

International Comparative Legal Guides



Lending & Secured Finance 2021

A practical cross-border insight into lending and secured finance

Ninth Edition

Featuring contributions from:

Allen & Overy LLP

Asia Pacific Loan Market Association

Astrea

Bär & Karrer Ltd.

Cadwalader, Wickersham & Taft LLP

Carey

Carey Olsen Jersey LLP

Cleary Gottlieb Steen & Hamilton LLP

Criales & Urcullo

Cuatrecasas

Davis Polk & Wardwell LLP

Dechert LLP

Dillon Eustace

Drew & Napier LLC

Felner Wratzfeld & Partners

Freshfields Bruckhaus Deringer LLP

Fried, Frank, Harris, Shriver & Jacobson LLP

Gonzalez Calvillo

Holland & Knight

Latham & Watkins LLP

Lee and Li, Attorneys-at-Law

Loan Market Association

Loan Syndications and Trading Association

Loyens & Loeff Luxembourg S.à r.l.

Macesic and Partners

Maples Group

Marval O'Farrell Mairal

McMillan LLP

Milbank LLP

Morgan, Lewis & Bockius LLP

Mori Hamada & Matsumoto

Morrison & Foerster LLP

O'Melveny & Myers LLP

Orrick Herrington & Sutcliffe LLP

Proskauer Rose LLP

Rodner, Martínez & Asociados

S. Koukounis & Partners LLC

Sardelas Petsa Law Firm

Seward & Kissel LLP

Shearman & Sterling LLP

Sidley Austin LLP

Skadden, Arps, Slate, Meagher & Flom LLP

SZA Schilling, Zutt & Anschutz

Rechtsanwalts-gesellschaft mbH

Veirano Advogados

Wakefield Quin Limited

Walalangi & Partners

(in association with Nishimura & Asahi)

White & Case LLP

Editorial Chapters

- 1** **Loan Syndications and Trading: An Overview of the Syndicated Loan Market**
Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association
- 7** **Loan Market Association – An Overview**
Hannah Vanstone, Loan Market Association
- 13** **Asia Pacific Loan Market Association – An Overview**
Andrew Ferguson & Rosamund Barker, Asia Pacific Loan Market Association

Expert Analysis Chapters

- 16** **An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions**
Thomas Mellor, Marcus Marsh & Michael Byrnes, Morgan, Lewis & Bockius LLP
- 21** **Global Trends in Leveraged Lending**
Joshua Thompson, James Crooks & Bryan Robson, Sidley Austin LLP
- 31** **The Rise of the SPAC**
Michael Steinberg & Alain Dermarkar, Shearman & Sterling LLP
- 36** **Intellectual Property and Personal Data in Drop-Down Financings**
Frank J. Azzopardi, Scott M. Herrig, Eli J. Vonnegut & Daniel F. Forester, Davis Polk & Wardwell LLP
- 41** **The Pandemic: A Regulatory Perspective**
Bill Satchell & Elizabeth Leckie, Allen & Overy LLP
- 52** **Acquisition Financing in the United States: A Year of Panic and Rebound**
Geoffrey Peck & Mark S. Wojciechowski, Morrison & Foerster LLP
- 58** **A Comparative Overview of Transatlantic Intercreditor Agreements**
Miko Bradford & Benjamin Sayagh, Milbank LLP
- 66** **A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements**
Sarah M. Ward & Clive J. Wells, Skadden, Arps, Slate, Meagher & Flom LLP
- 84** **Fund Finance: 2020 Year in Review**
Michael C. Mascia, Cadwalader, Wickersham & Taft LLP
- 87** **Recent Developments in U.S. Term Loan B**
Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP
- 96** **The Continued Prevalence of European Covenant Lite**
Jane Summers, Daniel Seale & Karan Chopra, Latham & Watkins LLP
- 100** **Restructuring Across the Pond and Back: A Comparison of Chapter 11 and the New UK Act**
Judah Frogel, Dan Guyder, Jennifer Marshall & Shaheen Karolia, Allen & Overy LLP
- 107** **Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions**
Sandra Lee Montgomery & Michelle L. Iodice, Proskauer Rose LLP
- 117** **Trade Finance on the Blockchain: 2021 Update**
Josias Dewey, Holland & Knight
- 124** **Financing Your Private Debt Platform**
Global Finance Group, Dechert LLP
- 134** **An Overview of Debtor in Possession Financing**
Gary L. Kaplan & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP
- 139** **Developments in Midstream Oil and Gas Finance in the United States**
Elena Maria Millerman, Charlie Ofner, Taylor Pullins & Ariel Oseasohn, White & Case LLP
- 147** **LIBOR – The End is Near(er)?**
Kalyan (“Kal”) Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP
- 151** **2021 Private Credit and Middle Market Update: Pandemic Priming Shifts Debt to Defence**
Jeff Norton, Jennifer Taylor, Sung Pak & Adam Longenbach, O’Melveny & Myers LLP
- 155** **Bankruptcy Asset Sales & Acquisition Financing Process: Key Considerations from a Buyer’s Perspective**
Margaret (Meme) S. Peponis, Lisa M. Schweitzer, Katherine (Katie) R. Reaves & John H. Veraja, Cleary Gottlieb Steen & Hamilton LLP

