



# ICLG

The International Comparative Legal Guide to:

## Lending & Secured Finance 2014

2nd Edition

A practical cross-border insight into lending and secured finance

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# Bermuda



Jeremy Leese



Timothy Frith

## MJM Limited

### 1 Overview

#### 1.1 What are the main trends/significant developments in the lending markets in Bermuda?

The downturn in the global economy over the last few years has decreased the level of business activity in the lending market in Bermuda. In response, lenders have been renegotiating and extending loans, and protecting their security positions.

This chapter concerns security matters relating to companies regulated by the Companies Act 1981 (*Companies Act*). There are three broad company categories:

**Local companies:** These provide goods or services in the local marketplace to Bermudians. They are subject to ownership and control restrictions.

**Exempted companies:** These are not permitted to conduct business in the local marketplace except in limited circumstances or under a licence issued on application to the Minister of Finance (MOF). The majority of foreign-owned companies that are incorporated in Bermuda are registered as exempted companies.

**Overseas or permit companies:** These are foreign companies that are entitled to do business in Bermuda under a permit issued by the MOF.

#### 1.2 What are some significant lending transactions that have taken place in Bermuda in recent years?

There has been activity with regard to the tourism section, in terms of provision of funds for hotel redevelopment and acquisition financing for purchases, as well as continuing borrowing by multinational groups whose holding company is incorporated in Bermuda, such as large shipping groups.

### 2 Guarantees

#### 2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Guarantees are commonly used in financing transactions in Bermuda. The borrower's parent company or shareholders typically gives guarantees to the lender. There is no equivalent in Bermuda to the English Statute of Frauds 1677, and no requirement that a guarantee obligation be evidenced in writing.

Guarantees can be created in a loan or facility agreement, provided that the guarantor is also a party to that agreement, or in a separate document. The guarantee can be limited to a pre-determined maximum amount or, in the case of guarantees given by regulated entities (for example, insurance companies), by reference to their statutory capital and liquidity requirements.

#### 2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Generally, a Bermudian company can (unless its memorandum of association or bye-laws provide otherwise) guarantee the debts of another party. However, the directors of the company must exercise their powers in the best interests of the company. When meeting to consider a transaction, the directors should specifically discuss and form a view as to whether the proposed transaction is in the company's best interests. The minutes of the meeting should reflect that discussion and view.

Clearly the issue of whether any benefit ensues to the company as a result of giving a guarantee is a part of this discussion. However, it is not the only factor and absence of direct benefit would not alone rule out a guarantee being validly given by a Bermudian company.

#### 2.3 Is lack of corporate power an issue?

It should not be, as Bermudian companies now have, by statute, the capacity, rights, powers and privileges of a natural person and their memoranda of association and bye-laws will generally be drafted widely enough to cover most obligations to be imposed thereon in a secured lending transaction.

#### 2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental or other consents or filings are needed for a Bermudian company to give a guarantee. However, guarantees in connection with loans to the following are prohibited without the consent of shareholders holding 90% of the voting shares:

- (i) directors;
- (ii) spouses and children of directors; and
- (iii) directors of certain related companies.

This general prohibition does not apply to guarantees that a company gives in the ordinary course of its business.

### 2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

None specifically, but the directors must always act in what they consider to be the company's best interests. Clearly, if a company is in severe financial difficulty or even technically insolvent, it is hard for the directors thereof to justify that it is in its best interests to enter into a multi-million dollar guarantee.

### 2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are currently no restrictions in Bermuda on the making of payments by a company (local or exempted) to a foreign lender under a guarantee, and exempted companies have never been subject to foreign currency controls. However, Bermuda's exchange control legislation has not been repealed.

## 3 Collateral Security

### 3.1 What types of collateral are available to secure lending obligations?

There are very few restrictions on the types of collateral available to secure lending obligations under Bermuda law – real estate, shares in companies, plant and machinery, aircrafts, ships and cash deposits are among the assets which can be used as security.

Certain assets may be incapable of assignment, for example, the company's rights under a licence granted by a governmental or regulatory body. Certain assets may also contain covenants against assignment without third party consent.

### 3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Security can usually be granted by a general security agreement, such as debenture-style security documents which set out, and cover, all assets of a company and provide for fixed and floating charges, as appropriate.

Certain types of asset require special consideration. Security can be granted over future assets – it is possible to create a fixed charge over specifically identified future assets, provided that safeguards are put in place to ensure that when the future assets come into existence, the assets are under the control of the chargee. Generally, it will not be possible to create a fixed charge over all future property, and it is likely that only a floating charge will be available. Taking security over fungible tangible assets requires that the assets be appropriated to the agreement. It is possible to take charge over a class of assets, even where those assets are pooled and later changed, provided that the chargee has a sufficient degree of control over the changes and has the ability to decide that changes will not be made to the asset pool. To take effective security over a company's intangible fungible assets, it is necessary to identify those assets.

