

# **Guide to Securitisation and Structured Finance Transactions**

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## PREFACE

Since their conception in the early 1980's securitisations and other forms of structured finance have gained popularity in the international corporate community as an alternative to more traditional methods of secured financing. The ability to utilize the present value of future proceeds from an ongoing income stream derived from an existing asset portfolio (the "Asset Portfolio") in limited recourse off-balance sheet transactions can provide an Originator (as defined below) with the necessary immediate capital to grow its existing business, reduce debt or engage in new ventures without exposing itself to the risk of that future income stream faltering.

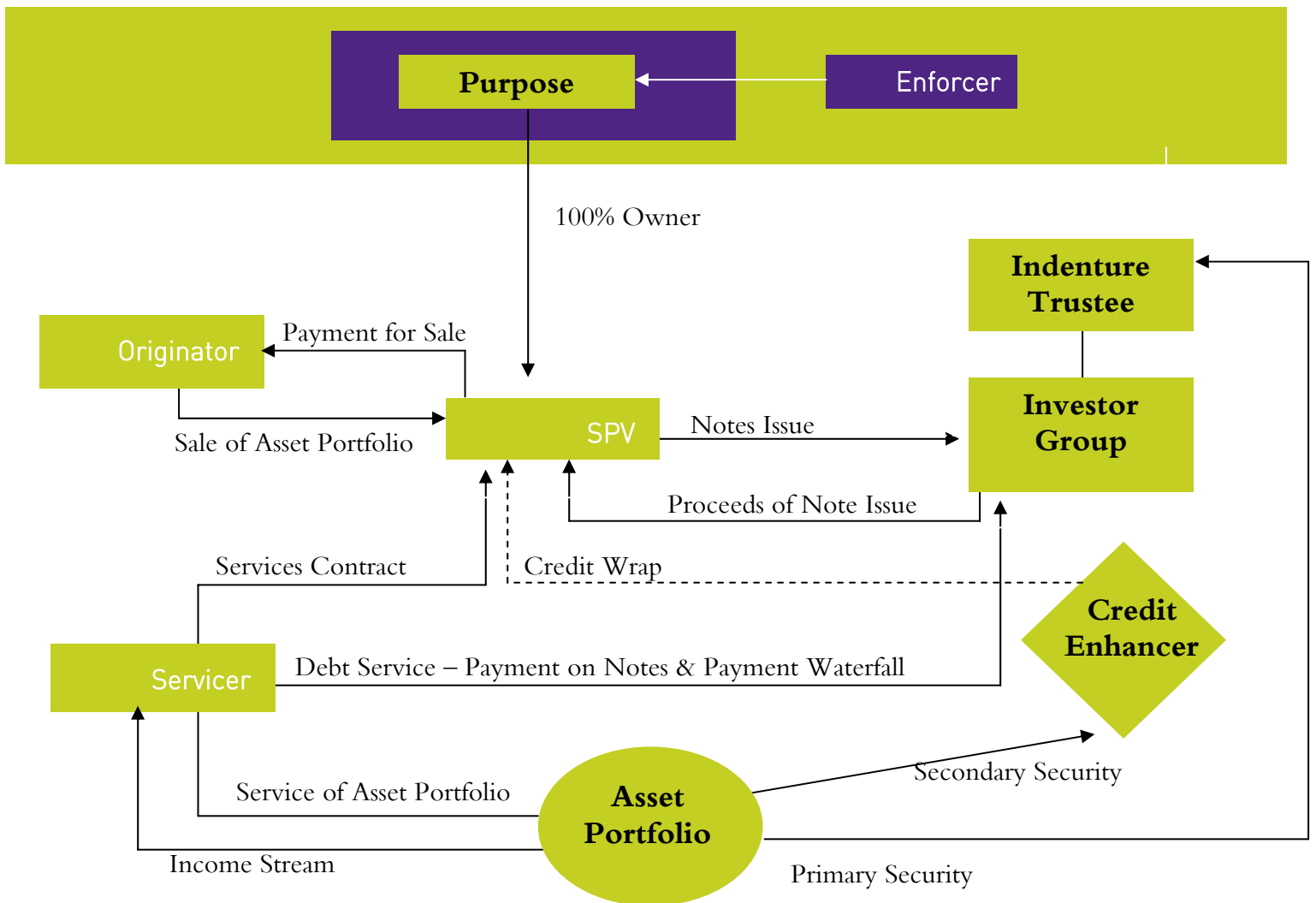
While asset-backed securitisations may take various forms, a typical off-shore structure (as illustrated in the diagram below – an example of a securitisation of a mortgage portfolio) will utilize each of the following elements structured subject to any specific accounting, tax, banking or other regulatory requirements of any relevant on-shore jurisdiction:

