LATHAM & WATKINS LLP

Taking Security in Africa

A Comparative Guide for Investors

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About This Guide

In light of Africa's sustained economic growth over the last two decades, 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 legal systems particular to the jurisdictions in which the investment is being made. The many different legal systems of the continent's 54 countries and regional blocs can be challenging to navigate. Africa's complex legal systems and the limited information about how those systems apply to foreign investments are often seen as obstacles to investment.

This guide provides 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. With contributions from leading local law firms, we focus on eight of the most active jurisdictions for foreign direct investment: Egypt, Ethiopia, Ghana, Kenya, Mauritius, Nigeria, South Africa, and Uganda.

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A share pledge may be taken over shares or quotas in an Egyptian joint stock or limited liability company. The pledge of shares would take the form of an agreement between the pledgor and the pledgee. In case of a pledge over shares of an Egyptian joint stock company, the agreement must be registered with Misr for Central Clearing, Depository and Registry (MCDR). In case of a limited liability company, a pledge over quotas would be perfected by virtue of an annotation on the quota certificate(s) and the quotaholders' ledger, as well as by the transfer of possession of the quota certificate to the pledgee or a third party.

Bank Accounts

Security over bank accounts is regulated under law no. 115 of 2015 and the executive regulations enacted thereunder pursuant to law no. 108 of 2016 (the Movable Collateral Law). Current accounts and time deposits in designated bank accounts may be pledged and/or assigned if the account holder and the account bank enter into a pledge agreement and/or an assignment agreement which is subject to registration with the Egyptian Collateral Registry (the ECR), an electronic register established for perfection of security created under the Movable Collateral Law.

Land

Security over immovable property may be taken by way of an official real estate mortgage over land, buildings, and/or buildings under construction. The real estate mortgage agreement must be registered with the relevant competent notary public office in order to be effective.

Contractual Rights

Security may be taken over contractual rights by way of an assignment by way of security pursuant to an assignment agreement. The assignment created pursuant to such agreement must bear a certified date (e.g., by notarisation) in order to be effective against third parties. In practice, the date certification of the assignment agreement is achieved by virtue of a notice of assignment served through a court bailiff.

Insurance Proceeds

Security may be taken over insurance proceeds by two means:

- by virtue of an assignment by way of security; or
- by endorsement of the insurance policy in favour of the secured parties, 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, transfer or assignment of authorisations or licences may, in certain scenarios, be conditioned upon obtaining the approval of the competent regulatory authority responsible for issuing the same. Under the Movable Collateral Law, it is prohibited to create security over licences issued by the State, public authorities, or any public juridical body.

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 possessory mortgage, a *fonds de commerce* mortgage, or a mortgage over movable property registered with the Egyptian Collateral Registry.

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, i.e., the Egyptian Civil Aviation Authority.

Ships: Security may be taken over vessels and vessels under construction by way of mortgage.

Types of Security Interests

Can security be taken over future assets?

As per the provisions of the Movable Collateral Law, the ECR has been created for the registration of any security interest granted over present and future movables. Said movables include any tangible (present or future) or intangible movables owned by the debtor or guarantor securing an obligation, debt, loan, or credit facility. The ECR allows for the perfection of security interests created in accordance with the provisions of the relevant law.

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

Any natural Egyptian citizen with legal capacity and authority to grant a security interest may legally grant the same. A natural Egyptian citizen may also hold certain types of security, such as pledge of shares as well as assignments by way of security. It is also permitted under the executive regulation of the Movable Collateral Law that a natural person granting a financing or credit hold a security over movables. While there is no express legal restriction in this regard, from a practical perspective it may be challenging to register a real estate mortgage or a *fonds de commerce* mortgage in favour of a natural person.

Egyptian juridical persons, on the other hand, may grant and/or hold a security interest, subject to the rules applicable to each type of collateral and any restrictions in their constitutional documents.

In relation to foreign lenders, Egyptian law is clear on restricting said entities from holding a security interest on certain types of assets. For instance, the Movable Collateral Law requires that the entity that the security is registered in the name of be licenced as an Egyptian bank, an Egyptian financial leasing company, or other Egyptian companies licenced to provide credit solutions. This means that the ECR is limited to Egyptian entities.

Foreign lenders that wish to hold such form of security must appoint a local security agent on their behalf, except for lenders which are established pursuant to a treaty, such as the European Bank for Reconstruction and Development.

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 is owned by the state or by 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. In case no commercial benefit is obtained, however, 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 MCDR (which includes all shares listed on the Egyptian Stock Exchange (EGX) as well as unlisted shares), the relevant share pledge must be submitted to the MCDR so that the latter may register the share pledge in its records upon submission of the required documents.

The obligation to register the shares with the MCDR has been introduced by virtue of an amendment to the Companies' Law (no. 4 of 2018). As such, all Egyptian joint stock companies, as well as companies limited by shares, are required to register their shares with the MCDR.

Bank Accounts

A pledge and/or assignment of cash deposits, or amounts, in a bank account is perfected through registering the security interest over the movable assets with the ECR. Generally, registration of all security interest registrable with the ECR, including bank accounts, is completed by the pledgee.

Land

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

Contractual Rights

To perfect an assignment against the debtor or third parties, the debtor must be notified of (or must otherwise acknowledge) the assignment. In practice, such notice of assignment is served by virtue of a court bailiff and entails a certification of the date of the assignment agreement.

Insurance Proceeds

To perfect an assignment of insurance proceeds, the insurer must be notified of (or must otherwise acknowledge) the assignment. The date of such assignment must be certified. Alternatively, an endorsement of the insurance policy in favour of the secured party may be completed.

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. Alternatively, a pledge over movables may be registered with the ECR. From a practical perspective, it is also acceptable to register a *fonds de commerce* mortgage with both the notary public and the ECR.

Personal Property and Tangible Assets

Possessory mortgage: Assets subject to a possessory mortgage must be transferred to the creditor in order to perfect the mortgage. The creditor may also register its rights as a possessory mortgage in the ECR.

***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. The creditor may register its rights under the *fonds de commerce* mortgage in the ECR.

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 held with the Egyptian Civil Aviation Authority.

Ships: A maritime mortgage over a vessel or vessel under construction must be registered at the vessels' registry.

Perfecting Security Interests and Priority

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 or a financial institution providing financing or credit facilities. Egyptian banks and foreign banks alike are eligible for the aforementioned cap by virtue of the Banking Law No. 194 of 2020 (Banking Law), which recently expressly applied the abovementioned cap to foreign banks, since the applicability of the same to foreign banks was vague under the preceding legislation. 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; and
- 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 date certainty). In addition, registration of *in rem* security interests is subject to survey fees, which typically is commensurate to the nature and size of the relevant land and/or property.

Stamp duty: A nominal stamp duty of EGP 0.9 per page is payable on any document which is intended to produce a legal effect in Egypt. If the relevant document was issued offshore and was brought into Egypt to be used, the stamp duty shall be due upon its usage. Credit facilities and loans provided by local banks are subject to a proportional stamp duty equivalent to 10 basis points levied quarterly on the highest debt balance under the facility, loan, or borrowing provided by banks.

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 insurance proceeds and assignment of contractual rights), the priority of creditors is determined subject to the dates on which their assignments are date certified in accordance with local law.

Shares deposited with the MCDR: While there is no express restriction of granting share security to multiple creditors, in practice, the system at the MCDR only allows for registration to one creditor.

Enforcement of Security

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take 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 *fonds de commerce* 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 by Egyptian banks and branches of foreign banks registered with the Central Bank of Egypt (CBE), 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 30 days 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 in a 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 10 days after notification, the pledgee may enforce its rights over the shares in accordance with the EGX sale and purchase rules. The aforementioned process applies only to Egyptian banks and branches of foreign banks registered with the CBE by virtue of Article 107 of the Banking Sector Law, while the process applicable to foreign banks differs, as enforcement shall take place through public auction and by an enforcement judge.

Bank account pledge: In order to enforce a bank account pledge which is registered with the ECR, amounts in the pledged accounts or pledged deposits may be set off against amounts owed by the pledgor to the pledgee. In case the pledgee is the account bank, set-off would be applied directly. In case the account bank is different to the pledgee, set-off takes place by virtue of a notification from the pledgee to the account bank. The rights subject to a set-off must be undisputed for set-off to take place.

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

Generally, while no governmental or other consents are required in order to enforce any category of security, in order for a creditor to enforce its security interests, a creditor generally must obtain a court order, which is simpler and more accelerated than a court judgment. Subsequently, the assets subject to security are sold in a public auction. As elaborated above, certain security may exceptionally be enforced without the need for a court order.

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

Under Egyptian law, only the registered pledgee, mortgagee, or assignee (as applicable) may enforce a security interest over assets located in, or governed by, the laws of Egypt regardless of such creditor's nationality and domicile.

Insolvency/Bankruptcy Proceedings

Overview

The Egyptian bankruptcy regime is primarily set out in the Restructuring, Rescue, and Bankruptcy Law no. 11 of 2018 (the Bankruptcy Law). However, the newly introduced Banking Sector Law explicitly excludes the application of the Bankruptcy Law to Egyptian banks and introduces a new chapter on settlement of distressed banks. The law allows the CBE, in certain scenarios, to extend facilities to distressed banks, take over the governance of the distressed bank, and/or appoint an interim bank to reserve the rights of the distressed bank and carry out its obligations.

Notably, Egyptian law distinguishes between insolvency procedures applicable to non-merchant individuals and bankruptcy procedures applied to merchants, including companies.

Bankruptcy proceedings, in accordance with the Bankruptcy Law, 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 a request in order to file for its own bankruptcy is limited to merchants — whether natural persons or legal entities (the latter category includes companies, branches, and agencies) — which carry out 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. Additionally, a certificate must be submitted evidencing that: (i) the merchant did not previously present such a request or submit a request that was rejected three months prior; and (ii) a deposit of EGP 10,000 having been made at the clerk's office.

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. The statement must also include any evidence of the debtor's refrainment of payment of due debts at the clerk's office in the competent court, accompanied by an amount equivalent to EGP 10,000 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?

Restructuring procedures prior to a declaration of bankruptcy are available. To be eligible to benefit from such proceedings, the relevant person must: (i) have been a merchant for a minimum period of two years prior to filing; (ii) have a minimum capital of EGP 1 million; (iii) not have committed fraud; (iv) be suffering from a turbulent financial status; (v) not have initiated proceedings for company rescue against bankruptcy; and (vi) not be undergoing liquidation proceedings.

Company rescue procedures prior to a declaration of bankruptcy are also available subject to the following conditions, whereby the relevant person must: (i) have been a merchant for a minimum period of two years prior to filing; (ii) not have committed fraud; (iii) be suffering from a turbulent financial status that caused him/her to be unable to pay due debts; (iv) file the request within 15 days starting from the date of the default in paying due amounts; (v) not be subject to liquidation procedures; and (vi) obtain the approval of the majority of the partners or general assembly of the company, subject to the type of company.

Insolvency/Bankruptcy Proceedings

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 its debts shall be considered due. Therefore, liens mandatorily preferred by law (such as debts related to judicial expenses and tax dues), shall take priority. After satisfaction of rights mandatorily preferred by law, secured creditors shall recover outstanding debt from the assets taken as security according to the ranking of registration. Finally, all unsecured creditors of a bankrupt borrower share the enforcement proceeds pro rata to each creditor's participation in the total indebtedness.

Where a secured creditor is not able fully to recover the debt after enforcement of security, such creditor will rank *pari passu* with the 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.

