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THE HIGHS (AND LOWS) OF MARIJUANA LEGALISATION: WHAT COULD IT MEAN FOR BUSINESS?

Catherine Ramnarine

For decades, marijuana (*Cannabis sativa L.*) was widely considered to be taboo. However, shifting public perception has led to marijuana being legalised in several jurisdictions in more recent times. Opponents of marijuana legalisation point to social welfare and health concerns, while advocates point to marijuana's medicinal value and the potential economic benefits of a legalised marijuana industry. There is no doubt that legalised marijuana has become big business in places like Colorado and Washington. Even our Caribbean neighbours are seeking to cash in on this "green rush". Jamaica recently decriminalised marijuana and is actively developing a wellness tourism industry around it, while Belize and Antigua are considering legislative reforms.

In Trinidad and Tobago, marijuana remains for all practical intents and purposes, very much illegal. Exploring what a hypothetical legalised marijuana industry could mean for business here may prove interesting though. Is it really a fabled pot of gold at the end of the rainbow, or just another half-baked idea?

Brand Protection and Intellectual Property:

Marijuana legalisation could create many business opportunities - not just for marijuana itself but also for related products and services like food, cosmetics and clothing. It would be important for budding marijuana entrepreneurs to understand how to protect and leverage their intellectual property rights.

For this reason, the Jamaican Intellectual Property Office is one of the key stakeholders in Jamaica's nascent legalised marijuana industry and has received trademark applications for everything from ganja tea to clothing to software applications. Beyond basic branding and trademarks, entrepreneurs could also seek protection for any new and unique plant varieties that they develop as well as patents for new production tools or methods.

One particular area of focus in Jamaica is "geographical indication". A geographical indication is a product that is protected as intellectual property based on characteristics directly related to its geographic origin. Geographical indication protection has typically been applied to wine and spirits - think Champagne, Cognac or Scotch Whiskey. However, Jamaica is hopeful that its marijuana can also attract geographical indication status. This would mean that in order for marijuana or related products and services to be branded as "Jamaican" they would need to originate there. It would also protect against the use of misleading terms such as "Jamaican-Style". Jamaica probably has the edge over T&T when it comes to leveraging its historical association with marijuana, but there could still be opportunities for creative local entrepreneurs to add a "trini" touch - like pairing marijuana with our world renowned cocoa to create the ultimate gourmet brownie, or with the pitch lake to create a unique wellness spa experience. In any case, it is worthwhile for entrepreneurs to be mindful of the potential intellectual property rights and protections that they may be able to access.

Business Risks and Insurance:

Marijuana is an agricultural crop. This means that any legalised marijuana industry would be subject to the same risks that currently plague other agricultural businesses - including pests, praedial larceny, droughts, floods and other natural disasters. Just recently, many legal marijuana farmers in California saw their investments literally go up in smoke when their crops were devastated by widespread wildfires. While insurance could be one way of potentially mitigating these risks, insurers have proven reluctant to insure marijuana businesses in those jurisdictions that have legalised it, leaving many entrepreneurs vulnerable.

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REVISITING CROSS BORDER SECURED FINANCING PART II: THE SECURITY PACKAGE

Nicole Ferreira-Aaron & Melissa Inglefield



In the last issue of the Forum, we highlighted some key legal and practical considerations in concluding a typical secured, cross-border loan, primarily from the perspective of a borrower. An offshore lender would itself have a checklist of matters to consider when either granting a loan to a Trinidad and Tobago ('T&T') borrower or holding a guarantee or security provided by a T&T entity.

In this Article, we focus on just one aspect of that checklist: the security package to be granted by the local borrower or guarantor (each, a '**Security Party**'). We have identified below the instruments which would typically comprise such a security package along with a high-level overview of local law considerations and perfection requirements in respect of each.

DEBENTURES

(a) Description of Security Document

A debenture is used to create a security interest over the whole of the Security Party's undertaking. It consists of a series of fixed and floating charges over all present and future assets of the chargor¹.

A "floating charge" is a charge which does not immediately attach to the specified assets or pool of assets. Instead, the security interest 'floats' over such assets until the occurrence of some event or action which causes the charge to 'crystallise' or affix itself to the relevant assets. The benefit of a floating charge to a Security Party is that the company is able to carry-on its business and deal with the assets subject to the charge (such as its stock in trade) in the ordinary course of its business unless or until an event occurs which causes the charge to crystallise.

By contrast, a "fixed charge" is a charge which is affixed to a specified asset from the outset of the creation of the charge. A fixed charge is more restrictive in nature and prevents a Security Party from dealing with the asset without the consent of the lender or without the charge being released.

(b) Local Law Considerations

While certain assets may be described in a debenture as being charged by a fixed charge, it is possible for a court to declare it to be a floating charge.

