



**BANK FINANCE AND REGULATION  
Multi-Jurisdictional Survey**

**SECURITY OVER COLLATERAL**

**TRINIDAD & TOBAGO  
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**1. Can assets be charged, liened and/or encumbered in your jurisdiction? Please insert any exemptions, if any.**

Assets can generally be charged, liened or otherwise encumbered in Trinidad and Tobago ("T&T").

There are no specific exemptions however the collateral must be readily identifiable and ascertainable in order for a security interest to attach to same. As such, creating a security interest over commingled goods, such as oil of a company stored in a holding tank along with oil belonging to other companies, may prove difficult or impossible to achieve where the specific collateral to be charged cannot be readily discerned.

Note also that under our Companies Act (Chap. 81:01), companies may not take notice of a trust, whether express, implied or constructive and same may not be entered into the registers of the company maintained by it under the Act (except in the case of personal representatives of a deceased individual member). Accordingly, an equitable charge over shares and dividends will not be recognized by a company until such time as the charge is enforced and the shares transferred into the name of a purchaser.

**2. In your jurisdiction, under what circumstances may security arrangements be subjected to choice of law and/or choice of forum clauses (does it matter, whether the security itself is located abroad and/or governed by foreign law [e.g. a pledged claim])? What is the market practice in your jurisdiction? Is there a treaty on this in your jurisdiction, whether bilateral or multi-lateral? Are there any requirements for enforcement in your jurisdiction?**

Security arrangements will be subjected to choice of law and/or forum clauses where there has been an agreement to have the documentation governed by the law of a country other than T&T. Such agreements will generally be effective and enforceable in T&T provided the relevant choice of law is bona fide and legal, and provided further that there is no reason for avoiding the choice on grounds of public policy. The possible effect of the 'bona fide and legal' requirement is that if a law is expressly chosen to evade the provisions of the legal system with which the contract, objectively, is connected, that choice may be disregarded. We are not aware of any case law in which an express choice of law was disregarded.

In the event that an express choice of law is not effective or valid (e.g. because a court holds that it was not made for bona fide reasons) the court may, nevertheless, consider whether the parties have by implication (or inference) come to an agreement as to what should be the proper law. Such an implication may be derived from a variety of factors, the most usual being jurisdiction or arbitration clauses. If it is not possible to conclude that the parties have made a valid express or implied choice of the proper law then the court will hold the contract to be governed by the law with which it is most closely connected. In this regard, all facts relevant to the contract and surrounding circumstances will be examined, e.g. the place the contract was made and/or performed, the place of residence or business of the parties and the nature and subject matter and standard terms of the contract.

Where the collateral itself is located abroad, it is customary that an agreement creating a security over same be governed by the jurisdiction in which it is located. In such a case, enforcement will be governed by the law in which the collateral is located. Where the collateral is owned by a local company, a notice or statement of the charge (along with originals or certified copies of the charging instrument) must be registered in the Companies Registry within thirty days of execution of same.

There is no specific treaty to which T&T is a signatory on choice of law/forum and in particular how same impacts on security. However, T&T is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is given effect in T&T by the Arbitration (Foreign Arbitral Awards) Act, 1996.

If a document creating a security interest is to be enforced in a T&T Court, stamp duty must first have been paid to the Board of Inland Revenue before same will be admissible in Court. Stamp duty must be paid within 60 days of the execution of the document, or, where the document was executed outside of T&T, within 60 days of it first being brought into T&T. Stamp duty on a primary security instrument is calculated at an ad valorem rate of either \$2 or \$4 per thousand of the amount secured depending on the nature of the primary instrument. Stamp duty on secondary security instruments (made collateral to primary security instruments) is payable at a flat rate of TT\$25 each

(approx US\$4). Stamp duty penalties (which can be significant) attach to any documents not properly stamped during the time frames set out above.

**3. In your jurisdiction, are floating charges or security over the overall assets of an entity accepted, and if so in what terms?**

Floating charges or security over the overall assets of an entity are accepted and are created by a Deed of Debenture which usually creates both fixed and floating charges over such assets. It is important to note that a document which purports to create a fixed security interest over an asset may in fact only be treated as creating a floating security interest where control and freedom to deal with the asset remains with the chargor/mortgagor after the creation of the interest.

The debenture or charging instrument may specify the events which trigger automatic crystallization of a floating charge into a fixed charge. Such events usually include a default under the underlying loan, the creation of a charge, pledge or other encumbrance over any of the assets charged or any attempt to so create without the secured party's consent, the levying of any distress, execution, sequestration or other process against any of the assets charged. The secured party may also reserve to itself the right by notice in writing to the Obligor to convert a floating charge into a fixed charge as regards any assets specified in the notice.

In the absence of such special provision a floating charge crystallizes and becomes fixed upon the appointment of a receiver or upon the commencement of winding up proceedings. Upon crystallization, the floating charge becomes fixed, however, it will take effect subject to third party rights or interests (including rights of set-off) unless the third party concerned had express notice that a term in the debenture prohibited the type of transaction to which that person is a party or that the floating charge had crystallized. It will also take effect subject to any execution or attachment completed before crystallization or to any distress levied before crystallization.

**4. In relation to the following types of assets, please explain in your jurisdiction the types of security that can be created or granted, if the security requires any type of registration or perfection requirements, an estimate of cost (including applicable taxes and any other duties/ costs) and timing for granting such security, and any special considerations regarding the asset type:**

**(a) Aircraft;**

**Type of Security**

Deed of Charge/Mortgage or Assignment of Leasehold interest.

**Perfection requirements**

Where a Trinidad incorporated company creates a security interest in an aircraft owned by it, a statement of charge and a copy of the duly stamped charging instrument should be filed in the file maintained in its name at the Companies Registry. Such filing is also recommended in the case where the aircraft, though foreign owned, is regularly located in Trinidad and Tobago (e.g. where an aircraft is leased to an operated by a local airline). In addition, while the Register of Aircraft maintained by the Airports Authority is not a substantive register conferring any priorities and is merely a notation register, an

Assignment or Mortgage should be lodged in the Aircraft Registry as evidence of the interest of the Security Party to permit its name to be noted on the Certificate of Registration.

### **Cost Estimate**

Registration in the Companies Registry costs TT\$300 (approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge.

### **Timing**

The Deed and Statement of Charge must be registered within 30 days of execution (where the execution takes place in Trinidad and Tobago or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

The security document should ensure that the definition of aircraft includes for example, the engines, spare parts, manuals and technical records. A charge over the earnings and insurance should also be included in the security document. Further the drafting of the covenants need special attention, for example covenants where the borrower covenants to maintain up to date payment of airport and navigation charges are important since such charges give rise to liens and rights of retention. The borrower should also covenant to maintain all necessary operating licences and certificate of airworthiness.

