



Taking Security in Africa

A Comparative Guide for Investors

ABOUT THIS GUIDE

In light of Africa's sustained economic growth over the last decade, the continent has become an increasingly attractive destination for investment.

However, to a foreign investor, assessing legal risk requires an understanding of the laws and the legal system particular to the jurisdictions in which the investment is being made. The many different legal systems of the continent's 54 countries and its regional blocs can be confusing. Africa's complex legal system and the limited information about how those systems apply to foreign investments are increasingly seen as obstacles to investment.

Latham & Watkins has produced *Taking Security In Africa – A Comparative Guide For Investors* to provide an overview of the types of assets over which security can be taken, the different types of security, as well as the related procedures for the perfection and enforcement of such security in Africa. This first series focuses on nine of the most active jurisdictions for foreign direct investment on the continent: Egypt, Ethiopia, Ghana, Kenya, Mauritius, Mozambique, Nigeria, South Africa, and Uganda, and has been compiled based on information provided by some of the leading law firms in those jurisdictions.

Latham & Watkins aims to update this guide to cover all African jurisdictions.



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EGYPT

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Egyptian financings?

Shares

A share pledge may be taken over shares in an Egyptian company, by the pledgor and pledgee entering into a share pledge agreement.

Bank Accounts

Although security over bank accounts is not specifically regulated under Egyptian law, customary practice permits cash deposits in designated bank accounts to be pledged if the account holder and the account bank enter into a pledge agreement.

Land

Security over immovable property may be taken by way of an official real estate mortgage over land, buildings, and/or buildings under construction.

Contractual Rights

Security can be taken over contractual rights by way of assignment pursuant to an assignment agreement. Such an assignment agreement must bear a certified date (e.g., by notarisation) in order to be effective against third parties.

Insurance Proceeds

Security may be taken over insurance proceeds by two means:

- By way of assignment; and
- By endorsement of the insurance policy, which is the method used more commonly in practice.

Authorisations and Licences

Governmental authorisations and licences are issued on the basis of “personal consideration” (*intuiti personae*) under Egyptian law. Accordingly, security may not be taken over such authorisations or licences unless approval is obtained from the competent regulatory authority responsible for issuing such authorisation or licence.

Intellectual Property

Intellectual property such as trademarks, patents and industrial designs are included in a person’s *fonds de commerce*, which may be mortgaged through a *fonds de commerce* mortgage.

Personal Property and Tangible Assets

Security may be taken over movable property by way of a possessive pledge or a *fonds de commerce* mortgage.

Aircraft and Ships

- **Aircraft:** security may be taken over aircraft by way of an official mortgage document, executed before the administrative authority entrusted with the registration of aircraft.
- **Ships:** security may be taken over vessels and vessels under construction by way of mortgage.

Can security be taken over future assets?

Egyptian law prohibits the grant of security over future assets other than rights which have effectively arisen but are not yet due, which may be assigned. By way of example, a pledge over cash deposits in a bank account may be invalidated on the grounds that such pledge covers future money, which may or may not be available at the time of execution of the pledge, unless the pledge agreement includes an assignment of the pledgor's rights in the account.

Are there any restrictions on who can legally grant and/or hold a security interest?

Any natural person with full capacity to dispose of assets may legally grant and/or hold a security interest. Any company may grant and/or hold a security interest, subject to any restrictions in its constitutional documents.

Egyptian law prohibits the creation of security over any asset which may not be disposed of legally. This includes public monies, namely all real estate and movable property which is designated for the public benefit and owned by the state or public legal persons.

Are security trustees or security agencies recognised under Egyptian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Egyptian law does not recognise the concept of a security trustee. However, the appointment of a security agent is common, especially in the context of syndicated loan agreements. The role, duties and rights of a security agent are regulated by contract, since Egyptian law does not stipulate further requirements as to the enforceability of a security agent's right in security.

What about third party security?

Third party security is permissible and the entity granting such security may receive a commercial benefit for doing so, however, in case no commercial benefit is obtained, the security grant will be considered a gratuity and shall be subject to provisions regulating gratuity.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

To perfect a pledge over shares that are deposited with the Misr for Central Clearing, Depository and Registry (MCDR) (which includes all shares that are listed on the Egyptian Stock Exchange (EGX) as well as some unlisted shares), the MCDR must be notified of the relevant share pledge so that the MCDR can annotate the share pledge on the MCDR's records.

To perfect a pledge over shares that are not deposited with the MCDR, the share certificates must be transferred to the lender or its third party custodian. The share pledge must then be annotated on the share certificates and the relevant shareholders' ledger.

Bank Accounts

A pledge of cash deposits in a bank account is perfected through the account bank annotating the pledge in its records.

Land

A real estate mortgage is perfected through registering the mortgage (which must be in the correct written form) with the competent notary public office.

Contractual Rights

To perfect an assignment as against the contractual counterparty, the latter must be notified of (or must otherwise acknowledge) the assignment. To perfect an assignment as against third parties, the assignment must bear a certified date.

Insurance Proceeds

To perfect an assignment of insurance proceeds as against the relevant insurer, the latter must be notified of (or otherwise acknowledge) the assignment. To perfect an assignment as against third parties, the assignment must bear a certified date.

Intangible Assets and Intellectual Property

A *fonds de commerce* mortgage is perfected through registration with the notary public and annotation on the mortgagor's commercial register.

Personal Property and Tangible Assets

- **Possessive pledge:** assets subject to a possessive pledge must be transferred to the creditor in order to perfect the pledge.
- **Fonds de commerce mortgage:** a *fonds de commerce* mortgage is perfected through registration with the notary public and annotation on the mortgagor's commercial register.

Aircrafts and Ships

- **Aircraft:** mortgages over aircraft are perfected through an official document written and executed before the administrative authority entrusted with the registration of aircraft. The mortgage must be registered in the aircraft register.
- **Ships:** a maritime mortgage over a vessel or vessel under construction must be registered at the vessels' registry.

What are the fees, costs and expenses associated with creating and perfecting security in Egypt?

- **Mortgage registration fee:** a fee cap of EGP 100,000 is legally applicable to, and payable in respect of, the registration of a mortgage in the event that such mortgage grants a security interest to a bank. The registration fee shall be determined as follows:
 - EGP 25,000 – if the value of the mortgage does not exceed EGP 10 million;
 - EGP 50,000 – if the value of the mortgage does not exceed EGP 20 million;
 - EGP 75,000 – if the value of the mortgage does not exceed EGP 30 million;
 - EGP 100,000 – if the value of the mortgage exceeds EGP 30 million.
- **Notary public fees:** such fees are payable if involvement of a notary public is required as part of any formalities required in connection with the perfection of a security interest (e.g., the establishment of a date certain).
- **Stamp duty:** stamp duty of EGP 0.9 per page is payable on any document which is to be [used] in Egypt. Use of the document entails using it to exercise any function that should or is intended to render its legal effect(s). Further, if the relevant document was issued offshore and was brought into Egypt to be used, the stamp duty shall be due upon its use. In respect to credit facilities and loans presented by banks every quarter in addition to the initial balance of the relevant quarter, they are subject to a proportional stamp duty equivalent to 0.001 every quarter.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

Security over a single asset may be granted to more than one creditor.

- **Registrable security interests:** for a security interest that must be registered (such as real estate and fonds de commerce mortgages), the priority of creditors is determined according to the date and time of registration or annotation.
- **Non-registrable security interests:** for a security interest that is not subject to registration (such as bank accounts, movable property, insurance proceeds and assignment of contractual rights) the priority of creditors is determined according to the certified date obtained on the underlying documentation.
- **Shares not deposited with the MCDR:** security over such shares may be granted to more than one creditor through the annotation of subsequent pledges on the share certificates. The priority of creditors will be determined based on the annotation date. While legally permissible, it is not customary for security over such shares to be granted to more than one creditor.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

- **Commercial mortgage:** In order to enforce a commercial mortgage the pledgee must first request payment of the secured debt from the mortgagor, usually through service of an official notice through a court bailiff. If the pledgor does not pay the secured debt within five days following such request, the pledgee may apply to the competent court for a sale order in relation to the pledged assets. Unless otherwise ordered by the court, the sale must be carried out by way of public auction.
- **Fonds de commerce mortgage:** In order to enforce a commercial mortgage the mortgagee must first request the payment of the secured debt from the mortgagor (as well as any other person in possession of the mortgaged asset), usually through service of an official notice through a court bailiff. If the mortgagor does not make payment within eight days of such notification, the mortgagee may submit a petition to the summary judge requesting the sale of the mortgaged asset through public auction. The judge will specify the date and time of the public auction.
- **Real estate mortgage:** In order to enforce a real estate mortgage, a payment default with respect to the secured debt must first have remained outstanding for a period of 30 days, then the mortgagee must request the mortgagor to make payment of such secured debt within a further 60 days. The notification is usually through service of an official notice through a court bailiff. If the mortgagor does not make the due payment, the mortgagee may request the competent judge to issue an exequatur (execution order) of the mortgage agreement as well as an order for seizure of the secured asset. The mortgagee must then notify the mortgagor of the exequatur and grant the mortgagor a period of 30 days in which to make the payment. The exequatur is annotated by the competent notary public. If the mortgagor fails to make the due payment, the secured asset will be sold by public auction under the supervision of the enforcement judge.
- **Share pledge:** In order to enforce a share pledge, the pledgee must first request payment of the secured debt from the pledgor, usually through service of an official notice through a court bailiff. If the pledgor does not make payment within ten days after notification, the pledgee may enforce its rights over the shares in accordance with the EGX sale and purchase rules.
- **Bank account pledge:** In order to enforce a bank account pledge, amounts in the pledged accounts or pledged deposits may be set off against amounts owed by the pledgor to the pledgee. The rights subject to a set-off must be undisputed in order for the application of the set-off.

Are any governmental or other consents required in connection with the enforcement of any category of security interest?

No governmental or other consents are required in connection with the enforcement of any category of security interest.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Egypt?

There are no restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Egypt.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

The Egyptian bankruptcy regime is set out in the Egyptian Commercial Code. Under the Commercial Code bankruptcy proceedings may only be declared by virtue of a court order at the request of the debtor, any of its creditors, or the public prosecutor. The debtor's right to submit such request in order to file for its own bankruptcy is limited to merchants, whether natural persons or legal entities (the latter category to include companies, branches and agencies), who practice their activities in Egypt.

To file for its own bankruptcy, a merchant must submit a request to the competent court within 15 days of the date of the default in paying due amounts for reasons attributable to the merchant's business conditions. This request must include the merchant's commercial records and documents, the reasons for its default, the names and addresses of its debtors and creditors, the amount of debt owed and the security on such debt.

In order to file for its debtor's bankruptcy, the creditor must deposit its statement requesting all necessary protective measures to be taken as well as any evidence for its debtor's refrainment of payment of due debts at the clerk's office in the competent court accompanied by an amount equivalent to EGP 1,000 to meet the costs of publishing the bankruptcy court order. The clerk's office shall then decide upon the soonest hearing and notify the debtor.

Are “company rescue” or reorganisation procedures available?

Protective composition proceedings prior to a declaration of bankruptcy are available. To be eligible to benefit from such proceedings, the relevant person must: (a) have been a merchant for a minimum period of two years prior to filing; (b) be suffering from a turbulent financial status; and (c) be unable to pay due debts for reasons attributable to this turbulent financial status.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

As soon as the court declares a merchant bankrupt, all his debts will be considered due. A creditor who has security over the bankrupt merchant's movable or immovable property is entitled to enforce such security, and is not placed in the group of unsecured creditors.

Where a secured creditor is not able fully to recover the debt after enforcement of security, such creditor is entitled to join the group of unsecured creditors, and will hope to obtain the remaining debt due from the proceeds of liquidation of the bankrupt merchant's assets. The bankrupt merchant's assets will be divided by the number of creditors, each according to the percentage of that creditor's debt.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Any security granted by the bankrupt merchant from the date on which such merchant has stopped making any payments that are due and payable to its creditors will be unenforceable.

Egyptian law provides for liens of higher priority which will be enforced before any other security. These liens of higher priority vary depending on the nature of the secured asset, especially depending on whether the asset is movable or immovable property.

- Certain preferential creditors must be accounted for in the order of priority in respect of liens attached to movable property that are subject to enforcement. Examples of such preferential creditors are:
 - Amounts Paid To Keep And Maintain The Debtors' Movable Assets;
 - Amounts Due To The Treasury, Including Taxes And Fees;
 - Any Amounts Due To The Seller Of The Movable Asset Subject To Enforcement; And
 - Any Amounts Due To The Partners Who, Along With The Debtor, Own The Movable Asset Subject To Enforcement.
- Certain preferential creditors must be accounted for in the order of priority in respect of liens attached to immovable property that are subject to enforcement. Examples of such preferential creditors are:
 - Amounts due to the seller of the immovable property and its fixtures and fittings (subject to satisfaction of registration requirements);
 - Amounts due to contractors and architects who built the immovable asset subject to enforcement; and
 - Amounts due to the partners who, along with the debtor, own the immovable asset subject to enforcement.

Can debt owed by a company to a creditor be contractually subordinated to debt owed by that company to another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

Egyptian law does not specifically regulate the subordination of debt. In practice, creditors enter into subordination agreements. The treatment of such agreements in the case of the bankruptcy of the debtor has not been sufficiently tested.

How is priority among secured parties determined on the insolvency of the debtor?

Priority among secured parties is determined in the same way as described above.



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ETHIOPIA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Ugandan financings?

Shares

Security over shares can be taken by way of a share pledge agreement.

Bank Accounts

Security over the proceeds of a bank account can be taken by way of agreement between creditor and pledgor (subject to the prior approval of the account bank — which is generally a purely administrative process). The pledgor will typically transfer a sum of money equal to the value of the security interest into a blocked account.

Land

In general, security cannot be granted over land because there is no private ownership of land in Ethiopia. However, an investor can provide security over a leasehold land interest by way of mortgage, provided that any such mortgage in respect of urban land is limited to the extent of the lease amount already paid.

Contractual Rights

There is no explicit legislative provision that allows security to be taken over contractual rights in general, except for security taken over public contracts from a contractor or subcontractor approved by the administrative authorities. It is also possible that security over contractual rights can be granted by way of an assignment, unless such assignment is forbidden by law, the contract, or the very nature of the transaction. The pledgor must provide consent in order for the creditor (also in its capacity as assignee) to take possession of the asset received in pledge.

Insurance Proceeds

Security over a life insurance policy at surrender value can be taken by way of pledge agreement or endorsement at the back of the insurance policy.

Authorisations and Licences

There is no law regarding the creation of security interests over rights arising under authorisations or licences.

Intellectual Property

Security can be taken over patents, copyrights and other intellectual properties by way of business mortgage. However, there is no legislation governing the ability to take security over incorporeal rights of intellectual property separated from the relevant good or tangible asset. There are no provisions for taking security over patents and copyrights in Ethiopian legislation.

Personal Property and Tangible Assets

Security can be taken over personal property and tangible assets.

Can security be taken over future assets?

Security cannot be taken over future assets.

Can security be taken generally over all of a person's/entity's assets or is it necessary to take security over each individual asset, or each class of assets, separately?

Security can be taken over all or part of a group of assets depending on the terms agreed by the parties. Pledges can be used for movable assets, and mortgages can be used for fixed assets (and may cover multiple fixed assets under a single mortgage).

Are there any restrictions on who can legally grant/hold a security interest?

As a general rule, any person that has the capacity to dispose of an asset or right can grant a security interest in that asset or right. However, there are some restrictions on the issuance of security depending on the issuer and the security instrument. For example, debentures cannot be issued by individuals; companies with capital that is not fully paid; and companies that have not issued a balance sheet in respect of their first financial year. Private limited companies cannot issue transferable securities in any form. Farmers and pastoralists cannot use their land as security when taking a mortgage, subject to regional nuances.

Are security trustees or security agencies recognised under Ethiopian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Although the concepts of a "security trust" or "security agency" are not expressly provided for under Ethiopian law, pursuant to the law of contracts and agency, the relevant parties are free to agree and enter into a private contract in which one or more individuals or entities are identified or nominated as security agents to hold security for lenders. Further, the parties to the security agreement can agree to allow the third-party security agent to handle possession of the pledged property.