¹ While such charges can collectively capture all of the Security Party's assets and undertaking, it is usually recommended that individual security instruments be obtained in respect of any specific material assets of the relevant Security Party.

Such a determination turns on the legal characteristics of the charge, including whether control over the asset to be charged is sufficiently transferred to the lender.

Such a risk will be a concern to a lender because a floating charge can be more vulnerable to being set aside in a liquidation or administration of the Security Party than a fixed charge. This is due in part to the provisions of the Companies Act and the Bankruptcy and Insolvency Act relating to floating charges.

In addition, the legal priority given to a floating charge is not indefeasible. It is possible for fixed charges granted later in time to take priority over existing floating charges. In order to mitigate this risk, it is important to include in the debenture certain restrictions against dealing with any assets and to ensure that notice of such restrictions is evident in the filings made on the Security Party's company file in respect of such instrument.

(c) Perfection Steps

A debenture must be stamped with stamp duty within the relevant timeframe² and a statement of charge must be filed with the Companies Registry in respect of same within 30 days of the execution thereof. If the debenture purports to create a legal mortgage over real property, the instrument must also be registered in the deeds registry.

MORTGAGES

(a) Description of Security Document

A mortgage is used to create a legal charge over real property. Such legal charge enables a lender on enforcement to take possession of and sell the property which is subject to the mortgage.

(b) Local Law Considerations

There are two systems of land registration in T&T: (1) common law; and (2) the Real Property Act Chapter 56:02³ ('RPA').

Each system requires a specific form of instrument and may have varying requirements applicable to the perfection of the instrument.

² The timeframe for the payment of stamp duty in T&T is 60 days or the earlier of: (i) the date on which the instrument is executed, if execution takes place in T&T; or (ii) the date on which the instrument is first brought into T&T, if execution takes place outside of the jurisdiction.

³ More information on the different systems of land registry can be found on our website: www.trinidadlaw.com

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Entrepreneurs could also face the risk of product liability claims from consumers who have bad experiences or reactions to their products. For example, edibles like brownies, cookies and cakes take longer to digest and produce a euphoric high. This can sometimes lead consumers to ingest greater quantities in order to feel the effects faster, with dangerous results. Moreover, understanding of the potential health risks of long term marijuana use, in particular its impact on pregnancy, cardiovascular and psychiatric health is still evolving and may leave a legalised marijuana industry open to lawsuits similar to those that have been brought against the tobacco industry in recent times. It would be important for businesses to utilise appropriate directions, warnings and disclaimers on their labels, though this alone would not eliminate the risk of product liability claims.

Licence Fees and Taxes:

Licence fees and taxes have been a lucrative source of government revenue in jurisdictions that have legalised marijuana, earning Colorado an estimated US\$200 million in tax revenue in 2016. However, complex licensing regimes have proven difficult for some entrepreneurs to navigate. Additionally, even in jurisdictions with legalised marijuana industries, the black market remains competitive because without the addition of taxes, its products are cheaper. For a legalised marijuana industry to be profitable, both for entrepreneurs and the State, there must be a robust and efficient regulatory and tax system in place.

Employment:

Employers would likely be concerned about the potential impact of marijuana legalisation on workplace safety, productivity and absenteeism. Employers would generally be entitled to prohibit the use of marijuana in the workplace, taking into concern the effects it may have on non-users, and particularly where it would create a clear and obvious safety risk, such as where workers are required to operate heavy machinery.

However, there may be grey areas. Would a disabled worker, for example, be entitled to claim disability discrimination where he is terminated for using medicinal marijuana? It would be important for employers to put in place clear policies to address marijuana use by their workers. Such policies should focus on the operational impact that marijuana use could have on the employer's business, like the risks to workplace safety.

Public Safety and Regulation:

Advocates of marijuana legalisation often argue that it would lighten our currently overburdened criminal justice

system. While there may be truth to this assertion, even if marijuana was legalised, there would still need to be regulations and protections in place. For example, currently there are strict advertising and packaging controls over alcohol and tobacco products, to ensure public safety and guard against such products being marketed to children. These types of controls would presumably also be extended to any legalised marijuana industry. Implementing clear road safety regulations and guidelines to ensure that people do not drive under the influence of marijuana, would be important, particularly as blood and alcohol tests can detect marijuana weeks after it is used and field sobriety tests remain the main method of determining whether individuals are driving while under the influence.

Additionally, it would also be critical to implement strict controls to insulate any legalised marijuana industry from contamination with illicit funds derived from money laundering or trade in illegal substances.

Legalised marijuana is now a booming and profitable business in many jurisdictions. However, like with any business, it is fraught with both legal risks and opportunities. While Trinidad and Tobago is a long way from having a legalised marijuana industry, some of the issues discussed in this Article can also apply to other industries. It is important for any entrepreneur in any industry to understand their legal rights, risks and obligations in order to ensure that any entrepreneurial seeds that they plant ultimately bear fruit.

