

FUND FINANCE FRIDAY

Cayman Counsel and Signature Block Comments – What’s the Deed?

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Of the comments that Cayman counsel add to transaction documents, one of the points that seems to incur a raised eyebrow by U.S. counsel or lenders now and again is the addition of “*executed as a deed*” in signature blocks of Cayman parties to credit and/or security agreements. What is and what is not a deed is not something that originates in U.S. law, of course, so on occasion we are asked to explain what this is all about and why Cayman counsel are commenting on signature blocks in this way.

What is it that Cayman Counsel add this comment to address?

As part of the standard security and collateral package granted in favour of a lender in a fund finance transaction, in addition and parallel to the grants of security interest over capital call rights and accounts, there will almost always be an irrevocable security power of attorney (PoA) granted in favour of the lender in order that in an event of default it may take actions in the name of the borrower (or its general partner) to enable it to effectively enforce its security. In the fund finance scenario, this PoA would, for example, aid a lender if it wished to send a capital call notice to limited partners on behalf of the general partner. Where a document contains such a PoA to be granted by a Cayman vehicle, this will likely catch the attention of Cayman counsel for the reasons set out below.

So Cayman Law requires it? How do you execute a document “as a deed”?

Execution requirements for PoAs granted by Cayman Islands companies are governed in Cayman by the Powers of Attorney Act (PoA Act) and the Companies Act (Companies Act).

The PoA Act provides that an instrument creating a PoA shall be executed as a deed (or as an instrument under seal – which isn't a route most people want to go down for obvious convenience reasons!). The Companies Act reinforces this for Cayman companies by providing that the appointment of an attorney other than by deed or instrument under seal shall *not* make the attorney a donee (the recipient of a PoA) for the purposes of the POA Act.

The next question we get when someone is exploring this issue is usually: “*Well, how does someone go about executing a document as a deed?*” The answer from a Cayman perspective is simple: you state the document to be executed as a deed. This question most frequently comes from people with experience of UK law or who have dealt with deeds being executed by UK companies, but equivalent formalities do not automatically extend to the Cayman Islands.

But the Credit Agreement/Security Agreement is not Cayman law-governed? Does this point still apply in those circumstances?

Unfortunately, there is no easy answer to this question. The PoA Act was not drafted with subscription finance and cross-border finance transactions in mind, and so neither it nor the Companies Act are specific on whether they intend to extend their requirements regarding execution formalities to foreign law-governed documents. As a result, Cayman attorneys that act for lenders prefer to take a more conservative approach when possible and request that such foreign law-governed documents that include PoAs are executed by Cayman funds “as a deed.” This is done to remove any doubt about whether the lender has a validly executed PoA by a Cayman fund in its favour and/or can rely on the security friendly provisions of the PoA Act that arise when an irrevocable PoA is granted in favour of a secured party, being that: (1) the power of attorney will survive the insolvency of the winding-up or insolvency of the donor (the grantor of the power); and (2) the power cannot be revoked by the donor without the consent of the donee.

As mentioned above, lender-side counsel in a transaction with Cayman funds prefer to see these formalities observed, but in some instances, this may not be possible. In these instances, while the lender would not be able to fall back on the protections of the Cayman PoA Act, the fact that Cayman formalities have not been followed does not affect the validity of the PoA from the perspective of its own governing law.

Conclusion: Cayman Firms will continue to comment on my signature blocks, right?

Pretty much! Unless the laws of the Cayman Islands governing PoAs are clarified to specifically address this point (which is not anticipated at present) we don't expect this long-established practise to stop. There are, of course, much more material points in fund finance transactions than the addition of “executed as a deed,” but if you have a deal where this comes up you now know why – and who to call with any questions!