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Cayman Islands

Project Finance

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This country-specific Q&A provides an overview of project finance laws and regulations applicable in Cayman Islands.

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Cayman Islands: Project Finance

1. What are the typical ownership structures for project companies in your jurisdiction? Does this vary based on the industry sector?

The Cayman Islands are considered to be an attractive tax neutral jurisdiction by project owners (also known as sponsors) seeking to raise international capital. This capital is usually contributed to a Cayman Islands holding vehicle that in turn owns the shares of the underlying project company. The most common type of vehicle used for these transactions is the Cayman Islands exempted company, although limited liability companies (or LLCs), exempted limited partnerships and trusts are also available. These vehicles are then typically funded by way of loan contributions from the sponsors, with share security over the project company typically then granted in favour of the project lenders.

The types of ownership structures generally do not vary by industry sector.

2. Are there any corporate governance laws or accounting practices that foreign investors in a project company should be aware of?

Project companies and project holding companies are subject to the same legal framework in the Cayman Islands as other commercial companies, save that companies looking to engage in local projects in the Cayman Islands are generally required to be 60% Caymanian owned and controlled. However, licences can be granted to international investors that have the effect of disapplying this condition where investors have tried unsuccessfully to attract local participation.

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

The Cayman Islands has not adopted any particular accounting framework as its national standard, but all companies (including LLCs) and exempted limited partnerships are required to keep proper books of account (including, where applicable, material underlying

documentation including contracts and invoices) and these books of account must give a true and fair view of the state of their affairs and explain their transactions.

3. If applicable, what forms of credit support from sponsors or host governments are typically provided?

The forms of credit support from sponsors typically include: (i) guarantees; (ii) loans (which can be structured in various ways to facilitate the type of funding required); and (iii) the assumption of responsibility for certain types of costs or risks to the project.

In the case of Cayman Islands-based projects, the forms of credit support from the Cayman Islands Government may include: (i) contributing property and physical assets to the project to lower the overall costs; (ii) guaranteeing a certain level of overall project consumption or revenue; (iii) loans; (iv) assuming certain project risks that cannot be quantified or may be uninsurable; and (v) waiving certain licensing requirements or waiving or reducing government fees in connection with the project. Such forms of credit may be provided where the project is of national importance and would generally not be relevant for a private sector project.

4. What types of security interests are available (and suitable) for a project financing in your jurisdiction?

Due to the international and cross-border nature of the transactions typically involving Cayman Islands vehicles, most project finance deals involving a Cayman Islands vehicle are not Cayman Islands projects. As a result, the project transaction documents are unlikely to be Cayman Islands law governed and the project assets are unlikely to be located in the Cayman Islands.

If the security interests are to be governed by Cayman Islands law, they are typically created by way of an all-asset debenture, which grants fixed and floating charges over all of the Cayman vehicle's assets, together with equitable security by way of assignment over its contractual rights. The security is commonly granted in favour of a security trustee or agent who holds the security for the benefit of the lender(s).

It is also typical for the equity holders of the Cayman vehicle to grant an equitable mortgage or charge over the interests in the vehicle in favour of the secured parties.

5. How are the above security interests perfected?

Perfection of security interests over property will depend on the nature of the property and its location.

An equitable mortgage or charge is validly created by the execution of the equitable mortgage or charge and is incapable of true "perfection". However, certain methods are available to improve the quality of the security, such as the following:

- with respect to equitable security by way of assignment over contractual rights, notice of the assignment should be given to the counterparty to the contract (as the priority of equitable interests in respect of contractual rights is determined by the order in which such notice is given); and
- with respect to an equitable mortgage or charge over shares in a Cayman company, share certificates representing the shares should be deposited with the security trustee or agent, together with a signed but undated share transfer form, and a security power of attorney. In each case, an annotation can be made on the register of members of the Cayman company to assist in placing third parties on notice of the creation of the security interest.