Q&A Chapters

- 161** **Argentina**
Marval O'Farrell Mairal: Juan M. Diehl Moreno & Diego A. Chighizola
- 171** **Austria**
Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter
- 182** **Belgium**
Astrea: Dieter Veestraeten
- 189** **Bermuda**
Wakefield Quin Limited: Erik L. Gotfredsen & Jemima Fearnside
- 197** **Bolivia**
Crales & Urcullo: Andrea Mariah Urcullo Pereira & Luis Valda Yanguas
- 205** **Brazil**
Veirano Advogados: Lior Pinsky, Ana Carolina Barretto & Amanda Leal
- 213** **British Virgin Islands**
Maples Group: Michael Gagie & Matthew Gilbert
- 221** **Canada**
McMillan LLP: Jeff Rogers & Don Waters
- 232** **Cayman Islands**
Maples Group: Tina Meigh & Bianca Leacock
- 240** **Chile**
Carey: Diego Peralta, Fernando Noriega & Diego Lasagna
- 248** **Croatia**
Macesic and Partners: Ivana Manovelo
- 257** **Cyprus**
S. Koukounis & Partners LLC: Stella C. Koukounis, Chara Paraskeva & Andreas Zevlaris
- 266** **England**
Allen & Overy LLP: Oleg Khomenko & Jane Glancy
- 277** **France**
Orrick Herrington & Sutcliffe LLP: Carine Mou Si Yan
- 287** **Germany**
SZA Schilling, Zutt & Anschutz Rechtsanwaltsgesellschaft mbH: Dr. Dietrich F. R. Stiller, Dr. Andreas Herr & Dr. Michael Maxim Cohen
- 297** **Greece**
Sardelas Petsa Law Firm: Panagiotis (Notis) Sardelas & Aggeliki Chatzistavrou
- 306** **Indonesia**
Walalangi & Partners (in association with Nishimura & Asahi): Miriam Andreta, R. Wisnu Renansyah Jenie & Raditya Pratamandika Putra
- 314** **Ireland**
Dillon Eustace: Conor Keaveny, Jamie Ensor & Richard Lacken
- 325** **Italy**
Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo
- 335** **Japan**
Mori Hamada & Matsumoto: Yusuke Suehiro
- 343** **Jersey**
Carey Olsen Jersey LLP: Robin Smith, Laura Healy, Kate Andrews & Peter German
- 353** **Luxembourg**
Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier Grethen & Tina Fettes
- 362** **Mexico**
Gonzalez Calvillo: José Ignacio Rivero Andere & Jacinto Avalos Capin
- 370** **Netherlands**
Freshfields Bruckhaus Deringer LLP: Mandeep Lotay & Tim Elkerbout
- 378** **Russia**
Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov
- 387** **Singapore**
Drew & Napier LLC: Pauline Chong, Renu Menon, Blossom Hing & Ong Ken Loon
- 398** **South Africa**
Allen & Overy (South Africa) LLP: Lionel Shawe
- 409** **Spain**
Cuatrecasas: Héctor Bros & Manuel Follía
- 420** **Sweden**
White & Case LLP: Carl Hugo Parment & Magnus Wennerhorn
- 427** **Switzerland**
Bär & Karrer Ltd.: Frédéric Bétrisey, Lukas Roesler, Micha Schilling & Tatiana Ayranova
- 437** **Taiwan**
Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu
- 446** **United Arab Emirates**
Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Tomisin Mosuro
- 462** **USA**
Morgan, Lewis & Bockius LLP: Thomas Mellor, Katherine Weinstein & Matthew Edward Scherneck
- 475** **Venezuela**
Rodner, Martínez & Asociados: Jaime Martínez Estévez

