Hamel-Smith FORUM

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VOLUME 10 ISSUE 2 | The Lawyers Newsletter for Business Professionals | SEPTEMBER 2017

REVISITING CROSS-BORDER SECURED FINANCING

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While local businesses will often seek to raise financing within our shores, certain regional or multinational borrower groups as well as borrowers in the oil and gas sector may find it necessary, from time to time, to raise financing from an offshore lender. If a Trinidad company with subsidiaries in Barbados and Jamaica (collectively the '**Security Parties'**), obtains financing from a US bank, the transaction will be a cross-border loan. Before entering into such a transaction, it would be wise to examine the laws of the jurisdictions whose borders will be crossed and the manner in which those laws work together.

In this Article, we will consider some key legal and practical considerations in concluding a typical secured cross border loan. The Trinidad Borrower will need to first consider: (1) each Security Party's ability to enter into the transaction and grant security for the financing; and (2) the likely costs associated with a cross-border transaction and how the structure of the financing might impact those costs.

Typical Secured Cross-Border Loan Structure: Generally:

i) the US Bank would lend to the Trinidad Borrower on a US law governed loan agreement;

ii) the Trinidad Borrower would charge some or all of its property located in Trinidad and its shares in the Barbados and Jamaica incorporated subsidiaries as security for the repayment of the loan;

iii) each subsidiary may be required to provide a guarantee of the Trinidad Borrower's loan obligations;

iv) each subsidiary may also be required to support its guarantee by a charge over its property located in its respective home jurisdiction.

1. Power, Capacity and Authority

The Trinidad Borrower will need to determine whether it can borrow from the US Bank and whether it can provide security. Each subsidiary will need to determine whether it can guarantee the obligations of the Trinidad Borrower and provide security for the guarantee.

Each Security Party will need to review its incorporation documents, by-laws and any applicable shareholder agreement (e.g. in respect of joint venture companies or subsidiaries that are not wholly owned by the Trinidad Borrower) to confirm that it has the capacity to enter into the relevant proposed obligations.

Each Security Party will need to review any applicable legislative restrictions on its ability to support the obligations of its parent e.g. financial assistance restrictions and confirm that it can meet any such restrictions. Special legislative restrictions or requirements may apply to subsidiaries that are financial institutions, insurance companies, publicly listed companies or other regulated entities and they warrant further enquiry.

Similarly, each Security Party will need to rule out any contractual restriction contained in any existing contract to which it is a party or to which it may be subject which might restrict its incurrence of indebtedness or its ability to grant any security.

(cont'd on page 2)

C O N T E N T S

A Trinidad Borrower contemplating or preparing to enter into a financing transaction to be supported by security provided by other members of the Borrower group would be well advised to compile a list of all proposed Security Parties and applying a jurisdictional analysis to anticipate hurdles to be overcome by each such entity prior to entering into any binding commitment for a proposed borrowing. This early analysis would aid in the negotiation of the term sheet with the arranger or lenders. The Trinidad Borrower would be well advised to seek to exclude any subsidiaries or affiliates that would be challenged in providing security or any jurisdiction whose rules would render the giving of security impractical or uneconomical.

Once the Trinidad Borrower has determined any limitations which might restrict either it or its subsidiaries from entering into the transaction or granting security for the financing, it will need to carefully negotiate the terms of the financing, including but not limited to the terms on which security for the financing will be granted.

2. Structuring of the Financing—Reducing Transaction Costs

In determining the structure and the security package of the transaction, it is likely that the arranger and lender will wish to ensure that they have first ranking security over all assets of the Trinidad Borrower group. Meanwhile, in addition to the Trinidad Borrower ensuring that the security can be easily granted and that the grant of such security will not have a detrimental impact on its ability to carry on its business, it will also be focussed on reducing the costs of the financing in so far as possible.

The Trinidad Borrower is typically liable for most (if not all) of the costs of the financing, including but not limited to the cost of both the lenders' and borrower's counsel, the fees payable to the administrative and paying agent and the cost of perfecting the financing and security documents. One of the highest costs in perfecting the security will often be the stamp duty payable in each participating jurisdiction. As a result, understanding the impact on the costs of a transaction that the following factors may have is critical: (a) the choice of governing law of the primary financing documents; (b) the location of the lenders or the agent(s); and (c) the make-up and requirements relating to the security package.

- **Governing Law:** Lenders will typically have a strong preference as to the law which is to govern the primary financing documents (e.g. the credit agreement or indenture) and there is usually little room for negotiation. However, a Trinidad Borrower should bear in mind that it will need to engage counsel in such jurisdiction to negotiate and settle the forms of such primary instruments on its behalf. The legal fees of counsel situated in jurisdictions such as New York and London are expected to be high and this should accordingly be budgeted for in a Trinidad Borrower's transaction costs.

- **Location of Lenders or Agent(s):** The location of the lenders or paying agent can have a substantial impact on the costs of a transaction as it will impact the percentage of withholding tax (WHT) payable in respect of any payments of interest or any fees payable to the relevant parties. Strictly speaking, a Trinidad Borrower is required to deduct from any payment of interest being made the relevant sum of withholding tax payable thereon and to remit same to the Board of Inland Revenue. However, in most instances, a Trinidad Borrower will be required to 'gross-up' any payments due to the lenders or agent in order to ensure that the total sum of the payment due to the relevant party is received by such party. Accordingly, the cost of the WHT is borne by the Trinidad Borrower thereby increasing the costs of the transaction. Wherever possible, the Trinidad Borrower may seek to structure the transaction by engaging parties in jurisdictions which have a palatable rate of WHT.

