



# Chambers Global Practice Guides

Definitive global law guides offering  
comparative analysis from top-ranked lawyers

# Project Finance 2021

Cayman Islands: Law & Practice  
Simon Firth and Finn O’Hegarty  
Maples Group

[practiceguides.chambers.com](https://practiceguides.chambers.com)

# CAYMAN ISLANDS

## Law and Practice

**Contributed by:**

*Simon Firth and Finn O’Hegarty  
Maples Group see p.14*



## CONTENTS

<b>1. Project Finance Panorama</b>	<b>p.3</b>	<b>5. Structuring and Documentation Considerations</b>	<b>p.9</b>
1.1 Sponsors and Lenders	p.3	5.1 Registering or Filing Financing of Project Agreements	p.9
1.2 Public-Private Partnership Transactions	p.3	5.2 Licence Requirements	p.9
1.3 Structuring the Deal	p.3	5.3 Agent and Trust Concepts	p.9
1.4 Active Industries and Sectors	p.5	5.4 Competing Security Interests	p.9
<b>2. Guarantees and Security</b>	<b>p.5</b>	5.5 Local Law Requirements	p.9
2.1 Assets Available as Collateral to Lenders	p.5	<b>6. Bankruptcy and Insolvency</b>	<b>p.10</b>
2.2 Charges or Interest over All Present and Future Assets of a Company	p.6	6.1 Company Reorganisation Procedures	p.10
2.3 Registering Collateral Security Interests	p.6	6.2 Impact of Insolvency Process	p.10
2.4 Granting a Valid Security Interest	p.6	6.3 Priority of Creditors	p.11
2.5 Restrictions on the Grant of Security or Guarantees	p.6	6.4 Risk Areas for Lenders	p.11
2.6 Absence of Other Liens	p.6	6.5 Entities Excluded from Bankruptcy Proceedings	p.12
2.7 Releasing Forms of Security	p.7	<b>7. Insurances</b>	<b>p.13</b>
<b>3. Enforcement</b>	<b>p.7</b>	7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies	p.13
3.1 Enforcement of Collateral by Secured Lender	p.7	7.2 Foreign Creditors	p.13
3.2 Foreign Law	p.7	<b>8. Tax</b>	<b>p.13</b>
3.3 Judgments of Foreign Courts	p.8	8.1 Withholding Tax	p.13
3.4 A Foreign Lender’s Ability to Enforce	p.8	8.2 Other Taxes, Duties, Charges	p.13
<b>4. Foreign Investment</b>	<b>p.8</b>	8.3 Limits to the Amount of Interest Charged	p.13
4.1 Restrictions on Foreign Lenders Granting Loans	p.8	<b>9. Applicable Law</b>	<b>p.13</b>
4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders	p.8	9.1 Project Agreements	p.13
4.3 Foreign Investment Regime	p.8	9.2 Financing Agreements	p.13
4.4 Restrictions on Payments Abroad or Repatriation of Capital	p.8	9.3 Domestic Laws	p.13
4.5 Offshore Foreign Currency Accounts	p.9		

## 1. PROJECT FINANCE PANORAMA

### 1.1 Sponsors and Lenders

As the Cayman Islands is typically used as a tax-neutral jurisdiction that is an efficient and neutral platform for sponsors and investors alike, a broad variety of participants in the international project finance space can be found, from domestic construction companies and foreign international infrastructure companies on the sponsor side, to government-owned development banks, institutional lending banks, and private equity and hedge funds, on the lender side.

### 1.2 Public-Private Partnership Transactions

Historically, soft-law guidelines from administrative authorities in the Cayman Islands were the main source of PPP regulation for local PPP projects. However, the introduction of a public procurement legal framework in 2018 has resulted in the Cayman Islands having one of the youngest PPP law and regulation models in the world. This framework has been used as the basis for assessing and regulating the current expansion of, for instance, the Owen Roberts International Airport located on Grand Cayman, Cayman Islands, as well as a new waste-management and treatment facility. As may be expected, the framework does not apply to international project finance transactions structured through Cayman Islands vehicles.