What about third-party security?

Under Ethiopian law, a person can grant security over his/her assets to secure the existing, future, or conditional obligations of a third party through agreement of suretyship, pledge, or mortgage. However, a person can secure a third party's debt by way of mortgage only in cases where he or she is entitled to dispose of the immovable asset gratuitously at the time of such mortgage agreement.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Bank Account

To perfect a security interest in a bank account, a notice of the security must be given to the account bank, which then provides its approval to validate the security. Moreover, the account bank can issue a letter of guarantee on behalf of the pledgor to the creditor. For example, the bank may provide a letter on behalf of the bank account holder to secure the appropriate discharge of security. The pledgor typically deposits a sum of money equal to the value of the secured amount to a blocked account, which cannot be accessed until the security is discharged. During such time, the account bank will continue to pay interest on the blocked account.

Shares

To take security over shares, an entry should be made in the register kept at the head office of the company. The shareholders themselves (i.e., not the pledgee) must represent the pledged shares at the annual general meeting of the company.

Contractual Rights and Life insurance

Security over any instrument bearing a contractual claim can be taken in a similar fashion to the assignment of rights by analogy in the Civil Code through a separate agreement. Life insurance must be delivered to the pledgee or the third party named in the contract of pledge if the claim or right pledged is established by such instruments.

Land and Other Immovable Properties

Under Ethiopian law, mortgages over a lease (periodical usufruct), right of land, or any other immovable asset such as real estate must be registered at the applicable lands or immovable properties registry. There is no applicable time limit, although mortgages are only effective upon registration, and the date of registration determines the order of priority between the mortgages. Notably, the registry authorities are obliged to register the mortgage immediately when all legal formalities are satisfied.

Personal Property

- **Pledge:** Under Ethiopian law, a pledge requires the transfer of actual or constructive possession of existing movable property.
- **Mortgage:** Any mortgage agreement should be in written form and should specify, in Ethiopian currency, the amount secured by the mortgage agreement. A special power of attorney is necessary in instances in which the agent is required to sign on the client's behalf. The registration of a mortgage is effective for 10 years from the day that the entry was made.
- **Business Mortgage:** Businesses consisting mainly of goodwill; incorporeal elements such as copyright and patents; and corporeal elements such as goods, should be registered by the appropriate federal or regional authority and given a business licence in order to be eligible for mortgage.
- Any business mortgage should be registered upon the request of an interested party by filing the two copies of the registration application form that are prepared by the registration authority. The applicant should also attach the contract and any other evidence that forms the basis of the registration request.

What are the fees, costs, and expenses associated with creating and perfecting security in Ethiopia?

Stamp Duty

- Stamp duty is payable on all security deeds at the rate of 1% on the value secured by the security document. The stamp duty is payable before or on the date of signing of the security deed. The debtor bears the stamp duty cost unless otherwise agreed. In exceptional circumstances, an exemption from paying stamp duty may be obtained from the Minister of Finance upon application.
- Stamp duty should also be payable on notarial acts, contracts, agreements, and memoranda thereof, at the nominal flat rate of 5 Ethiopian birr (ETB). Separately, power of attorney stamp duty is charged at the nominal flat rate of ETB35, bonds at the rate of 1%, and documents of title to properties at the rate of 2% (as applicable).
- The amount of stamp duty is calculated using an applicable average value of the stock or security at such time as the instrument is created if an instrument is chargeable with stamp duty on an ad-valorem basis in respect of any stock or of any marketable security.
- Any person executing or signing (excluding witnesses) a stamp duty chargeable document who does not pay or fraudulently seeks to avoid paying stamp duty may face criminal punishment in the form of: (i) a fine of an amount between ETB25,000 and ETB35,000; and (ii) a term of imprisonment between 10 and 15 years. Further, the security document may not be validly registered and will be deemed inadmissible in the Ethiopian courts.
- Fees for the registration of a mortgage and related services, which can be determined by the appropriate authority, are payable based on the Commercial Code.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

Bankruptcy in Ethiopia is governed by the fifth book of the 1960 Commercial Code.

- The scope of application of the bankruptcy legal regime covers any trader as defined in Art. 5 of the Commercial Code and any commercial business organizations, excluding joint ventures. Commercial business organizations include: private limited companies, companies limited by shares, limited liability partnerships, and general partnerships.
- The insolvency of public companies differs from the insolvency of their private counterparts due to the special features of public companies. Such special features include: (i) their establishment by regulation, rather than memorandum of association; (ii) the determination of their composition by the board and special law, rather than the commercial law; and (iii) their state ownership, rather than private ownership. However, the umbrella insolvency provisions of the commercial code apply to public enterprises.
- Bankruptcy can be instituted by way of petition made by: the debtor, one or more creditors, the public prosecutor, or the court itself.
- The competent court may declare bankruptcy of a company if there is suspension of payment or if the company is no longer able to meet its commitments relating to its commercial activities. The factual declaration of bankruptcy without court judgment has no legal effect in Ethiopia.
- There is no provision for a discharge in Ethiopian bankruptcy law. A bankruptcy proceeding cannot be closed and the debtor is not restored to his or her full rights unless the debtor proves that either: (i) all the creditors who have proved claims have been paid, or (ii) the trustees have been deposited with a sufficient amount to pay all creditors.

Are “company rescue” or reorganisation procedures available?

Yes, such procedures are available under the Commercial Code in the form of a ‘composition’ or a ‘scheme of arrangement’, but the procedures are burdensome and sometimes difficult to implement.

Are there any entities excluded by law from bankruptcy proceedings?

Non-commercial business organizations, i.e., ordinary partnerships, are excluded from Ethiopian bankruptcy law.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

No court, governmental, or other consents are required for enforcement of security.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Ethiopia?

There are no such restrictions.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

No, a secured creditor will still be able to enforce its security. In the case of a pledge, the trustees may at any time pay for and redeem the property pledged for the benefit of the estate.

Are there any preference periods, claw-back rights, or preferential creditors' rights that creditors should be aware of?

There are no preference periods. In fact, all proceedings for proving debts must be concluded no later than five months from the date of the judgement in bankruptcy. Such period may be extended by the commissioner in exceptional cases. Claw-back rights depend on the nature of the transaction and the good faith of the parties. For instance, the rights of creditors of a bankrupt party cannot be affected by the following transactions if such transactions are performed between 15 days before the date of suspension of payments (factual bankruptcy) and the date of adjudication of bankruptcy (real bankruptcy):

- Gratuitous assignments
- Payments of debts not due whether in cash or by assignment, sale, set-off, or otherwise
- Payments of debts due otherwise than in cash, by negotiable instrument, or by transfer to a bank
- Securities set up on the property of the debtor in respect of debts contracted before the setting up of such securities

Moreover, the trustees might request the invalidation and raise a claw-back right of payments made by the debtor for all acts of consideration entered into by the debtor after the date of factual bankruptcy, if the counterparties receiving payment or dealing with the debtor had prior knowledge of the factual bankruptcy.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

No, there is no contractual subordination in Ethiopian law.

How is priority among secured parties determined on the insolvency of the debtor?

After the deduction of costs, expenses, and sums applied for the support of the debtor or the debtor's family, the priority of creditors can be selected among secured parties by the decision of the commissioner when the trustee brings the list of creditors. Hence, the preference is:

- Taxes and labour-related obligations
- Prior secured creditors
- Preferred creditors
- Unsecured creditors



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TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Ghanaian financings?

Shares

Security can be taken in the shares of a company incorporated in Ghana by way of a charge.

Bank Accounts

Security can be taken over bank accounts by way of a charge.

Land

Security over land can be taken by way of a mortgage. A mortgage does not transfer title in the land to the secured party. The Mortgages Act 1972 (NRCD 96) governs the procedure for creating a mortgage.

Contractual Rights

Security over a person's rights under a contract can be taken by an assignment of the relevant rights in favour of the secured party. Depending on the terms of the underlying contract, the security assignment may require the contract counterparty's prior approval or notification.

Insurance Proceeds

Security over proceeds from an insurance policy can be taken by way of a charge over, or by way of an assignment of, the relevant insurance contract.

Authorisations and Licences

Rights arising under authorisations and licences can be charged or assigned by way of security to a secured party. However, many authorisations and licences (such as oil mining licences, mining permits, electricity generation and distribution licences and rights under petroleum agreements) are considered to be personal to the beneficiary or licence holder, and therefore, will prohibit the holder from assigning, charging or otherwise encumbering such authorisation or licence without the issuing authority's prior consent.

Intellectual Property

Security can be taken over patents, trademarks, copyright and designs by way of a charge or an assignment by way of security. Security also can be taken over an intellectual property license, in the same way as any other contract, as described above.

Personal Property and Tangible Assets

Security in the form of a charge, a pledge or an assignment may be taken over personal property such as merchandise/goods.

Can security be taken over future assets?

Security can be created in respect of future assets either by way of a floating charge over a specified category of assets or by way of a fixed charge (in which case, the future assets in question must be clearly identifiable). In the case of a fixed charge, the security interest attaches to future assets as soon as the charger acquires such assets, but the security interest is deemed to have been created on the date on which the security instrument was executed. Note that security cannot be created over a person's future interest in land.

Are there any restrictions on who can grant and/or hold a security interest?

There are no specific restrictions under Ghanaian law regarding persons who can grant or hold a security interest; provided that the grantor of the security interest holds the necessary title to the assets to be secured and has the power and authority to enter into the relevant security documents.

Are security trustees or security agencies recognised under Ghanaian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Security trustees and security agents are recognised under Ghanaian law, and a security trustee or agent may be appointed to hold security on trust on behalf of multiple lenders, or classes of lenders, or other secured parties. If a security trustee or agent is validly appointed, no additional steps are required for the trustee or agent to be recognised under Ghanaian law and, provided that any security interests granted in favour of that trustee or agent have been properly perfected, the trustee's or agent's rights regarding the security interests should be enforceable.

What about third-party security?

Under Ghanaian law, a company can grant security over its assets to secure the obligations of a third-party, provided the necessary authorisations and consents are obtained, and the company's constitutional documents do not prohibit or restrict the grant of such security.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

A charge over shares is created by the execution of the share charge and perfected upon the stamping and registration of the share charge. To facilitate enforcement of the share charge in accordance with its terms, the chargor is typically required to deposit its share certificates with the secured party, along with a signed and undated share transfer form in which the name of the transferee is left blank. The share certificate and the blank share transfer form enable the secured party to enforce the security by transferring the shares to a third-party, without the involvement of the charger, upon the expiration of a 30-day statutory notice period.

Bank Accounts

In the case of a fixed charge, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the chargee's consent. With a floating charge, the chargor is permitted to retain control of the charged accounts unless and until the charge converts into a fixed charge following the occurrence of a "crystallisation" event (as described in the account charge document).

Land

An instrument creating a mortgage over land in Ghana must be in writing and be signed by the mortgagor (or mortgagor's duly appointed agent). The mortgage must state the name and address of the mortgagor and the mortgagee, the nature of the mortgagor's interest, the identity and location of the mortgaged land and the secured amount. In addition, the mortgagor must execute the mortgage before (i) a Commissioner of Oaths if executed in Ghana, or (ii) a public notary if executed outside Ghana.

An instrument creating a mortgage over land in Ghana must be filed at the Land Registration Division of the Lands Commission under the terms of either the Land Registry Act 1962 (Act 122) if the land is within a non-registration district, or the Land Title Registration Law 1986 (PNDCL 152) if the land is in a registration district. As at the date of this note, the registration districts are Accra, Tema, Kumasi and parts of Winneba. This filing can only be made once any applicable stamp duty has been paid in respect of the instrument.

Furthermore, the Lands Commission's consent is required for the creation of a mortgage over land the State owns. In all other cases, subject to the terms of the relevant lease, the lessor's consent may be required in order to create a mortgage over land that is subject to a lease.

Contractual Rights and Insurance Proceeds

In order to perfect an assignment of contractual rights, notice of the security interest must be given to the counterparty of the underlying contract. The failure to give notice to such counterparty does not invalidate the security assignment. If notice is not given, the assignor must be joined to any enforcement proceedings unless the court holds that to join the assignor to such proceedings will be impossible or impracticable.

In an assignment of the right to receive proceeds under an insurance policy, this means giving notice to the relevant insurer.

An acknowledgment from the counterparty of the notice of assignment is not required as a matter of law. However, secured parties usually require the assignor to procure an acknowledgment of the notice of assignment in an agreed form, including a confirmation from the contract counterparty or insurer that it has not received notification of any prior assignment or security interest in respect of the underlying contract.

When taking security over an insurance policy, and/or the proceeds therefrom, to have the secured party endorsed as an additional loss payee on the insurance policy is also prudent.

Authorisations and Licences

Provided any necessary consent from the relevant issuing authority has been obtained, the assignment can be perfected in the same manner described above for assignments of contractual rights.

Note, even if the issuing authority's consent is not required to create security over the authorisation or licence, consent may still be required to effect a transfer of such authorisation or licence upon an enforcement.

Intellectual Property

As with other contractual rights, the licensor must be notified of any assignment of rights under an intellectual property license agreement.

What are the fees, costs and expenses associated with creating and perfecting security in Ghana?

Stamp duty: Security documents must be stamped prior to registration within 28 days of execution (whether executed in Ghana or not). In the event of a delay in registering a security document, an extension of time to register the security document may be obtained from the High Court of Ghana. The extension is typically granted as a matter of course except if granting an extension will prejudice the legitimate interests of a third-party.

Subject to certain exceptions, the stamp duty payable on the principal security document in a transaction is 0.5% of the secured amount. A rate of 0.25% of the secured amount is charged for every additional security document. In practice, a security document is usually submitted to the stamp duties office for an assessment of the applicable stamp duty prior to payment of the duty and the stamping of the document.

By statute, transactions involving the governments of certain countries or certain multilateral financial institutions such as the International Finance Corporation, African Export-Import Bank and Africa Finance Corporation, are exempt from stamp duties.

In addition to any stamp duty that is payable, a nominal administration fee is payable on presentation of a security document to the stamp duties office.

- **Collateral Registry registration:** After stamping, under the Borrowers and Lenders Act 2008 (Act 773), any security document or instrument a company creates must be registered at the Collateral Registry within 28 days of creation. A failure to register a security document with the Collateral Registry may render the security interest void.

Nominal fees usually below US\$100 are payable.

- **Companies Registry registration:** After stamping, the particulars of any security document creating security over the assets of a Ghanaian registered company must also be registered at the Companies Registry under the Companies Act 1963 (Act 179). The security document must be registered at the Companies Registry within 28 days of the creation of the security interest. A failure to register a security document with the Companies Registry may render the security interest void.

Nominal fees usually below US\$100 are payable.

- **Lands Commission registration fees:** Applicable fees depend on the size of the land over which security has been created, but the fees are not significant.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors. In such a case and in the absence of any agreement between the secured parties to the contrary, priority among the security interests will depend on the type of security interest and/or the security's date of creation.

Generally, the earlier created security interest ranks ahead of the later one. However, if a security interest is required to be registered with the Collateral Registry, Companies Registry or Lands Commission, a registered security interest has priority over an unregistered security interest.

Regarding assignments of contract rights, the timing of notification to the counterparty determines the priority of assigned interests.

A fixed charge on an asset and a security assignment would typically both have priority over a floating charge over the same asset, unless the terms of the floating charge prohibit the company from granting security that will have priority over the floating charge, and the new secured party has notice of the prohibition.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

The Borrowers and Lenders Act 2008 (Act 773) provides that prior to enforcement of security, the secured party must deliver a 30-day notice of default to the borrower and allow the borrower 30 days to remedy the breach. The notice of default must be registered with the Collateral Registry, and should contain the date of default under the relevant finance document(s) and the date on which the borrower receives the notice. After the 30-day period, the registrar of the Collateral Registry will issue a certificate confirming the enforcement of security.

Other than with respect to land (on which see below), all realisations of charges over non-cash assets must be by way of auction sale.

Any disposal of land subject to a mortgage is typically permissible only under a court- approved sale arrangement or by an out-of-court auction organised in accordance with the Auction Sales Act 1989 (PNDCL 230).

