GUIDE: BANKING ON AFRICA – FINANCING TRANSACTIONS ON THE CONTINENT
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Introduction

This is the first edition of our 'Banking on Africa' guide and is intended to answer some of the most frequently asked questions relating to the provision of financing and the law in certain key African jurisdictions, as well as the regulations relating to collateral in these jurisdictions. The guide reflects the relevant law and regulation in the context of latest market practice.

We have provided insight into various African jurisdictions including those where we are located. The guide has been prepared by banking and finance law specialists in our offices across Africa in collaboration with our best friend firms in a number of other African countries (including Bookbinder Business Law in Botswana, Udo Udoma & Belo-Osagie in Nigeria and John W Ffooks & Co. in Madagascar – with coverage of OHADA, WAKMU and CEMAC).

Although specific advice should always be sought regarding the application of the law in each jurisdiction, we would be delighted to discuss the contents of this guide further with you.

Please do not hesitate to contact your regular Bowmans contact, or one of the key contacts listed overleaf.

Shamilah Grimwood
Partner, Head of Banking and Finance

Jason Wilkinson
Partner, Banking and Finance

The contents of this publication are for reference purposes only. It is not a substitute for detailed legal advice.

Key Contacts

SHAMILAH GRIMWOOD-NORLEY
Head of Banking and Finance
Cape Town, South Africa
T: +27 21 480 7855
E: shamilah.grimwood@bowmanslaw.com

ERNEST WILTSHIRE
Managing Partner
Kampala, Uganda
T: +256 41 425 4540
E: ernest.wiltshire@bowmanslaw.com

CRAIG SCHAFER
Head of Commercial Property
Johannesburg, South Africa
T: +27 11 669 9468
E: craig.schafer@bowmanslaw.com

DARYN WEBB
Head of Project Finance
Johannesburg, South Africa
T: +27 11 669 9410
E: daryn.webb@bowmanslaw.com

DAVID GERAL
Head of Banking and Financial Services Regulatory
Johannesburg, South Africa
T: +27 11 669 9514
E: david.geral@bowmanslaw.com
Our Banking and Finance Practice

Our Banking and Finance Practice specialises in complex finance transactions and has extensive knowledge of, among others:

- leveraged and acquisition finance;
- structured finance;
- capital markets;
- project finance;
- property finance;
- trade finance;
- minerals and resource finance;
- insolvency and restructuring;
- derivatives;
- securitisation;
- preference share finance;
- asset finance, including aircraft and shipping finance.

Our expertise extends to bilateral and syndicated loans; guarantee and security issues; and regulatory matters, including the establishment of banks and the carrying on of lending and investment banking activities within South Africa and Sub-Saharan Africa.

We execute challenging and novel transactions with innovation, enthusiasm and commercial pragmatism and advise clients who are at the forefront of their markets. In this regard, we have deep sector experience across Africa, particularly in energy, resources, infrastructure, real estate, fast-moving consumer goods (FMCG) and financial services.

We are consistently at the forefront of developments in the banking and finance field and are seen as a market leader for innovation, documentation standards and best practice. We are well-known for our ability to close complex transactions in record time.

We also have a number of lawyers who are admitted as solicitors in the Senior Courts of England and Wales, allowing us to provide seamless advice on English law governed financings across Sub-Saharan Africa.

Our firm was named Banking, Finance and Restructuring Team of the Year at the prestigious African Legal Awards hosted by Legal Week and the Corporate Lawyers Association in 2016.

To view profiles of our lawyers, please visit www.bowmanslaw.com
Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With nine offices in seven African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist them to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, at the inaugural IFLR1000 Awards for Sub-Saharan Africa (2020), we received 10 awards across four jurisdictions confirming our leadership when it comes to advising on multijurisdictional mergers and acquisitions in Africa. At the African Legal Awards (2020), we won awards in three categories and were highly commended in a further four categories including African Law Firm of the Year – Large Practice. We received awards in three out of four categories at the DealMakers East Africa Awards (2019): top legal adviser in the M&A Category for both deal flow and deal value and advised on the Deal of the Year. In the DealMakers South Africa Awards (2019), we were placed third for deal value in the M&A Category and advised on both the Deal of the Year and the BEE Deal of the Year.

We are present in seven countries in Africa: Kenya (Nairobi), Malawi (Lilongwe), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have developed a best friend relationship with one of Mozambique’s strongest law firms (Taciana Peao Lopes & Advogados Associados) and regularly work with leading law firms in other countries such as Angola, Botswana, Ghana, Ivory Coast, Namibia, Rwanda, South Sudan and Zimbabwe.

We have a comprehensive database of all the law firms we work with in the rest of Africa covering such countries as Algeria, Egypt, Morocco and French-speaking West Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

There are currently no restrictions on capital outflow through financial institutions. The Financial Intelligence Act provides that the minister may publish regulations restricting the amount of money that may be transmitted into or out of Botswana on behalf of, or on the instruction of, a customer or any person and such amounts shall be reported to the Financial Intelligence Agency. Any person in contravention of this provision shall be liable to a fine not exceeding BWP 1 million. However, to date, no regulations to this effect have been published.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

In terms of the Banking Act, no person, other than a bank licensed under the Act, shall, without the prior approval of the Central Bank of Botswana, make any representation, or use any word or term in any billboard, letterhead, notice or advertisement, indicating in any manner that he is carrying on the activities of a bank. In the event the banking products are to be marketed, advertised or offered through an agent, such agent must be duly licensed in terms of the Trade Act.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

There are no restrictions on persons in Botswana opening bank accounts or holding assets outside of Botswana.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

There are no regulatory criteria in Botswana relating to the type of corporate customers that may be targeted by banks.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

There are no licensing or registration requirements to be met before a foreign lender may advance a loan to a domestic borrower. However, it must be noted that in the event of the lender requiring security by means of a manner prescribed under the Hypothecation Act, such lender will be required to be registered as an authorised creditor.

An authorised creditor is a person authorised by regulations to be a person empowered to take security by way of hypothec under the provisions of the Hypothecation Act and under the hand of the Minister for Finance and Development Planning.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

There are no obligations on the part of the domestic borrower and funding may be advanced to the domestic borrower in any currency.
3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

Freedom of contract is a well-observed and appreciated principle in Botswana. Parties are at liberty to consent to the jurisdiction of a particular state’s law to govern their agreement (choice of law clause). However, the courts will not give effect to such choice of law, if such law is against the public policy in Botswana.

In addition, foreign judgements from certain jurisdictions are capable of being registered and enforced by the High Court of Botswana. The enforcement of foreign judgements in Botswana is provided for under the Judgments (International Enforcement) Act (the Act). The process of recognition and enforcement is initiated by the judgement creditor who makes application to the High Court for registration and recognition of the judgement. The application must be made within six years after date of judgement from a foreign jurisdiction. Notice of the application for recognition and registration must also be served on the judgement debtor who may or may not decide to defend the recognition thereof. However, the registration of the judgement may be set aside if the registering court is satisfied that inter alia (among other things):

- the judgement is not a judgement to which the Act applies or the judgement was registered in contravention of the Act;
- the original court had no jurisdiction in the case;
- the judgement debtor (the defendant in the proceedings in the original court) did not (notwithstanding that process may have been duly served on him in accordance with the relevant law) receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- judgement was obtained by fraud;
- the enforcement of the judgement would be contrary to public policy in Botswana; and
- the rights under the judgement are not vested in the person applying for registration.

For purposes of execution, once registered, the judgement shall be of force and effect.

4. Are there any restrictions on financial institutions converting debt into equity?

The Banking Act restricts the activities and operations in which duly licensed banks may be involved in. The Banking Act provides that no bank shall, directly or indirectly, acquire or hold any part of the share capital of any financial, commercial, agricultural, industrial or other undertaking, except such share holdings as may be acquired in the course of the satisfaction of debts due to it, which share holdings shall, however, be disposed of at the earliest suitable moment.

From the interpretation of our Botswana Office of the provisions of the Banking Act, the above restrictions do not apply to foreign lenders.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immoveable property in your jurisdiction?

Immovable property means land and every right or interest in land or minerals which are registrable under the laws of Botswana in any deeds or other registration office wherein title to immovable property or mining title may be registered.

The term immovable property also includes property accessory to immovable property, livestock and equipment used in agriculture and forestry, long-term leases, usufructs in respect to immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

A mortgage over real estate being acquired or developed is a common and widely utilised form of security. This form is perfected by the registration of a mortgage bond with the Registrar of Deeds in accordance with the provisions of the Deeds Registry Act.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property, for example, machinery, trading stock (inventory), aircraft and ships?

Tangible movable property includes crops or other agricultural or natural produce, whether attached to the soil or not, felled timber, animals, fodder, industrial and fishing materials, rolling stock, boats, fishing tackle or nets, raw materials, equipment, machinery, stock-in-trade, goods, and generally all products of labour and things necessarily used in connection with production.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common form of security over moveables, which is widely used and preferred within Botswana, is that of a deed of hypothecation over moveables. This form of security is perfected by the registration of a deed with the Registrar of Deeds in the manner prescribed by the Hypothecation Act.

A deed of hypothecation is akin to a floating charge. With effect from the date of registration of a deed of hypothecation, all property thereby hypothecated and all progeny and produce thereof is deemed to be pledged in favour of the authorised creditor as fully and effectually as if it had been pledged by delivery to such authorised creditor and were retained in the authorised creditor’s possession. Any disposal thereof by or on behalf of the hypothecator without the consent in writing of the authorised creditor shall be null and void.
A pledge is another form of security over moveables. This form of security is created and perfected once the pledgor delivers the pledged property to the pledgee.

In addition to hypothecation, the Hypothecation Act also makes provision for security in the form of hire-purchase contracts relating to movable property.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

A cession is the most common form of security issued in relation to incorporeals, such as shares and financial instruments. In such instances, the cession is performed upon the execution of a valid cession agreement between the lender and borrower and the delivery of documents of title such as share certificates and share transfer forms in blank by the borrower to the lender.

1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

A cession of rights over claims and receivables or a cession of book debts is a common way in which security may be obtained in such instances. This is perfected by way of cession or assignment and perfected upon the valid execution of either a cession or assignment agreement.

With regard to copyright, economic rights are assignable in whole or in part. This must be done in writing and signed by the assignor and the assignee. Thus, the security is created and perfected upon the execution of an assignment/cession agreement in relation to such economic rights.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The Industrial Property Act which regulates patents, designs and trademarks, provides that the rights conferred under each of the aforementioned may be transferred by way of cession or assignment. Thus, security over the rights existing in patents, trademarks and designs is constituted by way of cession or assignment and perfected upon the valid execution of either a cession or assignment agreement.

2.2 FUNGIBLE ASSETS

2.2.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security granted over such facilities are:

- Mortgage Bonds
A mortgage over real estate being acquired or developed is a common and widely utilised form of security. This form of security is perfected by the registration of a mortgage bond with the Registrar of Deeds in accordance with the provisions of the Deeds Registry Act.

- Deed of Hypothecation
The most common form of security over moveables, that is widely used and preferred in Botswana, is that of a deed of hypothecation over moveables. This form of security is perfected by the registration of a deed with the Registrar of Deeds, in the manner prescribed by the Hypothecation Act.

- Pledge and Cession of Shares
A cession is the most common form of security issued in relation to incorporeals such as shares and financial instruments. In such instances, the cession is perfected upon the execution of a valid cession agreement between the lender and borrower and the delivery of documents of title such as share certificates and share transfer forms in blank by the borrower to the lender.

- Cession of Book Debts/Rentals/Insurance
A cession of rights over claims and receivables, or a cession of book debts/rentals/insurance, is a common way in which security may be obtained in such instances. This is perfected by way of a valid cession agreement concluded between the debtor and creditor. Actual delivery of the receivables is not necessary for the perfection of the cession.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

There are no prohibitions in Botswana in relation to taking as security assets that are not yet in existence. However, such assets should be properly identified in reasonable detail.

2.2 FUNGIBLE ASSETS

As it is not readily possible to distinguish between fungible assets, such assets present a challenge when granted as security. However, there is no prohibition with respect to the provision of security in the form of fungible assets and as detailed above, the court is not likely to render any security documents validly executed, unenforceable.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

There are no common quasi-security structures. However, the following two structures are slowly finding more application in Botswana. Although not vastly used in Botswana, hire-purchase agreements exist and reference has been made to them in the Hypothecation Act.

Factoring is also another form of quasi-security, which although not vastly utilised in Botswana, is an effective means of advancing security with respect to corporations engaged in trade.

4. Do company law rules or conventions affect taking security in your jurisdiction?

The Companies Act prohibits the giving of financial assistance by a company for the acquisition of its shares, except where the board has previously resolved that the following requirements have been complied with:

- giving the assistance is in the interests of the company;
- the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and
- immediately after giving the assistance, the company will satisfy the solvency test.

5. Under which circumstances can a secured lender enforce its collateral?

A secured creditor can generally enforce its security only upon the occurrence of a default on the part of the debtor. Such enforcement shall be pursuant to the terms of the contract/agreement under which the loan/advance/borrowing was made.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no restrictions in granting security (over all forms of property) to foreign lenders.
7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

There are no prescribed fees or taxes payable upon the taking of security in any form. However, in the event of transfers or registrations of deeds, bonds, etc., being required, the costs of effecting such will have to be incurred in accordance with the prescribed fees or tariffs, as the case may be.

BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvent or receivership proceedings) available and practised in your jurisdiction?

Part XXVI of the Companies Act makes provision for the judicial management of companies, Part XV makes provision for amalgamations, and Part XV makes provision for a compromise with creditors.

2. In what order are creditors paid on a company’s insolvency?

A creditor in an insolvent estate will enjoy a preferred claim (ranking ahead of concurrent creditors) with respect to claims secured by certain categories of mortgage bonds, notarial bonds, legal hypothechs, pledges or rights of retention.

Certain categories of creditors have statutory preferences over claims of concurrent creditors for all or part of their claims. In the event of insolvency and the company being wound up, the order in which creditors are paid out is as follows:

- secured creditors;
- costs of the liquidator in administering the estate;
- claims of employees;
- tax claims by the Commissioner;
- claims of preferent creditors, in respect of the free residue;
- concurrent creditors;
- holders of preference shares; and
- holders of ordinary shares.

3. How is the priority between creditors holding a security interest determined?

Secured creditors holding a first ranking pledge over certain property will have priority over creditors holding any subsequent pledge over the same property.

The priority is dependent on the dates on which the relevant security was created or registered.

Simply put, it is dealt with on a first-come, first-serve basis, with the creditor having taken security first in time, being the one being preferred upon insolvency.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The Botswana judicial system comprises of four courts, the Magistrate Court being the lowest in the hierarchy, the next level being the High Court and Industrial Court being courts of equal rank, and at the apex is the Court of Appeal, which is the most superior court; beyond it no appeal can be brought.

When instituting a claim at the High Court which deals with all disputes, it take approximately 18 months from the time a claim is filed to the date you receive judgement. The Botswana courts use the case management system which makes litigation slightly more expensive as a lot of the pre-trial work must be done upfront. The same system has improved the turnaround time at the courts and has eliminated to an extent the backlog previously experienced prior to 2008 when on average it took almost five years to get a date of hearing.

Magistrate Courts only have jurisdiction to hear cases of BWP 40 000 or less. The Industrial Court deals exclusively with trade disputes. Botswana does not have specialised commercial courts.

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Where a financial institution provides financing in respect of a merger, they must ensure compliance with the Competition Act.

The Competition Act regulates mergers, restrictive practices and abuse of dominance. There are no financial penalties for breach of the Competition Act. Every merger meeting the prescribed thresholds must be notified prior to implementation. However, if a merger is implemented in contravention of the Act, the Competition Authority may give a direction that the companies involved:

- not complete the merger;
- sell any shares, interest or assets acquired pursuant to the merger;
- terminate any agreements to which the merger was subject; or
- take any further measures necessary to restore the conditions of competition that existed prior to the merger.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

The Environmental Assessment Act and the regulations published therein provide a non-exhaustive list of activities, locations and thresholds for which an environmental statement is required. These include, but are not limited to, transboundary projects, extractive and associated industry, waste management, the energy industry, infrastructure developments, chemical, rubber and plastic industries and the food industry. Projects in the aforementioned industries shall not be licensed by any competent authority without the prior approval of the project in accordance with the Environmental Assessment Act.

Any financial institution financing a project in the above industries must satisfy itself that the project is duly approved.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

There are no exchange control regulations in Botswana.

BOOKBINDER BUSINESS LAW

9th floor, iTowers North
Lot 54368, CBD Gaborone
T: +267 391 2397
www.bookbinderlaw.co.bw
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Domestic borrowers are permitted to engage in investment banking activities outside Kenya, provided the proposed banking and investment services (for example, bonds) are offered outside Kenya. There are anti-money laundering laws as well as investment restrictions that apply to regulated domestic corporate borrowers such as the Government of Kenya, county governments, collective investment schemes and real estate investment trusts, as discussed below.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

The principle of territoriality implies that a foreign institution may be subject to Kenyan law and require authorisation. The legal regulatory approach in Kenya is fairly conservative. Most banking and investment services require licensing under Kenya’s legislation. Legal requirements for marketing activities will depend on the type of banking product:

**BANKING BUSINESS**

Any institution or person that issues an advertisement, brochure, circular or other document inviting any person to make a deposit must be authorised to accept deposits or be otherwise licensed under the Banking Act. The Guideline on Consumer Protection CBK/PG/22 of the Central Bank of Kenya Prudential Guidelines for Institutions Licensed under the Banking Act (the CBK Prudential Guidelines) will apply to marketing and promotions by licensed institutions.

**REPRESENTATIVE OFFICE**

A representative office of a foreign banking institution is a local office established by a foreign bank licensed in another country for purposes of marketing its products and services in Kenya. Representative offices are authorised by the Central Bank of Kenya as mandated under section 43 of the Banking Act and the Guideline on Representative Offices in Kenya CBK/PG/17 of the CBK Prudential Guidelines. Any banking or financial business sourced through the representative office must be booked in the country where the foreign institution is licensed to undertake banking business.

**INCIDENTAL BUSINESS ACTIVITIES**

A foreign bank may opt to enter into partnership with local licensed institutions for purposes of marketing authorised and regulated financial services and products incidental to banking business, such as insurance, underwriting, securities and investments services. Please note that for purposes of the Banking Act, banking business means:

- the acceptance of money on deposit from members of the public repayable on demand, or at the expiry of a fixed period or after notice;
- the acceptance of money on current account from members of the public; and payment on and acceptance of cheques; and
- the employment of money held on deposit, or on current account by lending, investment or
in any other manner for the account and at the risk of the person so employing the money.

The CBK Prudential Guidelines define advertisement as any form of public notice which invites or induces or attempts to invite or induce, directly or indirectly, any person to purchase or acquire an interest in a product or service. Although Kenya does not have a single codified regulation on advertising, depending on the type of marketing, Kenya law on communication and consumer protection (for instance, the Kenya Information and Communications Act, the Kenya Information and Communications (Consumer Protection) Regulations, of 2010 and the Consumer Protection Act, of 2012) would apply to direct marketing techniques and a county authority permit would be required for outdoor advertising. Best practice advertising industry standards can be found in the Code of Advertising Practice administered by the Marketing Society of Kenya (MSK), which is a voluntary self-regulating association.

3. Are there any restrictions on persons in your country opening bank accounts/ holding assets outside your country?

Save for state and public officers, there are no restrictions on Kenyan citizens opening bank accounts or holding assets outside Kenya. In terms of Kenya’s anti-graft laws, a state officer or public officer is prohibited from opening or continuing to operate a bank account outside Kenya without the approval of the Ethics and Anti-Corruption Commission in accordance with the Leadership and Integrity Act, of 2012.

Statutory disclosure requirements apply as follows to all persons:

- A person intending to convey monetary instruments (including currency) in excess of USD 10,000 (or its equivalent in any other currency) must report the particulars concerning that conveyance to the Financial Reporting Centre (the FRC) established under the Proceeds of Crime and Anti-Money Laundering Act, of 2009. The FRC became fully operational on 12 April 2012.

- Kenya has enacted a Prevention of Terrorism Act, of 2012 and is party to the International Convention for the Suppression of the Financing of Terrorism (the Convention), which require disclosure of information relating to suspicious accounts and/or transactions to the FRC or competent authorities under the Convention.

- There are no local regulatory criteria on the type of corporate customers that may be targeted by foreign banks. In targeting the Kenyan pension fund market, local regulations limit the extent or proportion of offshore investment. The Retirement Benefits Act, Retirement Benefits (Individual Retirement Benefit Schemes) Regulations, of 2000 and Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, of 2000 provide that a scheme or pooled fund can only invest a maximum percentage of 15% of the aggregate market value of its total assets in offshore investments in bank deposits, Government securities, quoted equities, rated corporate bonds and offshore collective investment schemes reflecting these assets.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

There are no requirements foreign lenders are required to comply with when advancing loans to domestic borrowers, merely by virtue of being a foreign lender. Sanctity of contract and governing law provisions in respect of contractual claims are recognised in Kenya. Where Kenyan law applies English contract law will govern the contractual obligations, in terms of the Law of Contract Act (Chapter 21 of the Laws of Kenya), which is a receiving statute providing for the application and recognition of English law of contract in Kenya, including statutes of general application, the substance of common law, and the doctrines of equity.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

There are no special obligations that attach to domestic corporate borrowers by virtue of entering into a foreign loan. The ordinary legal obligations that apply are irrespective of whether borrowings and securities are local or foreign, for example:

- Corporate borrowers incorporated under the Companies Act (Chapter 486, Laws of Kenya) are required to comply with corporate law requirements by obtaining all corporate authorisations in accordance with the Memorandum and Articles of Association and the Companies Act.
- Regulated corporate borrowers such as public listed companies, banks, insurance companies, investment banks, telecommunication companies, power companies and state corporations may require authorisations from shareholders, regulatory authorities or relevant Government ministries, as specified in the relevant statutes.
- For tax obligations, a withholding tax is deductible at a rate of 15% on all payments of interest on loans, whether the interest is paid to a local or foreign financial institution.