- ***true sale*** – the Asset Portfolio to be securitised is sold by the original owner (the "Originator") to an "Orphan Owner" structure, based on an off-shore Purpose Trust or Charitable Trust (the "Trust"), a Special Purpose Trustee Company ("SP Trust Co") (this is not always used) and a Special Purpose Vehicle ("SPV"). The SPV enters into contractual arrangements with the Originator, as required by the securitisation that effects a "true sale" of the Asset Portfolio from the Originator to the SPV. The SPV obtains the monies to purchase the Asset Portfolio from the Originator by issuing asset-backed commercial paper in the form of debt notes ("Notes") to chosen investors (the "Investor Group").
- ***"Orphan Owner" structure*** – for various purposes, discussed below, the SPV must be structured such that it is not affiliated with the Originator. The Orphan Owner structure for the SPV is achieved by utilizing the Trust as the ultimate beneficial owner of the SPV. The trustee is typically a non-related off-shore entity, usually a licensed trust company (the "Trustee"). While the Trust may hold the shares of the SPV directly, it is often desirable to interpose an intermediary company ("SP Trust Co") between the Trust and the SPV. The Trustee will hold the shares of SP Trust Co, providing an extra layer of protection for the Trustee. This arrangement also permits SP Trust Co to be "dedicated" for the purposes of the particular securitisation.
- ***off-balance sheet ownership*** – because the Asset Portfolio is transferred to the SPV by way of a true sale, these assets will be removed from the balance sheet of the Originator. The "true sale" combined with the independence of the "Orphan Owner" confers protection from the Originator's insolvency enhancing the "bankruptcy remote" status of the structure.
- ***bankruptcy remote*** – particularly where there is a connection with the jurisdiction of the United States bankruptcy courts, which have a power to consolidate groups of companies in certain circumstances, it is essential that the Asset Portfolio be insulated from the risk of insolvency of the Originator and that the risk of insolvency of the SPV be

minimised as much as possible. This is achieved by (i) strictly limiting the permissible business activities of the SPV in its charter documents, (ii) incorporating similar restrictions and the use of non-petition language in the transaction documents, (iii) strictly adhering to the principals of the independent “Orphan Owner” in terms of corporate structure and operation, and (iv) structuring the transfer of the Asset Portfolio as a true sale.

- ***ring-fencing*** – the securitisation will be structured as a limited recourse transaction where the extent of indebtedness of the SPV to the Investor Group will be limited to the Asset Portfolio and any other supporting security provided by the SPV over its ancillary assets. Particularly in structures designed to accommodate a single issuer securitising or repackaging multiple tranches of debt, in order to provide the best possible security to the Investor Group, the Asset Portfolio will be ring-fenced by comprehensive security taken by the Investor Group over the Asset Portfolio so that in the event of insolvency of the SPV the Asset Portfolio will remain dedicated to servicing the Notes and will not form part of the insolvent estate of the SPV.
- ***credit enhancement*** – some form of credit enhancement will frequently be arranged by the SPV, ensuring its ability to pay the principal and interest due on the Notes. Alternatives include insurance policies, third-party guarantees, swap agreements and arrangements having a similar effect. By means of these credit enhancement arrangements, the Notes issued by the SPV may satisfy the rating agencies and be raised above investment-grade instruments.
- ***dedicated servicer*** – the cash flows that represent the “income stream” from the Asset Portfolio will be “serviced” by a “Servicer” engaged by the SPV to (i) collect the income generated from the Asset Portfolio from the asset debtors and (ii) to service the payment waterfall pursuant to the terms of the trust indenture executed in conjunction with the securitisation (the “Trust Indenture”), in particular service the payments required on the Notes to the Investor Group.

## Basic Securitisation Structure



There is no restriction on the nature of the income-producing asset that may be the subject of a securitisation. Transactions providing for the securitisation of income producing assets such as aircraft leases, shipping container leases, credit card receivables and royalties (to name but a few) all can be structured identically.

The following memorandum addresses each of the key elements of the typical securitisation illustrated in more detail and, where appropriate, provides a comparative analysis as between the three key Caribbean off-shore jurisdictions of Bermuda, the Cayman Islands and the British Virgin Islands.

This memorandum is not intended as a definitive analysis of the law relating to the role of these three principal off-shore jurisdictions in relation to securitisations but only as a general guide. Each transaction will need to be tailored to the goals of the respective parties.

For further information visit our website at [www.applebyglobal.com](http://www.applebyglobal.com) or contact the head of the securitisation and Structured Finance Practice Group, Ken Robinson on his direct line at (441) 298 3237.

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## **1. INTRODUCTION**

The common law jurisdictions of Bermuda, the Cayman Islands and the British Virgin Islands, long recognised as leading off-shore financial centers, enjoy a reputation for economic stability stemming in large part from the continued expansion of their respective international business sectors. This growth is fostered by the long term commitment of each government to ensure the availability of a well educated local and ex-patriot workforce to the international business community, backed by modern infrastructure, and operating in a tax neutral regime completely absent any foreign exchange controls.

It is this political and economic stability that attracts arrangers, Originators, investors and Rating Agencies alike to choose these islands as the hub of so many off-shore securitisation transactions.

## **2. SECURITISATION OVERVIEW**

Securitisation is the means by which a portfolio of income producing assets such as mortgages or royalties, are packaged and converted into securities. The return on the securities issued to investors is then secured or backed by the income stream from those assets. This enables the Originator to monetise the assets and benefit immediately from the present value of the future income.

Typically, as explained above the Asset Portfolio is sold by the Originator to a special purpose vehicle ("SPV") that is owned by the off-shore Trust. The purchase price paid by the SPV for the securitised assets is provided by the proceeds of Notes issued by the SPV to the Investor Group. The purchase price paid to the Originator can then be used to provide immediate working capital to invest in or create further income generating assets (for example, more leases, mortgages or royalties). The income stream from the securitised assets then services the Notes, and the Asset Portfolio and associated income stream are ring-fenced by security taken by the Investor Group over those assets. As additional income-producing assets are acquired by the Originator through the use of proceeds from the securitisation, the process can be repeated.