Priority of creditors differs when the debtor is an Egyptian bank. Under Article 175 of the Banking Sector Law, liens ranked in said law shall take priority, regardless of any provision stating otherwise. Under the current umbrella, banks' liquidation proceedings are ranked as follows:

1. secured creditors shall recover outstanding debt from the assets taken as a security according to the ranking of registration (e.g., first, second, third degree);
2. liquidator's fees;
3. clients' deposits (other than those of related parties);
4. employees' salaries for six months prior to appointing the liquidator;
5. governmental dues (CBE loans relating to the settlement procedures);
6. taxes and insurance dues; and
7. private sector loans extended after appointing the liquidator.

Finally, the unsecured creditors will share any remaining liquidation proceedings on a pro rata basis related to the total indebtedness of the debtor.

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

Any security granted by the bankrupt merchant from the date of cessation of its due payments may be deemed unenforceable against its creditors if: (i) such security granted by the bankrupt merchant affects rights of its creditors; and (ii) the counterparty to the bankrupt merchant knew that such merchant has ceased payments that are due and payable to its creditors.

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 creditors entitled to:

- amounts paid to keep and maintain the debtors' movable assets;
- amounts due to the treasury, including taxes and fees;
- amounts due to the seller of the movable asset subject to enforcement; and
- amounts due to the partners who, along with the debtor, own the movable asset subject to enforcement.

Insolvency/Bankruptcy Proceedings

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 creditors entitled to:

- 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 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 according to the relevant subordination agreements.

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Ethiopia

Ethiopia Contents

Types of Security Interests

What categories of assets are typically provided as security to lenders in Ethiopian 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, security can be granted over the right to use land by way of pledge. An investor can also provide security over a leasehold land interest by way of a 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 a pledge agreement or endorsement at the back of the insurance policy. Furthermore, security over insurance proceeds can be taken as an extension of a pledged asset.

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. However, unless and otherwise agreed, a security interest in a tangible asset incorporating intellectual property does not cover the intellectual property itself, and a security interest in the intellectual property does not cover the tangible asset. Movable Property Security Right Proclamation 1147/2019 includes provisions about the security of intellectual property.

Personal Property and Tangible Assets

Security can be taken over personal property and tangible assets.

Types of Security Interests

Can security be taken over future assets?

Yes.

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. 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 who 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, or 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 their assets to secure the existing, future, or conditional obligations of a third party through an 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.

Other Securities

Security can be granted over warehouse receipts, treasury bills, and government bonds in the form of pledges. Security over businesses can be granted either by contracts or by law in the form of a mortgage.

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), or any other immovable asset such as real estate must be registered at the applicable lands or immovable properties registry. Security over land use shall be registered by the secured creditor in the movable collateral registry which is under the National Bank of Ethiopia. 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 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.

Perfecting Security Interests and Priority

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 ETB 5. Separately, power of attorney stamp duty is charged at the nominal flat rate of ETB 35, 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 ETB 25,000 and ETB 35,000; 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.
- Fees vary from ETB 30 to ETB 200 for the security registration-related services provided by the Movable Collateral Registry office located at the National Bank of Ethiopia.

Enforcement of Security

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

Bankruptcy in Ethiopia is governed by the third book of the new commercial code of Ethiopia enacted in 2021 with Proclamation No. 1243, which replaced the fifth book of the 1960s Commercial Code.

- The scope of application of the bankruptcy legal regime covers all traders and business organisations, excluding joint ventures having no legal personality, as well as craftsmen and natural persons exercising independent professional activities.
- Bankruptcy can be instituted by way of a 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 their 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 New Commercial Code of Proclamation No. 1243/2021 in the form of a preventive restructuring or a reorganisation. Preventive restructuring aims to enable financially distressed but viable debtors to efficiently restructure their debts with unanimous creditor consent, ensuring continued operation or facilitating a business sale. Reorganisation proceedings aim to restructure debts and operations efficiently with the consent of a qualified majority of creditors, benefiting them through a reorganisation plan or business sale.

Are there any entities excluded by law from bankruptcy proceedings?

Non-commercial business organisations, i.e., ordinary partnerships and joint ventures with no legal personality, are excluded from Ethiopian bankruptcy law.

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

No governmental or other consents are required for an out-of-court 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?

No.

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. However, the enforcement of the foreclosure right of a secured creditor can be suspended for a period of up to six months from the date of declaration of bankruptcy.

Enforcement of Security

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

There is a specific period of time, to be determined by a supervisory judge, in which to submit pre-insolvency claims. In fact, all proceedings for proving debts must be concluded no later than six months from the date of the judgment in bankruptcy. Clawback 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 during a certain period (where such transactions can be questioned) or 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; and
- 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 clawback 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 parities determined on the insolvency of the debtor?

Secured creditors have priority over the encumbered asset to enforce their security. However, where there are amounts that are not secured by the security package, a secured creditor is treated as an unsecured party. The order of preference among the debtor's creditors is as follows:

1. costs and expenses of the proceedings;
2. costs of the new financing in the context of preventive restructuring;
3. costs of the new financing in the context of reorganisation;
4. costs of the new financing authorised in the context of bankruptcy;
5. post-bankruptcy creditors, including creditors of new and ongoing contracts;
6. employee claims and claims of social security authorities;
7. taxes and duties owed to federal, regional and local government authorities, other than those which can be claimed from the debtor holding taxes and duties on behalf of the government (but excluding interest and penalties);
8. amounts ordered for the maintenance of the bankrupt debtor and family;
9. other preferred creditors;
10. unsecured creditors; and
11. penalties and fines imposed upon the debtor.

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Ghana

Ghana Contents

Types of Security Interests

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

Shares

Security can be taken over 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 creation of mortgages in Ghana.

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 downstream petroleum licences, mining permits, electricity generation and distribution licences, and rights under petroleum agreements) are considered to be personal to the beneficiary or licence holder. Therefore, they 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 licence, 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 security provider 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 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 capacity, power, and authority to enter into the relevant security documents.

Types of Security Interests

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, 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. 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 are 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. However, a company may not grant security over its assets in favour of a third party if doing so will breach financial assistance rules or where there is no corporate/commercial benefit to the company in providing 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 security provider 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 security provider, upon the expiration of a 30-day statutory notice period and upon relevant notice to the Collateral Registry and receipt of authorisation from the Collateral Registry to enforce the share charge.

A secured party is permitted to protect its interest in the charged shares by serving a Stop Notice and an accompanying affidavit on the company concerned in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

These rules require the company over whose shares the charge has been created to indicate on its register of members that the notice has been served, and not register a transfer or make a payment or return in respect of the shares contrary to the terms of the notice until the expiration of due notice to the secured party.

Bank Accounts

A charge over bank accounts may be by way of a fixed charge or a floating charge. In the case of a fixed charge, the secured party must exercise control over the charged accounts. Such control may be in the form of restrictions on the security provider's ability to withdraw monies from the charged accounts or otherwise dealing with the charged accounts without the lender's consent. With a floating charge, the security provider is permitted to retain control of the charged accounts until the charge converts into a fixed charge following the occurrence of a "crystallisation" event.

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.

Furthermore, the Lands Commission's consent is required for the creation of a mortgage over state land or stool land. 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. For property owned by a married individual, written spousal consent is required.

Contractual Rights and Insurance Proceeds

Contractual rights, insurance proceeds, and receivables may be assigned by way of security. Where the underlying contract requires the consent of the counterparty for the creation of security or assignment of the contract or receivables under the contract, failure to obtain such consent will invalidate the security.

Except otherwise stated in the underlying contract, notice to the relevant counterparty is not required for the validity of the assignment. It is, however, usual to give such notice. 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.

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 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, it is also prudent to have the secured party endorsed as loss payee on the insurance policy.

Perfecting Security Interests and Priority

Authorisations and Licences

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

Note that 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, it is usual to notify the licensor of any assignment of rights under an intellectual property licence agreement and to obtain consent of the licensor of the intellectual property rights where such consent is required under the terms of the intellectual property licence agreement.

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

Perfection of security involves the stamping of the security at the Stamp Duty Office and registration of the particulars of charge under the security instruments at relevant public registries discussed below.

Stamping

The Stamp Duty Act, 2005 (Act 689) (Stamp Duty Act) requires that an instrument executed in Ghana, or executed outside Ghana but relating to property situate, or any matter or thing done or to be done in Ghana, should be stamped. An instrument which is not stamped cannot be admitted as evidence in civil proceedings or be available for any purpose, such as registration at any public registry.

Under the Stamp Duty Act, all instruments subject to stamping must be stamped within two months of their execution or two months after it is first received in Ghana, where it is executed outside Ghana. Stamping is, however, a pre-requisite to registration of security at the Office of the Registrar of Companies and the Lands Commission. Thus it is essential that stamping be completed as soon as possible after execution of the documents. Doing so will enable registration of the security within the time limits set under law.

An instrument which is not stamped within the stipulated two-month period would be stamped upon paying a penalty of a value equivalent to two and a half penalty units (GHS 30, or approximately USD 2). Where the unpaid duty exceeds the equivalent of two and half penalty units, a further penalty in the form of interest at a rate of 5% per annum from the day the instrument was first executed up to the time when the interest is equal in amount to the unpaid duty. In practice, the penalties are not enforced.

Stamp duty may be assessed and payable at *ad valorem* or nominal rates, or may be exempt from stamp duty, depending on the instrument in question. The Stamp Duty Act makes provision for certain instruments to be exempt from stamp duty. An instrument which is exempt from stamp duty would need to be presented to the Stamp Duty Office and stamped "exempt".

Under the Stamp Duty Act, security (including a guarantee or a pledge) is subject to ad valorem stamp duty at a rate of 0.5% of the amount secured if the security constitutes principal/primary security, and 0.25% of the amount secured for each additional security. Note that the amount recoverable under a security agreement is the amount in respect of which stamp duty has been paid.

The stamp duty amount will usually be calculated over the loan amount unless the security agreement expressly specifies the secured amount. If the parties want to increase the secured amount at any time, they will have to amend the security agreement and pay stamp duty on the additional secured amount. Note that the additional secured amount constitutes new security and hardening periods will restart in relation to such additional secured amounts during insolvency of the security provider.

All other non-security finance documents are subject to a nominal stamp duty not exceeding USD 20 (including administrative expenses).

Perfecting Security Interests and Priority

Perfection of Security

Security must be registered with the Collateral Registry, the Office of the Registrar of Companies (in the case of security created by a company), and the Lands Commission (in the case of security over immovable property), in order to be perfected. As noted, stamping is a pre-requisite for registration of security at the Office of the Registrar of Companies and the Lands Commission. Priority to security is determined by the time of registration.

Registration at the Office of the Registrar of Companies

Further to the Companies Act, 2019 (Act 992), companies incorporated in Ghana are required to register particulars of charges with the Office of the Registrar of Companies within 45 days of the creation of the charge. Where a company fails to register a charge within 45 days of its creation, the charge becomes void and the amount secured becomes immediately payable notwithstanding any provision to the contrary in any agreement.

Registration of the particulars constitutes actual notice of such particulars to all persons and for all purposes as from the date of registration. However, the security is effective from the date of creation of the security except where the security has become void for non-registration. Thus an earlier security will have priority over a later security over the same asset where the earlier security is registered before the expiration of the 45-day statutory period but after the registration of the later security.

Where particulars of the security are not filed for registration at the Office of the Registrar of Companies within the 45-day statutory period, the security provider, or any person interested in the charge, may apply to the court for an extension of time within which to register the charge created. The courts will grant the application as a matter of course except if doing so will be prejudicial to the interest of other third parties, such as innocent purchasers for value without notice.

Registration at the Office of the Registrar of Companies can be completed within two months after submission of the security documents for registration.

Either party can register a charge at the Office of the Registrar of Companies. However, the primary obligation to register is on the security provider and the lender is entitled to a reimbursement of any fees incurred by it in the registration of a charge if the security provider fails to effect such registration. In practice, the lender's lawyers will be in charge of registration of the charge, as the effect of non-registration is weighted against lenders.

