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The International Comparative Legal Guide to:

# Lending and Secured Finance 2013

**1st Edition**

A practical cross-border insight into lending and secured finance

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Continued Overleaf

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Country Question and Answer Chapters:



# EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Lending and Secured Finance 2013*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into two main sections:

Six general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the laws and regulations of lending and secured finance in 35 jurisdictions.

All chapters are written by leading lending and secured finance lawyers, and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Bingham McCutchen LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk

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# Trinidad & Tobago

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## 1 Overview

### 1.1 What are the main trends/significant developments in the lending markets in Trinidad and Tobago?

Trinidad and Tobago has become heavily industrialised within the past 20 years through the development of industrial estates, in particular the Point Lisas Industrial Estate where a large variety of manufacturing plants have been established. In the early stages, loan financing for these plants was provided mainly by foreign lenders with minimal participation by local lenders. In recent years, local banks have grown substantially in lending capacity and expertise and can now participate to a much greater extent in loans for large projects. Local banks are now willing to offer different financing packages through a variety of bonds, notes and other securities in addition to standard loan transactions. The Government has also become a significant borrower to raise funds for its development projects and is now the largest debtor to local banks.

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

Typically, the significant lending transactions have been the loans to establish or acquire large plants or projects and loans to the Government.

## 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)?

Generally yes. In Trinidad and Tobago, a parent can guarantee the debt of a subsidiary, a subsidiary may guarantee the debt of a parent and a subsidiary may guarantee the debt of a sister company. The power of guarantee is subject to certain restrictions under Section 56 of the Companies Act, Chap 81:01 ("the Companies Act") which is discussed at length in our response to question 2.5 below.

### 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?

It is a general principle of company law that the directors of a company must exercise their powers in the best interests of the company. That principle is codified in section 99 of the Companies Act which provides *inter alia* that every director and officer of a company shall, in exercising his powers and discharging his duties, act honestly and in good faith with a view to the best interests of the company. Based on the foregoing, there must be a commercial justification for what the directors cause the company to do. Failure to act in the best interests of the company amounts to a breach of trust or a breach of duty owed by the directors to the company which is enforceable by the members of the company. A breach of that duty gives rise to a claim by the members of the company against the directors for breach of trust or misfeasance.

If a transaction is entered into otherwise than in the best interest of a company then any recipient of assets or benefits from the company who knew or ought reasonably to have known, that the transaction was carried out in breach of trust will be a constructive trustee of the assets or benefit received and will have to surrender the asset or benefit back to the company.

Where a company guarantees the debt of another company within an affiliated group, the directors would be entitled to consider the benefit to the group as a whole and not be limited to any direct benefit to the company.

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

The lack of corporate power is not an issue. The Companies Act has abolished the concept of "*ultra vires*" by conferring the broadest possible capacity upon companies. Section 21(2) provides that a company has the capacity and, subject to the Act and any other law, the rights, powers and privileges of an individual. Accordingly, a company has the power to do anything unless expressly restricted by its articles, the Companies Act or any other law. Section 23 of the Companies Act provides that no act of a company is invalid by reason only that the act or transfer is contrary to the articles.

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

The guarantee must be properly authorised, which generally means that the procedural rules of the company as set forth in its constituent documents must be followed and the board of directors take the proper measures to authorise the transaction unless the share holders are given this power under the Articles or By-laws or by way of a Unanimous Shareholder Agreement.

No governmental consents, filings or other formalities are required in connection with giving a guarantee.

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

Normally net worth, solvency or similar limitations on the amount guaranteed are not regulated by law and would be based on the lender's credit risk requirements. Section 56 of the Companies Act restricts a company or any of its affiliates from giving loan guarantees and other forms of financial assistance:

(i) to its shareholders, directors, officers or employees or to its affiliates or associates for any purpose; or

(ii) to any person for the acquisition of shares in the company or in its affiliate.

