

Creation of security by a Cayman Islands exempted company

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One of the major advantages of the Cayman Islands as an international financial centre is that its legislation provides a simple, flexible and robust regime for secured financing transactions that is attractive to lenders.

In most cases the assets of a Cayman Islands incorporated exempted company (a **Company**) will be located outside the Cayman Islands. The exception to this rule is generally (i) shares or other securities issued by another Cayman Islands exempted company and, to a less common degree, certain bank accounts; and (ii) aircraft and vessels registered in the Cayman Islands (which are each subject to a separate security regime). This guide therefore examines the key Cayman Islands aspects of the creation by a Company of security over its foreign assets under a foreign law.

For information about creating security over the shares in a Company, refer to our guide entitled '[Taking security over shares in a Cayman Islands exempted company](#)'.

Security basics

Unlike certain other leading international financial centres, the Cayman Islands does not have a statutory regime that governs the granting, perfection or enforcement of security over the assets of a Company to secure an obligation owed by it to another person.

As a result, the methods of taking security over the assets of a Company derive from English common law, which recognises various forms of security interest over assets, including a legal mortgage, equitable mortgage, charge, assignment by way of security and pledge. Of these, the creation of charges, equitable mortgages and security assignments are by far the most common as a matter of Cayman Islands law.

Security document

The Companies Act (as amended) (the **Companies Act**) is silent on the requirements for the creation of security over the assets of a Company. Nevertheless, the basic requirement is that a Company must create security over its assets by an instrument in writing. However, there is no particular form or provisions prescribed by Cayman Islands law.

In practice, the security will typically be created under the terms of a security document in the form of a charge, equitable mortgage or security assignment.

Governing law

Cayman Islands law allows a security document to be governed by foreign law and gives the parties the freedom to choose any law they consider appropriate to govern it. The security document will be binding on the Company in accordance with, and the remedies available to the chargee (being the recipient of the security) will be determined by, the chosen law.

In practice, it is fairly common to see security granted over the foreign assets of a Company to be governed by the governing law of the underlying lending document or the jurisdiction where the asset is located.

Stamp duty

No stamp duty is payable on the creation by a Company of security, or any transfer on the enforcement of the security, over any of its foreign assets, unless the security document or any ancillary documents thereto are executed in, or executed versions are brought into, the Cayman Islands.

Formalities

The security document does not need to be notarised or apostilled.

Perfection requirements

There are no perfection requirements under Cayman Islands law where a Company creates security over its foreign assets under a security document governed by foreign law.

First steps

Before taking security over a Company's assets, the chargee should:

- review the Company's memorandum and articles of association to ensure that there are no provisions that prohibit it from creating, or might hinder or impair the enforcement of, security over its assets; and
- review the Company's register of mortgages and charges.

Register of mortgages and charges

Duty to keep register

The Cayman Islands does not maintain any regime that permits the public registration of security interests, however, a Company must keep an internal register of mortgages and charges which records details of each security interest created by it. The register must be maintained even if no entries have been made.

A Company's register of mortgages and charges must be kept at its registered office. The register of mortgages and charges is a private record and is not open to inspection by the public, however such register must be open to inspection by any creditor or member of the Company at all reasonable times.

If the Company fails to comply with the obligations mentioned above in respect of the register of mortgages and charges, each director, manager or other officer of the Company who knowingly and wilfully authorises or permits such failure will incur a penalty, but the validity of the security or the admissibility in evidence of the security document will not be affected.

Details to be recorded

For each security interest created by it, a Company must record in its register of mortgages and charges:

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

As priority of competing security interests will be determined on the basis of common law principles, it is prudent for chargees taking floating charges to require that brief particulars of any negative pledge given by the Company in respect of the secured assets are included in the register of mortgages and charges, since a third party that inspected the register would have actual notice of the existence of the floating charge and the negative pledge.

Registration

As stated above, there is no central public registry or statutory priority regime in the Cayman Islands in relation to security created by a Company.

Variation of particulars

When the terms of the security which is entered in the register of mortgages and charges of a Company are later varied by the parties, the variation should be reflected in the Company's register of mortgages and charges. This is done by amending the existing register of mortgages and charges to reflect the variations to the terms of the registered particulars.

Release of security

Where a security interest over the assets of a Company has been released (which would usually involve the chargee executing a deed of release or such other document(s) that are required under the governing law of the security document), the security interest will be released at a time when the release is effective as a matter of the governing law of the security document. The validity of the security release is not reliant on any update to the register of mortgages and charges of the Company. The Company should, however, promptly record the date of the release of its security in its register of mortgages and charges so that the register accurately records the existing security over the Company's assets.

Priority under the Companies Act

Registering a security interest in the Company's register of mortgages and charges does not act to confer priority on a chargee in respect of that secured asset. There is no statutory regime for the mandatory or optional filing or registration of security interests created by a Company under the Cayman Islands law or to determining their priority.

Priority of security interests is a complex area of law and beyond the scope of this guide, however common law rules will apply, to the extent applicable, to determine priority of security as a matter of Cayman Islands law, including (but subject to a number of exceptions) that priority between competing security interests is determined by the dates on which the security interests were created.

Contacts

To find out more, please get in touch with your usual Mourant contact, or alternatively, a full list of contacts specialising in Banking and Finance can be found [here](#).