If a security instrument is governed by foreign law and is executed outside of Trinidad and Tobago and not stamped, it is permissible to file the statement of charge together with a certified copy of the unstamped security instrument in the Companies Registry. Often, upon a default, judgment will be sought in the jurisdiction of the governing law. Once obtained, one may sue on such foreign judgment in the local courts and the courts will generally enforce such foreign judgment without re-examining the merits (or requiring the filing of stamped documents) provided:

- the courts of Trinidad & Tobago recognise the jurisdictional competence of the foreign Court;
- the foreign judgment is for a definite sum of money other than a sum payable in respect of taxes and penalties;
- the foreign judgment is final and conclusive and was not obtained by fraud; and
- there is no defence to the recognition of the foreign judgment (it would not be contrary to public policy and it was not obtained in proceedings which were contrary to natural justice).

### **(b) Bank Accounts;**

#### **Type of Security**

Deed of Charge of Account

### **Perfection requirements**

Where the account is held in the name of a company incorporated in Trinidad and Tobago, the Deed must be registered along with a Statement of Charge setting out particulars in the Companies Registry and stamp duty must be paid on the instrument. Notice of the Charge should be given to the institution where the account is held (where that institution is not also the secured party) and an acknowledgement obtained.

### **Cost Estimate**

Registration in the Companies Registry costs TT\$300 (approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge of Account.

### **Timing**

The Deed and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

May take effect as a floating charge even if expressed to be a fixed charge if account holder continues to have unfettered access to the account.

### **(c) Animals, Crops (in ground and severed) and Timber;**

#### **Type of Security**

Legal Mortgage (pursuant to the Mortgages of Produce Ordinance in respect of crops)(livestock)

Assignment of Proceeds of Sale ( crops and livestock)

Deed of Charge ( Timber)

### **Perfection requirements**

#### **Registration of Mortgage at Lands Registry**

Registration of the Deed of Charge/Mortgage and filing of the Statement of Charge at the Companies Registry. If the purchaser of the crops is known third party then notice of the assignment to the purchaser of the severed crops should be given.

### **Cost Estimate**

The Mortgage (whether it is over crops, animals or timber) is registrable at the cost of \$100.00 for the Deed where the land that the crops are growing on is unregistered and \$50.00 where the land is registered.

The registration of the Deed of Charge and the Statement of Charge at the Companies Registry costs TT\$300 (approximately US\$50). Stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per

thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Deed of Charge is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Deed of Charge.

### **Timing**

A Mortgage executed pursuant to the Mortgage of Produce Ordinance must be registered within 21 clear days of execution or if it has been executed outside of the Trinidad and Tobago it must be registered within 21 clear days of its arrival in the country.

### **Special Considerations**

The Mortgage executed pursuant to the Mortgage of Produce Ordinance applies to severed crops as well as crops in the ground. Likewise, one can create a mortgage over the crops whether the land that the crops are growing on is unregistered (under the Conveyancing and Law of Property Ordinance, 'CLPO') or registered land (under the Real Property Ordinance, 'RPO'). If the land is RPO land the Mortgage must take the form prescribed by the Mortgage of Produce Ordinance. A Mortgage can be created over the crops alone or over the land and the crops.

The Mortgage/charge over the animals and timber should specifically include clauses which state that the Mortgage or charge is executed as continuing security for the debt and that it is made over all timber( whether in the ground or severed) or all livestock (whether dead or alive) for the time that the debt remains outstanding. Provision should be made for events such as death of the animals or destruction of the timber. In this regard a lender should ensure that such a borrower has adequate insurance to cover these eventualities. The Insurances should be assigned to the borrower to strengthen the security, notice should be given to the insurance company of such assignment and an acknowledgement of such notice form the insurance company should be procured.

### **(d) Equipment;**

#### **Type of Security**

Deed of Charge, Chattel Mortgage (company)/Mortgage Bill of Sale (individual) or Assignment of Leasehold interest

#### **Perfection requirements**

Registration of the deed/ Chattel Mortgage at the Companies Registry along with a Statement of Charge setting out the particulars in the Companies Registry and paying stamp duty on the instrument. The Chattel Mortgage must also be registered at the Land Registry.

Where the equipment is owned by an individual a Mortgage Bill of Sale must be registered at the Mortgage Bill of Sale Registry. The Chattel Mortgage is registered as a deed and is given a deed registration number whereas the Mortgage Bill of Sale is given a bill of sale registration number.

#### **Cost Estimate**

Registration of the Chattel Mortgage at the Land Registry costs TT\$100.00 while registration of a Mortgage Bill of Sale costs TT\$50.00. Generally registration of the

deed or Chattel Mortgage in the Companies Registry costs TT\$300 (approximately US\$50) where the statement of charge for the amount secured is greater than TT\$10,000. Where the amount secured is less than TT\$10,000 the cost is TT\$200.

Stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge or Mortgage.

### **Timing**

The Deed/Chattel Mortgage and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid). The Mortgage Bill of Sale must be registered at the Mortgage Bill of Sale Registry within 7 days of execution.

### **Special Considerations**

If a security instrument is governed by foreign law and is executed outside of Trinidad and Tobago and not stamped, it is permissible to file the statement of charge together with a certified copy of the unstamped security instrument in the Companies Registry. Often, upon a default, judgment will be sought in the jurisdiction of the governing law. Once obtained, one may sue on such foreign judgment in the local courts and the courts will generally enforce such foreign judgment without re-examining the merits (or requiring the filing of stamped documents) provided:

- The courts of Trinidad and Tobago recognise the jurisdictional competence of the foreign court;
- The foreign judgment is for a definite sum of money other than a sum payable in respect of taxes and penalties;
- The foreign judgment is final and conclusive and was not obtained by fraud; and
- There is no defence to the recognition of the foreign judgment (it would not be contrary to public policy and it was not obtained in proceedings which were contrary to natural justice).

### **(e) Intellectual Property;**

#### **Type of Security**

Equitable Charge

Legal Mortgage/Deed of Assignment and licence with proviso for re-assignment

#### **Perfection requirements**

#### **All Intellectual Property held by Companies**

All security interests over property in Trinidad & Tobago must be registered at the Companies Registry together with a Statement of Charge giving particulars of the property over which a charge has been created and any covenants in the security instrument affecting the collateral. This registration must be affected within 30 days of the creation of the charge,

If the charge is not registered it will be void against the liquidator and any creditor of the company so far as it is purporting to create a security interest.