A company cannot provide such financial assistance unless it can satisfy, at the time of giving the financial assistance, a dual test, which is as follows:

(i) a liquidity test as contained in Section 56 (2) (a); and

(ii) a solvency test as contained in Section 56 (2) (b).

Under Section 56, the liquidity and solvency tests are used to determine whether circumstances prejudicial to the company exist. Section 56 (2) is set out in full:

> *"(2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that:*
>
> *(a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due; or*
>
> *(b) the realizable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes."*

In order to determine whether or not the liquidity test is satisfied at the time of giving financial assistance, one must form a reasonable opinion, at the time of giving of financial assistance, based on the facts of each case to see what the likelihood would be of the security being called upon in the future so as to constitute it a "liability" which must be paid as part of the "liabilities as they become due". Any such liability must be assessed on the basis of the reasonable likelihood of the obligation or security being called upon under the liquidity test. A company fails to satisfy the liquidity test only in cases where there is cogent evidence to demonstrate that the particular transaction will offend the provisions of Section 56 (2) (a).

The realisable value of a company's assets for the purposes of the solvency test must be determined at the time of giving of the financial assistance. The valuation methodology will depend on the financial circumstances and prospects of the company. Normally, a company's assets would be valued as if sold on a going concern basis if that would maximise the price. However, a company's assets would be valued as if sold on a piece meal or break-up basis if the going concern approach were shown to conceal undervalued or redundant assets. "Distress" liquidation values are applicable where there is reason to believe that a company will experience financial difficulty, for example it has experienced years of losses with no chance of a turnaround, or it has major creditors ready to call in the company's financial obligations which the company is unlikely to honour. If it is not reasonably foreseeable at the time of providing the financial assistance that a company is likely to experience financial difficulty in the near future, then the company's assets should be valued on a going concern basis.

The failure by a company to satisfy either the liquidity test or the solvency test or both tests will render the security provided by the company in those circumstances void and unenforceable.

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

No. There are no exchange control restrictions in Trinidad and Tobago. Although not an issue relating to enforcement, it is worth mentioning that withholding tax is to be deducted from interest payable to a non-resident lender.

## 3 Collateral Security

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

A wide variety of assets (including land, buildings, equipment, inventory, accounts, contract rights, deposit accounts, shares, receivables, etc.) are available as security for loan obligations. Assets used as security are divided into two broad categories: (a) "personal property" which refers to property other than real property (land and buildings); and (b) real property.

### 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?

Generally, security on a company's assets can be given by a single security agreement, typically equitable charges under a debenture on all its property both present and future. Under this type of security, the charges on certain types of assets (real property, plant and equipment, intellectual property, personal property of all kinds, goodwill, etc.) may be fixed charges and the charges on other types of assets (typically inventory) will be floating charges under which the assets can be disposed of by the charger in the normal course of business without any consent of the secured party.

Legal charges are given by separate charging documents (often collateral to a debenture). It is recommended that there be a specific legal mortgage of real property to be registered in the Protocol of Deeds or the Real Property Register. These types of charges are discussed in greater detail in our response to question 3.3 below.

A statement of charge which includes certain statutory particulars regarding a security given by a company, together with a copy of the instrument by which the security interest is created, must be registered at the Companies Registry within 30 days after creation of the charge.

Stamp duty is payable on security documents which are principal securities at the rate of 0.4 per cent of the principal amount secured. Security documents given as collateral security for another security document which is stamped as principal security is to be stamped with a fixed duty of TT$25.00.

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

Yes. Collateral security over real property (land) is given by way of a deed of mortgage to be registered in the Protocol of Deeds (lands held under common law title) or the Real Property Register (lands held under the Real Property Act whereby the title is guaranteed by the State with certain limited exceptions normally involving fraud). The mortgage instrument creates a legal charge on the charged property, priority of which dates from date of registration. Enforcement of the mortgage is effected by (i) appointment of a receiver to collect rents, and (ii) sale of the charged property.

