# Loans & Secured Financing 2022

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Getting The Deal Through

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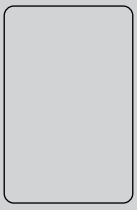

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**Michael Chernick**
Shearman & Sterling LLP

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Loans & Secured Financing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on United States, Mexico, Bahamas and Cyprus.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Michael Chernick of Shearman & Sterling LLP, for his assistance with this volume.

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# Bahamas

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## GENERAL FRAMEWORK

### Jurisdictional pros and cons

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

There are no particular advantages or disadvantages of incurring indebtedness in either form. In local transactions, indebtedness is primarily by way of bank loan. In cross-border financing transactions, structuring considerations are driven primarily by the law governing of the underlying credit agreement. Bahamian law is not the usual choice of governing law in such transactions. Nonetheless, given that Bahamian entities, such as the international business company (IBC) and the exempted limited partnership (ELP) have garnered much popularity internationally as prime vehicles for private equity management it is not uncommon to find that a counterparty to an international financing transaction may be incorporated, registered or established under Bahamian law, usually an IBC or ELP. If a Bahamian entity is involved in a cross-border financing transaction, it is most often in the role of guarantor or the equity interests in the Bahamian entity are the subject of the security for the loan. Less commonly, a Bahamian entity may be a borrower in the financing transaction.

### Forms

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

The most common form of bank loan facility is the term loan although Bahamian entities may be counterparty to any type of bank loan facility. The choice of loan facility will be driven by underpinning factors that typically emanate from locations outside of The Bahamas, such as tax residence of the borrower, preference of the lending institution and the lex situs of the debt.

### Investors

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

In international financing transactions with a Bahamian nexus, the investors are typically branches of multinational banks from the larger international financial centres (eg, London, New York, Hong Kong and Dubai). Given the size of these institutions, there is variety of modes of financing available. However, based on transactions seen in which a Bahamian entity is a counterparty, there seems to be a preference amongst multinational banks to provide term loan facilities on a more frequent basis than any other mode of financing, with medium-term note securities coming in a close second. Additionally, mezzanine loans are not uncommon, particularly where the borrower is large operating company as opposed to a private equity vehicle.

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

By and large, the salient terms of bank loan facilities in international financing transactions are not affected by Bahamian law considerations given that the investor is often a multinational bank not established in The Bahamas and the governing law of the underlying credit agreement is not that of The Bahamas. Bank loan facilities are more likely to have shorter tenors, be convertible and have more non-standard features where the participating investors are hedge funds rather than traditional banks.

### Bridge facilities

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

It is not uncommon for bank loan facilities to be used as bridges to permanent debt security financing. Bridge facilities typically have shorter tenors and higher interest rates. Often, they may be demand loans and may be unsecured or secured primarily by guarantees. In cross-border transactions, these terms are dictated by factors outside The Bahamas.

### Role of agents and trustees

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

The use and role of agents and trustees in financing transactions is dictated by and governed by the jurisdiction of the market on which the loan is offered and the governing law of the primary transaction documents. Typically, the terms of appointment of administrative agents, collateral agents and similar entities will expressly exclude any fiduciary responsibility to the investor group and the debtor and will provide for the agents to be fully reimbursed for costs and indemnified for any liability other than fraud. Given that the governing law of the transaction is not likely to be the laws of The Bahamas, Bahamian market and legal considerations do not impact the decision to use agents or trustees in these transactions or the role that they play. Agents typically administer the mechanical aspects of the loan, including disbursements, collections, currency conversions, interest calculations, service of notices, etc, and act on the instructions of the lenders.

**Role of lenders**

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

The roles and fees of financial institutions in syndicated loan transactions are dictated by the market and governing law of the primary loan documents. These are not likely to be the Bahamian market and laws of The Bahamas. However, in our experience, the financial institutions that act as arranger for syndicated loan transactions are usually responsible for assessing the borrower's credit, establishing the syndication of the loan, appointing the agents and advisers and negotiating the loan terms.