6. Please identify how security is enforced (notably the enforcement options available for secured parties) both pre and post insolvency/bankruptcy of the project company?

The project transaction documents will set out the basis on which the secured creditor can enforce the security. This is a matter of contract for agreement between the parties and will reflect the parties' commercial agreement and may provide for a remedy or grace period.

The enforcement provisions are likely to enable the creditor to:

(i) take possession of (and vote in relation to) the applicable assets (by transfer of title or notification, depending on the asset in question); (ii) sell or dispose of the assets to any third party; (iii) effect any contractual or

other rights of set-off; and (iv) appoint a receiver with a power of sale and such other rights as expressly set out in the relevant transaction document.

Liquidation does not generally affect the right of a secured creditor to enforce its security, although if the secured assets are shares in a Cayman Islands company, transfer of title cannot occur without leave of the court.

The Cayman Islands restructuring officer regime enables debtors to file for the appointment of restructuring officers and obtain an immediate stay on unsecured creditor action, without the need to file a winding-up petition. However, as a matter of Cayman Islands law, secured creditors remain entitled to enforce valid and enforceable security interests.

7. What are other important considerations in relation to the security regime in the jurisdiction that secured parties should be aware of?

A Cayman Islands company must make an entry in its register of mortgages and charges in respect of any security interest created over its property (but failure to comply with this requirement does not invalidate the security interest).

On a Cayman company's insolvency, the rights of a non-defaulting party may be affected by certain provisions of Cayman Islands statute, which contains potential clawback provisions in relation to (amongst other things) voidable preferences, transactions at an undervalue and fraudulent dispositions.

8. What key project risks should lenders be aware of in project financings in your jurisdiction? This may include, but may not be limited to, the following risks: force majeure, political risk, currency convertibility risk, regulating or permitting risk, construction/completion risk, supply or feed stock risk or legal and regulatory risk).

Key project risks tend to be project specific. For projects located in the Cayman Islands, these risks would be similar to other jurisdictions and include delays (for example, in obtaining the necessary approval of construction drawings, building permits or work permits) and cost overruns. Many of the insurance providers are also based outside of the Cayman Islands and so additional challenges and costs may arise in arranging insurance due to hurricane risks.

9. Are any governmental / regulatory consents required and are any financing or project documents requirement to be filed with any authority in order to be admissible in evidence in a court of law, valid or enforceable?

There are no governmental/regulatory consents required nor are there any requirements for financing or project documents to be filed with any authority in the Cayman Islands to be admissible in evidence in a court of law or to be valid or enforceable.

10. Are there any specific foreign exchange, royalties, export restrictions, subsidies, foreign investment, that are relevant for project financings (particularly in the natural resources sectors)?

There is no exchange control legislation under Cayman Islands law and accordingly there are no exchange control restrictions.

Whilst a business wishing to establish a physical presence in the Cayman Islands must be structured and licensed in accordance with local laws, there are no statutory or regulatory restrictions on foreign investment into the types of Cayman Islands vehicles that are used for international project finance transactions and no export restrictions or subsidies that are relevant to such international project finance transactions.

11. Please set out any specific environmental, social and governance issues that are relevant. For example, are project companies subject to certain ESG laws, reporting requirements or regulations?

Many environmental laws and measures apply to local project companies, such as the National Conservation Act that exists to protect and conserve endangered, threatened and endemic plants and their habitats, as well as the various types of wildlife in the Cayman Islands. In addition, the Department of Environment facilitates the responsible management and sustainable use of the natural environment and resources of the Cayman Islands.

The Cayman Islands does not currently impose ESG related obligations on Cayman Islands holding companies of international project companies but, as an adherent to international best practices and standards,

actively monitors international ESG trends and developments. If any ESG regulatory framework were to be introduced, its adoption would most likely be voluntary, thereby offering participants the flexibility of being able to integrate such a framework into their existing business models.

12. Has any public-private partnership models or laws been enacted in the jurisdiction, and if so, are they specific to certain industry sectors?

