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Securitisation 2025

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Cayman Islands: Law and Practice

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CAYMAN ISLANDS



Law and Practice

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Travers Thorp Alberga is a leading offshore law firm for complex and novel financing structuring across all conventional disciplines. The firm's highly experienced partners advise in respect of all types of offshore structures, including securitisations, collateralised loan obligation transactions, CFOs, SPV financing, hedge funds, private equity, corporate and partnership vehicles, asset and structured finance transactions, fund-linked structured products, cryptocurrencies, fintech, capital markets and general corporate

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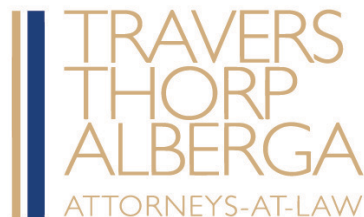
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1. Specific Financial Asset Types

1.1 Common Financial Assets

This section addresses certain issues of law and practice in respect of bankruptcy-remote, special-purpose entities incorporated or established under the laws of the Cayman Islands for the purposes of a securitisation transaction (defined below) (each, an “SPE”).

Where used in this section, a securitisation transaction (a “securitisation”) involves the following:

- An SPE is typically established as a thinly capitalised, exempted company with limited liability. Establishment of such entities can be effected quickly in the Cayman Islands. The shares of the SPE are held on trust by a share trustee (which holds a trust licence in the Cayman Islands), often for charitable purposes to achieve an orphan structure (defined below).
- An orphan structure, intended to ensure that the SPE (i) does not constitute an affiliate or subsidiary of any other entity, in particular, the entity responsible for the transfer of the receivables to the SPE (the “transferor”) and

(ii) should not be regarded as an entity which is otherwise controlled by the transferor from a legal, economic or accounting perspective (an “orphan structure”). Several structural features are incorporated into a securitisation in order to achieve an orphan structure. See **1.2 Structures Relating to Financial Assets**.

- The offer, issue and sale by the SPE of debt securities to regulated, institutional investors. Such debt securities are often listed on the Cayman Islands Stock Exchange and assigned a credit rating (“debt securities”).
- In securitisations a “true sale” generally involves the assignment of legal and/or beneficial title by a transferor to the SPE of the right to receive payments generated by an underlying portfolio of typically largely homogenous assets (such cash flows received in respect thereof are referred to herein as “receivables”). The intent of the true sale is that, after the closing date of the securitisation, the transferor does not have any ownership interest in the receivables that could form a part of the insolvent estate of the transferor (such transfers are referred to herein as a “true sale”). The SPE funds the purchase of the receivables using the net pro-

ceeds of the issuance of the debt securities. The analysis of what constitutes a true sale is fact specific. See **1.2 Structures Relating to Financial Assets**.

- Immediately upon the completion of the true sale, the SPE grants security over all of its assets to a security trustee in favour of the applicable transaction parties, debt securities holders and/or investors of the SPE, in order to secure the SPE's payment obligations to such parties (the "secured parties"). See **2.8 Security Trustees/Agents**.
- "Bankruptcy-remoteness" protections, intended to provide that the SPE is remote and protected from the bankruptcy or insolvency of the transferor. Bankruptcy remoteness seeks to provide that neither the bankrupt or insolvent transferor, nor the creditors of the transferor, would be able to either set aside, or successfully apply to a court to have set aside, the true sale of the assets to the SPE. See **1.2 Structures Relating to Financial Assets** and **3.1 Bankruptcy-Remote Transfer of Financial Assets**.

Traditional Asset Classes

Almost all financial assets that generate a predictable revenue stream arising from retail or corporate assets located in the USA, UK and EU are commonly securitised, including vehicle financing and leasing arrangements, cash flows arising from the operations of a corporate or entire group (whole business securitisation), commercial and residential mortgages, broadly syndicated loans and middle market loans made to commercial borrowers.

Alternative Asset Classes

Increasingly, entities are established in the Cayman Islands to provide funding with respect to the ongoing risk retention requirements of originators, sponsors, original lenders and servicers

pursuant to the EU/UK securitisation regulations. There has also been an increase in the usage of derivative instruments (total return swaps and credit default swaps) within the context of risk retention requirements.

Income, or other proceeds generated by Cayman Islands-domiciled funds, are commonly securitised in collateralised fund obligation transactions (CFOs). Such structures are increasingly common given the growth of the private credit markets in recent years.

A CFO typically involves securitisation of private fund interests (such as limited partnership interests) and other liquid assets or income proceeds. The debt securities are backed by the payment stream received from the underlying fund assets. The CFO issuer is structured as an SPE including typical bankruptcy-remote features.

1.2 Structures Relating to Financial Assets

A securitisation will typically include the material features outlined below.

Bankruptcy Remoteness

The SPE is intended to be treated as an entity remote from the transferor and unaffected by the insolvency of the transferor. Each transaction counterparty will undertake contractually not to engage in, or petition for, the winding up or insolvency of the SPE.