Note that the security provider is required to keep a copy of any instrument creating a charge over its assets at its registered office. The instruments are to be made available for inspection by the general public during normal business hours of the company, subject to any restrictions contained in the constitution of the company.

A member or creditor of the company may inspect the register of charges at no cost. However, nominal fees usually below USD 100 may be payable in the case of any other person.

Registration at the Collateral Registry

In addition to registration of security created by a company at the Office of the Registrar of Companies, a lender or a person interested in a charge is also required, under the Borrowers and Lenders Act, to register particulars of the charge or collateral created with the Collateral Registry within 28 days of the date of the creation of the collateral or charge.

Where a charge is not registered at the Collateral Registry, it remains effective between the parties to the agreement. However, the right of the lender or security agent/trustee to enforce the charge is subject to the rights of any other creditor or person entitled to priority under the Borrowers and Lenders Act. Additionally, where a bank licenced by the Bank of Ghana fails to register a security interest created in its favour at the Collateral Registry, such bank is liable to pay an administrative penalty of 10 penalty units (GHS 120, approximately USD 10) for each day the breach continues. Note that stamping is not a pre-requisite for registration of security at the Collateral Registry.

The Borrowers and Lenders Act is silent on whether leave is required for late registration of security at the Collateral Registry. However, in practice, leave

Perfecting Security Interests and Priority

is required to be obtained from the Registrar of the Collateral Registry where security is filed for registration at the Collateral Registry after the 28-day statutory period. Leave may be granted if the Registrar is satisfied that the failure to register within the time prescribed will not prejudice the position of creditors or shareholders of the borrower, or if it is just and equitable to do so. At the time of applying for registration of the security online, the reasons for the delay in registration must be specified in the application. Leave for late registration of security may be obtained within one day and is granted as a matter of course.

Late registration is of no effect against a liquidator, official trustee, and creditors of the security provider if insolvency or winding-up proceedings against the security provider had commenced before the actual date of registration.

Under the Borrowers and Lenders Act, where the charge is created by a company, the requirement to register the particulars of a charge at the Collateral Registry is in addition to the requirement to register the charge at the Office of the Registrar of Companies.

This suggests that in relation to a company, the charge should have been registered at both the Office of the Registrar of Companies and the Collateral Registry to be enforceable. Thus, in the event that an application for extension of time to register the charge at the Office of the Registrar of Companies is refused and because of that the charge is not registered at the Office of the Registrar of Companies, the charge although registered at the Collateral Registry may not be enforceable.

Nominal fees below USD 10 are payable for registration of security at the Collateral Registry.

Registration at the Lands Commission

Where security interest is in relation to land, the security interest must be registered with the Land Registration Division of the Lands Commission (in the case of lands in registrable districts such as Accra, Tema, and Kumasi) and/or the Deeds Registry of the Lands Commission (in the case of lands which are not in registrable districts) within three months of the creation of the mortgage, in accordance with the Land Act, 2020 (Act 1036).

Registration at the Land Registration Division of the Lands Commission may be completed within three to six months after submission of the security documents for registration. Registration of security at the Deeds Registry of the Lands Commission may be completed within three months.

As the registration of mortgages at the Lands Commission takes a long time to be completed, creditors usually decide to make the completion of the registration of the mortgage at the Lands Commission a condition subsequent, while the completion of the mortgage registration at the Office of the Registrar of Companies and the Collateral Registry remains a condition precedent. Priority of registration at the Lands Commission is determined by date of presentation for submission.

Applicable fees depend on the size of the land over which security has been created, but these fees are not significant.

Registration of Guarantees

Unless a guarantee is backed by security (assets of the guarantor), there is no requirement to register the guarantee with either the Office of the Registrar of Companies or the Collateral Registry.

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 date of creation of the security.

Generally, the earlier created security interest ranks ahead of the later one, subject to perfection.

A fixed charge on an asset and a security assignment will 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 to enforce its security interest?

The Borrowers and Lenders Act 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. It 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.

Realisations of charges over non-cash assets may be by way of auction sale, public tender, private sale, or any other method specified in the relevant finance document.

Realisation of security by way of auction must be organised in accordance with the Auction Sales Act 1989 (PNDCL 230).

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

1. amounts required to discharge reasonable costs and expenses incurred by the secured party in realising the security;
2. amounts required to discharge reasonable legal expenses;
3. amounts required to discharge any prior registered charge over the secured assets or a lien arising by operation of law;
4. amounts required to discharge the debt or obligation secured by the charge created in favour of the secured party;
5. amounts required to discharge debts owed by the security provider to persons who have a subordinate charge in the secured assets; and
6. amounts required to discharge debts owed by the security provider to any other person who claims interest in the secured assets upon an order of the court.

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 if the security has been registered with the Collateral Registry.

Prior to enforcement, the secured party is required to register a notice of intention to enforce security with the Collateral Registry. The Registrar of the Collateral Registry will then issue a Memorandum of No Objection certifying realisation of the charged assets, upon satisfaction of all requirements for realisation. The Memorandum of No Objection remains valid until the charged assets are sold or retained by the secured party, or the debt secured by the charged assets has been duly settled.

Where the secured party seeks to retain possession of the charged assets in full or partial satisfaction of the secured obligations, the secured party is required to notify the borrower and any other person who has registered security in the charged assets or has given the secured party earlier notice of interest in the charged assets before the secured party took possession of the charged assets. The secured party cannot retain possession of the charged assets if it receives a notice of objection (within 10 days of the secured party's notice) from a person whose interest will be adversely affected by the retention. In such case, the secured party is required to sell the secured assets.

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 licence.

Enforcement of Security

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

Except in the case of specific sectors such as the petroleum and power sectors, where specific local content rules apply, 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 engage a local receiver to act on its behalf in the enforcement of security.

Insolvency/Bankruptcy Proceedings

Overview

This section 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: (i) the Companies Act 2019 (Act 992), which applies to voluntary insolvency (also referred to as private liquidations); and (ii) the Corporate Insolvency and Restructuring Act 2020 (Act 1015), 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; and
- the 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 (including any outstanding taxes) have been paid, the company's name 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:

- a special resolution of the company;
- a petition to the Registrar of Companies by a member of the company or a creditor;
- conversion from a private liquidation (where it is determined that the company may not be able to pay its debts in full within the period stated in its declaration of insolvency);
- a petition to the court by a member, creditor, or Registrar of Companies or the Attorney General; or
- conversion from administration or restructuring of the company.

Note that 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 Office of the Registrar of Companies in respect of insolvency proceedings. Note that these registries are not available electronically or over the telephone.

Are "company rescue" or reorganisation procedures available?

A company may enter into administration restructuring procedures. A company may also 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?

A secured creditor who is affected by the appointment of an administrator over a company cannot enforce their security during the administration except with leave of the court. The secured creditor will need to apply to the court during the decision period, with notice to the administrator, for leave to enforce their security. The decision period begins when notice of the appointment of the administrator is given to the secured creditor and ends on the close of the 14th day after the administration begins. The court will not grant leave to enforce the security except where the court is satisfied that serious prejudice will be caused to the secured creditor if the application is not granted, and if that outweighs the prejudice which will be caused to the secured creditor if the application is not granted. In granting leave, the court may give directives for the sale of the property.

Insolvency/Bankruptcy Proceedings

In the case of a company undergoing a restructuring, a secured creditor is not permitted to enforce its security unless: (i) the restructuring agreement provides for the secured creditor to realise or enforce the security and the secured creditor at the watershed meeting voted in favour of the resolution as a result of which the company executed the agreement; or (ii) after the creditors have agreed to execute a restructuring agreement, the court orders that the secured creditor may realise its security. The court may make such order if satisfied that: (i) the grant of the order will not adversely affect the achievement of the purpose for which the restructuring agreement was entered into; and (ii) the interests of the secured creditor will not be prejudiced to an extent that outweighs the interests of other creditors if an order is not made having regard to the terms of the restructuring agreement.

Upon the commencement of winding-up proceedings, proceedings may not be brought against the security provider except:

- by a secured creditor for a realisation of the secured asset; or
- by leave of the court and subject to any conditions that the court will impose.

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

Fraudulent preference: Where the company, at a time when liquidation is imminent, enters into a transaction that gives a creditor preference over other creditors with the intent that any creditors should benefit at the expense of others, the liquidator is required to give notice to the creditor so preferred and require that creditor to restore to the liquidator — whether by payment of money, transfer of property, or surrender of rights — the benefit which has accrued to the creditor by reason of the creditor being preferred. Only transactions entered into 12 months before the onset of insolvency are at risk of a challenge on this basis.

Floating charges: A floating charge on the property of the company is invalid if the winding-up of the company commences within 12 months of the creation of the charge (unless it is proved that the company was solvent immediately after the creation of the charge), except to the amount of the cash paid to the company at the time of, or subsequent to, the creation of the charge and in consideration for the charge, together with interest on that amount at the yearly interest rate applicable to the 91-day government treasury bill. Note that in such case, the amount borrowed will become an unsecured debt.

Preferential creditors' rights: Payments accruing to the company's preferential creditors have priority over any claim for principal or interest due on secured debts. Statutorily preferred debts include: (i) pensions; (ii) salaries of employees which became due during restructuring or administration of the company and financings obtained by the company during administration or restructuring; (iii) salaries of employees regarding employment during the whole or a part of four months preceding the commencement of administration or winding up; and (iv) unpaid taxes, rates, and similar payments owed to the revenue authority or a local authority which have become due and payable within the year preceding the commencement of administration or winding up.

Payment by money lenders: Where in the process of winding up a company, it appears to the liquidator that within a period of 10 years preceding the winding up of the company, the company paid a sum of money in respect of a loan in circumstances whereby a court would have ordered that the company is entitled to a repayment of the sum of money paid to the lender, the liquidator may give a notice to the lender requiring the lender to make such repayment to the liquidator.

Reversal of transactions: Where in the process of winding up a company, it appears to the liquidator that within: (i) a period of two years preceding the winding up of the company; or (ii) a period of two to 10 years preceding the winding up of the company (where the company was insolvent), the company transferred its property or incurred an obligation otherwise than for full value or in settlement of a due debt, the liquidator may require the person to whom the transfer was made or for whose benefit the obligation was incurred to restore to the liquidator the excess benefit which accrued to such person above the value of the consideration provided. This may, however, not apply to transactions: (i) made in

Insolvency/Bankruptcy Proceedings

good faith to carry on the business of the company; (ii) made upon reasonable belief that they would benefit the company; and (iii) made at a time where the directors of the company were not aware that the company was insolvent or that the transaction had the effect of making the company insolvent.

Restoration of property: Where a company transfers money or property in respect of a debt owed to a creditor within 21 days prior to the petition for the winding up of the company, such creditor is required to restore the property or its value to the liquidator upon receipt of a notice from the liquidator to that effect. This rule does not apply to payments or transfers made: (i) by the company to its bank provided such payments are used in meeting cheques drawn by the company; (ii) in respect of debts incurred within 21 days prior to the winding up petition; (iii) in respect of a secured debt; or (iv) on the enforcement of a guarantee, indemnity, mortgage, charge, or lien against a third party.

Additionally, upon commencement of winding up, property in possession of a bailiff (or the proceeds thereof) in respect of an execution issued by a creditor of the company must be transferred to the liquidator after deduction of charges due to the bailiff for execution.

Conveyance or assignment of property: Upon commencement of winding up, a conveyance or assignment of property by the company to trustees for the benefit of creditors of the company is deemed void.

Can debt that 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 (including during insolvency of the company).

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

In the absence of agreement between secured creditors, priority between creditors will be determined by the time of registration of the security. Also, secured creditors under a fixed charge will have priority over holders of floating charges, except where the terms under which the floating charge was created prohibited the creation of later security which would have priority over the floating charge.

