

MATRIX

Real estate finance and security - a comparison

This matrix has been prepared to provide a comparison of the laws of, and practice in, the British Virgin Islands (BVI), the Cayman Islands, Guernsey and Jersey as at its date of publication. It is for general information only and is not intended to, and does not, constitute legal, financial or other advice upon which you may act or rely and does not constitute an offer to provide such advice

This matrix focuses on BVI, Cayman, Guernsey and Jersey unregulated structures used to hold overseas real estate (in particular UK real estate) and not real estate in the islands themselves

	BVI	Cayman	Guernsey	Jersey
Entities most commonly used in real estate finance transactions	Companies and limited partnerships (LPs) ¹		Companies, limited partnerships and unit trusts (UTs) (known as GPUTs)	Companies, limited partnerships and UTs (known as JPUTs)
Constitutional documents	Memorandum and articles of association (companies) Partnership agreement (LPs)		Memorandum and articles of incorporation (companies) Partnership agreement (LPs) Trust instrument (UTs)	Memorandum and articles of association (companies) Partnership agreement (LPs) Trust instrument (UTs)
Are the constitutional documents publicly available?	Memorandum and articles of association - yes Partnership agreement - no	Memorandum and articles of association - no Partnership agreement - no	Memorandum and articles of incorporation - yes Partnership agreement - no Trust instrument - no	Memorandum and articles of association - yes Partnership agreement - no Trust instrument - no
Key legislation	BVI Business Companies Act 2004 (for companies) BVI Limited Partnership Act 2017 (for LPs)	Companies Act (as amended) (for companies) Exempted Limited Partnership Act (as amended) (for LPs)	Companies (Guernsey) Law 2008 (for companies) Limited Partnerships (Guernsey) Law 1995 (for LPs) Trusts (Guernsey) Law, 2007 (for UTs)	Companies (Jersey) Law 1991 (for companies) Limited Partnerships (Jersey) Law 1994 (for LPs) Trusts (Jersey) Law 1984 (for UTs)

¹ Note: UTs are not commonly used as real estate holding vehicles in BVI or Cayman

	BVI	Cayman	Guernsey	Jersey
Confidentiality – companies	The identity of shareholders and directors is not a matter of public record, unless the company voluntarily elects to file its register of directors and/or shareholders at the BVI Registry of Corporate Affairs (which it must then keep up to date at the Registry)	The identity of shareholders and directors is not a matter of public record	<p>The register of members of a private company is, during business hours, available for inspection (no charge for members or directors, and on payment of a charge for any other person)</p> <p>However, a member cannot inspect the register in respect of any redeemable or non-voting shares held by them</p> <p>The identity of shareholders and directors is not a matter of public record</p> <p>A company's annual validation will disclose details of the directors of a company as at 31 December in each year</p> <p>Nominee shareholders may be used to preserve confidentiality</p>	<p>The register of members of a private company is, during business hours, available for inspection on payment of a charge</p> <p>In addition, a company's annual return will disclose details of the registered shareholders of a company as at 1 January in each year</p> <p>Nominee shareholders may be used to preserve confidentiality</p>
Day to day management – companies	<p>Managed by the directors</p> <p>Board meetings do not have to be held offshore, but it may be required for tax structuring purposes</p> <p>Directors' resolutions can be passed in writing if permitted by the articles of association/incorporation</p>			
Directors and officers	<p>Minimum of one director</p> <p>No nationality restrictions or local residency requirements</p> <p>Corporate directors are permitted</p> <p>Directors' duties are owed to the company (though a director of a subsidiary may (if permitted by the memorandum and articles) act in the best interests of the holding company even if that is not in the interests of the subsidiary)</p> <p>Statutory duties are imposed requiring a director to act honestly and in good faith and in what the director believes to be the best interests of the company</p> <p>Common law fiduciary duties are equally applicable</p> <p>A company secretary is permitted but not required</p>	<p>Minimum of one director</p> <p>No nationality restrictions or local residency requirements</p> <p>Corporate directors are permitted</p> <p>Directors' duties are owed to the company</p> <p>Common law fiduciary duties are imposed requiring the directors, for example, to act in the best interests of the company, to avoid conflicts of interest</p> <p>A company secretary is permitted but not required</p>	<p>Minimum of one director</p> <p>No nationality restrictions or local residency requirements</p> <p>Corporate directors are permitted (except for companies engaged in regulated activities)</p> <p>Directors' duties are owed to the company</p> <p>Common law fiduciary duties are imposed requiring the directors, for example, to act in the best interests of the company, to avoid conflicts of interest</p> <p>A company secretary is permitted but not required</p>	<p>Minimum of one director</p> <p>No nationality restrictions or local residency requirements</p> <p>Corporate directors are permitted, but a corporate director must be regulated to act as a corporate director</p> <p>Directors' duties are owed to the company</p> <p>A statutory duty is imposed requiring a director to act in the best interests of the company</p> <p>Common law fiduciary duties are also imposed, for example, to avoid conflicts of interest</p> <p>A company secretary is required</p>