3. Are there any requirements and/or considerations which may impact a foreign lender's ability to enforce rights and obligations under a loan agreement and/or security documents?

There are no restrictions to foreign lenders accessing domestic courts on domestic claims where loan or security terms are governed by Kenyan law. Foreign lenders are, however, likely to be required to provide security for costs in terms of the civil procedure rules. Where loan or security terms are governed by foreign law, any judgement obtained in a court of competent jurisdiction outside Kenya will only be recognised and enforceable in Kenya in respect of foreign countries (reciprocating countries) specified under the Foreign Judgments (Reciprocal Enforcement) Act. Judgments from courts of reciprocating countries will be recognised and enforced in accordance with the Foreign Judgments (Reciprocal Enforcement) Act. The Republic of South Africa is not a reciprocating country for purposes of enforceability under the Foreign Judgments (Reciprocal Enforcement) Act.

Not all contractual obligations will necessarily be enforced in all circumstances. For example, the following considerations may impact the ability to enforce rights and obligations under a loan agreement:

- enforcement may be limited by the effect of applicable bankruptcy, fraudulent conveyance, insolvency, reorganisation, moratorium or other similar local laws affecting the rights of creditors; and
- enforceability may be limited by general equitable principles (regardless of whether such enforceability is considered in a proceeding in equity or at law), including without limitation, (a) the possible unavailability of specific performance, injunctive relief or any other equitable remedy, and (b) concepts of materiality, reasonableness, good faith and fair dealing.

Provisions relating to arbitral awards (including interim arbitral awards) are contained in the Arbitration Act, of 1995 which provides for the recognition and enforcement by the High Court of Kenya of arbitral awards irrespective of the state in which the award is made. Enforcement is subject to compliance with the procedure for registration of the arbitral award with the High Court and may be refused only in limited circumstances.

4. Are there any restrictions on financial institutions converting debt into equity?

There are no express restrictions. Certain statutory provisions may make it difficult for financial institutions to convert debt into equity.
Prohibited Business

Subject to certain exceptions, a bank or financial institution established under the Banking Act is prohibited from:

- Acquiring or holding (directly or indirectly) any part of the share capital or beneficial interest in any financial, commercial, agricultural, industrial or other undertaking where the value of the institution's interest would exceed in the aggregate 25% of the core capital of the institution. An institution may only take an interest in such an undertaking in satisfaction of a debt due to it but, if it does so, it must dispose of the interest within the period of time that the Central Bank of Kenya may allow.
- Acquiring or holding any land or any interest or right in land, except where this may be reasonably necessary for the purpose of conducting its business, where the total amount of such investment does not exceed the proportion of its core capital that the Central Bank of Kenya may prescribe.

Pensions

In terms of the Retirement Benefits Act and its regulations, the maximum investment of a scheme or pooled fund in the quoted equity of any one company should be 30% of the aggregate market value of the total assets of the scheme or pooled fund. The maximum investment in unquoted shares of companies incorporated in Kenya is 5%, while a maximum investment of 5% applies to offshore investments in quoted equities.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immoveable property in your jurisdiction?

The terms real estate and immovable property are not specifically defined in Kenyan law. In practice, the term encompasses land (other than minerals and petroleum forming part of the land), as well as buildings and other structures permanently affixed to the land.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Following the recent enactment of a series of property laws over the past year, Kenya now has a single system of registration under the Land Registration Act for interests in real estate. In terms of the new Constitution of Kenya, of 2010, non-citizens may not own freehold titles and any leasehold held by a non-citizen will be converted into leases of up to 99 years. This also affects companies which are not wholly owned, directly and indirectly, by Kenyan citizens. Security over registered real property can be obtained only in form of a charge, which includes instruments creating mortgages. Charges are regulated under the Land Act, of 2012 and Land Registration Act.

A charge takes effect only when it is registered in the prescribed lands registry and a chargee is not entitled to exercise any of the remedies under a charge unless it is registered in accordance with the Land Act, of 2012. Charges rank according to the order in which they are registered.

Security over land can also be achieved through an equitable charge which must be recorded in a memorandum of deposit and which will need to comply with the requirements with regard to the form of execution and attestation for contracts for the disposition of interests in land, and are enforceable on obtaining a court order to that effect.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property? For example, machinery, trading stock (inventory), aircraft and ships?

Tangible moveable assets comprise property that can be handled physically and completely transferred by delivery including machinery, trading stock, aircraft and ships.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

There are a wide range of possessory liens recognised by the English common law. Possessory liens arise by operation of law. There is no applicable registration system. Examples include warehouse person’s liens, liens for other bailees (e.g. repairs of motor vehicles) and banker’s liens.

Security over motor vehicles is usually supplemented by a deposit of the vehicle logbook and a blank transfer. Lenders will usually require the vehicle to be transferred into the joint names of the financier and the hirer. No separate registration is required for security over aircraft. As a matter of practice, copies of mortgages or charges of Kenya-registered aircraft are usually sent to the Director of Civil Aviation with the request that they be placed on the register. See the following section regarding security over ships.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

There is no adequate system for the registration of security over shares in companies other than those listed on the securities exchange. Security is usually constituted by a deposit of share certificates with a blank share transfer form and a memorandum setting out the terms of the deposit and rights of enforcement. Publicly listed securities may be pledged. Pledging requires the lodging of a duly completed Securities Pledge Form (CDS 5) with the Central Depository and Settlement Corporation (CDSC). The Securities Pledge Form is a form prescribed by the CDSC. It is lodged through a CDSC Central Depository Agent (CDA). The CDSC facilitates freezing of securities pledged as collateral.

Taking security over Government bonds requires submission of duly completed sale and purchase confirmation forms (by the borrower and bank respectively) to the Central Bank of Kenya (CBK) which then marks a lien against the relevant securities. The sale and purchase confirmation forms are prescribed forms provided by the CBK. Security over all assets of a company is evidenced by debentures creating fixed and floating charges. These require registration at the Companies Registry. In large financing transactions these may be supplemented by formal mortgages of large value items (e.g. plant equipment and aircraft).

Security over ships and shares in ships requires registration under the Merchant Shipping Act. Priority is governed by the date of registration. The Act confers a statutory power of sale which may only be exercised under a certificate of sale issued by the Registrar. Pledges are permissible under general English common law. Pledges also apply to negotiable instruments. No registration is required. The pledge is constituted by the delivery of the goods or instrument. It is usual to take a short letter of pledge, setting out the rights of the holder of the pledge to sell the underlying security upon default. This security is used in relation to deposits.

1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security over actionable claims (e.g. debts) can be created by way of a fixed charge. An actionable claim can be transferred (whether by way of security or otherwise) by an instrument in writing which is effective immediately on execution. No special form is required. The transfer is only binding on the debtor if notice is given to the debtor by the transferor or, if he fails to do so, by the transferee. Priority is governed by registration and the date of giving of notice to a debtor.

The charge holder must also be able to exercise control over the actionable claims (for example, both the book debts and their proceeds).
1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

There are no special rules regarding security over intellectual property. Securities may require registration under the Companies Act or the Chattels Transfer Act. An assignment of a trademark by way of security may also require registration at the Trademarks Registry but this does not govern the priority of securities.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Depending on the amount to be secured, security over general banking facilities such as working capital facilities are typically created by fixed and floating charges over the assets of the borrower, for example by registering an all assets debenture. A fixed charge may be created on an asset which is, or is capable of being, ascertainment and definite and over which the lender can exercise sufficient control. A floating charge can be created on a class of assets, present and future, belonging to the charger and which in the ordinary course of the charger’s business changes from time to time. The securities may require registration under the Companies Act or the Land Registration Act in the case of immovable property.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce?

Under Kenyan law, security can be granted over all types of assets. Typically, security over land can be difficult to enforce. In terms of the new Constitution of Kenya, non-citizens may not own freehold titles and any leasehold held will be converted into leases of up to 99 years. This also affects companies which are not wholly owned, directly and indirectly, by Kenyan citizens.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

Rights to future assets can be granted as security in the form of a floating charge.

2.2 FUNGIBLE ASSETS

Security over fungible assets can be granted by way of a floating charge.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

The following forms of commercial security or quasi-security are common:

• guarantees and credit enhancement;
• factoring;
• finance leases;
• hire purchase; and
• instalment sales.

4. Do company law rules or conventions affect taking security in your jurisdiction?

Section 56 of the Companies Act prohibits companies from providing financial assistance directly or indirectly for the purpose of; or in connection with, purchasing or subscription of their own shares, or the shares of their holding company. Financial assistance includes the granting of loans; guarantees or security and the company and any officer that grants unlawful financial assistance is liable to a fine. The only exception to this rule arises where the assistance is given in connection with a scheme for the purchase of shares by employees of the company.

The power of the directors of a company to borrow and/or grant security on behalf of the company may be limited by its Memorandum and Articles of Association. Any borrowing or security granted in contravention of this restriction may be void in certain circumstances. The directors of a company will breach their fiduciary duties towards a company if they permit the company to enter into a transaction which is not in the best interests of the company. This includes the granting of security or a guarantee.

5. Under which circumstances can a secured lender enforce its collateral?

A secured lender can generally enforce its security following the occurrence of default or an event of default under the financing documents. Events of default include default of payment, breach of any financial or any other obligations under the facility, misrepresentation by the borrower and/or pledgor of the security, insolvency and occurrence of material adverse changes. Other events of default may be specified in the relevant security document.

A secured lender is ordinarily required to notify the borrower and in the case of collateral issued by a third party, such third party of the occurrence and intention of the lender to enforce its collateral. Statutory notices are required in the case of immovable property in terms of the Land Act, of 2012 and Land Registration Act.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no legal restrictions in granting security over any form of property to foreign lenders. However, there are some requirements for consent with respect to agricultural land. This applies to all lenders. There may be risks for lenders where the borrower is not 100% owned by Kenyan citizens, given that in terms of the new Constitution of Kenya, non-citizens may not own freehold titles and any leasehold held will be converted into leases of up to 99 years.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

Taking security can be a time-consuming business due to inefficiencies at the Government Registries. Depending upon the nature of the security, a minimum of three to four weeks should be allowed for stamping and registration.

There are no other notarial or similar fees payable although there are statutory requirements in relation to the form of execution and attestation of charges over land. In particular, it is necessary for execution to take place in the presence of a Kenyan advocate who must explain certain statutory provisions and append a certificate to that effect. It may be necessary to make special arrangements to ensure that any non-resident signatories are present in Kenya for signing.

There are no ongoing maintenance requirements in relation to the registration of securities. There are no taxes or fees that are payable on the granting of a loan. On granting of security by the borrower, registration fees and stamp duty may be payable depending on the nature of the security, as follows:

Stamp duty:
• on principal security: 0.1% of the sum secured; and
• on collateral security: 0.1% on supplemental security: KES 5.

Registration fees:
• KES 600 (approximately USD 7) at the Companies Registry; and
• KES 500 (approximately USD 6) at the Lands Registry.

In the case of assignment/ transfers by way of securitisation of debts and charges, the above provisions apply. In the case of an outright transfer/ assignment of debts and charges, no registration is necessary, but the rate of stamp duty is 2%.

For pledges no registration is required and there is no stamp duty on a simple pledge.

There are no taxes or fees payable on enforcement save where court orders are required such as in the case of foreclosure.

BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

There are no formal rescue or reorganisation procedures outside of insolvency or receivership proceedings in Kenya. Schemes of arrangement between the company and its creditors are provided for under the Companies Act, but these provisions are not invoked, possibly owing
to the need for court approval. Informal rescue and reorganisation are uncommon except in the financial sector where such arrangements have been brokered by statutory managers and regulators to rescue banks, insurance and stock-brokering companies. Generally such restructurings, many of which have involved the inclusion of third party investors, have been vulnerable to frustration from the original owners of the firms.

2. In what order are creditors paid on a company’s insolvency?

Certain creditors of a Kenyan company enjoy preference or priority arising by reason of law in the event that the company is being wound up. A receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge or possession is taken by or on behalf of those holders of any property comprised in or subject to a floating charge. The following debts must be paid out in priority to all unsecured debts and, in certain cases (mentioned below), must be paid out in priority to secured debts:

- All Government taxes and local rates due at the relevant date and having become due and payable within 12 months next before that date not exceeding in the whole one year’s assessment;
- All Government rents not more than one year in arrears;
- Employees’ (other than directors) wages or salary for four months prior to the relevant date and all workmen’s or laborers’ wages for services rendered, not in either case exceeding KES 4,000 per individual claimant;
- Amounts due by way of workmen’s compensation;
- Amounts due in respect of contributions payable during the period of 12 months immediately preceding the relevant date under the National Social Security Fund Act.

These preferential debts and the conditions applicable to them are specified in section 311 of the Companies Act, which also defines the relevant date. Essentially this is the date on which winding up is commenced, a receiver is appointed or possession is taken (as the case may be). Section 311 of the Companies Act sets out the position in a winding-up and section 95 of that Act applies the provisions of section 311 to the receiviorships and taking of possession described above. The costs and expenses of the liquidator, receiver or person taking possession also rank as a prior claim over the general creditors.

Assets comprised in floating charges must be used to satisfy preferential debts in priority to the creditors secured by the floating charge if other funds are not available. Assets comprised in fixed charges (including the charge over immovable property of the company) are not available to pay preferential debts until the creditors secured by those charges have realised their security.

If the company is subject to a winding up, all the charges, costs and expenses of the winding up rank as preferential payments to the payment of the holders of a floating charge.

It should also be noted that where a buyer has reserved title to goods, such goods do not form part of the goods that are subject to floating charges. This is as long as the goods remain capable of being separately identified.

Priority of secured creditors are subject to any inter-creditor arrangements. Priority is based on the date of registration of the security interest. The only creditors who may have priority to secured creditors are:

- preferential creditors as described above;
- sellers of goods who have reserved title of goods until payment;
- execution creditors who have completed their attachment; or
- a landlord who has distrained upon goods.

3. How is the priority between creditors, holding a security interest, determined?

Subject to any inter-creditor arrangements, priority is based on the date of registration of the security interest. Securities created by Kenyan companies or foreign companies with property in Kenya must be registered at the Companies Registry within 42 days of their creation. Registration is effected by delivering particulars of the securities in the prescribed form to the Registrar with a copy of the stamped instrument. A filing fee is payable for each filing.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The judicial system in Kenya is regulated by the Constitution of Kenya of 2010 (the Constitution), which vests judicial authority on the courts and tribunals established by the Constitution. The Constitution establishes superior courts, namely, the Supreme Court, the Court of Appeal, the High Court and specialised courts being the Land and Environment Court and the Industrial Court. The subordinate courts are the Magistrates’ courts, the Kadhis’ courts, the Court Martial and any other court or local tribunal established by statute. Commercial civil suits are heard and determined at the High Court and the Magistrates’ courts.

The suit filed depends on the amount of the claim and where the cause of action arose in terms of geographical jurisdiction. Magistrates’ courts hear and determine civil suits where the amount claimed does not exceed KES 7 million. The efficacy of the judicial system in Kenya has greatly improved since the Constitution came into force on 27 August 2010, for the following reasons:

- The Constitution has reinforced the independence of the judiciary and specifically stipulates that judicial authority will not be subject to the control or direction of any person or authority.
- Judicial officers are now exempted from liability in any suit in respect of anything they do or omit to do in good faith in the lawful performance of their judicial functions.
- The recently concluded vetting of judges and magistrates by the Judges and Magistrates Vetting Board.

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

The Environmental Management and Co-ordination Act, of 1999 (EMCA) requires that a proprietor of a project, before any financing for an undertaking specified in the EMCA (for example, energy infrastructure and mining), must undertake an environmental impact assessment study and submit a project report of the likely environmental effects of the proposed development to the National Environment Management Authority. Some leading banks in Kenya have now adopted international best practice ‘green banking’ principles, including the Social and Environmental Management System (SEMS), endorsement of the United Nations Environmental Programme Finance Initiative, Natural Capital Declaration, green bank reporting and ISO 14001:2004 Environmental Management Systems and Audit certification. This is purposed at ensuring clients adhere to environmental law requirements for their financed projects and that banking institutions reduce their carbon footprint and enhance their social relevance.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

There is no exchange control in force in Kenya.
**BANKING**

1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Yes, subject to a prior authorisation of the Ministry of Finance. However, even authorised, residents are required to repatriate funds received as a remuneration of its services or received from its foreign financial activities.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

Pursuant to Law No. 95-030 dated 22 February 1996 relating to the Malagasy banking law (the Banking Act) only financial institutions duly approved by the Financial and Banking Supervisory Commission or Commission de Supervision Bancaire et Financière (CSBF) can advertise, market, provide and offer banking products. The performance of banking activities in the territory of Madagascar is subject to the prior approval of the CSBF.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

Resident individual or legal entity is required to obtain prior authorisation of the Ministry of Finance before opening bank accounts/holding assets outside of Madagascar.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

There are no regulatory criteria in Madagascar relating to the type of corporate customers that may be targeted by banks.

**CORPORATE LOANS**

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

In Madagascar, there are no licensing requirements for a foreign lender to advance a loan to a Malagasy borrower. However, Banking Act requires a foreign entity engaging in the ‘business of a bank’ (as defined) to obtain the prior authorisation of the CSBF.

Regulations relating to exchange control may also impact on foreign lenders and financial institutions.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

The domestic borrower is required to obtain approval of the Exchange Control Services or Service de Suivi des Opérations de Change (SSOC) before any transfer of funds arising from a foreign loan.

The tax position of the Malagasy borrower in relation to the foreign loan should also be considered, specifically in relation to any withholding tax and tax treaties with other countries.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

Generally, parties to a contract are free to choose a foreign legal system to govern the interpretation of the contract. This ‘choice of law’ clause in a
contract will be upheld by the Malagasy courts except where the choice of law is made by the parties with the intention of evading the provisions of another more appropriate legal system, or where the foreign law is against public policy.

Madagascar is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Foreign arbitral awards will only be applied in Madagascar after the Malagasy court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Malagasy court will consider, as mentioned above, whether the foreign arbitral awards contravene any matters of public policy.

4. Are there any restrictions on financial institutions converting debt into equity?

A financial institution can hold interests in the share capital of other companies in accordance with the following conditions:

- The financial institution can allocate 15% of its capital stock to acquire a stake in another company without exceeding 15% of the other company’s share capital.

- The financial institution cannot allocate more than 60% of its capital stock for the aggregate stakes it owns in several companies.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?

The Civil Code contains provisions for all forms of real estate, including immovable properties.

The principal security related to real estate is a mortgage. There are three categories of real estate:

- Tangible real property – the civil code does not define tangibles but gives examples such as land and buildings (Art. 518).

- Fixtures are defined as all moveable goods that the owner has attached to an immovable property or permanency (Art. 524). To qualify as a permanency, immovable effects must be sealed, lime plastered or cemented, or be able to be removed without being broken or causing damage to the part of the land to which they are attached.

- Property which is immovable by the object to which it applies. This third category would include usufructs over real estate and easements or servitudes.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

In the Civil Code, a creditor may bring proceedings against his debtor for the execution of his debt on all assets of the debtor, whether moveable or immovable.

For real estate, Malagasy Law No.2003-041 on securities (the ‘Malagasy Securities Law’) provides two guarantees and securities:

- pledge of real property; and
- the mortgage.

The pledge of real property is the transfer of possession as security for an obligation. A creditor is entitled to the fruits of the property as a deduction against interest due, and alternatively on the principal debt. The creditor must, however, under penalty of forfeiture, provide for the conservation and maintenance of the immovable property. Should the creditor wish to avoid this obligation, all that is required is to return the property to its owner.

The creditor may, without losing possession for the purposes of the pledge, lease the immovable to any third party, or even to the debtor itself. But the debtor cannot reclaim the immovable before the debt is paid in full.

The pledge agreement must be notarised and registered at the tax office to be effective. The pledge is also registered at the land registry if the immovable property subject to the pledge is registered.

A pledge may be extinguished either by extinction of the principal obligation, or by the early return of the property to its owner.

A mortgage is an indivisible real right in immovable property used for the payment of an obligation.

There are three kinds: legal, judicial and conventional. The mortgage subsists in every portion of all affected immovable property, such that it follows the property into whatever hands it passes.

Only registered immovable property can be mortgaged. Future immovable property cannot be mortgaged.

The mortgage agreement must be notarised and registered at the tax authority and the land registry to be effective.