Alternatively the securitisation proceeds can be used by the Originator to pay off existing high-cost debt where possibly more traditional forms of financing were denied to it perhaps due to financial constraints on the Originator.

## **3. THE SPECIAL PURPOSE VEHICLE**

In order to ensure that the income stream and the Asset Portfolio being securitised are protected from the possible insolvency of the Originator, the Asset Portfolio generally will be sold to an arm's length or "orphan" SPV in order to remove the Asset Portfolio from the balance sheet of the Originator. The SPV cannot be affiliated with the Originator or any part of the corporate structure of the Originator. Otherwise there is a risk that the affairs of the SPV, and consequently the Asset Portfolio, may be consolidated into the assets of the Originator in the event of the insolvent winding up of the Originator.

Provided the SPV remains independent of the Originator, and the Originator has disposed of its entire interest in the Asset Portfolio to the SPV in a transaction that can be considered a “true sale” and not simply a disposition of a partial interest in those assets or a charging of those assets in favour of the SPV, then in the event of the insolvent winding-up of the Originator, the Asset Portfolio and the accompanying income stream will not form part of the insolvent estate of the Originator and will not be available to a liquidator to satisfy the creditors of the Originator.

As discussed above the sole shareholder of the SPV typically will be an off-shore Trust controlled by a corporate trustee. Alternatively in certain securitisation structures the SP Trust Co may be interposed between the Trust and the SPV. The SPV then issues Notes to finance the purchase of the Asset Portfolio from the Originator. The Notes are in turn secured by the granting of security over the Asset Portfolio, the associated income stream and all other assets of the SPV. This isolation or “ring-fencing” of the Asset Portfolio ensures that the collateral supporting the securitisation is available for the sole purpose of servicing the payment waterfall set out in the Trust Indenture.

#### **4. THE SHAREHOLDER**

The off-shore role in securitisations has evolved out of the creation of an SPV that operates as the asset-owner in a tax neutral environment and which allows the Originator to create an off-balance sheet structure which will be secure against the Originator’s own possible insolvency. For an “off balance sheet” arrangement, ownership of the SPV is structured (via holding of its voting shares) so that it will always be controlled independently of the Originator. Such independence ensures the income stream from the Asset Portfolio is insulated, after the true sale, from risks associated with the Originator’s separate operations (particularly, the insolvency risk). Typically a Charitable Trust, a trust established principally for charitable purposes, and more recently (particularly in Bermuda) a non-charitable Purpose Trust, a trust established for a specific purpose is employed to carry out the role as sole shareholder of the SPV.

Early in the evolution of off-shore securitisations a Charitable Trust would be established to hold the shares in the SPV. The SPV (usually through contractual arrangements with a dedicated Servicer) would distribute the income from the Asset Portfolio pursuant to the terms of the distribution waterfall set out in the Trust Indenture. Upon discharge of the obligations under the waterfall (and satisfaction of the terms of the Notes) the SPV would then be wound-up and the remaining assets (usually a nominal amount) distributed to the Charitable Trust as the sole shareholder. Those assets are then distributed in turn to the designated charity pursuant to the terms of the Deed. As generally there is no distribution to the designated charity until the final distribution from the winding-up of the SPV some concerns arose as to whether there was a truly “charitable purpose” to the Trust. As a result the Purpose Trust was created.

Unlike Charitable Trusts that are created for a specific beneficiary, Purpose Trusts are established for a specific purpose as set forth in the Deed and do not have to have any ascertainable beneficiary other than a residuary beneficiary (usually a charity) nominated to benefit upon the winding up of the SPV and the termination of the Trust. The Deed settling the Purpose Trust can be drafted in such a way as to clearly delineate the purpose of the Trust (and the therefore the duties of the Trustee) to



subscribe for the shares of the SPV and to carry out the obligations of the SPV under the Trust Indenture and related transaction documents.

In the case of a Purpose Trust, an “Enforcer” of the Trust is appointed pursuant to the Deed (this may be a corporation or an individual) whose role is to ensure that the Trustee observes the terms of the Trust. The Deed can also enhance the bankruptcy remoteness of the SPV by providing that the Trustee will not take any action to wind-up the SPV without the express consent of the Enforcer. The role of Enforcer will often be taken by the lead arranger or deal agent (the “Arranger”).

In the case of an off-shore Charitable Trust this role of enforcing the Trust is generally delegated to the Attorney General or a similarly empowered public official. We know of no instance where such an official has been called on to administer a Charitable Trust that is also the sole shareholder of an SPV. Bermuda, the Cayman Islands and the British Virgin Islands each offer both Charitable and Purpose Trusts.

## **5. TRUE SALE**

In order to remove the Asset Portfolio from the balance sheet of the Originator, and therefore from the Originator’s estate in a liquidation, it is not only necessary that the SPV be a separate legal entity (ideally one unaffiliated with the Originator), but that the transfer of the Asset Portfolio from the Originator to the SPV be characterised as a true sale and not something less in the way of a financing secured by a pledge of assets or bailment coupled with an agency. Generally the question of “true sale” will fall to the on-shore jurisdiction by which the Asset Transfer document is governed. However in the event that the question falls to be decided under the law governing the SPV the Rating Agencies and the Arranger will want an opinion as to how the courts in that jurisdiction will deal with the issue.