Cayman Islands

Maples Group



Tina Meigh



Bianca Leacock

1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

The Cayman Islands continues to be a jurisdiction of choice for the establishment of investment funds, portfolio investment companies and corporate vehicles, each of which utilise secured lending arrangements in a variety of forms. We have seen a significant uptick in the use of investment fund holding entities structured as orphan vehicles as lenders are looking to address US bankruptcy concerns. The robust and creditor-friendly legislation in the Cayman Islands provides counterparties with significant comfort in secured lending transactions, which continues to make the Cayman Islands the jurisdiction of choice for many financial institutions. We continue to see an increase in the use of hybrid and NAV facilities in both the private equity and hedge fund space. Exempted companies and exempted limited partnerships are still the most popular entities across all business areas, but we also see an increasing use of limited liability companies as a result of advantageous hybrid features taken from both the company and exempted limited partnership regimes.

The global regulatory shift has enforced the position that the Cayman Islands is a leading, well-respected and relied upon jurisdiction for many lending houses and financial institutions in all fund financing and secured lending transactions.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

The most significant lending transactions continue to occur in the investment funds space, especially to Cayman Islands domiciled private equity funds. These transactions tend to be governed by New York and English law finance documents with security taken over Cayman Islands assets being governed by both Cayman Islands law and non-Cayman Islands law. Although the courts in the Cayman Islands generally recognise foreign law documents, lenders often prefer, for commercial purposes, to have dual Cayman Islands law-governed security.

The main types of security are, in the case of funds established in the form of exempted limited partnerships, exempted companies and limited liability companies, security over capital calls (the right to call such capital and the right to receive the proceeds of such calls) and, more generally, security over Cayman Islands equity interests, either in the form of registered shares or exempted limited partnership interests. This is particularly common where there is a “master-feeder” structure or underlying blocker entities are used to hold assets and those structures are looking to utilise subscription and hybrid facilities.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a company can grant a guarantee in these circumstances assuming there is sufficient commercial rationale and benefit to the company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The directors of the company providing a guarantee must ensure that any proposed transaction is in the best interests of the company as a whole. Guarantee arrangements may be construed as not being in the best interests of a company (and not for the company’s corporate benefit) if the granting company receives no commercial benefit from the underlying financing arrangements.

The directors of the company giving the guarantee should approve the terms and execution of the guarantee by way of board resolution in accordance with the company’s articles of association. If there is any question of lack of corporate benefit or a potential breach of director’s duties, it is recommended that the company also obtain a shareholders’ resolution approving the grant of the guarantee.

2.3 Is lack of corporate power an issue?

In accordance with the Companies Act (2021 Revision) (“**Companies Act**”), the lack of capacity of a company to enter into a transaction by reason of anything in the company’s memorandum will not affect the validity of the transaction. However, where the company is acting without the necessary capacity, shareholders may issue proceedings prohibiting the company from performing its obligations under the transaction (including disposing of any property) and proceedings may be brought against present and past directors or officers of the company for loss or damage caused by them binding the company in this manner, contrary to the objects in the memorandum.