## **Trade Marks**

### **1) Perfecting Equitable Charge/**

While an equitable charge over trademarks may be registered at the Companies Registry, under section 69 of the Trade Marks Act, trusts cannot be entered on the Register of Trade Marks and as such equitable charges cannot be registered with the Intellectual Property Office.

As such, while the equitable charge is enforceable against the Chargor it may not be enforceable against third parties without notice. Further the Controller at the Intellectual Property Office may deal with the trade mark in ways incompatible with a charge.

Third parties will only be bound by the equitable charge if they are given notice of the charge. The third party will be deemed to have notice if the equitable charge is registered on the Companies Register. This notice will not of course apply to charged property not owned by a company as the charge would not have been entered on the companies register.

Third parties may also be put on notice of the equitable charge by entering a memorandum on the trade mark register pursuant to section 48 (1) of the Trade Marks Act. The memorandum should list the information which the lender wishes to bring to the notice of third parties. On the other hand, there is some possibility that the memorandum may be rejected on the grounds that it is an attempt to register a trust.

Even though a third party may be put on notice of an equitable charge, the IPO may still deal with the charged property in ways incompatible with the charge. As such in practical terms it may be advisable to create a legal mortgage.

### **2) Perfecting Deed of Assignment and licence with proviso for re-assignment /Deed of Mortgage**

As equitable charges over trademarks may not be registered at the IPO a safer alternative is to create a legal mortgage through a Deed of Mortgage or a Deed of Assignment and licence with proviso for re-assignment. While there is no provision for directly registering a mortgage an extract from the mortgage evincing the change of legal ownership may be entered on the register thus changing the owner of the mark and giving the mortgagee control of the mark.

There is no direct requirement for licensing agreements to be registered. A mark, however, may be removed from the register if it has not been used for five years. If the license agreement is not registered then the licensee's use of the mark will not count as bona fide use and as such the marks will be susceptible to an application for their removal in the event that only the licensee uses the mark and not the proprietor. In the circumstances, we highly recommend that the licensing agreement be registered.

In order to record the mortgage or the assignment and the licence one of the following documents must be filed at the Intellectual Property Office:

- a. A certified copy of the deed of assignment
- b. The original deed of assignment
- c. A certificate or transfer form as provided by the Intellectual Property Office

## **Patents**

### 1) Perfecting Deed of Charge

While an equitable charge over trademarks may be registered at the Companies Registry, under section 34(3) of the Trade Marks Act, trusts cannot be entered on the Register of Trade Marks and as such equitable charges cannot be registered with the Intellectual Property Office.

As such, while the equitable charge is enforceable against the Chargor it may not be enforceable against third parties without notice. Further the Controller at the Intellectual Property Office may deal with the trade mark in ways incompatible with a charge.

Third parties will only be bound by the equitable charge if they are given notice of the charge. The third party will be deemed to have notice if the equitable charge is registered on the Companies Register. This notice will not of course apply to charge property not owned by a company as the charge would not have been entered on the companies register. Unlike trademarks, a memorandum cannot be entered on the register to give notice of the equitable charge.

Even though a third party may be put on notice of an equitable charge, the IPO may still deal with the charged property in ways incompatible with the charge. As such in practical terms it is safer to create a legal mortgage.

### 2) Perfecting Deed of Assignment and licence with proviso for re-assignment /Deed of Mortgage

As equitable charges may not be registered at the IPO a preferred alternative is to create a legal mortgage through a Deed of Mortgage or a Deed of Assignment with proviso for re-assignment

In order to record the mortgage or the assignment the assignment/mortgage must be filed at the Intellectual Property Office.

## **Industrial Designs**

### 1) Perfecting Deed of Charge

Unlike trademarks and patents there is no specific restriction on the registration of trusts and as such it may be theoretically possible to register an equitable charge over an industrial design. There is however, no framework in place for registering an equitable charge and as such while theoretically possible, in practice it may not be possible to register equitable charges over industrial designs.

As such, while the equitable charge is enforceable against the Chargor it may not be enforceable against third parties without notice. Further the Controller at the Intellectual Property Office may deal with the trade mark in ways incompatible with a charge.

Third parties will only be bound by the equitable charge if they are given notice of the charge. The third party will be deemed to have notice if the equitable charge is registered on the Companies Register. This notice will of course not apply to charged property which is not owned by a company as such a charge cannot be entered on the Companies Register.

## 2) Perfecting Deed of Assignment and licence with proviso for re-assignment /Deed of Mortgage

As equitable charges may not be registered at the IPO it may preferable to create a legal mortgage through a Deed of Mortgage or a Deed of Assignment and licence with proviso for re-assignment

In order to record the mortgage or the assignment and the licence the deed of assignment and the licence must be filed at the Intellectual Property Office.

### **Copyright**

There is no copyright register. As such the enforceability of a security interest will depend on the doctrine of notice. Third parties will be deemed to have notice if the equitable charge is registered on the Companies Register. This notice will of course not apply to charged property which is not owned by a company as the charge would not have been entered on the companies register.

### **Cost Estimate**

#### **Registration on Companies Register**

The registration charge for filing the statement of charge and security instrument is TT\$300.00 (US\$ 50.00). Ordinarily the stamp duty on such a security instrument is calculated on the basis of \$4.00 per \$1000 of the principal amount secured. If the original security instrument is executed outside of Trinidad & Tobago and not brought into the jurisdiction stamp duty will be deferred until the original instrument is brought into Trinidad & Tobago.

If this procedure is adopted you should be aware if it became necessary to put the original security instrument into evidence in a Trinidad and Tobago Court the Court may refuse to allow its submission unless stamp duty is first paid.

Where the security instrument is deemed to be collateral to a primary instrument, such as a loan agreement, a nominal fee of TT \$25 will be payable as stamp duty.

#### **Stamp Duty for purposes of registration at the Intellectual Property Office**

While Stamp duty may be avoided for purposes of the Companies Register the IPO will not accept a document evincing a change of legal ownership without stamp duty. If the document evincing assignment transfers legal title to the assignor as a nominee only, as is the case with security interests) stamp duty will be assessed on a nominal basis of TT\$2.50 plus any late charges. While the assignee is a nominee in relation to the

assignor, the assignee will still be able to enforce the security as he has good title against the rest of the world as trusts are not recognised under the Trade Marks or Patents Acts.

In the case of Industrial Designs, as it is conceptually possible to register a trust assigning legal title to the assignee as nominee may make realisation of the security more difficult.

### **Trade Marks**

Filing Memorandum: US\$ US\$2.00 plus advertisement fees which will depend on the length of the memorandum to be advertised.