Alternatively, real property together with plant, machinery and equipment thereon may be charged under a debenture as described in our answer to question 3.2 above. The charge under this type of security is a fixed equitable charge and is normally enforced through appointment of a receiver by the secured creditor who in law is the agent of the company and is given, in the security document, a power of attorney containing the normal powers required for sale of the charged assets. No registration is required in the Deeds Registry unless the security includes real property.

A statement of charge must be registered within 30 days from the date of creation of the charge.

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

Yes. A collateral security over receivables may be effected by (i) an assignment by way of charge, or (ii) an equitable charge by the chargor in favour of the secured party. In either case, it is recommended that the charging document contain a provision requiring the charger to deposit the receivables into a bank account over which the chargee has a charge (see the answer to question 3.5 below) or a right of control over withdrawals.

The assignment is effected by a deed and gives legal title to the receivables to the assignee. Written notice of the assignment must be given to the debtor(s). The assignee takes subject to all equities arising between the assignor and the debtor(s) at the date of giving notice of the assignment, so notice should be given immediately after the assignment. The deed of assignment need not be registered in the Protocol of Deeds.

An equitable charge on receivables is often contained in a debenture as described in our answer to question 3.2 above. The charge under this type of security is usually a fixed charge by way of mortgage but the charge may be deemed to be only a floating charge unless supported by an obligation of the chargor to deposit the receivables into an account controlled by the chargee. A floating charge is not a very effective security as the right of control over the receivables prior to the floating charge being crystallised into a fixed charge is limited.

Where the security is provided by a company, a statement of charge must be registered within 30 days from the date of creation of the charge.

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

Yes. Collateral security over cash deposited in bank accounts can be created by way of (i) a general charge such as a debenture, or (ii) a specific account charge. Unless a general charge gives the chargee a right of control over the account, it will be deemed a floating charge. Therefore, we recommend that the charge be subject to the condition that withdrawals be permitted only with the prior consent of the charge.

A specific account charge creating a legal charge on the account is recommended in cases where an account has been established for receiving funds that are to be utilised in payment of the debt especially where the funds are also being utilised to pay other creditors or persons under a waterfall type arrangement. Under a charge of this type, the chargee will have full control over the account and the disposal of funds deposited therein.

**3.6 Can collateral security be taken over shares in companies incorporated in Trinidad and Tobago? 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?**

Yes. Shares in a private company or a public company whose shares are unlisted are in certificated form. Collateral security over shares is normally given by (i) a fixed equitable charge under a debenture, or (ii) by a memorandum of deposit or deed of charge of shares. The charge normally includes dividends, bonuses and all other rights accruing to the shares or the registered shareholder. Such security can also be validly granted under a New York or English law governed document. A shares charge is supported by delivery to the security holder of the share certificates (where the shares are certificated) accompanied by a transfer signed by the registered holder of the shares in the name of the security holder or a nominee as transferee or in blank with authority to complete the transfer in favour of a purchaser of the shares upon enforcement of the charge.

The Articles or By-laws of private companies often contain restrictions against transfer and provisions giving the directors discretion to refuse to register a transfer of shares without having to show good cause. Therefore, it is recommended that, in such cases, the charge be supported by a special resolution of the company irrevocably waiving these rights in favour of the charge waiving.

The shares of public companies listed on the Trinidad and Tobago Stock Exchange are usually uncertificated and are held by a central share depository under a single global certificate in trust for the registered shareholders. A charge on uncertificated shares must be supported by a pledge registration form by the registered shareholder whereby the shares are transferred to the pledgee or his nominee as security and the central depository is instructed to place them in a blocked account in favour of the pledgee. The pledge registration form is usually accompanied by an undated letter of authority from the registered shareholder to the pledge (i) authorising the pledge to instruct the registered shareholder's stockbroker, the company, or the pledgee's stockbroker to act as the pledgee's broker or participant under the rules of the central depository with respect to the pledged shares, and (ii) irrevocably appointing the pledgee as its agent to give instructions to such broker/participant with respect to disposal of the pledged shares and in particular in the event of any default to sell the shares through the central depository.

