

# Contracting with segregated portfolio companies — what any lender should know

By Michelle Frett-Mathavious, Esq., and Kimberly Seagojo, Esq., Harneys

NOVEMBER 28, 2022

Most lenders contracting with companies registered in the British Virgin Islands (BVI) will do so with 'standard' companies limited by shares. However, for those seeking to enter into transactions which involve them (i) taking security from a Segregated Portfolio Company (SPC) or (ii) taking security over the shares of an SPC, there are a number of matters peculiar to this specie of company which any lender would do well to be mindful of.

A BVI company may either be incorporated as an SPC or subsequently re-register as one and changes to BVI law since this specie of corporate vehicle was first conceptualized now mean that SPCs which, prior to the relevant change, had been regulated by the BVI Financial Services Commission and largely restricted to funds and companies conducting insurance business, can now also be used for unregulated business activity, including, but not limited to, holding assets for high net worth individuals, engaging in property development and management, including in real estate, aircraft and other property and to create bankruptcy remote vehicles which may be used in structured finance and capital markets transactions.

Though not as commonly used as standard companies, the expanded range of activity in which SPCs may engage is certainly worth noting as there is nothing which prevents the use of such vehicles in financing and other transactions.

## Features of SPCs

As a primary feature, SPCs possess multiple portfolios which are segregated from each other, with the additional benefit of statutorily segregated assets and liabilities between the segregated portfolios and for any lender, these companies are easily identifiable because of the requirement for the abbreviation 'SPC' or the words 'Segregated Portfolio Company' to appear in their name and for their constitutional documents to include a statement confirming their status as segregated portfolio companies.

While an SPC is a single legal entity and its segregated portfolios are not legal entities separate from the company, an SPC is characterized by what are essentially multiple pools of assets which broadly fall into two categories and are either (i) segregated portfolio assets (these are assets which are held within the various segregated portfolios of the SPC) or (ii) general assets of the company (these are those assets which fall outside of those comprised in and held by any of the segregated portfolios).

Each segregated portfolio must be identified or designated separately, with identifying words "Segregated Portfolio" and the assets of each segregated portfolio (as well as any general assets not owned by any segregated portfolio but by the SPC) must be separately maintained and separately identifiable from those of any other segregated portfolio or the general assets of the SPC.

An SPC may also issue shares (in multiple classes and series) (i) in respect of each segregated portfolio (with any proceeds of such shares being counted among the assets of the relevant segregated portfolio) and (ii) more generally in the SPC itself (with any proceeds of such shares being counted among the general assets of the SPC).

---

*It is the SPC that would need to execute the relevant documents, whether on its own behalf or on behalf of the relevant segregated portfolio.*

---

Similarly, any distributions and dividends may be paid on shares issued (i) in respect of a segregated portfolio or (ii) in respect of the SPC generally, in each case, upon satisfaction of the solvency test for distributions and in making the relevant determination the board of directors need only have regard to the assets and liabilities attributable to the specific segregated portfolio in the case of the former or to the assets and liabilities attributable to SPC generally in the case of the latter.

## Actions taken by SPCs

As with a standard company, an SPC will typically act through its board of directors. Any actions taken by an SPC or any segregated portfolio with the intention of binding the SPC or the relevant segregated portfolio shall be done by the SPC, whether acting on its own behalf (for any of its direct actions) or acting for and on behalf of the relevant segregated portfolio where acting on behalf of a specific segregated portfolio.

The same applies to the execution of any deeds, contracts, instruments under seal or otherwise to be executed by the SPC or any segregated portfolio which is meant to be binding on it or to operate for its benefit.

In either case, it is the SPC that would need to execute the relevant documents, whether on its own behalf or on behalf of the relevant segregated portfolio as the case may be. This comes back to the notion of an SPC being a single entity for the purposes of the concept of separate legal personality while providing a uniquely flexible structure which permits the effective housing of separate and distinct portfolios which are for all intents and purposes segregated from each other under the umbrella of a single SPC and possessed of an ability to engage in different activities or take different actions independently of each other and of the SPC itself.

Where the circumstances are such that the SPC takes actions on behalf of a specific segregated portfolio and the relevant documentation is in writing, it should always be made clear on the face of that documentation that the execution by the SPC is made in the name of, by or for the account of the relevant segregated portfolio(s). This is vitally important and to fail to do so would be to risk having the relevant documentation/actions be construed as ones executed/taken on behalf of the SPC itself instead of the relevant segregated portfolio(s).

---

*Insofar as a contracting segregated portfolio has incurred liabilities to a creditor, only its assets are available to satisfy the relevant liabilities.*

---

Also worth noting is the fact that it is also possible for a segregated portfolio to enter into contracts or other agreements with another segregated portfolio of its SPC or with a segregated portfolio or another SPC. In each case, the foregoing continues to hold true such that the relevant agreement(s) must be executed by the SPC itself and must make clear that the same is done for and on behalf of the relevant segregated portfolio(s).