If a shareholder brings proceedings to restrict the company from performing its obligations, we believe such action would not affect the other party’s rights under the transaction. If the company fails to perform, the other party would have the usual remedies.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any governmental authorities or agencies or other official bodies in the Cayman Islands in connection with the grant of a guarantee. In addition, it is not necessary to ensure the enforceability or admissibility in evidence of a guarantee that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the Cayman Islands.

The directors of the company giving the guarantee should approve the terms and execution of the guarantee by way of board resolution in accordance with the company's articles of association. If there is any question of lack of corporate benefit or a potential breach of director's duties, it is recommended that the company also obtain a shareholders' resolution also approving the grant of the guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no legislative restrictions imposed on the amount of any guarantee due to net worth or the solvency of a company. However, the directors of a company should, as part of fulfilling their fiduciary duties, consider the terms of any guarantee, particularly in the context of the company's asset base.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations imposed under Cayman Islands law that would act as an obstacle to enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are no legislative restrictions on the form of collateral and, accordingly, all property of a company is potentially available as security for lending obligations.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible for security to be taken by means of a general security agreement, such as a debenture, over a range of asset types. The main types of security under Cayman Islands law are mortgages (legal and equitable), charges (fixed and floating), liens and assignments of rights by way of security (albeit that this is deemed to be a form of mortgage). Formalities and perfection of such security interests will depend upon the nature of the underlying collateral and the applicable *lex situs* of such collateral.

Special regimes apply to the taking of security over certain assets, including ships, aircraft and land.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Security over land is usually granted by way of legal or equitable mortgage and by way of fixed charge over plant, machinery and equipment. In relation to chattels, security can also be created by a conditional bill of sale, which must be recorded in accordance with the Bills of Sale Act (2016 Revision).

A legal mortgage is granted by execution of a mortgage agreement between the mortgagor and the secured creditor. The terms of the mortgage will vary, but essentially a mortgage (i) requires transfer of legal title in the land to the secured creditor, subject to a requirement to re-transfer the land upon satisfaction of the underlying secured obligations, and (ii) grants the secured creditor certain powers to deal with the land upon a default.

An equitable mortgage can be created by (i) the execution of an equitable mortgage, (ii) an agreement to create a legal mortgage, (iii) a transfer of land which is not perfected by registering the secured creditor in the Land Registry in accordance with the Registered Lands Law, and (iv) the deposit of the relevant title deeds by way of security.

Fixed and floating charges are usually evidenced by an agreement between the parties reflecting the grant of the security interest and setting out the commercial terms.

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 section 54 of the Companies Act. A Limited Liability Company (an "LLC") must make an entry on its register of mortgages and charges in a similar manner to an exempted company incorporated or referenced under the Companies Law, in accordance with Section 62(1) of the Limited Liability Companies Act (2020 Revision) (the "LLC Act"). However, failure to comply with these requirements does not invalidate the security interests created by either a company or LLC.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Receivables arising under contract are examples of "choses in action", being a right which can only be asserted by bringing an action and not by taking possession of a physical thing. Receivables can be mortgaged or charged where that mortgage or charge takes the form of an assignment with an express or implied provision for reassignment on redemption. If a chose in action is charged, the charge can be either fixed or floating.

An assignment can be either legal or equitable, depending on the circumstances. The key requirements of a legal assignment are that it is: (i) an absolute assignment of the whole of a present (not future) chose in action; and (ii) the assignment must be both in writing and signed by the assignor and notified in writing to the debtor. An equitable assignment generally only relates to part of a chose in action and/or does not involve the notification of the debtor.