1.2 TANGIBLE MOVABLE PROPERTY

1.2.1 What is considered tangible movable property? For example, machinery, trading stock (inventory), aircraft and ships?

The Civil Code gives definitions of tangible movable property by classifying it into two groups:

- property which is movable by nature; and
- property which is deemed movable by the determination of the law (Art. 527).

Moveables are obligations and actions that have due amounts. Examples of moveable property are perpetual annuities (Art. 529), ships, windmills, floating structures, and generally all factories that are not built on pillars and do not form part of a house (Art. 531). Household effects and shares in commercial entities are two further examples.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Moveable property that is given as security is called a pledge. The pledge gives the creditor preference over other creditors (insofar as the pledged property is concerned) for the satisfaction of a debt. This privilege will arise only where there is a public document or private deed, duly recorded, containing:

- the declaration of the due amount;
- the species and the nature of pledged entities; or
- a statement of quality, weight and measure.

The pledge agreement must be drafted in writing and registered to be effective. The privilege that was previously set is then established on intangible guarantees such as debt securities, by a public act or private instruction. It is also registered at the tax authority and the company registry and made known to the debtor of the pledged debt. Any clause that would allow the creditor to appropriate the pledge or dispose of it without the formalities above is void.

Until the expropriation of the debtor, if any, the creditor remains the holder of the pledge, which constitutes a deposit, assuring the creditor’s privilege over others. The creditor will, however, be liable for any loss or deterioration of the security that is caused by its own negligence. For its part, the debtor must inform the creditor of necessary expenses that it has made for the conservation of the pledge.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common security is a guarantee in the form of a pledge. The pledge is assigned as security for a bond, an intangible asset or for all intangible personal property, present or future. Legal provisions for civil enforcement procedures govern the legal pledge.

In order to be a valid pledge, the agreement must be reduced to writing. Pledges for future secured debts, must allow for individual circumstances and indicate the debtor’s place of payment, the amount of the claim or its evaluation and, if applicable, its maturity.
1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security for claims and receivables is generally created by a pledge. If a claim is given in the form of a pledge, and this claim is creating interest, the creditor deducts the interest that may be due.

If the debt security for which the claim was pledged does not itself create interest, a deduction is made on the principal debt. Unless the holder of the pledge abuses the agreement, the debtor may not require restitution of the pledged debt after full payment of the principal debt, interests and expenses.

Furthermore, where a debtor takes on a second debt with the creditor after the initial pledge is formed, and where the second debt becomes payable before the first debt, the creditor is not obliged to release the pledge before being fully paid for the original debt. This is the case even if there is no stipulation to make a pledge for the payment of the second debt.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of guarantees on patents, trademarks, copyrights and designs are pledges on patents and copyrights – designs and models – because of their movable character. It should be noted that these intellectual properties, either registered or unregistered, are hired for the creditors. Creditors should, however, declare their debts to the office responsible for the registration of intellectual property so as to ensure that other creditors are on notice. Registration provides creditors with preferential rights over other unsecured creditors.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

- The Security Act does not foresee pledge over banking facility. However, the same Act allows a bank to pledge its borrower’s receivables resulting from the borrower’s business. The borrower is required to issue a signed bordereau to evidence its receivables. The bordereau must contain the designation: ‘deed of pledge’;
- the declaration that the deed will be governed by the Securities Act;
- identity of the beneficiary bank; and
- a statement on the receivables including identity of the debtor, the place of payment, the amount, and if any, their maturity.

The bordereau can also be assigned to the bank.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations:

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

The granting of security over future assets requires the asset to be delivered, or deemed to be delivered, to the creditor.

Article 185 of the Malagasy Securities Law provides that future immovable property cannot be mortgaged.

However, a mortgage may be granted on a building under construction or that is merely planned to be constructed, if the future owner already has an actual right to build on another person’s land. It should be noted that a mortgage must be granted over registered property. In this case, the right to build on another person’s land should have been registered at the land registry; otherwise, the building under construction must be mortgaged with the land where it (i.e. the building) is located. The building cannot be mortgaged separately to the land.

2.2 FUNGIBLE ASSETS

Fungible assets can be used as a debt guarantee if they are the only guarantee that debtors have in their possession to assure payment to creditors in the case of payment failure.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

The most common forms of commercial or quasi-securities in Madagascar are:

- sales and leasebacks;
- sell – rent;
- instalment sales;
- repurchase agreements; and
- credit – leases.

4. Do company law rules or conventions affect taking security in your jurisdiction?

A company may not purchase its own shares, whether directly or indirectly. Companies are also forbidden from granting advances or loans or providing security for subscription to or purchase of its own shares by a third party (Article 660 of the Malagasy Companies Law). Companies may, however, grant securities or guarantees to third parties under the prior authorisation of the board of directors (Article 475 of Malagasy Law on Companies).

Directors may be held personally liable for granting unlawful securities or guarantees. The transaction is not thereby rendered void – but it will be unenforceable as against the company.

5. Under which circumstances can a secured lender enforce its collateral?

Security is an accessory obligation under the Malagasy legislation: the secured creditor is entitled to enforce its rights under the principal obligation.

Where a creditor holds security conferred by pledge, the secured creditor, with a writ of execution granted by the court, may enforce the security through a public sale of the pledged asset provided that the debtor has been given eight days’ notice. Similar proceedings are applicable for pledging without disposition.

On the other hand, where a creditor holds security conferred by a mortgage on immovable property, the secured creditor is first required to enforce the security by a writ of execution sent to the debtor who can stop the proceedings by paying the debt. If the debtor fails to pay the debt, a competent court may enact the public auction of the secured asset to discharge the principal obligation (Title II Malagasy Civil Procedure Code. of 2003).
BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practiced in your jurisdiction?

In respect of movable properties, creditors ranking is as follows:

- creditors of the legal fees incurred to achieve the sale of the property and the distribution of the price;
- creditors of fees incurred for the maintaining and protection of the assets of the debtors at the interest of the creditors;
- creditors of highly preferred wages in proportion to the value of the property from all of the assets;
- creditors secured by a pledge, according to the date of the pledge;
- creditors with pledge subject to registration;
- creditors with special moveable privilege;
- creditors against all creditors as defined by the PCAP.

2. In what order are creditors paid on a company’s insolvency?

Generally in Madagascar, the priority between creditors who hold security interests on moveable and immovable properties is in the order set out below:

- legal expenses;
- funeral expenses;
- any final costs, whatever the termination, with competition between those to whom they are due;
- the seller of the sold immovable property, for the price of payment;
- if there are several successive sales whose price is due in whole or in part, the first seller is preferred to the second, the second to the third, and so on;
- those who provided funds for the acquisition of an immovable property, provided the Borrowing Act is observed, the sum was for the given job, and the receipt of the seller shows the payment was made with the borrowed money;
- co-heirs on the property in succession, for the guarantee of the share made between them and cash payments or return of lots;
- architects, contractors, construction companies and other workers employed to build, rebuild or repair buildings, canals or other works of any kind; and
- those who lent money to pay or reimburse workers provided that such use is covered by the Borrowing Act and the receipt of workers.

3. How is the priority between creditors holding a security interest determined?

Generally in Madagascar, the priority between creditors who hold security interests on moveable and immovable properties is in the order set out below:

- legal expenses;
- funeral expenses;
- any final costs, whatever the termination, with competition between those to whom they are due;
- the seller of the sold immovable property, for the price of payment;
- if there are several successive sales whose price is due in whole or in part, the first seller is preferred to the second, the second to the third, and so on;
- those who provided funds for the acquisition of an immovable property, provided the Borrowing Act is observed, the sum was for the given job, and the receipt of the seller shows the payment was made with the borrowed money;
- co-heirs on the property in succession, for the guarantee of the share made between them and cash payments or return of lots;
- architects, contractors, construction companies and other workers employed to build, rebuild or repair buildings, canals or other works of any kind; and
- those who lent money to pay or reimburse workers provided that such use is covered by the Borrowing Act and the receipt of workers.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The legal system in Madagascar is based upon the French civil law system. This is a codified legal system based on the Napoleonic model. In all civil law systems, statute law (which is contained in a series of codes) has the greatest importance. Please note that whilst the doctrine of precedent (jurisprudence) is also a source of law the judge mainly uses it when there is a lack/ inconsistency on the laws related to a specific matter.

The judicial system is divided in three levels:

- The Supreme Court;
- The Appeal Court; and
- The First Instance Court.

Generally, the judicial system in Madagascar is trustable. However, the court proceeding is time consuming and may last from several months to years.

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Yes, Law No. 2006-09 of 13 July 2006 on foreign exchange control and its enforcing decree, which provides guidance and restrictions on banking activities.

John W Fooks & Co.
Immeuble Assist 1st Floor, Ivandry Antananarivo 101, Madagascar
T: +261 20 224 3247
www.jwflegal.com
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Yes. Nigerian law does not impose any restrictions that would prevent domestic borrowers from engaging in investment banking activities outside Nigeria. The only issue is whether such domestic borrowers will have foreign exchange to make the investment outside Nigeria. Domestic borrowers who wish to make such investments are free to do so using their own foreign exchange holdings. If a domestic borrower does not have independent access to foreign exchange it may face a challenge in purchasing foreign exchange from the official foreign exchange market for this purpose. This is because foreign exchange is available only from the official foreign exchange market for the purpose of funding what the Nigerian foreign exchange regulations refer to as ‘eligible transactions’ (see Appendix 1), i.e. transactions approved by the Central Bank of Nigeria (CBN) as eligible for the purchase of foreign exchange. Whether the investment banking activities will be eligible transactions will depend on the nature. This means that where, in pursuance of business opportunities, a foreign company engages in business transactions that require it to perform services in Nigeria that are of a ‘continuous’ or ‘permanent’ nature, the provisions of CAMA – and more specifically the ‘doing business’ restrictions – will apply.

In addition, Section 8 of the Banks and Other Financial Institutions Act (Chapter B3) Laws of the Federation of Nigeria 2004 (BOFIA) prohibits foreign banks from operating a subsidiary or representative office in Nigeria without the prior approval of the CBN. Where a foreign bank does business only with Nigerian residents (companies or individuals) from its base outside Nigeria, it will neither be required to incorporate as a company in Nigeria nor obtain the approval of the CBN provided that it complies with the following conditions:

- The foreign bank must not have an office in Nigeria.
- Visits made by the foreign bank’s employees to Nigeria are for short periods (i.e. less than one month on each trip and for no more than 183 days in any 12-month period).

2. What extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/ clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

Section 54 of the Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria (LFN) of 2004 (CAMA) requires that all foreign companies wishing to “do business” in Nigeria must first incorporate a company in Nigeria for that purpose. The phrase to do or ‘carry on business’ in Nigeria was considered by our Court of Appeal in the 1999 case of Ritz Pumpenfabrik GMBH & Co. KG vs Techno-Continental Engineers Nigeria Ltd. & Others and defined to mean “to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation”. The Court also took the view that “the repetition of acts may be sufficient”. The Court did not clarify what ‘business’ is, but generally this is understood to mean an activity that is carried on for profit or gain. We can deduce from this case that before a company can be regarded as carrying on business in Nigeria under section 54 of CAMA, the acts must be of a continuous or permanent nature. What this means is that where, in pursuance of business opportunities, a foreign company engages in business transactions that require it to perform services in Nigeria that are of a ‘continuous’ or ‘permanent’ nature, the provisions of CAMA – and more specifically the ‘doing business’ restrictions – will apply.

In addition, Section 8 of the Banks and Other Financial Institutions Act (Chapter B3) Laws of the Federation of Nigeria 2004 (BOFIA) prohibits foreign banks from operating a subsidiary or representative office in Nigeria without the prior approval of the CBN. Where a foreign bank does business only with Nigerian residents (companies or individuals) from its base outside Nigeria, it will neither be required to incorporate as a company in Nigeria nor obtain the approval of the CBN provided that it complies with the following conditions:

- The foreign bank must not have an office in Nigeria.
- Visits made by the foreign bank’s employees to Nigeria are for short periods (i.e. less than one month on each trip and for no more than 183 days in any 12-month period).
• No contracts with potential banking clients are concluded by the foreign bank’s employees while they are in Nigeria. What this means is that any contracts that are proposed to be entered into between the foreign bank’s employees and potential banking clients would have to be completed by the foreign bank’s employees offshore (i.e. on a cross-border basis).

The risk that an extended visit by any of the foreign bank’s employees to Nigeria creates is that it could cause the foreign bank to be regarded as “doing business in Nigeria”. If the foreign bank is so regarded, the foreign bank would be in breach of the above provisions of the CAMA. Any contract entered into in breach of this restriction would be void.

Subject to a foreign bank complying with the assumptions set out above, foreign banking products may be offered, marketed, provided and advised upon to prospects/ clients in Nigeria without the need for the foreign bank to register or file, license or notify any Nigerian governmental, regulatory, administrative or tax authorities. Regarding advertising, Nigerian law does not contain provisions that specifically regulate how foreign banks can advertise and/or provide cross-border services to clients in Nigeria. As a practical matter, however, foreign banks typically market their products and services in Nigeria through targeted meetings, at which product information such as business cards and/or general marketing materials are provided. Foreign banks also market their services in Nigeria through the targeted distribution of product brochures, and through telephone calls and letters or emails. A foreign bank can use any of these means to market its products to prospects in Nigeria.

Where the marketing activities will involve offering foreign securities to the public, it will come under the regulatory purview of the Investments and Securities Act, of 2007 (ISA). The ISA defines securities to include stocks, shares and bonds as well as commodities futures, contracts, options and other derivatives and regulates the offering of securities to the public in Nigeria. Such securities are required to be registered with the SEC. Under section 75 of the ISA also, no person shall, without the prior approval of the SEC, issue, circulate, publish, disseminate or distribute any notice, circular or advertisement to the public which invites subscription for the purchase of securities. This restriction applies to all notices, circular or advertisements published or disseminated by a newspaper, radio or television broadcasting, cinematograph or any other means.

This restriction does not apply where the invitation to buy or dispose of securities is made privately to the individual concerned and not openly as an invitation to the public. Section 69 (2) provides that “nothing contained in this section shall be taken as requiring any invitation to be treated as an invitation to the public if it can properly be regarded in all circumstances as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making or receiving it.”

There is also a requirement in Section 78 of the ISA for anyone who intends to make an invitation to the public to acquire or dispose of securities of a public company to issue a prospectus which has been registered with the SEC. This provision exempts an invitation made by a member of a securities exchange or capital trade point to its client or made by an exempted dealer. The ISA does not define who an exempted dealer is. The term in our opinion is wide enough to include a dealer on a recognised stock exchange outside Nigeria.

3. Are there any restrictions on persons in your country opening bank accounts/ holding assets outside your country?

There are generally no restrictions against persons opening bank accounts or assets outside Nigeria. Nigerian law, however, prohibits certain public officials from holding foreign bank accounts while in office. These include the president, vice-president, governors, deputy governors, ministers of the Government of the federation and commissioners of the governments of the state, members of the national assembly and members of the houses of assembly of the states. These categories of persons are not permitted to maintain or operate a bank account in any country outside Nigeria while holding their respective offices.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

No, there are generally no restrictions or regulatory requirements for the type of corporate customers that may be targeted by foreign banks.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

There are no mandatory requirements that a foreign lender must comply with in order to advance a loan to a borrower in Nigeria. Having said that, Nigeria’s foreign exchange regulations stipulate that in order for a borrower to remit interest and principal payments to a foreign lender through the official foreign exchange market, the foreign lender must have obtained evidence, in the form of a certificate of capital importation (CCI) issued by an authorised dealer (i.e. a Nigerian bank licensed by the CBN to deal in foreign exchange). The CCI will serve as evidence that the foreign loan was brought into Nigeria and converted into Naira. In the absence of a CCI, the borrower will not be able to access the official foreign exchange market for the purpose of remitting interest and principal payments to the foreign lender. But if the borrower has access to independent sources of foreign currency (i.e. as would a borrower that generates foreign currency through exports), it could lawfully make such interest and principal payments from its own resources.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

Save for some formalities associated with procuring loans generally, Nigerian companies are not required to comply with any particular formalities or requirements, in order to enter into a foreign loan. The usual formalities that a Nigerian company must comply with in order to borrow, whether domestically or from a foreign lender, include ensuring that the company’s memorandum and articles of association provide that the company with the requisite borrowing powers, and ensuring that the board of directors of the company has approved the borrowing in question.

Once the loan has been obtained by a Nigerian company, the company will be required to withhold tax on any interest payments made to the foreign lender at a rate that is dependent on whether or not the lender is domiciled in a country that has entered into a double taxation treaty with Nigeria. The applicable rate for the withholding of tax on interest payments is 10%, but if the lender is resident in a country with which Nigeria has double taxation agreement, the rate will be reduced to 7.5%. The tax, when withheld from interest and paid over to the Federal Inland Revenue Service, will be the final tax payable to the Nigerian tax authorities on that income in the case of a foreign lender.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

A foreign lender will suffer no particular disadvantage, relative to a local lender, in proceedings that are brought to enforce a loan agreement and/or security document that is governed by Nigerian law; save that the foreign lender will be required to appoint an agent for service of process in Nigeria.

It is important to ensure that the relevant documents are stamped in Nigeria. Section 22(4) of the Stamp Duties Act (Chapter 58) LFN, of 2004 (Stamp Duties Guide: Banking on Africa - Financing Transactions on the Continent BOWMANS 38 CONTENTS PAGE 39 CONTENTS PAGE \end{quote}
Act) requires stamp duty to be paid, at the rates specified in the Act, on instruments executed in Nigeria “or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Nigeria”. Any agreement and security documents, being instruments that relate to property situate, and to a matter of thing done or to be done in Nigeria, will be subject to the payment of stamp duty in Nigeria. The payment of stamp duty will be at the applicable rate. The applicable rate of stamp duty can only be confirmed following an assessment of the documents by the Stamp Duties Commissioner. Stamp duty must be paid within 30 days after the execution of the documents except where such documents are executed outside Nigeria, in which case stamp duty on the documents must be paid within 30 days after the date that the documents are first brought into Nigeria. Failure to pay stamp duty on such instruments will render the documents not admissible in evidence in any civil proceedings in a Nigerian court.

In the case of agreements and/ or security documents that have a foreign (i.e. non-Nigerian) governing law the courts of Nigeria will, as a general rule, exercise effect to the parties’ choice of a foreign governing law and will, accordingly, apply such law in the determination of any claims that come within their jurisdiction. The Nigerian Supreme Court has held, however, that the parties’ choice of law is not conclusive and that to be effective the choice of law must be “real, genuine, bona fide (in good faith), and reasonable”. The Nigerian Supreme Court has further held that the foreign law chosen by parties as the proper law of their contract “must have some relationship to and must also be connected with the realities of the contract considered as a whole”.

Where a lender has obtained a judgement (a “foreign judgement”) in a court other than a Nigerian court, the lender can enforce the judgement in Nigeria. A lender can enforce such judgement in the Nigerian courts by virtue of either the Reciprocal Enforcement of Judgements Act (Chapter 175) LFN, of 1958 (in the case of the judgements of an English court) or the Foreign Judgements (Reciprocal Enforcement) Act (Chapter 35) LFN of 2004. A foreign judgement will not be enforced if it is contrary to Nigeria’s public policy, or does not relate to a definite sum; or if it is made by a court of the foreign country that has no jurisdiction over the matter; it was not registered and enforced in Nigeria within 12 months from the date of the judgement; or where the defendant was not given an opportunity to present its case. A foreign lender also has the option at common law of suing upon or bringing a fresh action for the recovery of a debt, based on the foreign judgement.

As regards foreign arbitral awards, Nigeria is a party to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards and Nigeria’s Arbitration Act (the Arbitration and Conciliation Act (Chapter A18) LFN of 2004) is modelled very closely upon the United Nations Commission on International Trade Laws (UNCITRAL) model law and its rules.

4. Are there any restrictions on financial institutions converting debt into equity?

Financial institutions are free to convert debt into equity provided that there is full compliance with the rules and regulations of the Securities and Exchange Commission (SEC) with respect to public companies and, in the case of private companies, if the conversion will amount to an acquisition of controlling interest in the company.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

These are real property, improvements, moveable assets, receivables and shares. The forms of security that could be taken over these assets include legal or equitable mortgage, fixed or floating charges etc.

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/ immovable property in your jurisdiction?

The types of assets considered to be real estate/ immovable property in Nigeria include bare land, residential and industrial buildings constructed on such land, and any property (referred to as ‘fixtures’) that is so firmly attached to the land/ or buildings that the law deems such property to have become part of the land.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

A company can create security over its real estate assets by way of a legal or equitable mortgage or, alternatively, by way of a charge.

MORTGAGE

A legal mortgage over real estate involves the transfer of legal title to the property by one party (mortgagor) to another (mortgagee), as security for the payment of a debt or discharge of some other obligation, subject to the condition that such title shall be re-conveyed to the mortgagee when the debt is paid or the obligation has been fully discharged. A legal mortgage gives the mortgagee immediate rights against the secured property and must be created by a deed. An equitable mortgage of real estate, on the other hand, is created by the borrower depositing the title deeds to the property with the lender, with or without a memorandum of deposit. Unlike a legal mortgage which gives the lender immediate rights over the mortgaged property, an equitable mortgage creates personal rights against the mortgagee, rights the mortgagee can only exercise with an order of the court.