### 3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

#### Real Property

Real estate is comprised of:

- (i) land, including land covered by water;

- (ii) immovable items located on land, for example:

- buildings;
- pools;
- fixtures;
- walls;
- fences; and
- improvements; and

- (iii) any estate, interest, right or easement in or over any land or building.

Title to land is unregistered. Estates in land include freehold and leasehold. Leases can be long (typically 99 or 999 years) or short (typically three to five years).

Specific rules apply to companies acquiring land in Bermuda:

Local companies can:

- Acquire and hold land in Bermuda if:
  - permitted to do so under its memorandum of association;
  - it has obtained the MOF's authorisation; and
  - the acquisition or holding is required for the purpose of the company's business.
- Enter into a lease of land in Bermuda:
  - for a term not exceeding 50 years, provided that land is required for the purpose of the company's business; or
  - for a term not exceeding 21 years, with the MOF's consent, to provide accommodation or recreational facilities for its officers and employees.

Exempted companies cannot acquire land in Bermuda. Exempted companies can enter into leases not exceeding 50 years for business purposes or, with the MOF's consent, for a term not exceeding 21 years to house employees and officers (*section 129, Companies Act*).

The following forms of security are commonly used:

**Legal mortgage.** A legal mortgage transfers the legal interest from the borrower (mortgagor) to the lender (mortgagee), subject to the borrower's right to redeem the property. The lender holds the legal title and the borrower retains possession.

**Equitable mortgage.** An equitable mortgage is a contract that can be enforced under a court's equitable jurisdiction. The borrower transfers the beneficial or equitable interest to the lender and retains the legal interest and possession.

**Equitable charge.** An equitable charge does not involve the transfer of the legal or equitable interest in, or possession of, property. It is an encumbrance on the borrower's property giving the lender the equitable right to sell the property for payment. A charge can be either fixed (attaches immediately to the borrower's asset) or floating (that is, a charge over a class of assets, which can later "crystallise" when certain events occur) and can potentially cover a rental lease forming part of the company's assets.

The following formalities must be complied with:

**Legal mortgage.** The mortgage must be created by a deed, and validly executed by the parties. The deed attracts stamp duty (*see question 3.9 below*). The deed (and prescribed memorandum setting out the mortgage particulars) must be submitted to the Office of the Registrar General (*section 1(1), Mortgage Registration Act 1786 (MRA)*). An entry is made in the book of mortgages maintained by the Registrar General in relation to land and the deed returned with the registration details noted on it. Priority is governed by the order in which mortgage deeds are deposited for registration. The lender then holds the title deeds.

**Equitable mortgage.** The mortgage must be in writing (a deed is

not required). It is commonly created by a memorandum of deposit of deeds outlining the terms under which the title deeds are deposited, which creates the equitable mortgage. All other formalities are the same as for a legal mortgage.

**Charge.** The charge must be in writing and registered under the MRA, and the MRA determines the charge's priority. Charges usually must be registered with the Registrar of Companies (ROC) under section 55 of the Companies Act to protect priority over assets relating to property (such as lease payments).

Most mortgages over Bermuda real estate are held by Bermuda banks. An overseas company (which, for this purpose, includes an exempted company) can hold a mortgage over land in its corporate name in the same way as a local company. However, if the total sum secured exceeds BD\$50,000, the MOF's consent is required (*section 144(1), Companies Act*). If the overseas company takes title to the property as part of the enforcement, the land must be sold within five years of taking possession. An overseas company also requires the approval of the MOF to enter into a mortgage or charge over land, as the company is considered a restricted person (*section 80, Bermuda Immigration and Protection Act 1956*), unless the company is either:

- licensed under the Banks and Deposit Companies Act 1999; or
- a non-resident insurance undertaking under the Non-Resident Insurance Undertaking Act 1967.

#### **Plant, machinery and equipment**

There is no statutory definition of tangible property. Common law principles determine whether something is tangible personal property. However, it is generally accepted that plant, machinery and equipment fall within the ambit of what constitutes tangible movable property.

The Companies Act defines the expression "charge" in very broad terms, and any interest created in property by way of security, including any mortgage, charge, assignment, pledge, lien or hypothecation of the assets of a company can be registered with the ROC. The nature of the specific tangible movable property determines the most suitable form of security. The most common form of security for plant, machinery and equipment is a fixed charge created by a debenture or a general security agreement.