### 1.3 Structuring the Deal

#### The Cayman Islands as a Jurisdiction of Choice

The Cayman Islands continues to be one of the leading tax-neutral jurisdictions through which to structure international project finance transactions where a tax-neutral jurisdiction is required for the relevant debt securities and bank loans. The four broad categories of benefits that contribute to the appeal of Cayman Islands' struc-

tures for international transactions are set out as follows.

#### *Sophistication as a jurisdiction*

The Cayman Islands is a British Overseas Territory. The United Kingdom is responsible for the external affairs of the Cayman Islands and its defence and internal security but, otherwise, the Cayman Islands is self-governing, with a democratically elected legislature. The Cayman Islands makes its own laws and has independent legal and judicial systems.

Well-recognised legal concepts (including limited liability and separate corporate personality) underpin the Cayman Islands corporate vehicle, as well as the principles governing lending and the granting of security over assets. Decades of experience and extensive due diligence have demonstrated to investors, banks, development agencies, counterparties, regulators and international authorities that these foundations are solid and reliable. Furthermore, international lenders and rating agencies have rigorously reviewed and stress-tested Cayman Islands laws governing lending and the granting of margin and security over assets.

There are dedicated commercial courts in the Cayman Islands, including a Financial Services Division of the Grand Court that recognises the need for special procedures and skills in dealing with the more complex civil cases that arise out of the financial sector in the Cayman Islands. Courts in the Cayman Islands are very active, efficient and well-respected. In addition, the ultimate court of appeal is the Privy Council in London; as a result, there is a good deal of certainty in relation to the judicial process. This is a strong source of comfort for investors and counterparties, who may want the reassurance that if rights have to be enforced before a court, it will be before a familiar and trusted system.

### *Commitment to transparency*

The Cayman Islands government and its main regulator, the Cayman Islands Monetary Authority, have worked continuously with governments and international authorities over many years to ensure that the Cayman Islands is trusted as a well-regulated, co-operative and transparent jurisdiction. For example, the Cayman Islands was an early adopter of:

- comprehensive and strict anti-money laundering (AML) laws and know-your-customer (KYC) rules and regulations, which are at least equivalent to those of established Organisation for Economic Co-operation and Development (OECD) member states; and
- the Foreign Account Tax Compliance Act and the OECD's Common Reporting Standard, so that tax information on investors is now exchanged with over 100 other countries.

As a result, the Cayman Islands is rated by the OECD as largely compliant regarding transparency and information exchange: the same rating given to the UK, Germany and the USA.

### *Tax neutrality*

The Cayman Islands is an ideal tax-neutral domicile for international project finance transactions, as it creates a level taxation playing field for investors by not adding a further layer of taxation, and it has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

### *Simplicity of entity-formation and flexibility of their administration*

The formalities regarding the incorporation of companies are simple and straightforward, so they can be incorporated on a same-day basis and at relatively low cost.

### *Types of Cayman Islands Vehicles*

While there are a range of Cayman Islands vehicles to choose from in these transactions (including exempted limited partnerships, limited-liability companies and trusts), "Cayman Islands exempted companies" remain the most popular form of vehicles used to structure "issuers" of debt securities and "borrowers" of bank loans. The Cayman Islands exempted non-resident company (or exempted company) is a body corporate limited by shares and is similar in form to "private companies limited by shares" and "corporations" in jurisdictions such as England and Wales and the USA, respectively.

The laws of the Cayman Islands underpinning companies provide a framework that can be adapted to give effect to a wide range of commercially agreed requirements, including bespoke objects for which exempted companies can be incorporated and highly individual corporate governance arrangements. This enables the constitution of companies to be tailored to many different situations.

### *Typical Funding Techniques*

The vast majority of PPP contracts are funded in one of three ways:

- structured finance repackaged securities, in which the underlying assets are infrastructure-related certificates issued by the state upon the completion of agreed milestones;
- project finance transactions, which rely on the cash-flows generated by the project assets for repayment;
- repackaged securities in line with the foregoing, where the debt is government-guaranteed.