Filing fee for registering change of ownership resulting from Assignment/Mortgage at the IPO: TT\$ 100.00 (US\$17.00)

### **Patents**

Filing fee for registering change of ownership resulting from Assignment/Mortgage at the IPO: TT\$ 150.00 (US\$25.00)

### **Industrial Designs**

Filing fee for registering change of ownership resulting from Assignment/Mortgage at the IPO: TT\$ 100.00 (US\$17.00)

### **Timing**

#### **Registration at companies register**

The Deed and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty (if necessary) must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the stamped document).

#### **Registration at the Intellectual Property Office**

There is no time limit for the filing of documents at the Intellectual Property Office that change legal title.

There is however, a time limit for the registration of a trade mark licence in the cases of unregistered trademarks; however this only applies if both the proprietor of the trade mark and the licensee are to be allowed to use the mark which of course will not normally apply to security arrangements.

### **Special Considerations**

The most important consideration is the inability to effectively register equitable charges in the case of intellectual property thus making legal mortgages the preferred option.

#### **(f) Inventory;**

#### **Type of Security**

Deed of Charge, Deed of Debenture

### **Perfection requirements**

Filing of the Deed of Charge or the Deed of Debenture together with Statement of Charge in the Companies Registry and paying stamp duty on the instrument.

### **Cost Estimate**

Generally registration in the Companies Registry costs TT\$300 (approximately US\$50) where the statement of charge for the amount secured is greater than TT \$10,000.

Where the amount secured is less than TT\$10,000 the cost is TT\$200. Stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge or Debenture.

### **Timing**

The deed and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

Generally the charge taken over inventory is a floating charge as an effective fixed charge over inventory would cripple the operations of the borrowing company. The floating charge crystallises to a fixed charge upon the occurrence of a specified event, usually upon the appointment of a receiver.

If a security instrument is governed by foreign law and is executed outside of Trinidad and Tobago and not stamped, it is permissible to file the statement of charge together with a certified copy of the unstamped security instrument in the Companies Registry. Often, upon a default, judgment will be sought in the jurisdiction of the governing law. Once obtained, one may sue on such foreign judgment in the local courts and the courts will generally enforce such foreign judgment without re-examining the merits (or requiring the filing of stamped documents) provided:

- The courts of Trinidad and Tobago recognise the jurisdictional competence of the foreign court;
- The foreign judgment is for a definite sum of money other than a sum payable in respect of taxes and penalties;
- The foreign judgment is final and conclusive and was not obtained by fraud; and
- There is no defence to the recognition of the foreign judgment (it would not be contrary to public policy and it was not obtained in proceedings which were contrary to natural justice).

### **(g) Leases;**

#### **Type of Security**

Deed of Mortgage (common law system), Memorandum of Mortgage (RPO system) or Loan Agreement and Collateral Deed of Mortgage or Memorandum of Mortgage. If a company, a Debenture and Collateral Deed of Mortgage or Memorandum of Mortgage

or Loan Agreement and Collateral Debenture, Deed of Mortgage or Memorandum of Mortgage.

### **Assignment of Lease**

#### **Perfection requirements**

Payment of Stamp Duty and filing of Security Instruments in Land Registry. If owned by a company, a copy of same must also be filed in Companies Registry along with a Statement of Charge within 30 days of the creation of the charge.

#### **Cost Estimate**

Attorneys fees are calculated on a scale based on the Attorneys-at-Law (Remuneration) (Non-Contentious Business) Rules, 1997. Stamp Duty is payable on a Mortgage/Debenture at the rate of \$4.00 for every \$1,000.00 of the sum secured. If a Loan Agreement is used as the primary security, stamp duty is payable at the rate of \$2.00 for every \$1000.00 of the sum secured and the Mortgage/Debenture stamped collateral thereto at the nominal rate of \$25 each. Registration fees \$100.00 for Deed and \$50.00 for registered land; Searches cost for unregistered land between TT\$1,000.00 and TT\$1,500.00 and registered land about \$350.00 and miscellaneous expenses.

#### **Timing**

On average a search for the common law system takes between two (2) to three (3) weeks and RPO about a week and Company Searches take 3 days .

#### **Special Considerations**

The following usually needs to be obtained:

- (a) The Deed by which the Vendor acquired the property or the Certificate of Title if the property is held under the Real Property Ordinance (registered land) and the Headlease.
- (b) Current receipts for Water and Sewerage Rates, Wasa Clearance Certificate (usually takes a number of working days), Land and Building Taxes, Original Share Certificate (if property has Management company), Land Rent and Condominium Management Charges paid up to date.
- (c) Other requirements of the lender or Attorney at Law.

#### **(h) Mineral Interests, including Hydrocarbons;**

#### **Type of Security**

(a) Minerals and Hydrocarbons in situ which have been alienated by the State and are thus privately owned may be treated in the same manner as an interest in land etc (mortgage).

(b) Minerals and Hydrocarbons which have not been alienated by the State remain the property of the State until extracted by a Licencee (Minerals and Hydrocarbons) or a Production Sharing Contractor (Hydrocarbons) and fiscalized for tax payment purposes. Thus the primary security obtainable in this case is an assignment (usually requiring the consent of the State) of the relevant Licence or Production Sharing Contract.

(c) A Charge on the undertaking or property of the company in the case of a corporate Licensee/Contractor

### **Perfection requirements**

(a) Registration of the Mortgage/ Memorandum of Mortgage at the Lands Registry

(b) If the Licence Deed has been registered in the Deeds registry then the Assignment together with the State's Consent should also be registered. Production Sharing Contracts and recent Licences are not, as a matter of practice, registered.

(c) Registration of the Charge and Statement of Charge at the Companies Registry.

### **Cost Estimate**

Filing and registration of the Mortgage Deed at the Lands Registry costs TT\$100.00 if the land that the minerals are attached to is unregistered and TT\$50.00 for registration of a Memorandum of Mortgage where the land that minerals are found is registered land. Stamp Duty for Mortgage/Memorandum of Mortgage/Debenture as principal documents \$4.00 for every \$1,000.00 as principal documents whereas stamp duty for Collateral Documents is \$25.00

The Registration of the Charge/Assignment of Licence and the Statement of Charge at the Companies Registry costs TT\$300(approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Assignment.

### **Timing**

The Assignment and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

Not applicable

**(i) Promissory Notes and Chattel Paper;**

### **Type of Security**

Assignment of Receivables

### **Perfection requirements**

Filing/registration of Assignment of Receivables along with the Statement of Charge which shall include the particulars of the Assignment in Companies Registry and payment of stamp duty. Notice should also be provided to the drawer as the third party that has issued the promissory note or chattel paper in the name of the borrower.

### **Cost Estimate**

Filing/ registration of the Assignment together with the Statement of Charge at the Companies Registry costs TT\$300(approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Assignment.

