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SIMPSONS SOLICITORS
Level 2, Pier 8/9 23 Hickson Road Millers Point NSW 2000 Sydney
Phone +61 2 8014 5050 Fax +61 2 8014 5060
www.simpsons.com.au

CHAPTER THIRTEEN: LOAN AGREEMENTS[1]

1. Introduction

Before using this chapter it would be wise to have already considered the issues set out in Chapter 15 and, in particular, to have given thought to the checklist for loan agreements. Checklists such as these are an invaluable risk-management tool when drafting agreements because they help you to ensure that the agreement contains everything you need. Given that we usually work from an earlier document (a precedent) it is an understandable temptation simply to review what is already there: it is much harder to recognise what should be there but is not. For this reason, the prudent drafter will always use a checklist of issues as an aid to memory. Checklists are invaluable drafting tools and you should personalise them so that they cover everything relevant to your needs.

2. Form of documentation

There are two basic styles of loan-in agreement: one can be described as ‘body heavy and annexure light’ and the other, ‘body light and annexure heavy’. There is no right or wrong approach; it is a matter of preferred style.

2.1 *Annexure heavy*

Some borrowers put as much of the detail as possible into the annexures. In some cases, the first section of a loan-in agreement is little more than a cover sheet with a place to sign. All the details are in the annexures.

The first annexure may set out all the unique details of the loan: the names of the lender and borrower (together with details of the the contact people); a description of the objects being loaned; the purpose of the loan; the value of the objects and so on. This allows all the matters that will vary from loan to loan to be provided without the need to vary that part of the document that sets out the rights and obligations that govern the loan. Keeping the variables in a separate annexure facilitates the administration of the loan and makes it easier for computerisation of the loan details, thus improving administration during the period of the loan. Indeed, in many cases, the first annexure may be generated from within the lending institution’s object management database.

The second annexure may set out all the substantial (and largely immoveable) legal rights and responsibilities. In these cases, the legal matters appear “standard”, less overwhelming and (perhaps) less negotiable than when they are set out in the body of an agreement. Their legal effect is the same: it is a matter of psychology, style, and administrative convenience.

Intellectual Property. Entertainment. Publishing. Media. Visual Arts & Design. Museums & Galleries. Litigation.

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2.2 *Annexure light*

Some borrowers, however, find that the use of annexures is daunting for lenders – particularly where the lender is not another institution. Where material is borrowed from members of the public, a bulky contract full of legalese creates an unnecessary psychological hurdle in the loan process. The simpler the form and the language, the easier it is for the lenders to understand the terms of the loan and the easier it is for them to agree to those terms.

2.3 *"Battle of the forms"*

It is reasonably standard practice between institutions for the lender's loan document to be used to govern a loan. An institution's incoming loan agreement will generally be reserved for cases where the loan is from a private collector.

It is perhaps a regrettable reality that in many, if not most, cases, the out-going and incoming loan agreements offered by collecting institutions are markedly different. Where loans take place between reputable institutions, it is surprising that the lender seeks to impose more onerous obligations than they would be prepared to accept under their incoming loan agreement. Why is it that when we lend our own assets we want maximum protection but when we borrow the assets of others, we want wriggle room? The contradiction of logic is obvious.

In a commercial context, this approach is understandable, but in the case of collecting institutions, where lenders are borrowers and borrowers are lenders, it makes sense to have a uniform approach to such obligations so that the administrative procedures are uniform, allowing the staff to be more certain of what is expected of them.

There is no rule as to how this is resolved. Sometimes the owner insists that the use of their contract must be used; sometimes the larger institution simply dominates over the smaller organisation.

It is even more regrettable – and a recipe for complete legal chaos – when the borrowing institution signs the out-going agreement offered by the lending institution and the lending institution signs the incoming loan agreement offered by the borrowing institution. In these cases, there may be wide and perhaps irreconcilable conflicts between how the two documents deal with issues. In short: do not do this! If you have, you will need to cross your fingers and hope that nothing goes wrong, because if it does, the only people to benefit will be the lawyers! It means that, in effect, there is no written contract of loan at all, because the terms of the transaction are conflictual and uncertain. This is what we call *The Scream* ...

Let's be clear. In every loan transaction, there is an owner who is entrusting its asset into the hands of the borrower. Why not acknowledge the obvious? It will save a lot of negotiation time (and avoid your being tempted into *The Scream*) if your incoming agreement is consistent with your out-going agreement.

2.4 *Battling "cut and paste" syndrome*

One of the dangers with model or template agreements is that they suffer from "cut and paste" syndrome: the busy Collections Manager or Registrar takes the last contract they used and amends it for the present loan; then takes that amended document for the next one and makes changes … and so on.

Of course, all model or template contracts should be seen as living creatures that can be improved by experience but sometimes, the changes are not deliberate improvements. More commonly, after a while, the integrity of the original document is compromised in ways that are not obvious to the non-lawyer.