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Kenya Contents

Types of Security Interests

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

Security can generally be taken over all assets including the below classes of assets:

Shares

Security over shares in a Kenyan company can be taken by way of a charge or 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 together with a blank share transfer form and a memorandum setting out the terms of the deposit and rights of enforcement with the secured party.

Typically, a pledge is used only in the case of certain movable assets and the pledgee (i.e., a lender) retains the possession of the goods until the pledgor (i.e., the borrower) repays the entire debt amount. In case there is default by the borrower, the pledgee has a right to sell the goods in their possession and adjust the proceeds towards the outstanding debt. A pledge is the actual or constructive delivery of possession of an asset by way of security. A pledge may also confer a power of sale. Since a key feature of a pledge is that the creditor takes possession of the asset, a pledge can only be taken over assets which are transferable by delivery of possession. Shares are abstract and hence not capable of a pledge unless they pertain to shares in a listed company (e.g., they also include bearer shares and debt securities).

Bank Accounts

Security over the deposits in a bank account can be taken by way of a fixed or floating charge. An assignment of receivables can also be coupled with security over a bank account when receivables are anticipated to be paid into an account and where they are assigned to the security holder as assignee by the entity entitled to receive such receivables.

Land

Security can be taken over land by way of a formal or informal charge.

- Formal charges are created when the parties enter into a formal charge in the prescribed form under the land laws in Kenya — principally, the Land Act (Cap.280, Laws of Kenya) and Land Registration Act (Cap.300, Laws of Kenya) and the associated regulations. Formal charges require registration and perfection at the relevant Land Registry to take effect as formal charges.
- Informal charges are created in two key ways: (i) when parties enter into a written contract, the effect of which is for the landowner to undertake to charge their property; or (ii) when a document of title or other instrument which evidences ownership is deposited with a secured party. Note that formal charges entered into but which are not perfected or duly registered in accordance with the land laws take effect as informal charges.

Contractual Rights and Receivables / Book Debts

Security can be granted over contractual rights by way of a fixed or floating charge or through a legal or equitable assignment in receivables or book debts. Creation of security in each case is predicated on the condition that there is nothing in the relevant contract that prohibits the granting of such security.

In the case of a legal assignment, notice of the security interest should be given to the counterparty of the underlying contract. The failure to give notice to a counterparty does not invalidate the assignment, but it may affect the priority of the assignment.

Insurance Proceeds

Security over proceeds from an insurance policy can be taken by way of an assignment of the relevant insurance contract. Typically, the chargee/assignee taking the benefit of the security is noted on the insurance policy as a co-insured or first loss payee in case of an insurance payout.

Types of Security Interests

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, license, 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 relevant issuing authority..

Intellectual Property

Typically, security is taken over trademarks, copyrights, and other intellectual property by way of a fixed or floating charge.

Tangible Assets

Security in the form of a fixed or floating charge or a pledge may be taken over personal property such as stock. The Movable Property Security Rights Act (Cap.499A, Laws of Kenya) (MPSRA) provides a legal framework for dealing with security rights in movable assets and which are registered at the Collateral Registry.

Securities can also be taken over ships and aircraft. A ship mortgage created by a company is registrable with the Companies Registry and the Kenya Maritime Authority. For an aircraft, the aircraft mortgage is noted on the certificate of registration, which is issued by the Kenya Civil Aviation Authority (KCAA) and may be registered at the International Registry of Mobile Assets (and the Companies Registry, if the chargor is a company registered in Kenya). It is important to note that the MPSRA does not apply to security rights in these assets (i.e., ships or aircraft).

Can security be taken over future assets?

Yes, security can be taken over future assets. Sector restrictions may apply to assets of certain types of companies, such as insurers and statutory corporations. The MPSRA states that a security can be taken over all the borrower's movable assets whether present or future. In the case of future assets, the security right is only created when the grantor acquires title to the asset or the power to encumber the asset and the asset will be charged at this point.

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

Generally, any person with legal title to an asset can grant security over it. Similarly, any person can hold a security interest. However, certain restrictions exist on who can legally grant and/or hold a security interest. The powers of a company or its directors on behalf of the company to borrow or issue security on behalf of the company may be limited by the company's memorandum and articles of association, and in some cases may be limited altogether. Similarly, parent and holding companies can provide collateral and guarantees for loan financing to their subsidiaries, provided that they will derive some commercial benefit for so doing.

Subject to certain exceptions, the Companies Act (Cap.486, Laws of Kenya) prohibits public companies from providing financial assistance for the purpose of, or in connection with, purchasing or subscribing for their own shares or the shares of their holding company if it is a private company limited by shares. This assistance includes the granting of loans, guarantees, or security. The company and any officer who is found guilty of providing unlawful financial assistance is liable to a fine.

Furthermore, companies undergoing formal insolvency face certain prohibitions in that it is only the liquidator and administrator who can create security. Where the property of an insolvent company is already charged, the liquidator or administrator requires the consent of the secured party or court approval to create security over property that is already subject to a fixed charge.

Similarly, where an individual has been declared bankrupt and their property is vested with the bankruptcy trustee, the bankrupt individual cannot create security over their property or enter into any binding contracts. Where any additional security is created over property already charged, the bankruptcy trustee needs approval from the secured party or court approval.

Types of Security Interests

Are security trustees or security agents 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 trustee or agent may be appointed to hold security for the benefit of lenders and other secured parties. Where a security trustee or security 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 their favour has been properly perfected, their rights in respect of the relevant security interest are 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. For a company, the ability to grant security over its assets to secure the obligations of a third party may be affected by provisions in its memorandum and articles of association and commercial benefit concerns.

On the issue of commercial benefit, directors of a company are under a duty to act in the best interests of the company, and this includes commercially. It is anticipated that each transaction a company enters into generally is for its commercial benefit. Where the companies in a third-party security are related, commercial benefit is considered in the resolutions. The board and shareholder resolutions will capture that the directors and shareholders have considered the third-party security and concluded that it is in the best interest of the creating company. Where the companies are not related, it is usually common to enter into a commercial benefit agreement. Lack of commercial benefit can be used as basis for challenging a transaction or security, hence the significance in ensuring it is catered for.

For a public company or a company connected to a public company, a shareholders' resolution approving the granting of security over the company's assets to secure the obligations of a third party is required.

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 (Cap.485C, Laws of Kenya) by the delivery to the chargee of a prescribed securities pledge form. This requirement is in addition to the normal process of registering the charge at the Companies Registry and the Collateral Registry. The pledgor is required to hand over a duly completed and signed securities pledge form to the Central Depository Agent (the CDA). The CDA will then verify the instructions and signature of the pledgor, and the pledgor will deliver the signed securities pledge form to the pledgee. The pledgee is required to send the securities pledge form to the Central Depository and Settlement Corporation (the CDSC) via a CDA. The CDSC will record the security interest and freeze the relevant shares in the chargor's account. This additional process is not required in respect of a floating charge over listed shares.

In certain instances, the Registrar may issue a letter confirming that the charge is not registrable due to factors including, but not limited to: (i) the prohibition by a court of competent jurisdiction in dealing with the security; and (ii) where there is a duplication in the issuance of the certificate representing the security. 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.

Where security is by way of a memorandum of deposit of shares or pledge, the following additional steps are usually taken:

- **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 relevant share certificates (and accompanying memorandum of deposit) and a signed but undated share transfer form to the chargee. Notice of the deposit of share certificates may be filed at the Collateral Registry created under the MPSRA in order to bind third parties.
- **Power of attorney:** The chargor grants and delivers an irrevocable power of attorney to the chargee, which allows the chargee to legally transfer the secured shares pursuant to the enforcement rights in the memorandum of deposit.
- **Director resignation letters:** Signed and undated letters of resignation from each of the directors of the company are required.
- **Statutory declaration:** The directors' letters of resignation must be accompanied by a declaration confirming that they are resigning voluntarily.
- **Board resolutions:** Certified copies of board of directors' resolutions approving the memorandum of deposit or pledge of shares.

Bank Accounts

In the case of a fixed charge, the secured party takes or retains control over the charged accounts. This prevents the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the consent of the chargee. 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 specified event as set out in the account charge documents.

For an all asset debenture creating security over bank accounts, unless the debenture contains an express prohibition against the creation of subsequent charges ranking in priority to or equal with the floating charge and the subsequent chargee has notice of the restriction, any later fixed charge created by the borrower, even in favour of a person who has notice of the floating charge, will rank in priority unless the floating charge had crystallised and the later chargee had notice of crystallisation before the later charge was created.

Perfecting Security Interests and Priority

Land

Charge: The charging instrument must be in the prescribed form. Third-party consent may be required prior to creation of such a charge in certain cases, including, for example, charges over matrimonial property, leasehold property, land leased from the Kenya Railways or the Kenya Ports Authority or agricultural land (requires consent from the Land Control Board established under the Land Control Act (Cap. 302, Laws of Kenya)).

A charge over land must be registered at the relevant Lands Registry to take effect as a formal charge. A notice of such charge may be filed at the Collateral Registry to make note of the security over any movables on the land (if the chargor is a company, then such charge must also be registered at the Companies Registry). There is no applicable time limit for registration at the Lands Registry, although formal charges are only effective upon registration, and the priority between charges is determined by the date of registration. Registration will be carried out once the Registrar receives the original copy of the charging instrument duly stamped and endorsed with the requisite stamp duty, the completed prescribed form, and a nominal fee per document and per title.

On 27 April 2021, the Ministry of Lands, in consultation with the National Lands Commission and other stakeholders, established a digital land registration platform called Ardhisasa. Its aim is to put an end to manual land transactions, which were often tedious, time consuming, and prone to corruption.

To effect the transition to the digital platform, the Ministry of Lands has been digitising and harmonising land records for all properties in Kenya. As part of the process, property owners are required to surrender their existing titles in exchange for new titles under the new harmonised system once the titles have been gazetted by the Ministry of Lands for purposes of conversion. Once the conversion process in respect of a title is completed, all processes pertaining to transactions that deal with that land (including the registration of a charge) are done via Ardhisasa. Any party wishing to use the platform is required to create and register an account.

A charge created by a company registered under the Companies Act should also be registered at the Companies Registry. Unlike registration at the Lands Registry, where no time periods apply, a charge must be registered at the Companies Registry within 30 days from the date of its creation. Where the charge has been created outside Kenya, it ought to be registered within 21 days of being received in Kenya. Failure to register the charge within the prescribed period will render the charge void as against any creditor, liquidator, or administrator of the company. If the prescribed time has lapsed, the secured party may seek court approval to register the charge out of time. Typically, the court will require a justification for late registration.

Deposit of title deeds: The grantor of the security interest is required to deposit the relevant title deeds with the secured party. This is done where an informal charge has been created as discussed above.

Contractual Rights and Insurance Proceeds

At common law, notice of a legal assignment usually must be given to the counterparty of the underlying contract. In the case of an assignment of insurance proceeds, this means giving notice to the relevant insurer. Typically, the failure to give notice to a counterparty in a legal assignment does not invalidate the security assignment but makes it an equitable security interest, and priority issues are determined in accordance with the principles of equity.

This position, however, has changed following the enactment of the MPSRA. Once a security interest is registered under the MPSRA, the interest is deemed binding on all third parties who are not parties to the assignment agreement, under the third-party effectiveness concept. Third-party effectiveness is a concept in the MPSRA under which security interests or rights in assets become effective against third parties when a notice of such security interests or rights is lodged at the Collateral Registry, without the need for third parties to be issued with actual notice of such security interests or rights. In our view, the third parties who may otherwise be entitled to notice become bound by the security registered under the MPSRA. The MPSRA is statutory law, and this takes precedence over common law.

Perfecting Security Interests and Priority

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

Intellectual Property

As with other contractual rights, the licensor may be notified of any assignment of rights under an intellectual property license agreement. These securities may require registration under the Companies Act and the MPSRA. An assignment of IP rights may also require registration at the Kenya Industrial Property Institute, which is the regulatory body governing registration of IP rights. It should be noted that, the same analysis as described above applies here with respect to notices and registration under the MPSRA. Once registration is procured under the MPSRA, notice requirements under common law for assignments fall away given the express provisions in the MPSRA on third-party effectiveness.

Personal Property

Charge: The charge must be registered at the Collateral Registry by the chargee filing a notice. There is no time limit within which such a notice may be filed, but priority of enforcement among creditors is determined by the date of registration. The chargee is required to share the registration notice with the grantor within 10 working days after receipt of the registration notice from the registrar. Failure to provide the registration notice within the stipulated timeline may upon conviction attract a fine not exceeding KES 5,000 (less than USD 35). This registration must be renewed every 10 years.

Pledge: No registration is required. However, to perfect the security, the pledgor must deliver possession of the relevant personal property to the pledgee. Possession can be actual or constructive (e.g., where keys to a safety deposit box in a bank are handed over to the pledgee). The pledgor will retain ownership of the personal property and will only regain physical possession once they have discharged their debt obligations. If the pledgor defaults on payment, the pledgee has the contractual right to sell the property to satisfy the debt.

Mortgage: The process of perfecting a mortgage over personal property is the same as that outlined above.

Ships and aircraft: For aircraft, a security interest is noted on the certificate of registration issued by the KCAA and registered at the International Registry of Mobile Assets and the Collateral Registry (and the Companies Registry if the chargor is a company registered in Kenya). For ships and shares in ships, the security interest must be registered under the Merchant Shipping Act at the Kenya Maritime Authority.

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

Stamp Duty

Charges over land: Stamp duty is payable at the rate of 0.1% of the amount secured by the principal security document. If the security is supplemental — i.e., it is granted by the same party in favour of the same lender to secure the same facilities as the principal security — then stamp duty is payable at the nominal rate of KES 200 (less than USD 2). If the security is created by a different party other than the one providing the principal security, stamp duty is payable at a rate of 0.05 % of the secured amount.

Charges over movable property: Pursuant to the MPSRA, the Stamp Duty Act (Cap.480, Laws of Kenya) was amended to remove the requirement to stamp security over movable assets (both tangible and intangible). This means that one can now apply to the Collector of Stamp Duty for an exemption from stamp duty for security instruments under the MPSRA.

Assignments and guarantees: Stamp duty is payable at the nominal rate of KES 200 (less than USD 2).

Perfecting Security Interests and Priority

Registration Costs

Lands Registry: The registration fee for charges is KES 500 (about USD 4).

Companies Registry: The registration fee for charges ranges from KES 2,000 (about USD 16) to KES 14,000 (about USD 108), depending on the amount secured by the charge.

Collateral Registry: No charges apply for the registration of securities. The registration is completed online and is instant.

Registry of Ships: The registration fee for a mortgage over ships depends on the gross registered tonnage (GRT) of the ship. For vessels of 50 GRT or more, the registration fee for an initial and only mortgage is USD 350. The registration fee for each additional mortgage is USD 250. The registration fee for a notice of intended mortgage is USD 100.

KCAA: Security instruments over an aircraft are registered with the KCAA, and no registration fee is applicable. However, if the aircraft is owned by a company, then the instrument has to be registered with the company's registry, and payment of registration fee will be as discussed above.

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 the case of security over land, unless otherwise provided under the charge document, priority among creditors is determined by the date of registration. The creditor who is registered first has priority over the other creditors.

In the case of security over other types of assets, priority among creditors is determined either by the date of creation (if both of the competing securities are not registered) or the date of registration (if one or both securities are registered). Importantly, the Insolvency Act (Cap.53, Laws of Kenya) provides that the priority of a floating charge will be determined by security registered first at the Collateral Registry.

Creditors may 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 prioritize their securities in the manner provided in the security sharing agreement.

Enforcement of Security

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

Enforcement of a debenture can be by way of receivership or administration. In order for a debenture to be enforced by way of administration, the debenture must be a qualifying floating charge. A qualifying floating charge is a charge that (i) is created over the whole or substantially the whole of the property of the chargor; and (ii) contains provisions empowering the chargee to appoint an administrator. A receiver is appointed under the terms of the debenture and derives their powers from the debenture document that appointed them. As a result, powers of sale, leasing, or other remedial powers are dependent on the terms of the debenture. Once appointed, an administrator derives their powers from the debenture that appointed them.

In the case of a charge over shares, a chargee enforces their security by completing the share transfer form under a power of attorney granted to them by the chargor at the time of perfection to transfer the shares to themselves or a nominee. The chargee must then stamp the share transfer form and notify the Companies Registry of their newly acquired interest in the shares. Finally, the company secretary of the company must register the charge or its nominee in its register of members.

Enforcement of a charge over land is governed by the Land Act and the Land Registration Act. 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, where there has been a payment default), the chargee may then:

a. sue for the amount due under the charge;

b. appoint a receiver of the income from the charged land;

c. lease the land, or, if the charge is of a lease, sublease the land;

d. take possession of the charged land; or

e. sell the land by private contract or public auction.

However, remedy (a) is not applicable where the land is considered to be customary or community land. The notice to carry out the remedies set out in (b) through (e) is prescribed in the Land Registration General Regulations, 2017. In addition, the chargee is required to make an application to the court for an order to exercise the rights under (d).

If the chargee elects to sell the land by private contract, it 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. A rebuttable presumption that the chargee is in breach of their duty will arise if the price at which the land is sold is 75% or below the market value.

For a security over ships, the Merchant Shipping Act confers a statutory power of sale which may only be exercised under a certificate of sale issued by the Registrar.

For pledges, it is normal practice, as derived from common law, for a pledge holder to stipulate in the pledge the right of the pledge holder to sell the pledged security upon default of the chargor.

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, no consent is required for out-of-court enforcement of security under Kenyan law.

If a creditor has taken security over land by way of a deposit of title, they must obtain permission from the court 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 generally no such restrictions.

Insolvency/Bankruptcy Proceedings

Overview

Insolvency in Kenya is governed by the Insolvency Act (Cap.53, Laws of Kenya) (the Insolvency Act).

This section deals with bankruptcy and insolvency law with an emphasis on incorporated companies. This section does not cover the insolvency of statutory corporations, banks, or insurance companies, which are subject to special insolvency legislation pursuant to the laws that regulate the licensing of such institutions.

The liquidation of a company under the Insolvency Act can be classified in two main categories: voluntary liquidation and involuntary liquidation. In a voluntary liquidation, the process is commenced by the members and/or directors who by resolution decide to wind up the operations of a company. If the company is not solvent, the liquidation is a voluntary liquidation by the creditors. In an involuntary liquidation, the company is liquidated following an application to the court seeking to have it liquidated.

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

Upon appointment of the liquidator, all powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance. Only an insolvency practitioner is eligible for appointment as a liquidator. Insolvency practitioners are persons licensed by the Official Receiver to undertake assignments under the Insolvency Act. To become a licensed insolvency practitioner, one must meet the requirements set out under the Insolvency Act and the Insolvency Regulations, 2016.

As soon as practicable after the liquidation of the company's affairs is complete, the liquidator shall prepare an account of the liquidation showing how such liquidation has been conducted and how the company's property has been disposed of. Within 30 days of preparing the account, the liquidator shall convene a general meeting of the company and a meeting of the creditors. The liquidator shall ensure that the notice for the meeting is published once in the Kenya Gazette, once in at least two newspapers circulating in 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 after the meeting, the liquidator shall lodge with the Registrar a copy of the account together with a return giving details of the holding of the meeting and of its date.

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

As soon as practicable after the liquidation of the company's affairs is complete, the liquidator shall prepare an account of the liquidation showing how such liquidation has been conducted and how the company's property has been disposed of. The liquidator shall convene a general meeting of the company by publishing at least 30 days before the meeting an advertisement, once in the Kenya Gazette, once in at least two newspapers, and on the company's website, specifying the time, date, place, and purpose of the meeting. Within seven days after the meeting, the liquidator shall lodge with the Registrar a copy of the account together with a return giving details of the holding of the meeting and of its date.

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;
- a special resolution is passed by the company that it be liquidated by the High Court;
- at the time at which a moratorium for the company ends, any voluntary arrangement does not have effect in relation to the company;
- except in the case of a private company limited by shares or by guarantee, the number of members is below two;
- being a public company that was registered as such on its original incorporation, (i) the company has not been issued with a trading certificate, and (ii) more than 12 months have lapsed since it was so registered;

Insolvency/Bankruptcy Proceedings

- 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 it is just and equitable to wind up the company; or
- the Attorney General makes an application to wind up the company.

Winding-up or insolvency registers

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

There is no express provision in the Insolvency Act that obligates the Official Receiver to maintain a register of insolvent companies. However, the Official Receiver's office maintains a register for companies in insolvency as a matter of policy.

Are "company rescue" or reorganisation procedures available?

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

Pre-Insolvency Moratorium

The Insolvency Act was amended in 2021 to allow for a pre-insolvency moratorium for financially distressed companies. Directors are required to file documents in court stating why a moratorium is desirable. If granted, the initial moratorium will be in effect for 30 days and can be extended for a further 30 days.

While a moratorium is in effect, creditors including suppliers and landlords are prevented from taking any enforcement action against the company and its assets without the consent of the monitor or the court.

The moratorium will not be available to companies that are under administration or liquidation, or in cases in which an administrative receiver has been appointed. Additionally, companies which have had a moratorium in effect or have been subject to a company voluntary arrangement (CVA) during the 12 months prior to the application date do not qualify for the moratorium.

Administration

A company is put under administration when an administrator is appointed over it. An administrator may be appointed by the court, by the holder of a qualifying floating charge, or by the company or its directors. However, an administrator is an officer of the court whether they are appointed by the court or not, and they are only appointed as such if they are a qualified insolvency practitioner.

An administration order will be issued if the court is satisfied that the company is or is likely to become unable to pay its debts (upon satisfaction of the cash flow and balance sheet tests) and that the administration order is reasonably likely to achieve the objective of administration.

The main objectives of administration are to: (i) maintain the company as a going concern, (ii) achieve a better outcome for the company's creditors than would occur if the company were liquidated; and (iii) realise the property of the company in order to make a distribution to the secured or preferential creditors. The administrator will usually 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 a security with the consent of the administrator or with the court's approval. However, an application for the liquidation of the company cannot be made, and any pending application for liquidation will be suspended.

Company voluntary arrangements (CVAs):

- A CVA is a voluntary arrangement, compromise, or scheme of arrangement between a company and its creditors that is lodged in court as a proposal to take effect as a voluntary arrangement. The CVA takes effect upon its approval by court and binds every creditor and member of the company.
- The directors of a company may make a proposal to the company and to its creditors for a voluntary arrangement which will allow the company to enter into a composition in satisfaction of its debts or a scheme for arranging its financial affairs. Only an authorised insolvency practitioner can be appointed to monitor such an arrangement. Such a proposal

Insolvency/Bankruptcy Proceedings

can be made 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 CVA, a moratorium takes effect. The company is restricted from obtaining further credit and/or paying its liabilities during the moratorium. A creditor will also be required to seek the court's approval to enforce its security over the company's assets or 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?

Yes, it will in certain instances. In a liquidation, a secured creditor can still enforce its security but is accountable to the liquidator for any surplus realised from the sale of the assets. The surplus must be remitted to the liquidator, who will distribute it in accordance with the priority stipulated in the Insolvency Act. In an administration, there is a statutory moratorium in place, and the secured party needs to seek approval of the court or seek consent of the administrator in order to enforce their security. Similarly, where a CVA has taken effect and has been approved, it binds all creditors, including secured creditors. A secured creditor wishing to enforce their security would need court approval.

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

Preferential creditors' rights: Preferential creditors under the Insolvency Act include, in order of priority: (i) reasonable costs of the liquidation/administration; (ii) wages and salaries; (iii) government taxes; and (iv) unsecured creditors (whose debts abate in equal proportions if the funds are not enough to cater for unsecured debts). It is important to note that for unsecured creditors, the Insolvency Act mandates that 20% of the realisations from the sale of property subject to a floating charge be set aside for their benefit. In some instances, this 20% realisation could favour the unsecured creditor over the secured creditor, more so where the 20% is sufficient to fully settle the unsecured creditor's debts. The Insolvency Act was amended in 2021 to allow for a floating charge holder to make an application to disapply the 20% realisation on the grounds that the rights of the floating charge holder will be harmed. Upon the application, the court may disapply the 20% realisation or allow the 20% realisation on certain conditions.

Clawback rights: Where a company is threatened by a formal insolvency process, certain transactions that were entered into by the company before the start of the insolvency may be challenged under the Insolvency Act. The procedures set out for challenging such reviewable transactions are meant to protect the equal distribution of the proceeds of insolvency among the company's creditors. Such reviewable transactions include:

- **Preference transactions:** Where a company enters into transactions that prefer certain creditors over others, thereby giving them an advantage over the other creditors, a preference is deemed to arise. These transactions have to be entered into within two years immediately preceding the date when the company went into formal insolvency. The Insolvency Act states that a company gives a preference to a person if: (i) the person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and (ii) the company does any act or allows an act to be done that (in either case) has the effect of placing the person in a position that, if the company were in insolvent liquidation, is better than the position the person would have been in had that act not been done. The definition of "preference" in the Insolvency Act does not expressly state that the preference has to be fraudulent.
- **Transactions at an undervalue:** A transaction is deemed to be at an undervalue if the company is not receiving any valuable consideration or the value being received is considerably lower than the consideration the company is giving for the transaction. These transactions have to be entered into within two years immediately preceding the date when the company goes into formal insolvency.

Insolvency/Bankruptcy Proceedings

- **Extortionate credit transactions:** A transaction is deemed to be extortionate if: (i) it occurs within the last three years before a company's insolvency, (ii) the transaction required the company to make exorbitant payments without any valuable return; or (iii) it otherwise grossly contravened ordinary principles of fair dealing.

Floating charges: Floating charges over a debtor's assets created within one to two years 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 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?

Debt owed by a company to 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 is based on the date of registration of the security interest at the relevant registries. Priority may also be subject to any intercreditor arrangements between the secured creditors. Creditors holding security by way of a floating charge will rank after preferential creditors.

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Mauritius

Mauritius Contents

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 primarily by way of a pledge or alternatively by a fixed/floating charge.

Bank Accounts

Security over a bank account is typically taken by the accountholder assigning/pledging its rights and interest in that bank account to the secured party or by way of an assignment by way of guarantee or 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 floating charge (if the beneficiary is an *Institution Agrées*), or an assignment by way of guarantee.

Insurance Proceeds

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

Authorisations and Licences

Security interests over rights arising under authorisations or licences can be taken by way of by way of a fixed or floating charge (if the beneficiary is an *Institution Agrées*), an assignment by way of guarantee, or a pledge.

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 Agrées*), an assignment by way of guarantee, 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 Agrées*), an assignment by way of guarantee, 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 legal ownership of an asset or the right and the legal capacity to dispose of the same 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 regimes of 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 Agrées* (being entities involved in the provision of financial or banking services generally).

Types of Security Interests

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 on 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 licence any trustee appointed under a Mauritian law trust instrument.

What about third-party security?

Under Mauritian law, a person can grant security over their assets to secure the obligations of a third party.

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 licence (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 licenced 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 commercial pledge over shares, the pledgor must remit 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 original share certificates if the shares are certificated; and (iv) an extract of the issuer's registers evidencing that the pledge has been duly inscribed in the books of the issuer of the shares.

Such pledges over shares do not need to be registered with the Registrar General.

Bank Accounts

To perfect an assignment of rights and interest in a bank account or a pledge, a notice of the assignment by way of guarantee or pledge must be given to the account bank. In addition, for the assignment, the execution and registration 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 licence 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 licence 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 the delivery of a notice of pledge on the debtor of the pledged rights.

Charge: Charges over contractual rights are perfected by registration and inscription with the Conservator of Mortgages/Registrar General of Mauritius.

Assignment by way of guarantee: Rights in respect of receivables arising under a contract may be assigned to a secured party by: (i) the execution of a *bordereau* (a deed that sets out the details of the receivables to be assigned, the names of the parties, and the amount secured); and (ii) delivery of a notice of assignment on the debtor of the assigned rights.

Insurance Proceeds

Pledge: To perfect a civil pledge over an insurance policy, a notice of pledge must be sent to the insurer.

Charge/assignment by way of guarantee: Assignments and charges over insurance proceeds are perfected in the same manner as for contractual rights.

Intangible assets

Pledge: To perfect a pledge over intangibles, the pledgor must transfer possession of the pledged assets to the secured party or annotate the title deed of the asset if any. The deed under which a civil pledge is created must be registered with the Registrar General of Mauritius.

Charge: The creation and perfection requirements for charges over intangible assets are the same as those for charges over land.

Perfecting Security Interests and Priority

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 approximately MUR 55,000 (USD 1,360) per document, irrespective of the amount secured.

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:

- **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 by way of guarantee:** 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 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 and the assets secured. A creditor seeking to enforce a general civil pledge or a general 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, the beneficiary 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 pledges, 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 or concluded 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: (i) will provide an opportunity for the company or a substantial part of its business to continue existing; or (ii) 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 — to be the holder of a charge over all of, or substantially all of, the company's assets. Otherwise, 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, clawback 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; and
- unsecured creditors.

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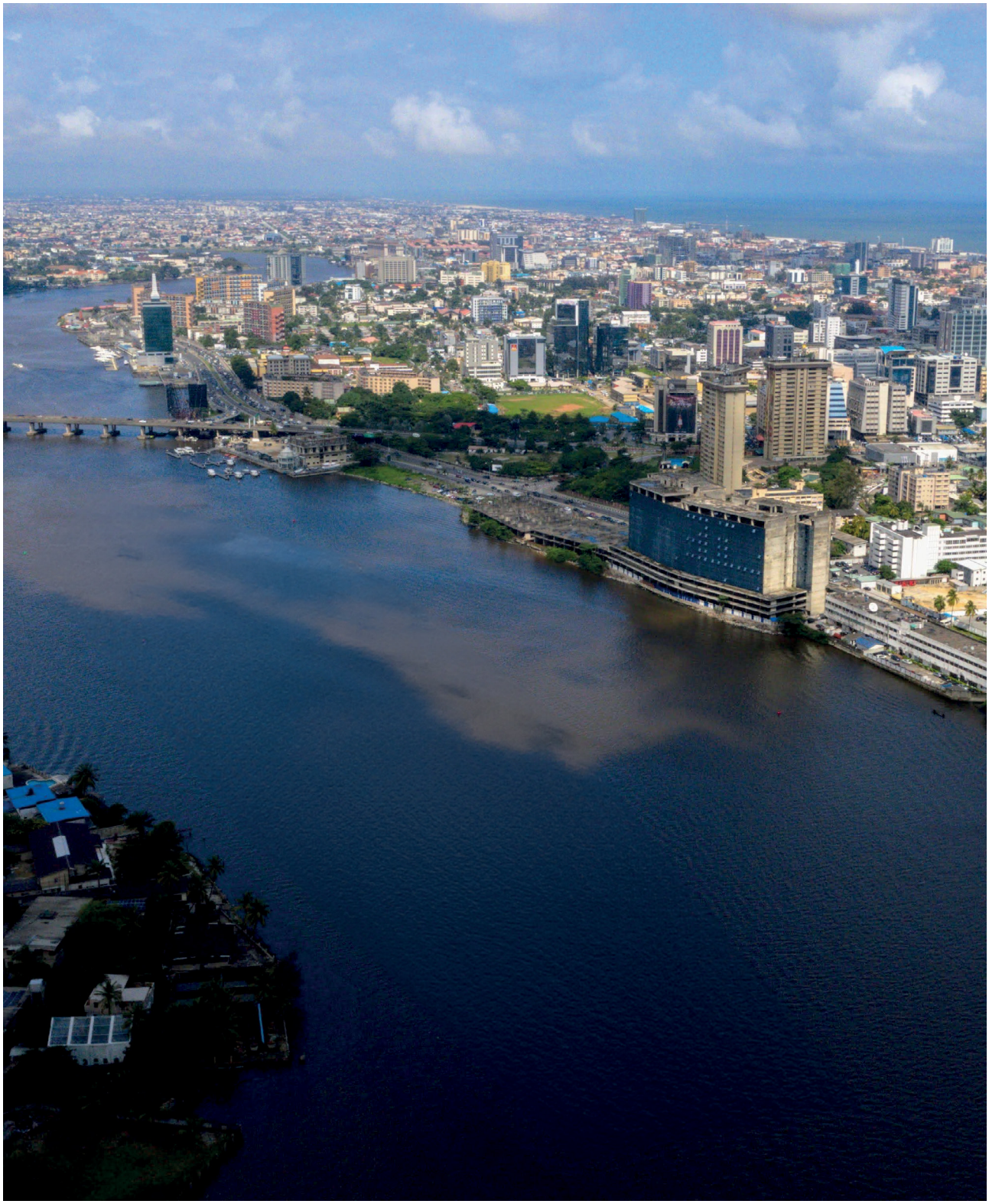

Nigeria Contents

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. Lenders would not usually take a legal mortgage over shares, as this would mean that the mortgagee will become a registered shareholder (on the condition that the shares will be transferred back to the mortgagor on repayment of the loan) and may incur liability by virtue of such shareholding. The more common forms of security over shares would therefore be by way of an equitable mortgage or charge (fixed or floating).

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. This can either be 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 (CBN)'s Foreign Exchange Manual prohibits a Nigerian resident (whether a corporate or a natural person) from assigning Nigerian residents' annuities and insurance policies to non-residents. To the extent that the CBN is not the insurance regulator in Nigeria and the restriction is contained in the Foreign Exchange Manual, this could be interpreted as a restriction on the ability of a non-resident to procure foreign exchange utilising the proceeds of enforcement in respect of an assignment of annuities and insurance policies belonging to Nigerian residents. In the absence of any certainty as to this interpretation, 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 prohibits the assignment of reinsurance policies.

Types of Security Interests

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 petroleum mining licences; petroleum prospecting licences; marginal field licences; power generation licences; aviation licences; shipping licences; communication licences; and mining licences issued in the oil and gas, power, aviation, shipping, telecommunications, and mining sectors, etc.) would usually prohibit the licence holder 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 movable assets can be granted by way of a mortgage, charge, or a pledge. A pledge of the assets involves the deposit of the tangible movable 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?

Generally, the following are restricted or prohibited from granting security under Nigerian law:

- **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 will be ineffective unless ratified by a resolution of its shareholders and/or its board of directors.
- **Trustees:** Generally, a trustee has power to grant security over any trust property, except where such power is expressly restricted by law or in the instrument of trust.
- **Adjudged bankrupts:** Under the Bankruptcy Act, a person's assignment (including an assignment by way of security) of their future or existing book debts will be void against the bankruptcy trustee as regards any book debts that have not been paid at the commencement of the bankruptcy, unless that assignment has been registered with the Chief Registrar of the Federal High Court in a register kept by the Chief Registrar 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.

Types of Security Interests

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 permit the company to do so and/or 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. Individuals can also grant third-party security over their shares in a company.