In order to perfect a legal mortgage that has been created by a company over real estate, three main steps must be taken. The first step, which is required by Nigeria’s Land Use Act (Chapter 59) LFN of 2004 (Land Use Act), is to obtain the consent of the governor of the state in which the land is situated, for the mortgage to be created (Governor’s consent). The second step is to submit the mortgage deed to the Stamps Duties Office so that stamp duty can be assessed at an ad valorem rate (tax on a piece of real estate) and paid by the mortgagee within the time prescribed by law (although payment of stamp duty is an obligation of the mortgagee, lenders will usually seek, contractually, to pass on this obligation to the borrower). The third step is to register the stamped mortgage on which the governor’s consent has been endorsed, at the relevant lands registry. In addition to registering the mortgage at the Lands Registry, the mortgage will have to be registered at the Corporate Affairs Commission (CAC, i.e. Nigeria’s companies registry) as a charge created by the company.

CHARGE

A charge created by a company over real estate does not transfer title or possession in the charged asset to the chargor, but simply creates a security interest in favour of the charge, which can be enforced upon the occurrence of specified events.

Two types of charges can be created by a company over real estate, namely, a fixed charge, or less usually, a floating charge. A fixed charge is created over specific property of a chargor, attaches to the charged property from the time of creation, and restricts the rights of the chargor to deal with the property without the consent of the party in whose favour the charge is created.

A floating charge, on the other hand, is one that generally takes effect over the whole or a specified class of a company’s assets and undertaking, but which permits the company to use, deal with or dispose of the assets that are subject to the charge in the ordinary course of business. Unlike a fixed charge, which attaches to the specified property immediately, a floating charge only attaches to the company’s assets or undertaking when a specified event occurs that causes the charge to ‘crystallise’.

A fixed charge which creates a legal or equitable mortgage over land requires governor’s consent in order to be valid but, prior to its crystallisation, a floating charge does not require governor’s consent as it does not, prior to such crystallisation, create or transfer any interest in land but only appropriates such land to the debt.

The procedure for perfecting a fixed charge that has been created by a company over its real property is the same as the procedure, already discussed above, for perfecting a legal mortgage created by a company over real estate.
1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property, for example, machinery, trading stock (inventory), aircraft and ships?

Tangible moveable property will comprise those assets that, under Nigerian law, are described as choses in possession, i.e. property that can be felt or touched and which is capable of being moved from one place to another. Examples include vehicles, equipment, furniture and fittings, machinery, aircraft, ships etc.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security that can be created over tangible moveable property owned by a company in Nigeria are a mortgage, charge and a pledge.

MORTGAGE

A mortgage of a tangible moveable asset can be created in ways similar to that in which a mortgage is created over real estate, namely, by a transfer of legal title with a proviso for re-conveyance when the debt is discharged, or by the creation of a charge. A mortgage created by a company over its tangible moveable property must, if it is to be valid against third parties and against the liquidator in the event of the company’s insolvency, be registered at the CAC as a charge under section 197 (3) of the CAMA.

CHARGE

We have already discussed the nature of a charge and the types of charges that can be created, in our response to the question about real estate above. These principles also apply to charges created over moveable property.

PLEDGE

A pledge is the deposit of goods or other tangible moveable property (or of negotiable instruments), and in certain cases of the documents of title to such goods or other tangible moveable property, with a lender as security for a debt on condition that the pledged items will be re-delivered to the borrower if the debt is repaid, or sold if the borrower defaults. The essential element of a pledge under Nigerian law is possession, and a valid pledge can arise only where the pledged item is in the actual or constructive possession of the lender.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security granted over financial instruments such as shares and other securities in Nigeria are legal or equitable mortgages and charges.

In order to create a legal mortgage of shares, the borrower or mortgagor will be required to transfer its shares to the lender or its nominee, with the proviso that such shares will be transferred back to the borrower upon repayment of the loan. The lender or its nominee must, in order to create a legal mortgage over shares, be registered in the company’s register of shareholders as the owner of the shares over which the security was created.

While this form of mortgage is capable of providing lenders with a great deal of comfort, it is regarded with suspicion by many borrowers. Typically, therefore, lenders tend to take as security, an equitable mortgage over the shares in question, with the principal terms of this equitable mortgage being set out in a memorandum that will accompany the deposit of the share certificates in respect of the shares. In addition to requiring the borrower to deposit its share certificate(s), the lender will usually also require the borrower to execute a blank share transfer form as well as a dividend mandate form.

A fixed or floating charge is another form of security that can be taken over shares. The requirement that such charges must be registered at the CAC has already been discussed in relation to land and this requirement also applies to charges created over shares.

Where the shares to be charged have been ‘dematerialised’, as may be the case where the shares in question relate to a listed company, notice of the charge must also be given to Nigeria’s Central Securities Clearing System Limited (i.e. the company which operates Nigeria’s central depository for listed shares) so that the interest of the mortgagee in the specified shares can be noted.

1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security can be created over a company’s claims and receivables, including insurance policies, cash in bank and other contractual rights, either by way of a floating charge (which we have already discussed in relation to real estate) or, where it is intended that the borrower’s right to use the specified assets should be immediately restricted, by way of a fixed charge (in the case of cash in a bank account for instance) or by an assignment of such contractual claims or receivables. Under Nigerian law, only rights (but not obligations) can be the subject of an assignment and where it is intended that the borrower should transfer both its rights and obligations to a third party by way of security, this can be done by way of a novation - effectively a new contract, in which the lender replaces the mortgagor as creditor.

Assignments are required to be in writing and there is no legal requirement that the consent of the borrower’s counterparty must be obtained to the assignment. However, in order for the assignment to vest legal (as opposed to equitable) rights in the lender, notice of the assignment must be given to the borrower’s counterparty. An assignment by way of security will require registration as a charge under Section 197 of CAMA, and such registration must be preceded by the payment of stamp duty on the deed of assignment, at an ad-valorem rate. Where a lender fails to register an assignment it will be void against other creditors of the borrower company and against its liquidator in the event of the borrower’s insolvency.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security can be created over patents, trademarks, copyright and designs by way of a charge (fixed or floating) in much the same way as we have described in relation to real estate. The instrument creating the charge will require registration under Section 197 of CAMA as a charge, and such registration must be preceded by the payment of stamp duty at an ad valorem rate.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Please see the previous paragraph 3.1.4.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

Apart from licences (for more information about licences, see below), there are generally no asset classes over which security cannot be taken, nor are there particular difficulties associated with the enforcement of security over any particular asset class.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

Apart from licences (for more information about licences, see below), there are generally no asset classes over which security cannot be taken, nor are there particular difficulties associated with the enforcement of security over any particular asset class.
2.2 FUNGIBLE ASSETS

Lenders can take security over a fungible pool of assets through the creation of a floating charge over such assets. It is also possible where the assets in question are fungible, as would be the case with listed shares or negotiable instruments, to create security over such assets by way of a fixed charge. In both such cases (i.e. in relation to either a fixed or floating charge) the charge would attach to the original pool of assets as well as to any replacement assets.

2.3 OTHER ASSETS

The creation of security over licences can be problematic. This is because the creation of security over a licence inevitably raises the possibility that in the event of a borrower defaulting the lender or its nominee (rather than the original licenciee) will seek to operate the enterprise or discharge the function in respect of which the licence was issued. In view of this possibility, and against the background of the fact that the issuance of licences involves an exercise of discretion by the relevant Government departments or agencies, it is not possible under Nigerian law to create security over a licence without the consent of the issuing department or agency.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

Equipment leases, including sale and lease-backs, reservation of title clauses, guarantees, comfort letters, negative pledges and rights of set-off are the most frequently used collateral enhancement techniques.

4. Do company law rules or conventions affect taking security in your jurisdiction?

The following company law rules or conventions affect the taking of security in Nigeria:

- Financial assistance

Section 159 of CAMA prohibits a Nigerian company or any of its subsidiaries from granting financial assistance, directly or indirectly to any person for the purpose of subscribing to the shares of such company. ‘Financial assistance’ is widely defined in the section as including “a gift, guarantee, security or indemnity, loan, and any form of credit.”

- Restrictions on borrowing in the articles

The articles of association of a company may limit, by reference to a specific sum, the power of the directors to borrow money and/or create security over the company’s assets on behalf of the company.

- ‘Hardening Period’

The combined effect of Section 495 of CAMA and of Section 46 of the Bankruptcy Act (Chapter B2) LFN, of 2004, is that any security created by a company within the three-month period prior to when winding up proceedings are commenced against the company, or of when the company’s shareholders pass a resolution for the voluntary winding up of the company, shall be deemed a fraudulent preference of the company’s creditors and be invalid accordingly.

- Registration of Charges Under Section 197 of CAMA

We have referred, previously, to the requirement under Section 197 of CAMA, that where a company creates any of the charges specified in that section of CAMA, such charge must be registered within 90 days after its creation falling which it will be void against other creditors of the company and against the company’s liquidator, in the event that the company should become insolvent.

5. Under which circumstances can a secured lender enforce its collateral?

A secured lender will be entitled to enforce its security upon the occurrence of a default by the debtor in meeting its obligations under the relevant facility agreement. These obligations can range from a payment default (principal, interest, fees or other payments) to a breach of financial or other covenants. A lender is generally not required to give notice of the borrower’s default (although the facility agreement may so require), but will be required to give the borrower or any third party that has provided security, notice of its intention to enforce the security. Remedies available to a secured lender will depend on the type of security and include taking possession of the charged assets, exercising a power of sale, exercising a right of foreclosure in the case of a mortgage, or appointing a receiver.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

The only restriction that exists, in relation to foreign lenders, is with regard to the creation of security interest over land. Nigeria is a federation comprising of 36 states and a Federal Capital Territory and the laws on this matter differ from state to state. Generally, such restrictions as do exist in relation to creating security over land in favour of foreign individuals or foreign companies are not absolute and, in our experience, can usually be waived by the governor of the state in which the land is situated.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

Various taxes and/ or fees are payable in connection with the perfection and enforcement of security. These include:

- Fees payable for governor’s consent and registration at the Lands’ Registry

Where the security is real estate, the borrower will be required to obtain Governor’s consent to the creation of the mortgage and this usually attracts the payment of a fee that varies from state to state. In addition, once the Governor’s consent has been granted the mortgage must be registered at the relevant state’s lands registry and, again, this attracts a fee that varies from state to state.

- Stamp duty

Instruments that create a charge over the assets of a company are subject to the payment of ad valorem stamp duty.

The applicable rate is usually 0.375% of the sum secured, although the precise rate can only be confirmed following an assessment of the security documents by the Stamp Duties Commissioner. It is worth mentioning that where the charging instrument is executed outside Nigeria, the obligation to pay stamp duty is suspended until the document is brought into Nigeria. Thereafter, stamp duty must be paid within 30 days after the document is first brought into Nigeria.

- Fees for registering the security as a charge at the CAC

In the case of a private company, the registration fee payable to the CAC in connection with the registration of a charge, amount to 1% of the sum secured and 2% in the case of a public company.

- Fees/ taxes payable in connection with the enforcement of security

Apart from the usual court fees, the lender must bear in mind that in the event that Governor’s consent is to be sought in order to dispose of an asset that was previously the subject of a floating charge, further fees may be payable; with the amount of such fees depending on the state in which the land in question is situated.

BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

The following types of reorganisation procedures are available under Nigerian law:

- Scheme of Arrangement and Compromise (Chapter XVI of CAMA)

A company and its creditors or any class of them, or a company and its members or any class of them may rely on the provisions set out in Chapter XVI of CAMA, for the purpose of embarking upon a shareholders’ or creditor’s scheme of arrangement with a view to reorganising the company or restructuring its debts.
A scheme of arrangement must be approved by not less than 75% of the shareholders and creditors, present and voting at separate meetings. Thereafter, the scheme must be referred to the SEC for approval and, if approved, must be sanctioned by the Federal High Court.

- Mergers and takeovers

It is also possible to achieve the reorganisation of a company by undertaking a merger of that company with one or more other companies, under the provisions of the Investments and Securities Act, of 2007 (ISA). The ISA procedure also requires that the proposed merger must be approved by 75% of the shareholders present and voting at a meeting convened by the Federal High Court, and that the merger must be approved by the SEC and sanctioned by the Federal High Court.

2. In what order are creditors paid on a company's insolvency?

The order in which creditors will be paid on an insolvency of a Nigerian company is specified by Sections 480 and 494 of CAMA and by Rule 167 of the Companies Winding-Up Rules 2001, and is as follows:

- the holders of fixed charges are entitled to realise their security and to prove, together with other unsecured creditors, for any shortfall;
- the costs, charges and expenses of the winding up;
- preferential payments, such as taxes and certain unpaid wages;
- floating charge creditors;
- unsecured creditors;
- subordinated creditors; and
- shareholders.

3. How is the priority between creditors holding a security interest determined?

Under Nigerian law, the priority of security interests is generally determined by the order of their creation as well as by the nature of these interests, i.e. whether legal or equitable. Thus, for instance, a fixed charge will usually have priority over a floating charge of the same type, and the holder of the fixed charge will have actual notice that the floating charge prohibited the company from creating any later charge having priority over the floating charge, the fixed charge will not have priority over the later floating charge. More specifically in relation to secured creditors, the priority rules will operate with the effect set out below although these rights can be varied, subordinated or waived by agreement:

- a creditor with a legal interest will rank ahead of a creditor with an equitable interest;
- if more than one creditor is granted the same security interest over the same asset, the creditor that was first granted security will rank ahead of the second creditor that was granted security;
- a later fixed charge (whether legal or equitable) will have priority over an earlier floating charge, provided the floating charge did not prohibit the company from creating the fixed charge in question, and provided the holder of the later fixed charge did not have actual notice of the prohibition.

Complicating these rules is the interplay of the requirement in Section 197 of CAMA that certain charges created by a company must be registered; and the parallel requirements imposed by various land and ship registries. As a general matter, however, registration of a charge at the CAC is not a priority point, provided the charge is registered within the statutory prescribed period of 90 days. Where that is done, a registered charge (i.e. registered at the CAC under CAMA) will have priority according to the date of its creation and not according to the date of its registration at the CAC. Where, however, the charge is not registered within the 90-day period it fails completely and will lose priority to a subsequently created and registered charge.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The structure of the Nigerian judicial system stems from its colonial roots (Britain) and has retained many of the features therein, for example, the doctrine of judicial precedent. However, the jury system is not practised in Nigeria. At the centre, the Ministry of Justice doubles as the Attorney General of the Federation. He is empowered to institute, take over and discontinue proceedings before any court of law, excluding the court martial, on any Act of the Nigerian National Assembly. At the state level, there is also the Attorney General of the State, who heads the Ministries of Justice of the various states and who is empowered to institute, take over, and discontinue proceedings before any court of law, excluding the court martial, on any law of the State Houses of Assembly.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) (Constitution) makes provision for the following courts:

- At the apex is the Supreme Court of Nigeria headed by the Chief Justice of the Federal Republic of Nigeria who also heads the judiciary. The court is situated in the Federal Capital Territory Abuja. The court has limited exclusive but exclusive original jurisdiction in any dispute between the federal government and the state government and between and among states. It is the final place of appeal and its decision on any matter is final and is not subject to appeal except for the exercise of the Prerogative of Mercy. Its decisions are binding on all other courts.
- Next in the hierarchy of courts in the Nigerian Court of Appeal. Appeals to the Supreme Court come from the Court of Appeal. The Court of Appeal is composed of the President of the Court of Appeal and other Justices not being less than 49 (forty-nine). The court is mainly a court of appellate jurisdiction, but has original jurisdiction to determine whether a person has been validly elected to the Office of President or Vice-President of the Federation or whether the term of office of such person has ceased or become vacant. For administrative convenience, the court is divided into judicial divisions which sit in various parts of the country, namely, Abuja, Benin, Calabar, Enugu, Ibadan, Ilorin, Jos, Kaduna, Lagos and Port Harcourt.
- There is a Federal High Court with exclusive jurisdiction in civil or criminal matters as prescribed by the Constitution. It is also divided into various judicial divisions. It is dully constituted by one judge.
- There is a High Court in each state of the federation and the Federal Capital Territory. Abuja. It has the broadest jurisdiction of the courts and has general original jurisdiction over civil and criminal matters and matters in respect of which any other court has been vested with exclusive jurisdiction. Each High Court is also divided into judicial divisions for administrative convenience.
- Sharia Court of Appeal and Customary Court of Appeal – both courts are represented in any State that requires it and the Federal Capital Territory. The Sharia Court of Appeal has appellate and supervisory jurisdiction in civil proceedings involving question of Islamic personal law which the Court is competent to decide in accordance with the Constitution. The Court comprises a grand khadji and other khadis as the National Assembly or States Houses of Assembly (as the case may be) may prescribe. The Customary Court of Appeal also has appellate and supervisory jurisdiction in civil proceedings involving questions of custom law and comprises a president and other number of judges and may be prescribed by the National Assembly and state Houses of Assembly as the case may be.

In addition to the above-mentioned courts, there is also the National Industrial Court which deals with mainly employment and labour disputes. There are also Magistrate Courts, District Courts, Area Courts, Customary Courts established by various states. These have limited jurisdiction and appeals from them lie to the High Court, Sharia Court of Appeal or Customary Court of Appeal as the case may be.
There are also specialised bodies such as the Investment and Securities Tribunal established to interpret and adjudicate capital market, investment and related matters. There are also various election tribunals and the Court Martial which is a military court.

A look at the judicial system reveals certain defects. Most visible is the issue of delay as disputes tend to drag on as a result of adjournments and cases remain in court for years. Most of these adjournments can be blamed on parties bringing numerous applications and a want of diligent prosecution. This discourages litigants and prevents other people who want to go into litigation. The second defect is the suspicion of a pervading corruption and the lack of independence of the judiciary. However, it is worthy of note that while the machinery to curb these defects can be improved, they are in place but there is the problem of implementation. As a way to reduce these problems, alternative dispute resolution has been introduced to litigants to reduce the load on the traditional courts and quickly resolve certain matters. For example, in a civil dispute, there is a period called pre-trial settlement where parties settle the issues arising and attempt amicable resolution of their disputes.

However, as strength to the Nigerian judicial system, sitting on its bench are sound judges. The rules of the various courts are also being amended to curb these defects.

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Nigeria currently does not have any statutes that deal specifically with competition law. The provisions of the ISA and the rules and regulations of the SEC made pursuant to the ISA (the SEC Rules), however, empower the SEC to determine whether any merger, acquisition or business combination is likely to substantially prevent or lessen competition. There are also certain sector-specific laws, guidelines and provisions that deal with competition-related issues within those sectors like the telecommunications and the aviation sectors. There are no competition-related legislations which may have direct impact or bearing on financing transactions in Nigeria.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Beyond the general environmental and social related laws and regulation (the National Environmental Standards and Regulations Enforcement Agency Act, of 2007, Environmental Impact Assessment Act (Chapter EB) LFN, of 2004, Harmful Wastes (Special Criminal Provisions etc.) Act (Chapter H.), LFN, of 2004, and the Land Use Act etc.), by a circular titled Implementation of Sustainable Banking Principles by Banks, Discount Houses and Development Finance Institutions, the CBN issued the following documents to banks, discount houses and development finance institutions:

- The Nigerian Sustainable Banking Principles (NSBP);
- The Nigeria Sustainable Banking Principles Guideline Notes (NSBPGN);
- Nigeria Sustainable Principles Power Sector Guidelines (NSPSPG);
- Nigeria Sustainable Banking Agriculture Sector Guidelines (NSBAG);
- Nigeria Sustainable Banking Principles Oil and Gas Sector Guidelines (NSBOPGS).

The above documents are to the effect that banks, discount houses and development finance institutions are to develop a management approach that balances environmental and social (E&S) risks identified with the opportunities to be exploited through business activities. The NSBP include seeking to avoid, minimise or mitigate negative impacts on the environment and local communities in which they operate and promote possible impacts wherever possible, integrating environmental and social considerations into decision-making processes to avoid, minimise or mitigate negative impacts, respecting human rights among others.

The NSBAG provide that in line with the NSBP and the NSBPGN, banks are to conduct E&S risk assessment of agricultural clients and activities, and ensure that identified risks are adequately monitored and managed. Banks are also to adhere to local E&S laws and international best practices. Banks are also to engage with their agriculture sector clients to encourage good E&S risk management practices as well as promote sustainable agricultural practices.

With respect to the oil and gas and power sectors, the NSBPOGS and NSPSPG provide that banks are to undertake E&S risk management due diligence on oil and gas sector and power sector clients and activities and determine a client’s ability to effectively manage identified risks, require that their oil and gas and power sector clients comply with Nigerian laws governing E&S issues as well as the IFC’s Performance Standards and the relevant Environmental, Health and Safety Guidelines that represent internationally accepted good practice, and explore opportunities in the sector reform initiatives for innovative sustainability-promotion products and services. Banks are also to require detailed E&S Impact Assessment and E&S Audits for new and existing power developments respectively from their power sector clients. Banks are also to ensure the uptake of opportunities relating to energy efficiency, clean technology and renewable energy as appropriate.