Charges by Bermudian companies over Bermuda property do not need to be registered to be valid and enforceable. However, the date of the registration of security documents determines the priority of charges or mortgages or other security documents, and therefore they are usually registered. Most charges are registered at the ROC under section 55 of the Companies Act for a local or exempted company and section 61 for an overseas company granting security over Bermuda property. The following must be filed with the ROC:

- an original of the security document (certified copies will generally be accepted);
- a Form 9 (particulars of a mortgage or charge); and
- the appropriate fee (*see later*).

The registration is effective as at the time of filing, and not the time the certificate of registration is issued. Special registration requirements apply to certain assets such as aircraft and ships (*see below*).

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#### **3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?**

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The benefit of contractual rights claims under insurance policies and debts are the most common types of claim or receivable over

which security is granted in Bermuda legal practice. In certain limited circumstances, it is possible to assign a cause of action, but in practice such assignments are very rare because of the public policy rules against maintenance and champerty. The proceeds of a cause of action may be assigned.

Contractual rights may be mortgaged by way of assignment, and an "all assets" debenture will typically provide a mechanism for taking security over the benefit of the security provider's interest in specific "material contracts". In addition, rights under insurance policies and the proceeds of any claims thereunder may be assigned. In both instances, the assignment is perfected by giving notice in writing of the assignment to the counterparty to the material contract or the relevant insurer, and the secured creditor may also require that its interest in the proceeds of an insurance policy is noted on the policy by the insurer.

Debts may be mortgaged by way of assignment, in which case the secured creditor becomes the owner of the debt. Alternatively, debts may be charged where security is being taken over a large pool of receivables, the security will usually take the form of a floating charge.

Security over large individual debts, such as inter-company loans, is usually granted through a mortgage of the debt, effected by assignment to the secured creditor, with a proviso for reassignment to the mortgagor when the secured obligations have been discharged.

The Supreme Court Act 1905 provides that a legal assignment (an unconditional assignment of the debt for the time being not by way of charge only) may be made by giving the debtor notice in writing of the assignment. An equitable assignment may be made without any requirement for notice or other formalities.

A legal assignment entitles the assignee to enforce the debt directly against the debtor. Where there has been an equitable assignment, the assignee may convert it into a legal assignment by giving the debtor written notice of the assignment.

Both assignments and charges are generally registered with the ROC to protect the second creditor's priority.

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#### **3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

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In 1990, Bermuda enacted special legislation to deal with the uncertainty caused by the decision in *Re Charge Card Services Ltd.* [1987] Ch. 150. The Charge and Security (Special Provisions) Act 1990 expressly provides that a bank may take security over its own indebtedness to its customers.

The most common form of security over cash deposit is a "charge back" whereby a bank takes security over cash deposited with it, or otherwise over indebtedness which it owes to the chargor. A 'charge back' is perfected by attachment without further act.

Where security is created in favour of a foreign bank over a deposit with a Bermuda bank, the most common form of security is a control agreement whereby the Bermuda bank agrees it will not exercise any rights of set off against the relevant account and will not permit any withdrawals from the relevant account without the consent of the foreign bank. The security provider and the foreign bank will agree that the security provider is not permitted to make withdrawals from the relevant account or otherwise exercise any of its rights as beneficial owner of the cash deposit until the secured obligations have been discharged, with the result that the security provider's cash deposit becomes a "flawed asset".

Charges over deposits are normally registered with the ROC.

### 3.6 Can collateral security be taken over shares in companies incorporated in Bermuda? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

The most common types of collateral over which security is granted is shares issued by privately held companies.

Bermudian companies are prohibited from issuing bearer shares. The usual security granted over certificated shares is an equitable mortgage. Legal mortgages of shares are rare in Bermuda.

Where shares are uncertificated, it is generally advisable to require that the shares be certificated for the purposes of obtaining an equitable mortgage, failing which, a fixed charge may be taken over uncertificated shares.

Where a Bermudian company gives security over dematerialised securities traded in a market outside Bermuda the usual practice is that security will be created in accordance with the laws of the place where the securities are situated and transferred.

On the other hand, where the relevant dematerialised securities are traded electronically on the Bermuda Stock Exchange (BSX) within the Bermuda Securities Depository (BSD), then the BSD regulations apply. All securities held in the BSD are registered in the name of BSD Nominee Ltd., which is a subsidiary of the BSX. All of the Bermuda banks are member participants in the BSD ("Member Banks"). When a Member Bank proposes to make a loan secured by the security provider's interests in securities held within the BSD, the security provider as beneficial owner ("BO") will instruct its broker to deliver the relevant securities within the BSD to the Member Bank as custodian on an intra-member basis.

The BO will also grant the Member Bank authority to sell the securities on an event of default, and thereby realise its security. For its part, the Member Bank as custodian will agree to re-deliver the securities to the BSD's broker when the BO discharges its obligations to the Member Bank.