- **The Security Package:** One additional but important consideration is what stamp duty will be payable by the Trinidad Borrower in each jurisdiction in which security is granted. While in some jurisdictions (like Trinidad and Tobago) the Security Parties can benefit from stamping one instrument as the primary finance or security document with the remaining instruments as collateral security at TT$25.00, other jurisdictions (such as Barbados) require each instrument to be stamped with ad valorem stamp duty. This can be an important negotiation point between the arranger or lead lender and Trinidad Borrower. For example, in circumstances where a subsidiary has a relatively small operation in a jurisdiction in which stamp duty at the ad valorem rate may be payable, the parties may negotiate to omit such jurisdiction from the transaction entirely. In some cases, there may be other options available to mitigate or defer the stamp duty payable partially or entirely.

While the foregoing highlights some of the key points to consider when negotiating and entering into a cross-border secured financing transaction, just as each jurisdiction will need to be considered on its own, it is likely that, each transaction will have its own nuances.

(cont'd on page 3)

WHOSE EMPLOYEE IS IT?

Liability Under a "Labour Only" Contract

Catherine Ramnarine

Engaging the services of third party labour contractors to supply labour for the operations of a business is not uncommon, particularly in the oil and gas industry. The business or 'client' often assumes that such contractors are the 'employers' in those scenarios and therefore that those contractors would be responsible for any employment related liabilities that might arise. Unfortunately, such an assumption can prove costly.

Workers employed through labour contractors may be classified for legal purposes in varying contexts and before different regulatory bodies, which may not necessarily classify the workers in the same way. For example, it is possible for workers to be considered the contractor's employees for payroll or income tax purposes, but the client's employees for health and safety or other purposes. In this Article, we focused on classification under the Industrial Relations Act, which governs among other things, union recognition, unfair dismissal claims and entitlement to severance.

Section 2(4)(b) of the Act introduces the concept of a "labour only contract", defined as a contract in which a person (i.e. a third party labour contractor) engages the services of a worker for the purpose of providing those services to another (i.e. the client). Under Section 2(4)(b) the client is deemed to be the employer of such a worker.

Section 2(4)(b) came under judicial scrutiny in the 2017 case of *Steelworkers Union of Trinidad and Tobago v Caribbean Ispat Limited*. In that case, the client had engaged two contractors to supply some of the labour for its operations. These workers worked alongside the client's own employees, performing the same functions. The client was unionised, and the union applied to the Industrial Court for a declaration that the client was the employer of these workers, and that the terms of the collective agreement should apply to them. The Industrial Court found that the workers were employed by the contractors for the purpose of providing services to the client. The client was accordingly deemed to be the employer of these workers under Section 2(4)(b). This meant that these workers were entitled to be paid in accordance with the terms of the collective agreement and were therefore entitled to a significant 'back pay', reportedly as high as TT$1.5 billion dollars. The Industrial Court's judgment was upheld by both the Court of Appeal and the Privy Council.

The Industrial Court has also applied Section 2(4)(b) in unfair dismissal claims. In *Banking and Insurance and General Workers Union v Trinity Exploration and Production Limited*, the client engaged a contractor to supply it with personnel, including Mr. Gopaul. Mr. Gopaul's employment was terminated and he brought a claim for unfair dismissal against the client. The client argued that it was not his employer, and that Mr. Gopaul ought to have sued the contractor. The Court took the view that Mr. Gopaul was employed under a 'labour only' contract for the purpose of providing services to the client, and that the client was therefore his employer under Section 2(4)(b). This was despite the fact that the worker had a written employment contract with the contractor (and not the client) and that the contractor had a number of obligations (including the provision of PPE) that were typically performed by employers.

It is important to note that the Court did not address the traditional criteria for ascertaining whether an employment relationship exists - control, supervision, payment etc. - in any significant way. Instead, the Court adopted a strict and literal approach to the interpretation of Section 2(4)(b), focusing its attention on the narrow issue of whether the workers were employed by the contractor for the purpose of providing their services to the client. It remains to be seen how the Court will approach cases in which contractors are engaged to provide specific services, e.g. maintenance or IT, and not merely labour or personnel. In any event, businesses should be careful not to assume that third party contractors automatically bear all responsibility for employment related claims and to be mindful of the potential traps and pitfalls of such arrangements.

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Revisiting Cross-Border Secured Financing *(cont'd from page 2)*

Any Trinidad Borrower or borrower group that intends to seek financing from offshore lenders should consider the additional costs likely to be incurred in relation to such a transaction, along with the additional complications of negotiating a security package comprised of assets in multiple jurisdictions.

Look out for our next issue of the Forum in which we highlight considerations to be taken into account by an offshore lender considering lending to or taking security from a Trinidad and Tobago incorporated company.

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The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
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Port of Spain, Trinidad & Tobago
Tel: 1(868) 299-0981 / Fax: 1(868) 625-9177
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