The net proceeds of enforcement must be distributed in the following order — amounts:

- Required to discharge reasonable costs the chargor incurred in realising the security;
- Required to discharge legal expenses to the extent the credit agreement permits
- Required to discharge the secured obligations
- The borrower owes to persons who have a subordinate charge in the secured assets
- The borrower owes any other person who has given the secured party notice of its interest in the secured assets

The balance of net proceeds, following these distributions, must be returned to the borrower.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Out-of-court enforcement regarding any asset is generally permitted under Ghanaian law. Governmental consents are only required prior to enforcement of security if the security is granted over an asset in which a Ghanaian governmental or statutory authority has an interest, or is in respect of a governmental authorisation or license.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Ghana?

Generally, there are no restrictions on who can enforce a security interest over assets in Ghana, provided that the person seeking the enforcement is the secured party, its trustee, agent, assignee, successor or transferee. From a practical perspective, a secured party that is a foreign entity can require a local receiver to act on its behalf.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

This section 4 deals with bankruptcy and insolvency as it applies to incorporated companies only.

Primary legislation for bankruptcy and insolvency in Ghana in respect of limited liability companies is contained in: (a) Act 179 which applies to voluntary insolvency (also referred to as private liquidations), and (b) the Bodies Corporate (Official Liquidation) Act 1963 (Act 180) which applies to an insolvent company (the Company Insolvency Rules).

- **Members' voluntary winding up / private liquidation:** Voluntary liquidation is only available if the company is solvent. The members of a company may wind up the company if the:
 - Directors swear an affidavit that the company is solvent
 - Company passes a special resolution to wind up the company voluntarily, with the resolution providing for the appointment of the liquidator

After the company's debts have been paid, the company's number is struck off the Companies' Register with notice published in a public gazette.

- **Creditors' winding up:** If a company is insolvent, its liquidation must be by official liquidation whereby the company may be placed into receivership or be wound up by its creditors. Under Ghanaian law, official liquidation may be commenced by either:
 - A special resolution of the company
 - A petition to the Registrar of Companies by a company member or creditor
 - Conversion from a private liquidation (where it is determined that the company cannot, in fact, pay its debts)
 - A petition to the court by a member, creditor or Registrar of Companies

Note, the Company Insolvency Rules do not apply to statutory corporations or State-owned entities, which instead must be wound up by a legislative instrument issued by the President.

Winding up or insolvency registers

Searches can be conducted at the superior court registries as well as the Companies Registries in respect of insolvency proceedings. Note, these registries are not available electronically or over the telephone.

Are “company rescue” or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Ghanaian law allows for a company to enter into an arrangement and compromise with its creditors, or undertake corporate restructuring. A company, for example, can enter into a scheme of arrangement with its creditors to reorganise the company's share capital or restructure its debts, including by debt-for-equity swaps. Not less than 75% of the company's shareholders and creditors, present and voting at their respective meetings, must approve a scheme of arrangement. The High Court must also sanction the scheme.

Will the commencement of insolvency proceedings against a grantor of security affect a secured party/creditor's ability to enforce the security interests granted to it by that company?

Generally, an asset that is assigned or over which a fixed charge is created is not considered part of the company's assets for insolvency purposes. In this regard, insolvency proceedings will not affect a creditor's right to enforce its security. However, a company's assets that are subject to a floating charge will form part of the pool of assets the official liquidator will distribute during insolvency. Thus, preferred creditors such as employees and tax authorities will be paid before the floating charge holders are paid. The ability of a floating charge holder to enforce its rights over the security without recourse to the official liquidation process is, accordingly, significantly restricted.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

- **Fraudulent preference:** The Company Insolvency Rules address situations in which a debtor may be deemed to have fraudulently ranked a creditor above other creditors in view of a forthcoming insolvency or bankruptcy proceedings.

Any charge registered after insolvency or winding up proceedings have commenced will be deemed to have been made with the intention of securing a preference for that creditor to the detriment of other creditors, and the liquidator may claw back the secured asset.

- **Floating charges:** Any floating charge on the undertaking or property of a company created within 12 months prior to the commencement of winding up proceedings against that company will be void unless one can prove that the company was solvent immediately after the charge was created.
- **Preferential creditors' rights:** Payments accruing to the company's preferential creditors have priority over any claim for principal or interest due on debts secured by a floating charge. Statutorily preferred debts include (i) remuneration not exceeding GHS6,000 owed to an employee in the four months preceding the commencement of the winding up, and (ii) tax liabilities owed to the State or a local authority that have become due.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

A debt a company owes a creditor can be contractually subordinated to a debt which that company owes other creditors, and contractual subordination ordinarily is recognised and enforceable under Ghanaian law. Such a contractual agreement should be respected upon the company's insolvency.

How is priority among secured parties determined on the insolvency of the debtor?

Priority between creditors will be as follows:

- Secured creditors holding a fixed charge
- Preferential creditors
- Creditors with floating charges
- Unsecured creditors



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KENYA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Kenyan financings?

Shares

Security over shares in a Kenyan company can be taken by way of a charge or a deposit of share certificates:

- **Charge:** Security over shares can be taken by way of a fixed or floating charge.
- **Deposit of share certificates:** Where shares have not been dematerialised, security can be taken over such shares by depositing the relevant share certificates with the secured party.

Bank Accounts

Security over the proceeds of a bank account is taken by way of a fixed or floating charge.

Land

Security can be taken over land by way of a charge, or a deposit of title deeds with the secured party.

Contractual Rights

Security can be granted over contractual rights by way of a fixed or floating charge or an assignment, in each case provided that there is nothing in the relevant contract that prohibits the granting of such security.

Insurance Proceeds

Security over proceeds from an insurance policy can be taken by way of a charge over, or by way of an assignment of, the relevant insurance contract.

Authorisations and Licences

Security can be taken over authorisations and licences by way of a fixed or floating charge or an assignment, in each case provided that there is nothing in the relevant contract, licence or authorisation that prohibits the granting of such security or assignment thereof.

Many authorisations and licences (such as oil mining licences, mining permits, electricity generation and distribution licences and rights under petroleum agreements) are considered to be personal to the beneficiary or licence holder and therefore will prohibit the holder from assigning, charging or otherwise encumbering such authorisation or licence without the prior consent of the issuing authority.

Intellectual Property

A company will typically take security over trademarks, copyrights and other intellectual property by way of a fixed or floating charge.

Personal Property and Tangible Assets

Security in the form of a fixed or floating charge or a pledge may be taken over personal property such as merchandise/goods.

Special rules apply regarding the taking of security over aircraft and ships.

Can security be taken over future assets?

Security can be created over future assets.

Are there any restrictions on who can legally grant and/or hold a security interest?

Generally, a company may grant or hold a security interest provided the company has sufficient capacity and authority. More restrictive regimes apply to certain types of companies, such as insurers and statutory corporations.

There are certain restrictions on the acquisition of shares by non-Kenyan nationals in certain types of companies, such as listed companies (i.e., listed on the Nairobi Securities Exchange), insurance companies and private companies that own agricultural land.

Are security trustees or security agencies recognised under Kenyan law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Security trustees and security agents are recognised under Kenyan law, and a security trustee or agent can be appointed to hold security for the benefit of lenders and other secured parties. If a security trustee or agent is validly appointed, no additional steps are required for the trustee or agent to be recognised under Kenyan law. Provided that the security granted in its favour has been properly perfected, the trustee's or agent's rights regarding the security interest should be enforceable.

What about third-party security?

Under Kenyan law, a person or entity can generally grant security over its assets to secure the obligations of a third-party. Regarding Kenyan companies, the ability to grant security over a company's assets to secure the obligations of a third-party is permitted only to the extent the company's constitutional documents authorise it to do so and the grant is for the company's commercial benefit. A shareholders' resolution is also required for a public company or a company connected to a public company.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

- **Registration:** For shares that are listed on the Nairobi Securities Exchange and have been dematerialised, security over those shares should be registered in accordance with the provisions of the Central Depositories Act 2000 by the delivery to the chargee of a prescribed form. The latter requirement is in addition to the process of registering a charge at the Companies Registry. The chargee is required to send the form to the Central Depository and Settlement Corporation via a central depository agent. The Central Depository and Settlement Corporation will record the security interest and freeze the shares in the chargor's account. This additional process is not required for a floating charge over listed shares.

Alternatively, the Registry may issue a letter confirming that the charge is not registrable. In such a case, the company secretary of the chargor should undertake not to allow the chargor to deal with the shares and note the charge in the chargor company's register of members.

- **Deposit of share certificates:** The terms of the deposit, enforcement rights and rights to return of the shares upon satisfaction of the underlying debt should be set out in a memorandum of deposit, accompanying the share certificate. The chargor must deliver the share certificates (and accompanying memorandum of deposit) and a signed but undated share transfer form to the chargee.
- **Power of attorney:** The chargor must grant and deliver an irrevocable power of attorney to the chargee.

Bank Accounts

In the case of a fixed charge, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the chargee's consent. With a floating charge, the chargor is permitted to retain control of the charged accounts unless and until the charge converts into a fixed charge following a specified event occurring as set out in the account charge documents.

Land

- **Charge:** The charging instrument must be in a prescribed form. Third-party consent may be required prior to creation of the charge in certain cases, *e.g.*, charges over leasehold property, land leased from the Kenya Railways Authority or the Kenya Ports Authority, or agricultural land.

A charge over land must be registered at the applicable Lands Registry. There is no applicable time limit, although charges are only effective upon registration, and the date of registration determines the priority between charges. Registration will be carried out once the Registry receives three original copies of the charging instrument, the completed prescribed form, and a nominal fee per document and per title.

If the chargor is a company registered in Kenya, the charge over land must also be registered at the Companies Registry.

- **Deposit of title deeds:** The grantor of the security interest is required to deposit the title deeds with the secured party.

Contractual Rights and Insurance Proceeds

Notice of the security interest must be given to the counterparty of the underlying contract. For an assignment of insurance proceeds, this means giving notice to the relevant insurer.

The failure to give notice to a counterparty does not invalidate the security assignment; it may however, affect the priority of the security interest.

Authorisations and Licences

Provided any necessary consent from the issuing authority has been obtained, the assignment can be perfected in the same manner described above. Importantly, even if the issuing authority's consent is not required to create security over the authorisation or license, consent may still be required to effect a transfer of the authorisation or license upon an enforcement.

Intellectual Property

As with other contractual rights, the licensor must be notified of any assignment of rights under an intellectual property license agreement.

Personal Property and Tangible Assets

- **Charge:** The charge must be registered at the Registrar of Chattels within 21 days of the charge's creation via the delivery of the original charging instrument attached to an Affidavit of Due Execution in a prescribed form, and a schedule of the property charged and a nominal fee paid. This registration must be renewed every five years.
- **Pledge:** The pledgor must deliver possession of the personal property to the pledgee.
- **Mortgage:** The process of perfecting a mortgage over personal property is the same as that outlined in above.
- **Ships and aircraft:** For aircraft, a security interest is noted on the certificate of registration, which is issued by the Kenya Civil Aviation Authority and registered at the International Registry of Mobile Assets (and the Companies Registry, if the chargor is a company registered in Kenya). For ships, registering the security interest at the Kenya Maritime Authority is recommended.

What are the fees, costs and expenses associated with creating and perfecting security in Kenya?

- **Stamp Duty:** Subject to certain limited exemptions, stamp duty is payable on all security documents. The stamping process must be completed within 30 days of executing the document (or, if the security was executed outside Kenya, within 30 days of the security document entering into Kenya). The person taking security bears the costs related to stamp duty. However, the parties usually agree to have the security provider bear these costs. The failure to stamp a security document can result in a fine, inability to register the security document, and the security document being declared inadmissible in court.

Stamp duty is typically payable at the rate of 0.1% of the amount secured by any principal security document. Stamp duty is payable on supplemental security documents at the nominal rate of KES20 (US\$0.25).

- **Companies registry:** After stamping, all registrable charges and mortgages a Kenyan company creates must be registered at the Companies Registry within 30 days of creation (*i.e.*, typically the charging instrument's date of execution) via the delivery of the original charging instrument, the completed prescribed form and fee of KES600 (US\$7).

Section 878 of the Companies Act 2015 (the Companies Act) lists the types of charges and mortgages that are registrable.

Charges over assets situated in Kenya, and created by a foreign company with a place of business in Kenya, must be registered at the Companies Registry within 21 days. Registration is effected by the delivery of a notarised copy of the charging instrument, a completed prescribed form and the payment of a registration fee (as stated above) to the Companies Registrar.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors.

For a security over land, date of registration determines priority among creditors. The creditor who is registered first has priority over the other creditors.

For security over other types of assets, either date of creation and registration of the security, or the date on which notice is given to a third-party, determines priority among creditors.

Creditors can also enter into a security sharing agreement in which they agree to disregard priority as determined by the date of registration, and instead, agree to prioritise their security as set out in the security sharing agreement.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

When a debenture is used to create a security interest, the terms of the debenture will typically set out the enforcement procedure and provide for the appointment of a receiver and/or manager to undertake the procedure.

In a charge over shares, a chargee would enforce by using the power of attorney and share transfer form (both granted to it by the chargor upon perfection) to transfer the shares to itself or a nominee. The chargee must then stamp the share transfer form and notify the Companies Registry of its newly acquired interest in the shares. Finally, the company secretary of the company whose shares were transferred must register the chargee in the company's register of members.

The Land Act (Number 6 of 2012) and the Land Registration Act 2012 govern enforcement of a charge over land. The chargee can commence enforcement proceedings only if the chargor has been in default for a month or more. The chargee must then serve notice upon the chargor to cure the default. If the default has not been remedied within two months (or three months, if there has been a payment default), the chargee may then either:

- Sue for the amount due
- Appoint a receiver of the income from the property
- Lease the land
- Take possession of the land
- Sell the land by private contract or public auction

However, remedies (a) and (d) described herein are not applicable if the land is considered to be customary or community land. Currently, there is a requirement to issue a notice in a prescribed form to carry out the remedies set out in (b) through (e); however, the prescribed form has not yet been determined, and consequently, the ability to enforce charges over land is uncertain at this time.

If the chargee elects to sell the land by private contract, the chargee must give the chargor 40 days' notice. A sale by auction requires the auctioneer to give the chargor 45 days' notice and to advertise the sale publicly. In either case, the chargee must obtain a "forced sale valuation" of the land. The chargee is under a legal duty to achieve the best price reasonably obtainable at the time of sale.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Land Control Board consent is required for any lease or sale of agricultural land. Otherwise, out-of-court enforcement of security is generally permitted under Kenyan law.

In cases where a creditor has taken security by way of a deposit of an ownership instrument, the creditor must obtain permission from the courts prior to possessing or selling the secured land.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Kenya?

There are no such restrictions.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

Insolvency in Kenya is governed by the Insolvency Act 2015.

This section deals with bankruptcy and insolvency law as it applies to incorporated companies only. This section does not cover the insolvency of statutory corporations, banks or insurance companies, which are subject to special insolvency legislation under the laws that regulate the licensing of such institutions.

- **Members' voluntary liquidation:** The members of the company in a general meeting must appoint one or more liquidators for the purpose of liquidating the company's affairs and distributing its assets.

Upon the liquidator's appointment, all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance. A liquidator will then be appointed to conduct the formal winding-up of the company.

Only an insolvency practitioner is eligible for appointment as a liquidator.

As soon as practicable after the company's liquidation is complete, the liquidator must prepare an account of the liquidation showing how it has been conducted and how the company's property has been disposed (the Liquidator's Account). Within 30 days of preparing the Liquidator's Account, the liquidator must convene a general meeting of the company and the company's creditors. The liquidator must ensure that the notice for the meeting is published once in the Kenya Gazette, once in at least two newspapers (circulating in the location of the company's principal place of business) and on the company's website, and specify the time, date, place and purpose of the meeting. Within seven days of the meeting, the liquidator must lodge with the Registry a copy of the Liquidator's Account together with a return giving details of the holding of the meeting and the meeting date.

- **Creditors' voluntary liquidation:** The creditors and the company can nominate an authorised insolvency practitioner to be the liquidator for the purposes of liquidating the company's affairs and distributing its assets.