Where security is granted by a debenture, a statement of charge must be registered at the Companies Registry. Where security is granted by a memorandum of deposit or deed of charge, a statement of charge is often registered but is not mandatory.

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

Yes, security can be taken over inventory. A charge over inventory is normally a floating charge created under a debenture which leaves the chargor free to deal and manage the inventory in the ordinary course of business until an event occurs which causes the floating charge to crystallise. When the floating charge crystallises, it fastens on the inventory and becomes a fixed charge.

**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, a company can 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 under a credit facility subject to any restriction set out in its Articles of Incorporation or any Unanimous Shareholder Agreement. However, please note the restrictions under section 56 of the Companies Act on a company giving financial assistance by means of a guarantee to a shareholder, director, officer or employee of a company or affiliated company or to any associate of such person (see the answer to question 2.5 above).

**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?**

Notarisation of security documents executed in Trinidad and Tobago is not required. Execution of documents to be registered in the Protocol of Deeds that are executed abroad must be certified by a Notary Public in the manner required under the Registration of Deeds Act. In such case, notarial fees are not payable locally. The stamp duty payable on the creation of a security is 0.4 per cent of the principal amount secured. The registration fee (in the case of instruments to be registered in the Protocol of Deeds) is TT$100.00. The fee for registration of a statement of charge is TT$300.00

**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?**

No, they do not.

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

No, they are not.

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

Priority of the security for a revolving credit facility may be lost in the event that a second charge is registered. Based on the well known rule in **Clayton's Case**, once the amount advanced under the revolving facility at the time of registration of the second charge is repaid, further advances under the revolving facility may rank after the debt secured by the second charge. For that reason, it is customary to provide in the security document for such a facility that (i) the borrower shall not charge the security assets without the lender's consent, and (ii) upon registration of a second charge, the original account will be closed and further advances made under a new account to be kept in credit. Normally, the provision includes a condition that the new account is deemed to have been opened once the second charge is registered. Where the second charge is given with consent of the first secured party, the lenders often enter into a deed whereby they agree the priorities of their respective securities.

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

All loan and security documents must be executed by duly authorised officer(s) of the borrower or party giving security. Deeds are usually sealed with the common seal of the company in the manner prescribed in the By-laws. Deeds that are to be registered under the Registration of Deeds Act must be executed (if locally) in the presence of an adult witness who signs his/her name and writes his/her address and occupation and certain legal functionaries (usually an attorney-at-law). Such deeds, if executed abroad, must be executed in the presence of an adult witness who will attend before Notary Public to swear an affidavit of due execution. There are stipulated formalities in the Registration of Deeds Act for notarisation of the Deed.

## 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; or (c) shares in a sister subsidiary?**

**(a) Shares of the company**

Yes. Section 56 1(b) of the Companies Act expressly prohibits a company from giving financial assistance by means of a loan guarantee or otherwise to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company, in the case where circumstances prejudicial to the company exist. This is discussed in detail in our answer to question 2.5 above.

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

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in an affiliate.

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

Yes. The above restriction also applies to provision of financial assistance for the purchase of shares in a sister subsidiary.

## 5 Syndicated Lending/Agency/Trustee/Transfers

**5.1 Will Trinidad and Tobago 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?**

Yes. A collateral agent or trustee may hold debt security in trust for the secured parties and enforce the security on their behalf. The appointment of the collateral agent or trustee is effected by an agency agreement or trust deed which will contain the general powers of the collateral agent/trustee including any restrictions on enforcement of the security, typically a condition requiring approval of a particular majority of the secured parties for this purpose.

**5.2 If an agent or trustee is not recognised in Trinidad and Tobago 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?**

No answer is required for Trinidad and Tobago.