In recent years, the securities used to finance Latin American project finance transactions have tended to be of the "structured finance repackaged" type described in the first bullet point

above. These securities are invariably issued by orphan note-issuing vehicles. Part of the proceeds of the issue of the securities is used by the issuer to purchase the assets (ie, the infrastructure-related certificates issued by the relevant government). The single most important structural feature of these issuers is to make them “bankruptcy-remote”. In practice, this means ensuring that, in the event that the originator or seller of the assets goes into bankruptcy:

- a liquidator of that originator or seller cannot attach them (ie, that the issuer is independent and that there is a “true sale” of the assets to it); and
- the issuer does not go into insolvency, in the Cayman Islands or elsewhere.

There are a number of essential features, often interrelated, that are employed to achieve that objective. These include:

- having the equity interests in the issuer being held under a declaration of trust (which serves to take the issuer “off the balance sheet” of related-transaction parties); and
- ensuring that all obligations of the issuer are secured and the recourse of creditors is limited to the secured assets as set out in the principal transaction documents (ie, that all obligations to transaction creditors are secured by the purchased assets and that recourse is limited to those assets accordingly).

The success of such orphan note-issuing vehicles and their attractiveness to international project finance sponsors is not surprising, given the broad categories of benefits that contribute to the appeal of Cayman Islands structures previously described.

## 1.4 Active Industries and Sectors

There was a noticeable slow-down in Latin American project finance transactions in 2020 and the beginning of 2021, due to the COVID-19 pandemic, and many existing transactions were delayed or postponed. Fortunately, it now appears that those transactions are being revisited and, in many cases, restructured. It is expected that a greater emphasis on public health projects will be seen in the coming year, although, thus far, no particular trend has been noticed in this sector, or in any other.

## 2. GUARANTEES AND SECURITY

### 2.1 Assets Available as Collateral to Lenders

The main assets available as collateral to lenders in international project finance transactions that rely on the cash-flows generated by their assets are:

- the shares in the project company;
- the project assets;
- the project site;
- the project company’s bank accounts;
- the key project contracts; and
- the project insurances.

In the case of structured finance repackaged securities, the main assets are the infrastructure-related certificates issued by government and, where available, government guarantees. In each case, the formalities and perfection of the relevant security interests will depend on the nature of the underlying assets that are subject to the security interest and the *lex situs* of collateral. Separately, security documents do not need to be filed, registered or recorded in the Cayman Islands in order to be perfected (as there is no public or central registry in which to record them). Certain entities are required to

maintain registers of mortgages and charges, which should be updated whenever they provide security over their assets; however, failure to update those registers does not impact the validity or priority of the security. Central security registers do exist for certain types of assets (including Cayman Islands real estate, intellectual property rights, ships, etc), which registers should be updated, in order to secure priority (as opposed to perfection).

## **2.2 Charges or Interest over All Present and Future Assets of a Company**

Fixed and floating charges are both possible under Cayman Islands law: fixed charges are usually taken over specific assets, while floating charges tend to cover those assets not covered by the fixed charge (which assets tend to be shifting by nature). Until crystallised into a fixed charge, a floating charge is intended to allow the charger to continue to use the secured assets in question.

## **2.3 Registering Collateral Security Interests**

A company must make an entry in its register of mortgages and charges in respect of any security interest created by it, in order to comply with the Companies Act (2021 Revision). A limited liability company (LLC) must also make an entry on its register of mortgages and charges in a similar manner. In each case, failure to make the entry does not affect the validity of the security; however, it would be in the interest of any secured party to ensure that this is done so that any potential creditors who inspect the register are put on notice. The registered office-provider to a company or LLC will usually arrange for this promptly and, because of how easy they are to do, these updates are typically very efficient from a costs' perspective. Other than this, it is not necessary that any transaction documents creating a security interest by a company be filed, recorded or enrolled with any government-

tal, regulatory or judicial authority in the Cayman Islands in order to ensure the validity of the security interest. However, charges over certain assets granted by Cayman Islands companies – such as Cayman Islands real estate, intellectual property rights, ships and aircraft – do need to be registered at other specialist registries related to the asset in question.

