d-FINANCE NEGOTIATION (PART II)

In our continuation of d-Finance bargaining, **EFA Partners** offers exhibitors some more useful tips on confidently negotiating loan and lease documentation.

So, you've decided to seek a loan or lease-financing facility to grow your business. And, armed with valuable information from our previous article (*Screentrade* February/March 2011, pp64-65), you approach several financiers eager for your business and confidently negotiate proposal terms. Then, having selected a financing partner offering favorable terms, you get a commitment letter outlining the deal. Now, the only thing standing between you and your needed funding dollars is the credit documentation. No problem, since your attorney can handle that, right? While you should, of course, have your counsel review the many legal points in your paperwork, do understand that typical commitment letters only provide an *outline* of your financing terms and that there still will be many business points to negotiate during the documentation process. Stay involved and recognize that financiers will often agree to revise many sections of their standard documents.

LOAN DOCUMENTATION

There are many business points in standard loan documentation that are subject to negotiation and samples of these include the following:

- **Financial Covenants** – Loans will typically require that certain performance measurements be maintained such as minimum annual EBITDA or minimum fixed charge coverage. Such levels should enjoy a significant cushion, compared to projections, so that loans are not declared in default when performance is slightly lower than anticipated.
- **Landlord Waivers** – For operators of several leased theatres, financiers will require that landlords waive or subordinate their property liens. It may not be realistic for all landlords to provide these on a timely basis so financiers will often agree to reduce the number of waivers necessary.
- **Collateral Requirements** – Many loans will require a lien on all assets of the business which can be troublesome when seeking additional financing, such as equipment leases. To avoid this, a reasonable 'carve-out' should be provided for leases based on future equipment needs.
- **Capital Expenditures** – Financiers may require their approval for any future capital expenditures; however, they will often agree to a limited amount that can be purchased without their consent.
- **Prepayment Penalties** – Loans often require a penalty payment in the event borrowers decide to voluntary prepay loans during the early years. While lenders typically won't eliminate these, they may agree to reduce them.
- **Ongoing Requirements** – For requirements such as provisions to deliver financial statements within a specified time-frame, loans should provide that such time-frames are realistic.
- **Required Lenders** – For loans with multiple lenders, approval for minor loan revisions should not require unanimous consent of all lenders.

EQUIPMENT LEASE DOCUMENTATION

Equipment lessors should have room to revise several sections of their standard lease documents. Some of these include the following:

- **End of Lease Purchase or Renewal Options** – Make sure the document language mirrors your understanding of the options referenced in the proposal letter.
- **FMV Determination** – For leases that provide you with a fair market value (FMV) purchase-option at lease expiration, the methodology to determine this should be defined rather than assuming a negotiation with the lessor, so include language that offers the input of independent appraisers.
- **FMV Cap** – In addition to the above, many lessors will agree to a predetermined cap on the fair market valuation amount.
- **Equipment Return Provisions** – For leases giving the lessee the option to return the equipment at lease maturity, the equipment must often be returned to any location designated by the lessor. This should be narrowed to a reasonable radius from the equipment location to reduce shipping costs.
- **Notice Periods** – Leases often require 180 days advance notice of the decision to either purchase or return leased equipment. Since lessees may be unsure of this decision until a later date, request a shorter notice period such as 90 days.
- **Early Termination** – Many leases do not clarify the final payment necessary for terminating leases prior to maturity or, if such payment is specified, it includes a significant penalty. Be sure to include language that clarifies this issue.
- **Tax Indemnification** – For leases that provide lessors with tax benefits, push back on requirements that provide that lease terms can be altered if tax regulation changes reduce the lessor's yield.

***EFA Partners**, based in New York and Atlanta, is a specialized advisory and consulting firm focused on providing financial services to the Film & Leisure sectors.*
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