**Governing law**

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

The chosen law of the credit agreement would normally be either: (1) the laws of the jurisdiction in which the creditor is situated or (2) the laws of the jurisdiction in which the debtor is situated. In practice, the law chosen is often the law of the jurisdiction in which the creditor is situated. However, where the equity interests or the business and goodwill of a Bahamian entity are the subject of the security for the loan, the security documents will be governed by the laws of the jurisdiction in which the secured property is located. Where the secured property consists of the share capital of the borrower or of another Bahamian entity, the governing law will usually be that of The Bahamas. The parties to the credit agreement may decide to execute parallel security agreements, one governed by the same laws as the credit agreement and the other governed by the laws of the jurisdiction in which the property that is the subject of the security is located (ie, The Bahamas).

## REGULATION

**Capital and liquidity requirements**

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Banks licensed in The Bahamas are supervised by the Central Bank of The Bahamas (the Central Bank). The Central Bank requires that banks observe the Basel III protocols as they relate to capital adequacy. In light of this, banks licensed in The Bahamas are required to maintain a minimum capital that aligns with the capital adequacy ratio of at least 8 per cent (exclusive of the capital conservation buffer) at all times as prescribed by Basel III. The capital adequacy ratio is calculated by dividing a bank's eligible capital base by its total risk-weighted exposures. A bank's total risk-weighted exposure is in part calculated by reference to its outstanding loans. Bearing this in mind, generally, a bank licensed in The Bahamas, when extending a facility will consider how the extension of that loan will impact its capital adequacy ratio. This may impact the terms upon which the bank would be willing to make the loan, including the total amount of the facility, the interest rate and maturity date of the loan, so as to manage the bank's exposure. Generally, the bank will seek to reduce the risk weighting of the facility through security enhancements, including, where possible, insurance.

**Disclosure requirements**

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

There are no specific requirements for public disclosure of bank loan facilities for public company debtors in The Bahamas. However, for public issuers, there are requirements for the publication of annual audited financial statements and quarterly interim financial statements, each prepared in accordance with generally accepted accounting principles, as well as an annual report, including management discussion and analysis of the company's financial position. Additionally, there may be disclosure requirements imposed upon such debtors in the jurisdictions in which the loans are made, the company operates or in which the exchange on which its shares are traded is located.

**Use of loan proceeds**

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

There is no direct regulation of bank loan proceeds in The Bahamas. If the debtor is a Bahamian entity, that entity is free to use those proceeds for any lawful purpose. However, if the loan proceeds or property derived from those proceeds are the proceeds of a criminal offence or are used for the purpose of terrorism, the debtor would be liable to prosecution under The Bahamas' anti-money laundering and anti-financing of terrorism legislation, namely, the Proceeds of Crime Act, the Financial Transactions Reporting Act, and the Anti-Terrorism Act. Investors could potentially be subject to fines, imprisonment or administrative sanctions if they knowingly or recklessly facilitate the commission of an offence or fail to report a suspicious transaction. However, such risks will be mitigated by the carrying out of effective due diligence/know your customer procedures in respect of the borrower prior to and periodically after granting a bank loan and by reporting any suspicious transaction to the Financial Intelligence Unit.

**Cross-border lending**

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Yes. Under the provisions of the International Obligations (Economic and Ancillary Measures) Act 1993, the Bahamian government may by order prohibit, among other things, the provision of financial services or any other services to, or for the benefit of or on the direction or order of a foreign state or any person in that foreign state. An investor who willfully contravenes or fails to comply with any such order or regulation commits an offence and is liable on summary conviction to a fine not exceeding B$10,000 or to imprisonment for a term not exceeding one year, or to both. Investors can mitigate their liability by carrying out searches and obtaining confirmation that persons to whom credit is being extended are not restricted or may apply to the Governor General for a permit to conduct particular transactions with a restricted person.

**Debtor's leverage profile**

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

There are no such limitations under Bahamian law. Such limitations will be prescribed by the market practices and laws of the jurisdiction of the lender.

**Interest rates**

14 Do regulations limit the rate of interest that can be charged on bank loans?

No. The rate of interest charged on a bank loan is not regulated.

Under the Rates of Interest Act, the maximum rates of interest that may be charged on loans in The Bahamas are 20 per cent if the loan is for a sum in excess of B$100, or 30 per cent if the loan is for a sum of B$100 or less. The Rates of Interest Act does not however apply to any loan made in a currency other than the currency of The Bahamas or in the currency of The Bahamas by any bank licensed in The Bahamas.