**5.3 Assume a loan is made to a company organised under the laws of Trinidad and Tobago and guaranteed by a guarantor organised under the laws of Trinidad and Tobago. 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?**

The benefit of the guarantee must be expressly assigned by Lender A to Lender B along with the principal loan contract to which the guarantee relates. The guarantee will normally contain a provision that it shall be binding upon and shall inure to the benefit of and be enforceable by and against the respective successors of each of the parties. It is not necessary, although it may be prudent for Lender A to give notice to the guarantor of the assignment of the guarantee.

## 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?**

Pursuant to section 5 of the Corporation Tax Act Chap 75:02 ("CTA"), interest payable on loans made to a domestic lender will be classified as taxable profits of the lender and will be subject to corporation tax at the rate of 25 per cent. The domestic lender is solely responsible for payment of corporation tax on its profits.

Pursuant to section 50 of the Income Tax Act Chap 75:01 ("ITA"), interest payable on a loan made by a non-resident lender to a Trinidad and Tobago resident is deemed to be income arising in Trinidad and Tobago and will be subject to withholding tax at the rate of 15 per cent (or such lower rate as provided in any double taxation treaty between Trinidad and Tobago and the country in which the lender is resident). The borrower or other person paying interest is responsible for deduction and payment of withholding tax to the local Revenue Authority before the interest is remitted to the non-resident payee.

It is normal to include in loan agreements/security documents for loans by overseas lenders a provision for grossing up interest payments so that, after deduction of withholding tax on the grossed up amount, the lender receives a net amount equal to the full amount which he would have received had such payment not been subject to withholding tax.

**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?**

Under Trinidad and Tobago law there is no provision for tax incentives or other incentives to be provided preferentially to foreign lenders nor any taxes applicable specifically to foreign lenders for the effectiveness or registration of loans, mortgages or other security documents issued by them.

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

The income of a foreign lender will not become taxable in Trinidad and Tobago solely because of a loan to or guarantee and/or grant of security from a company in Trinidad and Tobago. A single transaction will not constitute "carrying on business in Trinidad and Tobago" by the foreign lender, which is a requirement for tax liability under the CTA. A foreign lender would have to be cautious about entering into additional loan transactions in Trinidad and Tobago to ensure that it will not thereby be deemed to be carrying on business.

**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.?**

Execution by the foreign lender of the transaction documents outside of Trinidad and Tobago will not require notarisation except in the case of deeds that are required to be registered under the Registration of Deeds Act. There are no other significant costs which would be incurred by the foreign lender.

**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.**

Our company and tax laws permit thin capitalisation and there are no adverse consequences to a local company with a small equity capital if it raises capital through borrowing from foreign lenders.

## 7 Judicial Enforcement

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

Yes. Where the parties expressly stipulate that a contract is to be governed by a particular law, that law will be the proper law of the contract. This freedom of choice is subject to some limitations. The selection of a foreign law must be *bona fide* and legal (at least under Trinidad and Tobago law if a Trinidad court is required to adjudicate on this issue) and there must be no reason for avoiding the choice on the grounds of public policy. Express selection of a foreign law will not prevent the application of mandatory provisions of any local law which would normally have been applicable to the transaction but for the parties' choice of foreign law.

**7.2 Will the courts in Trinidad and Tobago 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?**

The courts in Trinidad and Tobago will recognise and enforce a final non-appealable judgment given against a company in a foreign court without a re-examination of its merits whether for fact or law by permitting such judgment to be sued upon and enforced through the courts of Trinidad and Tobago without retrial as a civil debt

subject to four exceptions. These exceptions are: (i) where the foreign court acted without jurisdiction; (ii) where the judgment was obtained by fraud; (iii) where the judgment was obtained by breach of the rules of natural justice; and (iv) where the enforcement of the judgment will be contrary to Trinidad and Tobago public policy.

