as at the date referred to below.

Conyers Dill & Pearman

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1. INTRODUCTION

Modern company, trust, banking, insurance and other related laws have made the Cayman Islands (“Cayman”) a leading offshore financial centre. The attitude of the Cayman government towards, and open communication with, the private sector encourages the promotion and maintenance of offshore business. Cayman enjoys sophisticated telecommunications systems, an abundance of professional service providers, as well as economic and political stability. These factors combine to make Cayman one of the jurisdictions of choice for offshore securitization transactions.

2. SECURITIZATION TRANSACTIONS GENERALLY

Securitization is the process of transforming an asset into a security which can be sold to investors in the capital markets. Securitization transactions are a fast expanding facility used by businesses all over the world. They provide the opportunity to employ innovative mechanisms for financings of all kinds. If there is an asset – securities, mortgages, receivables, royalties, rentals, or, indeed, just a “thing” – that produces income, then it can be securitized.

In a basic securitization transaction, a special purpose vehicle (an “SPV”) is incorporated and is often owned by a purpose or charitable trust. The SPV then purchases an asset, which usually has some form of regular cash flow, and issues loan notes or preference shares to investors in the capital markets to finance the purchase. The repayment of principal and interest on the notes is then secured by the purchased asset and the accompanying cash flow.

3. OFF BALANCE SHEET TRANSACTIONS

3.1 “Orphan” Special Purpose Vehicles

Although many securitization transactions involve an SPV that is directly owned by a parent, often a transaction will require an “orphan” SPV, meaning that it is not part of the originator’s corporate group. By selling the asset to the orphan SPV, the asset is

removed from the originator's balance sheet. When an orphan is required, the SPV is incorporated with all the shares issued to a trustee (also offshore) pursuant to a charitable or purpose trust. The SPV then issues securities such as notes to raise funds to purchase the asset pool from the originator. The asset pool is then "ring fenced" by the grant of a security interest over the asset pool in favour of the indenture trustee. The income flow from the asset pool is used to pay the transaction fees and costs and interest to the noteholders.

3.2 The Trust

As noted above, the shares of the SPV are usually issued to a trustee pursuant to either a charitable or purpose trust. A purpose trust (called a STAR trust in Cayman) is a trust to fulfil purposes rather than one for beneficiaries, while a charitable trust has charities as the beneficiaries.

The main advantages of the purpose trust are threefold:

The purposes of the trust and therefore the duties of the trustees can be clearly linked to the contemplated transactions, being to subscribe for shares of the SPV, retain those shares and support the activities of the SPV in the transactions. The duties of the trustees of a charitable trust are to maximise the benefits for the charity or charitable purposes and, depending on circumstances, a conflict of interest may arise.

A charitable trust that is created primarily to facilitate a particular structure or transaction and where the benefits to the charity are not maximised may be exposed to a "substance over form" argument that the trustees are really acting in the interests and for the benefit of those who benefit from the structure.

Most offshore centres that follow English common law principles, grant jurisdiction to the Attorney General (or some similar public official) to enforce charitable trusts that are not being properly administered for the benefit of the charity. Whilst it is not known of any instance where the Attorney General has sought to enforce a charitable

trust that is being used in a commercial structure, the risk cannot be entirely discounted.

The advantage of the charitable trust over the purpose trust is mainly one of nexus. It could be argued in some circumstances that a trust appearing to be for a certain purpose or purposes is in fact a trust for the benefit of an ascertainable person. This might give rise to a tax liability in the home jurisdiction of such a person. There is English case law authority to the effect that where the benefit to a person is so indirect or intangible or is otherwise so framed so as not to give such person any locus standi to apply to the Court to enforce the trust, the trust would be considered as a purpose trust. If the benefit is not so indirect the trust may conversely not be considered a purpose trust. Of course, the taxation rules in the home jurisdiction may apply different tests to determine whether a taxable benefit arises and those rules would need to be considered appropriately. A properly structured charitable trust from which distributions are made from a realistically set level of dividend paid by the SPV may therefore be preferable as the charities would be the person deriving a benefit.

4. OFFSHORE SPECIAL PURPOSE VEHICLES

For certain securitization transactions there may be benefits if the SPV is domiciled offshore. Cayman is a particularly well suited jurisdiction for the implementation of securitization transactions.

Cayman is a hub of the securitization industry. For more than fifteen years, Cayman has used its leading edge legislative regime, secure political and economic backdrop, and well-earned reputation for innovation in the offshore industry to attract securitization business.