**Currency restrictions**

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

In accordance with Bahamian exchange control regulations, a Bahamian resident may not borrow in foreign currency unless that resident has received exchange control approval. Investors wishing to fund a Bahamian debtor that is 'resident' for exchange control purposes would need to first secure the approval of the Bahamian Central Bank. However, that companies incorporated in the Bahamas are not subject to Bahamian Exchange Control Regulations if they are deemed 'non-resident'. This will usually be the case where their business operations are exclusively outside of The Bahamas.

**Other regulations**

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

There are no further regulatory requirements to consider. The regulatory regime applicable to the loan transaction will depend upon the jurisdiction in which the investor is situated and the market practices of that jurisdiction.

## SECURITY INTERESTS AND GUARANTEES

**Collateral and guarantee support**

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

Typically, collateral and guarantee support for bank loan financing is provided by the parent company. Where the parent company is a Bahamian international business company (IBC), there is no requirement for corporate benefit but directors will still have to consider where the grant of a guarantee is consistent with their fiduciary duties. A downstream guarantee by a parent company will not be problematic and the corporate benefit may be made out on the grounds that the parent is ultimately responsible for the success of the subsidiary. However, with upstream guarantees (ie, where a subsidiary guarantees the obligations of its parent company) and cross-stream guarantees (ie, where a company guarantees the obligations of its sister company), it may be more difficult to establish corporate benefit. As such, where the security requested is an upstream or cross-stream guarantee, shareholder approval should be sought as a matter of course. Additionally, where the solvency of the subsidiary or guaranteeing sister company is in question, the guarantee should not be given.

Where a Bahamian entity that owns real estate in The Bahamas or that operates a business in The Bahamas and a charge over the real estate or the business and goodwill of that entity is used to secure a loan, that charge will be subject to taxation in The Bahamas in the form of either value added tax or stamp duty, currently 1 per cent of the amount secured.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

The priority ranking of competing security over the same asset will be provided for in the security documents and determined in accordance with the law applicable to the collateral. In a syndicated loan transaction this would be agreed between the syndicate of lenders by provision in the loan documents. The loan document may include an inter-creditor agreement that addresses the ranking of the competing security interests specifically. As a matter of Bahamian law, subject to the express terms of any security documents (eg, providing for subordination), security will rank in order of creation. In the case of secured property located in The Bahamas, priority is accorded based on the order in which the security documents are lodged for recording at the Registry of Records.

In addition to this, Bahamian law does recognise the doctrine of pari passu. As such, all unsecured creditors share equally in the available assets of the company in proportion to the debt owed by the company to such creditor.

**Commonly pledged assets**

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The assets most commonly pledged as security, in order of popularity are:

- equity interests in companies and partnerships;
- assets held by a company or partnership;
- bank accounts holding cash and or securities; and
- asset and goodwill of an operating company.

A pledge of equity interests in a company may be subject to the limitations placed on the disposal of shares in the company's constitutional documents (eg, preferential rights of shareholders such as the right of first refusal). Pledging of equity interests in a company may also be limited by the terms of a shareholders' agreement. Likewise, a pledge of equity interests in a partnership, by virtue of the partnership agreement establishing the partnership, may be subject to similar restrictions on disposition as those applicable to equity interests in companies.

The constitutional documents of a company or partnership may restrict the manner in which a company or partnership may dispose of assets. Further, where the value of the assets of a Bahamian company to be pledged as security constitute more than 50 per cent of the total value of the assets of that company, shareholder consent is required. With respect to a Bahamian partnership, the disposal of property of the partnership may require the concurrence of all partners.

**Creating a security interest**

20 Describe the method of creating or attaching a security interest on the main categories of assets.

**Equity interests in a company**

The most common mode of creating a security interest over the shares of a company is by way of executing a pledge over those shares. Pledges are typically used where the ownership of the underlying asset is transferred by delivery. Under the terms of the pledge, the pledgor is usually required to effect constructive delivery of the shares to the pledgee. This is done by delivering blank signed share transfer forms, share certificates and proxies to the pledgee and noting the interest of the pledgee in the share register of the company whose shares are subject to the pledge. Additionally, the pledgee usually requires that the pledgor undertake not to transfer the shares either at all or without the prior written consent of the pledgee, and then only to a specified class of persons.

**Equity interest in a partnership**

The most common mode of creating a security interest over an interest in a partnership is also by way of executing a pledge or charge. Under the terms of the pledge, the pledgor would be required to deliver to the pledgee evidence of the pledgor's interest in the partnership (eg, a copy of the partnership agreement) along with an undated instrument of assignment of that interest in favour of the pledgee. The pledgee would also require that the pledgor undertake not to terminate the partnership or transfer the partnership interest either at all or without the prior written consent of the pledgee and then only to certain permitted persons.

