

Cayman considerations in financing transactions

Conyers' Matthew Stocker highlights the strong position of the Cayman Islands

The benefits of the Cayman Islands as an offshore jurisdiction through which to conduct financing transactions, and of the flexibility and ease of use of Cayman vehicles as participants in such financings, are well documented: the Cayman Islands' tax-neutral status; its political stability; the developed, English-based legal system; supporting infrastructure and high-quality service providers; the flexible and commercial nature of its legislation; and its adherence to international standards of compliance.

Cayman vehicles – particularly exempted companies and exempted limited partnerships (the latter especially in the private equity fund finance space) – feature prominently across the spectrum of financing transactions. We regularly act on behalf of lenders and obligors on all types of financings, including acquisition finance, structured finance, aircraft and vessel financings, and fund financing matters.

FINANCING AND SECURITY DOCUMENTATION

In a typical financing transaction, a Cayman borrower will enter into certain documentation providing for the financing – usually a loan facility agreement and security documentation.

The security package will frequently include a mortgage or charge over the relevant underlying assets, charges over bank accounts and security assignments of contractual rights. Further, the lender may have the benefit of a guarantee from a creditworthy party.

Additionally, the lender will often take an equitable mortgage over the shares of the Cayman corporate borrower/other Cayman obligor. As part of such share security, the lender will also receive and retain certain ancillary 'deliverables', designed to facilitate and allow the lender to take control of, and potentially sell, the obligor and, thereby, the underlying asset on an enforcement – typically an original share certificate with respect to the secured shares, executed, undated blank share transfer forms, executed but undated director resignation letters and accompanying letters of authority to date the same on an enforcement, an irrevocable proxy in favour of the lender to vote the shares in the obligor on an enforcement and an undertaking from the obligor (and often also from its registered office provider), *inter alia*, to co-operate with and take instructions directly from the lender on an enforcement. The company's articles of association may also be amended to include certain share security-related provisions. As a further protection for the lender in this context, it is also possible in Cayman to have a 'stop notice' recorded with the Cayman courts and served upon the registered office of the obligor,

which will have the effect of preventing the registered office from registering a transfer of the relevant shares until 14 days after sending notice thereof to the lender.

All of the aforementioned principal transaction documents – save for the share mortgage, which will commonly be Cayman law-governed – will typically be written under laws other than Cayman law, for example, English/New York/Delaware/Hong Kong.

Almost invariably, Cayman counsel will render

serving notice of the assignment of capital call rights on limited partners may arise.

ENFORCEMENT/CREDITOR FRIENDLY

The Cayman courts will commonly recognise and enforce foreign law contractual and security arrangements, provided such matters are validly created under such other laws. They will also customarily recognise self-help remedies, which will allow a lender to take possession of the obligor or the underlying asset via the security

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a Cayman law corporate and enforceability opinion addressed to the lender/other interested parties as to the obligor and the transaction documents to which it is a party.

Different types of transactions clearly have their own particular features. Aircraft financings, for example, have their own typical suite of documents, vessel financings may have statutory mortgages and deeds of covenant, while a key element of fund financings is the security assignment of capital call rights.

SECURITY FILINGS/PERFECTION

Save in relation to Cayman-registered aircraft and vessels, Cayman real estate and certain other specific asset classes, there is no public security register in Cayman and, accordingly, in general terms, no Cayman concept of 'perfection' by security filing.

As an internal administrative matter, the Cayman obligor is required to maintain at its registered office in Cayman a register containing details of all mortgages and charges specifically affecting its property. This is not a perfection matter and does not go to the effectiveness of the security created nor to priority. Further, in the context of share security, the lender may also require that the obligor's register of members be annotated to record the details of the security over the obligor's shares.

Again, there are certain additional considerations that may occur in specific sectors. For example, in aircraft financings, there is the added feature of Cape Town Convention filings at the International Registry; in the context of fund financing transactions, the issue of perfection by

granted in its favour without the requirement for a Cayman court order.

In the event of the insolvency of the obligor, as a matter of Cayman law, the lender's position and priority as a secured creditor would in general terms be preserved.

CSX

It is possible (and common in the collateralised loan obligation market and increasingly for aircraft asset-backed securitisations transactions) for debt securities to be listed on the Cayman Islands Stock Exchange for various reasons, for example, to take advantage of the quoted Eurobond exemption from withholding.

CONCLUSION

Parties to financing transactions value consistency of application of laws and procedures, a safe and stable political environment with no unnecessary jurisdictional risks, a lack of additional tax consequences, certainty as to how security and contractual rights may be enforced and high-quality professional support – all of which Cayman provides.

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