### **Timing**

The Assignment and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

The Notice to the drawer is not a legal requirement but is advisable as the priority of assignments in the event of bankruptcy or insolvency of the borrower is governed by the order in which notices were received by the drawer. Where notice is not given the drawer can receive a good discharge if he pays the creditor/borrower. Likewise the drawer may acquire counter-claims against the creditor/borrower which he can set off until he receives notice of the assignment.

### **(j) Real Estate;**

#### **Type of Security**

Deed of Mortgage (common law system), Memorandum of Mortgage (RPO system) or Loan Agreement and Collateral Deed of Mortgage or Collateral Memorandum of Mortgage. If a company, a Debenture and Collateral Deed of Mortgage or Memorandum of Mortgage or Loan Agreement and Collateral Debenture, Collateral Deed of Mortgage or Collateral Memorandum of Mortgage.

#### **Perfection requirements**

Payment of Stamp Duty and registration of Security Instruments in Land Registry. If owned by a company, a copy of same must also be filed in Companies Registry along with a Statement of Charge.

#### **Cost Estimate**

Attorneys fees are calculated on a scale based on the Attorneys-at-Law (Remuneration) (Non-Contentious Business) Rules, 1997. Stamp Duty is payable on a Mortgage/Debenture at the rate of \$4.00 for every \$1,000.00 of the sum secured. If a Loan Agreement is used as the primary security, stamp duty is payable at the rate of \$2.00 for every \$1000.00 of the sum secured and the Mortgage/Debenture stamped collateral thereto at the nominal rate of \$25 each. Registration fees \$100.00 for Deed and \$50.00 for registered land; Searches cost for unregistered land between TT\$1,000.00 and TT\$1,500.00 and registered land about \$350.00 and miscellaneous expenses.

### **Timing**

On average a search of unregistered land takes between 2 to 3 weeks and registered land about one week and Company Searches take 3 days.

### **Special Considerations**

Same as in (g) above save and except that it is necessary to obtain any required Consents and to ensure that all Land Rents and Condominium Management Charges have been paid up.

### **(k) Receivables (credit rights under contracts or invoices);**

#### **Type of Security**

Charge over Receivables or Deed of Debenture

#### **Perfection requirements**

Filing/registration of Charge over Receivables or Deed of Debenture along with the Statement of Charge which shall include the particulars of the Charge or the Debenture in Companies Registry and payment of stamp duty. Notice should also be provided to the third parties who owe the receivable/s to the borrower. Such notice is not a legal requirement; however it strengthens the security interest and may have implications for priority in the event that the borrower becomes insolvent or bankrupt.

#### **Cost Estimate**

Filing/ registration of the Charge/Deed together with the Statement of Charge at the Companies Registry costs TT\$300(approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge of Account.

#### **Timing**

The Deed and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

### **Special Considerations**

Will take effect as a floating interest if effective control is not maintained over receivables by the mortgagee and will only crystallize into a fixed charge upon an the occurrence of an event specified in the security instrument or upon the mortgagee taking steps to realise the security.

### **(l) Rights under Contracts (excluding Receivables);**

#### **Type of Security**

Assignment of Contract

#### **Registration or Perfection requirements**

Delivery of Notice of Assignment to Third Party to Contract and obtaining an Acknowledgement from the third party, thus providing evidence that the third party has recognised the assignment.

**Cost Estimate**

Not applicable

**Timing**

The priority of interests in contract rights and debts is determined by the order in which notice is given to the counterparty. As such, Notice of Assignment should be given to the third party as soon as possible, and an acknowledgement procured.

**Special Considerations**

See comments on timing above.

**(m) Shares (in book-entry and certificate form and other securities);**

**Type of Security**

Deed of Charge of Shares or Memorandum of Charge (where charge effected by delivery) and Pledge Form (where shares are listed and held central depository). Share Mortgages are also possible where shares are transferred into a nominee company.

**Perfection requirements**

When shares are owned by company, filing of a Charge of Shares or Memorandum of Charge or Mortgage of Shares in Companies Registry. Delivery of Share Certificates and executed blank share transfer forms and powers of attorney.

Filing of Pledge Form with Trinidad & Tobago Central Depository (where shares are listed and held in central depository).

**Cost Estimate**

The filing/registration of the Charge/Memorandum/Mortgage of Shares together with the Statement of Charge at the Companies Registry costs TT\$300.00 (approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge/Memorandum/Mortgage.

**Timing**

The Charge/Memorandum/Mortgage and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

**Special Considerations**

A lender may wish to consider the disadvantages and advantages of Deed/Memorandum of Shares as opposed to the Shares Mortgage, from the standpoint that the Deed/Memorandum of Charge is equitable in nature.

Some disadvantages of an equitable charge are:

1. a dishonest borrower may duplicate a share certificate and vest good title in a bona fide purchaser for value without notice;
2. without legal title to the shares the lender's claim on the shares will be defeated by any prior equitable interests; and
3. until the shares are registered in the name of a nominee for the bank, all communications and all dividends will be sent to the registered holder of the shares.

Some disadvantages of a Shares Mortgage (shares are registered in the name of the lender's nominee company which will receive all communications and dividends):

1. if the shares are partly paid and were registered in the name of the bank nominee company, the company would be liable to meet calls; and
2. in a private company the mortgagor would be required to vote at meetings which would be impossible if the shares were registered in the name of the nominee company.

**(n) Vessels;**

**Type of Security**

Ships Mortgage and Deed of Covenants

Assignment of (a) insurances, (b) the ship's earnings and (3) requisition compensation (where applicable) (4) existing and future charter parties (both time charter parties and bareboat charter parties)

**Perfection requirements**

Filing of Ships Mortgage and Deed of Covenants in Ships Registry and in Companies Registry.

**Cost Estimate**

Registration of the Ships Mortgage and Deed of Covenants costs TT\$250 at the Ships Registry. Registration of a Statement of Charge at the Companies Registry costs TT\$300 for each security instrument. Stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand of the amount secured where stamp duty is paid on a primary instrument (such as a loan agreement) and the Ships Mortgage and Deed of Covenants are expressed to be collateral to same in which case only a nominal fee of TT\$25 each will be payable on the Ships Mortgage and Deed of Covenants.

**Timing**

There is no specific time limit in which to register a Ships Mortgage at the Ships Registry, however where there are more than one mortgage over the same ship, the mortgagees are entitled in priority one over the other in accordance to the date and time that each mortgage had been recorded in the register book as opposed to the date of the mortgage itself. Hence, it would be advisable to register a ship mortgage as soon as possible after its execution.