A company and LLC must make an entry in its register of mortgages and charges in respect of any security interest created by it. See question 3.3 above.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A security interest over cash deposits is most commonly created by either a fixed or floating charge, depending on the commercial

intention of the parties and the level of control maintained over such cash deposits. The secured creditor should ensure that there is an agreement (usually a deed). Cash deposits are classified as choses in action. Accordingly, the analysis in question 3.4 above applies.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over cash deposited with a bank will be the law applicable where the bank is located (or the location of the bank branch with which the deposit is made).

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Security over shares in Cayman Islands companies, where the register of members is maintained in the Cayman Islands, is usually taken in the form of a legal or equitable mortgage, depending on whether the secured party wishes to take legal title to the shares prior to a default of the secured obligation. Different rules may apply if the register of members is maintained outside of the Cayman Islands or if the shares are in bearer form.

In accordance with Cayman Islands conflict of law rules, the appropriate law to govern any security over registered shares in a Cayman Islands company is determined according to the law applicable to the location of the register of members. Whilst it is possible to grant security over shares as a matter of other laws, enforcement of such security may prove problematic or difficult.

It is not possible to pledge registered shares under Cayman Islands law because title to the shares cannot be transferred by physical delivery. Any grant of security over registered shares that is called a “pledge” will typically fall into one of the mortgage categories, depending on its terms, or it may be entirely ineffective.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security can be taken over inventory or stock by way of a fixed or floating charge. A floating charge is more common given the changing nature of inventory in the usual course of a grantor’s business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can grant a security interest in order to secure its obligations as a borrower under a credit facility or as a guarantor of the obligations of other parties (see Section 2). Usual fiduciary duties applicable to directors’ actions will apply in each case.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No stamp duties or other similar taxes are payable, unless the applicable security document is executed in or brought into the

Cayman Islands. The amount of any applicable stamp duty will vary depending on the type of security document and the identity of the assets subject to the security interest. Unless the document needs to be executed in the Cayman Islands, it is common practice to execute documents outside of the Cayman Islands so that stamp duty is not levied. Court fees (of a nominal value) will fall due as part of any enforcement process.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

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 section 54 of the Companies Act (2021 Revision). An LLC must make an entry on its register of mortgages and charges in a similar manner to an exempted company incorporated or referenced under the Companies Law, in accordance with Section 62(1) of the LLC Act. This step is usually undertaken by the registered office service provider of the company or LLC and can be completed in a very short time period.

Charges over certain assets, such as land, intellectual property rights, ships and aircraft, need to be registered at other specialist registries related to the asset in question.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Subject to any licensing restrictions that may apply to a regulated entity, no authorisations or consents are required by law from any governmental authorities or agencies or other official bodies in the Cayman Islands in connection with the grant of a security interest.

The directors of the company (or manager, as the case may be) or of an LLC granting the security interest should approve the terms and execution of the security document by way of board resolution in accordance with the company’s articles of association or LLC’s limited liability company agreement. If there is any question of lack of corporate benefit or a potential breach of directors’ duties, it is recommended that the company also obtain a shareholders’ resolution approving the grant of the security interest.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority concerns regarding a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

A number of key documentation issues exist, each of which depend on the form of the security document, whether the document contains a power of attorney and if the document is to be executed by way of deed. The key issues of note are: (i) an agreement to create a legal mortgage over land should be executed and delivered as a deed; (ii) a legal assignment must be in writing and signed by both parties; (iii) any power of attorney or security document containing a power of attorney must be executed by

way of a deed to ensure compliance with the Powers of Attorney Law (1996 Revision); and (iv) where a deed is required, the relevant execution formalities are set out in the Companies Act and the LLC Act.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

- (a) Shares of the company
No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.
- (b) Shares of any company which directly or indirectly owns shares in the company
No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.
- (c) Shares in a sister subsidiary
No, there are no legislative prohibitions or restrictions under Cayman Islands law equivalent to the English law financial assistance rule.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Cayman Islands law recognises 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.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements under Cayman Islands law to make the loan and guarantee enforceable by Lender B, provided that the novation/transfer mechanics in the applicable facility agreement are adhered to as a matter of the applicable governing law.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The Cayman Islands currently have no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. Accordingly, no taxes, fees or charges (other than stamp duty) are payable either by direct assessment or withholding to the government or another taxing authority in the Cayman Islands under the laws of the Cayman Islands.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives or other incentives under Cayman Islands law. See question 6.1.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