There is very little relevant caselaw relating to the proper characterisation (true sale, pledge or bailment) of a transfer of property in the context of a securitisation in Bermuda, the Cayman Islands or the British Virgin Islands. Thus, a court in those jurisdictions addressing this issue will be forced to look to case law arising in other contexts and to reason by analogy and may take into account policy considerations, including the promotion of efficient financing arrangements, such as securitisations.

The courts in these jurisdictions have demonstrated a strong bias in favour of carrying out the intentions of contracting parties in accordance with their clearly expressed intentions, particularly where the parties involved are sophisticated commercial entities. In the absence of extra-ordinary circumstances, such as fraud, the courts of Bermuda, the Cayman Islands and the British Virgin Islands would not readily re-characterise a sale transaction as a different kind of transaction where the documentation in relation to the transaction indicates unambiguously an intention to transfer title in respect of the subject of the transaction.

## **6. NON-CONSOLIDATION**

Under the insolvency regimes operating in certain jurisdictions (particularly the US), in the insolvency of a parent company, courts may have jurisdiction to order that the affairs of the subsidiaries or affiliates of the parent, or companies so closely associated that one is said to be the alter-ego of the other, be consolidated with those of the parent company for the purposes of bankruptcy administration. As a consequence it is important that the SPV be sufficiently orphaned from the parent so as not to be subject to such consolidation upon the insolvent winding-up or bankruptcy (as the case may be) of the parent.

Consolidation of group companies in insolvency is extremely unlikely to occur in Bermuda, the Cayman Islands or British Virgin Islands. The status of a Bermudian company is a matter of Bermudian law and likewise the status of a Cayman company and BVI company a matter for Cayman and BVI law respectively. A cardinal principle of corporate common law is that a company is a separate legal entity. In exceptional circumstances (such as those involving fraud) the common law courts have a jurisdiction to look behind the “corporate veil”. However, the mere existence of a foreign order declaring that the affairs of a Bermudian, Cayman or BVI company be consolidated with those of another foreign company would not be a sufficient basis for the local courts to invoke this doctrine.

A court having jurisdiction in connection with the winding-up of a Bermuda, Cayman or BVI company has no statutory power to order that the estate of the company be consolidated with the estate of any other company whether subject to a liquidation proceeding or not. However, in very exceptional circumstances, where it is impractical to do otherwise (because the affairs of the companies are so intertwined), a court may treat a group of insolvent companies under its jurisdiction as one for the purposes of ascertaining claims against the group.

In order to invoke the doctrine whereby the corporate veil may be pierced successfully, the applicant would have to commence independent proceedings in the relevant jurisdiction and prove that the requisite elements in relation to piercing the corporate veil existed on the facts of the case.

## **7. RESTRICTIONS ON BUSINESS AND OPERATIONS**

In order for the securitisation to be successful the SPV must not only be adequately insulated from the consequences of any related party’s insolvency but it must also be unlikely to become insolvent as a consequence of its own activities. This is achieved by restricting the activities of the SPV to only those required to fulfill the obligations of the SPV in furtherance of the securitisation.

The contractual documentation entered into by the SPV at the outset will usually restrict it from engaging in any business or operations apart from transactions in furtherance of the securitisation. The constitutional documents of the SPV may also be stated restrictively, so that the SPV lacks legal capacity to undertake operations that are not within the scope of the securitisation documents. In addition the Deed governing the Trust and the powers of the Trustee will also support the restricted nature of the SPV’s permitted activities.

In particular, as well as restricting the nature of the permitted activities that may be undertaken by the SPV, the contractual documents governing the securitisation, the constitutional documents of the SPV and the Deed will each endeavour to minimise the possibility of the SPV being petitioned into winding-up, making material alterations to its structure or disposing of the Asset Portfolio or other material assets, without the express consent of the Arranger.

Restrictions of the foregoing nature will be tailored expressly for the requirements of a particular transaction, with the intention of limiting the risk of interruption of the income stream deriving from the Asset Portfolio by unrelated activities. Limitations upon the possible operations of the SPV, the use of non-petition and limited recourse language, taken together with its independence from the Originator and other participants in the transaction, combine to promote the greatest possible degree of “bankruptcy remoteness”, preserving the ability of the SPV to meet its obligations to the Investor Group.

## **8. RING-FENCING**

At the outset of the securitisation transaction, the SPV will enter into binding contracts that are designed to control the application of the income stream from the Asset Portfolio down through a payment waterfall that will be detailed in the Trust Indenture. Legal charging techniques will be applied, creating a security interest over the Asset Portfolio and the associated income stream in favour of the Investor Group holding the Notes who are ultimately entitled to the benefit of the income stream.

For the securitisation to be successful, particularly in relation to structures designed to accommodate a single issuer securitising or repackaging multiple tranches of debt, it will be necessary for the SPV to effectively ring-fence the Asset Portfolio and associated income stream by (i) granting comprehensive security over the Asset Portfolio and the associated income stream in favour of the security trustee on behalf of the Investor Group and (ii) structuring the transaction on a limited recourse basis and utilizing non-petition language to limit the Investor Group’s right to petition as an unpaid creditor.