The first public procurement framework was introduced in the Cayman Islands in 2018, replacing what were previously soft-law local authority guidelines and resulting in the Cayman Islands having one of the most modern public-private law and regulations models in the world.

13. Will foreign judgments, arbitration awards and contractual agreements to arbitrate be upheld?

Foreign judgments may be enforced in the Cayman Islands by action at common law or, in the case of judgments of certain courts, by registration under the Foreign Judgments Reciprocal Enforcement Act (As Revised), which codifies the common law rules relating to enforcement. However, as the statutory provisions currently apply only to judgments of certain Australian courts, they are generally of limited practical relevance.

The enforcement of foreign money judgments at common law is based upon the principle that the judgment of a foreign court of competent jurisdiction imposes upon the judgment debtor (i.e. the unsuccessful litigant) an obligation to pay the sum for which judgment has been given. Consequently, the Cayman Islands court will enforce a foreign judgment even though the relevant foreign court would not enforce a Cayman Islands judgment in similar circumstance. Importantly, the Cayman Islands court will not enquire into the merits of the original action, nor will it conduct an enquiry aimed at establishing that the legal system of the foreign country meets basic standards of justice. Furthermore, the Cayman Islands court will not review the measure of damages or compensation and seek to substitute its own judgment for that of the foreign court.

A foreign money judgment may be enforced by action at common law provided that it meets certain criteria. Specifically, it must:

- (i) be made by a court of competent jurisdiction; (ii) be for

a debt or definite sum of money; (iii) not be a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; (iv) be final and conclusive; (v) not be impeachable on the grounds of fraud; (vi) not offend natural justice; and (vii) not be contrary to public policy.

The application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, known as the New York Convention, has been extended to the Cayman Islands. Accordingly, the courts of the Cayman Islands will recognise and enforce most arbitral awards issued in a state which is a party to the New York Convention under the statutory procedure set out under the Foreign Arbitral Awards Enforcement Act (As Revised). It is also possible to enforce a Convention Award, or a foreign arbitral award issued by a non-contracting state, by common law.

14. Is submission to a foreign jurisdiction and waiver of immunity effective and enforceable?

The submission by a Cayman Islands company in any project finance transaction documents to a foreign jurisdiction (as is usually the case for international project finance transactions) will usually be legal, valid and binding on the company assuming the same is true under the governing law of the transaction documents and under the laws, rules and procedures applying in the courts of the foreign jurisdiction, provided that certain provisions that purport to grant exclusive jurisdiction may not always be enforceable (as there may be circumstances in which the courts of the Cayman Islands would accept jurisdiction notwithstanding such provisions).

A Cayman Islands company that is not a sovereign entity of any state or is not a subsidiary of any sovereign entity of any state is not entitled to any immunity under the laws of the Cayman Islands, whether characterised as sovereign immunity or otherwise, for any legal proceedings in the Cayman Islands to enforce or to collect upon any transaction documents.

15. Please identify what you consider to be (a) the key current issues for project financing in your jurisdiction; and (b) any emerging trends or topics which should be considered or focused on by project financing stakeholders.

If a sponsor or financial lending institution intends to provide equity or debt financing that is convertible into equity of a Cayman Islands company engaged in local

business (a "Local Company"), such financing arrangement may require authorisation from the Cayman Islands Trade and Business Licensing Board (the "TBL Board"). Specifically, where a sponsor or financial lending institution is entering into a transaction which would result in such person receiving a security interest over, or acquiring, a 10% or more stake in the Local Company, then regulatory approval from the TBL Board is required.

Furthermore, if the sponsor or financial lending institution is a foreign entity that is entering into a transaction which would result in such person acquiring greater than a 40% stake in the Local Company, the Local Company would have to obtain a special licence under the Local Companies (Control) Act (As Revised) (the "LCCA") or obtain an exemption from such licencing requirements from the Government Cabinet of the Cayman Islands. A licence granted under the LCCA is not renewable, may be issued for up to 12 years and may be subject to such terms and conditions that the TBL Board may see fit.