The following summarizes some of the more salient issues when considering a Cayman Islands securitization:

4.1 Incorporation of the SPV

- Generally incorporated with limited liability.
- No governmental approval is required for the incorporation of the SPV, nor is there any requirement to publicise an intention to incorporate.
- Generally incorporated by delivery of two signed copies of the memorandum of association and articles of association (if any) to the Registrar of Companies.
- Can generally be completed within 24 hours

4.2 Objects

- Can have unrestricted powers and is capable of exercising all the functions of a natural person, irrespective of corporate benefit.
- In order to assuage any concerns that the SPV may carry on other types of business, the SPV usually has restricted objects that limit its activities to those necessary to fulfil its obligations under the securitization transaction.

4.3 Directors

- The minimum number of directors is one.
- There are no residency requirements for directors. The directors of the SPV are responsible for the conduct of its day-to-day business and management.

4.4 Shareholders

An SPV must have at least one shareholder. For the standard securitization orphan SPV the shareholder will be the trustee of a Cayman STAR trust.

4.5 Share Capital

- There is no minimum authorised or issued share capital for an SPV.
- Bearer shares, fractional shares and shares of no par value may be issued. Shares may be issued fully, partly or nil paid.

4.6 Issue and Transfer of Shares or Notes

An SPV can transfer its shares if the transfer is expressly or impliedly permitted by the company's articles of association. Bearer shares may be transferred by delivery.

4.7 Dividends

Dividends may be paid from profits. Cayman law prohibits companies from paying a distribution or dividend to shareholders out of share premium account unless, immediately following the date on which the proposed payment is to be made, the company is able to pay its debts as they fall due in the ordinary course of business.

4.8 Public Offers

Cayman law does not require the issue or publication of a prospectus where an exempted company offers shares to the public.

4.9 Auditors

Generally, there is no requirement that an SPV appoint an auditor or file financial statements with the Registrar of Companies or any other governmental authority.

4.10 Books of Account and Records of the Company

An SPV must keep proper records of account with respect to all transactions as necessary to give a true and fair view of the state of the company's affairs and explanation of its transactions.

4.11 Annual Fee

An SPV is required to pay a fee in Cayman at the time of its incorporation and each year thereafter. The fee is provided for on a sliding scale. Most SPVs used in

securitization transactions issue minimal capital to the trustee pursuant to the purpose trust and raise other funds by the issuance of notes resulting in the payment of the minimum government fee.

4.12 Exchange Control

There are no exchange controls in Cayman.

4.13 Winding up

Consideration should be given at the outset as to the expected life of the SPV and whether it will need to be wound-up at the end of the transaction. For instance, it may be useful (but not necessary) to have the accounts audited annually and ensure the SPV retains enough funds at the end of the transaction to pay for liquidation and winding-up.

4.14 Taxes

- No taxes are imposed in Cayman upon an SPV or its shareholders. An SPV is entitled to receive an undertaking from the Cayman government such that no law enacted in Cayman imposing any tax to be levied on profits, gains or appreciation or which is in the nature of estate duty or inheritance tax shall apply to an exempted company, or its shares or by withholding for a period of up to twenty years, which is usually renewable for a further ten years upon expiry.
- Stamp duty applies in Cayman where original documents are brought to the jurisdiction although the liability of exempted companies is capped in most cases.

5. REGISTRATION OF SECURITY INTERESTS

A key aspect to the securitization transaction is that the asset is protected by the grant of security in favour of the indenture trustee. In Cayman there is no general system of registration of mortgages, charges, or other security interests (other than in respect of

some specific asset classes). A security interest cannot be filed with the Registrar of Companies nor is there any facility to obtain statutory priority.

Cayman companies are required to maintain their own register of mortgages and charges (which is available only to members and creditors), but failure to record a security interest therein does not affect the validity or priority of the security interest. Registration in the company's own register does not provide constructive notice of the existence of the charge to third parties. Priority of competing charges under Cayman law depends upon the application of conflicts of laws principles which, in essence, look to the law governing the security interest, the law constituting the asset over which the security interest is granted and/or the law of the place in which the asset is situated, depending on the nature of the asset.

6. "TRUE SALE" OR "NON-CONSOLIDATION"

Where the transaction is intended to be off balance sheet it is vital that the SPV be regarded as separate from the originator and will not be consolidated for on-shore accounting and regulatory purposes. In order to obtain the off balance sheet accounting treatment the sale of the underlying asset pool by the originator to the SPV must be a true bona fide sale. The transaction must not be characterised as a mortgage, which in substance involves the originator raising financing by charging the underlying asset pool. Nor should the SPV be regarded as a subsidiary of the originator.