**Special Considerations**

The Ships Mortgage must be in the form prescribed by the Shipping Act of Trinidad and Tobago.

The supporting assignments of the ships insurances, earnings, requisition compensation and charter parties are very important. Considerations re: insurance include, inter alia, the type of insurances that the ship has, whether it is insured individually or as part of a fleet. The Requisition compensation is applicable in countries where ships can be “Requisitioned for hire” or compulsorily acquired by the Government in times of war. In both cases the Government must compensate the ship-owner and as such the mortgagee must assign this requisition compensation.

**(o) Vehicles;**

**Type of Security**

Chattel Mortgage (Company) or Mortgage Bill of Sale (Individual)

**Perfection requirements**

Registration in Companies Registry (where owned by a company) or Bill of Sale Registry (where owned by individual). Payment of stamp duty.

**Cost Estimate**

The Registration fee is TT\$50.00 for a Mortgage Bill of Sale at the Bill of Sale Registry. Stamp duty pursuant to a Mortgage Bill of Sale however varies according to the value of the consideration being secured. Where the consideration is less than TT\$300.00 the stamp duty is TT\$20.00, where it is more than TT\$300.00 but less than TT\$500.00 the stamp duty is TT\$40.00 and where it is more than TT\$500.00 the stamp duty is TT\$60.00.

Registration of the Chattel Mortgage at the Land Registry costs TT\$100.00 while registration of the deed or Chattel Mortgage in the Companies Registry costs TT\$300 (approximately US\$50) where the statement of charge for the amount secured is greater than TT \$10,000. Where the amount secured is less than TT\$10,000 the cost is TT\$200. Stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Charge of Account is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Charge or Mortgage.

**Timing**

A Chattel Mortgage must be registered within 30 days at Companies Registry. Mortgage Bill of Sale must be registered within 7 days at Bill of Sale Registry. There is no specific time limit for registration of the Chattel Mortgage however it is advisable to register as soon as possible to maintain the priority and notice over subsequent charges.

**Special Considerations**

Mortgage Bill of Sale must be in the form prescribed by the Bills of Sale Act and must be renewed every three year to maintain validity. Such renewal must also be in the form of affidavit prescribed by the act and also carries a nominal stamp duty fee, in that where the consideration is less than \$300.00 the stamp duty on the renewal affidavit is \$20.00, where the consideration exceeds \$300.00 the stamp duty on same is \$40.00. There is no need to re-register a Chattel Mortgage.

**(p) Business as an ongoing concern.**

**Type of Security**

Deed of Charge/Debenture over the physical assets of the business. Equitable Charge or Legal Mortgage/Deed of Assignment licence with proviso for re-assignment over the Intellectual Property of the business.

**Perfection requirements**

The Deed of Debenture/Charge needs to be registered along with a Statement of Charge at the Companies Registry. Stamp duty on the amount secured by the Debenture must also be paid.

**Cost Estimate**

The filing/registration of the Debenture together with the Statement of Charge at the Companies Registry costs TT\$300.00. (approximately US\$50) and stamp duty is payable at \$4 per thousand of the amount secured. It may be possible to reduce stamp duty to \$2 per thousand where stamp duty is paid on a primary instrument (such as a loan agreement) and the Debenture is expressed to be collateral to same in which case only a nominal fee of TT\$25 (approximately US\$4) additional will be payable on the Debenture.

**Timing**

The Debenture and Statement of Charge must be registered within 30 days of execution (in the country or within 30 days of being brought into the country) and stamp duty must be paid on same within 60 days of execution (usually effectively 30 days as well as it is preferable and customary to register the document after stamp duty has been paid).

**Special Considerations**

The Debenture usually creates fixed and floating charges over various assets of the company and these assets are listed and identified in the Debenture itself. Where a specific charge is created over any of the assets that have been referred to above, please see the responses to (a)-(o) above in this regard.

**5. Please explain briefly for each type of assets the procedure for enforcement (judicial and extra-judicial). Is it possible to enforce security governed by another jurisdiction? If yes, what is the procedure?**

**Aircraft:**

Under an aircraft mortgage governed by the laws of Trinidad and Tobago the mortgagee will have the power to sell the aircraft either by private treaty or by judicial sale. Alternatively, such mortgagee may appoint a receiver of the aircraft. If the mortgage is governed by the laws of another jurisdiction, a judgment from such court may be sued upon in Trinidad and Tobago subject to the restrictions on enforcement of foreign judgments set out earlier.

To facilitate retaking physical possession of an aircraft, it is customary for the mortgagor or operator to execute a power of attorney in favour of the mortgagee or his agent.

### **Bank Accounts, Equipment, Inventory, Receivables and Business as a Going Concern:**

Generally, where the debtor is a company a secured creditor may enforce its security interests by appointing a Receiver or Receiver/Manager. This is done in accordance with the instrument that creates the security interest and it is not necessary for an application to be made to the Court. The Receiver/Manager may take control of and carry on the business of the debtor so as to realize the amount owed to the secured creditor. A Receiver or Receiver/Manager may also take control of and sell the collateral in order to realize the amount owed. In selling collateral a secured creditor must seek the best price reasonably obtainable for the collateral in the circumstances. Secured creditors are not subject to a duty to notify other creditors of enforcement unless such creditors rank higher in priority. It is not possible to provide specific advice on how long the enforcement process takes. In practice, the process may involve several steps including:

2. appointing a receiver-manager,
3. obtaining a valuation of the items to be sold,
4. advertising the sale of those items,
5. finding a suitable buyer for those items, and
6. taking steps to obtain the best price reasonably possible.

The appointment of the receiver/manager is usually utilised with respect to enforcement of security over bank accounts, equipment, inventory (when the floating charge over the inventory crystallizes), receivables and the business as going concern.

### **Crops**

With respect to a mortgage over crops a Mortgagee has the power to seize, take possession of, reap, and sell the crops, product where the mortgagor makes a default in payment, breaches a covenant with the mortgage, if the mortgagor becomes bankrupt, if the mortgaged crops are distrained for rent or taxes, if the mortgagor fraudulently removes the crops from the land, if the mortgagor fails to produce up to date receipts for rents, rates and taxes or if execution has been levied against the crops under any judgement at law.

### **Promissory Notes and Chattel Paper**

The lender can sue the drawer for the debt owed and represented by the promissory note or chattel paper.