**Bank accounts holding cash and or securities**

Security is commonly taken over cash or securities deposited into a bank account by way of fixed or floating charge. Where the account concerned is a non-trading account, the charge taken will usually be a fixed charge. Under a fixed charge, the chargor is usually prohibited from withdrawing funds or securities from the account without the prior written consent of the chargee and only for the purpose of apply those funds or securities as repayment for the loan granted by the chargee. Where the account concerned is a trading account, the charge taken is typically a floating charge. Pursuant to the terms of a floating charge over a trading account, the chargor would be permitted to continue trading and would not need to obtain the consent of the chargee for every trade made. However, there are usually limitations placed on the amount of trading that can be conducted without the consent of the chargee.

**Assets and goodwill of an operating company**

Security over the assets and goodwill of an operating company is taken by way of a debenture, which is a charge that is both fixed and floating. Debentures may also include an assignment of any contractual rights held by the company as well as any receivables owed to the company. Furthermore, where the assets of the company include real property, the debenture may provide for the mortgage of the real property in favour of the lender.

**Perfecting a security interest**

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

Under Bahamian law, security is validly taken once the security document is executed in the proper form. Further steps may be required in order to preserve the priority of the security over other security taken over the same assets later in time. In the case of security interests consisting of pledges and charges (including mortgages and debentures) over assets that are either physically or notionally located in The Bahamas, priority is protected by the recordation of the pledge or charge in the Registry of Records kept by the Registrar General. After execution of the pledge or charge, the original document containing the wet ink signatures of the parties thereto is submitted to the Registrar General for recording. If any taxes (stamp duty or VAT) are payable in respect of the charge or pledge, the same are required to be paid before registration of the pledge, otherwise the recording of the pledge or charge is invalid.

Additionally, that company may record the particulars of a charge over its assets the charge in a register of mortgages and charges maintained by it in accordance with Bahamian company legislation and filed with the Companies Registry.

The registration of the security document, in both instances described above, also serves as constructive notice to third parties of the existence of the security interest.

**Future-acquired assets**

22 Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Yes. Security interests can extend to future acquired assets and cover future incurred obligations.

Under Bahamian law, a security interest may only be taken over assets acquired in the future by way of equitable charge or mortgage, given that a legal mortgage or charge cannot be granted because there can be no delivery (actual or constructive) of property not yet acquired.

**Maintenance**

23 Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

There are no maintenance requirements. Once security has been validly given, it is not terminated until it discharged by the parties to the loan agreement.

**Release**

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

Sale of the underlying asset does not release the security. Where an asset is sold without the discharge of the security interest, the purchaser takes ownership of the asset subject to the security interest of the security holder. Only a bona fide purchaser for value without notice is capable of defeating the security interest. However, it would be difficult for a purchaser to assert that they had no notice of the security interest where that security interest has been recorded, thereby giving constructive notice to the world at large.

**Non-fulfilment of guarantee obligations**

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

If a Bahamian law-governed guarantee is given, a call on the guarantee is usually avoidable where: (1) the guarantee was obtained by fraud, misrepresentation or undue influence, or (2) the call on the guarantee was not made in the manner agreed to by the parties to the loan transaction. In both instances, express and unambiguous wording in the guarantee agreement would be required to waive the rights of

the guarantor. A guarantee will be released if the debtor is released from liability because a guarantor has all of the defences that are available to the debtor. Further, a guarantee may become unenforceable because of a variation in the loan agreement made between the lender and the debtor to which the guarantor did not agree, including an extension of the payment term or increase in the principal amount, or a failure to take security as agreed or because a condition precedent was not fulfilled. A typical guarantee will expressly waive all such matters and provide for the preservation of the guarantee notwithstanding their occurrence.

**Parallel debt requirements**

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

There are no such requirements under Bahamian law as Bahamian law recognises the trust arrangements under which a security trustee holds security for syndicated lenders. In cross-border transactions, Bahamian law is not likely to be chosen as the governing law of the loan agreement, which is the law that impacts such matters.

