

---

CHAMBERS GLOBAL PRACTICE GUIDES

---

# Banking & Finance 2022

---

Definitive global law guides offering  
comparative analysis from top-ranked lawyers

**Bermuda: Law & Practice**  
Adam Bathgate and Nathalie West  
Walkers

## Law and Practice

### Contributed by:

Adam Bathgate and Nathalie West

Walkers see p.19



## Contents

<b>1. Loan Market Panorama</b>	<b>p.4</b>	<b>4. Tax</b>	<b>p.8</b>
1.1 Impact of the Regulatory Environment and Economic Cycles	p.4	4.1 Withholding Tax	p.8
1.2 Impact of the COVID-19 Pandemic	p.4	4.2 Other Taxes, Duties, Charges or Tax Considerations	p.8
1.3 The High-Yield Market	p.5	4.3 Usury Laws	p.8
1.4 Alternative Credit Providers	p.5	<b>5. Guarantees and Security</b>	<b>p.8</b>
1.5 Banking and Finance Techniques	p.5	5.1 Assets and Forms of Security	p.8
1.6 Legal, Tax, Regulatory or Other Developments	p.5	5.2 Floating Charges or Other Universal or Similar Security Interests	p.9
1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending	p.6	5.3 Downstream, Upstream and Cross-Stream Guarantees	p.9
<b>2. Authorisation</b>	<b>p.6</b>	5.4 Restrictions on Target	p.10
2.1 Authorisation to Provide Financing to a Company	p.6	5.5 Other Restrictions	p.10
<b>3. Structuring and Documentation Considerations</b>	<b>p.7</b>	5.6 Release of Typical Forms of Security	p.10
3.1 Restrictions on Foreign Lenders Granting Loans	p.7	5.7 Rules Governing the Priority of Competing Security Interests	p.10
3.2 Restrictions on Foreign Lenders Granting Security	p.7	<b>6. Enforcement</b>	<b>p.11</b>
3.3 Restrictions and Controls on Foreign Currency Exchange	p.7	6.1 Enforcement of Collateral by Secured Lenders	p.11
3.4 Restrictions on the Borrower's Use of Proceeds	p.7	6.2 Foreign Law and Jurisdiction	p.12
3.5 Agent and Trust Concepts	p.7	6.3 A Judgment Given by a Foreign Court	p.12
3.6 Loan Transfer Mechanisms	p.7	6.4 A Foreign Lender's Ability to Enforce Its Rights	p.13
3.7 Debt Buy-Back	p.7	<b>7. Bankruptcy and Insolvency</b>	<b>p.13</b>
3.8 Public Acquisition Finance	p.7	7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency	p.13
		7.2 Impact of Insolvency Processes	p.14
		7.3 The Order Creditors Are Paid on Insolvency	p.14
		7.4 Concept of Equitable Subordination	p.15
		7.5 Risk Areas for Lenders	p.16

<b>8. Project Finance</b>	<b>p.17</b>
8.1 Introduction to Project Finance	p.17
8.2 Overview of Public-Private Partnership Transactions	p.17
8.3 Government Approvals, Taxes, Fees or Other Charges	p.17
8.4 The Responsible Government Body	p.17
8.5 The Main Issues When Structuring Deals	p.18
8.6 Typical Financing Sources and Structures for Project Financings	p.18
8.7 The Acquisition and Export of Natural Resources	p.18
8.8 Environmental, Health and Safety Laws	p.18

## 1. Loan Market Panorama

### 1.1 Impact of the Regulatory Environment and Economic Cycles

There have not been any significant legislative or regulatory changes affecting the rights of lenders or secured creditors over the past year, nor any that would affect Bermuda's status as a leading creditor-friendly jurisdiction.

After emerging from the recession caused by the global financial crisis more than a decade ago, Bermuda's economy showed three years of growth prior to the COVID-19 pandemic, driven principally by increases in tourism and by major projects such as the construction of a new terminal at the island's L.F. Wade International Airport.

As the USA is Bermuda's largest trade partner and the source of the majority of its tourist visitors, Bermuda is exposed to any volatility in the US economy. Global trends also inevitably affect Bermuda, and the effects of the war in Ukraine, rising energy, food and commodity prices and soaring inflation worldwide have all been felt on the island.

Bermuda is a leader on tax transparency, being one of the first overseas territories to be awarded white list status for country-by-country (CbC) reporting, adopting OECD standards for BEPS compliance and signing the Declaration to the Multilateral Competent Authority Agreement for automatic exchange of financial account information via OECD's CRS and CbC reports. Bermuda is graded as a "co-operative jurisdiction" for good tax governance by the EU Finance Ministers (ECOFIN).

Activity in the loan market is healthy and robust, with Bermuda entities frequently being used as holding companies and joint venture entities in

particular. It is also common to see Bermuda special purpose vehicles used in the shipping, aviation, mining, oil and gas and property sectors.

While Bermuda is a major international financial centre and Bermuda entities are used in a variety of cross-border structures and transactions, there is no real loan market to speak of in Bermuda, because such deals are mostly originated in one of the major "onshore" jurisdictions. As such, deals featuring Bermuda entities are inevitably susceptible to market trends and developments in such jurisdictions.

### 1.2 Impact of the COVID-19 Pandemic

Like the rest of the world, the economy in Bermuda has been affected by COVID-19. The Bermuda government itself was forced to borrow to fund previously unforeseen COVID-related expenditure, and in so doing raised Bermuda's debt ceiling to USD2.9 billion.

While Bermuda is open to visitors and residents are able to travel, the imposition of global and local travel restrictions as a result of the pandemic had a significant impact on tourism revenues and local businesses dependent on tourism. Along with most of the rest of the world, the island has largely re-opened following the successful roll-out of its vaccination programme, but some restrictions remain in place, including a mask mandate in government property and at the airport, and testing requirements for visitors.

To ameliorate the impact of the virus on tourism, and in an attempt to capitalise on the accelerated movement towards remote working around the world, in 2020 the Bermuda government introduced a one-year residential certificate, which allows employees and students to work and study remotely from Bermuda for a year.

Applicants must be able to support themselves while working remotely, and cannot seek work in Bermuda. The initiative has proven popular: according to government figures released shortly before the time of writing, the scheme has attracted 1,315 applications (with 1,127 approved) and has brought more than USD28 million to the island.

In the loan markets, and consistent with trends in the wider global economy, the early stages of the pandemic saw Bermuda borrowers having to restructure the terms of outstanding debt and access new liquidity to meet current funding needs. Although those needs became less acute as the global economy began to re-open in 2021, the loan markets have remained a healthy source of capital for Bermuda borrowers. In this regard, trends in Bermuda are mirroring those of the wider global economy.

### 1.3 The High-Yield Market

While there have been certain high-profile examples of Bermuda issuers accessing the high-yield market instead of the syndicated loan market to raise debt, such structuring decisions tend to be driven either by investor demand or by considerations in jurisdictions where such issuers operate or are tax-resident, and not by Bermuda-specific factors. To the extent Bermuda issuers elect to meet their financing needs through high-yield debt, they will invariably do so through the capital markets in one of the world's major financial centres, most frequently New York or Hong Kong.

In the reinsurance sector, Bermuda reinsurers may elect to issue subordinated debt instruments, which can constitute Tier 2 capital and as such assist with satisfying regulatory capital requirements.

### 1.4 Alternative Credit Providers

Bermuda entities feature in a variety of structures across numerous market sectors, so it is not uncommon to see credit facilities being made available to structures featuring Bermuda companies by alternative credit providers. In such circumstances, borrowers and sponsors may elect to source debt from such providers for a variety of reasons, including a willingness to lend at higher leverage multiples, greater execution speed and the ability to hold the debt throughout its term.

The Bermuda reinsurance market has proven an attractive deal source for some alternative credit providers, and there have been examples of subordinated debt issued by reinsurers being taken up either wholly by a private debt provider, or with a private debt provider as lead investor.

### 1.5 Banking and Finance Techniques

Bermuda is well established as a creditor-friendly jurisdiction with a legal system based on English common law, modified by Bermuda statutes and court decisions. With current market conditions trending towards borrowers requesting additional liquidity or restructuring of their credit arrangements, lenders are paying more attention to their possible remedies and enforcement options in distressed scenarios. Bermuda's regime provides certainty and reassurance to secured creditors in this regard.

### 1.6 Legal, Tax, Regulatory or Other Developments

#### Collateralised Loan Obligations (CLOs)

Following the inclusion in February 2022 of the Cayman Islands on the European Union's AML list, managers and investors have turned to Bermuda as an alternative jurisdiction for the incorporation of issuers of CLOs with EU-based investors. Bermuda is now one of the two major

jurisdictions of choice for US CLO managers seeking to market deals to EU investors.

The jurisdiction's advantages for managers and investors are numerous, including:

- tax neutrality;
- the stability of its legal and political system;
- its compliance with international standards including FATCA/CRS; and
- the familiarity of rating agencies with Bermuda structures established through the jurisdiction's status as the global market leader in insurance-linked securities and a favoured jurisdiction for market participants in the aircraft and shipping container sectors.

CLO issuers are not subject to Bermuda's AML or economic substance regimes and there is no requirement to prepare financial statements if the directors and shareholders agree to waive their preparation. The island has a secure, modern and established physical and technological infrastructure, with a long history of incorporating international companies and special purpose vehicles. As such, Bermuda is able to offer managers and investors many of the features previously available for CLOs with a Cayman issuer and, looking ahead, Bermuda is expected to continue to play a valuable role in this space.

## 1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending

The Bermuda Stock Exchange (BSX) launched an ESG initiative in 2019, setting guidelines for companies listed with the BSX, which can be examined by prospective investors. The Bermuda Business Development Agency, led by the Bermuda government, has also launched an initiative to establish and promote Bermuda as the world's climate risk finance capital. Bermuda

is a global hub for excess casualty reinsurance – ie, reinsurance for significant costs associated with damage and losses resulting from natural disasters.

Bermuda is the leading jurisdiction for insurance-linked securities (ILS), offering institutional investors the opportunity to invest in excess casualty reinsurance as an asset class. As part of their ESG strategies, the BSX and the Bermuda Business Development Agency are focused on highlighting the ESG opportunities of ILS in Bermuda, and catastrophe bonds in particular. For example, the US Federal Emergency Management Agency has issued catastrophe bonds that are listed on the BSX to raise funds for its National Flood Insurance Program, covering losses from major flood events caused by recent named storms.

## 2. Authorisation

### 2.1 Authorisation to Provide Financing to a Company

Any person carrying on “deposit-taking business” (ie, the lending of money received by way of deposit to others, or financing any other activity of the person's business wholly or to any material extent out of the capital of or the interest on money received by way of deposit) in or from within Bermuda must be licensed by the Bermuda Monetary Authority to do so under the Banks and Deposit Companies Act 1999.

The effect of the “in or from within Bermuda” formulation means that only deposit-taking business carried on in the jurisdiction is subject to the licensing requirement. Accordingly, it is not necessary for any non-Bermuda bank or other financial institution providing debt funding to a Bermuda borrower to be licensed or otherwise

approved by any Bermuda regulatory or government body in order to do so.

## 3. Structuring and Documentation Considerations

### 3.1 Restrictions on Foreign Lenders Granting Loans

There are no restrictions on foreign lenders granting loans from outside of Bermuda to Bermuda entities, but there are restrictions and licence requirements for a foreign lender establishing a branch in Bermuda.

### 3.2 Restrictions on Foreign Lenders Granting Security

There are generally no restrictions on the granting of security and guarantees to foreign lenders. Consent from the Bermuda Minister of Finance is required prior to the granting to foreign lenders of security over real property located in Bermuda where the principal debt secured exceeds USD50,000. In addition, if a foreign lender takes possession of Bermuda real property following the enforcement of its security interest, the property would need to be disposed of by the foreign lender within five years.

### 3.3 Restrictions and Controls on Foreign Currency Exchange

Bermuda exempted companies (the common vehicle used in Bermuda for international business and international transactions), exempted partnerships and certain permit companies designated as non-resident for exchange control purposes are not subject to restrictions or controls on foreign currency exchange.

### 3.4 Restrictions on the Borrower's Use of Proceeds

There are no such restrictions, other than, more generally, restrictions under Bermuda's anti-money laundering and anti-terrorist financing legislation.

### 3.5 Agent and Trust Concepts

Both agent and trust structures are recognised and regularly used in Bermuda.

### 3.6 Loan Transfer Mechanisms

There are no Bermuda-specific requirements for loan transfers between foreign lenders. If there is a change of security agent or security trustee (or lender, in the case of a bilateral loan arrangement) and Bermuda law governs the security arrangements, Bermuda law assignment agreements are used to transfer the benefit of the underlying security interests to the new agent, trustee or lender. If a security agreement is registered on the register of charges at the Bermuda Registrar of Companies (the Registrar), a registration would be made at the Registrar to note the change in agent, trustee or lender, as applicable.

### 3.7 Debt Buy-Back

Debt buy-back is permitted.

### 3.8 Public Acquisition Finance

The Companies Act does not differentiate between public and private companies, and there are no specific rules under Bermuda law regarding "certain funds" as such pertains to acquisition financings. However, it is common for Bermuda exempted companies to be listed on foreign exchanges and, as such, they would be subject to the listing and regulatory rules of that foreign exchange and any "certain funds" requirements thereunder.

## 4. Tax

### 4.1 Withholding Tax

No withholding tax is payable by Bermuda exempted companies or Bermuda exempted partnerships in Bermuda on any payments made to lenders.

### 4.2 Other Taxes, Duties, Charges or Tax Considerations

Bermuda exempted companies and Bermuda exempted partnerships are exempt from any taxes payable in Bermuda in respect of any loan, guarantee and security arrangements, including stamp duty. However, stamp duty would apply to security instruments granted over Bermuda real property. In addition, stamp duty is payable by Bermuda local companies (owned 60% by Bermudians) and certain permit companies upon the execution of certain agreements, such as loan, guarantee and security agreements, although certain exemptions can apply.

### 4.3 Usury Laws

No usury laws or other limitations on chargeable interest apply to Bermuda exempted companies or Bermuda exempted partnerships.

## 5. Guarantees and Security

### 5.1 Assets and Forms of Security

The assets most commonly taken as collateral include shares (and related rights), cash deposits in bank accounts, claims and receivables, real property, intellectual property, inventory, contractual rights and rights to insurance policy proceeds. Mortgages over Bermuda-registered vessels and aircraft are also common.

### Share Security

The form typically used to take security over shares issued by a Bermuda company is a Bermuda law equitable share charge or equitable share mortgage, executed by way of deed. It is customary for the following deliverables to be granted in respect of the share security:

- executed but undated share transfer forms and original share certificates;
- undated letters of resignation from directors and officers, and letters of authorisation to date the same;
- an irrevocable proxy and power of attorney; and
- an undertaking from the Bermuda company to register the share transfer forms upon enforcement.

### Other Assets

The form typically used to take security over all assets of a Bermuda company or specific assets (such as cash deposits in bank accounts, claims and receivables, real property, intellectual property, inventory, contractual rights and rights to insurance policy proceeds) with *lex situs* in Bermuda is a Bermuda law debenture, which can include a fixed and floating charge and an assignment by way of security, executed by way of deed.

Charges are registrable in Bermuda pursuant to Sections 55 and 61 of the Companies Act. It is not a statutory requirement for charges to be registered, but the secured party will want to ensure its security is registered in order to protect its priority.

### Receivables, Claims and Contractual Rights

Security over these assets is typically granted by way of fixed and floating charge and/or assignment. In order to grant a legal assignment,

whereby the secured party is able to enforce the debt or right directly against the debtor or counterparty, the assignor must notify the debtor or counterparty of the assignment.

For an assignee to enforce an equitable assignment, it will need to convert the assignment into a legal assignment by way of notification, as described above.

## Bank Accounts

Security over bank accounts is typically granted by way of fixed and floating charge and/or assignment of the rights to the bank account – ie, the chose in action. The account bank must be notified in order for the secured party to benefit from a legal assignment, as described above. In addition to the notice, local account banks in Bermuda typically require a deposit account control agreement between the secured party and the account bank, and charge the account holder an annual fee during the life of the control agreement.

## Real Property

As described in **3.2 Restrictions on Foreign Lenders Granting Security**, prior consent is required from the Minister of Finance to mortgage Bermuda real property in favour of a foreign lender (where the principal debt secured exceeds USD50,000).

Security over Bermuda land can be granted by way of a legal or equitable mortgage or a charge. As noted in **4.2 Other Taxes, Duties, Charges or Tax Considerations**, stamp duty is payable on instruments granting security over Bermuda real property.

- Legal mortgage: legal title to the land transfers from the mortgagor to the mortgagee, with a right for the mortgagor to redeem the

property upon full discharge of the secured obligation. The mortgagor remains in possession of the land during the life of the mortgage. Formalities: created by way of deed and must be submitted to the Bermuda Registrar General to be entered into the Book of Mortgages.

- Equitable mortgage: transfers the beneficial or equitable interest in the land from the mortgagor to the mortgagee, while the mortgagor retains legal title and possession of the land. Formalities: must be in writing, typically in the form of a memorandum of deposit of deeds. Also registered with the Bermuda Registrar General.
- Charge: creates an encumbrance on the land granting the chargee the right to sell the property in satisfaction of the secured obligation. Formalities: typically granted in the form of a fixed and floating charge and executed by way of deed. Registrable on the register of charges at the Registrar.

## 5.2 Floating Charges or Other Universal or Similar Security Interests

Floating charges over present and future assets are a common form of security in Bermuda.

## 5.3 Downstream, Upstream and Cross-Stream Guarantees

A Bermuda company may grant downstream, upstream and cross-stream guarantees. The memorandum of association and by-laws of the Bermuda company should be reviewed to ensure the company has the capacity to grant the contemplated guarantee. The directors of a Bermuda company have fiduciary duties under common law to act in the best interests of the company. Where there is no immediate corporate benefit to the Bermuda company in its granting of a guarantee, a resolution of the shareholder could be obtained to absolve the risk of a breach

of such director duties. No additional restrictions or associated limitations apply.

## 5.4 Restrictions on Target

There are no restrictions on a target granting guarantees, security or financial assistance for the acquisition of its own shares. Bermuda abolished its former statutory financial assistance restrictions.

## 5.5 Other Restrictions

The Exchange Control Act 1972 of Bermuda (and related regulations) restricts the transfer to foreign persons of equity securities (including shares) issued by a Bermuda company. However, certain general permissions apply to transfers made pursuant to the enforcement rights of a transferee under a security instrument, as follows:

- if the transferee is a licensed bank or financial institution in an “approved jurisdiction” (which includes the United States, the United Kingdom and members of the European Union, among others), the transfer is permitted if notice thereof is given to the Bermuda Monetary Authority; and
- if the transferee is not a licensed bank or financial institution in an “approved jurisdiction”, the transfer is permitted if consent is obtained from the Bermuda Monetary Authority.

## 5.6 Release of Typical Forms of Security

Bermuda law security is typically released pursuant to a Bermuda law deed of release. To remove released charges registered at the register of charges maintained at the Registrar, a copy of the release agreement (or equivalent) is filed electronically with the Registrar, who will record the charge as having been satisfied.

## 5.7 Rules Governing the Priority of Competing Security Interests

A Bermuda company granting a charge over its assets, a foreign company granting a charge over its Bermuda assets (such as shares in a Bermuda company) and a secured party (and any other person interested in the charge) have the option of making an application to register the charge in the register of charges maintained by the Registrar, pursuant to Section 55 or 61 of the Companies Act.

If the charge is duly registered with the Registrar it will, in respect of the secured assets, have priority over any security interests that are not registered or that are subsequently registered in the register of charges in respect of those assets. Registration of the security in this manner also provides constructive notice of the existence of the security to third parties. Once registered, the security provider should deliver a copy of the certificate of registration of charge to the secured party (unless the secured party is making the application). The register of charges maintained by the Registrar is publicly searchable. Bermuda exempted companies are not required to maintain a private register of charges.

There are no statutory time limits for registration of a charge with the Registrar, although it is prudent for a secured party to ensure it is registered with the Registrar as soon as possible so that it can take advantage of the priority afforded by registration and protect itself against competing security interests.

Registration is effected electronically by completing a short form on the Registrar’s online portal and by submitting a copy of the charge agreement. A fee is payable to the Registrar in respect of each charge filing (currently USD665).

Typical methods of subordination include entry by the parties into a subordination agreement or intercreditor agreement. A liquidator or other insolvency official will respect any valid and binding agreement between creditors as to their respective priority, including pursuant to a subordination agreement or intercreditor agreement.

## 6. Enforcement

### 6.1 Enforcement of Collateral by Secured Lenders

A security provider may take steps to enforce its collateral independently, without the need for any court application or for enforcement to take place through a court-supervised process.

The relevant security document will set out the triggers for enforcement, which will typically be linked to some form of default under the principal facility or note documentation. The principal methods by which Bermuda law security would be enforced are sale, possession, appointment of a receiver, or foreclosure. The English law remedy of appropriation is not available in Bermuda.

#### Sale

Bermuda law does not confer a statutory power of sale on a mortgagee or chargee. Any power of sale must therefore be contained in the security document itself (and is a standard feature of Bermuda law security documents).

The secured party owes no duties to the chargor other than a duty to act in good faith when exercising the power and a duty to obtain the best price reasonably obtainable in the market. A secured party may not sell the collateral to itself, because in such circumstances the secured party would have put itself in a position where

its duty (to obtain the best price reasonably obtainable) would conflict with its own interest (to obtain the property for the lowest possible price), and this would effectively amount to foreclosure without leave of the court (on which see below). However, it may sell it to a company in which it is interested, so long as said company is not a pure nominee. In such circumstances, the secured party would need to show that the terms of the sale were fair and proper.

To the extent the proceeds of realising the collateral are inadequate to satisfy the debt, the secured party may still sue the chargor for the difference or prove in the insolvency proceedings along with any other creditors. In such circumstances, the claims of the secured party will not have priority over those of unsecured creditors. If the sale proceeds exceed the debt, the secured party must account to the chargor for the excess.

#### Possession

It would also be possible for a secured party to enforce its security by taking possession of or exercising other rights in relation to the collateral (eg, in the context of enforcing security over shares, the right to receive dividends or voting rights), without transferring title.

#### Appointment of a Receiver

Bermuda law confers no statutory power on a secured party under a mortgage or charge to appoint a receiver. Instead, receivership is a contractual remedy conferred under the terms of the security document itself.

A secured party would usually appoint a receiver so as to achieve a sale of the secured property but in a manner that minimises its potential liability. This is because a well-drafted security docu-

ment will provide that the receiver is the agent of the chargor, and not the secured party.

The security document will set out the powers of the receiver, which will be wide-ranging and include powers of sale and powers to exercise rights in respect of the secured property. A receiver exercising a power of sale owes the same duties when doing so as the secured party itself, as described above.

A secured creditor who appoints a receiver over assets of a Bermuda company must notify the Registrar of Companies in Bermuda of that appointment within seven days of doing so.

## Foreclosure

This term is not a synonym for enforcement. Instead, it has a particular meaning under Bermuda law and refers to a court process whereby a secured party assumes absolute ownership of the secured property and a mortgagor's equity of redemption is extinguished. It is only available in respect of mortgages, and is rarely used as it is a lengthy and complicated process offering little advantage over exercising a power of sale.

## 6.2 Foreign Law and Jurisdiction

The Bermuda courts will generally respect the parties' express choice of law in a contract, except in certain limited circumstances (eg, where the choice has not been made in good faith or where the application of a rule of foreign law would be contrary to public policy in Bermuda). The Rome Convention and its successor EU regulations (Rome I and Rome II) do not extend to Bermuda.

Equally, the Bermuda courts will not usually interfere with the parties' submission to the courts of a foreign jurisdiction. However, notwithstanding any provision of any document providing for

the exclusive jurisdiction of a foreign court, the Bermuda court may decline to stay proceedings issued in contravention of such a provision, or grant leave to serve Bermuda proceedings out of Bermuda if it is satisfied that it is just and equitable to allow such proceedings to continue in Bermuda. Conversely, a Bermuda court may decline to accept jurisdiction notwithstanding a contractual provision submitting to the exclusive jurisdiction of the Bermuda courts if it determines that:

- some other jurisdiction is a more appropriate or convenient forum;
- another court of competent jurisdiction has made a determination in respect of the same matter; or
- litigation is pending in respect of the same matter in another jurisdiction.

In addition, proceedings may be stayed in Bermuda if concurrent proceedings in respect of the same matter are or have been commenced in another jurisdiction.

A foreign state or sovereign entity may waive its right to sovereign immunity by submitting to the jurisdiction of the Bermuda courts.

## 6.3 A Judgment Given by a Foreign Court

The procedure for enforcing a judgment of a foreign court depends on the jurisdiction in which the judgment was obtained.

The Judgments (Reciprocal Enforcement) Act 1958 (the 1958 Act) applies to judgments obtained in the UK (ie, England and Wales, and Scotland), the Bahamas, Barbados, British Guiana, Gibraltar, Grenada, the Leeward Islands, St. Vincent, Jamaica, Nigeria, Dominica, St. Lucia and Australia. Under the 1958 Act, any final con-

clusive monetary judgment (other than a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty or multiple damages) obtained against a Bermuda entity may be enforceable in Bermuda and would be enforced by the courts without re-examination of the merits of the case, provided that:

- the judgment is final and conclusive, notwithstanding that an appeal may be pending against it or that it may still be subject to an appeal in such country;
- the judgment has not been given on appeal from a court that is not a superior court; and
- the judgment is duly registered in the Bermuda courts in circumstances in which its registration is not liable to be set aside thereafter.

If the 1958 Act does not apply, a final and conclusive judgment of a competent foreign court obtained against a Bermuda entity under which a sum of money is payable (other than a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty or multiple damages) may be the subject of enforcement proceedings in the Bermuda courts under the common law doctrine of obligation by action on the debt evidenced by the judgment of such competent foreign court, provided that:

- the court that gave the judgment was competent to hear the action in accordance with private international law principles as applied in Bermuda; and
- the judgment is not contrary to public policy in Bermuda, has not been obtained by fraud or in proceedings contrary to natural justice, and is not based on an error in Bermuda law.

## 6.4 A Foreign Lender's Ability to Enforce Its Rights

As discussed in 3.2 **Restrictions on Foreign Lenders Granting Security**, Bermuda imposes restrictions on who may hold interests in land in Bermuda, and foreign companies will generally require the consent of the responsible Minister in order to do so. This will have an impact on the ability of a non-Bermuda lender to enforce security over land situated in Bermuda.

There are no other restrictions or limitations that apply specifically to foreign lenders.

## 7. Bankruptcy and Insolvency

### 7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency Schemes of Arrangement

Bermuda's statutory scheme of arrangement regime enables companies to restructure their financial liabilities outside a formal winding-up procedure.

A scheme of arrangement is a court-approved compromise or arrangement between a company and its creditors (or classes thereof). A Bermuda scheme is most commonly used to implement a distressed financial restructuring by varying or compromising the rights of the relevant stakeholders (ordinarily, the creditors) of the company, and is often deployed in the context of a provisional liquidation (on which see below). However, a scheme of arrangement can also be used to facilitate group restructurings, mergers and take-privates in a non-insolvency context.

The process involves a meeting of each class of stakeholder whose rights will be affected by the scheme. The proposed scheme must be approved by a majority in number represent-

ing 75% in value of each class of stakeholder attending and voting at the meeting (either in person or by proxy). The terms of the scheme will become binding on the company and all members of the relevant classes, regardless of whether they voted in favour of the scheme or not, once the necessary statutory majorities are achieved, the sanction of the Bermuda court has been obtained and the scheme has been filed with the Bermuda Registrar of Companies.

## Provisional Liquidation

Bermuda's provisional liquidation regime gives companies in financial distress the necessary time and space to implement a restructuring that may return the company to solvency and allow it to carry on business for the benefit of its stakeholders. It is a court-supervised process involving the appointment of independent provisional liquidators to oversee a restructuring process with a view to protecting the interests of creditors.

An application may be made by the company itself or by a creditor, and would typically need to demonstrate that creditors of significant value are supportive of the proposal or have indicated that they are willing to evaluate any restructuring proposal arising out of the provisional liquidation and accordingly do not wish for a winding-up order to be made immediately.

If the court grants the order requested and appoints provisional liquidators, the company obtains the benefit of a moratorium, meaning proceedings may not be brought against it while the provisional liquidators remain in office. This is a valuable protection for companies in the zone of insolvency, where creditor threats to commence winding-up proceedings can distract from the primary task of implementing a financial

or operational restructuring to ensure that the company may continue as a going concern.

## 7.2 Impact of Insolvency Processes

A secured creditor may enforce its security notwithstanding a winding-up order or an order for the appointment of provisional liquidators having been made, unless the company has negotiated a contractual standstill with that creditor.

If a company is wound up, proceedings may not be brought against it, other than with the sanction of the court. Furthermore, any disposition of the property of the company and any transfer of shares – or alteration in the status of the members of the company – made after the commencement of the winding-up shall be void, unless the court orders otherwise. While these provisions do not apply to prevent a secured creditor enforcing its security, they will generally prevent a lender enforcing a payment claim under a loan or guarantee after a winding-up order has been made.

## 7.3 The Order Creditors Are Paid on Insolvency

In an insolvent liquidation, creditors' claims are paid in the following order:

- secured creditors may enforce their security outside of the insolvency process, meaning that they will effectively have recourse to the assets over which they have taken security in priority to all other creditors;
- the costs and expenses of the liquidation, including (if sanctioned by the court) the remuneration of the liquidator, under the Companies (Winding-Up) Rules 1982;
- accrued but unpaid wages and vacation pay, and a severance allowance, payable to employees in Bermuda under the Employment Act 2000;

- preferential payments under the Companies Act, as set out in more detail below;
- if the company is an insurer or reinsurer, the claims of its policyholders or cedants;
- creditors whose claims are secured by a floating charge;
- the claims of unsecured creditors, including any remaining claims of secured creditors to the extent the realisation of security has not discharged such claims;
- post-liquidation interest on such unsecured claims; and
- debts due to shareholders in their capacity as such.

Any surplus remaining after the satisfaction of these liabilities may be returned to shareholders.

The Companies Act provides that in a winding-up the following shall be paid in priority to general creditors and to creditors whose security comprises a floating charge:

- all taxes owing to the Bermuda government and rates owing to a municipality in Bermuda at the commencement of the winding-up;
- all wages or salaries owing to employees of the company in respect of services rendered during the four months prior to the commencement of the winding-up, up to a maximum of USD2,500 per claimant;
- all accrued holiday remuneration payable to any employee on the termination of their employment before or by the effect of the winding-up order or resolution;
- all amounts due in respect of contributions payable during the 12 months preceding the commencement of the winding-up by the company in respect of employee pensions or any contract of insurance; and
- all amounts due in respect of any compensation or liability for compensation under the

Workman's Compensation Act 1965 that have accrued prior to the commencement of the winding-up.

The "insurance debts" of an insurance company (ie, the claims of its policyholders or cedants under reinsurance contracts) rank behind the preferential debts listed above but ahead of general unsecured creditors. If the insurer carried on both long-term (life) and general (property and casualty) business, debts attributable to each business must be paid out of the business fund maintained by the insurer in respect of that business. However, any surplus in a business fund after paying the preferential debts of that business must be applied against unpaid preferential debts of the other business before being used to pay policyholders or cedants of the related business, and any surplus available after paying the policyholder or cedant debts of a business must be applied in a similar way before the general unsecured debts of the business are met.

If the company is a segregated accounts company registered under the Segregated Accounts Companies Act 2000, a liquidator may only apply the assets linked to a segregated account to meet the liabilities of that segregated account, unless the asset or liability is linked to more than one segregated account, in which case the liquidator shall deal with the asset or liability in accordance with the terms of any relevant governing instrument or contract.

## 7.4 Concept of Equitable Subordination

Under the Companies Act, debts owed to shareholders in their role as such (by way of dividends, profits or otherwise) rank behind debts owed to other creditors who are not shareholders. Note that this rule does not extend to all debts owed to shareholders; for example, a shareholder who

has extended unsecured credit to the company will rank alongside other unsecured creditors.

## 7.5 Risk Areas for Lenders

The grounds on which transactions may be vulnerable to challenge upon insolvency are set out below.

### Fraudulent Preference

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

The Bankruptcy Act 1989, to which the above provision refers, provides that every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due in favour of any creditor with a view of giving the creditor a preference over other creditors shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.

The requirement that the offending transaction be made “with a view of giving the creditor a preference over other creditors” means that, in order to set aside a transaction as a fraudulent

preference, the liquidator will need to show an intention to prefer that creditor over others.

### Disposition of Property at an Undervalue with the Intention of Putting it Beyond the Reach of Creditors

Under the Conveyancing Act 1983, every disposition of property (including the creation of a security interest) made with the “requisite intention” (ie, with the dominant purpose of putting the property beyond the reach of a person or a class of persons who is making or may at some time make a claim against him) and at an undervalue shall be voidable at the instance of an eligible creditor thereby prejudiced. An “eligible creditor” for these purposes includes a person to whom, on or within two years after the date on which the disposition is made, the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied.

Note that the application of this provision is not limited to times when the company is insolvent or after a winding-up order has been made. Actions to set aside transfers on this ground must be commenced within six years.

It is not clear whether a liquidator would be able to set aside transactions on this ground, or whether this is merely a remedy available to an unpaid creditor.

### Avoidance of a Floating Charge

Under the Companies Act, where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months of the commencement of the winding-up shall be invalid (unless it is proved that the company immediately after the creation of the charge was solvent), 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, that charge, together with interest on that amount at the then-prevailing statutory rate (currently 3.5%) fixed under the Interest and Credit Charges (Regulation) Act 1975.

### **Disclaimer of Onerous Property**

The Companies Act also permits a liquidator of a Bermuda company to disclaim any property belonging to the company, whether real or personal, including any right of action or right of a contract which in the liquidator's opinion is onerous for the company to hold or is unprofitable or unsaleable. However, such a disclaimer of property requires the leave of the court.

## **8. Project Finance**

### **8.1 Introduction to Project Finance**

Bermuda has historically been and continues to be a well-recognised and robust jurisdiction in the international project finance market, with Bermuda special purpose vehicles used as holding and joint venture vehicles and “off balance sheet” vehicles to finance international projects, most commonly in the transportation and energy sectors. Bermuda's reputation as a well-established, flexible and creditor-friendly jurisdiction sees Bermuda incorporated exempted companies used frequently on diverse forms of international project and asset-based lending structures. The jurisdiction's popularity means Bermuda vehicles are used on a wide range of debt facilities, with transaction structures dictated “onshore” by the specific commercial needs of the parties and the wider risk profile of the project, with varying factors including class of asset, the geo-political landscape of the project jurisdiction and parties' access to capital.

### **8.2 Overview of Public-Private Partnership Transactions**

With Bermuda's small population of approximately 65,000, the island faces some obvious barriers to public-private partnership transactions, such as limited transaction flow and scale. That being said, Bermuda has successfully completed significant infrastructure developments financed through public-private partnerships, most notably the USD285 million development of Bermuda's international airport (the L.F. Wade International Airport), Bermuda's largest to date. The Bermuda government continues to show commitment to public-private partnerships with a number of projects in the pipeline, including the development of Bermuda's first utility-scale solar farm. As expected, Bermuda vehicles are more regularly used on international project finance transactions, as noted in **8.1 Introduction to Project Finance**.

### **8.3 Government Approvals, Taxes, Fees or Other Charges**

No government or regulatory approvals or registrations are required for international project finance transactions. As there is no tax payable in Bermuda for Bermuda exempted companies, sponsors and investors are attracted to Bermuda as a tax-neutral and efficient jurisdiction for structuring international transactions.

### **8.4 The Responsible Government Body**

The government body responsible for local infrastructure projects in Bermuda is the Regulatory Authority of Bermuda (the RA). However, the RA does not oversee or regulate international project finance transactions structured through Bermuda exempted companies.

## 8.5 The Main Issues When Structuring Deals

Bermuda exempted companies are the most commonly used form of vehicle for international transactions. Exempted companies are exempt from the requirement applicable to local companies that at least 60% of the issued shares must be beneficially held by Bermudians, and are exempt from Bermuda taxes and foreign currency restrictions. As described in 5.5 Other Restrictions, the change of ownership of an exempted company requires prior consent from the Bermuda Monetary Authority, although permissions are in place for share security enforcement by a licensed bank or financial institution located in an “approved jurisdiction”.

## 8.6 Typical Financing Sources and Structures for Project Financings

Please see 8.1 Introduction to Project Finance.

## 8.7 The Acquisition and Export of Natural Resources

Please see 8.1 Introduction to Project Finance.

## 8.8 Environmental, Health and Safety Laws

Please see 8.1 Introduction to Project Finance.

Contributed by: Adam Bathgate and Nathalie West, Walkers

Walkers is made up of lawyers drawn from top international law firms, who are regular panel guests and webinar hosts, and actively participate in the major Bermuda industry associations that seek to shape legislation and policy. They provide first-class, commercially focused advice that is attuned to clients' requirements and facilitates their business and professional needs. Clients include global corporations,

financial institutions, capital markets participants, (re)insurers, investment fund managers and high net worth individuals located throughout the world. Walkers' industry experts also regularly advise major Bermuda businesses focusing on – but not limited to – infrastructure, telecommunications, transport, employment and energy.

## Authors



**Adam Bathgate** specialises in banking and finance transactions involving Bermuda companies and partnerships. He regularly advises asset managers, public and private

companies and financial institutions on matters such as leveraged and acquisition finance, syndicated lending, note issuances, securitisations, asset finance and financial restructuring. He also has experience in the field of investment funds, including the formation and ongoing maintenance of private equity, real estate, infrastructure and hedge funds. Adam has a leading role in the establishment of Bermuda as a jurisdiction of choice for blue-chip CLO managers and investors following the inclusion of the Cayman Islands on the EU's AML list, and has played a key role in establishing expedited incorporation and continuation procedures with the Bermuda Monetary Authority and the Registrar of Companies.



**Nathalie West** is senior counsel in Walkers' corporate, finance, funds and insurance group. She advises on a wide range of finance and corporate transactions in connection with

leveraged buyouts, share offerings, bond offerings, subscription finance, securitisations, restructurings, project and infrastructure finance and other complex cross-border financings. Nathalie has extensive experience in leveraged and acquisition financings. She also advises clients across the aviation and shipping industries, including major operating lessors, financiers, airlines and ship operators, as well as acting for leading onshore law firms on a variety of finance, leasing and registration transactions.

Contributed by: Adam Bathgate and Nathalie West, **Walkers**

## Walkers

Park Place  
55 Par La Ville Road  
Third Floor  
Hamilton HM11  
Bermuda

Tel: +1 441 242 1500  
Email: [info@walkersglobal.com](mailto:info@walkersglobal.com)  
Web: [www.walkersglobal.com](http://www.walkersglobal.com)



---

## CHAMBERS GLOBAL PRACTICE GUIDES

---

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email [Katie.Burrington@chambers.com](mailto:Katie.Burrington@chambers.com)