## **2.4 Granting a Valid Security Interest**

All-asset debentures are both common and permissible in the Cayman Islands, and do not require that each item of collateral be individually identified in the debenture itself. The laws of the Cayman Islands also permit liens and pledges, although these are rarely used in practice (in the case of pledges, this is most likely because physical delivery of the underlying asset is required). Mortgages (both legal and equitable) and charges (both fixed and floating) are generally used instead.

## **2.5 Restrictions on the Grant of Security or Guarantees**

There are no statutory restrictions on the form of security that can be granted by a Cayman Islands company, nor do any such restrictions exist in respect of the amount of any guarantees that can be granted. All the property of a Cayman Islands company should therefore be available to secure any international project finance transactions. In approving the grant of any security or the provision of any guarantee, among the various fiduciary duties that are imposed on them, the directors of the company should act in good faith and should be satisfied that their provision is in the best interests of the company as a whole.

## **2.6 Absence of Other Liens**

With limited exceptions (for Cayman Islands real estate, intellectual property rights, ships, etc), no public security register exists in the Cayman Islands that can be searched to determine

whether a Cayman Islands company has granted any security interests. However, as noted in **2.3 Registering Collateral Security Interests**, a company must make an entry in its register of mortgages and charges in respect of any security interest created by it in order to comply with the Companies Act (2021 Revision) and an LLC must also make an entry on its register of mortgages and charges in a similar manner.

## 2.7 Releasing Forms of Security

In the context of international project finance transactions, where the assets are not located in the Cayman Islands and where the laws of the Cayman Islands are not used as the governing law of the relevant security agreements, no Cayman Islands steps need to be taken to release the security. However, it is customary to enter into a deed of release or equivalent document to confirm or evidence the release. Any entries on the register of mortgages and charges of a company or an LLC should be updated to reflect the release of the security, although failure to do so does not impact the validity of the release.

## 3. ENFORCEMENT

### 3.1 Enforcement of Collateral by Secured Lender

The Cayman Islands has statutory provisions that allow secured creditors to enforce their security without leave of a liquidator or the court (one limited exception being the case of foreclosure, which is unlikely to be available in ordinary circumstances). The transaction documents in each financing transaction will set out the basis on which the lender can enforce its collateral, and a secured creditor's rights on the enforcement of a security interest should be set out in their enforcement provisions. A secured creditor with a valid and enforceable security interest will ordinarily be entitled to enforce its security inter-

est, irrespective of whether the granting company is in liquidation.

Any secured party looking to exercise its collateral should (of course) seek Cayman Islands legal advice to the extent that there is a Cayman Islands nexus. For example, no statutory power of sale exists in Cayman Islands law, so this should be included in Cayman Islands law-governed security documents where possible. Any party looking to enforce its security where such a power exists should also be mindful of the need to:

- act in good faith in choosing to sell the collateral; and
- take all reasonable precautions to obtain the best price reasonably obtainable on the sale.

If the security in question is shares in a Cayman Islands company, any transfer of those shares would require the approval of the liquidator (if the company is in voluntary liquidation) or the court (if the company is in liquidation under the supervision of the court).

### 3.2 Foreign Law

The choice of a foreign law as the governing law of a contract would be recognised by the courts of the Cayman Islands, assuming it:

- would be regarded as a valid and binding selection that would be upheld by the relevant foreign courts as a matter of the applicable foreign law and all other relevant laws; and
- had been made in good faith.

The submission by a company in a contract to the jurisdiction of the courts of a particular foreign jurisdiction will be legal, valid and binding on that company, assuming that the same is true under the governing law of the contract and under the laws, rules and procedures applying in the courts of that foreign jurisdiction.