**Enforcement**

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

Where Bahamian law governed documents are used to grant security in a loan transaction, there is no need to seek the court's involvement to enforce the security in The Bahamas. A properly drafted security agreement should detail the manner in which the security holder is permitted to enforce the security. Usually, enforcement may only occur after an event of default that is defined in the security agreement and must be initiated by a demand for repayment of the loan and notice that enforcement action will be taken. Under a pledge or charge, provision is made for the security holder to transfer the collateral by completing the blank instrument of transfer provided as an assurance for the security. Additionally, the security agreement may incorporate the power of sale provisions under the Conveyancing and Law of Property Act or contain bespoke power of sale provisions. The power of sale would allow the security holder to sell the collateral to recoup the money advanced under the loan.

Where the security agreement is governed by the laws of another jurisdiction, but the security granted is over property that is located in The Bahamas, judicial involvement may be necessary. The courts of The Bahamas would recognise a foreign law governed contract where the choice of law is regarded as valid choice of law. Furthermore, if a creditor obtains a judgment in a foreign court in respect of the enforcement of the security, Bahamian law would assist in the enforcement of that judgment (without retrial of the merits of the case) in the following manner and circumstances.

**Reciprocal Enforcement of Judgments Act (REJA)**

Under the provisions of the REJA, a judgment obtained from a foreign court may be enforced in The Bahamas provided the following criteria are met:

- the judgment is made in civil proceedings (arbitral awards included);
- proceedings are brought under the REJA within 12 months of the date of the judgment; and
- the judgment was issued by a court in one of the following jurisdictions: Australia, Barbados, Belize, Bermuda, Guyana, Jamaica, the Leeward Islands, Trinidad & Tobago or the United Kingdom.

Where a judgment does not meet the criteria to be registered under the REJA, a Bahamian court would recognise the foreign judgment if:

- the courts of the jurisdiction in which the judgment was issued had proper jurisdiction under Bahamian conflict of laws rules over the parties subject to such a judgment;
- the judgment is for a debt or definite sum of money other than a sum payable in respect of taxes or charges of a like nature or in respect of a fine or penalty;
- the court granting judgment did not contravene the rules of natural justice of The Bahamas;
- the judgment was not obtained by fraud on the part of the party in whose favour the judgment was given or of the court pronouncing it;
- enforcement of the judgment would not be contrary to the public policy of The Bahamas;
- the correct procedures under the laws of The Bahamas are duly complied with;
- the judgment is not inconsistent with a prior Bahamian judgment in respect of the same matter; and
- enforcement proceedings are instituted within six years after the date of such judgment.

In general, a secured creditor can realise security notwithstanding the bankruptcy or insolvency of the debtor or guarantor as the security asset is outside the insolvent estate and as there is no automatic moratorium on realisation. However, with respect to collateral granted by Bahamian banks, the Banks and Trust Companies Act 2020 now imposes a special resolution and insolvency regime, including statutory administration and liquidation. The Central Bank of The Bahamas (the Central Bank) may impose a moratorium temporarily suspending some or all payments by a bank under statutory administration if the Central Bank considers this necessary to protect the interests of depositors or the stability of the financial sector. Additionally, no rights may be exercised or proceedings brought against a bank while it is under statutory administration under any security or collateral instrument without the prior written consent of the statutory administrator.

Additional restrictions have also been imposed in the event that there is an insolvent liquidation of a bank. Section 61(17) of the BTCRA provides, inter alia, that as of the date of appointment of a liquidator:

- the calculation of interest and penalties against the bank's obligations will be suspended and no other charge or liability will accrue on the obligations of the bank;
- the exercise of any right in respect of the bank's assets will be suspended;
- no right shall be exerted over the bank's assets during the bank's liquidation, except rights given to the liquidator;
- no creditor may attach, sell or take possession of any assets of the bank as a means of enforcing his claim or initiate or continue any legal proceeding to recover the debt or perfect security interests in the bank's assets; and
- any attachment or security interest (except one existing six months prior to the effective date of the liquidation) will be vacated, and no attachment or security interest, except one created by the liquidator, shall attach to any of the assets or property of the bank so long as the liquidation continues.

**Fraudulent conveyance and similar doctrines**

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Under Bahamian law, voidable transactions are of the following types.

**Voidable preferences**

A charge over property of a Bahamian company may be set aside as a voidable preference, pursuant to the provisions of section 241 of the Companies Act. Section 241 provides that a charge over property of a company granted in favour of any creditor at a time when the company is unable to pay its debts, with a view to giving such creditor a preference over the other creditors, shall be invalid if made within six months immediately preceding the commencement of a liquidation.