No income of a foreign lender will become taxable in the Cayman Islands.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other than, potentially, the payment of stamp duty and applicable court fees on enforcement, no other significant costs should be incurred by foreign lenders in the grant of any loan or the taking of the benefit of any guarantee or security interest.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Assuming that the lenders are not connected to the borrower, in principle there are no adverse consequences if the lenders are organised in a jurisdiction other than the Cayman Islands.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The courts of the Cayman Islands will observe and give effect to the choice of the applicable governing law (the "Relevant Law") of a contract assuming that the choice of the Relevant

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 that jurisdiction and any other relevant jurisdiction as a matter of the Relevant Law and all other relevant laws.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a “foreign judgment”) without re-examination of the merits of the case?

Assuming that the choice of the Relevant Law (as defined in question 7.1 above) 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 Relevant 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 such 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 such judgment is given by a foreign court of competent jurisdiction and is final, for a liquidated sum, not in respect of taxes or a fine or a penalty, and was not obtained in a manner, and is not of a kind, the enforcement of which is contrary to the public policy of the Cayman Islands.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Timing of any litigation will inevitably be dependent on a large number of variable factors (such as location of the defendant, defences raised, complexity of the proceedings and resistance to enforcement). Assuming the defendant is in the Cayman Islands and the matter is straightforward and uncontested, it is possible to obtain default or summary judgment within a short time period. Assuming there is no resistance to enforcement, it may be possible to complete the process in six months. If the defendant is outside the jurisdiction, the process may take substantially longer. The timing for enforcement of a judgment is also dependent on a number of variable factors. It may be possible to complete the process in two to three months, but it could take substantially longer.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

While there are no legislative requirements for a public auction or similar process in the Cayman Islands, liquidators owe fiduciary duties to the creditors and shareholders of a company to

recover the best price possible (usually market value) for all assets of a company upon a liquidation. Recent case law has set a precedent for this in the case of enforcement over land located in the Cayman Islands. Receivers owe their primary duty to the secured party and will seek to recover sufficient funds to repay the debt due; however, they also have a duty to the obligor to recover the best price reasonably obtainable on a sale of the secured assets. Accordingly, public auction or a similar process may be appropriate in certain circumstances. Certain consents may also be required from the Monetary Authority if the obligor is a regulated entity.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

There are no legislative restrictions on foreign lenders filing suit against a company in the Cayman Islands, assuming that they can establish that the Cayman Islands court has jurisdiction over the suit. There are no legislative restrictions applicable to foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

No formal corporate rehabilitation procedure exists under either the Companies Act or the LLC Act, as is the case in England and Wales (administration) or in the United States (Chapter 11), that would give a company or LLC the benefit of moratorium provisions in the payment of its secured debts. Each of a Cayman Islands company and LLC can be subject to voluntary or involuntary winding up proceedings under the Companies Act, although it is possible for a court to appoint a provisional liquidator after the presentation of a petition for the winding up of a company or LLC but before an order for the winding up of the company or LLC is made where, for example, there is an immediate need to take actions to safeguard assets for creditors. There is also a growing practice in the Cayman Islands for provisional liquidators to be appointed with the principal objective of preparing a scheme of arrangement with the aim of avoiding a formal winding up (see further below). While there is an automatic stay of proceedings against the entity when an order for winding up has been made and on the appointment of a provisional liquidator, the stay does not prevent a secured creditor from enforcing its security interest.

