

BRIEFING NOTE

2021

Guide: Creation of security by a Cayman Islands exempted company

Cayman Islands exempted companies (“**Cayman Companies**” and each a “**Cayman Company**”) are widely utilized in structuring cross-border finance transactions. One of the key reasons for this is that the Cayman Islands provides a flexible and well-tested regime for secured financing transactions that is attractive to borrowers and lenders alike. The process for creating security in the Cayman Islands is also straightforward and will not typically impact the timeframe of a proposed transaction.

In this brief guide, we address certain of the key Cayman Islands law points pertaining to the creation and protection of security by a Cayman Company over its assets. For details with respect to the creation of security over Cayman Islands shares, please refer to our separate guide entitled “Granting and protecting security over shares in a Cayman Islands exempted company”.

This guide does not consider the additional steps that may be necessary for the purposes of creating and protecting security over specific asset classes, such as Cayman Islands registered aircraft and ships, or land located in the Cayman Islands.

1. Creation of security

The Companies Act (as Revised) of the Cayman Islands (the “**Act**”) does not contain any provisions with respect to the creation of security over the assets of a Cayman Company. Therefore, the security should adhere to the following common law principles:

- i. it must be in writing;
- ii. the security document must be signed by, or with the authority of, the Cayman Company; and
- iii. the security document must clearly indicate the intention to create security over the relevant assets and the amount secured or how that amount is to be calculated.

Cayman Islands law recognizes various forms of security over assets, including legal mortgages, equitable mortgages, charges and assignments by way of security. The type of security interest that is created will depend on the type of asset to be secured.

2. Execution formalities and regulatory approvals

Cayman Islands law does not prescribe a particular mode of execution with respect to security over the assets of a Cayman Company and it is not necessary for such security to be certified, notarized or apostilled to make the security valid or enforceable from a Cayman Islands law perspective.



It is important to review the memorandum of association and articles of association of the Cayman Company to ensure compliance with any applicable signing formalities.

No regulatory approvals are necessary to create valid and enforceable security as a matter of Cayman Islands law in respect of security that is created over a Cayman Company's assets.

3. **Stamp duty and taxes**

No stamp duty or taxes are payable with respect to the creation of security over the assets of a Cayman Company or upon any transfer thereof in an enforcement as a matter of Cayman Islands law so long as:

- i. the security document and any ancillary documents thereunder are not executed or delivered in, brought into, or produced before a court of, the Cayman Islands; and/or
- ii. the assets do not comprise land in the Cayman Islands, or shares in a subsidiary that has an interest in land in the Cayman Islands.

4. **Governing law**

Cayman Islands law permits security over the assets of a Cayman Company to be governed by Cayman Islands law or foreign law.

In cross-border finance transactions, it is relatively common for the governing law of a security document over the assets of a Cayman Company to be aligned with the governing law of the principal finance documents or the *lex situs* of the secured asset. One advantage of adopting a foreign governing law clause in a security document is that it may make available certain additional remedies (such as appropriation) which are not available under Cayman Islands law. Care should however be taken to ensure that there are no conflicts of law issues where a security document is governed by foreign law. English, Hong Kong and Singapore law are frequently adopted to govern security over the assets of a Cayman Company and no major conflicts of law issues are likely to arise.

Where the security document is governed by foreign law, the:

- i. security document should comply with the requirements of its governing law to be valid and binding on the Cayman Company; and
- ii. remedies available to a secured party are governed by the governing law and the terms of the security document.

5. **Security deliverables**

The Cayman Company will typically be required to deliver the following documents to the secured party under the terms of the relevant security document and/or the other finance documents:

- i. a certified copy of its register of mortgages and charges showing the security created over the secured assets (see further below); and
- ii. a copy of the board resolutions of its board of directors authorizing:
 - a. its entry into and execution of the security document; and
 - b. the updates to be made to its register of mortgages and charges.



6. Register of mortgages and charges

Pursuant to section 54 of the Act, a Cayman Company must record particulars of the security created over any of its assets in its register of mortgages and charges. The register of mortgages and charges must include:

- i. a short description of the property mortgaged or charged;
- ii. the amount of charge created; and
- iii. the names of the mortgagees or persons entitled to such charge.

There is no statutory timeframe within which the register needs to be updated. However, a well-advised secured party will request that the register is updated promptly so that third parties that inspect it are on notice of the security.

Any variations and releases of charge should also be reflected in the register of mortgages and charges.

A copy of the register of mortgages and charges (including a blank register if no prior security has been granted) must be kept at the registered office of the Cayman Company and is a private record that is not open to inspection by the public. However, any creditor or member of the Cayman Company may inspect the register at all reasonable times.

If a Cayman Company does not comply with the aforementioned provisions, every director or officer who authorizes or knowingly and willfully permits such non-compliance is liable to a penalty. This does not invalidate the validity, enforceability or the admissibility in evidence of the charge, however.

As there is no statutory regime for registering security interests under Cayman Islands law, the common law rules of priority continue to apply. In general terms, these rules specify that priority between competing security interests is determined by the dates on which the relevant security interests were created. It is important to note that inserting details of mortgages and charges in the register of mortgages and charges of a Cayman Company does not confer priority on a charge in respect of the relevant secured asset.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice, please contact:

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