**Dispositions made at an undervalue**

Under section 242 of the Companies Act, dispositions (including charges) made at an undervalue (ie, at no consideration or consideration that in monies or monies worth is significantly less the value of the property), with an intent to defraud creditors, may be set aside at the instance of the company's official liquidator provided the action or proceedings to set aside the disposition is instituted by the official liquidator within two years of the disposition.

**Fraudulent dispositions**

Pursuant to the Fraudulent Dispositions Act, a disposition (including a charge) made at an undervalue with an intent to defraud a creditor may be set aside as the instance of creditors so prejudiced provided proceedings are brought to set aside the disposition within two years of that disposition.

## INTERCREDITOR MATTERS

**Payment and lien subordination arrangements**

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

It is common for intercreditor or subordination agreements to provide for payment or security interests of one creditor or class of creditors to be is senior to another. The terms of the contract usually provide that the debtor's payment obligations to the junior creditors and the rights or claims of the junior creditors are deferred or subordinated until the senior creditor has been paid or exercised their rights or claims.

Section 236 (1) of the Companies Act 1992 (Companies Act) provides that in an insolvency proceeding the property of a company incorporated under either the Companies Act, must be applied in satisfaction of its liabilities pari passu. However, section 236(2) of the Companies Act provides that the collection in and application of the property of a company referred to in section 236(1) is without prejudice to and after taking into account and giving effect to:

- the rights of preferred creditors and secured creditors;
- any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors; and
- any contractual rights of set-off or netting of claims between the company and any person or persons, and subject to any agreement between the company and any person or persons to waiver or limit the same.

The aforementioned provisions of the Companies Act also apply to a company incorporated under the International Business Companies Act 2000 (IBC Act). In light of the foregoing, in an insolvency proceeding, subordination arrangements are enforceable against companies established, incorporated or registered under either the Companies Act or IBC Act.

Section 30 of the Bankruptcy Act (Ch.69), which applies to partnerships and individuals, does not contain similar provisions to the Companies Act with respect to subordination arrangements. As a result, there is a risk that a subordination arrangement would not be enforceable in a bankruptcy proceeding. We are of the view however that the Bahamian courts would follow UK case law, which, in the cases *In Re Maxwell Communications Corp Plc (No 2)* [1994] 1 All ER 737 and *Re SSSL Realisations* [2006] EWCA Civ 7 has upheld the validity and enforceability of subordination agreements after the insolvency of the debtor.

**Creditor groups**

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

All creditor groups are typically included as parties to an intercreditor agreement. The parties usually consist of senior creditors and junior creditors. The junior creditors' voting rights tend to be limited to any actions that specifically affect the debtor's obligations to them, which are subject to the debtor's obligations to the senior creditors.

**Rights of junior creditors**

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors are typically stayed from enforcing remedies until senior creditors have been paid. Prior to the repayment of senior debt, junior creditors typically have:

1 rights of unsecured creditors;
2 rights to file claims;
3 take any action not adverse to the priority status of the senior creditor's security; and
4 voting rights with respect to the debtor's obligations to the junior creditors and their security.

Items (2) to (4) may still be subject to the prior consent of the senior creditors.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

It depends on the terms of the intercreditor agreement but, in an insolvency proceeding involving the debtor, the junior secured creditors tend to have voting rights with respect to the realisation of the security under the loan agreement.

**Pari passu creditors**

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

If creditor groups will be secured on a pari passu basis, the intercreditor arrangement is unlikely to stay junior creditors from enforcing their rights and remedies until senior creditors have been repaid. The debtor's payment obligations to the junior creditors may be subordinated to the debtor's payment obligations to the senior creditors but it is likely that the junior creditors will have equal voting rights with respect to the security.

## LOAN DOCUMENT TERMS

### Standard forms and documentation

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

Local transactions are not typically documented under the terms of a market association. Typically, banks will utilise their in-house standardised forms (especially for guarantees, debentures and mortgages) or customised forms prepared by the bank's attorney. For cross-border transactions, it is common for trade association standard forms to be utilised. The terms of trade association standardised documents, such as those prepared by the Loan Market Association or the Loan Syndications and Trading Association, are generally recognised by investors and debtors as the market 'norm' when negotiating cross-border bank loan documentation.