Court-supervised debt restructurings are implemented through a scheme of arrangement. A scheme of arrangement involves a compromise or arrangement between a company and its creditors and/or members. In an insolvency or potential insolvency situation, schemes are principally used to: (i) restructure the company’s debts when the company is in financial difficulties, with a view to the company continuing its operations (either on a stand-alone basis or within provisional liquidation proceedings); or (ii) reach a compromise with creditors following commencement of liquidation (the scheme being used as the mechanism for making distributions in the liquidation). No protection from creditor action is afforded if a scheme of arrangement is used outside of liquidation or provisional liquidation proceedings. Where there are different classes of creditors involved, each class is required to hold separate meetings to vote on the scheme proposals. The scheme will be approved by the company’s creditors if a majority (i.e. over 50%) in number,

representing 75% in value of each class of creditors, present and attending, either in person or by proxy, vote in favour of the scheme. Once approved, the scheme will be required to be sanctioned by the Court and delivered to the Registrar of Companies to become binding on all affected parties, regardless of whether and how they voted at the class meeting(s). A scheme of arrangement is broadly analogous to a plan of reorganisation in a Chapter 11.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

The courts of the Cayman Islands will recognise and enforce arbitral awards made pursuant to an arbitration agreement in a jurisdiction which is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”).

Although there is no statutory enforcement of arbitral awards made in jurisdictions not party to the New York Convention, the courts of the Cayman Islands will recognise and enforce such arbitral awards provided that (a) the parties have submitted to the arbitration by an agreement which is valid by its governing law, and (b) the arbitral award is valid and final according to the law which governs the arbitration proceedings. The arbitral award will not be regarded as final by a Cayman Islands court unless the arbitral tribunal has disposed of all the issues itself. A Cayman Islands court will not, however, recognise or enforce such arbitral awards if: (a) under the submission agreement and the law applicable thereto, the arbitrators have no jurisdiction to make the award; (b) it was obtained by fraud; (c) its recognition or, as the case may be, enforcement would be contrary to public policy; or (d) the proceedings in which it was obtained were opposed to natural justice.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Companies Act, when a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company or LLC except with the leave of the court and subject to such terms as the court may impose. This prohibition in our view extends to judicial proceedings and does not include security enforcement methods which do not require an order of the court in the Cayman Islands. Furthermore, subject to any debts preferred by law, each of the Companies Act and the LLC Act provide that secured creditors may enforce their security notwithstanding that a winding up order has been made in respect of the applicable company or LLC.

8.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

The enforceability of any security document will be subject to general insolvency rules applicable to companies and LLCs in the Cayman Islands including voidable preferences and transactions effected at an undervalue.

A secured party holding a fixed charge will, notwithstanding that a winding up order has been made, be entitled to enforce

his security without the leave of the Cayman Islands court and without reference to the liquidator. However, if the security created by the relevant security document is treated as a floating charge, then debts preferred under Cayman Islands law will have priority over the secured party on a liquidation of the company or LLC.

In addition, subsequent purchasers, mortgagees, chargees, lienholders and execution creditors in respect of the assets subject to the floating charge are likely to have priority over the secured party, although this will depend upon such factors as the terms of the floating charge, in particular the scope of any restrictions, whether any subsequent purchasers, mortgagees or chargees have knowledge of any restrictions and the circumstances in which any subsequent transactions arise.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Neither companies nor LLCs incorporated in the Cayman Islands are excluded from proceedings under the Companies Act, the LLC Act or any other applicable laws or regulations.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The Companies Act provides that, at any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may (a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Cayman Islands court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and (b) where any action or proceeding is pending against the company in a foreign court, apply to the court for an injunction to restrain further proceedings therein, and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit. On a voluntary winding up, there is no automatic moratorium. The Cayman Islands court does, however, have discretion to impose a moratorium on a blanket or a case-by-case basis. In practice, the court would only exercise its discretion if there was any doubt about the company’s solvency.