Orphan Structure

Several structural features supporting orphan structure analysis are typically included in securitisations, including the following:

- First, the appointment of the directors of the SPE may be effected by the SPE's Cayman Islands corporate services provider or admin-

istrator, as opposed to the transferor or its advisers.

- Second, the shareholder of the SPE will often be a Cayman Islands-domiciled share trustee. The shares are commonly held on trust for charitable purposes. Neither the transferor nor any member of its corporate group should be appointed as a shareholder or director of the SPE.
- Third, the SPE will have independent Cayman Islands legal counsel appointed by the directors of the SPE. The Cayman Islands are home to many reputable law firms that provide such independent advice.
- Fourth, the assets, proceeds generated from the receivables of the SPE and monies belonging to the SPE, are held separately from the assets and monies of the transferor, with a view to minimising commingling risk.
- Fifth, evidence of arm's length negotiation, and incorporation of commercially reasonable terms into the securitisation transaction documentation are important from a Cayman Islands perspective. For example, overcollateralisation should be kept within a reasonable, commercial level and proper consideration should be given (and paid) in respect of the sale of the receivables. The applicable corporate resolutions of the SPE often include analysis of the corporate benefit to the SPE of it entering into the securitisation.

Limited Recourse

The transaction documents will provide that the secured parties must rely solely on the cash flows generated by the receivables (and in certain circumstances following an event of default, proceeds from the liquidation of the underlying assets) in order for the SPE to meet its payment obligations to the secured parties. If distributions on the assets are insufficient to make payments to the secured parties, no other assets will be

available for the shortfall and, following liquidation of the assets, the liability of the SPE to pay any such shortfall will be extinguished.

Issuance of Debt Securities and Waterfalls

The transaction parties will agree the order and frequency of distributions paid by the SPE, both in normal course and in an enforcement situation (such priorities of payment, the "waterfalls").

The laws of the Cayman Islands recognise both contractual and structural subordination and the Companies Act (defined below) specifically provides that an otherwise enforceable agreement to contractually subordinate claims shall be recognised in a liquidation of a Cayman Islands company.

There will typically be no intention to accumulate any surplus in the SPE (other than amounts standing to the credit of a general reserve or liquidity fund).

Receivables

On the closing date of the securitisation, title to the receivables and their related security are transferred to the SPE. The initial purchase price is funded using the net proceeds of the issuance of the debt securities of the SPE.

Grant of Security

Immediately upon the transfer or assignment to the SPE of the receivables, a security grant will be made in favour of a security trustee for the benefit of the secured parties.

Tax

There is no concept of tax residency under the laws of the Cayman Islands, rather, the applicable onshore regimes do not claim a tax nexus or base if implemented correctly. There is currently no income, corporation or capital gains

tax charged in the Cayman Islands. See 7. Tax Laws and Issues.

Foreign Account Tax Compliance Act (FATCA)

The Cayman Islands Tax Information Authority Act (International Tax Compliance) (United States of America) Regulations (2021 Revision) was implemented in furtherance of the intergovernmental agreement between the United States and the Cayman Islands and requires financial institutions to report US tax resident account-holders to the Cayman Islands Tax Information Authority, which will pass such information to the US IRS. As a result, the SPE should generally not be subject to withholding tax on payments made to the SPE.

Common Reporting Standard

The Cayman Islands has implemented the Organisation for Economic Co-operation and Development (OECD) Standard for Automatic Exchange of Financial Account Information (commonly known as the Common Reporting Standard (CRS)) through the Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision).

Registered Office Provider

As a matter of the laws of the Cayman Islands, the only requisite Cayman Islands-based administrative provider is a registered office provider. However, for tax and other reasons, the SPE will typically appoint Cayman Islands-domiciled corporate service providers and/or administrators to provide directorships, legal, regulatory and compliance assistance.

1.3 Applicable Laws and Regulations

The principal laws and regulations of the Cayman Islands that impact the majority of secu-

ritisations can broadly be divided into two categories:

- laws in respect of the establishment and incorporation of SPEs; and
- laws in respect of ongoing compliance.

Establishment and Incorporation of SPEs

The Companies Act (2023 Revision), as amended, of the Cayman Islands (the “Companies Act”) is likely to be the most relevant instrument for most SPEs.

Ongoing Compliance

One or more of the following laws and regulations (as amended, in each case) are likely to be relevant:

- Anti-Money Laundering Regulations (2023 Revision) (together with the Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and Proliferation Financing in the Cayman Islands (the “Guidance Notes”)) (AMLRs);
- Beneficial Ownership Transparency Act, 2023;
- Beneficial Ownership Transparency Regulations, 2024;
- Data Protection Act (2021 Revision);
- Proceeds of Crime Act (2024 Revision) (the “POCA”);
- Tax Information Authority (International Tax Compliance) (United States of America) Regulations; and
- Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision).

All Cayman Islands persons (which will include an SPE) are required to observe Cayman Islands sanctions provisions. The list of sanctions regimes currently in force in the Cayman Islands

is available on the Financial Reporting Authority website.

