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Bermuda

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Bermuda.

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BERMUDA LENDING & SECURED FINANCE



1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

There are no restrictions on foreign lenders granting loans to Bermuda companies unless the foreign lender seeks to undertake a lending business within Bermuda or establish a branch in Bermuda. There are restrictions on foreign lenders taking security over certain Bermuda property, including mortgages over Bermuda real estate and charges over shares of Bermuda companies.

Bermuda exchange control regulations require the written consent of the Bermuda Monetary Authority (BMA) prior to any disposition of shares (including the creation of a security interest) of a Bermuda company to non-residents of Bermuda. The BMA has granted a blanket consent where the licensed foreign bank or lending institution is located in an approved jurisdiction and written notification has been submitted to the BMA.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Bermuda does not have any usury laws that limit the amount of interest that can be charged by lenders.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

No such restrictions apply to exempted companies.

4. Can security be taken over the following

types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.

Real Property, plant and machinery:

Security over real property in Bermuda is usually granted by way of either a legal mortgage (executed as a deed), where title is transferred to the mortgagee (or lender), or an equitable mortgage (executed under hand), where a charge is created without title being transferred to the mortgagee.

Security is typically granted over plant, machinery and equipment by way of fixed charge or chattel mortgage.

Given that a legal mortgage involving real property transfers title to the mortgagee, such a mortgage has typically been executed subject to a requirement that title be transferred back to the mortgagor upon satisfaction of the underlying secured obligations.

Pursuant to the Land Title Registration Act 2011 (2011 Act), the grant of both a legal mortgage and an equitable mortgage will require compulsory first registration of title to the real property forming the subject matter of the mortgage or charge and it is necessary to lodge the relevant mortgage or charge, together with the title documents relating to the property in question at the Land Title Registry Office (LTRO).

It was thought that the electronic title register established under the 2011 Act would replace title deeds (as evidence of ownership), however most mortgagees are continuing to take possession of title deeds on the basis that the detailed plans and other historic information that is included with the deeds has proven helpful in respect of resolving title-related challenges.

There are different rules that apply if an overseas or exempted company wishes to hold a mortgage over real property in Bermuda, including obtaining the prior

written consent of the Minister of Finance and the Minister responsible for Immigration, respectively. If a mortgage taken by an overseas or exempted company is subsequently enforced, any land obtained by such company (as mortgagee in possession) must, with limited exceptions, be sold within five years.

Equipment:

Security is granted over equipment by way of fixed charge or chattel mortgage.

Inventory:

The most common form of security taken over inventory is a floating charge, due to the fluctuating nature of inventory.

Receivables:

Collateral security can be granted over receivables by way of fixed and floating charge and/or assignment.

Assignments can be either legal or equitable. Legal assignments must be in writing, signed by the assignor and unconditional and written notice must be provided to the debtor. An equitable assignment will result if any of these requirements are not met.

Shares in companies incorporated in Bermuda:

Security over shares of Bermuda companies is usually granted by way of a share charge. It is uncommon for legal mortgages to be created, although share charges usually provide the chargee with the right to create a legal mortgage upon the occurrence of certain events.

It is customary for certain ancillary documents to be delivered to the chargee under a share charge including an executed but undated share transfer form, any current share certificates, undated letters of resignation from each of the directors, irrevocable voting proxies and an undertaking from the Bermuda company to register all transfers of charged shares submitted to the company for registration.

Security created under a foreign law governed document:

With certain exceptions, it is possible to grant security under foreign law governed documents.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

There is no issue granting security over future assets.

Security over future property will generally be effected by a floating charge.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

A debenture or fixed and floating charge is typically used to grant security over all of a company's assets.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

With limited exceptions, there are no notarisation or legalisation requirements in relation to the granting or perfection of security interests.

8. Are there any security registration requirements in your jurisdiction?

In relation to real property, a mortgagee's priority position is established on the property register at the LTRO. Priority is based on the date that an application for first registration is submitted to the LTRO. The 2011 Act also operates to automatically convert a legal mortgage into a registered charge (meaning that title is returned to the mortgagor by way of a statutory vesting and the mortgagee comes to own a registered charge (only), rather than title to the real property in question). This system replaces the historical regime, which required that any legal mortgage or charge be registered in the Book of Mortgages in order to protect a mortgagee's priority position.

It is not necessary to ensure the enforceability in Bermuda of most security documents that they be registered in Bermuda. However, if a security document creates a charge over assets of a Bermuda company, it is recommended that it be registered in the Register of Charges at the Registrar of Companies (ROC). On registration, to the extent Bermuda law governs the priority of a charge, such charge will have priority in Bermuda over any unregistered charges, and over any subsequently registered charges. Priority is based on the date and time that an application for registration is submitted to the ROC.