### **3.3 Judgments of Foreign Courts**

Subject to certain criteria described below, and assuming that the choice of the applicable foreign governing law as the governing law of the applicable contract has been made in good faith and would be regarded as a valid and binding selection, which will be upheld by the courts of the applicable jurisdiction (the relevant jurisdiction) and any other relevant jurisdiction (other than the Cayman Islands), as a matter of the applicable governing law and all other relevant laws (other than the laws of the Cayman Islands), then, although there is no statutory enforcement in the Cayman Islands of judgments obtained in the relevant jurisdiction, a judgment obtained in the relevant jurisdiction will be recognised and enforced in the courts of the Cayman Islands at common law, without any re-examination of the merits of the underlying dispute, by an action commenced on the foreign-judgment debt in the Grand Court of the Cayman Islands, provided that judgment:

- is given by a foreign court of competent jurisdiction;
- is final, for a liquidated sum, not in respect of taxes or a fine or a penalty; and
- was not obtained in a manner that, nor is of a kind the enforcement of which, is contrary to the public policy of the Cayman Islands.

### **3.4 A Foreign Lender's Ability to Enforce**

There are no restrictions on granting security or guarantees to foreign lenders. However, if the property (in particular, real estate) is located in the Cayman Islands, the lender may wish to approve an agent to enforce the security interest to avoid certain local licensing, registration and conduct of business laws and regulations.

## **4. FOREIGN INVESTMENT**

### **4.1 Restrictions on Foreign Lenders Granting Loans**

There are no restrictions on foreign lenders granting loans to a Cayman Islands company. Assuming the foreign lenders are not registered as foreign entities under the laws of the Cayman Islands and their activities have not been, and will not be, carried on through a place of business in the Cayman Islands, those lenders are not required to be licensed in the Cayman Islands, nor are there any eligibility or residency requirements in order for them to grant a loan to a Cayman Islands company.

### **4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders**

The granting of security or guarantees to foreign, as opposed to domestic, lenders is not restricted or impeded in any way by the laws of the Cayman Islands.

### **4.3 Foreign Investment Regime**

While a business wishing to establish a physical presence in the Cayman Islands must be structured and licensed in accordance with local laws (which laws include a requirement that the company in question must have a minimum of 60% Caymanian shareholders and directors, who maintain no less than 60% of the economic and voting control of the company), there are no statutory or regulatory restrictions on foreign investment made into the types of Cayman Islands vehicles that are used for international project finance transactions.

### **4.4 Restrictions on Payments Abroad or Repatriation of Capital**

There is no exchange-control legislation under Cayman Islands law and, accordingly, there are no exchange-control regulations imposed under the laws of the Cayman Islands.

## 4.5 Offshore Foreign Currency Accounts

There are no restrictions on a Cayman Islands company maintaining offshore currency accounts under the laws of the Cayman Islands.

## 5. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

### 5.1 Registering or Filing Financing of Project Agreements

It is not necessary – in order to ensure the legality, validity, enforceability or admissibility in evidence of the project agreements – that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the Cayman Islands.

### 5.2 Licence Requirements

The ownership of land or natural resources outside the Cayman Islands by a Cayman Islands company does not require any licence under the laws of the Cayman Islands.

### 5.3 Agent and Trust Concepts

The laws of the Cayman Islands recognise the role of an agent or trustee, acting on behalf of all lenders, assuming the transaction documents provide for the relevant trust mechanics and the trust is properly constituted. Such roles are usually documented in accordance with the laws of the jurisdiction of the principal transaction documents.

### 5.4 Competing Security Interests

The priority of competing security interests is fact-specific and depends on the nature of the security interest granted and the *lex situs* of the underlying asset subject to the interest. Both contractual and structural subordination are permitted (and both are common) under the laws of the Cayman Islands. Inter-creditor arrange-

ments are also common, although, in the context of international project transactions, these are usually governed by the laws of the jurisdiction of the principal transaction documents. There is statutory recognition of both contractual subordination and of inter-creditor arrangements: Sections 140(1) and (2) of the Companies Act (2021 Revision) provide as follows:

- in (1), subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company;
- in (2), the collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors “and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors” and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.