To avoid this, the Christchurch Art Gallery adopted what at the time was an unusual but excellent risk management strategy. The body of the standard agreement remains intact and unamended from loan to loan. However, where individual transactions require that the standard terms be amended, a Variation Agreement is entered. This is a very simple strategy that ensure that the lender can be confident in the integrity of the basic terms of the contract and, if the negotiation requires amendments to be made, they are made in an obvious, deliberate way that will not, by oversight, carry forward into future transactions.

Our description of the contract as being "a living creature" is intended to recognise that contracts should be regularly reviewed in light of experience from use.

All contracts benefit from this but it should be treated as a deliberate process: are there things that are regularly changed in the Variation Agreement that would be best taking up in the standard agreement? The organisation's lawyer should check those changes before being put into effect.

3. Matters to be covered in incoming loan agreements

Matters to be covered in loan agreements, whether for art or the sciences, will include:

- details of the parties (including contact details for the individuals handling the matter and in case of emergencies and an obligation to notify any changes to these);
- the object/s that are subject to the loan;
- the loan start and finish dates;
- the purpose of the loan;
- whether or not conservation treatment by the borrower is permitted (noting also that a borrower may usually be permitted to undertake certain emergency steps – such as fumigation in the case of pest infestation);
- details of any copyright owner (if known);
- how costs are to be borne (including for packing, any warehousing, shipment, conservation and so on);
- who is responsible for packing both at the start and end of the loan;
- courier and shipping arrangements;
- condition reporting (including when this is to occur and who is to undertake this);
- who is responsible for international and Australian customs clearances (usually the borrowing institution will be responsible for the latter, though the lender may be responsible for the former, in which case they will be obliged under the loan agreement to provide copies of relevant documentation to the borrower);
- what is to happen in the event of damage (usually, a clause dealing with this will include obligations to document the damage and report it to the other party and to the custodial institution's insurers);
- where within the borrowing institution the object is to be displayed while it is on loan, and whether the borrower is obliged to display it throughout the loan period (including whether they must return it if, for some reason, it is not displayed or taken off display);
- the value of the object and the basis of the valuation (for example, market or retail replacement value);
- which party will be responsible for insuring the object (usually, the borrowing institution will be responsible for insuring the object "wall to wall" and against "all risks", subject to the exclusions usually apply to such policies);
- any limitation on the borrowing institution's liability;
- how the loan will be credited (for example, in any exhibition or catalogue or publicity);
- copyright and reproduction rights; and
- what will happen if the lender cannot be contacted at the end of the loan period.

The loan agreement will also usually contain "boilerplate": what law will apply; how the parties will attempt to settle any disputes before one or other party can go to court; that the agreement is the whole agreement; and so on.

4. Comments on particular clauses in inward-loan agreements

The following are some of the issues that deserve to be highlighted: not all necessarily should be included – but they should be considered.

4.1 *Lender notifications*

One common matter that would be a beneficial inclusion in most agreements is a clause that obliges the lender to advise the borrower if there is any change in address of the lender or change of ownership of the borrowed material. Many borrowers have faced difficulties when, at the end of the loan period, they discover that the material has been sold, the lender has died, gone bankrupt, gone into liquidation or simply moved.

The borrower needs to know that the person giving it instructions has the authority to do so (and the basis of that authority) and needs to be assured it is returning the loan to the appropriate person, entity and place. It is exposing itself to a potential claim for negligence if it does not do so and including such notice requirements alleviates some of that risk. If the lender fails to provide such notice to the borrower in breach of its obligations under the agreement, it is more difficult for it to allege negligence on the part of the borrower.

4.2 *Copyright*

Where the loan is of material in which copyright subsists, most agreements should contain a provision that articulates the borrower's rights to exercise any of the rights that are the exclusive property of the copyright owner. Can it be reproduced in the catalogue, on the web site, in advertising for the show, for teaching purposes, for archival purposes? If so, what are the limits of that permission? Too often, the copyright clauses in loan agreements are too bland and without sufficient detail to act as tools that facilitate or maximise the opportunities of the loan.

It is also important that some enquiry be made as to the basis upon which the lender has made the claim of ownership of copyright. All too often, the owner mistakenly assumes that it is the owner of copyright and grants the borrower rights that it does not have. When dealing with non-sophisticated lenders it is well worth including a question in the pre-loan negotiations along the following lines: "Are you the owner of copyright in the work? If so, what is the basis of your ownership of copyright?". Such a question will assist the borrower ascertain the validity of the claim. If the answer to the second question is '"Because it owns the work", the borrower knows that it cannot rely on the claim of copyright and the permissions that flow from it.