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Most importantly, under the RPA regime, an original duplicate certificate of title is issued to the owner of property registered thereunder. As such, in order to register a mortgage in respect of RPA property, the original duplicate certificate of title in respect of the relevant property must be produced at the time of registration.

(c) Perfection Steps

A mortgage must be stamped with stamp duty within the relevant timeframe and registered in the deeds or RPA registry. A statement of charge must also be filed with the Companies Registry within 30 days of the execution of the mortgage where the mortgage is granted by a company.

CHARGE OVER SHARES

(a) Description of Security Document

It is typical for the shareholder(s) of a Security Party to grant a charge over the shares it holds in the entity. Parties may need to negotiate whether the charge should extend to ancillary rights attaching to the shares e.g. dividends payable on the shares or rights issues, whether before or after the occurrence of an enforcement event. Such a charge enables a lender in an enforcement scenario to recover its debt by selling the shares subject to the charge.

This form of security will be attractive to a lender as it will allow the lender to have more flexibility on enforcement with respect to the structure of any sale of the secured assets. However, on its own, a charge over shares can be vulnerable to mistake or fraud in circumstances where, for example, a corporate secretary of a company takes notice of a transfer of charged shares that is carried out either inadvertently or fraudulently.

(b) Local Law Considerations

It is important for lenders to review a corporate Security Party's Articles of Incorporation/Conformance prior to the grant of charge in order to:

- i) identify any restrictions on transfer which might reduce the effectiveness of a charge over shares; and
- ii) consider whether amendments may be necessary to strengthen the charge, given its inherent vulnerabilities.

(c) Perfection Steps

A charge over shares must be stamped with stamp duty within the relevant timeframe. If the charge extends to dividends, a

statement of charge must be filed with the Companies Registry in respect of the charge within 30 days of the execution thereof.

SECURITY ASSIGNMENT OF MATERIAL CONTRACTS

(a) Description of Security Document

A lender will often require a Security Party to mortgage (by way of assignment) its rights and benefits (including any revenue arising) under contracts with third parties which are material to its business. This is even more important in project financing transactions where a lender will be focussed on preserving its ability to easily put a third-party into the shoes of the Security Party (by assigning the underlying contract to a third party acquiror) during the more risky development stage of the project.

(a) Local Law Considerations

Confirming that the contract is freely assignable or if consent is required, obtaining the requisite third-party consent to assignment is important.

Under T&T law, a legal assignment is created by:

- (a) the delivery of notice to the counterparty to the assigned contract; and
- (b) the acknowledgment of the receipt of such notice by the counterparty.

It is therefore important that the security instrument include covenants requiring the Security Party to issue such notice and take all reasonable steps to obtain the acknowledgment.

(c) Perfection Steps

In addition to obtaining consent (if necessary), issuing the notice and obtaining the acknowledgment, an assignment must be stamped with stamp duty within the usual timeframe. Where the assignment is deemed to constitute a charge on the book debts of the company entering into the assignment, a statement of charge in respect of the assignment will need to be filed with the Companies Registry within 30 days of the execution thereof.

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Nicole Ferreira-Aaron & Melissa Inglefield (cont'd)

CHARGE OVER ACCOUNTS

(a) Description of Security Document

A lender may also require a Security Party to grant a charge over its bank accounts and over any cash standing to the credit thereof. Typically, such a charge would establish to what extent the Security Party may access and withdraw funds from the charged accounts.

(b) Local Law Considerations

While a charge over accounts will usually be described therein as a fixed charge, such a charge may be reconstituted under T&T Law to take effect as a floating charge in certain circumstances. Such circumstances primarily include where the lender does not exercise sufficient control over the account, as is typically required in the case of a fixed charge.

(c) Perfection Steps

A charge over accounts must be stamped with stamp duty within the relevant timeframe. Where the charge over accounts is deemed to be a charge on the book debts of the company, a statement of charge in respect thereof will be filed with the Companies Registry within 30 days of the execution of the charge.

While the foregoing describes the most typical security instruments used in our jurisdiction, some transactions may require different or additional forms of security instruments in order to properly address the needs of such transaction or the nuances of the relevant Security Party and its business. Accordingly, one of the most important aspects of a cross-border, secured transaction (or any secured transaction for that matter) is ensuring that both the lender and its local counsel have a careful understanding of a Security Party's business. Such an understanding should include the ability to clearly identify all of the Security Party's key assets and revenue streams. Together, these will undoubtedly improve the likelihood of the security package being both comprehensive and effective.

Look out for our next Article in this tri-partite series in which we consider some key drafting points for conditions precedent under T&T law, including local law nuances that should be taken into account.

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