It is not mandatory for Bermuda law to govern a charge over the shares of a Bermudian company, although it is recommended. A charge over shares governed by Bermuda law will typically be executed as a deed. A share charge generally requires the delivery of ancillary documents to the chargee, including:

- (i) executed but undated share transfer forms and share certificates;
- (ii) undated letters of resignation, letters of authority, and powers of attorney from the directors, and an irrevocable proxy from the shareholder;
- (iii) evidence of approval of the directors of the company whose shares are being charged, if the bye-laws of that company so require;
- (iv) certified copies of directors' resolutions approving the granting of the charge; and
- (v) an undertaking from the company, in the form of a deed, that it will register the share transfer form.

Share charges generally are registered with the ROC to protect priority.

Except in the case of shares listed on an appointed stock exchange, prior permission must be obtained from the Bermuda Monetary Authority (BMA) for the transfer of shares of an exempted company or a local company owned by a non-Bermudian. However, the BMA has granted a general permission under the Exchange Control Regulations 1973 for the granting of a charge to a licensed bank or licensed lending institution in Canada, the US, Australia, EU countries, Bermuda, Hong Kong, Singapore, Norway, Switzerland and Japan (*Notice to the Public dated 1 June 2005*).

This permission extends to transfers to those licensed lenders on enforcement of the charge.

The general permission does not extend to:

- (i) charges over shares of Bermuda insurance companies; and
- (ii) sales by the licensed lenders to third parties as part of the enforcement process.

BMA permission is not required where the securities being charged either do not carry the right to vote, or appoint one or more directors of the issuer, or are not by their terms convertible into securities carrying such rights.

### 3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory falls within the ambit of what constitutes tangible property, which can be secured under Bermuda law. The most common form of security for inventory is a floating charge, which can be registered with the ROC.

Charges by Bermudian companies over Bermuda property do not need to be registered to be valid and enforceable. However, the date of the registration of security documents determines the priority of charges or mortgages or other security documents, and therefore they are usually registered. Most charges are registered at the ROC under section 55 of the Companies Act for a local or exempted company and section 61 for an overseas company granting security over a Bermuda property. The following must be filed with the ROC:

- an original of the security document (certified copies will generally be accepted);
- a Form 9 (particulars of a mortgage or charge); and
- the appropriate fee (*see later*).

The registration is effective as at the time of filing, and not the time the certificate of registration is issued.

### 3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, these are both very common circumstances in which a Bermudian company will grant a security interest over its assets.

### 3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The Stamp Duties (International Business Relief) Act 1990 abolished stamp duty on most documents (including loan and security documents) executed by "international businesses" (including exempted and overseas companies). However, this exemption does not extend to stamp duty payable on instruments involving Bermuda real estate.

A legal mortgage attracts:

- (i) stamp duty at the rate of 0.25%, where the sum secured is no more than BMS\$400,000; and
- (ii) stamp duty at the rate of 0.5%, where the sum secured is more than BMS\$400,000.

Local companies are liable for stamp duty on the execution of most documents unless the relevant transaction can be brought within the

relatively narrow statutory exemptions in section 46(c) of the Stamp Duties Act 1976.

The following registration fees are payable for a charge against a company at the ROC:

- (i) over exempted or overseas companies, BM\$328 where the amount secured is less than BM\$1 million and BM\$574 where the amount secured is greater than BM\$1 million (*sections 55 and 61, Companies Act*); and
- (ii) over local companies: BM\$164.

The fees for registration of an aircraft mortgage:

- (i) where the amount secured by the mortgage does not exceed BM\$5 million, the fee is BM\$200;
- (ii) where the amount secured by the mortgage does not exceed BM\$20 million, the fee is BM\$400; and
- (iii) where the amount secured by the mortgage does exceed BM\$20 million, the fee is BM\$800.

Stamp duty in the amount of BM\$25 is payable on all notarial acts, except for protests on bills of exchange or promissory notes. If there are exhibits to the document, an additional BM\$25 must be affixed to each exhibit.

### 3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Usually, provided all documentation required to be filed or registered is provided promptly, filings and registrations can be completed quickly after security has been executed, and notifications received as to their acceptance for filing or registration, and any certificates of registration, returned in a matter of a few days.

As for expense, please see the answer to question 3.9. However, it is worth pointing out that stamp duty generally is not payable when security is granted over the assets of an exempted company, so there is no need to structure a transaction to minimise Bermuda tax consequences. Where local companies are granting security, there may be ways to minimise the stamp duty payable, such as using one composite security document to cover various assets. It is also possible to minimise registration fees by using a single document. However, registration fees usually are not a material issue in determining the structure of security arrangements.