### Pricing and interest rate structures

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

Bank loans are typically based on floating pricing or interest rate structures. For Bahamian dollar loans, the Central Bank of The Bahamas sets the discount (bank) rate, which is the rate at which it lends to commercial banks. Commercial banks might adjust their prime rate, the rate at which they lend to their best customers, in response to changes in the discount rate.

In cross-border transactions or in local transactions involving a bank loan denominated in a currency other than the domestic currency, the bank will typically utilise LIBOR or one of the more recent benchmark rates, such as the Secured Overnight Financing Rate.

36 Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

For loans where the rates are still based on LIBOR, the banks have implemented contract addenda expressly authorising the bank to discontinue the calculation of interest based on LIBOR and permitting the calculations to be made on the basis of an alternate reference rate selected by the bank based on prevailing market conventions if LIBOR is no longer published as a reference rate or if the means for determining LIBOR no longer exist.

### Other loan yield determinants

37 What other bank loan yield determinants are commonly used?

Interest rates are the only commonly used loan yield determinant for bank loans. Pricing floors are sometimes used but are not typical, except that it will usually be expressly stated that the rate cannot be less than zero.

### Yield protection provisions

38 Describe any yield protection provisions typically included in the bank loan documentation.

Withholding tax gross up provisions and increased cost provisions are almost universally included in loan documentation. Prepayment premiums, although used commonly, are also commonly expressly excluded.

### Accordion provisions and side-car financings

39 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

Bank loan agreements do not typically allow additional debt that is secured on a pari passu basis with senior secured bank loans. That being said, where there is only one class of creditor it is common for a loan agreement to include provisions allowing for additional debt from the same creditors or class of creditors under the same terms as the loan agreement.

### Financial maintenance covenants

40 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Financial maintenance covenants such as debt service coverage ratios and interest coverage ratios are commonly included in bank loan documentation. The debt service coverage ratio is usually calculated by dividing the net operating income by the total debt service and the interest rate coverage ratio is usually calculated by dividing earnings before interest and tax by the interest payment expense. Both the debtor's past performance and projected results are taken into consideration when setting these covenant levels. It is not common for bank loan documentation to include a prohibition on capital contributions from a debtor's shareholders to cure breaches in financial maintenance covenants.

Although not specifically a financial maintenance covenant, the bank loan documentation is likely to include reporting requirements such as the provision of a balance sheet, profit and loss account, financial budget, financial forecasts and any other information the lender may require, at specific times of the year, to monitor the performance of the debtor.

### Other covenants

41 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Other covenants restricting the operation of the debtor's business thay are commonly included in the bank loan documentation are as follows:

- restrictions on dividend payments;
- maintaining insurance with reputable insurance companies covering risks for the debtor's business;
- requirement to maintain and preserve properties for the conduct of the debtor's business in good working order;
- restrictions on pledging any of its assets to other lenders, issuing additional long-term debt or guaranteeing payment or performance obligations of a third party;
- restrictions on mergers and change of control; and
- restrictions on selling or leasing any assets provided as security.

### Mandatory prepayment

42 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

Mandatory prepayment requirements are not common in bank loan documentation.

**Debtor's indemnification and expense reimbursement**

43 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

Debtors are generally required to indemnify and reimburse the bank for all costs, charges and expenses incurred or to be incurred by the bank in connection with the loan agreement (including legal fees, value added tax, stamp duty and recording fees) or any default by the debtor in respect of any of the covenants for the enforcement or protection of any rights of the bank under the loan agreement. These may extend after termination of the loan agreement.

## UPDATE AND TRENDS

**Key developments**

44 Are there any current developments or emerging trends that should be noted?

The Bahamas has recently enacted the Digital Assets and Registered Exchanges Act 2020 (DARE), which seeks to regulate digital assets in The Bahamas. Fintech is a global phenomenon that is characterised by innovations in, and the combination of finance and technology. With the DARE, The Bahamas is poised to enter into a new market locally, and globally that can change or influence the manner in which loans and secured financing is traditionally conducted. For instance, using cryptocurrency, digital cash and smart contracts (collectively Digital Assets) with regard to loans and secured financing.

**Coronavirus**

45 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

**Emergency legislation relief programmes and other initiatives**

As a result of the covid-19 pandemic, The Bahamas has enacted several Emergency Powers Orders (the Orders) in an effort to contain the spread of the virus. Some of the Orders had a direct effect on commercial transactions. The Orders and their effect will be discussed in turn.