### **Ring-fencing of assets and liabilities**

Where a contract or agreement is entered into by an SPC with the intention to bind a segregated portfolio, the rights and obligations under the contract or agreement are those of the contracting segregated portfolio and do not extend to the other segregated portfolios. The assets and liabilities of each segregated portfolio are effectively ring-fenced so that the assets and liabilities of each segregated portfolio are attributable only to the relevant segregated portfolio and do not extend to those of any other segregated portfolio.

Insofar as a contracting segregated portfolio has incurred liabilities to a creditor, only *its* assets are available to satisfy the relevant liabilities. Any such creditor would have no recourse to the assets of any other segregated portfolio but insofar as the assets of the contracting segregated portfolio are insufficient to satisfy its obligations, the creditor may have recourse against the general assets of the SPC.

Any liabilities incurred by a segregated portfolio in circumstances which are not related to the relevant segregated portfolio or any other segregated portfolio(s) or which are otherwise not attributable to a segregated portfolio shall entitle the relevant creditor to have recourse to the general assets of the SPC (and not those of any of segregated portfolio).

### **Registration of security interests**

The BVI security registration regime applies to SPCs much in the same way as it does to standard companies. An SPC entering into a financing transaction with a lender for and on behalf of a segregated portfolio can grant security over the assets of that segregated portfolio by making it clear on the face of the security document that SPC has granted the security for and on behalf of the relevant segregated portfolio and once granted, the SPC will be required in the ordinary course to (i) register particulars of the security on behalf of the relevant segregated portfolio in its privately maintained register of charges and (ii) in order to preserve priority for the creditor under BVI law, a public filing should also be made in the register of registered charges of the SPC which should also contain appropriate language to demonstrate entry by the SPC into the relevant security for and on behalf of the contracting segregated portfolio.

The priority position with respect to the security will relate only to the specific segregated portfolio and will have no bearing on that of any other segregated portfolio.

### **Security over shares**

Taking security over the shares issued by BVI companies is a customary feature of offshore financing and other commercial transactions. Whether the company whose shares are charged is a standard company or an SPC with one or more segregated portfolios, security may, subject to the provisions of its constitutional documents (or in the case of a regulated company, the approval of the BVI Financial Services Commission), be taken over the shares in issue.

While in a broad sense, many of the considerations which are relevant when taking security over the shares in a standard BVI company will also apply to security over shares in an SPC or a segregated portfolio, there are certain other matters which may apply in the case of the latter. For instance, where an SPC is regulated by the BVI Financial Services Commission (the FSC) further consideration would need to be given to the ability to transfer the mortgaged shares when structuring the security documentation.

Subject to any special considerations which may be relevant to the taking of security over the shares of the SPC or a specific segregated portfolio of the SPC, the documentation which creates the security interest over the shares may take a similar format to that used to document security over the shares in a standard company.

Many of the usual considerations will apply at the time of structuring the transaction and security documentation (such as

what law should properly govern the share security, the nature of the company whose shares are being charged, the nature of the shares subject to the security interest and the preferred method of enforcement) and care will need to be taken to ensure that the security documentation reflects both the commercial will of the parties as well as the commercial realities in which the parties are operating and against which the transaction is being structured.

For instance, the most typically deployed method of enforcement for share security over shares in BVI companies tends to be the appointment of a receiver (with a view to having the receiver vote the shares to replace the board of directors with one which is more sympathetic to the interests of the creditor and ultimately realize the debt owed).

This approach typically works best when taking security over all or a majority of the shares in the relevant company but when taking security over the shares in an SPC or a segregated portfolio it is possible that the security may not cover all of the shares in issue — where this is not the case, any receiver which is appointed will not

necessarily be able to take control of the SPC and operate it in a way which generates funds to repay the debt owed.

Share security will typically take the form of equitable security and upon entry into the share security, a shareholder will ensure deliver of certain ancillary documents to the creditor (these include unsigned share transfer forms, original share certificates, signed but undated directors' resignation letters with authority to date them upon enforcement and signed but undated proxies).

Each deliverable is tantamount to a weapon or tool in the arsenal of a creditor, aimed at facilitating enforcement should it become necessary but these may or may not be appropriate or obtainable when dealing with security over the shares of an SPC or any segregated portfolio and by extension the options for enforcement of the relevant security interests may well be affected as a result.

Ultimately, the commercial terms and the enforcement options will vary from one transactions to another and so it is always advisable for bespoke legal advice to be sought in each case.

### About the authors



**Michelle Frett-Mathavious** (L) is a partner in **Harneys'** banking and finance practice group in the British Virgin Islands. She advises clients such as onshore law firms, banks and other financial institutions, funds and corporations on finance and corporate matters related to British Virgin Islands and Anguilla law. She can be reached at [michelle.frett-mathavious@harneys.com](mailto:michelle.frett-mathavious@harneys.com).  
**Kimberly Seagojo** (R) is a member of the firm's investment funds and regulatory team in the BVI and advises on all aspects of the formation, licensing, maintenance and restructuring of offshore funds as well as regulatory matters. She can be reached at [kimberly.seagojo@harneys.com](mailto:kimberly.seagojo@harneys.com).

This article was first published on Westlaw Today on November 28, 2022.