The requirements for a meeting and for a Liquidator's Account.

- **Liquidation by court:** A company may be wound-up by petition to court if:
 - The company is unable to pay its debts as they fall due
 - The company passes a special resolution that it be liquidated by the High Court
 - At the time which a moratorium for the company ends, an agreed voluntary arrangement does not have effect regarding the company
 - Except for a private company limited by shares or by guarantee, the number of members is reduced below two
 - Being a public company that was registered as such on its original incorporation, (A) the company has not been issued with a trading certificate, and (B) more than 12 months have elapsed since it was so registered
 - The company fails to commence its business within a year of its incorporation or suspension of its business for one year or longer
 - The court decides that winding up the company is just and equitable
 - The Attorney-General makes an application to that effect

Winding up or insolvency registers

The Official Receiver must maintain a public register of undischarged and discharged bankrupts, debtors subject to current summary installment orders and persons admitted to (and discharged from) the no-asset procedure.

Are “company rescue” or reorganisation procedures available?

Yes, such procedures (in particular, administration and company voluntary arrangements) are available under the Insolvency Act 2015.

- **Administration:** A company is put under administration when an administrator is appointed over it. An administrator may be appointed by the courts, by the holder of a floating charge or by the company or its directors. In all instances, the administrator must be a qualified insolvency practitioner and will be regarded as an officer of the court.

The main objectives of administration are to maintain the company as a going concern and to achieve an outcome for the company’s creditors that would be better than a liquidation of the company. The administrator will typically develop a plan of action to rescue the company while the administration order is in effect and will act in the best interest of all the company’s creditors.

Once an administration order is made, a moratorium comes into effect and a creditor may only take steps to enforce security with the consent of the administrator or with the court’s approval. While an administration order is in effect, an application for the liquidation of the company cannot be made and any pending application for liquidation will be suspended.

While a company is under administration, the administrator shall ensure that all business documents issued by or on behalf of the company or the administrator, state the name of the administrator and that the affairs and property of the company are being managed by the administrator.

- **Company voluntary arrangements:** The directors of a company may make a proposal to the company and to its creditors for a voluntary arrangement in respect of the company’s debts and financial affairs. An authorised insolvency practitioner must be appointed to supervise such an arrangement. Such voluntary arrangements may also be proposed by an administrator if a company is in administration or by a liquidator if the company is in liquidation.

When a company enters into a voluntary arrangement, a moratorium takes effect. The company is restricted from obtaining further credit and/or paying its liabilities during the moratorium. The company’s creditors will require the court’s approval to enforce security over the company’s assets or to commence proceedings against the company.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

No, a secured creditor will still be able to enforce its security.

However, if a company is under a moratorium, a secured creditor must first seek court approval to enforce the creditor’s security.

Are there any preference periods, claw-back rights or preferential creditors’ rights that creditors should be aware of?

- **Preferential creditors’ rights:** Preferential creditors include (in order of priority): reasonable costs of the liquidator; wages and salaries; and government taxes.
- **Fraudulent preference:** Any transfer, conveyance, mortgage or charge, delivery of goods, payment, execution or other act relating to the debtor’s property occurring six months or less before the commencement of insolvency proceedings, and that had as its motive the favouring of one creditor’s interest over others’, may be set aside as a fraudulent preference.
- **Floating charges:** Floating charges over a debtor’s assets created within 12 months of the presentation of a winding-up petition may be invalidated unless the chargee was solvent immediately after the creation of the charge. There is an exception such that the invalidation of a floating charge will not affect a creditor’s ability to claim amounts of cash paid to the chargee (plus interest at the prescribed rate) subsequent to, and in consideration of the creation of the charge.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

Debt a company owes a creditor can be contractually subordinated to debt owed to other creditors, and contractual subordination is typically recognised under Kenyan law in the event of insolvency.

How is priority among secured parties determined on the insolvency of the debtor?

Priority between creditors will be as follows:

- Secured creditors holding a first fixed charge
- Preferential creditors
- Creditors with floating charges
- Unsecured creditors



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MAURITIUS

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Mauritian financings?

Shares

Security over the shares of a Mauritian company can be taken by way of a pledge or fixed charge

Bank Accounts

Security over a bank account is typically taken by the accountholder assigning its rights and interest in that bank account to the secured party or by way of a pledge.

Land

Security over land is taken by way of a mortgage or a charge (typically a fixed charge, but a floating charge can also be used)

Contractual Rights

Security over rights arising under a contract or an agreement can be taken by way of a pledge, a charge (if the beneficiary is an *Institution Agréées*) or an assignment.

Insurance Proceeds

Security over insurance proceeds can be taken by way of a fixed or floating charge (if the beneficiary is an *Institution Agréées*), an assignment or a pledge.

Authorisations and Licences

A security interest cannot be created over rights arising under authorisations or licences.

Intellectual Property

Security can be created over intellectual property or other intangible assets by way of a fixed or floating charge (if the beneficiary is an *Institution Agréées*) or a pledge.

Personal Property and Tangible Assets

Security over personal property can be taken by way of a charge (if the beneficiary is an *Institution Agréées*) or a pledge.

Can security be taken over future assets?

Security can be taken over future assets by way of a floating charge or pledge of receivables.

Are there any restrictions on who can legally grant and/or hold a security interest?

As a general rule, any person having the capacity to dispose of an asset or right can grant a security interest in that asset or right.

The nature of the security interest usually will determine who can legally hold that security interest. For example, certain security interests like certain share pledges can be created only in favour of banks established in Mauritius, while others such as fixed and floating charges can be created in favour of *Institution Agréées* (being entities involved in the provision of finance or banking services generally).

Are security trustees or security agencies recognised under Mauritian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Security trustees and security agents are recognised under Mauritian law, and a security trustee or agent can be appointed to hold security in trust on behalf of lenders and other secured parties. If a foreign security trustee or agent is validly appointed, no additional steps are required for Mauritian law to recognise the trustee or agent. In addition, provided that the security granted in favour of a trustee or agent has been properly created and perfected, the trustee's or agent's rights regarding the security interest should be enforceable. The Financial Services Commission must license any local entity acting as a security trustee.

What about third-party security?

Under Mauritian law, a person can grant security over his or her assets to secure the obligations of a third-party. If a person grants a fixed or floating charge over his or her assets to secure the obligations of a third-party, that person must first grant a guarantee (suretyship) in respect of that third-party's obligations.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

In the case of a pledge over the shares of a company that holds a global business license (which, generally, would be a Mauritian offshore company) that is granted in favour of a financial institution, a 'commercial pledge' can be taken. A 'special civil pledge' is taken when the beneficiary is a bank licensed in Mauritius. These are the two common forms of pledges, and in all instances, a pledge is taken by executing a written pledge agreement.

To perfect a special civil pledge or a special commercial pledge over shares, the pledgor must transfer the pledged shares by executing and remitting to the secured party (i) a transfer in guarantee documents; (ii) a transfer of shares form that is undated and executed in blank; (iii) the related share certificates if the shares are certificated; and (iv) an extract of the issuer's registers evidencing that inscription of the pledge in its books.

Such pledges over shares do not need to be registered with the Registrar General. However, the registration of the security interest is recommended to give the security document a *date certaine* (a date which cannot be challenged in court).

Bank Accounts

To perfect an assignment of rights and interest in a bank account or a pledge, a notice of the assignment or pledge must be given to the account bank. In addition, for the assignment, the execution of a *bordereau* will be required.

Land

- **Mortgage:** A mortgage over land is created under a deed prepared by a notary public. To perfect a mortgage over land, the notarial deed under which the mortgage was created must be registered and inscribed at the Conservator of Mortgages/Registrar General of Mauritius. If an entity holding a global business license grants the mortgage, the mortgage must be inscribed and registered within three months of the date of the notarial deed. Any other mortgage must be inscribed and registered within eight days of the date of the notarial deed.
- **Charge:** A fixed or floating charge over land is created by deed under private signature. A charge over land must be registered and inscribed with the Conservator of Mortgages/Registrar General of Mauritius. If an entity holding a global business license grants the charge, the charge must be inscribed and registered within three months of the date of creation. Any other charge must be inscribed and registered within eight days of the date of creation.

Contractual Rights

- **Pledge:** Security by way of a commercial pledge is created by entering into a deed, specifying the receivables that are being pledged and the amount secured. A commercial pledge over receivables is perfected by registering and inscribing the deed under which the pledge is created with the Conservator of Mortgages/Registrar General.
- **Charge:** The creation and perfection requirements for charges over contractual rights are the same as those that apply to charges over land.
- **Assignment:** Rights in respect of receivables arising under a contract may be assigned to a secured party, by the execution of a *bordereau*, which is a deed that sets out the details of the receivables to be assigned, the names of the parties and the amount secured. Executing a *bordereau* gives full force and effect to that assignment without the need for any further registration or other perfection formalities.

Insurance Proceeds

- **Pledge:** To perfect a civil pledge over an insurance policy an inscription must be made on the registers of the insurer that issued the insurance policy. The inscription must specify that the insurance policy is subject to a pledge, the name of the beneficiary of the pledge and the amount secured.
- **Charge/assignment:** Assignments and charges over insurance proceeds are perfected in the same manner as for contractual rights.

Intangible assets

- **Pledge:** A pledge in respect of intangible assets is created by executing a deed. To perfect a pledge over intangibles, the pledgor must transfer possession of the pledged assets to the secured party. Registration of the deed under which the pledge was created with the Conservator of Mortgages/Registrar General of Mauritius is recommended (and in the case of a civil pledge, is required).
- **Charge:** The creation and perfection requirements for charges over intangible assets are the same as those for charges over land.

Personal Property

- **Pledge:** The creation and perfection requirements for pledges over personal property are the same as those that apply to pledges of intangible assets.
- **Charge:** The creation and perfection requirements for charges over personal property are the same as those that apply to charges over land.

What are the fees, costs and expenses associated with creating and perfecting security in Mauritius?

The only fees, costs and expenses payable in connection with the perfection of security are the registration and inscription fees payable to the Conservator of Mortgages/Registrar General, if applicable. These fees are capped at MUR51,000 (US\$1,700) per document, irrespective of the amount secured. No stamp duties are payable.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

Security over a single asset can be granted to more than one creditor. Priority among secured parties is generally determined as follows — with respect to:

- Mortgages, priority will depend on the security interest's date of inscription at the Conservator of Mortgages/Registrar General
- Pledges, the creditor in possession of the pledged property has priority
- Fixed and floating charges, priority will depend on the security interest's date of inscription at the Conservator of Mortgages/Registrar General
- Assignments, the date of the *bordereau*

However, creditors may agree among themselves to contractually vary the order of priority or waive or subordinate their security interests to those of other creditors by entering into an intercreditor agreement or a *pari passu* arrangement.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

The procedure for enforcing security outside of bankruptcy or insolvency proceedings will depend on the type of security interest to be enforced. In each case, an event of default must have occurred under the loan arrangement, deed or other agreement under which the security interest was granted.

- **Mortgages:** A creditor can enforce a mortgage over immovable property, such as land, by serving the debtor with a *commandement*, which is a notice that, among other things, notifies the debtor that if it fails to pay the amount claimed, a seizure will be effected on the mortgaged property. The service of a *commandement* is done through a public or private registered usher. The seizure of the mortgaged asset cannot be effected until at least 10 days have elapsed since the date on which the *commandement* is served. The usher will then draw up a memorandum of seizure that must be registered and transcribed with the Conservator of Mortgages/Registrar General of Mauritius. A creditor that enforces a mortgage must also register and transcribe a memorandum of charges with the Conservator of Mortgages/Registrar General of Mauritius containing the desired conditions of sale. The property may then be seized and sold before the Supreme Court of Mauritius to the highest bidder.
- **Pledges:** The enforcement procedure with respect to pledges will depend on the type of pledge involved. A creditor seeking to enforce a regular civil pledge or a regular commercial pledge must apply to the Supreme Court of Mauritius for authorisation to realise the pledged assets or transfer ownership of the pledged assets to that creditor. Once the creditor receives authorisation, it may then serve on the debtor a *commandement* and follow the same procedure outlined above in respect of mortgages to seize and sell the pledged assets. To enforce a special civil pledge over shares, the creditor must serve notice on the debtor stating its intention to proceed with the transfer of the pledged shares. The creditor can then cause the pledged shares to be transferred after seven days of the notice being served. In a special commercial pledge over shares that is granted in favour of a financial institution, that financial institution can realise the pledged shares by completing and executing the share transfer form. No other formalities are required.
- **Fixed Charges:** A creditor can enforce a fixed charge that it holds over assets by appointing a public or private registered usher to seize the assets without the need to serve a *commandement* on the debtor. If the debt remains unpaid, for three weeks following the date of seizure, the creditor can then sell the seized assets by public auction (in the case of movable assets), or by serving a *commandement* in the same manner described above (in the case of immovable assets).
- **Floating Charges:** To enforce a floating charge, the floating charge must have crystallised. The crystallisation of a floating charge will occur if the creditor serves notice on the Conservator of Mortgages/Registrar General of Mauritius to create an inventory of all assets the debtor owns that are subject to the floating charge at the time of the notice. The creditor must also serve a notice on the debtor to inform the debtor of the commencement of seizure proceedings. Once the inventory is completed, a public or private registered usher must be appointed to carry out the seizure and sale of the charged assets in the same way as a fixed charge.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Except for the authorisations of the Supreme Court of Mauritius required for the enforcement of regular civil actions, no governmental authorisations are required for the enforcement of security under Mauritian law.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Mauritius?

No.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

The insolvency regime for companies is set out in the Insolvency Act 2009 (the Insolvency Act), which covers the voluntary and involuntary (winding-up by court) insolvency procedures.

Certain statutory bodies may be excluded, in whole or in part, from the general insolvency legislation or may be subject to a separate insolvency regime that was enacted specifically for that particular statutory body.

For example, banks and other financial institutions are subject to the company rescue and insolvency regime in the Banking Act in priority to the general insolvency legislation. There is separate legislation similar to the insolvency regime in the Banking Act that applies to insurance companies.

Winding up or insolvency registers

A search carried out at the Bankruptcy Division of the Supreme Court of Mauritius or at the Registrar of Companies/Director of Insolvency should reveal any insolvency proceedings that are pending against a company. These searches cannot be conducted online or over the phone.

Are “company rescue” or reorganisation procedures available?

The laws of Mauritius allow for a company to be placed into voluntary administration, whereby the business, property and affairs of that company are administered in such a way that: (a) will provide an opportunity for the company or a substantial part of its business to continue existing; or (b) if there is no possibility for the company or a substantial part of its business to continue existing, will result in a better return for its creditors and shareholders than if immediate insolvency proceedings were commenced.

In voluntary administration, a person is appointed as the administrator of the company in administration. The company can appoint the administrator or, in certain circumstances, a liquidator, the holder of a charge over all or substantially all of the company's assets or a creditor on application to the court can make the appointment.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

A secured creditor must obtain leave of court before enforcing any security interest granted to it by a company subject to insolvency proceedings.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Under the Insolvency Act, the court can set aside any transactions made by, or any charge or security constituted over assets of, a company within two years of the commencement of insolvency proceedings and at a time when that company was insolvent.

Certain preferential creditors, which include tax authorities and workers, have super-priority over secured creditors (including holders of fixed charges) regarding the receivables from an insolvency.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the company's insolvency or bankruptcy?

Yes.

How is priority among secured parties determined on the insolvency of the debtor?

Priority between creditors will be as follows:

- Super-priority preferential creditors
- Secured creditors holding a fixed/floating charge
- Other preferential creditors
- Unsecured creditors



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REPUBLIC OF MOZAMBIQUE

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Mozambican financings?

Shares

Security can be taken over the shares of a company incorporated in Mozambique by way of a pledge. The Mozambique Commercial Code (the Commercial Code) sets out the requirements for taking security over shares.

There are two types of company under the Commercial Code: private limited (*limitada*) companies whose share capital is represented by “*quotas*,” an immaterial form of equity representation; and public limited (*sociedade anónima*) companies whose share capital is represented by: (i) share certificates (such share certificates may be issued in bearer form or in registered form), or (ii) dematerialised shares held in a depositary account operated by a Mozambican commercial bank. The type of company will affect how the security is taken over the shares.