The listing rules of the CSX (including applicable disclosure requirements) will apply if the debt securities are listed on the CSX. See **3.8 Bonds/Notes/Securities**.

All Cayman Islands persons (which will include an SPE) are required to file electronically with the Registrar of Companies a notification regarding their status under the International Tax Cooperation (Economic Substance) Act (the “ES Act”). Relevant entities engaged in relevant activities are also required to satisfy the economic substance test under the ES Act and to file an annual report with the Cayman Islands Tax Information Authority concerning compliance with the economic substance test. A securitisation SPE is likely to fall within the definition of an “investment fund” under the ES Act, which means it will not be a relevant entity, and will not therefore have to satisfy the economic substance test under the ES Act.

As a matter of the laws of the Cayman Islands, an SPE is unlikely to be registerable under the Mutual Funds Act or the Private Funds Act.

In respect of a CFO transaction involving either receivables governed by the laws of the Cayman Islands or equity interests of Cayman Islands funds, the true sale and asset transfer analysis may require consideration of the Exempted Limited Partnership Act (2021 Revision) and the Limited Liability Companies Act (2023 Revision), each as amended. In the case of a securitisation involving an orphan trust established in the Cayman Islands, the Trusts Act (2021 Revision), as amended, will likely be applicable.

1.4 Special Purpose Entity (SPE) Jurisdiction

There are a number of reasons why the Cayman Islands are attractive in the context of incorporating special purpose entities.

Flexible and Well-Established Legal System

The sophisticated and well-established common law legal system in the Cayman Islands has been used extensively for the establishment of SPEs for securitisations.

The Cayman Islands has its own company, trust, partnership and related laws that allow a high degree of flexibility for establishing special purpose entities, invariably driven by user inputs.

Because of their structure, securitisation special purpose entities that are not insurance securitisation vehicles are generally not required to be registered or licensed by the Cayman Islands Monetary Authority (CIMA) under any regulatory law.

The Cayman Islands are seen as a creditor-friendly jurisdiction, with no Chapter 11 or equivalent procedures that might frustrate the enforcement of security arrangements.

Quoted Eurobond Exemption – CSX

The quoted Eurobond exemption is an exemption from the obligation to withhold income tax from certain (UK) source payments. In order to qualify for the quoted eurobond exemption, the debt must, among other things, be listed on a recognised stock exchange. Since March 2004, the Official List of the CSX has been a “recognised stock exchange” by His Majesty’s Revenue & Customs. Typically, SPEs involving UK-source payments take advantage of this exemption and list debt securities on the CSX.

Debt securities can be efficiently and promptly listed on the CSX given the CSX's familiarity with securitisation structures. The CSX is an affiliate member of the International Organization of Securities Commissions. The CSX has a listed market value in excess of USD884 billion.

Mitigation of Counterparty Risk and Availability of Service Providers

The focus in the Cayman Islands on financial services means that there are a wide range of well-staffed, high-quality law firms, accountancy firms, insurance companies, banks and both captive and third-party service providers able to provide professional advice and services to both Cayman Islands-domiciled special purpose entities and their sponsors and advisers.

Market participants can mitigate their own internal counterparty risk by engaging and instructing different service providers across transactions and product groups.

Tax Neutrality

See 7. Tax Laws and Issues.

1.5 Material Forms of Credit Enhancement

SPEs are able, under the laws of the Cayman Islands, to enter into securitisations, which include typical forms of credit enhancement, the most common forms being:

- **Tranching of Credit Risk:** Tranching involves contractual subordination of the rights of each secured party to receive payment. The highest-ranking class of debt securities will rank *pari passu* and rateably without any preference or priority among themselves as to payments of interest and principal. Each other class of debt securities will be subordinated in payment to each higher-ranking class.

Pursuant to the waterfalls, no payments will be made on any class of debt securities until amounts due on each higher-ranking class have been paid in full.

- **Over-Collateralisation:** The assets of the SPE may be required to exceed the aggregate amount outstanding under its debt securities by a specified percentage.
- **Excess Spread:** Additional revenue may be generated by the difference between the interest payable on the underlying assets (such as a mortgage interest rate) and the interest payable on the debt securities.
- **Reserve Funds:** A general reserve fund is typically established by the SPE from the proceeds of the issuance of the debt securities (up to a required amount). Typically, such amounts may be invested by or on behalf of the SPE in authorised investments. A liquidity reserve fund may also be established by the SPE on the closing date (up to a required amount) in order to provide the SPE with increased liquidity.

2. Roles and Responsibilities of the Parties

2.1 Issuers

See 1.1 Common Financial Assets and 6.2 SPEs.

2.2 Sponsors

Role of the Sponsor

The role and meaning of the term “sponsor” varies across jurisdictions. There is no statutory definition of such term under the laws of the Cayman Islands with respect to a securitisation. The sponsor would usually be understood to be the party who initiates the securitisation and appoints service providers.