Specific security registration regimes apply for security over Bermuda ships, aircraft and aircraft engines registered in Bermuda.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?

Stamp duty rarely applies to documents that are executed by Bermuda companies engaged in international business. However, legal mortgages and charges on Bermuda real estate attract stamp duty generally at the rate of 0.5% of the principal sum secured.

With limited exceptions, stamp duty is payable on documents executed by local companies.

A fee of between \$380 and \$665 will be payable for registering a charge at the ROC, depending on the value secured. There is also a \$95 fee for registering a satisfaction of a charge at the ROC.

A fee of between \$100 and \$1,300 is payable to the LTRO on the first registration of real property. Thereafter, a fee of between \$50 and \$400 is levied to register a charge against a registered title.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?

A company may guarantee borrowings of members of its corporate group provided the company has capacity to provide such guarantees and there is a sufficient corporate benefit to the company, which may be in the form of a benefit to the corporate group.

11. Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any company which directly/indirectly owns shares in the company; or (iii) in a related company?

There is no general prohibition or restriction on financial assistance, but loans to directors or security in favour of director loans (or loans to persons connected to a director) are restricted.

Without the consent of the members of the company holding shares with 90% of the voting rights, it is unlawful for a company to make a loan, enter into a

guarantee or provide security in connection with a loan to a director (or to certain persons connected with a director) except in certain limited circumstances.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

A Bermuda court would recognise the role of a security agent or trustee and allow the agent or trustee to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders pursuant to the terms of the applicable intercreditor, loan and security documentation.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Bermuda law recognises agent and trustee relationships.

14. Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?

Bermuda has no income, corporate, withholding or capital gains tax and no estate duty or inheritance tax. No such taxes or duty are payable to any authority in Bermuda whether on loan interest or proceeds of claim.

15. If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?

No such tax is payable in Bermuda.

16. Are there any other tax issues that

foreign lenders should be aware of when lending into your jurisdiction?

No such tax issues exist in Bermuda.

17. Are there any tax incentives available for foreign lenders lending into your jurisdiction?

There are no specific tax incentives for foreign lenders. Foreign lenders will not be deemed to be resident, domiciled or carrying on business in Bermuda by reason only of the execution, performance and/or enforcement of their loan and security documents.

18. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.

Generally, no such challenges have been brought before the Bermuda courts.

19. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Bermuda courts will give effect to the choice of foreign law as the governing law of a contract, provided that: (i) the point is specifically pleaded; (ii) the choice of law is valid and binding under foreign law; and (iii) recognition would not be contrary to public policy under Bermuda law. Where the foreign governing law of a contract is the laws of England and Wales, Bermuda courts are very comfortable enforcing such contracts.

20. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The procedure for enforcing a judgment of a foreign court depends on the jurisdiction in which the judgment was obtained.

A final and conclusive judgment in a US court against a

Bermuda company, based on a contract under which a sum of money is payable (a Money Claim), may be enforced in Bermuda under the common law doctrine of obligation for the debt, provided that (a) the US court was competent to hear the action in accordance with private international law principles as applied in Bermuda, and (b) the judgment is not contrary to public policy in Bermuda, has not been obtained by fraud, or in proceedings contrary to natural justice and is not based on an error in Bermuda law.

The Judgments (Reciprocal Enforcement) Act 1958 applies to judgments obtained in England. A final conclusive monetary judgment obtained against a Bermuda company in the superior courts of England will be enforceable in Bermuda without the necessity of any retrial of issues or any re-examination of underlying claims, provided that the judgment: (a) is final and conclusive (notwithstanding that an appeal may be pending against it or that it may still be subject to an appeal in such country); (b) has not been given on an appeal from a court that is not a superior court; and (c) is duly registered in the Supreme Court of Bermuda.

Bermuda is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and recognises awards made under arbitration agreements in a foreign jurisdiction that is also party to the New York Convention. If a foreign arbitral award is given against a defaulting debtor company as a result of arbitration in a "convention" jurisdiction, Bermuda's International Conciliation and Arbitration Act 1993 (ICAA) provides that the award may be enforced in Bermuda either by action or, with leave from the court, in the same way as a judgment or order to the same effect. The enforcing party must make an application for leave (with or without notice) under section 48 of the ICAA, regardless of the jurisdiction in which the award was made and (where leave is given) judgment can be entered in terms of the award, without re-examination of its merits. On an *ex parte* application where leave has been granted to enforce the award, the order will not allow enforcement until the other party has 14 days to respond and bring an application to set the award aside.