### 5.5 Local Law Requirements

There are no Cayman Islands law restrictions on the jurisdiction in which the project company must be organised. Usually, however, the project company will be organised in the jurisdiction in which the project assets are located.

## **6. BANKRUPTCY AND INSOLVENCY**

### **6.1 Company Reorganisation Procedures**

The Cayman Islands has the flexible tools necessary to enable a company to restructure its debts successfully and these tools can be employed effectively in the context of complex multinational structures. That can be the case, even where not all of the entities are incorporated in the Cayman Islands, and where the debts are not governed by Cayman Islands law.

#### **Provisional Liquidation**

The Cayman Islands does not have a formal corporate rehabilitation procedure similar to administration in the United Kingdom or Chapter 11 proceedings in the United States. The Cayman Islands regime utilises restructuring provisional liquidation and schemes of arrangement. Specific statutory provisions exist to enable provisional liquidation to be used as a restructuring tool. Once a winding-up petition has been presented, the company can apply, following on from this petition, to appoint provisional liquidators, known as restructuring provisional liquidators or “light-touch” provisional liquidators. The court will set out the powers and functions of the restructuring provisional liquidator on a case-by-case basis, but ordinarily the management will remain in day-to-day control of operations. The appointment allows the restructuring of a company to be pursued with the benefit of a moratorium on creditor action, although a secured creditor will be able to enforce its security in accordance with its terms. The restructuring can take the form of a scheme of arrangement (either under Cayman Islands law, as highlighted below, or the law of another jurisdiction), a foreign restructuring proceeding or a consensual deal with the company’s creditors.

#### **Schemes of Arrangement**

Compromises can be made with shareholders and/or creditors by way of a scheme of arrangement, which is a court-supervised arrangement between a company and its members or its creditors (or classes thereof), and which is broadly equivalent to a Chapter 11 Plan of Reorganisation. A scheme can be used to effect, among other things, a (friendly) takeover or a privatisation. A shareholder scheme can, for example, effect the cancellation or redemption of a company’s shares, or their transfer to a third party, for the consideration and on the terms set out in the scheme itself. A creditors’ scheme can be used to effect a debt restructuring, including (for example) a debt-for-equity swap.

The scheme process involves meeting(s), convened by the court, of each of the relevant class(es) of members or creditors whose rights are to be subject to the scheme. For the scheme to proceed to be approved by the court, the majorities which must be achieved at the meeting of each class of members or creditors at the meeting are:

- 50% + one in number; and
- 75% in value.

The principal benefit of a scheme is that if all the necessary majorities are obtained and hurdles are cleared, and the court approves the scheme, the terms of the scheme become binding on all members of the relevant class(es) of shareholders or creditors, whether or not they:

- received notice of the scheme;
- voted at the meeting;
- voted for or against the scheme; and
- changed their minds afterwards.

### **6.2 Impact of Insolvency Process**

Secured creditors, with respect to secured property, rank senior to unsecured or trade creditors

in an insolvency, at least with respect to secured property, and (in the absence of some sort of a scheme of arrangement) all creditors rank ahead of equity. Some preferred creditors (for example, severance pay, medical health insurance premiums-related payments and certain salaries due to employees) rank ahead of all secured creditors as a matter of law, although these are generally not relevant in the context of international project finance transactions.

### 6.3 Priority of Creditors

Parties are usually paid in the following order of priority on a company's liquidation:

- severance pay claims (for employees working in the Cayman Islands);
- fixed charge-holders;
- costs and expenses of the liquidation;
- preferential debts (including certain fees and taxes due to the Cayman Islands Government);
- floating charge-holders;
- unsecured, unsubordinated provable debts (ie, ordinary unsecured creditors);
- subordinated creditors;
- post-liquidation interest (where the liquidation lasts for more than six months);
- non-provable liabilities;
- shareholder claims pursuant to non-paid redemptions;
- preference shareholders;
- shareholders.