As set out in question 7.6, a creditor of a company or LLC may have a compromise or arrangement imposed upon him under the Companies Act if a majority in number representing three quarters or more in value of the creditors (or class of creditors including the affected creditor) have approved the compromise or arrangement and it has been sanctioned by the Grand Court of the Cayman Islands. Although this is not a mandatory insolvency provision, it is a circumstance in which a creditor of a company or LLC may be made subject to an arrangement or compromise affecting his rights without his consent. It would not, however, affect the enforcement of security rights.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party’s submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

The submission by a company or LLC in a security document to the jurisdiction of the courts of a particular jurisdiction will be

legal, valid and binding on the company or LLC assuming that the same is true under the governing law of the security document and under the laws, rules and procedures applying in the courts of that jurisdiction.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Companies and LLCs can, as a matter of contract, waive immunity for any legal proceedings in the Cayman Islands. However, subject to certain exceptions, companies may receive the benefit of sovereign immunity under the State Immunity Act of the United Kingdom, which has been extended to the Cayman Islands by statutory order.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing or eligibility requirements under Cayman Islands law for lenders to a company or LLC. Assuming that the lenders are not incorporated in or registered under Cayman Islands law and all the activities of such parties have not been and will not be carried on through a place of business in the Cayman Islands, then the lenders will not be required to be licensed in the Cayman Islands solely in order to provide a loan to a company or LLC. Any lenders that are incorporated or registered in the Cayman Islands or otherwise carrying on business in the Cayman Islands will be required to register and be licensed, as applicable, in accordance with Cayman Islands law.

11 Other Matters

11.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2020 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020 due to COVID-19 to continue into 2021 and beyond?

Execution and delivery requirements by a Cayman Islands entity or Cayman Islands-governed document have not been impacted; the use of electronic signatures is usual practice and delivery of original documents are not required, unless otherwise expressly provided for in such entity's constituent documents or the transaction documents. If certain deliverables are required to be certified by a Cayman Islands notary, such notary may adhere their stamp to the document by electronic means. Given that the Cayman Islands has been executing and delivering documents by electronic means for a number of years, the transition to the virtual world has been relatively seamless. We do not anticipate there to be any challenges with the execution and delivery requirements in the coming months and beyond.

In addition, given COVID-19, the Cayman Islands Government has reacted to the impact of social distancing measures by introducing the Notaries Public (Virtual Conduct of Notarial Acts) Regulations, 2020 (the "**Regulations**"). These Regulations permit the use of audiovisual communications technology in connection with notarial acts and will initially be in effect for two years. Pursuant to the Regulations, the primary signatory may now, provided that the primary signatory is physically located in the Cayman Islands at the time they apply their own signature, appear before a Cayman Islands notary public via audiovisual communications platforms such as Zoom or Skype. Upon receipt of an electronic copy of the executed document, the notary public may then apply their seal to, and sign, the electronic copy of the document before returning this notarised copy to the primary signatory.

11.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

No material considerations need to be taken into account other than those described above.



Tina Meigh is head of the Cayman Islands Finance team at Maples and Calder, the Maples Group's law firm. She specialises in finance transactions and has extensive experience in all aspects of fund finance, banking, derivatives and securitisations. Tina represents hedge funds, private equity funds and banks on lending transactions, bank products, deal structures and on all types of secured transactions. She advises a large number of international associations and financial institutions on derivatives and issues surrounding related collateral packages in the context of insolvency in the Cayman Islands. She also has significant experience of general corporate and commercial matters and the establishment of offshore investment funds.

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

Tel: +1 345 814 5242
Email: tina.meigh@maples.com
URL: www.maples.com



Bianca Leacock is an associate in the Cayman Islands Finance team at Maples and Calder, the Maples Group's law firm. She advises on banking, fund financing, structured finance transactions and Cayman Islands Stock Exchange listings. She also advises on general corporate and commercial matters.

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

Tel: +1 345 814 5193
Email: bianca.leacock@maples.com
URL: www.maples.com

The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in 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. For more information, please visit: maples.com/services/legal-services.

www.maples.com



MAPLES GROUP

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs

Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms