

Forbearance Agreements: Considerations For Debtors And Creditors

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Introduction

- What is a forbearance agreement?
 - a forbearance arrangement between a lender and debtor typically acknowledges that a lender has the right to enforce upon its security at that time but will forbear from doing so for a period of time based upon a number of important considerations.
 - we have also seen in the years and months that have followed the Covid-19 pandemic a greater use and stronger reliance on forbearance agreements by lenders to navigate through the uncertain and challenging economic conditions that the pandemic created for both lenders and borrowers. Entering into forbearance agreements between the lender and borrower over this time frame has proven to be a valuable and pragmatic option to mitigate the impacts the pandemic had on these challenging business circumstances.



Different Purposes For Lenders And Borrowers

For Borrowers:

- Providing more time for the borrower to address its financial and operational issues, including the time to solicit and secure potential sales, re-financing or investment opportunities
- Possibility of continued financing during the forbearance period
- Possibility of revised repayment terms during the forbearance period

For Lenders:

- Obtaining additional collateral, security or guarantees to further or secure the debt
- Potentially enhancing the overall recovery of the file by allowing the borrower time to resolve its issues or by requiring the borrower to engage professional consultants or advisors to assist in identifying solutions to the distressed borrower
- Controlling the direction of the workout by requiring certain actions be taken by the borrower within a specific period of time
- Potentially strengthening the position of the lender if the workout fails by having the borrower acknowledge the debt, the validity of their security interest, the existence of certain defaults under the loan documents and the borrower's lack of any defenses or counterclaims



Essential Terms Of A Forbearance Agreement

- **Preamble and Recitals**

- The preamble identifies the parties to the forbearance agreement, which includes the lender, the borrower and any guarantors.

- **Acknowledgment of Obligations by Borrower**

- This section requires the borrower (and the guarantors, if applicable) to acknowledge that certain defaults have occurred under the loan agreements and acknowledge the validity and enforceability of the loan and security documents.

- **Payments of Debt During Forbearance Period**

- This section outlines the regularly scheduled payments the borrower must make on the existing debt during the forbearance period, including principal, interest and late fees.

- **Additional Security Given by Borrower**

- This section may require the borrower (or the guarantor, as the case may be) to provide additional security, typically in the form of collateral mortgages of land or further guarantees.



Cont. – Essential Terms

- **Forbearance Period**
 - This section outlines the forbearance period which typically ends by the earlier of a specified date or the occurrence of an event of default under the forbearance agreement. A typical forbearance period is less than one year.
- **Suspension of Limitation Periods During Forbearance Period**
 - The forbearance agreement should include a provision that the debtor agrees that any applicable limitation period, whether under *The Limitations Act*, SS, 2004, c L-16,1 or otherwise, shall not run during the forbearance period.
- **Events of Default**
 - This section specifies the events that allow the lender to terminate its obligations to forbear and exercise its rights.



Cont. – Essential Terms

- **Rights and Remedies Upon Default**

- If an event of default has occurred, the lender has the right to exercise the remedies provided for in this section, which include, but are not limited to, the termination of the forbearance period.

- **Conditions Precedent**

- This section provides for the conditions that the borrower (and, guarantors, if applicable) must meet before the forbearance agreement becomes effective.

- **General Provisions**

- This section includes the boilerplate provisions that one would normally find in a standard forbearance agreement.





Promises To Waive Statutory Rights: The *SFSA*

- *The Saskatchewan Farm Security Act, SS, 1988-89, c S-17.1.*
 - Pre-action proceedings for farm mortgages
 - Prohibition on costs and fees
 - Protections for homesteads
 - Regime for the seizure of farm implements
 - Exemptions
- **No Waiver of the *SFSA***
 - Waiver of protections is null and void: section 105(2)
 - The exception and the exception to the exception: section 105(4)





Promises To Waive Statutory Rights: The *Interest Act*

- Section 8(1) of the *Interest Act*, RSC, 1985, c I-15

No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

- Waiver and Forbearance

- Waiver of section 8 is prohibited: *Moore v Rosenberg*, 206 ACWS (3d) 416, 2011 CarswellOnt 9156
- A higher rate of interest during a forbearance period does not offend section 8: *Stawro v Mayfield Holdings Inc.*, 2016 ONCA 710; *Monk Development Corporation v CVC Ardellini Investments Inc.*, 2019 ONSC 127



Judicial Commentary: Consideration

- A promise to forbear is good consideration
 - *Versatile Credit Corp v Rak*, 7 ACWS (3d) 447, 1987 CarswellSask 829
- Does actual forbearance constitute consideration?
 - Yes, in Ontario: *Royal Bank v Kiska*, [1967] 2 OR 379-393, 1967 CarswellOnt 125 (CA)
 - No, in British Columbia: *Canadian Imperial Bank of Commerce v Cedar Hills Properties Ltd.*, 70 ACWS (3d) 1085, 1997 CarswellBC 1557 (CA)





Judicial Commentary: Limitation Periods

- Does a forbearance agreement suspend limitation periods at common law?
- The Law in Ontario and Alberta
 - *Hamilton (City) v Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156
 - *Sucker Creek First Nation v Canada (Attorney General)*, 2013 ABQB 199
- Uncertainty in Saskatchewan
 - *Superior Canadian Livestock Auction Ltd. v Stewart*, 2014 SKQB 394
 - Forbearance agreements should expressly provide for the suspension of limitation periods