Banks are also to monitor and report on activities of their clients in the agriculture, power and oil and gas sectors consistent with the guidelines and the NSBP.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

Although significantly deregulated, foreign exchange controls remain in place in Nigeria. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (Chapter F34) LFN 2004 (the FEMM Act), the CBN Foreign Exchange Manual (the ‘Manual’) and various circulars issued by the CBN regulate foreign exchange transactions in Nigeria. There are a number of restrictions that could affect the ability of a Nigerian to enter into transactions that would require him to settle his obligations in foreign exchange. The foreign exchange restrictions are geared towards the preservation of Nigeria’s foreign exchange reserves. What this means is that while there are few restrictions on the ability of a Nigerian bank that is licensed to deal in foreign exchange (an Authorised Dealer) to buy foreign exchange, such banks are only permitted to sell foreign exchange for the purpose of funding what the FEMM Act terms ‘eligible transactions’. ‘Eligible transactions’ are defined in section 10 of the FEMM Act as: “any transaction adequately supported by appropriate documentation.” This somewhat general definition has been fleshed out in the manual, which provides a list of ‘eligible transactions’ in respect of which funds can be remitted through the official foreign exchange market, subject to the required documentation being provided. Please see Appendix 1 for a list of ‘eligible transactions’. Nigerian companies and individuals are only permitted to buy foreign exchange for the purpose of funding ‘eligible transactions’. However, companies and individuals who have foreign currency obtained from other legitimate sources (i.e. not from the official market) are unrestricted in how they may utilise such funds. Other legitimate sources could include receiving payment for goods and/or services in foreign currency which is not prohibited under Nigerian law or regulations, and foreign currency received through international money transfers.

UDO UDOMA & BELO-OSAGIE
10th & 13th floors, St. Nicolas House
Catholic Mission Street, Lagos, Nigeria
T: +234 1 432 2307-10
www.uubo.org
Appendix 1

ELIGIBLE TRANSACTIONS

1. Visible imports (except imports under absolute prohibition)

2. Invisible trade

   i. educational expenses – student tuition and maintenance;
   ii. expatriate personal home remittances;
      (a) monthly remittance
      (b) gratuity
      (c) leave pay
      (d) final balance
      (e) bonus
      (f) provident fund
      (g) company’s share of provident/pension fund liabilities to expatriate staff
   iii. re-insurance (all types);
   iv. insurance;
   v. net proceeds of international air ticket sales;
   vi. aircraft lease fees;
   vii. charter fees for bunkering, fishing and other vessels;
   viii. repairs and maintenance of all shipping vessels and aircraft;
   ix. travels;
      (a) personal travel allowance (PTA)
      (b) business trip allowance (BTA)
      (c) medical tours
      (d) pilgrimage
   x. conferences, seminars and training courses;
   xi. in-service training;
   xii. contract service fees;
      (a) management and technical services
      (b) service charges for work done in Nigeria by highly skilled expatriate personnel
   (c) service charges for repairs of machinery and equipment outside Nigeria
   (d) consultancy fees
   (a) directors’ fees
   xiii. membership subscription and examination fees;
   xiv. single copies of books for personal use;
   xv. subscription;
   xvi. correspondence courses;
   xvii. freight of personal effects for returning students;
   xviii. profits and dividends;
   xix. judgement debt;
   xx. commissions and brokerages;
   xxi. copyright, patent and royalties;
   xxii. advertisement outside Nigeria;
   xxiii. aerial survey photographs; and
   xxiv. others (this covers all transactions not listed, which are neither prohibited by law, nor suspended by current regulations. In case of doubt about the eligibility of any transaction, reference should be made to the Central Bank).

NB: Prohibited items are as published by the Fiscal Department, Federal Ministry of Finance.
OHADA


Please note that OHADA countries are members of two other organisations: the West African Economic and Monetary Union (WAEMU) and the Central African Economic and Monetary Community, known by its French acronym CEMAC. These communities establish a common regional stock exchange and regulatory framework for a regional banking system.

The following countries are members of the WAEMU: Benin, Burkina Faso, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

The following countries are members of CEMAC: Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon.

Please see the following responses in respect of each Economic and Monetary Community.
BANKING

1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

WAEMU banking regulations do not provide special restriction for domestic borrowers engaging in investment banking activities outside the WAEMU jurisdictions.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

In accordance with the WAEMU banking regulations, the exercise of banking activities in the WAEMU countries is subject to the approval of the relevant finance minister and the WAEMU banking commission. The commission ensures the supervision of bank activities and respect of banking regulations. Consequently, banking products must be offered, advertised, marketed, provided and advised through a registered bank.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

There are no restrictions on persons in WAEMU countries opening bank accounts or holding assets outside WAEMU countries.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

There are no regulatory criteria in WAEMU countries regarding the type of corporate customers that may be targeted by banks.

CORPORATE LOANS

1. Are there any requirements foreign lenders must comply with when advancing a loan to a domestic borrower in your jurisdiction?

In accordance with the WAEMU banking regulations, the advancing of loan to a domestic borrower must be made through a registered financial institution, unless otherwise decided by the relevant finance minister.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

As defined under the directive relating to financial relationships between WAEMU member states and foreign countries No. R09/98/CM/Uemoa dated 20 December 1998, any foreign loan applications made by domestic corporates must be made through a registered financial institution. In addition, the loan operations are subject to a prior declaration to the relevant external finance department of the relevant country. Domestic corporate borrowers are also required to comply with all guidelines in the declaration set forth in Annex 7 of the aforementioned directive.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

There are no particular provisions that may impact on a foreign lender’s ability to enforce rights and obligations under a loan agreement or security agreement. However, foreign judgments are only effective once they are covered by an exequatur
4. Are there any restrictions on financial institutions converting debt into equity?

The WAEMU banking regulations restrict the activities in which registered banks and financial institutions may be involved. The WAEMU banking regulations prohibit banks or financial institutions to hold directly or indirectly more than 25% of the shares of any commercial company except in other banks, financial institutions or real estate companies.

SECURITY

1. What assets are available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?

The francophone African countries have a civil law system broadly based on the French model. On that basis, the French Civil Code contains provisions for all forms of real estate, including immovable properties.

- There are three categories of real estate:
  - immovable property by nature;
  - by their destination; and
  - by the object to which they apply.
- Tangible real property – the civil code does not define tangibles, but gives examples such as land and buildings.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The OHADA uniform act on securities (the "Security Act") is applicable to the WAEMU countries. The Security Act governs legal guarantees granted to the creditor to ensure the implementation of the debtor’s commitments. The Security Act grants debt security to creditor to ensure the payment of a debt.

The most common form of security granted over real estate is a mortgage. A mortgage is created either by an agreement between the creditor and debtor, or by a court order. In any case, a mortgage must be recorded at the land registry. A conventional mortgage stems from a contract between the creditor and debtor, and takes the form of either an authenticated act (i.e. certified by a notary) or a private agreement, duly approved by the land registry.

With reference to judicial mortgages – those ordered by the court – the creditor is initially permitted by the court to register a provisional mortgage on a debtor’s immovable property, which is followed by a final judgement. The final judgement depends on whether the creditor has filed a petition for an irrevocable mortgage, within a limited timescale imposed by the court.

Registration for a provisional mortgage is permitted if the creditor submits the decision to the competent court where the debtor is domiciled, or the court where the property is located.

If the creditor is not paid on the due date, the mortgage confers the right to seize the property to the creditor, even if the debtor has transferred the property to another party. Such a right is commonly known as the droit de suite. The creditor is entitled to a preferential right (i.e. the right to be paid before other creditors, if any). The Security Act ranks the mortgage third among all other creditors.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property?

The Civil Code gives definitions of tangible moveable property by classifying it into two groups:

- property which is movable by nature;
- property which is deemed movable by the determination of the law.

Moveables are obligations and actions that have due amounts. Examples of moveable property are perpetual annuities, ships, windmills, floating structures, and generally all factories that are not built on pillars and do not form part of a house. Household effects and shares in commercial entities are two further examples.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security granted over moveable properties:

- A lien enables the creditor to retain a debtor’s moveable property until all debt is fully paid. A creditor is only able to take a lien on a property under the following conditions: the debt must be certain; the exact amount of the debt must be known by the creditor and the debtor; the debt must be due for payment; and the debt must relate to the property.
- A pledge enables the creditor to take a property from the debtor to guarantee debt payment. The creditor has no right to use the property that is the subject of a pledge. However, if the debtor fails to pay the debt when it is due, the creditor may be entitled to enforce the sale of the property with a writ of execution. A pledge ranks fourth among creditors in terms of payment priority.

- A collateral security without dispossession is provided for specific property rights such as shareholders’ rights; professional equipment; cars and raw materials. The collateral security is formed either as an authenticated act or a private agreement, which must be registered at the Register of Commerce and Real Estate.

All the securities listed above must be registered at the Register of Commerce and Real Estate in order to be valid and enforceable, except for a lien.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common form of security granted over financial instruments such as shares is collateral security without dispossession. Such collateral stems from either a contract or a court decision.

The collateral security must include the following information or else it is void:

- the names and addresses of the creditor, the debtor and pledgee, if the latter is not the debtor;
- the registered office and the registration number of the share issuer at the Register of Commerce and Real Estate;
- the number of shares that are subject to the collateral security; the amount of secured debt;
- payment terms relating to the debt and interest; and
- the creditor’s elected domicile within the jurisdiction of the Register of Commerce and Real Estate where the company is being registered.

If the collateral security is granted by a court decision, the judge will permit the creditor to take a security over the share, as long as the decision contains the above information.
1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common form of security granted over claims and receivables is a collateral security without dispossess, which is made valid and enforceable by registration at the Register of Commerce and Real Estate.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of guarantees on patents, trademarks, copyrights and designs are pledges, which are made valid and enforceable by registration at the Register of Commerce and Real Estate. Such pledge stems from either a contract or a court decision.

The pledge must include the following information or else it is void:

• the names of the creditor, the debtor and the pledge
• identification of the rights assigned as a guarantee; and
• information regarding the secured debt such as its amount, its term and its maturity.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

As stated above, the most common forms of security granted over claims and receivables are:

• A lien enables the creditor to retain a debtor’s moveable property until all debt is fully paid. A creditor is only able to take a lien on a property under the following conditions: the debt must be certain; the exact amount of the debt must be known by the creditor and the debtor; the debt must be due for payment; and the debt must relate to the property.
  • A pledge enables the creditor to take a property from the debtor to guarantee debt payment. The creditor has no right to use the property that is the subject of a pledge. However, if the debtor fails to pay the debt when it is due, the creditor may be entitled to enforce the sale of the property with a writ of execution. A pledge ranks fourth among creditors in terms of payment priority.
  • A collateral security without disposses is provided for specific property rights such as shareholders’ rights; professional equipment; cars and raw materials. The collateral security is formed either as an authenticated act or a private agreement, which must be registered at the Register of Commerce and Real Estate. All the securities listed above must be registered at the Register of Commerce and Real Estate in order to be valid and enforceable, except for a lien.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

In general, security can be granted over all assets.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

The granting of security over future assets requires the asset to be fixed or determinable.

2.2 FUNDIBLE ASSETS

Fungible assets can be used as a debt guarantee, but the creditor must have the fungible assets separated from assets of the same kind that are in his possession.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

According to the OHADA Uniform Commercial Act, in which Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal and Togo are members, the most common forms of commercial or quasi-secures are:

• sales and leasebacks;
• sell – rent;
• instalment sales;
• repurchase agreements; and
• credit – leases.

4. Do company law rules or conventions affect taking security in your jurisdiction?

According to the OHADA Uniform Act on Companies, financial assistance given by a company administrator is not binding unless it has been authorised at an ordinary general meeting, generally or specifically. Such assistance is not prohibited if it is given for the benefit of a company. Moreover, directors cannot contract borrowing from the company in any form, either directly or indirectly, or guarantee their commitments to a third party.

5. Under which circumstances can a secured lender enforce its collateral?

According to the OHADA Uniform Act on the Organisation of the simplified procedures of debt collecting and enforcement, a secured lender may enforce its rights in the case of a default on payment of the borrower’s principal obligations. Depending on the guarantee, the lender can be paid on all the debtor’s assets without exception, or be paid on a debt security; or on specific property held by the debtor. The lender cannot immediately be paid off for the debt, as he must follow a procedure to sell it at auction and will only be paid after the payment of court costs or priority rights.

Regarding the security guaranteed by a pledge, the secured creditor must take possession of secured assets to ensure the security, generally by way of seizure. The secured creditor may proceed with the sale of assets and apply the proceeds to satisfy the principal obligation.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no restrictions on granting security to foreign lenders.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

Financial activities for all operations relating to banking, finance, trade, securities and money are subject to tax.

BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

The OHADA Uniform Act organising collective proceedings for wiping off debts provides a reorganisation procedure called Preventive Settlement. Title I of this Act contains provision for the judicial management of companies and provision for a compromise with creditors.

Preventive settlement consists of proceedings aimed at avoiding the cessation of payments or the cessation of activity by a company or of the possibility to wipe off the company’s debts through a preventive composition agreement.

2. In what order are creditors paid on a company’s insolvency?

A creditor in an insolvent estate will have a prefered claim (ranking ahead of concurrent creditors) with respect to claims secured by certain categories of bonds such as mortgage or pledge as described in section 3 above. Creditors have statutory preferences over claims of concurrent creditors for all or part of their claims. According to the Security Act, in the event of company insolvency, the order in which creditors are paid out is as follows: Regarding immovable assets:

• creditors of court costs incurred to achieve the sale of the property and the distribution of prizes itself;
• creditors of wages;
• creditors holding a mortgage agreement or other enforceable guarantee and registered within the statutory period, each according to his rank in Land registration;
• creditors with a general privilege subject to publication, according to the rank of each entry in the Register of Commerce and Credit Register;
• creditors with a general privilege not subject to publication; and
• unsecured creditors in possession of an enforcement if they intervene by way of seizure or opposition to the procedure.

Regarding moveable assets:
• creditors for court costs incurred to achieve the sale of the property and distribution of prizes itself;
• creditors of expenses incurred for the conservation of the debtor’s asset for the benefit of previous creditors;
• creditors of wages;
• creditors secured by a pledge, according to the date of the pledge;
• creditors secured by a pledge or a privilege subject to publication, according to the rank of each entry in the Register of Commerce and Credit Register;
• creditors with a special privilege, according to the moveable property of their privilege. In the case of conflict between a claim secured by a special privilege on the same moveable property, preference is given to the first seizing office;
• creditors with a general privilege not subject to publication; and
• unsecured creditors in possession of an enforceable guarantee, if they intervene by way of seizure or opposition to the distribution procedure.

3. How is the priority between creditors holding a security interest determined?

Creditors holding security interest over the same asset priority are ranked according to the order in which the security is registered.

OTHER

1. Briefly set out the structure and comment on the generally efficacy of the judicial system in your jurisdiction.

The structure of the judicial system in WAEMU countries is based on the former French judicial system structure and customary law. In general, in these countries, local courts are often slow acting. The time it takes for a case to be heard is dependent on the complexity of the case. Below is the structure of the judicial system in WAEMU countries.

Benin
• Constitutional Court;
• High Court of Justice;
• Supreme Court;
• Appeal Courts;
• District Court; and
• Primary Court.

Burkina Faso
• Court of Cassation;
• Appeal Courts;
• Higher Instance Courts; and
• First Instance Courts.

Ivory Coast
• Supreme Court;
• Appeal Courts;
• First Instance Courts; and
• Higher Instance Courts.

Mali
• Supreme Court;
• Appeal Courts; and
• First Instance Courts.

Niger
• High Court of Justice;
• Court of State Security;
• Supreme Court;
• Appeal Courts;
• First Instance Court; and
• Instance Courts.

Senegal
• Constitutional Court;
• Supreme and Auditors Courts;
• Appeal Courts; and
• Primary Court.

Togo
• Supreme Court;
• Appeal Courts; and
• First Instance Courts.

2. Are there any competition law restrictions or requirements that financial institutions lending and/ or providing banking services to entities in your jurisdiction must be aware of?

Financial institutions must comply with the following regulations which prohibit the abuse of dominant position in WAEMU countries. WAEMU regulation No. 02-2002/CM-UEMOA of 23 May 2002 relating to anti-competitive practices and Regulation No. 03-2002/CM-UEMOA of 23 May 2002 relating to applicable procedure to agreements and abuse of dominant position within WAEMU countries regulates anti-competitive practices in WAEMU countries.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/ or providing banking services to entities in your jurisdiction must be aware of?

No.

4. Are there any foreign exchange control rules relevant to banking products and/ or lending in your jurisdiction?

WAEMU regulation No. 019-2010/CM-UEMOA of 1 October 2010 provides that foreign exchange operations, capital movements and payments between WAEMU countries or between WAEMU resident and WAEMU non-resident should be made through an authorised agent such as banks.

JOHN W FFOOKS & CO.
Immeuble Assist 1st Floor, Ixandry Antananarivo 101, Madagascar
T: +261 20 224 3247
www.jwfflegal.com
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

According to the Economic Community of Central African States or Communauté Économique des États de l’Afrique Centrale (CEMAC) exchange convention dated on 29 April 2000, capital movements between CEMAC and abroad and payments relating to current international transaction are free. However, some capital movements are subject to administrative control. In particular, some borrowing and lending operations, foreign transferable securities for amounts exceeding FCFA 10 million are subject to a prior declaration to the relevant authority.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

In terms of the convention of 17 January 1992 to harmonise banking regulations in Central African States, it is prohibited for any person other than a credit institution:

• to carry out banking operations on a habitual basis, or
• to use a designation, a company name, an advertisement or generally expressions which may lead to think that they are licensed as a credit institution, or create confusion about this.

It is prohibited for a credit institution to make unauthorised transactions by the category under which it got its licence or to cause confusion on this point.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

According to the CEMAC Exchange Convention, residents are not authorised to open a foreign currency account in the CEMAC zone. However, the finance minister can authorise some resident legal entities to open foreign currency accounts after obtaining the assent from the Bank of Central African States (BEAC).

There is no provision in the exchange regulations prohibiting persons to hold assets outside CEMAC zone.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e., companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

There are no regulatory criteria in the CEMAC zone relating to the type of corporate customers that may be targeted by banks.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

There are no licensing requirements on a foreign lender advancing a loan to a borrower based in CEMAC countries. However, regulations relating to exchange control may further impact foreign lenders and financial institutions. Transfers into CEMAC countries of sums more than FCFA 1 billion are subject to approval of the ministry of finances of the relevant country, delivered with the assent of the Central African Banking Committee.

It must be noted that in the event of the lender requiring security by means of a manner prescribed under the OHADA Uniform Act.
on securities (the Security Act), such lender will be required to be registered as an Authorised Creditor.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

The funds allocated to the domestic borrower must be in one of their currency or in any other currency agreed by both parties.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

There are no particular provisions that may impact on a foreign lender’s ability to enforce rights and obligations under a loan agreement or security agreement.

Parties are free to choose the legal system that governs their contract. Parties are at liberty to consent to the jurisdiction of a particular state’s law to govern their agreement (choice of law clause). However, the courts will not give effect to the choice of law, if such law is against the public policy in each jurisdiction.

In the event that a lender obtains a judgement in a foreign jurisdiction, foreign court judgements will only be applied in OHADA jurisdiction after the relevant court has issued an exequatur decision. In considering whether to issue an exequatur decision, the court will consider whether the foreign court judgement contravenes any matters of public policy. However, the court will not reopen the dispute or reconsider the merits of the case when doing so.

4. Are there any restrictions on financial institutions converting debt into equity?

The CEMAC banking regulations restrict the activities in which registered banks and financial institutions may be involved.

A financial institution can hold interests in the share capital of other companies except in other banks, financial institutions or real estate companies, in accordance with the following conditions:

- The financial institution can allocate 15% of its capital stock to acquire a stake in another company without exceeding 15% of the other company’s share capital.
- The financial institution cannot allocate more than 45% of its capital stock for the aggregate stakes it owns in several companies.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?

The francophone African countries have a civil law system broadly based on the French model. On that basis, the French Civil Code contains provisions for all forms of real estate, including immovable properties. There are three categories of real estate:

- immovable property by their nature;
- by their destination;
- by the object to which they apply.

Tangible real property – the civil code does not define tangibles but gives examples such as land and buildings. Fixtures are defined as all movable goods that the owner has attached to an immovable property or permanently. To qualify as a permanency, immovable effects must be sealed, lime plastered or cemented, or be able to be removed without being broken or causing damage to the part of the land to which they are attached.

Property which is immovable by the object to which it applies. This third category would include usufructs over real estate and easements or servitudes.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The Security Act is applicable to CEMAC countries. The Security Act governs legal guarantees granted to the creditor to ensure the implementation of the debtor’s commitments. The Security Act grants debt security to creditor to ensure the payment of a debt.

The most common form of security granted over real estate is a mortgage. A mortgage is created either by an agreement between the creditor and debtor, or by a court order. In any case, a mortgage must be registered at the land registry.

A conventional mortgage stems from a contract between the creditor and debtor, and takes the form of either an authenticated act (i.e. certified by a notary) or a private agreement, duly approved by the land registry.