### 3.11 Are any regulatory or similar consents required with respect to the creation of security?

Subject to the specific circumstances highlighted above with regard to the BMA's consent being required for the granting of security over the shares of certain types of companies or over the assets of certain regulated entities (such as insurance companies), no such consents are required for a Bermuda company to grant security over its assets.

### 3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no specifically Bermudian concerns to note, but the usual issues about ensuring that there is sufficient collateral to secure the variable amount outstanding under the credit facility and that the definition of secured obligations is drafted widely enough to encompass all amounts so borrowed subsist.

### 3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As long as documents are executed in accordance with a Bermudian company's memorandum of association and bye-laws, the Companies Act and authorising board resolutions, there is no need for Bermuda law purposes for anything more than execution under hand by one authorised signatory (who does not have to be, although usually is, a director of the company). For foreign law governed security documents, one needs to ensure compliance with any requirements of such laws with regard to enforceability, security filing/registration and admissibility into evidence in court proceedings.

## 4 Financial Assistance

### 4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; (c) or shares in a sister subsidiary?

#### (a) Shares of the company

The statutory rule against financial assistance being given by Bermudian companies was abolished by amendments to the Companies Act passed in 2011.

#### (b) Shares of any company which directly or indirectly owns shares in the company

See above.

#### (c) Shares in a sister subsidiary

See above.

## 5 Syndicated Lending/Agency/Trustee/Transfers

### 5.1 Will Bermuda recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concept of both agency and trustee is well recognised in Bermuda.

The agent bank is often the arranger of the facility, and is normally chosen by the syndicate members. An agency arrangement governed by foreign laws will be recognised by Bermuda courts. Typically, the agent acts as a conduit for payments, and for dissemination of information to syndicate members. In a pre-insolvency situation, the agent bank usually represents the syndicate members in dealing with the enforcement of the lenders' remedies. On the liquidation of the debtor company, each lender bank may submit proof of debt or the agent bank may do this on behalf of the syndicate members, provided that the agent bank is able to submit a proof of debt on its own account.

With regard to security trustees, generally, only the security trustee can enforce the security on the creditors' behalf, and the borrower's individual creditor is precluded from taking independent action against the borrower. By virtue of the UK Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, trusts from other common law jurisdictions and certain types of similar concepts that apply in civil law jurisdictions generally are recognised in Bermuda.



- 5.2 If an agent or trustee is not recognised in Bermuda, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not applicable in Bermuda.

- 5.3 Assume a loan is made to a company organised under the laws of Bermuda and guaranteed by a guarantor organised under the laws of Bermuda. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

There are no special requirements to ensure a transferred loan is enforceable by the new lender. However, to ensure priority of registration of any related security, notification of the transfer of the secured obligations should be notified to the Registrar of Companies on the appropriate form.

## 6 Withholding, Stamp and other Taxes; Notarial and other Costs

- 6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

No Bermudian company is required or entitled under Bermuda law to make any deduction or withholding in respect of any Bermuda taxes from or with respect to any payment to be made by it under a facility agreement it has entered into, whether of principal, interest, fees or otherwise.

- 6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

No foreign lender will be deemed to be resident, domiciled or carrying on business, or subject to any tax, in Bermuda by reason only of the execution, delivery, performance and/or enforcement of any loan facility agreement or related security document where the borrower or guarantor is incorporated in Bermuda.

- 6.3 Will any income of a foreign lender become taxable in Bermuda solely because of a loan to or guarantee and/or grant of security from a company in Bermuda?**

Please see the answer to question 6.2 above.

- 6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

None, other than the fees set out in answer to question 3.9.

- 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

The fact that the lenders are overseas makes no difference to a Bermudian borrower's position.

## 7 Judicial Enforcement

- 7.1 Will the courts in Bermuda recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Bermuda enforce a contract that has a foreign governing law?**

The express choice of the applicable foreign governing law as the governing laws of any loan facility agreement or related security document would be deemed a proper, valid and binding choice of law, and would be recognised and given effect to in any action brought before a court of competent jurisdiction in Bermuda, except for those laws:

- (i) which such courts consider to be procedural in nature;
- (ii) which are revenue or penal laws; or
- (iii) the application of which would be inconsistent with public policy, as that term is interpreted under Bermuda law.