Bank Accounts

Security interests over bank accounts in Mozambique are created by means of a pledge.

Land

The Constitution of Mozambique provides that land is property of the State. Accordingly, it is prohibited for any person to grant any type of security over land. Instead, the State grants to private individuals or companies the right to use such land, through formal authorisations known as “*Direito do Uso e Aproveitamento da Terra*” or “*DUAT*,” which entitle the recipient to have access to and use the designated area of land. The duration of the DUAT is unlimited for land used for residential purposes and lasts for 50 years for land used for commercial purposes.

The holder of a DUAT becomes the owner of any building, premises or other immovable assets erected on the land subject to the DUAT. Accordingly, the holder of a DUAT may create security interests over such real estate (although not the land itself) by means of a mortgage (*hipoteca*). The DUAT itself cannot be assigned or pledged by way of security.

Contractual Rights

Security over rights arising under a contract is usually taken either by way of a written pledge (authorised by the pledgor and signed by both the pledgor and the pledgee) or an assignment of the relevant rights of the assignor in favour of a secured party (with a provision for re-assignment to the assignor after the secured obligations have been discharged in full). Depending on the terms of such contract or agreement, an assignment might require the prior approval of the counterparty to such contract or agreement.

Authorisations and Licences

Rights arising under authorisations and licences can be assigned by way of security to a secured party. However, since authorisations and licences are considered to be personal to the beneficiary or licence holder, an assignment or transfer of the rights of the beneficiary or licence holder to a third-party as security requires the consent of the relevant issuing authority through a direct agreement between that issuing entity, license holder and the creditor. Although not prohibited, this type of security is not commonly granted in Mozambique.

Personal Property and Tangible Assets

Personal property, either tangible or intangible, can be given as security. A pledge is typically used for movable assets (other than those subject to registration, as described below) and intangible ones (e.g., rights), while a mortgage is typically taken for unmovable assets as well as movable assets that are subject to registration.

Notably, due to the different legal forms prescribed for the constitution of security interests over different assets, Mozambican law prohibits the taking of blanket security over all of an entity's assets. Separate security is taken over each class of assets (tangible, intangible, movable and unmovable) or even on an asset-by-asset basis.

Can security be taken over future assets?

The Mozambican legal system requires that security be created only on existing and specified assets as a condition of its validity. Accordingly, taking valid security over future assets is not possible. However, a promissory mortgage can be granted (typically backed by an irrevocable power of attorney in favour of the lender or security agent) over future assets such that, as and when the identified assets come into existence, the grantor is required to execute a security agreement in the appropriate form. The promissory mortgage itself does not create a security interest in the future asset, but a contractual claim against the grantor.

Are there restrictions on who can legally grant and/ or hold security interest?

Any person with full legal capacity may provide security without restrictions.

Are security trustees or security agencies recognised and, if so, do any steps need to be taken to ensure the enforceability of the security or security agent's right?

Although the concepts of a "security trust" or "security agency" are not expressly provided for under Mozambican law and there is no record of a foreign security agent enforcing security in Mozambique, local market practice does recognise the concept of a security agent. Relevant parties are free to agree and enter into a private contract in which one or more individuals or entities are identified or nominated as security agents to hold security for lenders, to deal with registration and perfection formalities applying to such security and to enforce such security.

What about third-party security?

Under the Mozambican Commercial Code, article 88, companies are prohibited from offering personal or real guarantees for the obligations of others, unless such guarantees or offers are in the interest of the company, which should be justified in writing by the board of such company. Accordingly, companies should obtain board confirmations confirming that the directors consider any grant of third-party security by a company to be in such company's interests.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

- **Shares:** A share pledge in relation to “quotas” in a private limited company must be in writing, authorised by the pledgor and signed by the pledgor and the pledgee. Although not mandatory, the common and recommended practice is to have the share pledge notarised.

Pledges with respect to shares in Private Limited Companies also must be registered at the Registry of Legal Entities Registrar (*Conservatoria do Registo das Entidades Legais*).

If share capital in a public limited company is represented by share certificates, a share pledge in relation to such must be in writing, authorised by the pledgor, signed by the pledgor and the pledgee and recorded on the share certificates. In addition, if such share certificates are issued in bearer form, they must also be delivered to the pledgee. However, if share capital in a public limited company is represented by dematerialised shares, a share pledge in relation to such dematerialised shares must be recorded with the depositary bank. Pledges with respect to shares (referred to as *ações nominativas*) in public limited companies also must be registered either: (i) in the official company shares book of the public limited company where such shares are represented by share certificates; or (ii) with the relevant depositary bank where such shares are dematerialised.

- **Bank accounts:** Pledges over bank accounts must be in writing and be notified to the bank holding the relevant account. Typically, the bank is not a party to the pledge agreement, but it should be notified of the pledge agreement. The bank should also be required to acknowledge the pledge and to undertake to comply with a number of operational obligations in favour of the pledgee. Although not mandatory, the parties should have the pledge notarised.
- **Registrable movable assets:** Pledges over certain categories of movable assets (including cars, boats and airplanes) are subject to certain registration requirements. A pledge should be constituted through a written agreement signed between the pledgor and pledgee. Although not mandatory, by common practice the signatures of the parties should be verified by a notary who will certify the identity of the parties as well as their capacity to bind the entity that they represent.
- **Mortgage:** The mortgage must be executed in the form of a notarial public deed and must be registered at the relevant immovable registry office.

What are the fees, costs and expenses associated with creating and perfecting security in Mozambique?

Mortgage: The following fees are applicable to mortgages:

- Stamp duty tax at the rate of 0.3% of the amount of secured debt (which may be capped in the security document)
- Notarial costs, which calculation depends on the number of attached documents; and
- nominal registration costs

Pledge: The following fees are applicable to pledges:

- Stamp duty tax at the rate of 0.3% of the amount of secured debt (which may be capped in the security document)
- If applicable, nominal registration costs

Although stamp duty is payable on each security document, certain exemptions may apply depending on the circumstances of the transaction.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

Outside of bankruptcy or insolvency proceedings, the steps required to enforce Mozambican security depend on the type of security to be enforced, and will depend on the terms of the applicable security documents.

Pledges are typically enforced extra-judicially and in accordance with a procedure agreed by the parties in the relevant pledge agreement.

However, a party seeking to enforce a mortgage will not be entitled to take over, sell or otherwise dispose of the mortgaged asset without first commencing judicial proceedings for the same purpose before a Mozambican court. In order to file a petition for enforcement in Mozambique, a mortgagee must first establish the validity of the claim and the basis of enforcement.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

The enforcement of any category or type of security interest is the exclusive jurisdiction of the courts, and does not require additional consents, although the relevant security documents may prescribe that particular steps must be taken.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of Mozambique?

Generally there are no restrictions on who can enforce a security interest over assets in Mozambique, provided that the person seeking such enforcement is the secured party, its authorised representative, assignee, successor or transferee.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

What is Mozambique's insolvency process?

The current insolvency and bankruptcy regime is the decree-law n° 1/2013. In addition to the company itself, any creditor of that company may apply for the company's liquidation. An insolvency will be formalised once pronounced by the court, registered at the company's registry office (which records the insolvency on the debtor registration) and published by notice in the Official Gazette.

How do winding up or insolvency registers function in Mozambique?

Winding up or insolvency registers at the Companies Registrar Offices can be searched to determine whether bankruptcy or insolvency proceedings are pending or a bankruptcy or winding up order has been made against a company. Note, such insolvency registers cannot be searched electronically or over the telephone.

Are "company rescue" or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Mozambican legislation allows for the restructuring of a company in an insolvency process; provided that an insolvency plan with respect to that company has been approved by the general assembly of creditors and has been subsequently ratified by the Judicial Court.

In addition, a judicial reorganisation of a company may be requested through an instrument named "*Writ of Summons*" which includes a detailed account of the specific debtor's equity and the reasons of its financial and economic crisis. The Writ of Summons and accompanying document may be submitted to court by the debtor or any other interested party.

An extra-judicial reorganisation process is also available in which the debtor may propose and negotiate with its creditors an extra-judicial recovery plan. Such negotiation is conducted pursuant to the rules of conciliation and mediation established in the Arbitration Law (No. 11/99).

Will the commencement of bankruptcy proceedings in respect of a grantor of security affect the liability of a secured party to enforce the security interests granted to it by that company?

If insolvency proceedings are commenced in respect of a company, such company will be summoned by the court to challenge such request and/or request that recovery proceedings be commenced instead. If the company is declared bankrupt, all its assets will be seized by a nominated receiver and, as a general rule, all contracts that were in force at the time of such declaration will be maintained. The company will then be liquidated and creditors be paid in accordance with their legal rank.

Are there any preference periods, claw-back rights or other preferential creditors' rights that creditors should be aware of?

Secured parties have a priority claim, ranking subordinate only to certain credits arising from labour legislation and certain special liabilities relating to work accidents. Under Mozambican law, any transaction carried out (including granting security) during the restructuring of a company would be considered void.

Can debt owed by a company to one creditor be contractually subordinated to debt owed to another creditor? Are contractual subordination provisions agreed between creditors of a company legally recognised in the event of bankruptcy/insolvency of that entity?

Yes. Contractual subordination is ordinarily recognised under Mozambican law and therefore a debt owed by a company to a creditor can be contractually subordinated to a debt owed by that company to other creditors. That subordination agreement would be respected upon the insolvency of the company.

How is the priority between creditors holding a security interest determined upon a company's insolvency?

Creditors will rank in the following order of priority:

- Creditors in respect of liabilities arising from labour legislation and certain special liabilities relating to work accidents
- Secured creditors
- Creditors in respect of liabilities arising from government taxes, irrespective of the nature of such tax liability or when such tax liability is incurred. These liabilities do not include those relating to tax fines and social security credits, both of which will rank below unsecured creditors
- Unsecured creditors



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NIGERIA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Nigerian financings?

Shares

Security can be taken in the shares of a company incorporated in Nigeria by way of a mortgage or a charge. In Nigeria, shares in companies are issued in registered form and not bearer form. Therefore, a pledge of shares by mere delivery of the share certificates to the secured party would not be an effective means of creating security as a share certificate is merely evidence of title and not an instrument conferring title.

Bank Accounts

The most common security interest taken over bank accounts is a charge, which can be either a fixed or a floating charge. For a fixed charge, the secured party/chargee has control over the charged accounts and the chargor is prevented from dealing with the charged accounts without the chargee's consent. With a floating charge, the chargor retains control of the charged accounts until the charge crystallises into a fixed charge following certain events, which usually are specified in the security document.

Land

Security over land is granted by way of a legal or an equitable mortgage.

Contractual Rights

Rights arising under a contract or an agreement are usually assigned by way of security to a secured party, with a provision for re-assignment to the assignor after the secured obligations have been discharged. Depending on the terms of the contract or agreement, an assignment might be subject to the prior approval of the counterparty.

Insurance Proceeds

Insurance proceeds are usually assigned by way of security to a secured party, with a provision for re-assignment to the assignor after the secured obligations have been discharged.

The Central Bank of Nigeria prohibits a Nigerian resident (whether a corporate or a natural person) from assigning Nigerian residents' annuities and insurance policies to non-residents. If a non-resident lender proposes to take security over residents' insurance policies, that lender would either: (i) appoint a local security agent to which the insurance proceeds are assigned on the lender's behalf, or (ii) require the borrower to establish an insurance proceeds account into which all insurance proceeds are paid, and then take security over that account.

The insurance regulator in Nigeria recently outlawed the assignment of reinsurance policies.

Authorisations and Licences

Rights arising under authorisations and licences can be assigned by way of security to a secured party. However, since authorisations and licences are considered personal to the beneficiary or licence holder, an assignment or transfer of the beneficiary's or licence holder's rights to a third-party as security requires the issuing authority's consent. Accordingly, the terms of most authorisations and licences (including oil mining licences, mining permits and licences issued in the electricity sector) usually would prohibit its holder(s) from mortgaging, charging or otherwise encumbering its interest under the authorisation or licence without the issuing authority's prior consent.

Intellectual Property

Security over patents, trademarks, copyright and designs is typically granted by way of a fixed charge or an assignment by way of security. Security can also be taken over intellectual property by way of a mortgage or a floating charge.

Personal Property and Tangible Assets

Security over tangible assets such as plant and machinery and other moveable assets can be granted by way of a mortgage, charge or a pledge. A pledge of the assets involves the deposit of the tangible moveable asset with the secured party/lender as security for the secured obligations, and on the condition that the assets will be returned to the pledgor after the secured obligation has been discharged.

Can security be taken over future assets?

Security can be granted over future assets either by way of a floating charge over a specified category of assets or by way of a fixed charge (where the future assets in question are clearly identifiable). For the fixed charge, the security interest attaches to future assets as soon as the assets are acquired, but the security interest is deemed created on the security instrument's execution date.

Are there any restrictions on who can legally grant and/or hold a security interest?

Under Nigerian law, generally, the following are restricted or prohibited from granting security:

- **Statutory corporations:** The capacity of a statutory corporation to grant security over its assets will depend on the establishing statute of that statutory corporation. Where the establishing statute does not include an express right to grant security, the relevant statutory corporation would be prohibited from doing so.
- **Incorporated companies:** The ability of an incorporated company to grant security over its assets may be limited by the articles and memorandum of association of that company. Where a company's articles and memorandum of association are silent on the ability of that company to grant security, any such grant of will be ineffective unless ratified by a resolution of its shareholders and its board of directors.
- **Banks:** A bank cannot grant security over its assets without the prior written approval of the Central Bank of Nigeria.
- **Trustees:** Generally, a trustee has power to grant security over any trust property, except where if such power is expressly restricted by law or in the instrument of trust.
- **Adjudged bankrupts:** Under the Nigerian Bankruptcy Act 2004 (the Bankruptcy Act), a person's assignment (including an assignment by way of security) of his or her future or existing book debts will be void against the bankruptcy trustee as regards any book debts that have not been paid at the bankruptcy's commencement, unless that assignment has been registered with the Chief Registrar of the Federal High Court in a register that person keeps for that purpose. Other circumstances under which a security interest could be set aside (including on an insolvency or a bankruptcy) are discussed further below.

Are security trustees or security agencies recognised under Nigerian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Both security trustees and security agents are recognised under Nigerian law. A security trustee or agent can be appointed to hold security in trust on behalf of lenders and other secured parties. If a security trustee or agent is validly appointed, no additional steps are required for the trustee or agent to be recognised under Nigerian law and, provided that any security interests granted in favour of that trustee or agent have been properly perfected, the trustee's or agent's rights over the security interests are enforceable.

What about third-party security?

Under Nigerian law, a company incorporated in Nigeria can grant third-party security if its constitutional documents permitted the company to do so, and if its directors, acting in good faith and in the best interests of the company, approve the arrangement. If the arrangement's commercial benefit is unclear, shareholder approval of the transaction should also be obtained to avoid claims against the directors for breach of their fiduciary duties to the company.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

To perfect an equitable mortgage or charge over shares, the mortgagor must deposit the share certificates with the secured party/mortgagee with or without a memorandum of deposit. The mortgagor must also provide the mortgagee with an undated share transfer form in respect of the shares executed in blank. These documents will also be accompanied by a signed and undated resolution of the mortgagor's board of directors approving the transfer of the shares in the event of an enforcement. Note that this resolution may no longer be deemed valid upon enforcement if the board of directors has been reconstituted since the grant of security.

To perfect a legal mortgage over shares, the mortgagee must be registered as a shareholder in the register of company members, with an undertaking for re-transfer of the shares to the mortgagor following discharge of the secured obligations.

There is no requirement to register a charge over shares with the Corporate Affairs Commission (the CAC), but if the mortgaged/charged shares are transferred on enforcement, the transferee must be registered as a shareholder in the register of company members.

Additional steps are required to be taken to perfect charged shares that are in dematerialised form and deposited with Nigeria's Central Securities Clearing System (the CSCS), which include the secured parties submitting to the CSCS a memorandum the chargor and chargee have jointly signed, requesting the CSCS to place a lien on a specified number of the shares.