A judgment obtained in the English Courts may also be registered in Trinidad and Tobago pursuant to the Judgment Extension Act Chap 5:02. Section 3 of this act provides that where a money judgment has been obtained in a Superior Court in the United Kingdom, the judgment creditor, on production of a certified copy of the judgment, may apply to the High Court, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the Court, to have the judgment registered in the Court, and on any such application the Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Trinidad and Tobago and subject to this Act, order the judgment to be registered accordingly. Once a judgment has been registered under the Act, as at its date of registration, it is of the same force and effect as a judgment originally obtained in Trinidad and Tobago.

Under section 4, an English judgment will not be registered where:

- the original court acted without jurisdiction;
- the judgment creditor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to the jurisdiction of that court;
- the judgment debtor, being the defendant in the proceedings was not duly served;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
- the judgment was in respect of a cause of action which, for reasons of public policy or some other similar reason, could not have been entertained by the registering court.

**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 Trinidad and Tobago 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 Trinidad and Tobago against the assets of the company?**

(a) A claim can be instituted against the borrower and guarantor in the High Court of Justice for recovery of the debt as soon as it has become due and any grace period allowed has expired. The Rules of Court contain procedures for the claimant to apply for summary judgment. The application must be supported by an affidavit on behalf of the claimant deposing to the truth of the facts and matters pleaded in the statement of case as to the debt having been incurred and the failure to pay same when due and that there is no defence to the claim. The period for filing and service of the claim form and statement of case, allowing time for the defendant(s) to enter an appearance and the filing and hearing of the application for summary judgment would normally be 4-8 months.

(b) The procedure for filing a claim for recovery of the judgment amount as a civil debt and applying for summary judgment described above is available for enforcement of a foreign judgment against the borrower and guarantor.

**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 is no requirement under Trinidad and Tobago law that the sale of security assets upon default of the debtor be effected by public auction. In some cases, the consent of a party to a transaction document over which security is granted may be required. In such cases, the original consent for granting the security will often provide that consent for a further assignment by the secured party is waived or will be readily given. Regulatory consents would not normally be required except in the case of a regulated borrower, such as an insurance company or financial institution, where, on a sale of the shares of the borrower, consent of the regulator is required for a change of controlling shareholder and change of chief executive officer. Except as aforesaid, there are no significant restrictions under Trinidad and Tobago law which may impact the timing and value of enforcement.

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

A foreign lender who institutes proceedings in the Trinidad and Tobago courts for recovery of the debt may be required to give security for the defendant's costs of the claim. Security is normally given by (i) depositing the amount ordered or agreed in court, or (ii) providing a guarantee from a local bank. Otherwise there are no restrictions. It is unnecessary to seek enforcement of a collateral security under a legal charge through the courts. Enforcement may be effected by the sale of the charged asset(s). Enforcement of a collateral security under an equitable charge is normally effected through the courts by an order for sale unless the charging document contains a power of attorney in a form that may be registered in the Protocol of Deeds in favour of the secured party or a receiver appointed under the charging document.

**7.6 Do the bankruptcy, reorganisation or similar laws in Trinidad and Tobago 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 winding up by the court, no action or claim may be proceeded with or commenced without leave of the court and subject to such terms as the court may impose. Typically, leave will be granted where the company disputes the claim or the court is required to determine a complex issue of law. Where the debt is admitted, the creditor must prove the claim in the normal manner.

A company may be wound up voluntarily by the creditors without recourse to the court. The members are required to pass a special resolution for winding up. They must also convene a meeting of creditors to receive a report on the company's financial condition. The liquidator is usually appointed by the creditors at their meeting but he may be appointed by the members if the creditors fail to do so. The liquidation is conducted under the supervision of the creditors.

In a members' voluntary winding up, the directors must make a statutory declaration that the company will be able to pay its debts within 1 year. The liquidator is appointed by the members and they are entitled to supervise his actions. However, if the liquidator on examination of the affairs of the company forms the opinion that the company is insolvent, the liquidation must thereafter be conducted as a creditors' voluntary liquidation.

The effect of winding up on the remedies of a secured creditor is discussed in our answer to question 8.1 below.