Reimbursement Agreements

In many cases, the SPE and sponsor may enter into an agreement pursuant to which the transferor or sponsor will reimburse the SPE in respect of certain obligations of the SPE to make payment of certain transaction fees, expenses and payments under any indemnities provided by the SPE (a “reimbursement agreement”).

2.3 Originators/Sellers

There is no statutory definition of “originator” or “seller” under the laws of the Cayman Islands with respect to a securitisation SPE.

- **Originator:** The “originator” would usually be understood to be the party who initially created legal and equitable title in the underlying assets.
- **Seller:** The “seller”, in the context of a securitisation, is the transferor (transferring current or future rights over, or in respect of, the receivables) from whom an SPE acquires (or would in the future have the right or an obligation to acquire) title to the receivables.

The seller and the originator are not necessarily the same entity.

2.4 Underwriters and Placement Agents

The underwriter or placement agent is usually engaged on behalf of the SPE to act as structurer and arranger in connection with a securitisation.

2.5 Servicers

Asset Manager

In a transaction where the underlying assets are subject to discretionary management, the SPE will appoint an asset manager. Certain management, advisory and administrative functions with respect to the assets will be performed by the asset manager, including managing the selec-

tion, acquisition, reinvestment and disposition of the assets.

Servicer

In transactions involving a static portfolio of assets, an asset servicer is appointed. The role of the servicer is to maximise the value of assets and recoveries for the secured parties, as well as to maintain regulatory compliance. Back-up servicers may be appointed to mitigate the risk of default or insolvency of the existing servicer.

2.6 Investors

Outside of the scope of applicable sanctions laws and regulations, there are few restrictions on the types or number of entities that can invest in an SPE.

No invitation (whether directly or indirectly) may be made to the public in the Cayman Islands to subscribe for debt securities issued in a securitisation transaction unless the debt securities are listed on the CSX.

See 1.1 Common Financial Assets.

2.7 Bond/Note Trustees

Bond/note trustees are appointed by the SPE in respect of the grant of security over its assets. A bond/note trustee acts on behalf of the holders of the debt securities, and whilst any debt securities remain outstanding, the bond/note trustee will not be required to have regard to the interests of the other secured parties.

SPEs may hold legal and/or equitable title to assets located in the Cayman Islands or another jurisdiction with little or no specific custody arrangements mandated by the laws of the Cayman Islands.

2.8 Security Trustees/Agents

Similarly with bond/note trustees, security trustees/agents are appointed by the SPE on a trust or agency basis in respect of the grant of security over its assets. The security trustee/agent holds the portfolio of assets on trust for the benefit of the secured parties.

As a matter of the laws of the Cayman Islands, the Companies Act requires that a limited company maintain a statutory register of mortgages and charges recording all security interests affecting the property of the company, plus a short description of the charged property, the amount of the charge and the persons entitled to such charge.

Set out below are some material considerations with respect to security governed by the laws of the Cayman Islands.

General Principles

As with other common law jurisdictions, the purpose of any security created in favour of a secured party is to recognise that such secured party will be able to look to an asset (or the proceeds of disposal of such asset) if the SPE fails to discharge its liabilities.

Mortgages

Legal mortgages are the most comprehensive and secure form of security in the Cayman Islands. A legal mortgage is the transfer, by conveyance or assignment, of the legal ownership of an asset by way of security. This transfer is subject to an obligation to re-transfer ownership of the asset to the mortgagor if the mortgagor discharges its liabilities.

An equitable mortgage is the transfer by the mortgagor of its beneficial interest in the relevant

asset to the mortgagee while the legal interest remains with the mortgagor.

Charges

Charges are always equitable in nature. Chargors do not transfer legal or equitable interests in the asset to the chargee, nor do they confer a right of possession. Instead, the chargee has a right to resort to the asset in order to realise it and apply the sale proceeds towards payment of its debts.

Liens and Pledges

Liens and pledges are dependent upon delivery of possession of the secured asset; thus, they are rarely used in Cayman law-governed security structures.

Registration of Security

There is no public system of registration of security in the Cayman Islands and therefore no basis for constructive knowledge of a registered charge. A Cayman Islands company granting security is required under the Companies Act to note a short description of the secured asset, the amount of the security and the name of the secured creditor on its internal register of mortgages and charges, which must be maintained at its registered office in the Cayman Islands. Failure to register does not invalidate the security itself unlike in some jurisdictions (eg, England and Wales). There is no statutory time limit within which registration must take place.

3. Documentation

3.1 Bankruptcy-Remote Transfer of Financial Assets

Various forms of legal instrument are used to give exposure to underlying assets.