Bank Accounts

A floating charge a company creates over its cash deposits or bank accounts is not registrable at the CAC. In practice, an account bank will usually require notification of a security interest over accounts the bank holds. Notifying the account bank of a charge over an account is recommended in any event.

Land

Governor's and other consents: Under the Land Use Act 2004 (the Land Use Act), an assignment, mortgage, transfer, sublease or other disposal of an interest in land requires the consent of the Governor of the State in which the land is situated in order to be valid and enforceable. Accordingly, this consent is required for a legal mortgage to be valid and enforceable at the time of its creation. However, in the case of an equitable mortgage that does not constitute a transfer of title in land to the mortgagee, the Governor's consent is not required at the time of the mortgage's creation, but will be required at the point of enforcement.

Taking security over land held by the Federal Government of Nigeria or any of its agencies also requires the consent of the Minister of Lands, Housing and Urban Development, or, if the land is situated in Abuja, the Minister of the Federal Capital Territory.

Registrations: An instrument creating a mortgage over land must be filed at the relevant lands registry. This filing can only be made once any applicable stamp duty has been paid in respect of the instrument, and the Governor's consent has been endorsed the instrument.

To create an equitable mortgage, the mortgagor deposits the title deeds to the property with the mortgagee together with a memorandum of title deposit that sets out the terms of the mortgage or obligates the mortgagor to execute a legal mortgage when required to do so. An equitable mortgage can also arise under an agreement to create a legal mortgage if there has been no conveyance or the relevant statutory forms have not been completed.

If the mortgagor for a legal or an equitable mortgage is a company, the stamped and endorsed mortgage instrument also must be registered at the CAC.

Contractual Rights and Insurance Proceeds

Under Nigerian law, in order to perfect an assignment of contractual rights, notice of the security interest must be given to the counterparty of the underlying contract, subject to prior compliance with any approval rights of the counterparty thereunder. For an assignment of insurance proceeds, this means giving notice to the insurer under the policy. An acknowledgment of the notice of assignment is not required as a matter of law. However, secured parties usually require the assignor to procure an acknowledgment of the notice of assignment in an agreed form and a confirmation from the contract counterparty or insurer that the contract counterparty or insurer has received no notification of any prior assignment or security interest regarding the underlying contract.

If the assignor is a company, an assignment of contractual rights and insurance proceeds is required to be registered at the CAC.

Authorisations and Licences

If the issuing authority has consented to the beneficiary or licence holder assigning by way of security the beneficiary's or license holder's rights under an authorisation or licence, the assignment can be perfected in the same manner described above for assignments of contractual rights.

Intellectual Property

An instrument creating a security interest over a trademark or patent must be registered at the Trade Marks and Patent Registry. Assignments or other security interests for patents and designs also must be registered at the Patents and Design Registry in order to be effective against third parties. Additionally, to perfect a security interest that is a mortgage or a fixed or floating charge granted by a company, the security interest must be registered at the CAC.

Aircrafts, Ships and Vessels

Consents: The Federal Ministry of Transport's written consent must be obtained prior to creating a mortgage over a ship or vessel that is registered in Nigeria by submitting an application to the Director General of the Nigerian Maritime Administration and Safety Agency. The application must be accompanied with a mortgagor board resolution authorising the creation of the mortgage, payment of a nominal consent fee of ₦20 (US\$0.12), and a duly stamped deed of mortgage.

Registrations: A mortgage or charge over an aircraft, ship or vessel must be registered with the CAC and the Nigerian Maritime Administration and Safety Agency (for a mortgage over a ship or vessel) or the Nigerian Civil Aviation Authority (for a mortgage over an aircraft). Mortgages over ships and vessels must also be registered at the ship's or vessel's port of registry.

What are the fees, costs and expenses associated with creating and perfecting security in Nigeria?

Stamp duty: Under the Stamp Duties Act 2004 (the Stamp Duties Act), and subject to limited exceptions, any document that transfers or creates a proprietary interest in assets, such as a security document, is subject to the payment of *ad valorem* stamp duty and must be stamped: (a) if executed within Nigeria, within 40 days of such execution; or (b) if executed outside of Nigeria, within 30 days of that document being received in Nigeria.

The stamp duty payable on a legal mortgage or a debenture deed is 0.375% of the secured amount. In practice, a security document is usually submitted to the Stamp Duties Commissioner for an assessment of the applicable stamp duty prior to paying the duty and stamping the document.

Accordingly, on a large financing, the stamp duty payable for a security document can be very high (and in certain cases, prohibitively so). For lenders to a financing to agree that the borrower can pay stamp duty on only a portion of the secured amount rather than the whole secured amount is not uncommon, with the borrower's further assurance that the full stamp duty will be paid on a future date or upon certain events. This practice is known as "upstamping." Until the security document is upstamped, any such lender is only protected up to the amount expressed to be secured, and a lender may lose priority to any subsequent security granted on the charged assets during the period between the initial stamping and the full upstamping of the security document.

By statute, transactions involving the governments of certain countries or certain multilateral financial institutions such as the International Finance Corporation, the African Export-Import Bank and the Africa Finance Corporation are exempt from stamp duties.

Generally, a failure to stamp a security document does not render the security document or the security interest created thereunder void or invalid. However, the Stamp Duties Act provides that no instrument executed in Nigeria, or wheresoever executed relating to any property situated or any manner or thing done or to be done in Nigeria, will be admissible in evidence or available for any purpose whatsoever, unless duly stamped in accordance with Nigerian law in force at the time when the instrument was first executed. Legal practitioners in Nigeria have interpreted this to mean that a security document is inadmissible in evidence unless it is stamped. A corollary of this is that any security document that is required to be registered with the CAC or any other government body must be stamped prior to its submission for registration. Thus, in relation to registrable security documents, if the documents are not stamped, they will not be accepted for registration and non-registration would render the security void. On the other hand, if the security documents are not registrable, a failure to stamp will simply render them inadmissible in evidence or unavailable for any other purpose in Nigeria until they are stamped.

CAC registration: Under the Companies and Allied Matters Act 2004 (CAMA), any security document or instrument under which a company creates a mortgage or charge (whether fixed or floating) must be registered at the CAC within 90 days of that mortgage's or charge's creation. A failure to register a registrable security document with the CAC will render the mortgage or charge thereunder void against a liquidator or any creditor of that company.

A CAC registration fee of 1% of the secured amount is payable by private companies, or 2% of the secured amount for public companies, on registration of a mortgage or charge with the CAC.

Consent and registration fees on mortgages over land: Under the Land Use Act, an assignment, mortgage, transfer, sublease or other disposal of an interest in land requires the consent of the Governor of the State in which the land is situated, as described above. The fee payable on the application for consent varies from State to State.

The registration of a mortgage over land at the lands registry also attracts a fee, which varies from State to State.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors. In this case, under Nigerian law, priority among the security interests will depend on the type of security interest and/or the date of the security's creation.

Generally, any earlier created security interest ranks ahead of a later one. However, if a security interest is required to be registered with the CAC, a registered security interest has priority over an unregistered security interest. If two security interests granted to two separate creditors are both required to be registered with the CAC, and are registered as prescribed, the security's date of creation rather than its registration determines priority between the security interests.

A fixed charge on an asset has priority over a floating charge over the same asset, unless (i) the floating charge was created first and on terms prohibiting the chargor from granting any subsequent security having priority to the floating charge; and (ii) the person in whose favour the subsequent security was granted had actual notice of the prohibition at the time the subsequent charge was granted.

A legal mortgage or other security interest has priority over an equitable mortgage or security interest.

Creditors may agree among themselves to contractually vary the order of priority or waive or subordinate their security interests to those of other creditors. This is done under an intercreditor, subordination or priority agreement that would cover issues such as priority of claims and subordination.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

Outside of bankruptcy or insolvency proceedings, a secured party is only able to enforce its security interest in accordance with the enforcement provisions and other terms of the finance and security documents, and as provided by applicable law.

Security documents governed by Nigerian law typically specify the events that allow the security interest to be enforced. Once the holder of a security interest is entitled to enforce the security in accordance with its terms, the security documents typically provide for enforcement through either the: (i) creditor's or security trustee/agent's exercise of a power of sale to dispose of the secured assets; or (ii) appointment of a receiver or a receiver/manager in respect of the secured assets. If the power of sale has arisen and is exercised, the sale of the secured assets can be by public auction or, if expressly provided in the security document, by private sale.

The appointment of a receiver or a receiver/manager needs to be registered at the CAC.

A mortgagee under a legal mortgage relating to land can also: (i) apply for a court order to extinguish the mortgagor's equity of redemption and vest the mortgagor's entire interest in the mortgagee; or (ii) enter into and take possession of the mortgaged property.

The holder of a security interest is not obligated to maximise the proceeds from enforcement of the security, but must act in good faith in realising such proceeds. The holder of a security interest becomes a trustee of the grantor for any proceeds from the sale of the secured assets and has a duty to deliver to the grantor the balance of the proceeds of enforcement after deducting amounts required to discharge the secured obligations.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Out-of-court enforcement of any asset generally is permitted under Nigerian law.

Any disposal by a security trustee/agent of land subject to an equitable mortgage requires the prior consent of the Governor of the State in which the mortgaged land is situated if the consent was not obtained before the mortgage's creation. In certain States, foreign purchasers are prohibited from acquiring an interest or right in or over land unless the Governor of the State approves the transaction. In such States, the Governor's consent is required to enforce the security against the mortgaged land if that enforcement will result in the sale of the land to a foreign purchaser. A "foreign purchaser" refers to: (a) an individual that is not a Nigerian national; (b) a company that is not incorporated in Nigeria; or (c) a company that is incorporated in Nigeria but that is majority owned by foreigners.

The sale of a vessel that is subject to a legal mortgage requires the Minister of Transport's prior consent. A disposal of any rights under an authorisation or a licence that is subject to an assignment by way of security requires the issuing authority's prior approval.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Nigeria?

Generally, there are no restrictions on who can enforce a security interest over assets in Nigeria, provided the person seeking the enforcement is the secured party, its trustee, agent, assignee, successor or transferee. From a practical perspective, a secured party that is a foreign entity may require a local receiver to act on its behalf.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

Primary legislation for bankruptcy and insolvency in Nigeria is contained in: (a) the Bankruptcy Act and the Bankruptcy (Proceedings) Rules 1990, which apply if the debtor is an individual or a firm; and (b) the CAMA and the Companies Winding-Up Rules 2001 (the Companies Winding-Up Rules), which apply if the debtor is a limited liability company. This section deals with bankruptcy and insolvency as it applies to incorporated companies only.

The CAMA and the Companies Winding-Up Rules apply only to limited liability companies incorporated in Nigeria and do not apply to statutory corporations or State-owned entities, which instead are governed by their enabling legislation. Usually, if the enabling legislation provides for the insolvency or dissolution of a statutory body, the legislation will also provide for a new entity that will assume that statutory body's assets and liabilities.

Winding up or insolvency registers

Insolvency proceedings against a company must be commenced in the Federal High Court, which is the court with jurisdiction to wind up a company, in the jurisdiction in which the company's registered office or head office is located. A manual search of the Federal High Court's records can be conducted (as the records are not computerised) to determine whether bankruptcy or insolvency proceedings are pending, or a bankruptcy or winding up order has been made against a company.

Are "company rescue" or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Nigerian law allows for a company to enter into a scheme of arrangement with its creditors or undertake corporate restructuring. A scheme of arrangement must be approved by not less than 75% of the company's shareholders and creditors, present and voting at their respective meetings. The scheme must also be referred to the Securities and Exchange Commission for approval and, if approved, sanctioned by the Federal High Court.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

Provided that the security interest is validly created and has been duly perfected, the insolvency or bankruptcy of the grantor of the security interest will not affect a secured party's ability to enforce the security or a secured party's rights in the secured assets.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Fraudulent preference: The Bankruptcy Act and the CAMA both address situations in which a debtor may fraudulently rank a creditor above other creditors in view of a forthcoming insolvency or bankruptcy proceedings.

The CAMA provides that any conveyance, mortgage or other transaction relating to property, which if done by an individual would be deemed in his bankruptcy a fraudulent preference, will if done by a company be deemed, in the event of the company being wound up, a fraudulent preference of its creditors and invalid.

Under the Bankruptcy Act, any conveyance, mortgage or other transaction relating to property in favour of a creditor made by a company that is unable to pay its debts from the company's own money, will be deemed a fraudulent preference of that creditor and invalid if the company is wound up upon a winding up petition being presented within three months of that transaction, unless one can show that the transaction was done in good faith and for valuable consideration.

Floating charges: Any floating charge on the undertaking or property of a company created within three months of the commencement of winding up proceedings against that company will be invalid (except with respect to the amount of any cash paid to the company in consideration for the floating charge with interest at the current bank rate), unless one can prove that the company immediately after the charge was created was solvent or new money was advanced contemporaneously with or subsequent to the creation of the charge.

Disclaimer of onerous property: With the court's approval, a company's liquidator can disclaim any onerous property in writing signed by the liquidator within 12 months of the commencement of the winding up or such extended period as the court may allow. Onerous property includes unprofitable contracts, any company property considered unsellable or not readily sellable, or any property that may give rise to a liability to pay money or perform other onerous acts. The disclaimer will not affect any proprietary rights and interests that any third-party may have acquired prior to the date of the disclaimer.

Preferential creditors' rights: The ranking or priority of a secured party in whose favour a floating charge is created may be restricted or set aside with respect to preferential creditors. Statutorily preferred debts include local rates, charges, taxes and pay-as-you-earn deductions; deductions under the Nigerian Social Insurance Trust Fund (formerly known as the National Provident Fund)¹; wages and salaries; accrued holiday remuneration; and compensation due to workers. These amounts would rank equally among themselves or rateably if company's assets are insufficient. If a company is not being wound up, payments accruing to the company's preferential creditors have priority over any claim for principal or interest due on debts secured by a floating charge. On a winding up of the company, amounts due to preferential creditors must be paid in priority to all other debts.

Other than payments to preferential creditors, secured assets fall outside of the debtor's assets that are available to the general pool of creditors, and these secured assets are used to satisfy the claims of the relevant secured parties.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the company's insolvency or bankruptcy?

A debt a company owes a creditor can be contractually subordinated to a debt that company owes other creditors, and contractual subordination ordinarily is recognised and enforceable under Nigerian law.

However, whether contractual subordination provisions are legally valid on the debtor's insolvency are unclear, in which case a liquidator or other insolvency officer of the courts tends to recognise only the order of payments the statute stipulates. The *pari passu* principle (which provides that distributions in a winding up must be made to creditors in each category on a *pari passu* basis) is applicable in the distribution of an insolvent company's assets among its creditors. There is case law in Nigeria that suggests that Nigerian courts can uphold the provisions of an intercreditor or a subordination agreement on the basis that the provisions do not undermine the *pari passu* principle.

How is priority among secured parties determined on the insolvency of the debtor?

Creditors will rank in the following order of priority:

- Creditors secured by way of a fixed charge
- Preferential creditors
- Creditors secured by way of a floating charge
- Secured but contractually subordinated creditors
- Unsecured creditors

¹ The Nigerian Social Insurance Trust Fund is the government agency whose statutory mandate is the provision of social security and social protection for the poor, the aged, the disabled and the disadvantaged members of the population. The Nigerian Social Insurance Trust Fund requires employers to make monthly pension and social security contributions on behalf of their employees.



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SOUTH AFRICA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in South African financings?

Shares

In South Africa, shares in companies are issued in certificated form (evidenced by a physical share certificate) or uncertificated form (transfer thereof takes place by way of electronic entry in a central securities depository). Security over certificated shares can be created by way of a pledge agreement. Security over uncertificated shares is created by way of a security cession agreement and notation in the pledgor's securities account. Note that the doctrinal nature of cession in *securitatem debiti* is akin to that of a pledge.

Bank Accounts

A security interest over a bank account can be created by way of a security cession over the account holder's rights in the bank account, and rights against the bank in respect of that account.

Land

Security over land and other immovable property can be created by a mortgage (commonly referred to as a mortgage bond) under the Deeds Registries Act 1937.

Contractual Rights

Security over rights arising under a contract or an agreement can be created by a security cession agreement.