- 7.2 Will the courts in Bermuda recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?**

A foreign judgment given by a New York court or an English court (a "foreign court") is not of itself enforceable in Bermuda, but a final and conclusive judgment *in personam* obtained in a foreign court against any Bermudian company based upon any loan facility agreement or related security document under which a sum of money is payable, (other than a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) may be enforced by separate action before a Bermuda court, provided that:

- (i) the foreign court had jurisdiction in relation to the subject matter of the dispute under all applicable laws and Bermuda conflicts of laws rules (and an express, contractual submission to jurisdiction is sufficient for these purposes);
- (ii) the judgment was not obtained by fraud or in a manner opposed to natural justice;
- (iii) the relevant obligor received notice of the proceedings and was afforded an adequate opportunity to present its defence;
- (iv) the enforcement of the judgment would not involve the enforcement of foreign revenue, penal or other public laws or otherwise be contrary to Bermuda public policy;
- (v) there has been due compliance with the provisions of the Judgments (Reciprocal Enforcement) Act 1958, as amended, where applicable (it applies to English courts, and those of most of the commonwealth countries, but not the courts of the United States);
- (vi) enforcement of the judgment is not precluded by the Protection of Trading Interest Act 1981, as amended (which prohibits the enforcement of judgments for multiple damages and certain other foreign judgments); and
- (vii) the proceedings to enforce the judgment of the foreign court are commenced within six years of the date of such judgment.

**7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Bermuda, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Bermuda against the assets of the company?**

The court system in Bermuda is efficient and responsive. A liquidated money claim for recovery pursuant to obligations set out in a loan agreement or guarantee is normally issued in the Commercial Court of the Supreme Court by way of a writ of summons under Order 6 Rules of the Supreme Court 1985. If the company is registered in Bermuda, the Defendant must file a memorandum of appearance through its attorneys within 14 days of service of the writ of summons in accordance with Order 12 Rules of the Supreme Court 1985. The time limit is extended if it is necessary to serve proceedings on a Defendant out of the jurisdiction.

If the Defendant does not enter an appearance within the period allowed, the Plaintiff may have a judgment entered for the liquidated claim in accordance with Order 13 Rule 1 Rules of the Supreme Court 1985.

If a notice of appearance is served but it is considered that the Defendant has no legal merit in defending the claim, an application for Summary Judgment can be made by the Plaintiff under Order 14 Rules of the Supreme Court 1985. This application is made by summons and supported by affidavit.

If the application is not defended then judgment can be entered on the first return date which would be approximately 4-5 weeks from the issue of proceedings. If the application is defended then directions are given at the application return date and the Defendant will have leave to serve an affidavit in answer and the Plaintiff a further affidavit in reply. The application is then relisted for a hearing which would normally take place 12-14 weeks after the original proceedings were served on the Defendant.

**7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?**

There are no significant restrictions other than following due process in any proceedings to enforce judgment, obtain possession of property or obtain an order for the sale of the property.

**7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Bermuda or (b) foreclosure on collateral security?**

There are no specific restrictions that apply to a foreign lender in the event of filing suit against a company in Bermuda or foreclosing on collateral security. However, it should be noted that the Defendant to any writ of summons or Court controlled enforcement process by a foreign lender can apply for security for costs pursuant to Order 23 Rules of the Supreme Court 1985 on the basis that the Plaintiff is ordinarily resident out of the jurisdiction. Following application for security, the Court may order the granting of an appropriate security for the payment of the Defendant's costs as a condition of the Plaintiff continuing with the litigation. The grant of such an order is intended to protect the Defendant in the event

that the Defence to the Claim is successful. The security is released if the Plaintiff is ultimately successful at trial or prior summary determination of the claim.

**7.6 Do the bankruptcy, reorganisation or similar laws in Bermuda provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?**

In a compulsory winding up of a company in Bermuda, following the presentation of a petition, the company or a creditor or contributory may apply to Court under s.165 Companies Act 1981 to have any creditor's claim stayed. The Court may stay the proceedings on such terms as it thinks fit. Following the grant of a winding up order or the appointment of a provisional liquidator, no action or proceeding may be commenced or continued without the leave of the Court pursuant to section 167(4) of the Companies Act. The generic rationale is for the claims of unsecured creditors to be stayed to allow an orderly distribution to creditors *pari-passu* following the winding up of the company.

The position of a secured creditor is largely unaffected by the insolvency regime as the security interest is normally a property right of the secured creditor and as such stands outside the insolvency regime which is designed to effect the orderly distribution of the company's assets. If, on the basis of the security documents, the lender is entitled to take possession of and title to the secured property, he may after realising the security prove in the liquidation for the balance of any debt as an unsecured creditor. In the event that the assistance of the Court is needed to enforce the security then an application has to be made to the court for permission to proceed.

Under Rule 98 of the Companies (Winding-Up) Rules 1982, the liquidator may require a creditor to give up security on payment of the estimated value of the security plus a 20% uplift.