In any winding up, a judgment creditor who has not completed execution under the judgment loses the benefit of any execution commenced before the winding up in favour of the liquidator and must claim as an unsecured creditor. Execution cannot be commenced after the winding up.

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

Trinidad and Tobago law recognises and will enforce an agreement to refer disputes to arbitration whether locally or in a foreign jurisdiction. All awards must be enforced through the courts on application by the successful party.

Local arbitration is governed by the Arbitration Act, Chap. 5:01 which is more than 50 years old and provides for an appeal against the award to the High Court on questions of law so that the decision on an arbitration conducted under Trinidad and Tobago law is not necessarily final and may be subject to further appeals to the Court of Appeal and the Judicial Committee of the Privy Council with the possibility of considerable delay and substantial cost before an award can be enforced. Even though the parties to the arbitration agree that the arbitral panel's decision will be final and binding, such an agreement is not enforceable in the courts of Trinidad and Tobago.

Arbitration may also be conducted in a foreign jurisdiction under the domestic law of the venue or other procedural law as agreed by the parties. Trinidad and Tobago has enacted the Arbitration (Foreign Arbitral Awards) Act, 1996 which gives effect to the New York Convention on the recognition and enforcement of foreign arbitral awards. A final non-appealable award is enforceable in Trinidad and Tobago and is not impeachable or examinable on the merits whether for fact or law subject to the same exceptions as set out in our answer to question 7.2 above with respect to foreign judgments. A final award in a convention country is enforceable in Trinidad and Tobago on application to the court. A final award in a non-convention country is enforceable by permitting such judgment to be sued upon and enforced as a civil debt through the courts of Trinidad and Tobago. The local court order may be enforced through the normal remedies available to a judgment creditor.

## 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 Companies Act provides for the winding up of a company which is deemed to be unable to pay its debts as defined therein. A secured creditor has the option of either giving up the security to the liquidator and claiming pari passu with unsecured creditors or enforcing the security in the normal manner. If he chooses to enforce the security, he will be entitled to utilise the proceeds in payment in full of the principal of the debt and interest thereon to commencement of the winding up with any surplus being given to the liquidator. If the proceeds are insufficient then he is entitled to claim as an unsecured creditor for any outstanding balance of the debt.

**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?**

Sections 48 of the Bankruptcy Act and section 435 of the Companies Act provide that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property, made or done by or against a company within 3 months before the commencement of its winding up which had it been done by or against an individual within 3 months before the presentation of a bankruptcy petition on which he is adjudged bankrupt, would be deemed in his bankruptcy a fraudulent preference, is in the event of the company being wound up, to be a fraudulent preference of its creditors and invalid accordingly.

By section 437, the provisions with respect to fraudulent preferences are extended to the holders of security over the company's property.

A preference is deemed to be fraudulent when the substantial and dominant motive in the mind of the debtor was to prefer one creditor or particular creditors. A preference made to shield the company from the legal consequences of some prior act is not a fraudulent preference, though a mere sense of moral obligation is not sufficient to prevent the preference being fraudulent.

The following are classified as preferential debts under the Companies Act:

(a) rates, charges and taxes, assessments or impositions, and National Insurance contributions;

(b) wages or salary of an employee;

(c) severance payments due, or accruing, to an employee; and

(d) amounts for compensation or liability for compensation under the Workmens Compensation Act.

The above mentioned preferential debts have no preference or priority over the claims of secured creditors in relation to their securities except that so far as the company's assets available for payment of general creditors are insufficient to meet them, they have priority over the claims of holders of debentures under any floating charge created by the company, and are to be paid accordingly out of any property comprised in or subject to that charge.

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

The Financial Institutions Act 2008 and the Insurance Act, Chap 84:01 govern the winding up of banks and financial institutions and insurance companies respectively. Those acts expressly provide for the application of the winding up provisions under the Companies Act to the winding up of those entities subject to the provisions the said acts. The Co-operative Societies Act, Chap 81:03, governs the winding up of credit unions and specifically excludes the Companies Act. Further, the Companies Act does not govern the winding up of statutory corporations.