This ring-fencing ensures that the value of the underlying secured assets are utilized only to support the payments to the Investor Group and that the liability of the SPV to the Investor Group is limited to the value of those underlying assets. Effectively, in the event of a default under the payment obligations of the SPV to the Investor Group once recourse to the secured assets has been exhausted the Investor Group will have no further claim against the SPV or its remaining assets.

Depending on the nature of the collateral, the law governing the security interest typically will be determined by either, (i) the law by which the instrument creating the security interest is expressed to be governed, (ii) the law constituting the collateral for the security; or (iii) the law of the place in which the collateral is situated. However in the event that the question of priority falls to be determined by the local law of the SPV, the means by which the security interest is perfected in that jurisdiction will be of relevance to the Investor Group. The means by which the security interests granted over the assets of the SPV are perfected differs with the jurisdiction of incorporation as can be seen by the following table:

<b>Bermuda</b>	<b>Cayman Islands</b>	<b>British Virgin Islands</b>
<p>Charges over the assets of Bermuda companies (other than real property in Bermuda or a ship or aircraft registered in Bermuda) wherever situated, and charges on assets situated in Bermuda (other than those asset classes excluded above) which are granted by or to companies incorporated outside Bermuda, are capable of being registered in Bermuda in the office of the Registrar of Companies. Registration under the Act is the only method of registration of charges over the assets of Bermuda companies in Bermuda (except with regards to those excluded assets referred to).</p> <p>Registration under the Act is not compulsory and does not affect the validity or enforceability of a charge and there is no time limit within which registration of a charge must be affected.</p> <p>In the event that questions of priority fall to be determined by reference to Bermuda law, any charge registered pursuant to the Act will take priority over any other charge that is registered subsequently in regard to the same assets, and over all other charges created over such assets after 1 July 1983, which are not registered.</p>	<p>There is no general system for the registration of security interests against the assets of a Cayman company in order to perfect or obtain priority (other than in respect of ships and aircraft registered in Cayman and personal chattels under Bills of Sale legislation).</p> <p>Cayman companies are required to maintain their own internal register of mortgages and charges open only to members and creditors, but failure to make the appropriate entries does not of itself affect the creation of the security interest or its perfection or, in certain circumstances, priority.</p> <p>Registration in the register of the company does not provide constructive notice of the existence of the charge to third parties.</p>	<p>There is no obligation on a BVI International Business Corporation (IBC) company to maintain a register of charges over its assets.</p> <p>An IBC may maintain a register of charges over its assets at its registered office. If it does so then any registered charge will have priority over any subsequently registered charge and any unregistered charge (other than a charge created prior to 1 January 1991).</p> <p>Priority is based on the date of entry in the internal register and not the date that the charge was created. It is also possible to file a copy of this internal register of mortgages and charges on its public file with the Registrar of Companies thereby providing constructive notice to third parties.</p> <p>There is no period within which a charge must be registered and non-registration does not affect the validity of the charge.</p>

## **9. RATING AGENCIES**

The Investor Group will need to be satisfied that the credit quality of the Asset Portfolio is independently verified. In order to satisfy this requirement it will be generally desirable to have the Notes rated and raised above investment grade (Standard & Poor's BBB- or equivalent) with the support of accompanying credit enhancement. Standard and Poor's, Fitch Ratings Ltd and Moody's each have their own rating system. Each rating agency however will focus on the same two fundamental principals relating to potential insolvency when rating the Notes:

- Is the SPV sufficiently bankruptcy remote in terms of both its own insolvency and that of the Originator; and
- how creditworthy is the Asset Portfolio.

The rating agencies require that the SPV be structured so as to make it extremely unlikely that it will be able to commence a voluntary insolvency or winding-up proceeding action in its own right or have such proceedings commenced against it. To that end the rating agencies will insist on particular attention being given in the transactional documents and the charter documents of the SPV to the following areas:

- limiting the scope of permitted business activities of the SPV;
- limiting the extent of indebtedness of the SPV to the Asset Portfolio and any debt owed to the credit enhancers;
- limiting the security interests to those in favour of the Investor Group over the Asset Portfolio;
- limiting the ability of the SPV to commence a voluntary winding-up; and
- limiting the exposure of the SPV to a winding-up being commenced against it.

The credit quality of the Asset Portfolio will be addressed by an individual analysis of the debtors servicing the Asset Portfolio.

## **10. CREDIT ENHANCEMENT**

In order to reduce the risk to the Investor Group and enhance the rating of the Notes and thereby decrease the cost of the Notes to the SPV, the securitisation structure will usually include some form of credit enhancement. This enhancement may be either internal, for example through over-collateralisation by the SPV (whereby the value of the income stream due from the Asset Portfolio exceeds the amount owed on the Notes), reserve accounts (provided in the event that there is an interruption in the income received from the Asset Portfolio) or the issue of subordinated securities (lower rated and higher interest notes), or external through insurance policies and third party guarantees, liquidity facilities or subordinated loans from the Originator.

Income received by the SPV from the Asset Portfolio can, in the case of more elaborate arrangements, be paid to swap counterparties under a contract such as an ISDA Master Agreement. Pursuant to such an arrangement, the SPV will agree to pay the income from the Asset Portfolio to the swap counterparty, and in consideration of such payments the swap counterparty will undertake

to make payments to the SPV that enable it to make the interest payments on the Notes held by the Investor Group. A final payment to the SPV under the swap at the end of the securitisation will permit the SPV to redeem the Notes. This type of arrangement effectively substitutes the credit standing (i.e. creditworthiness) of the swap counterparty for that of the SPV, thereby enhancing the 'marketability' of the Notes to potential securitisation investors .