Insurance Proceeds

A security interest over insurance proceeds can be created by a security cession agreement.

Authorisations and Licences

The specific legislation and terms by which an authorisation or license is granted, regulates whether creating a security interest over that authorisation or licence is possible. Consent from the issuing authority will likely be required.

Intellectual Property

Security over intellectual property rights (including trademarks, copyright and designs) can be created by way of a security cession agreement, a general notarial bond or a special notarial bond. Note that security over a copyright can only be taken by a security cession agreement.

Personal Property and Tangible Assets

There are two categories of movable property: (i) corporeal movable property (such as machinery or equipment); and (ii) incorporeal movable property (such as choses in action). Security over either category of movable property can be taken by a pledge, a general notarial bond (over all the debtor's moveable assets), or a special notarial bond (over specific movable assets of the debtor). In addition, a lien may arise over corporeal movable property as a right to retain physical control of the asset to secure payment of a claim. Notarial bonds are most commonly used in South Africa.

Can security be taken over future assets?

The right to future intangible assets can be granted as security by way of a security cession agreement. The courts have adopted the notion of a cession *in anticipando*, whereby the security cession will effect a transfer of the future right when that right comes into existence, without the need for any further act of transfer, and neither party can unilaterally renege on the security cession in the interim period.

Are there any restrictions on who can legally grant and/or hold a security interest?

A grantor of security must have the requisite legal capacity to bind itself and/or its assets. This determination is made on a case by case basis. Some entities have limited capacity to grant security and these include: public entities regulated by the Public Finance Management Act, 29 of 1999; long-term insurers regulated by the Long-Term Insurance Act, 52 of 1998; and short-term insurers regulated by the Short-Term Insurance Act, 53 of 1998.

Further, the principle of *actor sequitur forum rei* applies in South African law such that the party giving security over assets cannot give more rights to the security than he holds himself.

Are security trustees or security agencies recognised under South African law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

While security trustees or security agencies are generally not established under South African law, an agency or trustee arrangement is recognised under South African law. The South African law of agency would govern such an arrangement. Consideration must be given to whether the agent or trustee has been given the proper authority to enforce security on behalf of its principal, and the extent of that authority.

What about third-party security?

A person or entity may grant security over its own assets to secure its own obligations or the obligations of a third-party. This is often done by providing a suretyship and/or a guarantee for the obligations of the third-party.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

There are no formal requirements regarding certificated shares. As a practical step to enable the enforcement of security, the share certificates together with a share transfer form signed by the pledgor (and left blank as to transferee) are delivered to the pledgee. In accordance with the Financial Markets Act, 2012, a security interest over uncertificated shares is established by way of electronic entry in the securities account where the shares are held.

Bank Accounts

There are no specific requirements or formalities prescribed for establishing a security cession over a bank account. The conclusion of a valid security cession agreement is sufficient to establish the security. Best practice is for the bank to sign an acknowledgement of the pledge.

Land

The owner of the immovable property over which security is to be created, or a duly authorised conveyancer acting on the owner's behalf, must execute a mortgage bond in the presence of the Registrar of Deeds. Registration is deemed upon the Registrar's signature being affixed to the bond. The Registrar thereafter enters the mortgage in the appropriate register and endorses the registration of the bond against the title deed of the property burdened by the bond.

Contractual Rights and Insurance Proceeds

There are no specific requirements or formalities prescribed for establishing a security cession over contractual rights. The conclusion of a valid security cession agreement is sufficient to establish the security.

There are no specific requirements or formalities prescribed for establishing a South African law security interest in insurance proceeds. The conclusion of a valid security cession agreement is sufficient to establish the security. The pledgee should take possession of the policy documents.

Authorisations and Licences

Requirements in respect of security over authorisations and licences vary depending on the specific legislation under which the authorisation or licence is granted.

Intellectual Property

The security interest over trademarks, patents and registered designs must be recorded against the trademark, patent or design in the official registers maintained for that intellectual property right. In addition, the security interest must be recorded in writing and lodged with the Companies and Intellectual Property Commission (CIPC) with proof that the application has been served on the registered proprietor of the intellectual property right, together with any other parties recorded as having an interest in the intellectual property right.

As described above, there are no specific requirements or formalities prescribed for establishing a security cession over copyrights.

Personal Property and Tangible Assets

The steps required to create and perfect security interest over movable property depends on the type of security that is created, as described below.

Pledge: A pledge is established by entering into a valid security cession agreement and, in the case of corporeal property, delivery of the pledged property to the pledgee. Except as set out below, no specific formalities are required to deliver incorporeal property, but to deliver, for example, certificates evidencing the incorporeal property, is customary in order to grant the pledgee a measure of control over the pledged property. There are no registration or notification requirements for a pledge.

General Notarial Bond: A general notarial bond must be attested by a public notary and is established by registration at the deeds office in accordance with the Deeds Registries Act 1937 within three months after the date of the bond's execution, in order for the notarial bond to be enforceable against third parties. However, the creditor only acquires a right over the bonded property under a general notarial bond upon taking possession of the property.

Special Notarial Bond: A special notarial bond must be attested by a public notary and registered at the deeds office that covers the area where the property is situated, within three months after the date of the bond's execution. A special notarial bond is perfected by possession of the assets over which security is held.

Lien: There are no specific perfection requirements for a lien. A lien is established by the existence of an obligation owing to the lien-holder and the lien-holder's possession of the asset over which the lien is held.

What are the fees, costs and expenses associated with creating and perfecting security in South Africa?

Conveyancers (in relation to mortgage bonds) and public notaries (in relation to notarial bonds) are entitled to charge fees for preparing bonds according to a prescribed tariff, which calculates a fee based on the sum secured by the bond on a sliding scale, and range from 0.8% to 1.9% of the sum secured as the starting amount charged.

Nominal registration fees are payable for the registration of mortgage bonds, general notarial bonds, special notarial bonds and security interests relating to intellectual property.

On enforcement of security, nominal fees are payable to the Sheriff of the court to the extent that the Sheriff will be required to attach property.

There are no exceptions or exemptions to making such payments; however, the level of fees payable to conveyancers and public notaries can be negotiated.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

Creating a security interest over immovable property in favour of two or more creditors is possible. The ranking of the various creditors' security would have to be expressly stated in the mortgage bonds. In the absence of an express statement on the ranking of creditors' rights to the secured assets, the secured creditor whose security is registered first will presumably take priority. Regarding immovable property, a creditor can verify the priority of its security interest by inspecting the deeds register.

If more than one interest or limited interest is entered against the same uncertificated securities, priority must be granted to the interest or limited interest in the order entered in the securities account or central securities account. The order of priority in any interest or limited interest may be varied by agreement between the parties, but this variation is not effective against third parties.

The principle of *prior in tempore, potior in iure*, which means 'first in time, first in law' is applicable to security cessions. If there is a conflict between two or more security cessions, the *prior in tempore* principle implies that the security cession first in time will be preferred first in law. As such, the security interest of the first cessionary will not rank *pari passu* with the security interests of subsequent cessionaries. Subsequent cessionaries are only entitled to the balance of the proceeds once the first security interest is satisfied. The *prior in tempore* principle applies by operation of law, and this principle can only be varied if the party who was first in time agrees to have their rights subordinated.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

In a default or breach of the secured obligation, generally, a secured creditor is entitled to enforce its security against the asset over which the creditor holds a security interest.

For a mortgage bond over immovable property, or a general notarial bond over all the assets of a person or entity, the secured creditor is first required to take possession of the secured assets, usually by way of attachment by the Sheriff of the High Court of South Africa, under a court order to that effect. After this, the secured creditor can sell the assets and apply the proceeds to discharge the outstanding obligation.

Except for mortgage bonds, general notarial bonds and special notarial bonds, a secured creditor can, without having to obtain a court order and without notifying the security provider, enforce security by procuring the sale of the secured assets and applying the proceeds to satisfy the principal obligation — provided this is in a contractual agreement between the parties.

A court order would always be required to enforce mortgage bonds, general notarial bonds and special notarial bonds.

Are any governmental or other consents required in connection with the enforcement of any category of security interest or against any type of asset?

There are no governmental or other consents required in connection with the enforcement of any category of security interest or against any type of asset. However, a party wishing to enforce security should consider exchange control implications and the legislation governing the asset that is the subject of a security interest.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

In South Africa insolvency is regulated primarily by the Insolvency Act 24 of 1936 (the Insolvency Act). Regarding companies, the Companies Act, 71 of 2008 (the Companies Act 2008) and the Companies Act, 61 of 1973 (the Companies Act 1973 and together with the Companies Act 2008, the Companies Acts) would also apply.

Regarding banks, the Banks Act, No. 94 of 1990 would apply together with the Insolvency Act and the Companies Acts.

Regarding long-term and short-term insurers, the Long-Term Insurance Act, No. 52 of 1998 or the Short-Term Insurance Act, No. 53 of 1998 would apply together with the Insolvency Act and the Companies Acts.

Winding up or insolvency registers

No such registers exist in South Africa. A search can be conducted with the CIPC to determine whether a company is in the process of being wound up. However, this search is not always accurate because the search provides no information on whether a company is solvent, nor does it contain any information on whether an insolvency application has been launched.

Are “company rescue” or reorganisation procedures available?

Prior to commencing insolvency proceedings, there are various reorganisation procedures available under South African law:

Regarding companies, the Companies Act 2008 provides for (i) business rescue proceedings or (ii) compromises with creditors. The Financial Institutions (Protection of Funds) Act, 28 of 2001 (the Financial Institutions (POF) Act) provides for the curatorship of certain “financial institutions” (as defined in section 1 of the Financial Institutions (POF) Act). The Banks Act, 94 of 1990 (the “Banks Act”) provides for the curatorship of banks.

Business Rescue

“Business rescue” is defined in section 128(1)(b) of the Companies Act 2008 and relates to proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for temporary supervision of the company; a temporary moratorium on the rights of claimants against the company; and the development and implementation of a plan to either rescue the company by restructuring its affairs to maximise the likelihood the company can continue existing and be solvent; or, if the company cannot so continue, that results in a better return for the company’s creditors or shareholders than would result from the company’s immediate liquidation.

The test for whether a company is “financially distressed” is set out in section 128(1)(f) of the Companies Act 2008, and is satisfied if it appears reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or, it appears reasonably likely that the company will become insolvent within the immediately ensuing six months.

The Companies Act 2008 provides for the appointment of a business rescue practitioner to oversee the company during business rescue proceedings.

Compromise

Section 155 of the Companies Act 2008 provides for a compromise between a company and its creditors, regardless of whether the company is financially distressed.

A company’s board of directors or liquidator (if the company is being wound up) can propose an arrangement or a compromise of the company’s financial obligations to all of its creditors, or to all of the members of a class of the company’s creditors.

The company's board of directors or liquidator, as applicable, is required to deliver the proposal to every company creditor or to every member of the relevant class of creditors, and to the CIPC. The proposal will be adopted if supported by a majority in number representing at least 75% of all the creditors or class of creditors who are present and voting at a meeting called for that purpose.

Curatorship of Financial Institutions

Under section 5 of the Financial Institutions (POF) Act, the registrar can apply to the High Court "on good cause shown" to have a curator appointed to take control of and manage the business of a "financial institution." The definition of "financial institution" in section 1 of the Financial Institutions (POF) Act includes collective investment schemes, hedge funds, long-term insurers and short-term insurers. The registrar is determined according to the financial institution in question. For example, if the financial institution is a pension fund, then the registrar would be the Registrar of Pension Funds. Or, if the financial institution was a collective investment scheme, then the registrar would be the Registrar of Collective Investment Schemes.

No meeting of creditors results from curatorship, and therefore, the secured party's contractual rights will not automatically be stayed by reason of a curatorship of a financial institution (as defined). However, while a financial institution is under curatorship, the High Court can stay all legal actions against the financial institution or issue any other order regarding the curator's powers and duties.

Bank Curatorship

Under section 69 of the Banks Act, the Minister of Finance can put a bank under curatorship if, in the opinion of the Registrar of Banks, the bank is experiencing financial difficulties and curatorship is in the public's best interest.

No meeting of creditors results from curatorship, but while the bank is under curatorship all legal actions (except as described below) against the bank are stayed, and a curator can, in terms of section 69(3) of the Banks Act, "suspend or reduce ... the right of creditors of the bank concerned to claim or receive interest on any money owing to them." A secured creditor's contractual rights would not be stayed by reason of a bank curatorship (as no concurrence of creditors results from curatorship).

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

At the commencement of insolvency proceedings, a moratorium is placed on the enforcement of security against the insolvent company.

Once insolvency procedures commence, a secured creditor holding movable or immovable property as security may not as a general rule realise that security itself, but must deliver it to the liquidator of the insolvent debtor for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator, that the creditor holds the security before the second meeting of creditors. Once the liquidator realises the secured property, the liquidator must pay the proceeds (less the liquidator's fees) to the secured creditor, in preference to other creditors.

Section 83 of the Insolvency Act provides for alternative procedures regarding the realisation of certain types of property held as security. For example, if the property consists of a marketable security (*i.e.*, property that is ordinarily sold through a stockbroker), a bill of exchange, or a financial instrument, the secured creditor can, before the second meeting of creditors, sell the property through a stockbroker (or if the creditor is a stockbroker, through another stockbroker).

After realising the property, the secured creditor must forthwith pay the net proceeds to the liquidator. Provided that the secured creditor can prove a valid claim against the insolvent's estate, the secured creditor will be entitled to a payment out of the proceeds of such realisation.

Section 35B of the Insolvency Act imposes a statutory netting of all obligations arising under certain master agreements. Obligations incorporated in the netting would include those of a transferee of security to return the security to the transferor. We note that security that is pledged, mortgaged or bonded to a secured party cannot be included in netting.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Under section 32 of the Insolvency Act, a court can, at the liquidator's insistence, set aside certain transactions entered into by an insolvent person/entity prior to its liquidation. These are referred to as impeachable dispositions. A disposition is any transfer or abandonment of rights to property, and can include a mortgage over immovable property, a cession, a pledge or a special notarial bond, among others.

The Insolvency Act provides for the following impeachable dispositions:

Disposition without Value

In terms of section 26 of the Insolvency Act, a court may set aside an insolvent company's disposition of property provided such disposition is not made for value. A court will set aside such a disposition if the liquidator proves that either at any time:

- More than two years before the liquidation of the insolvent's estate, the insolvent made a disposition of property and that, immediately after the disposition was made, the insolvent's liabilities exceeded its assets and the disposition was not made for value
- Within two years of the liquidation of the insolvent's estate the insolvent made a disposition of property not for value, unless the person claiming under or who benefited by the disposition proves that, immediately after the disposition was made, the insolvent's assets exceeded its liabilities

In either case, if proved that at any time after the making of the disposition the insolvent's liabilities exceeded its assets by an amount less than the value of the property disposed of, the disposition may be set aside to the extent of such excess.

Voidable Preferences

Section 29 of the Insolvency Act provides for the setting aside of a disposition of an insolvent person or entity's property made within six months before the date of liquidation and has the effect of preferring one creditor above another, if, immediately after the disposition, the liabilities of the insolvent person or entity exceed the value of its assets. In these circumstances, a court can set aside the disposition.

The setting aside of such a disposition may be avoided if the person or entity in whose favour the disposition was made can prove that the disposition was made in the ordinary course of the insolvent person or entity's business, and that the disposition was not intended to prefer one creditor above another.

Undue Preference to Creditors

Section 30 of the Insolvency Act provides that if an insolvent person/entity, prior to its liquidation, made a disposition of its property at a time when the insolvent's liabilities exceeded its assets, with the intention of preferring one of its creditors above another, that disposition can be set aside.

Collusive Dealings

Section 31 of the Insolvency Act provides for the setting aside of dispositions under which the insolvent person/entity, prior to its liquidation, and in collusion with another person, disposed of its assets in a manner prejudicing the insolvent's creditors or preferring one creditor over another.

Fraudulent Dispositions

In addition to the Insolvency Act, dispositions of property prior to liquidation or sequestration can be set aside at common law, if the insolvent and the recipient of the alienation had the common intention of prejudicing other creditors. For an action to be successful, the third-party that acquired the asset must (i) have had actual knowledge of the fraud, or (ii) have not given value for the asset.