	BVI	Cayman	Guernsey	Jersey
Shareholders	Minimum of one shareholder No nationality restrictions or local residency requirements Shareholders' liability for the debts of the company is limited to the amounts (if any) unpaid on their shares			
Shareholder meetings	Do not have to be held in BVI Shareholder resolutions can be passed by written resolution if authorised by the articles of association The majority required to pass a written resolution can be specified in the articles of association	Do not have to be held in Cayman Shareholder resolutions can be passed by unanimous written resolution if authorised by the articles of association	Do not have to be held in Guernsey Shareholder resolutions can be passed by written resolution The majority required to pass a written resolution is the same as at a meeting	Do not have to be held in Jersey Shareholder resolutions can be passed by written resolution unless prohibited by the articles of association The majority required to pass a written resolution is either all shareholders with voting rights or a lower majority specified in the articles of association (no lower than two thirds for a special resolution)
Day to day management – LPs	Managed by the general partner, which is usually a company Board meetings of the general partner do not have to be held offshore, but it may be required for tax structuring purposes The general partner owes its duties to the limited partners (when solvent) The general partner has unlimited liability for the debts of the LP			
Limited partners	Minimum of one limited partner (in addition to the general partner) Limited partners' liability for the debts of the LP is limited to the amounts they have agreed to contribute to the LP			
Day to day management – UTs²	Not applicable		Managed by the trustee, which is usually a company Board meetings of the trustee do not have to be held offshore, but it may be required for tax structuring purposes The trustee owes its duties to the unitholders (when solvent) In order to constitute a collective investment scheme, the trustee will usually be an SPV 'orphan' company (or regulated trust company), so that it is not under common ownership with the unitholders The trustee's liability for the debts of the UT will be limited to the assets of the UT, provided those who deal with the trustee know it is acting as trustee	

² Note: assuming no separate manager is appointed

	BVI	Cayman	Guernsey	Jersey
Unitholders	Not applicable		In practice a minimum of two is required Unitholders' liability for the debts of the UT is limited to the amounts (if any) unpaid on their units	
Restrictions on borrowing	No statutory restrictions, though check for any restrictions in the constitutional documents of the borrower entities			
Restrictions on guarantees	No statutory restrictions, though check for any restrictions in the constitutional documents of the guarantor entities		No statutory restrictions, though the customary law rights of <i>droit de discussion</i> and <i>droit de division</i> are waived as standard Check for any restrictions in the constitutional documents of the guarantor entities	
Corporate benefit	Up-stream and cross-stream guarantees may raise corporate benefit issues These can generally be remedied with shareholder/partner/unitholder approval (provided the company/LP/UT is solvent)			
Financial assistance	No statutory restriction ³			
Execution blocks for foreign law governed documents	No specific requirements			
Tax	The BVI has no income tax, corporation tax, capital gains tax, inheritance tax, gift tax, wealth tax or any other form of direct taxation or withholding There are no currency exchange controls in the BVI	Cayman has no income tax, corporation tax, capital gains tax, inheritance tax, gift tax, wealth tax or any other form of direct taxation or withholding There are no currency exchange controls in Cayman	Guernsey has a standard zero per cent rate of corporate tax for Guernsey tax resident companies (subject to limited exceptions not relevant to this area) Guernsey has no withholding tax, capital gains tax, inheritance tax, gift tax, or wealth tax There are no currency exchange controls in Guernsey	Jersey has a standard zero per cent rate of corporate tax for Jersey tax resident companies (subject to limited exceptions not relevant to this area) Jersey has no withholding tax, capital gains tax, inheritance tax, gift tax, or wealth tax There are no currency exchange controls in Jersey
Standard searches	Company, court and registered agent certificate Usually run searches one business day before utilisation due to time difference	Court and good standing certificate Usually run searches one business day before utilisation due to time difference	Company and Judicial Greffier (court) - to check for court or insolvency proceedings in Guernsey Same day results	Company, Viscount (to check commencement of <i>désastre</i> – an insolvency proceeding in Jersey) and security interests register ⁴ Same day results

³ Note: financial assistance is treated as a distribution in Guernsey and must be approved by directors by satisfaction of a statutory solvency test