- **True Sale and the Sale Agreement:** The agreement effects a sale and transfer of title in the receivables from the transferor to the SPE. See **1.1 Common Financial Assets**.
- **Recharacterisation Risk:** Such risk arises in the context of an insolvency practitioner, creditor, court or regulator seeking to recharacterise a true sale as a secured loan arrangement. The English Court of Appeal set out the differences between a sale and a secured loan in the case *Re: George Inglefield Ltd* [1933] Ch. 1. The three principles characterising a sale transaction set out by the Court of Appeal are as follows:
 - (a) The seller should not have the right to the return of the asset sold by returning the purchase price to the purchaser.
 - (b) If the purchaser disposes of the asset for an amount in excess of the initial purchase price, the purchaser does not have to account to the original seller in respect of the gain.
 - (c) The seller is not necessarily obliged to account to the purchaser for losses incurred by the purchaser on the disposal of an asset.
- **Participations:** A participation interest is created where an SPE acquires, or is transferred, an interest in an asset, commonly in exchange for a financial contribution to the originator. Pursuant to such arrangement, the SPE avoids acquiring legal title or an absolute ownership interest in such asset. As a result, the SPE avoids triggering any prohibitions on transfers or other restrictions related to the ownership of the underlying assets and has no servicing obligations with respect to the underlying assets. However, such participation results in a contractual relationship only with the originator and therefore the SPE cannot sue the underlying obligor upon a default without joining the originator in an enforcement. The SPE will generally have the right to receive payments of principal, interest and fees only from the originator, and only upon receipt by such originator of such payments from the underlying obligor. The SPE generally will have no right to enforce compliance by the underlying obligor with the terms of the agreement governing the receivable, no rights of set-off or netting, and the SPE may not directly benefit from the security and related rights that support the asset.
- **Due Diligence:** Due diligence should be carried out on the underlying assets to ensure that there are no prohibitions on transfer, that the requirements of transfer (eg, notice, consent, registration, formalities) will be complied with, and that there are no material hidden economic or other risks for the SPE which have not been disclosed.
- **CFO-Specific Issues:** The Cayman Islands-established originator fund's constitutional documents must be reviewed for restrictions, ensuring that the securitisation will not trigger any leverage limits or require consent of the limited partners. In addition, transferring Cayman Islands law-governed partnership interests typically requires the consent of the general partner even if the actual fund interest is not transferred, only the right relating to such fund interest to receive distributions.
- **Derivative Transactions:** The form of swaps that may be entered into vary, but they are commonly based on forms provided by the International Swaps and Derivatives Association. Total return swaps and credit default swaps are commonly used. Interest rate and currency swaps may, in the case of securitisations with rate or currency mismatches, be included. Swaps are used in all synthetic securitisations where title of ownership of the underlying assets are not transferred, only

certain economic rights and/or obligations related to such assets.

- Declaration of Trust: An originator, seller or original lender (as trustee), declares a trust over its equitable rights to the distributions from the receivables in favour of the SPE (as beneficiary) ringfencing those rights for the beneficiary SPE and hence removing them from the bankruptcy estate of the originator.

3.2 Principal Warranties

Material warranties fall into two separate categories: corporate warranties and asset warranties.

Each of the SPE and transferor will typically provide standard warranties regarding solvency, corporate authority and ability to enter into the transaction, respectively.

Asset warranties are of particular importance in a securitisation. The most important of which cover the transferability of the assets to the SPE.

Other material warranties include, in respect of the assets: enforceability, compliance with law and regulation, no known or reasonably discoverable material risks, no pending or threatened litigation, regulatory or governmental action.

3.3 Principal Perfection Provisions

As a matter of the laws of the Cayman Islands, there is no statutory method for perfection of security per se. For example, there is no public register of security interests. As a result, principles regarding perfection of security follow other common law jurisdictions. In the context of a securitisation, perfection is usually understood to mean the ability for security to become enforceable, in accordance with its terms, by the applicable secured party (or trustee or agent on its behalf).

Requirements in respect of perfection of security vary depending on whether the receivables are located in (or governed by the laws of) the Cayman Islands or are located elsewhere. In respect of receivables located in the Cayman Islands, perfection may involve the provision of notice, registration of a charge and/or the updating of corporate registers of the SPE prior to any such insolvency.

3.4 Principal Covenants

Each of the transferor and SPE will provide a standard covenant package. The covenants binding on the SPE are typically more comprehensive and include:

- making timely payments in full;
- compliance with applicable laws and regulations;
- maintenance of separate legal identity and independent directors;
- maintenance of security;
- not to deal in or dispose of its assets;
- not to deduct or offset any amounts due;
- not to incur indebtedness;
- not to permit any incumbrance over its assets; and
- not to enter into any other transaction or have any other business, change its name, allow its non-petition or limited recourse provisions to be amended, hire employees or dissolve or liquidate itself, in whole or in part.

3.5 Principal Servicing Provisions

See 2.5 Servicers.

3.6 Principal Defaults

The following summary describes certain principal defaults by an SPE:

- a default in any payment due on any debt securities issued by the SPE when due and payable, subject to an applicable cure period;
- the failure to maintain asset-level quality tests, overcollateralisation ratios or requirements to maintain a minimum reserve or liquidity fund;
- a default in the performance, or breach, of any other covenant, representation, warranty or other agreement of the SPE which is materially prejudiced, subject to an applicable cure period; or
- the occurrence of a bankruptcy event in respect of the SPE.