With reference to judicial mortgages – those ordered by the court – the creditor is initially permitted by the court to register a provisional mortgage on a debtor’s immovable property, which is followed by a final judgement. The final judgement depends on whether the creditor has filed a petition for an irrecoverable mortgage, within a limited timescale imposed by the court.

Registration for a provisional mortgage is permitted if the creditor submits the decision to the competent court where the debtor is domiciled, or the court where the property is located.

If the creditor is not paid on the due date, the mortgage confers the right to seize the property to the creditor, even if the debtor has transferred the property to another party. Such a right is commonly known as the droit de suite. The creditor is entitled to a preferential right, i.e. the right to be paid before other creditors, if any. The Security Act ranks the mortgagee third among all other creditors.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property. For example, machinery, trading stock (inventory), aircraft and ships?

The Civil Code defines tangible moveable property by classifying it into two groups:

- property which is movable by nature; or
- property which is deemed moveable by the determination of the law.

Moveables are obligations and actions that have due amounts. Examples of movable property are perpetual annuities, ships, windmills, floating structures, and generally all factories that are not built on pillars and do not form part of a house. Household effects and shares in commercial entities are two further examples.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security granted over moveable properties are:

- A lien enables the creditor to retain a debtor’s movable property until all debt payments are made. A creditor is only able to take a lien on a property under the following conditions: the debt must be certain; the exact amount of the debt must be known by the creditor; the debt must be due for payment; and the debt must relate to the property.
- A pledge enables the creditor to take a property from the debtor to guarantee debt payment. The creditor has no right to use the property that is the subject of a pledge. However, if the debtor fails to pay the debt when it is due, the creditor may be entitled to enforce the sale of the property with a writ of execution. A pledge ranks fourth among creditors in terms of payment priority.
- A collateral security without dispossession is provided for specific property rights such as shareholders’ rights; professional equipment; cars and raw materials. The collateral security is formed either as an authenticated act or a private agreement, which must be registered at the Register of Commerce and Real Estate.
All the securities listed above must be registered at the Register of Commerce and Real Estate in order to be valid and enforceable, except for a lien.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

The most common form of security granted over financial instruments such as shares is collateral security without dispossession. Such collateral stems from either a contract or a court decision.

The collateral security must include the following information or else it is void:

- the names and addresses of the creditor, the debtor and pledger, if the latter is not the debtor;
- the registered office and the registration number of the share issuer at the Register of Commerce and Real Estate;
- the number of shares that are subject to the collateral security;
- the amount of secured debt;
- payment terms relating to the debt and interest; and
- the creditor’s elected domicile within the jurisdiction of the Register of Commerce and Real Estate where the company is being registered.

If the collateral security is granted by a court decision, the judge will permit the creditor to take a security over the share, as long as the decision contains the above information.

1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

The most common form of security granted over claims and receivables is collateral security without dispossession, which is made valid and enforceable by registration at the Register of Commerce and Real Estate.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

The most common forms of guarantees on patents, trademarks, copyrights and designs are pledges, which are made valid and enforceable by registration at the Register of Commerce and Real Estate. Such pledge stems from either a contract or a court decision.

The pledge must include the following information:

- the names of the creditor, the debtor and pledger;
- if the latter is not the debtor;
- identification of the rights assigned as a guarantee; and
- information regarding the secured debt such as its amount, its term and its maturity.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

The most common forms of security granted over moveable properties:

- A lien enables the creditor to retain a debtor’s moveable property until all debt is fully paid. A creditor is only able to take a lien on a property under the following conditions: the debt must be certain; the exact amount of the debt must be known by the creditor and the debtor; the debt must be due for payment; and the debt must relate to the property.
- A pledge enables the creditor to take a property from the debtor to guarantee debt payment. The creditor has no right to use the property that is the subject of a pledge. However, if the debtor fails to pay the debt when it is due, the creditor may be entitled to enforce the sale of the property with a writ of execution. A pledge ranks fourth among creditors in terms of payment priority.

- A collateral security without dispossession is provided for specific property rights such as shareholders’ rights; professional equipment; cars and raw materials. The collateral security is formed either as an authenticated act or a private agreement, which must be registered at the Register of Commerce and Real Estate.

All the securities listed above must be registered at the Register of Commerce and Real Estate in order to be valid and enforceable, except for a lien.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

In general, security can be granted over all assets.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

The granting of security over future assets requires the asset to be fixed or determinable.

2.2 FUNGIBLE ASSETS

Fungible assets can be used as a debt guarantee, but the creditor must have the fungible assets separated from assets of the same kind that are in his possession.

3. What type of commercial or quasi-security structures (i.e., legal structures used instead of taking security) are common in your jurisdiction?

According to the OHADA Uniform Commercial Act, in which Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal and Togo are members, the most common forms of commercial or quasi- securities are:

- sales and leasebacks;
- sell – rent;
- installment sales;
- repurchase agreements; and
- credit – leases.

4. Do company law rules or conventions affect taking security in your jurisdiction?

According to the OHADA Uniform Act on Companies, financial assistance given by a company administrator is not binding unless it has been authorised at an ordinary general meeting, generally or specifically. Such assistance is not prohibited if it is given for the benefit of society.

Moreover, directors cannot contract borrowing from the company in any form, either directly or indirectly, or guarantee their commitments to a third party.

5. Under which circumstances can a secured lender enforce its collateral?

According to the OHADA Uniform Act on the Organisation of the simplified procedures of debt collecting and enforcement, a secured lender may enforce its rights in the case of a default on payment of the borrower’s principal obligations. Depending on the guarantee, the lender can be paid on all the debtor’s assets without exception, or be paid on a debt security; or on specific property held by the debtor. The lender cannot immediately be paid off for the debt, as he must follow a procedure to sell it at auction and will only be paid after the payment of court costs or priority rights.

Regarding the security guaranteed by a pledge, the secured creditor must take possession of secured assets to ensure the security, generally by way of seizure. The secured creditor may proceed with the sale of assets and apply the proceeds to satisfy the principal obligation.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no specific provisions concerning restrictions on granting security to foreign lenders.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

Financial activities for all operations relating to banking, finance, trade, securities and money are subject to tax.
BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

Yes. The OHADA Uniform Act Organising Collective Proceedings for Wiping Off Debts provides reorganisation procedure called Preventive Settlement. Title I of this Act makes provision for the judicial management of the companies and provision for a compromise with creditors.

Preventive settlement shall be proceedings aimed at avoiding the cessation of payments or the cessation of activity by a company, or at making it possible to wipe off its debts through a preventive composition agreement.

2. In what order are creditors paid on a company’s insolvency?

A creditor in an insolvent estate will have a preferred claim (ranking ahead of concurrent creditors) with respect to claims secured by certain categories of bonds such as mortgage, pledge described in section 3 above.

Certain categories of creditors have statutory preferences over claims of concurrent creditors for all or part of their claims. According to the Security Act, in the event of company insolvency, the order in which creditors are paid is as follows:

Regarding movable assets:
- creditors for court costs incurred to achieve the sale of the property and the distribution of prizes itself;
- creditors of expenses incurred for the conservation of the debtor’s asset for the benefit of previous creditors;
- creditors of wages;
- creditors secured by a pledge, according to the date of the pledge;
- creditors secured by a pledge or a privilege subject to publication, according to the rank of each entry in the Register of Commerce and Credit Register;
- creditors with a special privilege, according to the movable property of their privilege. In the case of conflict between a claim secured by a special privilege on the same movable property, preference is given to the first seizing officer;
- creditors with a general privilege not subject to publication; and
- unsecured creditors in possession of an enforcement if they intervene by way of seizure or opposition to the procedure.

Regarding immovable assets:
- creditors of court costs incurred to achieve the sale of the property and the distribution of prizes itself;
- creditors of wages;
- creditors holding a mortgage agreement or other enforceable guarantee and registered within the statutory period, each according to his rank in land registration;
- creditors with a general privilege subject to publication, according to the rank of each entry in the Register of Commerce and Credit Register;
- creditors with a general privilege not subject to publication; and
- unsecured creditors in possession of an enforcement if they intervene by way of seizure or opposition to the procedure.

Regarding moveable assets:
- creditors for court costs incurred to achieve the sale of the property and distribution of prizes itself;
- creditors of expenses incurred for the conservation of the debtor’s asset for the benefit of previous creditors;
- creditors of wages;
- creditors secured by a pledge, according to the date of the pledge;
- creditors secured by a pledge or a privilege subject to publication, according to the rank of each entry in the Register of Commerce and Credit Register;
- creditors with a special privilege, according to the movable property of their privilege. In the case of conflict between a claim secured by a special privilege on the same movable property, preference is given to the first seizing officer;
- creditors with a general privilege not subject to publication; and
- unsecured creditors in possession of an enforcement if they intervene by way of seizure or opposition to the procedure.

3. How is the priority between creditors holding a security interest determined?

Secured creditors holding a first ranking pledge over certain property will have priority over creditors holding any subsequent pledge over the same property.

The priority depends on the dates on which the relevant security was created or registered.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The structure of the judicial system in CEMAC countries is based on the former French judicial system structure and customary law. In general, in these countries local courts are often slow acting. The time it takes for a case to be heard is dependent on the complexity of the case. Below is the structure of the judicial system in CEMAC countries.

Cameron

The judicial system comprises of the Court of First Instance, The County Court, the Appeal Court, Supreme Court and the High Court of Justice. Customary rules apply when they comply with law and human rights.

Congo Brazzaville

The judicial system comprises of the Supreme Court, the Court Of Auditors, the Courts of Appeal, the High Courts, the Administrative Courts, the Commercial Courts, Magistrates’ Courts, Labour Courts and the Military Courts. The Supreme Court is located in Brazzaville. It has jurisdiction over the whole of the national territory and supervisory authority over all other courts in the country.

Gabon

The judicial system is based on the principle of degree jurisdiction. At the lower level, the first instance is formed by civil, commercial, criminal and social or administrative sections.

There is a court of appeal in each province. The Judicial Court is the highest court, which is divided into four chambers: civil, commercial, social and criminal.

The Central African Republic

The judicial system comprises of the Court of Cassation, the State Council, the Court of Auditors, the Court of Jurisdictional Conflict and the Courts and Tribunals.

The Court of Jurisdictional Conflict is not a permanent court. It is formed when there is a jurisdictional dispute between judicial courts and those of the administrative order, the conflict will be resolved by the court of jurisdictional conflict.

Chad

The tribunal is divided into four sections: the civil and commercial section, the criminal section, the social section and the administrative section. The civil and commercial section of the court of first instance is the ordinary court.

There is an appeal court in the capital city of all provinces. The Judicial Court is the highest court of the state. It is divided into four chambers (civil, commercial, social and criminal).

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

In the CEMAC Competition Regulation dated 25 June 1999, there are no specific provisions regarding restrictions or requirements for financial institutions to lend and/or provide banking services to entities.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Each country in the CEMAC zone has its own environmental regulation. Some activities such as extractive and associated industry, waste management, the energy industry, chemical, rubber and plastic industry, food industry may be subject to an environmental impact assessment in order to obtain a licence.

Any financial institution financing one of such activities must satisfy itself that the project is duly approved.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

Borrowing and lending abroad, direct investment from abroad or made abroad, and the issuance, advertisement or sale of foreign transferable securities in the CEMAC may be subject to special control measures.

JOHN W FPOOKS & CO.
Immeuble Assist 1st Floor, Ivandry Antananarivo 101, Madagascar
T: +261 20 224 3247
www.jwflegal.com
BANKING

1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Yes, although such activities may be subject to exchange control regulations (see below). The ability of a small corporate domestic borrower (or an individual domestic borrower) to obtain a loan/credit from an offshore lender is restricted by the provisions of the National Credit Act, of 2005 (NCA). Please see the response to question 1.2 below for a description of the provisions of the NCA and other potentially applicable licensing requirements.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

Marketing bank accounts (deposit or cash) in South Africa is seen to be tantamount to soliciting for deposits in South Africa, an activity which a person or entity not licensed as a bank or as a branch of a foreign banking institution is prohibited from conducting in terms of the Banks Act, of 1990 (the Banks Act). The Registrar of Banks in South Africa (the official responsible for monitoring and overseeing compliance with the provisions of the Banks Act) considers even general brand marketing by (foreign) banks that are not authorised as banks or as branches under the Banks Act to constitute indirect solicitation for deposits in South Africa. As such, a foreign bank which does not have a registered branch in South Africa in terms of the Banks Act may not engage in marketing in South Africa, even in general brand marketing.

An entity or person not licensed as a Financial Services Provider (FSP) under the Financial Advisory and Intermediary Services Act, of 2002 (FAIS) may not in any manner or by any means, and whether within or outside South Africa, canvass for, market or advertise any business related to the rendering of financial services (being ‘advice’ and ‘intermediary services’) nor a representative of an authorised FSP, or publish any advertisement, communication or announcement directed to clients, nor use any name, title or designation, which implies that such person is an authorised FSP or a representative of an authorised FSP.

A person who is required to be registered as a credit provider with the National Credit Regulator (NCR) in terms of the provisions of the NCA, but who is not so registered, is prohibited from advertising the availability of credit (including loans and credit facilities) and/or the terms on which such credit may be made available. The provision of any loan or credit to natural persons (individuals) in South Africa or to smaller juristic (corporate) entities, which have a net asset value or an annual turnover of below ZAR 1 million, will trigger the registration provisions of the NCA. The NCA applies to all credit agreements made in or having an effect within South Africa, irrespective of whether the credit grantor resides or has its principal place of business outside South Africa. Unfortunately, the NCA provides no guidance whatsoever as to precisely when an agreement may be seen to have ‘an effect within’ South Africa. What is clear, however, is that the provisions of the NCA enjoy general application to offshore lenders extending loans and credit to South African-resident parties. Furthermore, an unlicensed entity may not, on its own initiative, call a South African client to market, offer or provide loans or credit.

Investments in foreign collective investment schemes or funds may not be marketed or promoted to South African-resident investors.
by any person, unless such foreign scheme or fund has been formally approved by the Registrar of Collective Investment Schemes in South Africa, under section 6(5)(c) of the Collective Investment Schemes Control Act, of 2002.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

South African residents are permitted to open foreign bank accounts, subject to exchange control restrictions and provided that this is done on a reverse solicitation/reverse enquiry basis. A foreign bank that does not have a registered branch in South Africa under the Banks Act may not promote or market bank accounts to South African resident prospective clients.

In terms of the exchange control restrictions currently in force as of 1 April 2015, a South African resident individual is permitted to transfer up to ZAR 10 million offshore, annually, for investment purposes or to invest in non-South African assets up to that limit. South African-resident individuals can also make use of a single, annual, discretionary allocation of ZAR 1 million (per individual) for the purposes of foreign investment, meaning that individuals may now be able to invest up to ZAR 11 million offshore on an annual basis.

Foreign assets acquired by South African-resident individuals through such individuals’ use of the annual foreign investment allowance are regarded by the South African Reserve Bank (SARB) as being ‘approved foreign assets’, which are exempt from repatriation to South Africa. This means that dividends declared on any offshore investment made by a South African client, for example, may be retained offshore in an offshore account. South African-resident individuals are also not required to repatriate to South Africa the proceeds of any disposals of foreign investments or assets made by such individuals, and such proceeds may accordingly be retained offshore.

With effect from 1 April 2015, South African companies are permitted to invest (in foreign direct investments) up to ZAR 1 billion per annum, subject to the approval of an authorised dealer in South Africa. Any additional sum exceeding ZAR 1 billion per annum requires the approval of the Financial Surveillance Department of the South African Reserve Bank. South African institutional investors are allowed to transfer funds from South Africa for investments abroad. The exchange control limit on foreign portfolio investment by an institutional investor depends on the total retail assets of the particular institution.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e., companies, sectional title schemes, share-block schemes, real estate investment trusts, pension funds, etc.)?

Please see the previous question with respect to licensing requirements.

Prudential investment restrictions do apply to certain institutional investors in South Africa, namely collective investment scheme managers, pension funds, insurers and banks. The relevant restrictions must be adhered to by any such entity seeking to invest.

An entity which seeks to offer or provide financial services (‘advice’ and ‘intermediary services’) to only institutional clients in South Africa, excluding pension funds, may be able to obtain an exemption from the licensing requirement imposed under FAIS. This exemption is not automatically available and must be specifically applied for on a case-by-case basis.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

The extension of loans or credit is governed under South African law by the NCA, the provisions of which are policed by the regulatory body established under the NCA and called the National Credit Regulator (NCR).

One of the key obligations imposed by the NCA on a credit grantor to whom the NCA applies is the duty to register as a ‘credit provider’ with the NCR. The consequences of a non-registered credit provider extending credit under circumstances in which the NCA is applicable are serious.

The NCA applies to every credit agreement entered into between parties dealing at arm’s length that is made within South Africa, or which has an effect within South Africa, irrespective of the fact that the credit grantor concerned may have its principal place of business outside South Africa. The NCR takes a number of factors into account in making the determination as to whether a credit agreement (such as a credit facility/credit card) or a loan agreement has an effect within South Africa.

These factors include (but are not limited to): whether or not the proceeds of a loan provided by an offshore credit grantor to an offshore credit receiver will nevertheless be remitted to South Africa; whether or not the credit facility in question will be utilised in South Africa; whether or not repayments under the loan or credit agreement will be made from within South Africa; and whether or not any collateral or security in respect of the relevant loan or credit provided is situated or located in South Africa. This means that the fact that a credit agreement and any supplementary documents are executed outside South Africa is not decisive in respect of the applicability of the NCA and, depending on the facts and circumstances of the transaction, such a credit agreement may still be deemed to have an effect within South Africa and so be caught by the NCA’s regulatory net.

There are exemptions to the application of the NCA, including that:

- The NCA will not apply to credit agreements or loans extended or provided to juristic persons (corporates) under circumstances where such juristic persons have net asset values or annual turnovers equal to or in excess of ZAR 1 million (either alone or in conjunction with the net asset values or annual turnovers of other juristic persons related to the relevant credit recipient). In this regard, a juristic person is ‘related’ to another juristic person if (a) one of them has direct or indirect control over the whole or part of the business of the other; or (b) the same person has direct or indirect control over both of them.

- The NCA will not apply to credit agreements or loans extended to juristic persons (corporates) whose net asset values or annual turnovers fall below ZAR 1 million where the principal debt owing under that credit agreement or loan exceeds ZAR 250,000.

Unless exempted from the provisions of the NCA, an offshore credit provider will need to make successful application to the NCR for approval as a credit provider under the NCA in order to lawfully extend loans or credit (or to market loans or credit) to clients or prospects in South Africa.

Following registration with the NCR, a credit provider is required to adhere to all conduct of business rules prescribed under the NCA and its regulations.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

The South African borrower will require exchange control approval in order to enter into and obtain a loan from a foreign lender.

Payments to a foreign creditor arising from loan agreements and security documents require exchange control approval as these payments constitute the repatriation of realisation proceeds. This approval must be obtained prior to the granting of the loan and the taking of the security.

The tax position of the South African borrower in relation to the foreign loan should also be considered, specifically in relation to any withholding tax and tax treaties with other countries.

Until the end of February 2015, a specific exemption applied to interest paid to a non-resident, unless the non-resident carried on business through a permanent establishment (PE) in South Africa. However, a new withholding tax on interest came into effect on 1 March 2015 in the form of sections 50A – 50H of Part 1VB of the Income Tax Act, 58, of 1962 (ITA). This part applies to interest received by non-residents to the extent that the interest has been received or accrued from a source within South Africa. It is imposed at a rate of 15%, subject thereto that it may be reduced in terms of an applicable Double Taxation Agreement (DTA).
In terms of section 50E of the ITA, any person who makes a payment of any amount of interest to or for the benefit of a foreign person must withhold the amount of withholding tax on interest from the payment to that foreign person. For the purposes of the interest withholding tax, interest will in terms of section 50B(2) be deemed to be paid on the earlier of the date on which the interest is paid or becomes due and payable.

The person withholding the tax is obliged to submit a return and pay the interest withholding tax by the last day of the month following the month during which the interest is paid.

In terms of section 50F, the non-resident is liable to pay the withholding tax by the last day of the month following the month during which the interest is paid, unless the tax has been paid by any other person. The non-resident will also be obliged to submit a return by such date.

There are various exemptions from the interest withholding tax set out in section 50D of the ITA. If, for example, the interest is paid by the South African Government, a South African bank or in respect of any listed debt, the interest will not be subject to the withholding tax on interest. However, this is subject to anti-avoidance rules regarding back-to-back arrangements in terms whereof the bank advances funds to another person on the strength of the amount advanced by the foreign person.

Furthermore, if the debt is effectively connected to a PEE of the non-resident in South Africa and the non-resident is registered as a taxpayer in South Africa, the interest should be subject to normal income tax as opposed to interest withholding tax.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?

A lender who is required under the NCA to be registered with the NCR but who is not so registered will not be able to enforce a loan agreement against its South African borrower, as the loan agreement will be void in terms of the NCA. Where the NCA applies and the lender is NCR-registered, enforcement of the loan against the South African borrower will need to take place strictly in accordance with the enforcement requirements and prescripts of the NCA. More generally, and outside of the NCA, parties to a contract are free to choose a foreign legal system to govern the interpretation of the contract. This ‘choice of law’ clause in a contract will be upheld by the South African courts except where the choice of law is made by the parties with the intention of evading the provisions of another, more appropriate legal system or where the foreign law is against public policy in South Africa.