Perfecting Security Interests and Priority

Are there any asset-specific perfection requirements?

Shares

The perfection process in relation to a floating charge over shares entails the stamping of the instrument creating the charge and registering the particulars of the charge with the instrument creating the charge at the Corporate Affairs Commission (CAC) within 90 days of creation. The perfection process in relation to a fixed charge over shares entails the stamping of the instrument creating the charge at the stamp duties office. While there is no requirement to register a fixed charge over shares at the CAC, in practice it can be registered. Such registration would be deemed to give third parties constructive notice of the fixed charge. The secured party may also serve a notice of interest on the company in which the charged shares are held.

To perfect a legal mortgage over shares, the mortgagee must also 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.

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 (CSCS). These steps include the secured parties: (i) submitting to the CSCS a memorandum which the chargor and chargee have jointly signed; and (ii) requesting the CSCS to place a lien on a specified number of the shares as well as an undated letter signed by the chargor authorising the lender to sell the shares where a default occurs.

Bank Accounts

A floating or fixed charge created over a bank account may be perfected by stamping the instrument creating the charge (usually at an *ad valorem* rate) and registering the instrument at the CAC within 90 days of the creation of the charge.

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, 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. 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 may not be obtained at the time of the creation of the mortgage 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 Works and Housing, 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 on 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 if 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.

Perfecting Security Interests and Priority

Contractual Rights and Insurance Proceeds

Under Nigerian law, in order to perfect a legal 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, where it is an assignment by way of security that would qualify as book debts.

Authorisations and Licences

If the issuing authority has consented to the beneficiary or licence holder assigning by way of security, the beneficiary's or licence 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 must be registered at the Trade Marks Registry and assignments or other security interests for patents and designs 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: In creating a mortgage over ships and vessels, 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 (NIMASA). The application for consent must be accompanied with the board resolution of the mortgagor authorising the creation of the mortgage, a duly stamped deed of mortgage as well as the payment of NGN 35,000 to obtain the consent form and a consent fee of NGN 50,000 per vessel.

Registrations: A mortgage or charge over an aircraft, ship or vessel must be registered with the CAC and NIMASA (for a mortgage over a ship or vessel) or the Nigerian Civil Aviation Authority (NCAA) (for a mortgage over an aircraft). The registration fee payable to NIMASA is not a flat rate; it is determined by the gross tonnage of the vessel. Mortgages over ships and vessels must also be registered at the ship's or vessel's port of registry.

To register a mortgage over an aircraft, an application in writing is required to be made to the Director General of the NCAA supported by the duly stamped deed of mortgage and the payment of the applicable registration fee. An applicant will pay NGN 1,000 on the first NGN 100,000 of the sum secured by the mortgage and for each additional NGN 10,000. An applicant will pay NGN 1,000 on the next NGN 900,000 for each NGN 100,000 or part thereof. Thereafter, for each NGN 1,000,000 or part thereof, an applicant will pay a minimum charge of NGN 50,000 and a maximum charge of NGN 250,000.

Perfecting Security Interests and Priority

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

Stamp Duty

Under the Stamp Duties Act (as amended by the Finance Act 2019) and subject to limited exceptions, any document that is executed in Nigeria, or has anything to do with Nigeria to the extent it is executed outside of Nigeria, is subject to the payment of stamp duty: (i) if executed within Nigeria, within 40 days of such execution (this will be within 30 days where *ad valorem* duty applies); or (ii) if executed outside of Nigeria, within 30 days of that document being received in Nigeria. The Stamp Duties Act was amended in 2019, among other things, to include electronic documents within the definition of instruments and the Federal Inland Revenue Services (FIRS) has clarified that an electronic document is received in Nigeria, where it is stored on a device that is brought in Nigeria or accessed in or from 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. However, vessel and ship mortgages are exempt from payment of stamp duties in Nigeria.

Accordingly, the stamp duty payable for a security document on a large financing can be very high (and in certain cases, prohibitively so). In practice, it is not uncommon for lenders in a financing to agree that the borrower can pay stamp duty on only a portion of the facility rather than the entire facility, 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; also, 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 Africa 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, except in criminal proceedings. Nor will they be 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 in civil proceedings 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 against a liquidator or creditor of the company. On the other hand, if the security documents are not registrable, a failure to stamp will simply render them inadmissible in evidence until they are stamped.

CAC Registration

Under the Companies and Allied Matters Act 2020 (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.

Pursuant to the Companies and Allied Matters Act passed in August 2020, and with effect from January 2021, the CAC registration fee has been reduced to a maximum of 0.35% of the secured amount.

Perfecting Security Interests and Priority

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.

Registration at the NCR

The Secured Transactions in Movable Assets Act (STMAA) signed into law in June 2017 creates a new registration regime for security interests in movable assets with an express exclusion of security over land, vessels, and mortgages. Under the STMAA, charges over movable assets are to be registered at the National Collateral Registry (NCR).

The definition of the term “movable assets” relates to tangible and intangible property but excludes real property. This is wider than the original contemplation behind the drafting of this piece of legislation. Therefore, some uncertainty has been created as to whether the intention is for all types of security over tangible and intangible assets to be registered, or whether registration should be limited to intangible property deriving from movable assets in the ordinary meaning of the term (such as goods and chattel). In the absence of any court decision on this point, parties register at the NCR out of an abundance of caution.

The NCR registration fee is a flat sum of NGN 1,000. There is a stamp duty exemption in respect of security interests to be filed at the NCR, but as a practical matter the benefit of this exemption can only be accessed in instances where the instrument is not required to be registered at the CAC (e.g., as a fixed charge over shares), as the CAC would typically request evidence of stamping prior to registration.

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 creation of the security.

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 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.

Where a receiver/manager is appointed over the assets of a company, notice of such appointment is required to be given to the CAC within 14 days of the appointment.

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: (i) an individual who is not a Nigerian national; (ii) a company that is not incorporated in Nigeria; or (iii) a company that is incorporated in Nigeria but 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: (i) the Bankruptcy Act and the Bankruptcy (Proceedings) Rules 1990, which apply if the debtor is an individual or a firm; and (ii) 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; they 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 (the records are not computerised) to determine whether bankruptcy or insolvency proceedings are pending, or whether a winding-up order has been made against a company.

Are "company rescue" or reorganisation procedures available?

The CAMA introduces the concept of administration in respect of companies in Nigeria. This involves managing the affairs of a company by an administrator with the sole objective of rescuing the company, achieving a better result for the company's creditors and realising property in order to make a distribution to one or more secured or preferential creditors. An administrator may be appointed by: (i) order of court; (ii) the holder of a floating charge; or (iii) the company or its directors. The duration of appointment of an administrator automatically ceases to have effect at the end of the period of one year from the date on which the administration took effect, except if extended in accordance with the CAMA.

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, must be 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.

Insolvency/Bankruptcy Proceedings

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

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 forthcoming insolvency or bankruptcy proceedings.

The CAMA provides that where a company — at any time prior to the onset of insolvency in the case of a preference which is given to a person connected with the company (excluding an employee), and within three months in the case of any other person — does anything or procures anything to be done which has the effect of putting a person, being one of the company's creditors or a surety or guarantor at undue advantage, then such act shall be deemed a preference of that person and shall be invalid. The CAMA does not stipulate the time period applicable in the case of preference being given to a person connected to the company.

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.

The CAMA also includes provisions regarding certain transactions conducted at an undervalue in view of an insolvency. Where a company has — up to two years prior to the commencement of insolvency and until the appointment of an administrator — entered into a transaction with any person at an undervalue, the liquidator or administrator may apply to the court for an order restoring the position to what it would have been if the company had not entered into that transaction.

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 where the assets of the company are insufficient to satisfy the preferential debts. 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); wages and salaries; accrued holiday remuneration; and compensation due to workers. These amounts would rank equally among themselves or rateably if a company's assets are insufficient.

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. This position has been recently clarified in the Business Facilitation Act 2023, which states that the holder of a fixed charge shall have priority over other debts of the company including preferential debts.

Insolvency/Bankruptcy Proceedings

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, if it is unclear whether contractual subordination provisions are legally valid on the debtor's insolvency, 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:

1. creditors secured by way of a fixed charge;
2. preferential creditors;
3. creditors secured by way of a floating charge;
4. secured but contractually subordinated creditors; and
5. unsecured creditors.

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South Africa

South Africa Contents

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, or in respect of uncertificated, listed shares only, an outright transfer in security.

Bank Accounts

A security interest over a bank account can be created by way of a security cession over the account holder's cash in the bank account, and rights against the bank in respect of that account. Best practice is for the bank at which the account is held to sign an acknowledgement of the cession. South African law also recognises a security interest where a party pays cash as collateral for a secured obligation to another party, subject to an agreement by that other party to return the cash on discharge of the secured obligations.

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 licence is granted regulates whether creating a security interest over that authorisation or licence is possible. Consent from the issuing authority will likely be required. Additional requirements will depend on the particular legislation under which the authorisation or licence has been granted.

Intellectual Property

The form required to grant a security interest over intellectual property rights depends on the nature of the rights in question.

- **Patents:** Security can be taken either by a hypothecation under section 60(5) of the Patents Act, 1978, a security cession, or a notarial bond.
- **Trademarks:** Security can be taken either by a hypothecation of trademarks under a deed of security under the Trade Marks Act, 1993, a security cession, or a notarial bond.
- **Copyrights:** Security can only be taken by security cession.
- **Designs:** Security can be taken either by a hypothecation under section 30(5) of the Designs Act, 1993, a security cession, or a notarial bond.

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 a chose in action). Security over either category of movable property can be taken by a pledge, a general notarial bond (over all the debtor's movable 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. In South Africa, notarial bonds are most commonly used. Unlike an outright transfer of a chose in action, a pledge does not give the beneficiary the right to use the chose in action in its business.

Types of Security Interests

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. These include public entities regulated by the Public Finance Management Act 29 of 1999, as amended from time to time, and insurers regulated by the Insurance Act 18 of 2017, as amended from time to time.

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. Practical issues must also be taken into account, for example, the registrar of Deeds for Immovable Property will not register a mortgage bond over land in the name of a trustee acting for and on behalf of underlying lenders.

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. Contracts of guarantee establish primary obligations that stand independently from any other debt or agreement. This distinguishes them from contracts of suretyship, which are accessory obligations. Accessory obligations are contingent upon the presence or creation of a valid and effective principal obligation. If the principal obligation is null or has been fulfilled, such as through payment or performance, such accessory obligations cease to exist.

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 19 of 2012, a pledge over uncertificated shares is established by way of electronic entry in the securities account where the shares are held, and an outright transfer occurs by debiting the transferor's account and crediting the transferee's account. An outright transfer may attract securities transfer tax unless certain rules, set out in the Securities Transfer Tax Act 25 of 2007 and as amended from time to time, are followed to qualify the transfer for an exemption.

Bank Accounts

Under South African law, the valid creation of a cession in security necessitates that the borrower possesses entitlement to cede the personal right as its holder, the personal right must be cession-capable (personal rights in bank accounts are capable of cession under South African law). Also, a clear agreement must exist which expresses the intention between borrower and lender to transfer said rights as security for a debt. There are no specific requirements or formalities prescribed for establishing a security cession over a bank account, only a clear expression of intent from both parties. 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 security interest. There are no specific requirements beyond payment of the cash.

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. A mortgage bond does not transfer title in the mortgaged immovable property to the creditor. It confers a limited real right on the creditor to have the immovable property sold in execution and the proceeds of that sale applied to settle or reduce the debt secured by the mortgage 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. The prescribed forms to be completed and submitted differ depending on the nature of the right.

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

In the absence of a registered hypothecation, a transfer of intellectual property to a third party may be validly effected despite a creditor's security interest. If the hypothecation has been registered against the intellectual property right the proprietor may not voluntarily licence the right to third parties.