Accordingly, as mentioned above, the SPV is incorporated with all of the shares issued to a trustee pursuant to a purpose or a charitable trust.

The relevant accounting rules differ depending on the jurisdiction of the originator. While this is primarily an accounting question, factors which may be taken into account include the means by which the originator withdraws profit from the SPV, the extent of influence wielded by the originator over the SPV, the identity of directors of the SPV, the name of the SPV, the extent to which the originator has underwritten the SPV's liability to the investors or other third parties and the ability

of the originator to redeem the underlying asset pool at the end of the transaction. Accordingly, most SPV's are organised with unrelated names and directors and officers who are all members of an offshore service provider such as the offshore law firm. For instance, in certain cases, particularly where the entire transaction is the subject of pre-determined contractual obligations, Conyers Dill & Pearman and its related service companies will provide directors resident in Cayman.

7. BANKRUPTCY REMOTENESS

When establishing the structure for the SPV, it is important to ensure that the SPV is bankruptcy remote. Although the SPV may be established with very broad objects and powers while the transactions are being negotiated, prior to the transactions being entered into the objects and powers of the SPV should be limited to allow the SPV to only enter into the specific transactions related to the securitization. This is also necessary if the securities the SPV is issuing are to be rated by one of the rating agencies. The rating agencies will want to ensure the SPV is not able to carry on any business other than the securitization.

It is also important that the trustee pursuant to the purpose or charitable trust not be allowed to sell the shares, amalgamate the SPV, continue the SPV into another jurisdiction or make any other structural changes to the SPV such as amending its constitutional documents. If a purpose trust is used these requirements can be set out in the purpose trust. If a charitable trust is used the trustee may agree pursuant to a separate agreement that it will not change the structure of the SPV. Again, this is one of the advantages of using a purpose trust whereby everything can be set out in one document.

Finally, it is important to ensure that the SPV will not be petitioned into winding up (bankruptcy). The trustee of the purpose or charitable trust will agree not to petition the SPV into bankruptcy. Further, the noteholders, indenture trustee and other service providers such as a collateral manager will agree in the indenture and other transaction documents that they will not petition the SPV into bankruptcy. Also, the transaction documents will usually contain a provision for the extinguishment or

diminishment of obligations if at any point the liabilities are greater than the assets so that the liabilities will be extinguished or diminished to be less than the assets. This will ensure that the SPV is at all times solvent and thus could not be petitioned into bankruptcy.

8. CREDIT RATINGS

The rating agencies apply selected criteria to assign credit ratings to companies carrying out structured finance transactions. A blanket statement of what will be considered by the rating agencies is not possible. Standard and Poor's emphasizes that there are many variables taken into consideration in evaluating the risk involved in a securitization transaction, too many to detail here. However, as a rule, the rating agencies take particular notice of the following factors in assigning a credit rating to international securitization transactions:

- whether the securitized assets can be sufficiently separated from the transferor so that an insolvency of the transferor will not affect the creditworthiness of the assets;
- the overall creditworthiness of the asset pool being securitized; and
- whether any legal issues may affect the cash flow of the transaction.

Standard and Poor's has noted that the insolvency and corporate law of Cayman differs in some significant respects that are relevant to their analysis of SPV's. Accordingly, Standard and Poor's has introduced legal criteria that specifically address SPV's incorporated in Cayman. Cayman has no formal corporate rehabilitation procedure that would give the company the benefit of a moratorium on the payment of its secured debts during the restructuring period. Accordingly, to be deemed an insolvency remote SPV, the entity must satisfy the rating agency that it has taken the following steps to ensure that the assets are sufficiently protected against both voluntary and involuntary insolvency risks:

- placing contractual restrictions on the activities of the SPV;
- placing contractual debt limitations;
- ensuring that there are contractual limitations on reorganizations or changes of ownership;

- imposing contractual separateness covenants;
- established fixed security interests over the asset pool; and
- restricting the power of the shareholders to wind up the SPV voluntarily and to make amendments to the memorandum and articles of association of the SPV.

These concerns can be addressed in the transaction documents. If the transaction documents are comprehensive and adequately address these concerns, a Cayman Island SPV has the opportunity to achieve a high credit rating, so long as the underlying asset pool is otherwise creditworthy.

9. CONCLUSION

The basic offshore structure, while adding the benefit of no offshore taxation, is not complicated. However, it is very important to ensure that the SPV is properly organised to ensure that the treatment of the underlying asset pool is off balance sheet and there will be no consolidation with the originator, that the SPV is bankruptcy remote and that the SPV will only and can only enter into the specific securitization transactions.

This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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