If a sponsor or financial lending institution is a Cayman Islands vehicle or a foreign company registered in the Cayman Islands that intends to provide equity financing or debt financing to other entities, such sponsor or financial lending institution may have to satisfy certain economic substance requirements under the International Tax Co-Operation (Economic Substance) Act (As Revised) and associated regulations (together, the "Economic Substance Legislation"). The Economic Substance Legislation applies economic substance requirements within the Cayman Islands to certain categories of geographically mobile "relevant activities" previously identified by the OECD (and adopted by the European Union), including, among other activities, banking, financing and leasing, and holding company business.

16. Please identify in your jurisdiction what key legislation or regulations have been implemented (or will / plan to be) for projects in connection with the energy transition?

The following policy and legislation are relevant for energy transition projects within the Cayman Islands:

(i) National Energy Policy of the Cayman Islands 2017: This emphasizes the adoption of alternative and sustainable energy resources, advocates for energy-saving practices, and strengthens energy security by minimizing dependency on fossil fuel imports.

(ii) Utility Regulation and Competition Act (As Revised): The Utility Regulation and Competition Office has been

established to regulate the following sectors: a) electricity markets (including the generation, transmission, distribution and supply of electricity); b) fuels markets; c) information and communications technology markets; and d) the water sector (including the production, distribution, supply and treatment of water).

(iii) Electricity Sector Regulation Act (As Revised) ("ESRA"): A project company that intends to generate energy or electricity is required to obtain an energy/electricity generation licence under ESRA that can be granted for a period of up to 20 years.

17. Please identify if there are any material tax considerations which need to be taken into account for a project financing in your jurisdiction, and if so, how such tax issues can be mitigated.

In the context of international project finance transactions: (i) payments of principal, interest or other payments made to lenders are not subject to withholding tax as a matter of Cayman Islands law; (ii) the Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax; and (iii) no stamp duties or similar taxes are payable unless the relevant transaction documents are executed or brought into the Cayman Islands. The amount of any such stamp duties or similar taxes depends on the type of transaction document (and the type and location of the assets that are subject to any security interest that might be created by any such document) but would typically not constitute a material amount.

With respect to local project finance transactions, the project company will have to take into consideration that much of the equipment required for the project will likely not be located in the Cayman Islands. As such, stamp duty would be payable on any equipment imported into the Cayman Islands for use, even if such equipment would only be imported on a temporary basis. Stamp duty on local real estate may also be applicable.

18. What types of funding structures (e.g. debt,

equity or alternative financing) are typical for project financing in your jurisdiction. For example, are project bond issuances, Islamic finance and – in the context of mining deals – streams or royalties, seen as attractive (and common) options for stakeholders?

As noted above, Cayman Islands holding companies funded by loan contributions from the project sponsors and lenders are a popular type of transaction funding structure. In other types of structures, such as those used for international public-private partnership (or PPP) transactions, Cayman Islands companies also serve as "off balance sheet" special purpose vehicles (or SPVs) which issue debt securities to international investors. The proceeds raised from the issuance of such debt securities are then used to fund the infrastructure projects that are arranged by sponsors in the local jurisdiction.

19. Please explain if there are any regional development banks or export credit agencies, and if so, what is their role in project financing in your jurisdiction and beyond.

There is no export credit agency located in the Cayman Islands. The Cayman Islands Development Bank (CIDB) is a development bank located in the Cayman Islands but its role is limited to supporting the activities of mortgage companies and local commercial banks.

20. Please explain if there are any important insurance law principles or considerations in connection with any project financing in your jurisdiction.

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 (As Revised). However, insurance for international project finance transactions is typically provided by insurers outside of 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.

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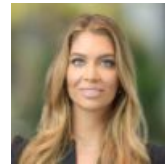
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