3.7 Principal Indemnities

A broad indemnification package is often given by the SPE in favour of the trustees and their agents, who will require full indemnification to their satisfaction prior to taking any enforcement action, in addition to the other secured parties.

The obligation of the SPE to make indemnity payments will be required to be made in the priority set out in the waterfalls in the applicable transaction documents. As SPEs are incorporated on a thinly capitalised basis and have limited assets to meet their liabilities to the secured parties, a sponsor typically provides back-to-back indemnification under a reimbursement agreement to an SPE in order for an SPE to be able to meet its obligations. See 2.2 Sponsors.

An SPE may have pre-existing indemnification obligations with respect to its existing warehouse financing, which in some cases may survive the termination of the warehouse funding agreement.

3.8 Bonds/Notes/Securities

From a Cayman Islands legal perspective, there are no material restrictions on an SPE enter-

ing into any principal form of documentation in respect of debt securities.

Debt securities listed on the CSX can benefit from the quoted eurobond exemption (see 1.4 **Special Purpose Entity (SPE) Jurisdiction**). From a Cayman perspective, in order to list debt securities on the CSX, the applicant must comply with the rules of the Cayman Islands Stock Exchange Listing Rules (2023) (the “Listing Rules”). See 3.10 **Offering Memoranda**.

3.9 Derivatives

See 3.1 **Bankruptcy-Remote Transfer of Financial Assets**.

3.10 Offering Memoranda

The securities laws of mature markets generally require the production of an offering memorandum in respect of a securitisation. In respect of a private issuance under the laws of the Cayman Islands, a private placement memorandum can be produced. The disclosure contained in a private placement memorandum is shorter and less detailed than in the offering memorandum seen in most securitisations.

As well as including disclosure of material risks to investors, the offering memorandum will contain certain SPE-specific disclosure. Some material points are set out below.

Responsibility Statement

Where the debt securities of the SPE are listed on the CSX, the SPE is required to make statements that: (i) the SPE has provided and accepts responsibility for applicable information contained in the offering memorandum; (ii) to the best of the knowledge and belief of the SPE, which has taken reasonable care to ensure that such is the case, the information contained in the offering memorandum is in accordance with

the facts and does not omit anything likely to affect the importance of such information; and (iii) if listed on the official list of the CSX, the listing document includes information given in compliance with the Listing Rules.

CSX Listing Rules

The Listing Rules contain specific disclosure requirements for different forms of securities. In respect of debt securities, the contents of a listing document must include at least the following: (i) name and country of incorporation of the SPE; (ii) address of principal or registered office of the SPE; (iii) number and description of the securities; (iv) names and addresses of the arrangers, auditors, trustees, fiscal agent, paying agent, calculation agent, registrar and legal advisers; (v) statement that application has been made for the relevant securities to be admitted to the official list of the CSX; (vi) a responsibility statement and disclaimer (see above); and (vii) any matter of significance to investors relating to the securities.

Common Law Disclosure Rules

The offering materials need to be true, accurate and not misleading in all material respects. There is a positive duty on an SPE, the directors and any promoters and distributors to ensure conflicts of interest and sources of fees and profit, direct and indirect, are fully disclosed.

Cayman-Specific Disclosure

Any offering memorandum involving an SPE must be subject to review and input from Cayman Islands counsel to the SPE. In particular, counsel should expect to provide input on the following sections of the offering memorandum: the description of the SPE (including any disclosure required under the Listing Rules; descriptions of the terms of the appointment of the agents of the SPE (including their fees and the

material terms of the applicable agreements); risk factors, including any material Cayman Islands-specific risks; the investment objectives of the SPE; structure, description of shareholding and directorships and any other applicable key terms.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

The Cayman Islands do not have any securitisation-specific disclosure laws or regulations.

The listing rules of the CSX will apply if debt securities are listed on the CSX. See 3.8 **Bonds/Notes/Securities**.

Certain common law principles require the disclosure of specific information. See 3.10 **Offering Memoranda**.

4.2 General Disclosure Laws or Regulations

See 3.10 **Offering Memoranda**.

4.3 Credit Risk Retention

The Cayman Islands do not impose any requirements on an SPE, transferor, sponsor or original lender to hold or retain either assets or debt securities in respect of a securitisation.

However, the legal systems of the USA, UK and the EU do impose such requirements, so it is common to see such provisions.

4.4 Periodic Reporting

The Cayman Islands do not impose any requirements on an SPE, transferor, sponsor or original

lender to produce asset or debt securities level reports to investors or otherwise. Certain jurisdictions do require such reporting, so it is common to see such provisions.

The auditors of the SPE, the accounting reference date and details regarding publication of accounts or interim accounts (in each case, if any) are disclosed in the offering memorandum. As a matter of the laws of the Cayman Islands, there is no mandatory audit requirement.