Perfecting Security Interests and Priority

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. However, delivering certificates evidencing the incorporeal property, for example, 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 of 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 of 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 1.2% 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, greater in right" 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 it 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 to enforce its security interest?

In a default or breach of the secured obligation, a secured creditor generally 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 (Insolvency Act), as amended from time to time. Regarding companies, the Companies Act 71 of 2008 (Companies Act 2008) and the Companies Act 61 of 1973 (Companies Act 1973), together with the Companies Act 2008 (the Companies Acts, both as amended from time to time), would also apply.

Regarding banks, the Banks Act, No. 94 of 1990 (Banks Act), as amended from time to time, would apply, together with the Insolvency Act and the Companies Acts.

Regarding insurers, the Insurance Act 17 of 2018, as amended from time to time, 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 it provides no information as to whether a company is solvent, nor does it contain any information as to 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 (Financial Institutions Act, or POF) provides for the curatorship — or a less invasive procedure known as "statutory management" — of certain "financial institutions" (as defined in section 1 of the POF Act). The Financial Sector Laws Amendment Act of 2021 (FLSA Act) repealed curatorship of banks under the Banks Act and introduced a system of resolution for certain designated financial institutions, including banks and systemically important financial institutions. It did so by inserting a new Chapter 12A (Resolution of Designated Institutions, or the Resolution Chapter) into the Financial Sector Regulation Act of 2017 (FSRA). The impact of the introduction of the new resolution regime is discussed in further detail below.

Business Rescue

"Business rescue" — defined in section 128(1)(b) of the Companies Act 2008 — relates to: (i) proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for temporary supervision of the company; (ii) a temporary moratorium on the rights of claimants against the company; and (iii) the development and implementation of a plan to either rescue the company by restructuring its affairs to maximise the likelihood of the company continuing to exist and be solvent. If the company cannot so continue, it relates to a plan 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" set out in section 128(1)(f) of the Companies Act 2008 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 if 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

Insolvency/Bankruptcy Proceedings

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 or Statutory Management 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, excludes banks and any other designated institution (which are designated in terms of the FSRA) and includes (unless so designated) collective investment schemes, hedge funds, insurers, securities dealers, and any entity that is licenced to provide financial services in terms of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS), or is a "representative", as defined in FAIS, of such an entity.

No meeting of creditors results from curatorship or statutory management. Therefore, the secured party's contractual rights will not automatically be stayed by reason of a curatorship or statutory management 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.

Replacement of Bank Curatorship by the South African Resolution Regime

The new resolution regime (Resolution), established by the amendments to the FSRA by the FSLA Act, applies to a range of financial institutions including banks. Under that regime, counterparties that are not in Resolution (in each case, the Other Party) are not entitled to invoke their contractual close-out netting rights in case a bank (or designated institution) becomes subject to Resolution, because South Africa has opted for an "open resolution" regime (Open Resolution). Open Resolution requires that the institution in Resolution continues to operate through the Resolution process. This is achieved in part through the new section 166L of the FSRA establishing a "stay", which provides in part that a provision of an agreement that would confer, accelerate or vary a right of a person (such as a termination or close-out netting provision) on the basis of a party being put into resolution or of a "resolution action" being taken (or there being a proposal for either) is of no effect. Notably, the amended FSRA does not prevent a counterparty from exercising termination or close-out netting rights on other bases, such as a failure to pay, deliver, or provide collateral.

The powers of the South African Reserve Bank (SARB) as the "resolution authority" in respect of an institution in Resolution are set out in the new sections 166R and 166S of the FSRA. One of the powers of the resolution authority, set out in new section 166R(1)(d), to suspend any obligation — including obligations to make payments and deliveries and termination and close-out netting rights — of a party to a pre-resolution contract. However, the obligations which have not been suspended in terms of section 166R(1)(d) should still be performed, and failure to do so may give rise to the relevant default provisions found within the applicable contract. The new section 166R(4) further states that where a notice of suspension in terms of section 166R(1)(d) is given, a "reasonable" period must be specified. Prudential Standard RA01 "[s]tays on early-termination rights and resolution moratoria on contracts of designated institutions in resolution" confirms that the moratorium period will, in line with many other jurisdictions, not exceed 48 hours.

The new section 166S(1), as read with 166S(2), provides that the SARB can transfer any asset or liability of the institution in Resolution, notwithstanding the requirement to obtain consent. The SARB confirmed, in paragraph 7.3 of Prudential Standard RA02 — "Transfer of assets and liabilities of a designated institution in resolution" — that safeguards have been introduced, including that transfer is restricted to whole netting sets if it is used to transfer assets or liabilities. This was designed to ensure that the designated institution in Resolution cannot selectively transfer or "cherry pick" individual contracts under a master agreement with a particular counterparty. The contracts must be transferred as a whole or not transferred at all. Furthermore, paragraph 7.2 of Prudential Standard RA02 provides that the Reserve Bank shall ensure that in cases where the liabilities are secured, the creditor's claims shall not be separated from the assets securing the liability.

Insolvency/Bankruptcy Proceedings

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 securities, a bill of exchange, or a foreign financial instrument, the creditor can, before the second meeting of creditors, sell the property through an authorised user or a stockbroker (or if the creditor is a stockbroker, through another stockbroker).

Except in respect of master agreements defined in section 35B of the Insolvency Act, 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. The term "master agreement" is defined as including the ISDA Master Agreement published by the International Swaps and Derivatives Association (ISDA), the Global Master Securities Lending Agreement (GMSLA) published by the International Securities Lending Association, and the Global Master Repurchase Agreement (GMRA) published by the International Capital Markets Association (ICMA), or similar agreements published in accordance with standard terms (i.e., internally drafted master agreements do not qualify). Securities that are pledged in terms of a master agreement may be realised as above, and the proceeds need not be paid to the liquidator. Instead, section 83 of the Insolvency Act provides for a process by which creditors, through a court procedure, can dispute the realisation of securities pledged in terms of a master agreement.

Under section 5A of the Financial Institutions Act of 2001, as amended from time to time, a registrar can appoint a statutory manager by agreement with the financial institution to manage the business of the financial institution if: (i) the business is, *inter alia*, maladministered; (ii) the business is likely to be in an unsound financial position; or (iii) managing the business will be in the interests of the clients of the financial institution.

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

Under 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 a transfer or abandonment of rights to property, and can include, among other things, a mortgage over immovable property, a cession, a pledge, or a special notarial bond. Sections 26, 29, and 30 of the Insolvency Act do not apply to dispositions under certain master agreements. Section 35B of the Insolvency Act 1936 defines agreements containing standard terms and published by the ISDA (mentioned above), the International Securities Lending Association (ISLA), the ICMA (mentioned above), and the Bond Market Association (TBMA) as "master agreements".

Insolvency/Bankruptcy Proceedings

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:

- 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; or
- 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 it is proved that at any time after making 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 six months prior to the date of liquidation and which 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 where the insolvent person/entity, prior to its liquidation and in collusion with another person, disposed of its assets in a manner that prejudiced the insolvent's creditors or preferred 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); and
- claims of holders of general notarial bonds and certain special notarial bonds (section 102).

Insolvency/Bankruptcy Proceedings

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:

1. secured creditors;
2. preferential creditors; and
3. 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 Contents

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 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.

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 a floating charge, pledge or mortgage may be taken over personal or tangible property such as machinery and any other movable property. The creation of such security is codified in the Security Interest in Movable Property Act 2019.

Can security be taken over future assets?

Yes.

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 martial 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.

Types of Security Interests

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 as amended (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 they are 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. Where there is an intercreditor agreement or a security sharing agreement for sharing of securities by the secured parties, the title may be deposited with a trusted custodian under bailment.

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 Licences

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 licences that is granted by a company must be registered as a debenture with the Companies Registry.

Perfecting Security Interests and Priority

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: A charge over personal or movable property must be registered as a chattels mortgage through a notice in the Security Interest in Movable Property Registry under the Security Interest in Movable Property Act 2019. (See Sections 4 and 12 of the Security Interest in Movable Property Act 2019).

Where the movable property is a vehicle, the charge is also registered as a caveat on the logbook at the motor vehicle registry.

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.

Aircraft: For aircraft, 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 also be 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 valorem* rate. Ordinarily, where the security instrument is a mortgage, stamp duty is 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. Where the security instrument is a debenture, the stamp duty chargeable is nil. However, there is an applicable registration fee of UGX 50,000 (approximately USD 13). 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 (typically, at the charging instrument's date of execution) via delivery of the prescribed form. A fee of UGX 30,000 (approximately USD 9) is payable for registration of the respective forms.

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.

Perfecting Security Interests and Priority

Security Interest in Movable Property Registry

After the creation of the security interest, upon the authorisation of the grantor in writing, the payment of the prescribed fees, the initial notice or amendment notice shall be registered. Registration fees of UGX 18,000 (approximately USD 5) and proof of payment of stamp duty. An additional fee of UGX 50,000 (approximately USD 14) and 1% of the amount secured by any principal security document to lodge a caveat where the security is a vehicle. The former is payable in respect to registration at the Companies Registry while the latter is payable at the Uganda Revenue Authority (under a motor vehicle registration). (See Section 19 of the Security Interest in Movable Property Act 2019.)

Search Fees

Fees to search for the company file at the Companies Registry cost UGX 25,000 (USD 7).

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 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.

Priority of Competing Security Interests in Same Movable Property

In Ugandan law, priority between perfected security interests is determined by the order of whichever of the following actions: (i) the registration of the initial notice to perfect the security; (ii) the secured creditor or another person on the secured creditor's behalf taking possession of the collateral; or (iii) the secured creditor or another person on the secured creditors behalf acquiring control of the collateral. (See Section 30 of the Security Interest in Movable Property Act 2019.)

Enforcement of Security

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

When a debenture is used to create a security interest, the terms of the debenture typically will 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 would then be required to stamp the share transfer form and notify the Companies Registry of its newly acquired interest in the shares. The shares would have to be valued by a Certified Public Accountant and a report would have to be provided to the Companies Registry. Finally, the company secretary of the company whose shares were transferred would have to 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 take one or more of the following actions:

- 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 five working days' written notice to the chargor, informing them of the intention to take possession of the whole or part of the land.
- 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 the sale is to be conducted by private treaty or contract, the charge is required to seek the mortgagor's consent in writing. (See Regulation 10 of the Mortgage Regulations of 2012.) Where a 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.

The Security Interest in Movable Property Act 2019 governs the enforcement of charges or security interests over movable property, personal, or tangible property. Upon default, the secured creditor must serve a notification in writing of the default. Where the default is not remedied within the time stipulated in the notification, the secured creditor then has the option to enforce the security. (See Section 44(3) of the Security Interest in Movable Property Act 2019.) The secured creditor will in case of a security perfected by registration file a default and enforcement notice with the Registrar to initiate the enforcement. The secured creditor will then dispose of the movable property after issuing a 10-working-day prior notice and file the disposal notice with the registrar. (See Section 49 of the Security Interest in Movable Property Act 2019.) A secured creditor may also sell the collateral by public auction at a commercially reasonable preparation and processing. (See Section 48 of the Security Interest in Movable Property Act 2019.)

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

No.

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

No.

Insolvency/Bankruptcy Proceedings

Overview

Insolvency in Uganda is governed by the Insolvency Act 2011 (Insolvency Act). This section deals with bankruptcy and insolvency law as it applies to incorporated companies only. It 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 licencing 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 insofar 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; and
- 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.

To amalgamate, all documentation must be registered at the Companies Registry within 10 working days after the resolution is passed.

Insolvency/Bankruptcy Proceedings

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 its 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 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 Ugandan government;
- 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, clawback rights, or preferential creditors' rights that creditors should be aware of?

No.

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 parities 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; and
- unsecured creditors.

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