Preferential Creditors

The Insolvency Act creates preferences regarding the following claims over an insolvent estate (among others):

- Costs of liquidation (section 97)
- Costs of execution (section 98)
- Salary or remuneration of employees (section 98A)
- Statutory obligations (section 99)
- Income tax (section 101)
- Claims of holders of general notarial bonds and certain special notarial bonds (section 102)

Can debt a company owes a creditor be contractually subordinated to debt a company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the company's insolvency or bankruptcy?

Contractual subordination provisions agreed between creditors of a company are legally recognised if the company should become insolvent. This is subject to the qualification that they are not dispositions that can be set aside, and subject to an exception for uncertificated securities.

The Insolvency Act provides for mandatory netting of master agreements, which cannot be contracted out of as an intercreditor matter. As of the date of liquidation of the company's estate, all unperformed obligations arising out of "master agreements" are automatically terminated. These unperformed obligations include obligations regarding assets in which ownership has been transferred as security. The values of the unperformed obligations are calculated at market value as at the date of liquidation or sequestration, and the market values so calculated are netted against one another so that a net amount payable is determined.

How is priority among secured parties determined on the insolvency of the debtor?

The Insolvency Act and the Companies Act regulate the ranking of security in circumstances of insolvency. The order of priority for the ranking of creditors on the insolvency of a company is typically as follows:

- Secured creditors
- Preferential creditors
- Unsecured creditors

The Insolvency Act does not prescribe any special priority between secured creditors, since each creditor has a secured claim on a particular asset. If different creditors hold security over the same asset, the secured creditor that took security earlier in time than the other will have a higher ranking claim regarding that asset.



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UGANDA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Ugandan financings?

Shares

Security over shares in a Ugandan company can be taken by way of a share pledge agreement.

Bank Accounts

Security over the proceeds of a bank account can be taken by way of a fixed or floating charge.

Land

Security can be taken over land by way of a mortgage, charge or lien.

Contractual Rights

Security can be granted over contractual rights by way of an assignment, provided that there is nothing in the relevant contract that prohibits the granting of such security.

Insurance Proceeds

Security over proceeds from an insurance policy can be taken by way of a charge over, or by way of an assignment of, the relevant insurance contract.

Authorisations and Licenses

Security can be taken over authorisations and licences by way of a fixed or floating charge.

Security can only be granted once prior written consent of the line regulator has been obtained.

Intellectual Property

A company will typically take security over trademarks, copyrights and other intellectual property by way of a fixed or floating charge or by way of a licence under a copyright.

Personal Property and Tangible Assets

Security in the form of a fixed or floating charge, pledge or mortgage may be taken over personal property such as land or stock.

Can security be taken over future assets?

Security can be taken over future assets.

Can security be taken generally over all of a person's/ entity's assets or is it necessary to take security over each individual asset, or each class of assets, separately?

Under Ugandan law, depending on the type of assets, security may be taken over all the assets or each asset individually.

Debentures may cover more than one movable asset. Likewise, mortgages used for fixed assets such as land may cover two or more immovable assets. Further charges may also be created by means of a separate security instrument relating to the same asset or group of assets.

Are there any restrictions on who can legally grant/hold a security interest?

Generally, a company may grant or hold a security interest provided the company has sufficient capacity and authority.

There may be certain restrictions applicable to the granting of security interests by regulated industries, or applicable to a security interest that encumbers family land or marital property.

Are security trustees or security agencies recognised under Ugandan law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Security trustees and security agents are recognised under Ugandan law. Provided the security trustee or agent is validly appointed, and the security granted in its favour has been properly perfected, the trustee's or agent's rights regarding the security interest should be enforceable.

What about third-party security?

Under Ugandan law, where a person or entity proposes to grant security over its assets to secure the obligations of a third party, a power of attorney should be executed between the parties allowing the third party to take security. The power of attorney must specifically grant the third party the right to create security over property belonging to another person or entity. Alternatively, the parties may execute a tripartite agreement where the third party agrees to use their assets as security.

The ability to grant security over a company's assets to secure the obligations of a third-party is permitted only to the extent the company's constitutional documents authorise it to do so. Where a company borrows within its capital limits, a board resolution must be passed, however, where the company is borrowing beyond its share capital, an ordinary shareholder resolution must also be passed in addition to the board resolution. More stringent requirements apply in the case of public companies acting as borrowers. Most public companies in Uganda are listed on the securities exchange.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

- **Registration:** Share pledges should be registered in accordance with the provisions of the Companies Act 2012 (the “Companies Act”). Generally, the chargee is required to register the pledge with the Companies Registry within 42 days of execution of the pledge.

Charges of any foreign company must be registered and will require notarisation of the security document prior to the registration.

- **Deposit of share certificates:** The borrower must deposit the relevant share certificates with the secured party together with the signed share transfer forms. The share pledge must be registered by the secured party and evidenced by means of a certificate of registration.

Bank Accounts

A charge over a bank account must be registered as a debenture with the Companies Registry. In case of a fixed charge, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the chargee’s consent. With a floating charge, the chargor is permitted to retain control of the charged accounts unless and until the charge converts into a fixed charge following a specified event occurring as set out in the account charge documents.

Land

- **Charge:** Under Ugandan law, mortgages and charges over land must be registered at the Ministry of Lands Registry. There is no applicable time limit, although charges are only effective upon registration, and the date of registration determines the priority between the charges. Registration will be carried out once the Lands Registry receives two original copies of the charging instrument or mortgage deed, a copy of the certificate of title and in the case of companies, a copy of the company resolutions authorising the charge.

Individuals providing security for a company over their personal property, should also present the Lands Registry with an executed power of attorney in favour of the secured party. The power of attorney must be registered and commissioned by the Commissioner for Oaths in order to have effect. If the power of attorney is to be executed outside of Uganda, it must be notarised by a notary public in the place where it is executed and registered in Uganda.

In cases where a married individual is providing security over the matrimonial home, a declaration from the applicant must be provided, stating whether he/she is married. If so, a copy of the marriage certificate must also be provided to the secured party. In addition, evidence of spousal consent must be provided to the Land Registry.

Companies are however obliged under the Companies Act to keep a register of all charges created over its assets.

- **Deposit of title deeds:** The grantor of the security interest is required to deposit the title deeds with the secured party.

Contractual Rights and Insurance Proceeds

Notice of the security interest must be given to the counterparty of the underlying contract for an assignment of contractual rights and insurance proceeds. Any debenture relating to insurance and contractual rights that is granted by a company, must be registered at the Companies Registry in order to perfect the security.

The failure to give notice to a counterparty will affect the priority of the security interest but may not affect the validity of the security, unless the underlying contract or insurance policy requires the consent of the counterparty to be obtained.

Authorisations and Licenses

Provided any necessary consent and/or no objection letter from the issuing authority/line regulator has been obtained, the charge can be perfected by registration of the debenture at the Companies Registry.

Any charge on licenses that is granted by a company, must be registered as a debenture with the Companies Registry.

Intellectual Property

As with other contractual rights, any charge that is granted by a company, should be registered in accordance with the provisions of the Companies Act. The chargee is required to register the charge with the Companies Registry within 42 days of execution of the charge. In addition, the chargee is required to register the charge at the Registrar of Intellectual Property.

Personal Property and Tangible Assets

- **Charge:** The charge must be registered with the Companies Registry within 42 days of execution of the charge, following the payment of the relevant stamp duty and registration fees.
- **Pledge:** The pledge can be perfected in the same manner described above under the Companies Act. In certain cases, movable property may also be required to be delivered to the secured party.
- **Mortgage:** The mortgage over personal property can be perfected in the same manner as land under the Companies Act.
- **Aircraft:** For aircrafts, the security interest is noted on the certificate of registration, which is issued by and registered at, the Ugandan Civil Aviation Authority. In the case of a company chargor, it is advisable that the charge is also registered with the Companies Registry.

What are the fees, costs and expenses associated with creating and perfecting security in Uganda?

- **Stamp Duty:** Subject to certain limited exemptions, stamp duty is payable on all security documents which relate either to (i) property situated in Uganda or (ii) a transaction which relates to a thing done or to be done in Uganda. If the security instrument is executed in Uganda it must be stamped within 45 days of execution. Any security instrument executed outside of Uganda must be stamped within 30 days from the date the security document is delivered to Uganda.

The person taking security bears the cost related to stamp duty, unless otherwise agreed. The failure to pay stamp duty on a security document can result in a fine not exceeding 10 currency points (approximately \$59) for each day the default subsists. Furthermore, the security document may not be validly registered and will be deemed inadmissible in the Ugandan courts.

Stamp duty is typically payable at a fixed or ad volarem rate. Ordinarily, security instruments are charged at a rate of 0.5% of the amount secured by any principal security document. Where there is more than one security instrument relating to the same transaction, the parties may elect a principal document which

shall attract stamp duty, such that any supplemental security will only attract nominal duty. However, where the various security instruments relate to different aspects of the same transaction and are capable of separation, each instrument is to be charged stamp duty separately.

In exceptional circumstances, an exemption from paying stamp duty may be obtained from the Minister of Finance upon application. This only applies if the industry where the entity seeks to invest is deemed to be a priority industry. In this case, stamp duty may be waived when perfecting security. The relevant Minister waives the duty by issuing a statutory instrument to that effect.

- **Companies Registry:** After stamping, all registrable charges a Ugandan company creates must be registered at the Companies Registry within 42 days of creation (i.e. typically the charging instrument's date of execution) via delivery of the prescribed form. A fee of UGX 100,000 (US\$29) for debentures and proof of payment of stamp duty.

Charges over assets situated in Uganda, and created by a foreign company with a place of business in Uganda, also must be registered at the Companies Registry within 42 days. Registration of the charge is affected by delivery of a notarised copy of the charge instrument, a completed prescribed form and the payment of a registration fee (as stated above) to the Companies Registrar.

- **Search fees:** Fees to search for the company file at the Companies Registry cost UGX 30,000 (US\$9).

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors.

For a security over land and other types of assets, date of registration determines priority among creditors. The creditor who is registered first has priority over the other creditors.

Creditors can also enter into a security sharing agreement in which they agree to disregard priority as determined by the date of registration, and instead, agree to prioritise their security as set out in the security sharing agreement.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce the security interest?

When a debenture is used to create a security interest, the terms of the debenture will typically set out the enforcement procedure and provide for the appointment of a receiver and/or manager to undertake the procedure.

In a charge over shares, a chargee would enforce its security interest by using the power of attorney and share transfer form (both granted to it by the chargor upon perfection) to transfer the shares to itself or a nominee. The chargee must then stamp the share transfer form and notify the Companies Registry of its newly acquired interest in the shares. The shares must be valued by a Certified Public Accountant and a report must be provided to the Companies Registry. Finally, the company secretary of the company whose shares were transferred must register the chargee in the company's register of members.

The Mortgage Act 2009 governs the enforcement of a charge over land. The chargee can commence enforcement proceedings only if the chargor has been in default for at least 45 days. The chargee may then serve a demand notice upon the chargor, following which, if the default has not been remedied within 30 days, the chargee may serve a notice of default to the chargor. Provided the default has still not been remedied within 45 days of the service of the notice of default, the chargee may then either:

- sue for the amount due;
- appoint a receiver of the income from the property. The chargee is required to serve an additional 15 working days' written notice to the chargor, prior to appointing a receiver;
- lease the land. The chargee is required to serve an additional 15 working days' written notice to the chargor, prior to granting a lease on the land;
- take possession of the land. The chargee is required to serve an additional 5 working days' written notice to the chargor, informing them of the intention to take possession of the whole or part of the land; and/or
- sell the land by private contract or public auction. The chargee is required to serve an additional 21 working days' written notice to the chargor, informing them of the intended sale. Where sale is to be conducted by public auction, a publicly advertised notice of the auction must be placed in a newspaper of wide circulation for 30 days from the date of the first advert.

Are any governmental or other consents required in connect with an out-of-court enforcement of security?

No court, governmental or other consents are required for enforcement of security.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of Uganda?

There are no such restrictions.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

Insolvency in Uganda is governed by the Insolvency Act 2011 (the “Insolvency Act”).

This section deals with bankruptcy and insolvency law as it applies to incorporated companies only. This section does not cover the insolvency of statutory corporations, banks or insurance companies, which are subject to special insolvency legislation under the laws that regulate the licensing of such institutions.

- **Members’ voluntary liquidation:** The directors of the company must make a declaration of solvency, confirming that the company is able to pay its debts within 12 months from the commencement of voluntary liquidation proceedings. The members of the company in a general meeting must appoint one or more liquidators for the purpose of liquidating the company’s affairs and distributing its assets. Upon the liquidator’s appointment, all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance. A liquidator will then be appointed to conduct the formal winding-up of the company.

As soon as practicable after the company’s liquidation is completed, the liquidator must prepare an account of the liquidation showing how it has been conducted and how the company’s property has been disposed (the “Liquidator’s Account”). Within 30 days of preparing the Liquidator’s Account, the liquidator must convene a general meeting of the company and the company’s creditors. The liquidator must ensure that the notice for the meeting is published once in the Uganda Gazette. The liquidator must lodge with the Companies Registry a copy of the notice. Within 14 days of the meeting, the liquidator must lodge with the Companies Registry a copy of the Liquidators Account together with a return giving details of the holding of the meeting and the meeting date.

- **Creditor’s voluntary liquidation:** The creditors and the company can nominate an authorised insolvency practitioner to be a liquidator for the purposes of liquidating the company’s affairs and distributing its assets.
- **Liquidation by court:** A company may be wound-up by petition to court if:
 - The company has been served with a statutory demand and is unable to comply with the demand;
 - The company is unable to pay its debts as they fall due; or
 - The company has agreed to make a settlement with its creditors or entered into administration.

Winding up or insolvency registers

The Companies Registry maintains all winding up records and relevant registers.

Are “company rescue” or reorganisation procedures available?

Yes, such procedures are available under the Companies Act and the Insolvency Act.

- **Amalgamation procedure:** Two or more companies (each a “Pre- Amalgamated Company”) may amalgamate and continue as one company. The amalgamated company inherits all property, rights, privileges, shareholder’s interests, business and liabilities of each Pre - Amalgamated Company.

A board resolution of each Pre-Amalgamated Company will be required to approve the procedure and the directors in favour will proceed to certify that the following conditions of the Companies Act have been met:

- Each Pre-Amalgamated Company has provided an amalgamation proposal and a set of proposed incorporation documents of the amalgamated company.
- The amalgamation is in the best interests of the members and will be solvent at the time at which the amalgamation is effective.

Following receipt of the board resolutions, the members of each Pre-Amalgamated Company will then proceed to hold a special resolution to approve use of the amalgamation procedure.

All documentation must then be registered at the Companies Registry within 10 working days after the resolution is passed to amalgamate.

- **Compromise or arrangement:** The court can sanction the compromise or arrangements between a company and its creditors. A compromise is binding on a liquidator in circumstances where a company has begun the winding-up process.

A company intending to make arrangements with their creditors may apply to court for an interim protective order (a moratorium). Under the Insolvency Act, an order is valid for 14 days.

Provisional administrators are appointed on the date of the passing of an interim protective order, to investigate the company's business and ensure survival of the company.

Are there any entities excluded by law from bankruptcy proceedings?

Under both the Insolvency Act and Companies Act, the law on bankruptcy only applies to individuals and companies. The following entities are excluded from bankruptcy proceedings:

- The Government of the Republic of Uganda;
- Local governments;
- Social Security Funds;
- National Parastatals and Statutory Corporations;
- Non- Governmental Organisations;
- Public Trusts; and
- Public-Private Partnerships.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

No, a secured creditor will still be able to enforce its security.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

No, there are no preference periods, claw-back rights or preferential creditors' rights.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

Debt a company owes a creditor can be contractually subordinated to debt owed to other creditors, and contractual subordination is typically recognised under Ugandan law in the event of insolvency.

How is priority among secured parties determined on the insolvency of the debtor?

Priority between creditors will be as follows:

- Secured creditors holding a first fixed charge
- Preferential creditors
- Creditors with floating charges
- Unsecured creditors.

FOR MORE INFORMATION



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