**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?**

A creditor is entitled to seize the assets of a debtor through enforcement of (1) any security held for the debt, and (2) a judgment obtained against the debtor for recovery of the debt. Enforcement of a security is normally effected by sale of the charged asset or, in the case where the security is a general charge such as a debenture by appointment of a receiver, proceedings for

enforcement of a judgment usually require the creditor to make a further application to the court for an appropriate order except that a writ of execution against goods and chattels of the debtor may be taken out by the creditor without further order.

Insolvency proceedings against a company are normally instituted in court for an order that the company be wound up and for appointment of a liquidator. The winding up is conducted by the court.

The Companies Act also provides for a company to be wound up voluntarily under the supervision of its creditors. The company will pass a special resolution for voluntary winding up. A meeting of creditors must be summoned for the day or the day following the day on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed. Notices of the meeting of creditors shall be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.
The meeting of creditors shall be advertised once in the Gazette and once at least in one daily newspaper printed and circulating in Trinidad and Tobago. The directors of the company shall: (i) cause a full statement of the position of the company's affairs together with a list of its creditors and the estimated amount of their claims to be laid before the meeting of creditors; and (ii) appoint one of their number to preside at the meeting. The director so appointed shall attend and preside at the meeting of creditors. The liquidator will normally be appointed by the creditors at their meeting but in the absence of an appointment the company may appoint the liquidator.

## 9 Jurisdiction and Waiver of Immunity

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

Yes, it is.

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

Yes, it is.

## 10 Other Matters

**10.1 Are there any eligibility requirements in Trinidad and Tobago 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 Trinidad and Tobago need to be licensed or authorised in Trinidad and Tobago or in their jurisdiction of incorporation?**

In Trinidad and Tobago, a lender is not required to be a bank. With the exception of money lenders licensed under the Money Lenders Act, entities engaged in the business of lending of money must be licensed by the Central Bank of Trinidad and Tobago under the Financial Institutions Act, No. 26 of 2008 ("FIA") to carry on the business of banking or business of a financial nature (which is very widely defined in the FIA). The role of a trustee/security agent constitutes business of a financial nature and accordingly a trustee/security agent carrying on business as such must be the holder of a licence issued by the Central Bank under the FIA. A licence may be granted to an entity incorporated in Trinidad and Tobago which meets the minimum capitalisation requirements and other conditions set by the Central Bank or to a foreign entity. An entity incorporated in Trinidad and Tobago must have in cash a minimum stated capital of TT$15 million or such larger amount as may be specified by the Minister of Finance. A foreign financial institution may be issued with a licence to carry on banking business or business of a financial nature on a branch basis, where such foreign bank or foreign financial institution is subject to regulation and supervision in its home jurisdiction that is satisfactory to the Central Bank of Trinidad and Tobago. A foreign bank or financial institution may engage in a lending or security transaction without being licensed provided that it is not deemed to be engaged in a business in Trinidad and Tobago. A single transaction or multiple occasional transactions by the same foreign entity would not be deemed carrying on a business.

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

Under the Foreign Investment Act Chap 70:07, a foreign investor is required to obtain a licence from the Minister of Finance to hold land in excess of 5 acres for the purpose of his business. Lenders financing major projects where prospective purchasers in the event of security being enforced are likely to be other foreign investors should bear in mind the need in such case for the purchaser to obtain a licence.

### Cautionary Statement

The Parliament of Trinidad and Tobago has enacted the Bankruptcy and Insolvency Act 2007 which repeals the Bankruptcy Act. The new act will come into force on proclamation but it has not yet been proclaimed and we have no indication when this will be done. We caution that the provisions of the new act when proclaimed may require variation of the responses to some of the questions herein, especially those relating to bankruptcy or insolvency of a party.

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