⁴ Note: to check for a security interest registered against a grantor in respect of a Jersey security interest granted on or after 2 January 2014 (when the Security Interests (Jersey) Law 2012 came into effect)

	BVI	Cayman	Guernsey	Jersey
Restrictions on granting foreign security	No statutory restrictions, though check for any restrictions in the constitutional documents of the entities granting security			
Most common forms of local asset secured	Shares, units, partnership interests, intercompany loans and bank accounts			
	Check for and disapply any restrictions on transfer of shares, units, partnership interests			
	Check for and disapply or obtain consent to any restrictions on assignment or creation of security in intercompany loan agreements/account terms			
Is local law security required in relation to local assets?	Optional		Mandatory – a Guernsey or Jersey situs asset is properly secured under local law	
Legal framework for security over intangible movable property (such as shares, units, partnership interests, intercompany loans and bank accounts)	English common law		Statutory Security Interests (Guernsey) Law 1993	Statutory Security Interests (Jersey) Law 1983 (for pre-2014 Jersey security) Security Interests (Jersey) Law 2012 (for Jersey security granted since 2014)
Public registration of security	Optional but encouraged when acting for lender	No registration system		Optional or mandatory depending on the asset being secured and nature of grantor
Third party security permitted	Yes			
Second ranking security permitted	Yes ⁵			
Security over shares and units	Created by equitable share mortgage and annotation of original register of members		Created by security agreement and possession of share or unit certificates	Created by security agreement, registration and possession of share or unit certificates
Security over LP interests	Created by charge over partnership interests		Problematic without the secured party becoming a limited partner An alternative is to grant security over the entity above and/or below the LP	Created by security agreement and registration

⁵ Note: there are some difficulties with junior security in Guernsey. For example, the junior secured party cannot be in possession of share certificates and security is created by possession of share certificates. The junior secured party will need to rely on contractual obligations on the senior secured party to deliver the certificates post discharge of the senior security package

	BVI	Cayman	Guernsey	Jersey
Security over intercompany loans	Created by security agreement (if a BVI/Cayman law governed security document) and mandatory to notify the counterparty and market practice to seek an acknowledgement from them		Created by security agreement and mandatory in Guernsey to notify the counterparty and market practice to seek an acknowledgement from them	Created by security agreement, registration and market practice in Jersey to notify the counterparty and seek an acknowledgement from them
Security over bank accounts	Accounts rarely located in BVI or Cayman		Created by security agreement and mandatory in Guernsey to notify the account bank and market practice to seek an acknowledgement from them	Created by security agreement, registration and market practice in Jersey to notify the account bank and seek an acknowledgement from them
Main powers of enforcement	Sale or receivership (if a BVI/Cayman law governed security document)		Sale or application (sale to self)	Sale or appropriation
'Step-in' rights	No (if a BVI/Cayman law governed security document)		Yes (if registered as holder)	Yes
Notification of enforcement	If security agreement requires (if a BVI/Cayman law governed security document)		Notify event of default	Notify event of default Grantor typically waives notice of sale/appropriation in security agreement
Principal insolvency regimes	Liquidation		Bankruptcy (<i>désastre</i>) Administration Compulsory winding up	Bankruptcy (<i>désastre</i>) Creditors' winding up
Can a creditor initiate the procedure?	Yes		Yes	Bankruptcy (<i>désastre</i>) - yes Creditors' winding up – no (though law due to change)
Is there a stay on enforcement of local law security on insolvency?	No			
Is there a stay on enforcement of English/other foreign law security on insolvency?	No		Unlikely in practice	

	BVI	Cayman	Guernsey	Jersey
What are the benefits of this particular jurisdiction?	<p>The legal regimes in each of the BVI, Cayman, Guernsey and Jersey for finance transactions are materially the same, with the result that the choice of jurisdiction is unlikely to be driven by particular laws</p> <p>The choice of jurisdiction will generally come down to other factors such as:</p> <ul style="list-style-type: none"> Investor preference - investors will often prefer to invest via certain jurisdictions, due to perceptions of and/or existing relationships within certain jurisdictions (for example, Asian investors will often be more familiar with BVI, US investors will often be more familiar with BVI and Cayman and European investors will often be more familiar with Jersey and Guernsey) Sponsor preference - if the sponsor has existing operations and/or relationships in a particular jurisdiction Sector - certain jurisdictions are historically more closely associated with certain sectors (such as Jersey, Guernsey and BVI with UK real estate) Tax - each jurisdiction is tax neutral so they should all offer the same benefit in this respect 			

Contacts

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

This matrix is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this matrix, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED

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