### **Real Estate and Leasehold Property**

A mortgagee of unregistered (common law system) or registered land (RPO land) can enforce the security created by the mortgage in the same manner. The following are the main methods of enforcement:

- 1) Sue on personal covenant to pay: The mortgagee may sue the mortgagor on the personal covenant to repay that is contained in the mortgage deed.
- 2) Enter into possession: The Mortgagee has a right at common law to enter into possession or bring an action for entry into possession. On entry the Mortgagee would receive the rents and profits from the land or real estate and apply them towards the repayment of the debt. However a mortgagee in possession carries certain liabilities (for example liability for voluntary waste). Entry into possession is

usually exercised immediately prior to the exercise of the mortgagee's power of sale.

- 3) Appointment of a receiver: A mortgagee who desires to avoid the liabilities that attend entry into possession may appoint a receiver who ensures that the rents and profits from the land are applied towards satisfaction of the mortgage debt.
- 4) Power of Sale: This power arises when the money becomes due, however it is not excisable until:
  - a) Notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the mortgage money, or part of it, for 3 months after such service of notice; or
  - b) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
  - c) There has been a breach of a provision of the Mortgage Deed or the Ordinance (Conveyancing and Law of Property Ordinance/ Real Property Ordinance) other than the covenant for repayment.
- 5) Foreclosure: Whereas the power of sale is exercisable without recourse to the court, foreclosure of the mortgagor's equity of redemption must be executed by a Court Order. The mortgagee makes an application for foreclosure. There is usually a first hearing where an order nisi is made wherein the mortgagor has a fixed limited time in which to redeem. Upon expiration of that time an order absolute (an order for foreclosure) is made whereby the mortgaged property is vested in the mortgagee free from the equity of redemption.

While an action on the personal covenant to repay the debt and an action for foreclosure are the only remedies that require an application to the court, a mortgagee may also apply to the court for the possession and the sale of the mortgaged property.

All application to the court are made by way of the filing of a fixed date claim form which usually must be accompanied by a copy of the original mortgage and other particulars, for example, inter alia, the amount of the advance, the interest payable under the mortgage, the circumstances under which the right of possession arises etc..

#### **Rights under a contract (excluding receivables)**

The lender's security under an assigned contract is based general contractual principles for breach of contract. This would involve issuing a Claim Form and Statement of Case. However, no enforcement can take place unless judgment is obtained against the offending party following an investigation by the Court.

#### **Vessels**

Every registered mortgagee has power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money; but, where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of the High Court, sell the ship or share without the concurrence of every prior mortgagee. The Mortgagee's power to take possession of the ship and to sell it can be exercised by physically going to the ship (wherever it may be), paying off the captain and crew any outstanding wages and taking control. Alternatively a mortgagee may desire to wait until the ship enters into a specific territory before taking possession of the ship. The mortgagee may chose to sell the ship either by private sale or judicial sale. Pursuant to a private sale the mortgagee usually must indemnify the purchaser for claims brought against the ship

after sale (for example there are some maritime liens that survive the sale). However a judicial sale transfers the unencumbered absolute title and it is commonly said that the ship has been “washed clean” of its maritime liens as the proceeds of sale are used to pay off known maritime liens ahead of the mortgagees.

### **What is the procedure for arrest?**

Application is made to the High Court for a warrant of arrest.

What are the requirements for preparation of an application to arrest a vessel?

1. The name address and occupation of the applicant for the warrant.
2. Nature of the claim in respect of which the warrant is required and the fact that it has not been satisfied.
3. Name of ship and port to which it belongs.
4. Nationality of the ship and notice of the action served on the relevant Consulate.
5. An undertaking must be given by attorney for arresting party (enforceable by committal to prison) to pay the fees and expenses of the Marshal of the Court (who executes the warrant of arrest).

What is involved in proceeding to obtain a judgment over a vessel? The process of arrest involves making an application to the Court ex parte and obtaining an order. If there is no appearance to the writ of summons which is served on the vessel, then an application may be made 14 days after service for judgment in default of appearance. On the application for judgment, an order for sale may also be sought. In Trinidad, the order for sale sought would normally provide that such sale be by public auction after the vessel is appraised and the sale has been advertised.

What is the usual order of priority of claims against a vessel in Trinidad? In Trinidad, questions of priority are treated as being procedural and are decided according to the lex fori. The usual order of priority is as follows:

1. Marshal’s charges, expenses, etc., are in practice paid in priority to all claims.
2. The costs of the plaintiff in whose action the res (i.e. the ship) was arrested.
3. Salvage.
4. Damage liens.
5. Crew’s wages.
6. Master’s wages and disbursements.
7. Mortgages.
8. Necessaries and contractual claims.

This order of priorities is general and may be subject to variations depending upon the specific circumstances.

Note that the validity and construction of a ship mortgage are decided according to the law of the country in which the mortgage is made or registered.

### **Vehicles**

Security over a vehicle whether created by a chattel mortgage or a Bill of Sale can simply be enforced by taking possession of the vehicle since by virtue of the chattel Mortgage/bill of sale the mortgagee is the legal owner.

## Shares

Where the Share Certificates are delivered together with executed blank share transfer forms and power of attorney, such a deposit of the share certificates is considered to be an implied agreement that the bank as equitable chargee can sell the shares if the borrower defaults. The onus, however, is on the lender to show that the certificates were deposited as security, not for safe custody. The power of attorney allows the lender to complete the blank share transfer forms without resorting to the courts.

Is it possible to enforce security governed by another jurisdiction? If yes, what is the procedure?

Yes, generally it is possible to enforce security governed by another jurisdiction.

Note that ships and aircrafts are deemed to be assets situated at the jurisdiction of its registration, notwithstanding that at the time of enforcement the physical asset may be located in a jurisdiction other than the jurisdiction of registration. Although the validity and construction of a ship/aircraft mortgage is determined in accordance with the law of the country in which the ship/aircraft is mortgaged or registered, the enforcement procedure would be the law of the jurisdiction where the court hearing the matter is located.

Where a security documents creates security over land and goods (real and personal property), the security document should comply and be governed by the *lex situs*, which is the law of the jurisdiction where the land or the goods are located at the time of the transaction. Therefore to enforce security over land and goods that are physically located in Trinidad and Tobago, the documents must be governed by local law. Where security is created over shares the proprietary effect of a transaction concerning shares is governed by the *lex situs* of the shares. The *lex situs* of the shares is the place of incorporation of the company whose shares are the subject of the security.

Where there has been assignment of contracts and rights there under, the governing law is the law that governs the assigned contract. It is this law that shall determine the assignability of the contract, the relationship between the assignee and the counterparty and the conditions under which the assignment can be invoked against the counterparty and any question as to whether the counterparty's obligations have been discharged.

Where local courts must apply foreign law note that the following types of foreign law may not be recognised and/or enforced by the local courts:

1. Foreign Penal Law
2. Foreign Revenue Law
3. Foreign Public Law
4. Foreign Procedural Rules
5. Foreign laws which violate local public policy and that are contrary to national interest.