Emergency Powers (COVID 19) (No. 2) Order 2020 came into force on 24 March 2020, this Order instituted a 24-hour curfew, which meant that employees had to work remotely from home in order for businesses and offices to continue their operations. Additionally, this Order suspended the obligation to make filings with government agencies or regulatory authorities. Obligations to file declarations and to pay fees to the Registrar of Companies under the Companies Act 1992 (Ch.308), and the International Business Companies Act 2000 (Ch.309) were suspended for the period of the state of emergency and for an additional 14 days thereafter. This Order suspended the statutory limitation periods imposed under the Limitation Act 1995 (Ch.83) for the duration of the state of public emergency and for an additional 30 days thereafter.

Requirements to file a document, pay a fee or renew a licence under the following Acts were suspended for the duration of the public state of emergency and for an additional 14 days thereafter:

- the Trade Marks Act (Ch.322);
- the Industrial Property Act (Ch. 324);
- the Copyright Act (Ch. 323); and
- any other legislation relating to intellectual property.

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The obligation to renew a licence, visa or permit was suspended during the state of public emergency with the exception of those licence or permit fees payable under inter alia, the Customs Management Act, the Value Added Tax Act, the Real Property Tax Act and the National Insurance Act. During the state of public emergency sealing documents as deeds were dispensed with, it was sufficient that a document is a deed as long as it appeared on the face of the document that it is intended to operate as a deed (the Property (Execution of Deeds and Documents) Act 2020 came into force on 11 December 2020, which removed the requirement for a seal to be affixed for a document to constitute a deed).

On 26 March 2020, the Ministry of Finance of The Bahamas extended the deadline for economic substance filings pursuant to the Commercial Entities (Substance Requirements) Act 2018 by three months for all entities reporting for the 2019 fiscal year.

The Emergency Powers (COVID 19) (Special Provisions) (Amendment) Order 2020 – 16 April 2020, allowed for businesses whose growth or advancement was damaged, injured, or impaired by the provisions of the Orders and Regulations to apply for compensation. However, regulated financial and insurance businesses were exempt from this initiative. This Order also allowed persons to apply for an extension of time to pay value added tax or business licence fees to the relevant authority. Persons could enter into an arrangement to pay the sums due. This resulted in the Tax Credit and Tax Deferral Employment Retention Programme, which allowed businesses to defer the payment of certain taxes and to benefit from a tax credit of up to $300,000. The aim was to provide businesses with enough cash flow to assist with payroll support and retain employment levels. Under the programme, qualifying businesses were allowed to withhold outstanding business licence fees or VAT receipts collected up to a maximum of B$200,000 per month for up to three months. Businesses that qualified at the maximum funding level were given $100,000 in the form of non-reimbursable tax credit and the other B$100,000 was deferred until January 2021, at which time it would be repaid in 12 equal monthly instalments.

The Business Continuity Loan Programme was also established and managed through the Small Business Development Centre to assist

businesses as a result of the hardships and uncertainty brought about by covid-19. The programme allowed small and medium-sized businesses to apply for loans ranging from B$5,000 to B$300,000. Approved loans had a four-month grace payment period.

**Amendments to government programmes, laws or regulations**

There were no amendments to legislation, however, requirements under certain legislative provisions were suspended or relaxed such as the requirement to file a document, pay a fee, or renew a licence under the intellectual property laws, company laws and certain tax laws.

The government passed the Companies (Amendment) Bill 2020 and the International Business Companies (Amendment) Bill 2020, which will abolish the requirement for a company to execute documents by seal. The amendments allow for the company seal to be optional. As a result of covid-19 and the subsequent lockdowns, it was exceptionally difficult for companies to conduct business due to the requirement for seals when executing documents. An amendment to the legislation was considered for several years prior to covid-19. However, the difficulties of conducting business during the pandemic highlighted the need for amendments to the legislation.

**Best practices for clients**

The effect if covid-19 led to significant business disruptions particularly in the performance of contractual obligations. Going forward, clients should seek to include force majeure clauses in their agreements that could act as a safety net lessening the impact that will arise from a pandemic. Additionally, clients should seek to determine the manner in which a prospective counterparty would act in an event of crises, and make provisions for crises in their agreements.

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