

Lending to Cayman Islands Entities

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Cayman's modern legal framework and tax neutral regime are attractive to professionals structuring transactions for their clients. As a consequence, lending institutions are frequently requested to put in place credit arrangements that involve Cayman Islands entities.

This client briefing is intended to highlight the issues that may be relevant when lending to a Cayman Islands entity.

This client briefing is intended to provide a general summary of the position in law as at the date shown above, and is not to be taken as specific legal advice applicable to particular issues or circumstances. If such advice is required, please contact your usual Ogier contact or one of our partners listed here.

Forms of Cayman Islands entities

Exempted Companies

The Companies Act (Revised) (**Companies Act**) is the primary law relating to Cayman Islands companies and exempted companies are the most common Cayman corporate vehicle.

An exempted company (as opposed to an ordinary company) is required to carry out its objects mainly outside the Cayman Islands, and is only permitted to trade in the Cayman Islands in furtherance of its business outside Cayman (but may conclude contracts in the Cayman Islands and exercise all its powers in the Cayman Islands necessary for carrying on its business outside the Cayman Islands).

An exempted company may also be registered as a segregated portfolio company under the Companies Act. A segregated portfolio company is a single corporate entity which may create one or more segregated portfolios. The assets of a segregated portfolio are required to be segregated

from those of any other portfolio and from the company's general assets (i.e. assets which are not comprised in any particular segregated portfolio). Liabilities of a segregated portfolio are also kept separate, so that assets of one portfolio cannot be used to satisfy the liabilities of another portfolio.

Cayman companies are required to maintain 4 registers under the Companies Act:

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Exempted Limited Partnerships

The Exempted Limited Partnership Act (Revised) (**ELP Act**) is the law that governs Cayman Islands exempted limited partnerships.

Like an exempted company, a Cayman exempted limited partnership may not undertake business in the Cayman Islands other than as may be necessary for the carrying on of its business exterior to the Cayman Islands.

An exempted limited partnership is not a separate legal person - an exempted limited partnership acts through its general partner. Assets of the exempted limited partnership are held by the general partner on trust as partnership property.

An exempted limited partnership has to maintain two registers:

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Trusts

The Trusts Act (Revised) sets out the principles of trusts law that have been established in the Cayman Islands.

A Cayman trust is not a separate legal entity. The trust acts through its trustee. Legal title to the trust assets is vested in the trustee subject to the obligations imposed by the trust and the trustee is responsible for the administration of the trust. The trustee holds the assets of the trust for the benefit of the beneficiaries.

Limited Liability Companies

The Limited Liability Companies Act (Revised) (**LLC Act**) establishes the fundamentals of the most recently introduced corporate vehicle, a limited liability company.

A Cayman Islands limited liability company is broadly based on the Delaware limited liability company with certain modifications. It is a corporate vehicle with separate legal personality like an exempted company but with certain features and flexibility that are similar to those of an exempted limited partnership.

The internal governance and management arrangements of a limited liability company may be determined by the members amongst themselves (in the LLC agreement), subject to certain statutory provisions contained in the LLC Act.

Members of the limited liability company have capital accounts and make capital contributions rather than subscribing for shares. Profits and losses are allocated among members in the manner set out in the LLC agreement in a manner consistent with the way a Delaware limited liability company or a Cayman Islands exempted limited partnership allocates profits and losses.

A limited liability company has to maintain 5 registers:

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Registration of security interests

Aside from particular assets, such as Cayman real estate, Cayman personal chattels, Cayman registered ships and aircraft, there is no central registration system or public register of liens or security interests in the Cayman Islands.

However, Cayman companies (including limited liability companies) are required under the Companies Act or the LLC Act to maintain an internal register of mortgages and charges at its registered office. This register is not a public document but it is open to inspection by members and creditors of the company. A potential new lender will not, however, have this right, but will usually request a copy of the register as a pre-condition of lending.