Since foreign procedural rules are not applied by the local courts, in order to enforce security over an asset that is physically located in Trinidad and Tobago, our local rules

for enforcement procedures must be applied. See above for discussion on applicable local rules of enforcement relevant to the specified assets.

**6. Can a trustee or security agent be used in your jurisdiction, or must security be granted in favour of all lenders?**

The concept of trust is recognized in T&T and is governed by the Trustee Ordinance, (Chap8. No. 3 – 1940). There are no special provisions for dealing with the concept and role of a security agent in the legislation, however, the concept has been utilized frequently in commercial transactions in T&T and is recognized.

**7. In bankruptcy or insolvency scenarios, what are the suspect periods, is claw-back possible, and what other types of rights (tax debts, employees, etc.) have preference over security granted?**

The Bankruptcy Act of T&T Chap. 9:70 (the 'Bankruptcy Act') provides with respect to individuals that every conveyance or transfer of property, or charge, or payment made or obligation incurred by a person unable to pay his debts as they become due in favor of a creditor with a view of giving such creditor a preference over other creditors shall if done within three months of a petition being presented for that person's bankruptcy, be deemed fraudulent and void. Under the Companies Act, acts which if done by an individual would be deemed in his bankruptcy to be a fraudulent preference are a fraudulent preference if done by a company and therefore the provisions of the Bankruptcy Act in this regard apply to companies.

In addition, where a company is being wound up, a floating charge on the undertaking or property of the company created within twelve months of the commencement of the winding up is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of six per cent per annum or other rate as may for the time being be prescribed by regulation.

In the winding up of a company, there shall be paid in priority to all other debts (including debts for which security has been granted):

- (i) rates, taxes, charges, assessments or impositions imposed or made by any Governmental Authority of the Republic of Trinidad and Tobago under provisions of any statute of the Republic of Trinidad and Tobago due and payable, and all contributions due and payable to the Trinidad and Tobago National Insurance Board, in each case to the extent due and payable within twelve months prior to the “relevant date” as defined in Section 435 of the Companies Act, Chapter 81:01 of the Laws of the Republic of Trinidad and Tobago,
- (ii) wages and salaries due and payable in respect of services rendered to the Borrower by its employees to the extent due and payable within four months prior to said “relevant date”,
- (iii) severance benefits (including termination benefits) due and payable pursuant to Section 18(6) of the Trinidad and Tobago

- Retrenchment and Severance Benefits Act in an amount not to exceed two months' wages or salary, and
- (iv) workmen's compensation as may be due and payable in accordance with Section 435 of said Companies Act.

Note that the holder of a fixed charge can realize his security, rather than proving the debt in a winding up, thereby obtaining the benefit of his superior proprietary remedy as chargee. In other words, if he realizes his security he can be paid out of the property subject to that charge ahead of the debts listed at (i) to (iv) above. However, the position of the holder of a floating charge is different. By statute, the debts listed at (i) to (iv), so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and must be paid accordingly out of any property comprised in or subject to that charge.

Subject to the above, foreign creditors are entitled to participate in the distribution of the debtor's assets on an equal footing with local creditors.

**8. In your jurisdiction, can borrowers or guarantors subordinate their claims and if so in what terms?**

Yes. If there is more than one security interest in the assets of an obligor the issue of the relative priorities of such security interests arise. Such priority will be determined by (i) the express wording of the charging instrument; (ii) the date of registration of the charging instrument in the Companies Registry (in the case where the charge is registrable), (iii) the date of registration of the charging instrument in the Deeds Registry (in the case of a mortgage over land), and (iv) by the date the charge is created.

The relative priorities may also be established by the express terms of a deed of priorities entered into by the creditors and the obligor regulating the respective priorities and rights of the creditors. The above applies equally to claims of borrowers or guarantors in respect of rights to payments or security interests over assets.

**9. What are the consequences of a transfer, assignment or novation of an underlying credit in your jurisdiction (is new security necessary, is the security automatically transferred, etc.)**

If the security in respect of the credit was originally granted to a trustee to hold upon trust for the benefit of the creditor and its assignees and transferees from time to time, a transfer, assignment or novation of an underlying credit will not affect the security which will remain intact.

Where the security is held directly by the creditor, it will be necessary to either create an assignment of the security interests or alternatively to create new security interests at that time which however would lead to a loss of priority to any intervening security interests over the same assets.

**10. Can you have on top of a security in your jurisdiction, another layer consisting of an assignment of the collateral concerned conditional upon default by the debtor?**

Yes, an assignment of existing collateral as security is permissible and there is no restriction on what may constitute an event of default (which is a contractual matter), including a default by the underlying debtor.

**11. Are step-in rights lawful in your jurisdiction or does any action to take control require the creditors to go through a court process?**

Step in rights are lawful in Trinidad and Tobago and are usually created contractually. A secured creditor may enforce its security interests by appointing a Receiver or Receiver/Manager. This is done in accordance with the instrument that creates the security interest and it is not necessary for an application to be made to the Court. The Receiver/Manager may take control of and carry on the business of the debtor so as to realize the amount owed to the secured creditor. A Receiver or Receiver/Manager may also take control of and sell the collateral in order to realize the amount owed. In selling collateral a secured creditor must seek the best price reasonably obtainable for the collateral in the circumstances. Secured creditors are not subject to a duty to notify other creditors of enforcement unless such creditors rank higher in priority. It is not possible to provide specific advice on how long the enforcement process takes. In practice, the process may involve several steps including:

1. appointing a receiver-manager,
2. obtaining a valuation of the items to be sold,
3. advertising the sale of those items,
4. finding a suitable buyer for those items, and
5. taking steps to obtain the best price reasonably possible.

It should be noted that a secured creditor may not sell the collateral to itself. While a foreclosure order would usually permit the secured creditor to bid at a public auction, it is necessary for an application to be made to the Court for such an order

Additionally, it should be noted that there is proposed legislation in Trinidad and Tobago which will introduce significant changes to the current bankruptcy and insolvency regime. If or when these proposed changes come into effect they will affect the enforcement of claims in the context of insolvency. Under the current insolvency regime there is no limit on the termination of an agreement or on claiming an accelerated payment by reason only that the insolvent person is insolvent. The proposed new legislation is more focused on corporate rescue (akin to Chapter 11 in the United States). Therefore, it provides that: “Where a notice of intention or a proposal [to creditors] has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person, or claim an accelerated payment under any agreement with the insolvent person by reason only that— (a) the insolvent person is insolvent; or (b) a notice of intention or a proposal has been filed in respect of the insolvent person.” It is not possible to predict when the abovementioned proposals will become law.