Secured creditors should be able to enforce their security outside of the insolvency proceedings, as Section 142(1) of the Companies Act (2021 Revision) provides as follows:

- notwithstanding that a winding-up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce that person's security without the leave of the Grand Court of the

Cayman Islands and without a reference to a liquidator.

The priority of competing security interests is fact-specific and depends on the nature of the security interest granted and the *lex situs* of the underlying asset subject to the interest.

### 6.4 Risk Areas for Lenders

#### Corporate Benefit

In respect of the granting of guarantees or security interests, the directors of the company providing them should be satisfied that any such granting is in the best interests of the company as a whole; where the company derives a commercial benefit from the underlying transactions, this will usually be the case.

#### Claw-backs

Certain provisions of the Companies Act (2021 Revision), which also extend to LLCs and exempted limited partnerships, dealing with potential avoidance actions, may be relevant to an insolvency. Several of these are set out below.

#### Voidable preferences

In accordance with Section 145(1) of the Companies Act (2021 Revision), every conveyance or transfer of property or charge therein, every payment, every obligation and every judicial proceeding made, incurred, taken or suffered by any company that is unable to pay its debts as they become due from its own monies in favour of any creditor, with a view to giving that creditor a preference over the other creditors, will be invalid if made, incurred, taken or suffered within the six months immediately preceding the commencement of a liquidation. A payment to a related party of the company will be deemed to have been made with a view to giving that creditor a preference. A conveyance or transfer will be made "with a view" to giving a preference if it can be established that the transferor's dominant intention was to prefer the creditor (ie,

to put the creditor in a better position than he, she or they would otherwise have been). If the company's primary purpose in making the disposition was to achieve something else, then it will not be a voidable preference, even if preferring the creditor was an obvious collateral effect of that payment.

#### *Transaction at an undervalue under the Companies Act (2021 Revision)*

In accordance with Section 146(2) of the Companies Act (2021 Revision), every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator. Intention to defraud means an intention wilfully to defeat an obligation owed to another creditor and this may not require deceit or a dishonest intent.

#### *Fraudulent disposition under the Fraudulent Dispositions Act (1996 Revision)*

Under the Fraudulent Dispositions Law (1996 Revision), every disposition of property made with an intent to defraud (which has the same meaning as described in the foregoing) and at an undervalue shall be voidable at the instance of the creditor thereby prejudiced.

#### *Fraudulent trading*

If, in the course of the winding-up of a company, it appears that any business of the company has been carried on with intent to defraud (which has the same meaning as previously described) creditors of the company or creditors of any other person, or for any fraudulent purpose, the liquidator may apply to the court for a declaration that any persons who were knowingly parties to the carrying on of business in the aforementioned manner are liable to make such contributions, if any, to the company's assets as the court thinks proper.

#### **Unenforceable Penalties**

While there are no usury or interest limitation laws in the Cayman Islands that would limit the recovery of payments from a Cayman Islands company, one exception to this general principle is that obligations to make payments that could be considered penal in nature are not enforceable as a matter of Cayman Islands law.

#### **Capacity and Authority**

Where applicable, a company's constitutional documents should be reviewed to ensure that any loans to directors are capable of being entered into and have been properly authorised.

#### **Thin Capitalisation and Financial Assistance**

Under the laws of the Cayman Islands there are no thin-capitalisation rules and there is no statutory or common-law rule that prohibits a company giving financial assistance to any person for the acquisition of its shares. However, the directors must ensure the transaction is in the best interests of the company and is carried out on a proper commercial basis, otherwise the transaction may be impugned on the basis of breach of the directors' fiduciary duties. While a company is solvent, what is in the best interests of the company means taking into account the interests of shareholders. Where the company is insolvent or on the verge of insolvency, the director's duty to act in what the directors consider to be the best interests of the company manifests as a duty to take into account the interests of the company's creditors as whole.