## **11. INSOLVENCY LAWS**

The insolvency laws of Bermuda, Cayman and BVI are generally regarded as more favourable to creditors (especially secured creditors) than those of many on-shore jurisdictions, the United States in particular. Under these laws there is no system of corporate rehabilitation that is equivalent to the US Federal Bankruptcy Code chapter 11 proceedings, where a debtor is able effectively to freeze the rights of creditors, including the creditors' rights to enforce security interests previously granted.

In particular, these laws do not prevent secured creditors enforcing their security during the course of the liquidation of an SPV. Liquidators of the SPV generally cannot disclaim onerous contracts. On those rare occasions they may do so (usually in cases involving long-term leases), they cannot do so selectively (i.e. they cannot "cherry pick"). Even then the counterparty to a disclaimed contract is entitled to claim in the liquidation for any damages suffered. The right of disclaimer does not affect the interests of secured creditors. Therefore, the contractual rights and security interests of creditors will continue to exist following the liquidation.

The laws of Bermuda, Cayman and BVI include doctrines akin to the notion of "fraudulent preference" in insolvency. However broadly speaking none of these doctrines will apply to structures of the kind under discussion as long as the parties are solvent when they establish the structure, act in good faith and have no improper intention of preferring an unsecured creditor over other creditors or of removing assets from within the reach of persons who would otherwise be entitled to them.

## **12. DEDICATED SERVICER**

Typically the cash flows that represent the income stream from the Asset Portfolio will be managed and serviced by a dedicated Servicer engaged by the SPV to (among other things) (i) collect the income generated from the Asset Portfolio from the asset debtors, (ii) service the payment waterfall pursuant to the terms of the Trust Indenture, (in particular those payments required on the Notes to the Investor Group) and (iii) follow up on delinquent creditors and maintain detailed creditor performance records. The Servicer will receive a fee for providing these services from the cash-flow waterfall.

This Servicer has in the past typically been an affiliate of the Originator or the Originator itself. However as securitisation transactions become more complex and Investor Groups and rating agencies require greater independence from the Originator and stricter management of, and more comprehensive reporting on, the performance on the Asset Portfolio it is becoming more common to see specialised institutional servicers or alternate servicers. In the absence of an independent Servicer, as the Servicer will have control over the distribution of the income stream generated by the Asset

Portfolio, the Arranger will often insist on ultimate control of the Servicer through the issue of a special preferred or “Golden” share or similar mechanism.

### 13. JURISDICTIONAL COMPARISON

As demonstrated above Bermuda, the Cayman Islands, and the British Virgin Islands are each similarly positioned to deliver to their international clients an SPV capable of centering even the most complex structured finance transaction. Each jurisdiction boasts an environment attractive to each of the Originator, Investor Group and rating agency in structured finance transactions, featuring in particular:

- stable political and economic environment;
- certainty of common law based legal system;
- neutral corporate tax regime;
- creditor friendly insolvency laws;
- flexible trust ownership structures
- quality professional service providers; and
- modern international business infrastructure.

The differences between the three jurisdictions referred to above with regards to the structure and regulation of a securitisation or other structured finance transaction are minimal and mostly immaterial, with the exception of the security registration regime that has already been addressed. What follows is a review of the key aspects of an off-shore SPV as they relate to a structured finance transaction and a comparison of how those aspects are impacted by the laws Bermuda, the Cayman Islands and the British Virgin Islands:

	<b>Bermuda</b>	<b>Cayman Islands</b>	<b>British Virgin Islands</b>
<b>Form of SPV</b>	<p>Generally, an exempted company limited by shares.</p> <p>Bermuda Monetary Authority (the “BMA”) permission to incorporate and issue shares required.</p> <p>Disclosure of ultimate beneficial owners of SPV to the BMA required.</p>	<p>Generally, an exempted company limited by shares.</p> <p>No governmental approval is required for the incorporation of the SPV.</p> <p>Generally incorporated by delivery of signed copies of the memorandum of association and articles of association (if any)</p>	<p>Generally, an International Business Corporation (IBC) limited by shares.</p> <p>No governmental approval is required for the incorporation of an SPV.</p> <p>An SPV is incorporated by the filing in duplicate of the company’s memorandum of</p>

	<p>If sole shareholder of SPV is a Trust the application is made in the Trustee's name.</p> <p>Once BMA permission received, the memorandum of association is registered with the Registrar of Companies and certificate of incorporation issued.</p> <p>Can be incorporated within 3 business days.</p>	<p>to the Registrar of Companies.</p> <p>Generally incorporated within 24 hours.</p>	<p>association and articles of association with the Registrar of Companies.</p> <p>Generally incorporated within 24 hours.</p>
<b>Restricted Objects</b>	<p>Limited to those activities set out in the Memorandum of Association and acts necessarily incidental to the furtherance of such objects.</p> <p>In order to enhance bankruptcy remoteness generally restricted to those activities necessary to carry out the terms of the securitisation.</p>	<p>Capable of exercising all the functions of a natural person unless otherwise limited by the express terms of its Objects.</p> <p>In order to enhance bankruptcy remoteness generally restricted to activities necessary to carry out the terms of the securitisation.</p>	<p>Limited to those activities specifically set out in the Objects and has the power irrespective of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of those objects.</p> <p>In order to enhance bankruptcy remoteness generally restricted to activities necessary to carry out the terms of the securitisation.</p>