Failure to have a security interest noted on the register does not render it void or invalid against the company or a liquidator of the company nor does it have any impact on the priority of the security.

The only consequence would be that the company and its directors would be liable to a fine under the Companies Act or the LLC Act.

Stamp duty

Although the Cayman Islands is tax neutral, it does have a stamp duty regime. Stamp duty is payable on any documents that are executed in the Cayman Islands or that are brought into the Cayman Islands after execution (for enforcement purposes or otherwise).

Generally, the stamp duty payable on any such documents will be nominal only (although the stamp duty can potentially be onerous if security includes any Cayman located real estate or if security is granted by locally resident entities (i.e. non-exempted entities)).

Corporate benefit

A director of a Cayman company has a duty to act in the best interest of the company. As a result if a Cayman company proposes to enter into a guarantee or third party security, the corporate benefit to the company ought to be considered.

Guarantees or third party security may be construed as not being in the best interests of a Cayman company (and not for the Cayman company's corporate benefit) if the Cayman company receives no commercial benefit from the underlying financing arrangements.

Where a Cayman company is guaranteeing or providing security in support of obligations of a subsidiary (downstream guarantee/security) there is a presumption that the guarantee on security will benefit the company, since any benefits accruing to the subsidiary will indirectly benefit the parent.

Where the corporate benefit is less clear, such as in circumstances where the guarantee or security is being provided to secure obligations of a parent of the Cayman company (upstream guarantee/security) or a group affiliate (cross-stream guarantee/security), it is recommended that the Cayman company obtain shareholder approval in order to prevent shareholders subsequently challenging the transaction on the basis of a lack of corporate benefit. However, this may not eliminate the risk of challenge by creditors whose rights are prejudiced, or in the event that the Cayman company is wound up.

Enforcement

Any default of an obligation owed to a lender by a Cayman borrower or guarantor, and the remedies available to the lender arising as a result of such default would be a contractual matter pursuant to the contract under which the obligation arises. Rights under such a contract may be enforced by action in the Cayman Islands courts or by enforcement in the Cayman Islands courts of a judgment of a foreign court or a foreign arbitral award, in each case if the obligor is

incorporated or registered in the Cayman Islands or has otherwise submitted to the jurisdiction of the Cayman Islands courts.

It is very common for loan documentation entered into by Cayman borrowers or guarantors to be governed by foreign law (typically New York law or English law). Provided that the choice of the foreign governing law was made in good faith (i.e. not to avoid the mandatory application of the law of another jurisdiction and is not illegal under any other applicable law) the Cayman courts will honour the choice of law, and apply the chosen law in any proceedings before it. Note that the relevant provisions of the foreign law would have to be proved as matters of fact (usually by expert evidence). For this reason, it is normally preferable to bring proceedings in the relevant foreign court, and then seek to enforce the foreign judgment in the Cayman Islands.

The courts of the Cayman Islands will recognize and enforce a foreign judgment of a court of competent jurisdiction, based upon the principle that the foreign judgment imposes upon the judgment debtor an obligation to pay the sum for which judgment has been given. However, the judgment must be final, for a liquidated sum and not obtained in a manner or of a kind the enforcement of which is contrary to Cayman Islands public policy. Note that whether the foreign court had jurisdiction to give the judgment is determined in accordance with Cayman Islands principles of jurisdiction. However, this will not be an issue where the transaction documents contain an express submission to the jurisdiction of the court that gave the judgment, or if the judgment debtor voluntarily appeared (otherwise than to contest jurisdiction) in the proceedings in which that judgment was given.

The typical procedure for enforcement of a foreign judgment is by commencing an action in the courts of the Cayman Islands, with the foreign judgment being the basis for the cause of action, usually founding the basis for a debt claim, and then applying for summary judgment in that action. The Cayman Islands court will not itself inquire into the issues underlying the foreign judgment as the foreign judgment creates a debt enforceable in the Cayman Islands in the circumstances referred to above.

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concerning individual situations.

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