21. What (briefly) is the insolvency process in your jurisdiction?

There are only five Bermuda insolvency proceedings to which a Bermuda company can be subject:

1. Compulsory Winding-Up: A Bermuda company can be compulsory wound-up by the Supreme Court of Bermuda pursuant to section 161 of the Companies Act 1981 including on the

grounds that the company is unable to pay its debts;

2. Creditors' Voluntary Winding-Up: A Bermuda company can be wound-up pursuant to a creditors' voluntary liquidation which is begun by the company itself passing a resolution of its shareholders;
3. Scheme of Arrangement: Pursuant to section 99 of the Companies Act 1981, a Bermuda company and its creditors (or any class of them) can enter into a compromise or arrangement, which must be sanctioned by the Supreme Court of Bermuda;
4. Receivership: A receiver or manager can be appointed over the property (or any part of the property) of a Bermuda company pursuant to the powers of appointment contained in an instrument or by order of the Supreme Court of Bermuda; and
5. Voluntary Arrangement: A Bermuda company can enter into an informal voluntary arrangement involving a consensual compromise with its creditors.

22. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

A secured party's remedies in respect of its collateral would not be subject to a stay by a Bermuda court in the event of the commencement of insolvency proceedings. However, bankruptcy proceedings may impact on the ability of a secured party to enforce its rights over security, as the Bermuda company's underlying transactions may be subject to attack. Please see question 23.

23. Please comment on transactions voidable upon insolvency.

Any conveyance, mortgage or other act relating to property made by or against a Bermuda company within six months prior to the commencement of its winding up, will be invalid if it was made with the intent to prefer one creditor over the other company's creditors at a time that the company was unable to pay its debts.

Under the fraudulent conveyance provisions under Bermuda's conveyancing legislation, a creditor may seek to set aside a disposition of property (including the creation of a security interest), if the disposition was made in circumstances where the transferor's dominant purpose was to put the property beyond the reach of a

person (or class of persons) who is making, or may make, a claim against the transferor and the disposition was at an undervalue. Such a claim can only be made by an "eligible creditor", which is a person who: (i) is owed a debt by the transferor within two years after the disposition; (ii) on the date of the disposition is owed a contingent liability by the transferor, where the contingency giving rise to the obligation has occurred; or (iii) on the date of the action to set aside the disposition, is owed an obligation arising from a cause of action which occurred prior to or within two years after the date of the transfer.

In relation to floating charges, where a floating charge was created within 12 months of the commencement of the granting company's winding up and immediately after the creation of the charge the company became insolvent, such floating charge would be considered invalid.

From the commencement of a winding up of a Bermuda company, the liquidator may, with leave of the Supreme Court of Bermuda, disclaim any of the company's property that the liquidator believes to be onerous for the company to hold or is unprofitable or unsalable.

24. Is set off recognised on insolvency?

Where there are mutual credits, mutual debts or other mutual dealings between one party to the other party in respect of mutual dealings at the time of the winding up order, the sum due from the one party shall be set off against any sum due from the other party and one party will be under a single obligation to pay a net amount to the other party.

25. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency

Certain debts are preferred by statute in Bermuda but only over claims of unsecured creditors and claims of secured creditors who are holders of floating charges. None of these debts are preferred over fixed charges.

Certain regulatory bodies in Bermuda, such as the BMA and the Regulatory Authority of Bermuda, could in certain circumstances investigate the affairs of an insolvent company and exercise such regulatory powers as they deem appropriate.

26. Are there any impending reforms in

your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

There are no impending reforms that are expected to change the existing regulatory or legal environment for foreign lenders.

27. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Bermuda is an international financial centre and Bermuda companies are regularly involved in a variety of cross-border structures and transactions, the majority of which originate in other major jurisdictions. It is not uncommon to see credit facilities being made available by alternative credit providers.

28. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring

of such deals such as (i) Brexit (ii) LIBOR transition and/or (iii) COVID 19

Financial institutions in the United Kingdom and Europe will bear the brunt of Brexit over both the short and long term, as the timetable for full separation is two years following the invocation of Article 50 of the Lisbon Treaty. The structuring of certain deals will be impacted by passporting arrangement changes for UK entities operating in Europe which may affect distribution networks and create additional regulatory costs for lenders.

The phasing out of LIBOR as a loan benchmark from 31 December 2021 has had little impact in Bermuda to date, as most loan arrangements reference USD LIBOR, which continues to be published until 30 June 2023. However, with US banks already restricted from creating new USD LIBOR loans, lenders in or to Bermuda are advised to either reference the secured overnight financing rate (SOFR) recommended by New York Federal Reserve Bank for facilities in USD or the Sterling Overnight Indexed Average (SONIA) for facilities in GBP.

COVID 19 continues to have a major impact on the world including Bermuda. COVID 19 has pushed Bermuda into adopting paperless processes for the registration and de-registration of security interests at the ROC.

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