A foreign lender is entitled to institute legal proceedings in the same manner as a South African litigant. The foreign plaintiff may be called upon to defend the proceedings. A South African court will not give effect to a foreign choice of law clause in a security document granting security over moveable or immovable property situated in South Africa as the proper law of the security document is South African law.

South African courts recognise party autonomy in a contract and will generally give effect to provisions in an agreement referring exclusive jurisdiction to a foreign court (an ‘ouster clause’). The court may assume jurisdiction despite the ouster clause, depending on whether, in the opinion of the court, grounds for doing so exist.

In the event that a lender obtains a judgement in a foreign jurisdiction, the South African courts will give effect to such foreign judgement where the following requirements are satisfied:
- the foreign court had international competence to decide the matter;
- the decision is final and conclusive and has not become superannuated; and
- the judgement is not against public policy.

South African courts will enforce arbitral awards where there has been a valid submission to arbitration. South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. As such, arbitral awards awarded in, among others, France, Germany and the United Kingdom, will be upheld by South African courts.

The rights of contracting parties, the rule of law, international treaties and the independence of the judiciary are all principles recognised and entrenched in South African law and protected by the South African Constitution.

Payments to a foreign lender by a South African borrower arising from a judgement given by a South African court in the foreign lender’s favour are subject to exchange control approval.

As a practical consideration, if documents are signed outside of South Africa, it may be prudent to have the document authenticated by Apostille or attestation. In order for a document signed outside of South Africa to be proved in a South African court, any signature on the document must be authenticated following the Apostille procedure (for member countries of the Hague Convention) or the attestation process (for non-member countries), unless the document is shown to the satisfaction of the court to have been actually signed by the person purporting to have signed such document.

4. Are there any restrictions on financial institutions converting debt into equity?

The transfer pricing provisions of the ITA (which are generally in accordance with the guidelines of the OECD) apply to affected transactions, which broadly speaking refers to cross-border transactions between connected persons, and in respect of which any term or condition is not arm’s length.

In the event that such a term or condition results or will result in a tax benefit for any person that is a party to the transaction, then the taxable income of or tax payable by the person that derives the tax benefit has to be calculated as if the transaction was concluded on arm’s length terms and conditions.

The South African transfer pricing rules, including the thin capitalisation rules, were amended with effect from 1 April 2012, providing inter alia that the general transfer pricing (arm’s length) provisions will be applied to determine whether a company is thinly capitalised.

SARS has recently published a draft interpretation note on thin capitalisation. Previously, the general guideline was that a 3:1 loan funding to equity ratio was regarded as acceptable. This rule will no longer apply, but each funding structure would have to be considered taking into account all relevant factors, such as the (proposed) funding structure, the financial strategy of the business, the use of comparable data, etc.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?

Generally, real estate encompasses what is known under South African law as ‘immovable property’. Although there is no all-encompassing definition of immovable property, the following principles apply (among others):
- An asset will be classified as immovable property if it is land, minerals in the soil, trees and growing crops.
- A building attached to the soil (or other articles attached to immovable property) is considered to be immovable property if the manner of its attachment is so secure that separation from the soil or immovable property would involve substantial injury to the soil, the immovable property or the article (as the case may be).
- Any real right in land, including inter alia a lease of land which has a duration (including renewal periods) of more than 10 years and which lease is registered in notarial form against the title deed(s) of the land, in accordance with the formalities in respect of Leases of Land Act, of 1969.
- An incorporeal (intangible) asset is classified as immovable property if the corporeal (tangible) asset to which it relates is classified as immovable property (e.g. mineral rights).
1.2.1 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security over immovable property can be obtained only by a special mortgage of immovable property in the manner prescribed by the Deeds Registries Act, of 1937 (the ‘Deeds Registries Act’). A special mortgage of immovable property is created by a mortgage bond. The most common type of mortgage bond is a covering mortgage bond, which is generally used to secure all indebtedness of the borrower. A mortgage bond is perfected by registration in the Deeds Registry where the immovable property over which the mortgage bond is granted is registered, and on registration the lender is vested with a real right against the immovable property. It should be noted that a mortgage bond does not transfer title to the immovable property mortgaged to the lender, but only vests the lender with a limited real right of security against such immovable property; if the borrower fails to fulfill his/her obligations towards the lender, the lender is entitled to enforce its rights against the borrower by calling up the mortgage bond and obtaining an order of court which in turn authorises the lender to have the immovable property sold in execution (after the borrower has been notified) with the proceeds of the sale being applied to settle or reduce the secured debt.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property. For example, machinery, trading stock (inventory), aircraft and ships?

Under South African law, moveable property is anything which can be moved from place to place without damage to itself. Generally, all property which is not immovable property is classified as moveable property. A further distinction is drawn between corporeal (tangible) moveable property which can be handled or touched and incorporeal (intangible) moveable property which cannot be touched (for example, intellectual property, book debts and shares).

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security that can be granted over tangible moveable property are:

- A pledge which is a type of mortgage of moveable property given by a debtor (pledgor) in favour of a creditor (pledgee) as security for a debt or other obligation. It is created by an agreement between the pledgor and the pledgee and is perfected by the delivery of the moveable property to the pledgee or its agent. Title to the moveable property remains with the pledgor, subject to the security interest of the pledge.
- A general notarial bond is a bond given in favour of a creditor (mortgagee) over property described generally and not over specific identifiable moveables as security for a debt or other obligation. The general notarial bond is applicable to all moveable property in the possession of the debtor (mortgagor). However, a general notarial bond does not, in the absence of attachment of the property by the court, confer any real security and as such does not constitute the mortgagee as a secured creditor of the mortgagor. Consequently, a general notarial bond gives a creditor a preference over unsecured claims in respect of the free residue of an insolvent estate.
- A special notarial bond is a mortgage created over specifically identified corporeal (tangible) moveable property of a debtor (mortgagor) in favour of a creditor (mortgagee), as security for a debt or other obligation meeting the requirements set out in the Security by Means of Moveable Property Act, of 1993 (Security by Means of Moveable Property Act), and registered under the Deeds Registries Act. In terms of the Security by Means of Moveable Property Act, the moveable property (specifically identified) will be deemed to have been pledged to the mortgagee as effectively as if it had expressly been pledged and delivered to the mortgagee, provided that such notarial bond is registered in terms of the formalities prescribed by the Security by Means of Moveable Property Act. Special notarial bonds (once registered) constitute a form of real security over the moveable property specially described and identified in the bond. The mortgagee (creditor) is therefore a secured creditor in respect of the proceeds of the sale of any moveable property identified in the notarial bond.
- In respect of aircraft or shares in an aircraft, security can be created only by a deed of mortgage in the prescribed form according to the Recognition of Rights in Aircraft Act, of 1993. The Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment have been passed into law in South Africa by the Convention on International Interests in Mobile Equipment Act, of 2007. As a result, the relevant interests constitute an international interest, and can be enforced by third party creditors to the extent that the asset is located in South Africa.
- In respect of a registered South African ship or a share in a registered South African ship, security can be created by a mortgage only in the prescribed form according to the Ship Registration Act, of 1998. Security over a South African ship which is neither registered nor carried in a trade that is not registered (typically small craft of less than 25 gross tons or not more than three metres in length) can be created by means of a general notarial bond or special notarial bond.
- A general notarial bond or special notarial bond cannot be created or registered over an aircraft.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security over financial instruments is usually created by a pledge, in the case of an instrument that is a tangible document of title, or, in most cases a cession in security over rights and/or claims, or a combination of these.

A pledge is a type of mortgage of tangible moveable property given by a debtor (pledgor) in favour of a creditor (pledgee) as security for a debt or other obligation. It is created by an agreement between the pledgor and the pledgee and is perfected by the delivery of the moveable property to the pledgee or its agent. Title to the moveable property remains with the pledgor, subject to the security interest of the pledge.

A cession in security is created by the debtor (cedent) agreeing to grant security by way of cession over incorporeal (intangible) moveable property in favour of a creditor (cessionary). It can either be structured as:

- generally in the form of a cession in securitatem debitis where title (bare dominium) to the property remains with the cedent (as with a pledge); or
- in limited cases, as an out-and-out cession, where title to the property is transferred to the cessionary, subject to a right of the cedent to have the property transferred back to it by the cessionary, once the debt or other obligation secured is discharged.

To the extent that the financial instruments are evidenced by certificates, the certificates are usually delivered with a transfer form to assist in exercising the security. Where financial instruments are uncertificated, the security is perfected by noting the existence of the security on the securities account of the provider where the financial instrument is recorded.

Section 39 of the Financial Markets Act, of 2012, regulates the use of uncertificated securities and provides, inter alia, that:

- uncertificated securities or an interest in uncertificated securities may not be transferred or otherwise dealt with, and no instruction by the pledgor or cedent may be given effect to, without the written consent of the pledger or cessionary;
- the pledgee or cessionary of uncertificated securities or an interest in uncertificated securities is entitled to all the rights of a pledgee of moveable property or cessionary of a right in moveable property pledged or ceded to secure a debt; and
- a pledge or cession in securitatem debitis effected in respect of uncertificated securities is effective against third parties.
1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

Security over claims and receivables is generally created by cession in security, as described in paragraph 3.1.3 above. There are no specific perfection requirements as the act of cession itself is sufficient to perfect the security. While notification of the transfer of the receivables is not required for a valid transfer of ownership to the buyer, failure to notify the debtors continues to entitle them to make payment of the receivables to the seller in discharge of their obligations. In such circumstances, the buyer will have no recourse to the debtor.

A cession will be unenforceable to the extent that it weakens the debtor’s position or renders it more onerous than it was prior to such cession taking place. As such, the transfer of a portion of the debt resulting in a splitting of claims such that the debtor may be required to face two creditors is invalid, save with the debtor’s consent.

1.5 INTELLECTUAL PROPERTY

1.5.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

The following principles apply to security over intellectual property:

- A registered trademark may be hypothecated by a deed of security having the effect of a pledge of moveable property. The deed of security must be recorded against the relevant mark in the Trademarks Register (established in terms of the Trademarks Act, of 1993). Security over an unregistered trademark is granted by a cession in security.
- Security over registered designs or applications for designs can be taken by a hypothecation under the Designs Act, of 1993 or by cession in security. Security over unregistered designs is granted by a cession in security.
- Security over patents or application for patents can be taken by a hypothecation according to the Patents Act, of 1978 or by a cession in security. Security over unregistered patents is granted by a cession in security.
- Security over copyright is created by a cession in security.
- In the absence of a registered hypothecation, a bona fide transfer of the intellectual property to a third party without knowledge of the security interest, can be validly effected despite the lender’s security interest.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e., made valid and enforceable) in relation thereto?

Claims and receivables include book debts and other rights under contracts such as insurance contracts and are commonly granted in South Africa.

Security over claims and receivables is usually created by a cession in security (See previous paragraph 3.1.4).

There are no specific perfection requirements for a cession in security, as the act of cession itself is sufficient to perfect the security, save the issues relating to notification of transfer and the splitting of claims, as described in 3.1.4.

2. Are there any types or class of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

Security can generally be granted over all assets (subject to what is stated hereafter).

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

- Tangible assets

The granting of security over future assets requires the asset to be delivered or deemed to be delivered to the creditor. For immovable property, at best there can be an undertaking by the debtor to deliver the asset or procure the registration of a bond over the asset, once the asset is in its possession. This undertaking is nothing more than a contractual undertaking which affords no real security.

- Intangible assets

It is now generally accepted that rights to future intangible assets can be granted as security. Similarly to immovable assets, there can be an undertaking by the debtor to deliver the asset. This undertaking is nothing more than a contractual undertaking which affords no real security.

However, it is also possible to cede future rights in anticipandop.

Here the parties execute a deed of cession in anticipation of future rights arising; the deed of cession contains both the so-called ‘obligationary agreement’, creating the duty to cede the right, and the ‘transfer agreement’ by means of which the right is actually transferred; but until such time as the right materialises, the transfer does not take place. When it does materialise, the transfer occurs automatically without the need for any further act of transfer by the parties; and pending such materialisation, the parties are bound.

2.2 INTANGIBLE ASSETS

A person’s right to cede an intangible asset can be restricted by common law, by agreement and by statute. As set out in 3.1.4, the transfer of a portion of the debt resulting in a splitting of claims such that the debtor may be required to face two creditors is invalid, save with the debtor’s consent.

2.3 FUNGIBLE ASSETS

Taking security over tangible moveable fungible assets presents difficulties under South African law, due to the requirement that the asset must be delivered in pledge to the holder of the security to create real security.

In general, the manner of acquiring a security interest in a tangible moveable fungible asset is by a general notarial bond, but this will give the security holder only a limited security interest.

In the alternative, in structured commodity financing transactions, commodities may be secured under warehouse structures where the collateral agent of the lenders receives and controls the commodities in a warehouse, as pledgors.

2.4 MINERAL AND PETROLEUM RIGHTS

There are certain restrictions on the enforcement of security granted over mineral and petroleum rights. In terms of section 11 of the Mineral and Petroleum Resources Development Act, 2002, the written consent of the Minister of Mineral Resources is required for the cession, transfer, assignment or other disposition of a mineral or petroleum right, or an interest in such right, as well as for the sale of a controlling interest in an unlisted company or close corporation that holds such right.

3. What type of commercial or quasi-security structures (i.e., legal structures used instead of taking security) are common in your jurisdiction?

The following forms of commercial security or quasi-security are common:

- sale and leaseback;
- factoring;
- hire purchase;
- instalment sales;
- finance leases; and
- repurchase agreements.

In general, there are no specific formalities to be complied with in relation to these transactions, unless the NCA applies to the specific transaction. This Act governs the extension of credit but will generally not apply to transactions exceeding a certain threshold amount. Care should be taken to ensure that forms of security are not re-characterised on the basis of the substance over form principles of South African law.

4. Do company law rules or conventions affect taking security in your jurisdiction?

Yes, it must be noted that the previous company law rules and conventions affecting the taking of security in South Africa have changed with the enactment of the Companies Act, of 2008 (the Companies Act).

The board of directors of a South African company may authorise that company to provide direct or indirect financial assistance to a related
or inter-related company in terms of section 45 of the Companies Act, except to the extent that the memorandum of incorporation of a company provides otherwise.

This restriction should be kept in mind when funds are being advanced to a South African borrower which forms part of a group of South African companies, particularly where companies within the Group will be securing the obligations of the South African borrower. This is because financial assistance, for the purposes of section 45 of the Companies Act, includes lending money, guaranteeing a loan or other obligation, and securing a debt or obligation.

Any financial assistance must be:

• provided pursuant to a valid employee share scheme that complies with the requirements of section 97 of the Companies Act; or
• authorised by a special resolution adopted within the previous two years by the shareholders of the company approving such assistance.

In addition to these requirements the directors of the company must be reasonably satisfied that the solvency and liquidity test (as set out in the Companies Act) has been met, and the terms under which the financial assistance is proposed to be given are fair and reasonable to the company. This authorisation must be given prior to the company giving financial assistance, as the provision of financial assistance cannot be ratified. The provision of security without the necessary financial assistance authorisation will therefore be void.

5. Under which circumstances can a secured lender enforce its collateral?

Since security is an accessory obligation under South African law, the secured creditor can generally enforce its security on the occurrence of a default of the principal obligation. The secured creditor is thus entitled to enforce its rights under the principal obligation. As a general principle, the debtor is always entitled to settle the debt.

The following general principles apply:

• Depending on the nature of the security, it may not be necessary to enforce the security through a public sale pursuant to a court order.
• Where security has been conferred by way of a cession in securitatum debiti, a pledge or a special notarial bond, the secured creditor can, without prior judgement against or exclusion of the security provider, procure the sale of the secured assets and apply the proceeds to satisfy the principal obligation.
• In relation to the security conferred by a mortgage bond and a general notarial bond, the secured creditor is first required to perfect the security by taking possession of the secured assets, usually by way of attachment, pursuant to a court order, by the sheriff of the High Court. After this, the secured creditor can procure the sale of the assets and apply the proceeds to discharge the principal obligation.
• It is in some cases permissible for the secured creditor to agree with the security provider that the secured assets be sold without the need for judicial execution (parate execute). An agreement of parate execute in respect of moveables pledged and delivered to the secured creditor is valid, provided (i) the agreement itself is not unreasonably or against public policy, and (ii) the circumstances at the time of enforcement favour the exercise of the parate execute clause, in that there is no prejudice to the security provider. This type of agreement is invalid in relation to security over immovable property or secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights over the secured assets.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

As a general matter, security can be granted in favour of foreign lenders. However, the prior written approval of the South African Reserve Bank must be obtained to permit a South African resident to validly grant such security. In relation to certain types of property, there may be restrictions on how or whether security may be granted, mining rights being an example of such property.

7. Are there any restrictions in granting and enforcement of security or the granting of a loan?

Conveyancers in relation to mortgage bonds, and notaries public 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.

There are nominal registration fees payable for the registration of mortgage bonds, general notarial bonds, special notarial bonds, aircraft mortgages, ship mortgages and hypothecations relating to trademarks, designs and patents. There are no documentary taxes payable in connection with the granting or taking of any other forms of security.

On enforcement of security, there are court fees payable to the extent it is necessary to apply to a court to seek an order entitling the secured creditor to enforce its security. If property is attached and/or sold in execution, nominal fees are payable to the Sheriff of the Court in connection with any attachment and sale in execution. The registration fees, court fees and sheriff’s fees do not make the granting or taking of security prohibitively expensive.

**BANKRUPTCY**

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practiced in your jurisdiction?

Yes, there are generally two types of company rescue procedures available under the Companies Act:

• a scheme of arrangement (Chapter 5 of the Companies Act); and
• business rescue (Chapter 6 of the Companies Act).

The business rescue procedure has, since 1 May 2011, replaced the judicial management procedure under the Companies Act of 1973. Business rescue is modelled on the US’s chapter 11 bankruptcy proceedings. The procedure is intended to be quick and largely commercial, avoiding the need for court involvement. The company’s board can pass a resolution putting the company into business rescue if the company is “financially distressed”. “Financial distress” is defined as the company’s liabilities exceeding its assets (balance-sheet insolvency) or the company being unable to pay its debts on time (cash-flow insolvency). A moratorium applies immediately once the resolution is filed. A practitioner is appointed to “supervise” the board, which remains in office. The company in business rescue can sell its entire business and assets if a greater return to creditors can be achieved. The practitioner prepares a business plan, which must be voted on by the creditors.

2. In what order are creditors paid on a company’s insolvency?

Under the Insolvency Act, of 1936 (the Insolvency Act), the order of priority is generally as follows:

**2.1 LIQUIDATION COSTS**

The costs of the liquidation must be paid prior to creditors receiving any dividend on their claim.

**2.2 SECURED CREDITORS**

Secured creditors (a creditor holding security for its claim in the form of a special mortgage, landlord’s hypothec, pledge or right of retention) rank first on insolvency and are paid from the proceeds of the sale of the secured asset. All of the types of security (other than general notarial bonds where the mortgagee has not taken possession of the property subject to the bond) will, if validly created, constitute the holder of the security interest as a secured creditor in the insolvent estate of the borrower in relation to the secured asset. No special priority applies among the secured creditors, as each secured creditor has a secured claim in respect of the particular asset. To the extent that creditors have security over the same asset, the creditor granted security earlier in time has a higher-ranking claim in respect of that asset. Where a secured creditor’s claim is not satisfied in full, the unpaid balance is considered a concurrent claim (see the following on concurrent creditors).
2.3 PREFERENTIAL CREDITORS

Preferential creditors are creditors who do not hold specific security for their claims, but rank above concurrent creditors. They are paid from the proceeds of unencumbered assets in a predetermined order as set out in the Insolvency Act. Preferential creditors include employees’ remuneration (up to a prescribed amount) and the South African Revenue Service. The holder of an unperfected general notarial bond is also a preferential creditor.

2.4 CONCURRENT CREDITORS

Concurrent creditors are paid from any proceeds of unencumbered assets that remain after preferential creditors have been paid in full. They are paid in proportion to the amounts owing to them. Any sums that remain after the payment of all concurrent claims in full, must be used to satisfy the interest on concurrent claims from the date of liquidation to the date of payment, in proportion to the amount of each concurrent claim.

3. How is the priority between creditors holding a security interest, determined?

If more than one creditor is granted the same security interest over the same asset at different times, the creditor granted security first in time will rank ahead of the creditor granted security second in time. The creditor granted security second in time will generally have security only over the debtor’s reversionary interest in the asset.

It is possible to create a security interest over immovable property in favour of multiple creditors; the creditors’ ranking, whether pari passu or otherwise, would have to be expressly stated in the mortgage bonds. In the absence of an express statement to the ranking creditors’ rights to the secured assets, there will be a presumption that the creditor whose security is registered first will take priority. It is also possible to grant security over the same asset to multiple creditors jointly and severally.

It should be noted that it is not possible to pledge a tangible moveable asset to more than one creditor, as pledge is perfected by the delivery of the moveable property to the pledgee, unless an agent holds the property on behalf of the multiple creditors.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The Constitution vests the judicial authority of South Africa in the courts. The court structure consists of three tiers of courts. These are the apex courts, the superior courts and the inferior courts. The apex courts are the Constitutional Court and the Supreme Court of Appeal. Both courts are courts of final appeal save that in the case of constitutional matters or matters involving points of law of general public importance an appeal may be brought in the Constitutional Court against a ruling of the Supreme Court of Appeal.