**7.7 Will the courts in Bermuda recognise and enforce an arbitral award given against the company without re-examination of the merits?**

An arbitration award made in a foreign country other than the United Kingdom that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 19 June 1958 (the "New York Convention") in respect of any loan facility agreement or related security document for a definite sum obtained against the Bermudian company may be enforced with the Bermuda courts and judgment entered in the terms of the award. The Bermuda courts may only exercise its discretion to refuse leave if:

- (i) a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
- (ii) the arbitration agreement was not valid under the governing law of the arbitration agreement;
- (iii) the Bermudian company was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- (iv) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration, subject to the proviso that an award which contains decisions on matters submitted to arbitration which can be separated from those matters was not so submitted;
- (v) the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement, with the foreign governing law;

- (vi) the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either pursuant to the foreign governing law, or pursuant to the law of the arbitration agreement;
- (vii) the subject matter of the award was not capable of resolution by arbitration; or
- (viii) enforcement would be contrary to public policy.

An award made pursuant to an arbitration agreement in a foreign country including the United Kingdom that is not a party to the New York Convention may be registered under the provisions of the Arbitration Act (Cap 6) and enforced as a judgment of the Bermuda courts. There is no statutory test for the exercise of the courts' discretion in relation to registration in this manner, but in our view the court would be likely to exercise its discretion in a similar matter to the requirements for enforcing awards under the New York Convention where the award was made in a jurisdiction which is a signatory of the New York Convention.

If any such final and conclusive monetary award in an arbitration has the force of a judgment under the foreign governing law, then it may be registered and enforced as a judgment of the Bermuda court as set out above.

## 8 Bankruptcy Proceedings

### 8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The start of insolvency proceedings against a Bermudian company may affect a creditor's ability to enforce its rights. All or part of a transaction may be attacked as constituting a fraudulent conveyance or a fraudulent preference. In certain circumstances, floating charges can also be attacked. Please see the answer to question 8.2 below.

### 8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Security created within six months of the start of a Bermudian company's winding up can be set aside on the application of the liquidator where the purpose of creating the security was to give a secured creditor preference over other creditors (*section 237, Companies Act*). Section 237 cross-references Bermuda's bankruptcy law regime, and section 47 of the Bankruptcy Act 1989 reproduces section 44 of the English Bankruptcy Act 1914. English or Commonwealth cases on the meaning and effect of those provisions will be relevant to their interpretation in Bermuda courts.

The start of the winding up is either:

- (i) the date that the company resolves that it be wound up; or
- (ii) if there is no such resolution, the time of presentation of the petition that led to the winding up.

The legislation's intention is to avoid preferences at the expense of unsecured creditors. The presence of "fraud" on the company's part or the person who is being preferred is not required. However, it is necessary to show that the company's "dominant intention" was to prefer one creditor over other creditors. The burden of proof is on the liquidator, although the court can draw inferences about intention from all the relevant facts. Payments to secured creditors are normally not preferences. However, the granting of security may be a preferential transaction that can be set aside if the relevant intention exists.

Floating charges that are created within 12 months before winding up commences can be set aside (*section 239, Companies Act*). This provision takes automatic effect, and is not dependent on the liquidator or creditor applying to set the floating charge aside. Floating charges are valid if the creditor provided new value (cash paid) at the time of, or in consideration for, the security. Otherwise, they are void to the extent that the creditor did not provide new value, unless the creditor can prove that the company was not insolvent at the time of the charge. The creditor is entitled to recover interest on the amount of money paid to the company at a statutory rate.

Notwithstanding the above, secured creditors with fixed charges may realise their security outside the winding up regime. Secured creditors also may recover the full proceeds of realisation without deductions other than for enforcement expenses. Other creditors are usually paid in the following order on an insolvency:

- (i) secured creditors with fixed charges;
- (ii) preferred creditors set out in section 236(1) of the Companies Act, including the government and municipalities' claims over taxes and rates;
- (iii) employees, for up to BM\$2,500 of wages or salary relating to the four months before the liquidation or winding up, and accrued holiday pay;
- (iv) all amounts due in respect of:
  - contributions payable by the company for the preceding 12 months under the Contributory Pensions Act 1970;
  - any contract of insurance;
  - any accrued compensation; or
  - liability for compensation under the Workmen's Compensation Act 1965;
- (v) secured creditors with floating charges; and
- (vi) unsecured creditors.

The ranking of subordinated creditors depends on the nature of the subordination. A junior secured creditor is paid after a senior secured creditor, but before unsecured creditors. However, an unsecured subordinated creditor normally ranks after other general unsecured creditors. The priority of security depends on the registration date of the security document, priority notice or, in the case of aircraft, the notice of intention to file a mortgage.

The registration of security is not mandatory and is not essential to the creation of valid security. On insolvency, the failure of a secured creditor to perfect its security or register it as a charge does not entitle a liquidator to have the security set aside for the benefit of the company's unsecured creditors. The general position is that registration does not constitute perfection and so the method of perfection for a particular asset class is a matter of common law. Where a creditor has failed to perfect their security, there is a risk that a subsequent creditor with a security interest in the same asset may be able to achieve priority by being the first to register their security as a "charge".