#### **6.5 Entities Excluded from Bankruptcy Proceedings**

Neither companies nor LLCs are excluded from proceedings under any applicable laws or regulations (including the Companies Act (2021 Revision) and the Limited Liability Companies Act (2021 Revision)).

## 7. INSURANCES

### 7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

All persons carrying on or desiring to carry on insurance business (including reinsurance business) in or from within the Cayman Islands need to be licensed under the Insurance Act, 2010 (as amended). However, insurance for international project finance transactions is provided by insurers outside the Cayman Islands. There are no Cayman Islands law restrictions, controls, fees and/or taxes on insurance policies over project assets located outside of the Cayman Islands.

### 7.2 Foreign Creditors

Assuming the insurance is being provided by insurers outside the Cayman Islands and is in respect of project assets located outside the Cayman Islands, there are no Cayman Islands law restrictions on insurance policies over project assets being payable to foreign creditors.

## 8. TAX

### 8.1 Withholding Tax

Payments of principal, interest or other payments made to lenders are not subject to withholding tax as a matter of Cayman Islands law.

### 8.2 Other Taxes, Duties, Charges

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. No stamp or similar taxes are payable, unless the relevant transaction documents are executed or brought into the Cayman Islands. The amount of any such stamp duty depends on the type of document and the assets that are subject to the security interest (in the case of transaction documents that create security) and would typically not constitute a material amount.

### 8.3 Limits to the Amount of Interest Charged

There are no usury or interest limitation laws in the Cayman Islands that would limit the recovery of payments from a Cayman Islands company (subject to a limited number of exceptions – for example, arrangements that constitute penalties will not be enforceable).

## 9. APPLICABLE LAW

### 9.1 Project Agreements

Project agreements are usually governed by the law of the jurisdiction in which the project assets are located.

### 9.2 Financing Agreements

In international project finance transactions, US or English law is invariably chosen as the governing law for financing agreements. Security agreements that create security over local assets outside these jurisdictions are usually governed by the laws of the jurisdiction in which those local assets are located.

### 9.3 Domestic Laws

In the case of orphan note-issuing vehicles, as described in the Typical Funding Techniques section of **1.3 Structuring the Deal**, which are commonly used for international project finance transactions, their equity interests are usually owned by a licensed Cayman Islands trust company (in its capacity as share trustee on trust for charitable purposes). The trust is created through a declaration of trust. This declaration of trust, the constitutional documents of the vehicle and the local service agreements are usually (and in some cases are required to be) governed by Cayman Islands law.

**Maples Group** advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, through its leading international law firm, Maples and Calder. With offices in key jurisdictions around the world, the Maples Group has specific strengths

in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service-offering for global business initiatives.

## AUTHORS



**Simon Firth** is a partner and co-head of the Latin American team at Maples and Calder, the Maples Group's law firm, in the Cayman Islands. With more than 20 years' experience structuring

transactions in the region, he advises financial institutions, public and private companies, and private equity and hedge funds (both originating from and investing into Latin America) on all aspects of offshore structures, with a particular focus on structured finance, investment funds and general corporate matters. Simon also has wide-ranging skills in advising telecommunications-providers on licensing and regulatory matters.



**Finn O'Hegarty** is a partner and a member of the corporate and Latin American team at Maples and Calder, the Maples Group's law firm, in the Cayman Islands.

Finn has extensive experience in all aspects of corporate work, including joint ventures, initial public offerings (IPOs), and mergers and acquisitions. He also advises on a wide variety of structured finance, capital markets and investment fund transactions.

---

## Maples Group

Ugland House  
South Church Street  
PO Box 309  
Grand Cayman  
KY1-1104  
Cayman Islands

Tel: +1 345 949 8066  
Fax: +1 345 949 8080  
Email: [info@maples.com](mailto:info@maples.com)  
Web: [www.maples.com](http://www.maples.com)