<b>Directors and Representatives</b>	<p>The minimum number of directors of an SPV is two.</p> <p>In addition each SPV must satisfy certain Bermuda residency requirements, namely: (i) two resident directors; or (ii) resident director and secretary or (iii) a Bermuda resident representative and secretary, each of whom must be an individual.</p>	<p>The minimum number of directors of an SPV is one.</p> <p>There are no residency requirements for directors or officers.</p> <p>Corporate directors allowed.</p>	<p>The minimum number of directors of an SPV is one.</p> <p>There are no residency requirements for directors or officers however the SPV must appoint a registered agent resident in the BVI.</p> <p>Corporate directors allowed.</p>
<b>Directors Duty of Care</b>	<p>To act honestly and in good faith with a view to the best interests of the company; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.</p>	<p>To act bona fide in the interests of the company and to exercise the care, diligence and skill that may be reasonably expected from a person of his knowledge and experience.</p>	<p>To act honestly and in good faith with a view to the best interests of the company; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.</p>
<b>Shareholders and Meetings</b>	<p>An SPV must have at least one shareholder.</p> <p>Generally the shareholder will be the trustee of a Bermuda charitable or purpose trust.</p> <p>An SPV is required to have a meeting of the</p>	<p>An SPV must have at least one shareholder.</p> <p>Generally the shareholder will be a trustee of a Cayman charitable or STAR trust.</p> <p>An SPV will be incorporated as an</p>	<p>An SPV must have at least one shareholder.</p> <p>Generally the shareholder will be the trustee of a BVI charitable or purpose trust.</p> <p>Shareholders may meet at such times</p>

	shareholders at least once in every calendar year.	exempted company and is not required to hold an annual shareholders meeting.	and places within or outside the BVI as the directors consider necessary or desirable.
<b>Capitalisation</b>	<p>Minimum share capital is US\$12,000 (for an insurance company, US\$120,000)</p> <p>Bearer shares not permitted.</p> <p>Nominee shareholder permitted.</p> <p>Shares must have par value and may be issued nil paid, partly paid or fully paid.</p>	<p>There is no minimum authorised or issued share capital.</p> <p>Bearer shares permitted but rarely used.</p> <p>Nominee shareholder permitted.</p> <p>Shares may be issued with or without par value and may be issued partly or fully paid.</p>	<p>There is no minimum authorised or issued share capital.</p> <p>Bearer Shares permitted but there use actively discouraged.</p> <p>Nominee shareholder permitted.</p> <p>Shares may be issued with or without par value and must be issued fully paid.</p>
<b>Issue and Transfer of the Notes</b>	In addition to necessary corporate authorities, BMA permission to the issue and transfer of Notes is required. BMA permission to free transferability of the Notes is usually obtained prior to closing.	Apart from the necessary corporate authorities no regulatory approvals for the issuance or transfer of the Notes is required.	Apart from the necessary corporate authorities no regulatory approvals for the issuance or transfer of the Notes is required.
<b>Distributions</b>	The SPV may continue to make distributions under the payment waterfall whilst it remains solvent.	The SPV may continue to make distributions under the payment waterfall whilst it remains solvent.	The SPV may continue to make distributions under the payment waterfall whilst it remains solvent.
<b>Prospectus Filings</b>	May need to file a prospectus with the Registrar of	Cayman law does not require the issue or publication of a	The law of the British Virgin Islands does not require the issue or

	Companies if securitisation designed to result in more than 35 Note-holders.	prospectus. An exempted company may not offer securities to the Cayman public.	publication of a prospectus where an IBC offers securities to the public.
<b>Appointment of Auditors</b>	The shareholders of an SPV must appoint auditors unless all of the shareholders and all of the directors otherwise agree. There is no obligation to file financial statements with any Bermuda regulatory authority.	There is no requirement that an SPV appoint an auditor or file financial statements with any Cayman regulatory authority.	There is no requirement that an SPV appoint an auditor or file financial statements with any BVI regulatory authority.
<b>Books of Account and Records of the Company</b>	<p>An SPV must maintain proper records of accounts prepared in accordance with acceptable GAAP.</p> <p>The directors are required to lay audited financials before the general meeting of the shareholders unless waived by all directors and shareholders of the SPV.</p> <p>Register of Directors and officers and Register of Members open to public inspection daily at the Registered Office of the SPV.</p>	<p>An SPV must keep proper records of account with respect to all transactions as necessary to give a true and fair view of the state of the company's affairs and explanation of its transactions.</p> <p>Neither the Register of Directors and Officers or the Register of Members of an exempted company are open to the public.</p>	<p>An SPV must keep such accounts and records as the directors consider necessary or desirable to reflect its financial position.</p> <p>The books and records of an SPV upon written request are open to inspection by the members during normal business hours.</p>
<b>Annual Fee &amp; Associated Reporting</b>	An SPV is required to pay a fee in Bermuda at the time of its	An SPV is required to pay a fee in the Cayman Islands at the time of its	An SPV is required to pay a fee in the British Virgin Islands at the