4.5 Activities of Rating Agencies

It is generally a requirement of the credit rating agencies that an opinion of counsel to the SPE as to certain matters of the laws of the Cayman Islands is issued to the rating agency. See 7.5 Obtaining Legal Opinions.

The rating criteria used in respect of insolvency-remote SPE typically cover:

- asset isolation;
- insolvency-remoteness of SPEs;
- restrictions on activities;
- covenants in the transaction documents not to engage in any businesses or activities other than those necessary for its role in the transaction;
- debt limitations;
- separateness covenants;
- creation of security interest over assets; and
- limitations on reorganisation or changes of ownership and shareholder restrictions.

4.6 Treatment of Securitisation in Financial Entities

In respect of any Cayman Islands-based financial entity investing in securitisation positions, there are no special rules under Cayman Islands law governing capital or liquidity treatment with respect thereto.

4.7 Use of Derivatives

There are no specific laws in the Cayman Islands regarding the use of derivatives.

4.8 Investor Protection

See 2.6 Investors.

4.9 Banks Securitising Financial Assets

A financial institution outside of the Cayman Islands originating receivables to be securitised will be subject to the rules concerning the origination and servicing of such assets in the jurisdiction of its incorporation and usually the jurisdiction within which such receivables are located. The rules that are applicable will depend on asset type, borrower type and the governing law of the receivables.

4.10 SPEs or Other Entities

Cayman Islands law does not prescribe a specific form of securitisation vehicle. The Cayman Islands courts will generally give effect to limited recourse provisions that are legal, valid and binding under the relevant applicable law.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Regulatory requirements must be thoroughly assessed in each transaction to ensure the compliance of the transaction with, amongst other matters: the AMLRs, sanctions laws and regulations; data protection legislation; beneficial ownership reporting obligations; and CRS/FATCA obligations. Under Data Protection Legislation, the SPE acts as data controller and has obligations with respect to the processing of personal data by both the SPE itself and its affiliates and delegates.

4.12 Participation of Government-Sponsored Entities

There is no economic participation in the securitisation markets by Cayman Islands government-sponsored entities at this time.

4.13 Entities Investing in Securitisation

See 2.6 Investors.

4.14 Other Principal Laws and Regulations

Because of their structure, securitisation SPEs that are not insurance securitisation vehicles are generally not required to be registered or licensed by CIMA under any regulatory law. However, securitisation transactions may nevertheless present money laundering/terrorist financing/proliferation financing risks. CIMA has therefore issued sector-specific guidance titled the “Guidance Notes Amendment (Securitisation), May 2021”, which is applicable to non-insurance SPEs and the parties that provide services to such SPEs.

The SPE will be carrying on relevant financial business under the POCA, and will therefore be required to comply with the AMLRs. The SPE may delegate or outsource the performance of its obligations to a service provider, but will be required to comply with the relevant principles in the Guidance Notes.

Various service providers to the SPEs may also be considered as carrying on relevant financial business under the POCA.

5. Synthetic Securitisation

5.1 Synthetic Securitisation Regulation and Structure

There are no particular rules of the laws of the Cayman Islands that specifically cover synthetic securitisation.

6. Structurally Embedded Laws of General Application

6.1 Insolvency Laws

There are a number of statutory provisions that may render a transaction voidable and therefore affect the clawback analysis under a securitisation. Preferences and transactions at undervalue are potentially voidable upon application by the liquidator. A liquidator may also apply for a declaration 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 creditors or for any other fraudulent purpose. See 6.5 Bankruptcy-Remote SPE.

SPE

Each of the secured parties will be required to agree not to institute any bankruptcy or similar proceedings against the SPE (under Cayman Islands law or similar laws of any jurisdiction) until payment in full of all debt securities and the expiration of an applicable period.

Non-petition provisions are recognised under the laws of the Cayman Islands. Section 95(2) of the Companies Act provides that the court shall dismiss a winding-up petition or adjourn the hearing of a winding-up petition on the ground that a petitioner is contractually bound not to present a winding-up petition against an SPE. In order to benefit from these statutory protections, non-petition clauses require clear, precise and

unequivocal drafting. A contractual agreement in respect of non-petition is likely to be enforceable in the Cayman Islands unless it breaches public policy. As the petition for appointment of a company restructuring officer is commenced by a company (via its directors) itself, if that company was restricted under a contract from petitioning for such a company restructuring officer itself, that could be upheld.

Secured Creditors

As a matter of law in the Cayman Islands, 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 a Cayman Islands court and without reference to the applicable liquidator.

6.2 SPEs

Some practical considerations relating to an SPE are set out below.

Incorporation

Generally, a certificate of incorporation can be provided within 24 hours if ordered on an expedited basis. There are no minimum capital requirements for a securitisation SPE under the Companies Act, although there must be at least one share in issue at all times. Cayman Islands-exempted limited companies are often incorporated with an authorised capital of USD50,000 (which is the maximum authorised capital for payment of the minimum fee to the Registrar of Companies).