On insolvency, secured creditors with fixed charges have priority over all other secured and unsecured creditors. Registration affects priority between secured lenders. If no secured creditor has registered their security, priority is determined by the time of creation.

### 8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The insolvency regime contained in the Companies Act generally applies to all Bermudian companies. The insolvency of individuals

is dealt with by the Bankruptcy Act 1989 and the Bankruptcy Rules 1990. The insolvency of partnerships is governed by the Bankruptcy Act 1989 and sections 33-40 of the Partnership Act 1902.

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#### **8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?**

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The mechanisms for enforcement depend on the remedies contained in the security documents:

- (i) **Powers of sale:** Mortgages (over land or other assets) or charges generally contain powers of sale. In the case of mortgages over land, the Conveyancing Act provides for limited rights of sale and foreclosure.
- (ii) **Appointment of receiver:** The terms of the security may enable the lender to appoint the receiver. Alternatively, it may be possible to apply to the court for the appointment of a receiver.
- (iii) **Possession of assets:** A lender may be able to take possession of charged assets or be noted as the registered owner in the case of a security interest over shares (see section 3 above).

What is the best enforcement action depends on the particular circumstances at the time.

An alternative to enforcement is a scheme of arrangement, which is available under section 99 of the Companies Act. A scheme may be used to effect the reorganisation of a company. There is a substantial body of English case law on schemes to effect the reorganisation of a company and on the relevant provisions of the Companies Act. Bermuda applies English law principles to the interpretation and implementation of schemes. A scheme must be approved by a 75% majority in value and a number majority of each distinct class of creditors (and shareholders, if the scheme also involves shareholders) and sanctioned by the court.

The court has wide powers under section 102 of the Companies Act to deal with various ancillary matters under the scheme.

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## **9 Jurisdiction and Waiver of Immunity**

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### **9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Bermuda?**

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The submission by any Bermudian company in any loan facility agreement and related security document to which it is a party to the

jurisdiction of the relevant foreign courts would be deemed valid and binding upon such Bermudian company and would be recognised as such by the Bermuda courts, if such submission is accepted by the relevant foreign courts and is valid and binding under the foreign governing law.

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### **9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Bermuda?**

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The signature, delivery and performance of any loan facility agreement and related security document to which it is a party by any Bermudian company constitutes private and commercial acts by such company rather than public or governmental acts and, accordingly, such company is subject to suit under private commercial laws. Neither it nor any of its property has any right of immunity on any grounds from suit or from jurisdiction or execution of judgments.

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## **10 Other Matters**

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### **10.1 Are there any eligibility requirements in Bermuda for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Bermuda need to be licensed or authorised in Bermuda or in their jurisdiction of incorporation?**

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There is no eligibility requirement for a lender to a Bermudian company, nor is it necessary for any foreign lender to be licensed, authorised or establish a place of business in Bermuda in order to enforce any provision of any loan facility agreement and related security document where the other party thereto is a Bermudian company.

### **10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Bermuda?**

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None that are material.



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Jeremy's practice focuses on corporate finance, mergers and acquisitions, corporate reorganisations and restructurings, banking and international real estate finance, structured finance, as well as regulatory and legislative compliance.

After studying at Oxford University and the College of Law (York), Jeremy was admitted as a solicitor of the Supreme Court of England and Wales (now non-practising) in 1995, and called to the Bermuda Bar 2003. He was also admitted as a solicitor of the Eastern Caribbean Supreme Court (BVI Circuit) in 2008, and as a solicitor of the Eastern Caribbean Supreme Court (Anguilla Circuit) in 2011.

Following qualification with a magic circle firm in the UK, Jeremy practised corporate law there for four years before a move in 1999 to a leading offshore law firm and working in their Bermuda, Hong Kong, Jersey and British Virgin Islands offices. After a spell heading the Corporate team at a firm in Anguilla, Jeremy returned to Bermuda with MJM in August 2012.



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Timothy Frith MA (Hons) LL.M. FCIarb is a Commercial Barrister with 15 years' experience at the Bar in London. He moved to MJM from Devereux Chambers in 2012 and became a registered associate of the Bermudian Bar in September of that year. He practises in a wide range of Commercial and Corporate disputes having a particular expertise in Minority Shareholder, Banking, Insolvency and Telecommunications cases. He has acted for clients in litigation, mediation and arbitration in Singapore, Spain, Thailand, Jordan, Dubai, Bermuda and the United Kingdom. He is a Fellow of the Chartered Institute of Arbitrators and an Accredited Mediator.



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We have extensive experience in forming Bermuda local and exempted companies and partnerships. Our Quorum group provides a full range of corporate management and secretarial services to local and international clients.

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