<b>Requirements</b>	<p>incorporation and in January of each year thereafter. The fee is provided for on a sliding scale based upon the total sum of the share capital and share premium of the SPV.</p> <p>An annual declaration must be filed in conjunction with the payment of the fee declaring that the SPV continues in operation.</p> <p>Most SPVs shall operate with minimum share capital and no premium resulting in the minimum government fee of US\$1,780.</p>	<p>incorporation and each year thereafter. The fee is provided for on a sliding scale based on authorised share capital.</p> <p>An annual declaration must be filed in conjunction with the payment of the annual fee.</p> <p>Most SPVs shall operate with minimum share capital and no premium resulting in the minimum government fee of US\$573.17.</p>	<p>time of its incorporation and each year thereafter, The fee is provided for on a sliding scale.</p> <p>There are no annual reporting obligations on the SPV in the BVI.</p> <p>Most SPVs shall operate with minimum share capital and no premium resulting in the minimum government fee of US\$300.</p>
<b>Exchange Control</b>	<p>Exempted companies are designated non-resident and therefore exempt for the purposes of exchange control.</p>	<p>There are no exchange controls in the Cayman Islands.</p>	<p>There are no exchange controls in the British Virgin Islands.</p>
<b>Taxes</b>	<p>No income, withholding or other taxes, or stamp or other duties, are imposed by Bermuda law upon the issue, transfer or sale of the Notes, other than on any Note-holder who may be ordinarily</p>	<p>No income, withholding or other taxes, or stamp or other duties are imposed in the Cayman Islands upon the issue, transfer or sale of the Notes regardless of residency of the Note-holders.</p>	<p>No income, withholding or other taxes, or stamp or other duties, are imposed by BVI law upon the issue, transfer or sale of the Notes other than on any Note-holder who may be ordinarily resident</p>

	<p>resident in Bermuda.</p> <p>Upon application to the Ministry of Finance the SPV may receive an assurance granting an exemption, until 28 March 2016, from the imposition of any such tax or duties on the issue, transfer or sale of the Notes. Under the scheme of the legislation governing this exemption it is intended as in the past that this date be rolled forward by amending statute typically for a further 25 years.</p>	<p>An SPV is entitled to receive an undertaking from the Cayman government such that no law enacted in Cayman imposing any such tax shall apply to it, or its shares for a period of up to twenty years. This period is usually renewable for a further ten years upon expiry.</p> <p>Stamp duty applies in the Cayman Islands where original documents are brought to the jurisdiction.</p>	<p>in the BVI.</p>
<p><b>Anti-Money Laundering Compliance</b></p>	<p>All beneficial owners of 5% or more of the SPV must satisfy BMA requirements as to suitability by completing a Personal Declaration disclosure form. In the case of individual owners identification must be verified (certified copy of passport or other government identification). In the case of ownership by publicly listed companies evidence of listing and a copy of the most recent</p>	<p>Cayman law requires that we obtain verification of the identification of all 10% beneficial owners and 2 Directors. In the case of individual owners this requires 2 forms of identification to establish identity and address. Usually a passport and utility bill are sufficient. In the case of ownership by publicly listed companies we will require evidence of listing and a copy of the most recent financial returns. In the case of other corporate owners we</p>	<p>British Virgin Islands law requires that we obtain verification of the identification of all 10% beneficial owners and 2 Directors. In the case of individual owners this requires 2 forms of identification to establish identity and address. Usually a passport and utility bill are sufficient. In the case of ownership by publicly listed companies we will require evidence of listing and a copy of</p>

	<p>financial returns will be required. In the case of other corporate owners we will require satisfaction as to the existence and bona fides of the company and the identification of individual owners and directors. BMA in its discretion may require particulars of other shareholders. Similar rules apply to other entities.</p> <p>Reports must be made to the Financial Intelligence Unit (FIU) if there are any suspicions of laundering the proceeds of drug trafficking.</p>	<p>will require satisfaction as to the existence and bona fides of the company, its authority to enter into the transaction, a list of directors, the identity of individual owners of 10% of the company, the person providing instructions and at least 2 Directors. Similar Rules apply to other entities.</p> <p>Reports must be made to the Financial Intelligence Unit (FIU) if there are any suspicions of money laundering.</p>	<p>the most recent financial returns. In the case of other corporate owners we will require satisfaction as to the existence and bona fides of the company and the identification of individual owners &amp; those providing instructions, have evidence of authority to act and a statement of the company's business signed by a Director. Similar Rules apply to other entities.</p> <p>Reports must be made to the Financial Intelligence Unit (FIU) if there are any suspicions of money laundering.</p>
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## 14. CONCLUSION

The corporate law and business environment of Bermuda, the Cayman Islands and the British Virgin Islands are sophisticated yet sufficiently flexible to service even the most complex securitisation or structured finance transaction. An SPV incorporated as a Bermuda or Cayman exempt company or a British Virgin Islands international business corporation when structured with the appropriate shareholding Trust will serve to hold the Asset Portfolio under securitisation, secured and remote from the threat of insolvency in a creditor-friendly, tax neutral environment.

For more specific advice on securitization and structured finance transactions in the Cayman Islands, Bermuda and the British Virgin Islands we invite you to contact one of the following lawyers:

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