Directors

In respect of an SPE incorporated as an exempted company limited by shares, there is a requirement for there to be at least one director appointed at any point in time. In practice, two or three independent directors are often appointed,

and often the constitutional documents permit the appointment of a proxy. As a matter of the laws of the Cayman Islands, the directors are not required to be located within the Cayman Islands. However, there may be tax consequences if such directors are located outside of the Cayman Islands. Each director is under a duty to act honestly and in good faith with a view to acting in the best interests of the SPE, regardless of any other directorship such director may hold. Each director is responsible for advising the board of directors in advance of any potential conflicts of interest. A director of the SPE is not required to own any shares in the SPE in order to qualify as a director. An SPE will generally have no subsidiaries or employees.

Shareholders

A Cayman Islands-exempted limited company can limit the liability of its members by a declaration of the same in the memorandum of association. Shares of a fixed amount or shares without a nominal value may be issued. Shares may be expressed (and subscribed for) in any currency.

Substantive Consolidation

Neither the laws of the Cayman Islands nor the laws of England and Wales recognise or provide for a doctrine of substantive consolidation.

6.3 Transfer of Financial Assets

See 3.1 Bankruptcy-Remote Transfer of Financial Assets.

6.4 Construction of Bankruptcy-Remote Transactions

See 3.1 Bankruptcy-Remote Transfer of Financial Assets.

6.5 Bankruptcy-Remote SPE

See 1.2 Structures Relating to Financial Assets and 6.1 Insolvency Laws.

7. Tax Laws and Issues

7.1 Transfer Taxes

The Cayman Islands currently has no income, corporation or capital gains tax and no estate duty, inheritance tax or gift tax.

The Tax Information Authority, which serves as the competent authority in respect of taxation in the Cayman Islands, does not at present impose transfer taxes in the Cayman Islands in respect of the entry by an SPE into a securitisation transaction regarding the transfer of receivables from the transferor.

In theory, Cayman Islands stamp duty may be payable if any documents are executed in, after execution brought to, or produced before a court of the Cayman Islands.

7.2 Taxes on Profit

There are no taxes on profits imposed in the Cayman Islands at present in respect of the income an SPE earns from the receivables in a securitisation.

7.3 Withholding Taxes

There should generally be no withholding tax on cross-border payments received by an SPE under a securitisation. Neither should withholding be required on the payment of interest or principal on the debt securities, nor should gains derived from the disposal of debt securities be subject to Cayman Islands income or corporation tax. See 1.2 Structures Relating to Financial Assets.

There is no income tax treaty arrangement with the USA or any other country that is applicable to payment on debt or equitable instruments; however, the Cayman Islands has entered into

a tax information exchange agreement with the USA, the UK and various other countries.

7.4 Other Taxes

An SPE may receive a tax concession undertaking (under the Tax Concessions Law (2018 Revision)) from the Financial Secretary of the Cayman Islands in respect of the taxable status of the SPE, which can be valid for up to 30 years.

See 7.1 Transfer Taxes to 7.3 Withholding Taxes.

7.5 Obtaining Legal Opinions

An opinion from Cayman Islands counsel, addressed to, among others, the SPE will typically confirm certain matters, including (subject to usual reservations, qualifications and assumptions):

- The Cayman Islands currently has no form of income, corporate or capital gains tax and no taxes, fees or charges are payable to the Cayman Islands government in respect of the execution, delivery or performance of the transaction documents by the SPE.
- The courts of the Cayman Islands will observe and give effect to the choice of governing law of the applicable transaction documents as a valid choice of law in proceedings in the courts of the Cayman Islands.
- A judgment obtained in a foreign court will be recognised and enforced by the courts of the Cayman Islands without any re-examination of the merits at common law (where such foreign court has jurisdiction, and the judgment is final and conclusive and not contrary to public policy within the Cayman Islands).
- Submission to jurisdiction by the SPE to the courts of a non-Cayman Islands jurisdiction is valid and binding.

- There is no concept of substantive consolidation.
- Where the securitisation involves the transfer of Cayman Islands-domiciled receivables, or assets governed by the laws of the Cayman Islands, upon the winding up of the SPE, the liquidator or receiver appointed in respect of such SPE would have recourse only to the assets of such SPE in order to satisfy the claims of the creditors of the SPE.
- Where the securitisation involves the transfer of Cayman Islands-domiciled receivables, or assets governed by the laws of the Cayman Islands, the sale and transfer of the applicable assets should be treated as an absolute assignment and transfer and not as the creation of a security interest.

8. Accounting Rules and Issues

8.1 Legal Issues With Securitisation Accounting Rules

Other than in respect of considerations relating to the orphan structure of the SPE and non-consolidation of assets and receivables, there are no specific legal issues in connection with accounting rules that apply to securitisations in the Cayman Islands. Typically, the SPE will have no prior operating history (other than warehouse financing).

8.2 Dealing With Legal Issues

See 7.5 Obtaining Legal Opinions.

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