Where the lender does claim to be the owner of copyright it is also worth including a simple clause that states: "If the Lender is not the owner of copyright in respect of any of the Works that are subject to this agreement, the Lender warrants that he/she has obtained all necessary permissions". This is simple risk management: sometimes, no matter how careful the borrower is and how honestly and fervently the lender believes in its ownership of copyright, the lender may be sued by a third party who believes that they are the real owner of the rights. The inclusion of a warranty such as this means that the borrower can then look to the lender for the costs and damages incurred as a result of its breach.

In an age of smartphones (and visitor resentment of any restrictions on their "right" to use them), a borrowing institution dealing with a copyright owning lender should also resist agreeing to any liability for third-party photography and consider whether the loan agreement should articulate that the borrowing institution has no liability for photos taken by members of the public and posted by them (for example) to social media.[2]

4.3 *Period of the loan*

Although most lenders and borrowers think that this is clear in all loan agreements, often it is not. Absolute clarity as to the commencement of the loan is essential because this is the moment that risk transfers to the borrower. All standard loan agreements should be reviewed to ensure that this apparently simple feature is clearly established.

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[2] We deal with this issue in more detail in our chapter on copyright but, in brief, an institution may have limited liability for visitor photography unless it positively encourages it. Absent that, it would generally be difficult to show that an institution has a copyright liability merely because visitors take photos on their devices or that an institution has a positive obligation under the *Copyright Act* to invigilate against infringements.

More commonly, loan agreements do not sufficiently specify the end of the loan period. This is particularly important in situations in which the loaned material is not collected or is unable to be returned.

First, at the end of this period, the borrower's legal duty of care owed to the lender should reduce to those of an involuntary bailee.

Second, it is the date of the end of the loan from which all notice periods will need to be calculated. For example, if the agreement contains a provision that allows the borrower to warehouse, sell or acquire the abandoned material, the borrower must be able to comply meticulously with its time-based obligations and be able to show exactly upon what dates it acquired which rights.

4.4 *Return of the loan material*

As is discussed in the previous chapter, many institutions are plagued with the problem of uncollected loans – material that can never become part of the collection but which the organisation is obliged to store, insure and administer. Given that all public institutions need to maximise the effectiveness of their limited resources, it is a waste.

As also discussed in the previous chapter, it is essential that borrowers fully consider their resources (including their ability to warehouse materials) and then include full and favourable clauses that articulate their rights over uncollected or undeliverable loan material.

4.5 *Catastrophe*

As hard as one might try to avoid them, accidents do happen. People are thoughtless or ignorant. The elements wreak their havoc. Whatever the reason, all borrowers are familiar with the dreaded situation in which loaned material suffers damage.

It is good practice to include a provision that provides an agreed mechanism that will be carried out in such situations. A simple version of this might be set out in the body of the loan agreement, but where the procedure is more complex, it is best handled as a schedule to the agreement.. To work out what procedures are appropriate, think of the loan agreement as a risk management tool, and make sure the procedure is as clear and as useful as possible.

5. Loan-out of collection material

The museum's collection is its core business. Moreover, the items that make up the collection are often of considerable monetary, social, spiritual or intellectual importance. They are often unique and easily damaged or destroyed. Accordingly, when collection items are allowed out of a museum, it can only be in circumstances in which all aspects of the transaction are highly controlled. The loan-out agreement is the very heart of the risk management regime and every prudent owner will need to ensure that its asset is treated in a way that reflects the value and importance of that asset.

Lending collection material may also allow the lending institution to gain particular benefits from the loan. For example, where a natural science museum lends a quantity of material to a researcher, it may require that the researcher give the museum a copy of any resulting research results or article and, further, that the researcher use the museum's numbering when referring to the museum's objects. Similarly, where the loan material is largely unidentified or classified, the museum may require that all data be made available to the museum. In this way, the researcher benefits from having access to the public asset and the public interest is promoted by the enhancement of publicly available knowledge[3]

Just as with incoming loan agreements, outward loan agreements need to take into account the nature and particular characteristics of the transaction and of the material being loaned.

The concerns of a loans officer in an art museum will have some resonances for the loans officer in a natural history museum: the generic issues will be consistent. However, the natural history loan agreement will (as a

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[3] If the researcher is not prepared to agree to the release of information because of its potential for commercialisation, the museum should consider entering a commercialisation agreement in respect of the project.

matter of day-to-day practice) have greater emphasis on quarantine obligations, the prohibition or regulation of destructive testing, the mechanisms required by CITES legislation and the risk management procedures required by the sometimes hazardous nature of the collection materials (or storage media such as ethanol). Each collection type imposes its own requirements on the loan-out agreement.

The issues relevant to the loan-out agreement are, of course, no different from those discussed in relation to loan-in agreements: the positions are merely reversed.

Each party will consider such issues from its own point of view. Yet the loan-out agreement seems to attract more time and care from collection managers and registrars than the loan-in documentation. Curious. So, if you are reading this chapter because you want to review your loan-out agreement, please take one step back and start by reading the early part of this chapter relating to incoming loans!