The superior courts consist of the High Courts (provincial and local divisions) and other specialised courts such as Tax Courts, the Competition Appeal Court, Labour Court and Labour Appeal Court, Land Claims Court, Electoral Court, Divorce Courts and Equality Courts (which in some instances are specially designated magistrates’ courts/ inferior courts). Superior courts have both review and appellate jurisdiction in criminal and civil matters.

The inferior courts consist of regional and district magistrates’ courts. Both the regional and district magistrates’ courts have criminal and civil jurisdiction. The civil jurisdiction of the magistrates’ courts are constrained among other things by the value of the property or claim in dispute.

Rules of jurisdiction relating to the value of a claim and geographical area are important considerations in approaching the correct superior or inferior court and legal advice should be sought in this regard. The decisions of all courts are binding on the parties including, where relevant, the State. It should further be noted that the rule of stare decisis is applicable in South African law and accordingly courts of particular tiers will be bound by the legal reasoning or precedent of higher ranking courts.

2. Are there any competition law restrictions or requirements that financial institutions lending and/ or providing banking services to entities in your jurisdiction must be aware of?

In the ordinary course, there are no restrictions or requirements on financial institutions lending and/ or providing banking services to entities in South Africa from a competition law perspective. However, the Competition Commission has published a Practitioner Update (2015) relating to risk mitigation financial transactions (Update 4). In terms of Update 4, the Competition Commission recognises that in the ordinary course of business, banks mitigate the inherent risk involved in money lending by taking security from their borrowers.

2.1 As such, a security interest in an asset is granted to the bank. In the ordinary course, the bank would not acquire control over the asset at this stage of the financing transaction. However, in the event of default by the borrower, the bank would acquire/ take possession the asset from the borrower in terms of its security rights. In this regard it is important to note two distinct but interlinked stages:

- The taking of security at inception of the finance agreement:
  - The taking of security is generally one of the principal clauses in lending agreements, aimed at ensuring that the financial institution can take effective control over the specified assets or business interests of the borrower, including management control, over the specific entity.
  - The exercise of a security interest in a financial asset:
    - In the event of a default by the borrower and the financial institution exercises its security rights set out in the “initial taking of security” clause discussed above, or where the financial institution exercises management control for the purpose of preventing a default or other failure by the borrower.

The exercise of the security right by the bank may give rise to a merger in terms of the Competition Act, B19 of 1998 (as amended) (the Competition Act). Section 102(1)(a) of the Competition Act states that a transaction constitutes a merger when “one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.”

The definition of a merger in the Competition Act does not distinguish between short- and long-term acquisitions of control of assets or a business (or part of a business). In its current form, the definition of a merger covers all transactions, irrespective of their temporary nature.

Section 12(2) of the Competition Act gives a range of examples of when control arises. The provisions of section 12(2) provide that:

- “A person controls a firm if that person –
  1. beneficially owns more than one-half of the issued share capital of the firm;
  2. is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
  3. is able to appoint or to veto the appointment of a majority of the directors of the firm;
  4. is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, of 1973 (Act No. 61, of 1973);
  5. in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint or dismiss the trustees or to appoint or change the majority of members’ votes in the close corporation; or
  6. has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).”

1. A bank is defined in the Banking Act, 94 of 1990 as being “a public company registered as a bank in terms of this Act.”
2. For the sake of completeness, we note that Update 4 applies both to registered banks and bank-hold financial institutions but for purposes of this note, are only referred to as “banks” and as such, we refer to other examples of banks.
3. “A person” includes any body corporate, a natural person, a partnership, a trust, a firm, a syndicate, or any other unincorporated association or arrangement of persons, a government agency, or any other form of entity, whether incorporated or unincorporated.
4. “A firm” includes any form of entity, whether incorporated or unincorporated, including a syndicate, a trust or any other unincorporated arrangement of persons or any other arrangement of persons.
5. A “person” includes any body corporate, a natural person, a partnership, a firm, a syndicate, a trust, or any other unincorporated association or arrangement of persons, a government agency, or any other form of entity, whether incorporated or unincorporated.
6. A “merger” includes a situation where control is acquired or established directly or indirectly, over the whole or part of the business of another firm.
7. For the sake of completeness, we note that Update 4 applies both to registered banks and bank-hold financial institutions but for purposes of this note, are only referred to as “banks.”
The examples cited in the Competition Act are not a closed list of what constitutes control. Section 12(2)(a)-(f) of the Competition Act sets out a variety of methodologies in terms of which control may be acquired directly or through intermediaries, such as companies, trustees and close corporations. These are referred to as instances of ‘bright line’ or ‘de jure’ control.

Section 12(2)(g) of the Competition Act provides a ‘catch-all’ provision in terms of which a firm, without acquiring ‘bright line’ control, may acquire de facto control by being able to materially influence the policy of another firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of ‘bright line’ or ‘de jure’ control.

The Competition Act does not provide guidance on the application of section 12(2)(g). However, a useful document relating to minority protections which may confer control is the European Commission’s Consolidated Jurisdictional Notice on the control of concentrations between undertakings (the EC Notice). Although the EC Notice has not been adopted as part of South African law, the Competition Act provides that “[a]ny person interpreting or applying this Act may consider appropriate foreign and international law” and our authorities have referred to the EC Notice when interpreting section 12(2)(g) of the Competition Act.

An important difference in emphasis between section 12(2)(g) of the Competition Act and the EC Notice, however, is that section 12(2)(g) of the Competition Act in fact requires a higher threshold to be met as it posits a conjunctive test, linking the ability to materially influence the policy of the firm to the position of a person exercising ordinary majority control.

Accordingly, in the South African competition law context, financial institutions exercising security rights in terms of lending facilities granted to a borrower may, by exercising those rights, acquire control for the purposes of the Competition Act, and as such, give rise to a merger for purposes of the Competition Act. However, the approach of the Competition Commission has been that transactions where a ‘bank’ acquires control over an asset or control over a business (or part of a business) in the ordinary course of perfecting its security upon default by the borrower with the intention of safeguarding its investment or to on-sell the asset or business (as the case may be) to a third party, such acquisition of control does not require a notification.

However, if the bank fails to dispose of the assets or the controlling interest in the business (or part thereof) within a period of 24 months, a merger notification would be required upon the expiry of the 24 month period where the thresholds requirements are met. This 24 month period commences only once the bank exercises its security rights to gain control over the asset or business (or part thereof), as the case may be. The expiry of this period, without more, will trigger the obligation to notify the acquisition if the thresholds are met.

If a bank has not disposed of the assets or the controlling interest in the business (or part thereof) within a period of 24 months, it may approach the Competition Commission for an extension of this period. In seeking an extension of this ‘grace’ period, the bank bears the onus of providing a substantial basis for the non-disposal of the asset or business (or part thereof) within the set 24-month period. The Competition Commission would then exercise its discretion in granting such an extension on a case-by-case basis.

Failure to notify the exercise of the security rights (which conferred control over an asset or a business) by the bank upon expiry of the 24-month period or the extended period granted by the Competition Commission in circumstances where the thresholds for mandatory notification of a merger are met will be construed as prior implementation of a merger in contravention of the provisions of the Competition Act dealing with merger control and the penalties in terms of Section 59(1)(d) and (2) of the Competition Act will be applicable.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?


Section 26 of NEMA lists persons who may be liable for an environmental cleanup as including “an owner of land or premises, “a person in control of land or premises”, or “a person who has the right to use the land or premises on which, or in which… any activity or process is or was undertaken… or any other situation exists which causes, has caused or is likely to cause significant pollution or degradation of the environment” (our emphasis). Section 19 of the NWA provides that “An owner of land, a person in control of land or a person who occupies or uses the land on which… any activity or process is or was performed or will be performed in another situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring” (our emphasis).

In the context of NEMA and NWA, a bank could be held to be in ‘control of’ a borrower’s land or premises where a lender:

- has a high degree of oversight over operations, such as in a structured project-finance lending context (in particular where the lender requests and receives regular reports and audits that include environmental impact assessment studies);
- exercises step in rights in respect of a project, e.g. in a project finance context;
- has foreclosed a securitised asset; and
- has taken equity in the business or a seat on the board as part of the finance package.

Additionally, both NEMA and the NWA allow for recovery of costs by the authorities from any other person who benefited from the measures taken by the environmental authorities in remediating the land (in the case of NEMA the claim may be ‘proportionally’ claimed from such parties and in the case of the NWA such claim may only be “to the extent of such benefit”).

Consequently, a lender with an interest in land which has been remediated and which derives some benefit from the measures taken by the environmental authorities on the land (such as in the event of the lender selling the remediated land after foreclosure) may be targeted for cost recovery by the authorities.

The contaminated land provisions of NEMWA, which commenced on 2 May 2014, provide further scope for a lender to be held liable when exercising step in rights in respect of a project. These provisions allow for ‘contaminated’ land to be declared an “investigation area” and then, if found to be significantly contaminated, a ‘remediation site’ and an order may be issued to remediate the site. Such an order can be directed at the landowner or the person who undertook the activity which may have caused the contamination.

Where land is subject to a remediation order, NEMWA prohibits such land being transferred without notifying the Minister of Environmental Affairs or the provincial Member of the Executive Council (MEC) responsible for waste management. The Minister or MEC may impose conditions which would have to be complied with before the transfer could proceed. Land which is the subject of a remediation order will also be required to be recorded in the South African deeds office. These provisions will clearly have an adverse impact on the value of the land.

The contaminated land provisions further prohibit the transfer of ‘contaminated land’ without first informing the person to whom that land is to be transferred that the land is ‘contaminated’, regardless of whether remediation has been

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8. This is regardless of whether the transaction involves only shares.
9. The Competition Commission may impose an administrative penalty of the public.
10. NEMA section 28 and the NWA section 59 respectively. An order of a type prescribed by a NEMA. ‘Contamination’ is defined in terms to mean “the presence of or in any land, soil, buildings or structures of a substance or substances which are or are likely to cause pollution or degradation of the environment or which may have an indirectly or directly effects or may affect the quality or value of the natural environment adversely.”
ordered in respect of the land. This imposes onerous investigation and due diligence requirements on a seller of property and may limit the capacity of a lender to dispose of contaminated land.

Lender liability for environmental transgressions or impacts may also arise in that:

• criminal offences relating to pollution under NEMA and the NWA, and under a range of other statutes, allow for the directors of an entity that caused pollution to be liable in certain circumstances (although in the ordinary course the entity causing pollution would be expected to be criminally liable); and

• in the context of pollution, wrongfulness as an element of delictual liability could be imposed by the principles of ‘polluter pays’, the ‘precautionary principle’ and the ‘preventative principle’, which have been incorporated into environmental legislation or by the breach of a statutory or other legal duty.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

South African residents (both individuals and corporate bodies) are subject to exchange control restrictions which may restrict their ability to transfer assets out of South Africa. In terms of the Exchange Control Regulations, of 1961 (Exchange Control Regulations), made pursuant to the Currency and Exchanges Act, of 1933, a South African resident may not enter into any transaction in terms of which capital (whether in the form of funds or otherwise) or any right to capital is directly or indirectly exported from South Africa without prior approval of either the Financial Surveillance Department (FSD) of the South African Reserve Bank (SARB) or a South African authorised dealers in foreign exchange (Authorised Dealers). Authorised Dealers are generally the major commercial banks in South Africa appointed as such by the SARB which are any one of the major banks registered in South Africa. The Exchange Control Regulations also preclude South African residents from holding assets outside South Africa except with prior approval of the FSD or Authorised Dealers. Certain powers of the FSD have been delegated to Authorised Dealers such that certain transactions may be approved by Authorised Dealers without reference to the FSD.

The FSD places limits on the amount which certain South African residents can commit to foreign exposure without approval of the FSD. These limits (as set out below) are commonly known as “foreign investment allowances”.

As of 1 April 2015, a South African-resident individual is permitted to transfer up to ZAR 10 million offshore, annually, for investment purposes or to invest in non-South African assets up to that limit. South African-resident individuals can also make use of a single, annual, discretionary allowance of ZAR 1 million (per individual) for the purposes of foreign investment, meaning that individuals may now be able to invest up to ZAR 11 million offshore on an annual basis.

A South African company is permitted to engage in foreign direct investment of up to ZAR 1 billion per annum, provided that certain criteria in relation to such investment are met.

South African institutional investors namely: retirement funds, long-term insurers, collective investment scheme (CIS) management companies and investment managers are allowed to transfer funds from South Africa for investment purposes offshore, subject to the following limits:

• Retirement funds and underwritten policy business of long-term insurers are allowed to invest up to 25% of their total retail assets under management.

• CIS management companies and investment managers registered as institutional investors for exchange control purposes and the investment linked business of long-term insurers are allowed to invest up to 35% of total retail assets under management.

Any transfer in excess of the above limits must be approved by the FSD.

12 NEMWA section 40.
13 On conviction under NEMA, a person so convicted would be liable to a fine not exceeding ZAR 10 million or to imprisonment for a period not exceeding ten years or both such a fine and such imprisonment. Comparable penalties are imposed under the NWA. Various additional criminal penalties could also be imposed on conviction.
14 NEMA chapter 8.
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Domestic borrowers are permitted to engage in investment banking activities outside Tanzania. However, residents are restricted from engaging in outward direct investments and portfolio investments without the prior approval from the Bank of Tanzania.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

The law prohibits conducting banking business in Tanzania without obtaining registration from the Bank of Tanzania. This means that a person seeking to undertake banking business in Tanzania must be duly registered.

While registration is mandatory where one seeks to conduct banking business in Tanzania, there is no legal requirement to register where an entity wishes to offer banking products to clients in Tanzania without subjecting itself to Tanzanian registration. In such a situation, the entity can advertise and market its products to Tanzanian clients/prospects without being registered in Tanzania. However, where the products marketed relate to investment funds or outward bound capital funds the entity marketing the products must be registered.

3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?

Operation of offshore foreign currency accounts is restricted.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pensions funds, etc.)?

No distinctions are provided.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?

Generally, foreign lenders are not bound to comply with local legal and regulatory requirements when advancing a loan to a Tanzanian corporate entity. The licensing and compliance requirements governing lending transactions as covered under the Banking and Financial Institutions Act, of 2006 only apply to banks and/or financial institutions registered in Tanzania. This means that such licensing and/or compliance requirements do not apply to foreign lenders. Additionally, there is no requirement for foreign lenders to have residency in Tanzania in order to advance a loan to a domestic corporate entity.

However, foreign lenders are required to generally comply with the laws relating to money laundering as provided under the Anti-Money Laundering Act, 2006 (Act No. 12 of 2006) as well as the Foreign Exchange Act, Cap. 271 (Revised Edition, of 2002).

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?

There are various obligations imposed under the law that domestic corporate borrowers are required to comply with when entering into a loan transaction with a foreign lender. The most basic is for the domestic corporate entity to ensure that it has
complied with and obtained all consents, licences, approvals and authorisations of governmental or other authority or agency of the Government of the United Republic of Tanzania which are required under the law or regulations applicable to the borrower. Additionally, domestic corporate borrowers are required to process all corporate authorisations and consents required for such company to enter into the financing transaction.

Domestic corporate entities must also ensure that they comply with the provisions of the Foreign Exchange Act, Cap. 271 (Revised Edition, 2002) in as far as repatriation of payments is concerned. It is important that the lender and the borrower execute a loan agreement detailing the terms of advancing the loan, the tenure of the loan, and any interest charges. The loan agreement and all financing documents must be registered by the Bank of Tanzania for purposes of obtaining a Debt Record Number. The Debt Record Number is the reference number for disbursement and debt servicing issued by the Bank of Tanzania to the local approving bank.

It is the responsibility of the local approving bank with the assistance of the borrower to process and obtain the Debt Record Number from the Bank of Tanzania.

Tax treaties between Tanzania and other countries, must be considered, specifically in as far as withholding tax is concerned.

3. Are there any requirements and/or considerations which may impact a foreign lender's ability to enforce rights and obligations under a loan agreement and/or security documents?

There are various requirements and considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents entered into with a domestic corporate borrower.

A foreign lender is entitled to institute legal proceedings in Tanzania. However, under the provisions of the Civil Procedure Code Act, Cap. 33 (Revised Edition, 2002), a foreign plaintiff may be required to deposit security costs in court which the defendant may incur in defending the proceedings in the event that the foreign plaintiff does not own sufficient immovable property within Tanzania.

Where security is provided by a Tanzanian corporate entity, the registration of such securities must be perfected in accordance with local laws and regulations in order for the lender to be able to enforce the securities in the event of default.

It is also worth noting that a judgement obtained from a foreign jurisdiction can be enforced in Tanzania only if the country from which such a judgement has been obtained is listed in the Schedule to the Foreign Judgements (Reciprocal Enforcement) Act, Cap. 8 (Revised Edition, 2002). Unless this condition is met, Tanzanian courts would not enforce any judgement given by a court of any other jurisdiction without the re-examination or re-litigation of the merits of the case.

4. Are there any restrictions on financial institutions converting debt into equity?

Approval from the Bank of Tanzania is required.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?

Although Tanzanian law does not provide a specific definition for the term ‘immovable property’, generally the term encompasses land and all substances (other than minerals and petroleum) forming part of the land, as well as buildings and other structures permanently affixed to the land.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security over real estate can only be in the form of a mortgage as provided under the Land Act, Cap. 113 (Revised Edition, 2002) (the Land Act). A mortgage creates an interest in a property as security for the repayment of a loan. A mortgage is created by way of a mortgage deed/instrument and is perfected under the provisions of the Land Act, and the Land Registration Act, Cap. 334 (Revised Edition, of 2002). In the case of a domestic corporate entity, a mortgage like all other charges as specified under section 97 of the Companies Act, Cap. 212 (the Companies Act) must be registered within 42 days from the date of its creation, failing which it becomes void against any liquidator or administrator or any creditor of the borrower company.

Under the provisions of the Land Act a mortgage does not operate as a transfer of any interests or rights in the property and only acts as security in favour of the lender. Additionally, a mortgagee (or lender in this case) must take the appropriate steps to realise the mortgage. A mortgagee cannot foreclose on the property and have it sold in execution without having regard to the mortgagor’s rights of equitable redemption.

The Land Act does not provide any specific procedure for equitable redemption and traditionally all that is required is for the mortgagor to make good on the default. A court order must be obtained when enforcing security over immovable property where such property is:

- a dwelling house;
- any land in actual use for agricultural purposes;
- any land in actual use for pastoral purposes; and
- any land where taking physical possession peacefully is not possible.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property. For example, machinery, trading stock (inventory), aircraft and ships?

Generally, security over tangible moveable property is covered under the Companies Act and the Chattels Transfer Act, Cap. 210 (Revised Edition, of 2002) (Chattels Transfer Act). The types of moveable assets governed by the Chattels Transfer Act include any moveable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock and crops but does not include:

- title deeds, things in action, other than a debt or negotiable instruments;
- shares and interests in the stock, funds, or securities of any government or local authority;
- shares and interests in the capital or property of any company or other corporate body; or
- debentures and interest coupons issued by any government, or local authority, company, or other corporate body.

In addition to the above, one can distinguish between corporeal/ tangible moveable property which covers property that can physically be handled or touched including aircraft and ships on the one hand, and incorporeal/ intangible moveable property includes property that cannot be touched such as goodwill or intellectual property, book debts and shares on the other hand.

1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common form of security that can be granted over both tangible and intangible property under Tanzanian law is in the form of a debenture. A debenture allows the company to continue dealing with the charged assets in the ordinary course of its business until such time that an event of default occurs in which case the floating charge is crystallised.

Other modes of taking security over moveable property which are common under Tanzanian law include cession in security which is a way of granting security over incorporeal/ intangible moveable property.

The aforementioned securities must be registered within 42 days from the date of creation in accordance with the provisions of section 96 of the Companies Act.
property can be enforced only if the intellectual law. Under Tanzanian law, rights on intellectual property is not common, even though it is permitted under Tanzanian law. Under Tanzanian law, rights on intellectual property can be enforced only if the intellectual property has been registered. As such, security cannot be created and perfected over unregistered intellectual property since registration is a prerequisite of legal title. An unregistered interest takes effect only as an equitable interest which is difficult to enforce.

As far as registered intellectual property is concerned, security can be granted by creation of a fixed or floating charge. The document creating the charge must be registered within 42 days in accordance with the requirements of section 96 of the Companies Act, Cap. 212.

1.6 GENERAL BANKING FACILITIES

1.6.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Under Tanzania law, various forms of securities can be granted to secure all types of banking facilities (such as working capital facilities). The most common form of security granted over most forms of banking facilities is a charge over immovable property usually secured by way of a legal mortgage. Other forms of security include a debenture which is preferred in the case of tangible moveable assets, charge over shares, pledges etc.

2. Are there any types or classes of assets over which security cannot be granted or if granted, is difficult to enforce? Please consider the following and provide brief details of any relevant requirements or considerations.

Generally, under Tanzanian law, security can be granted over all types of assets to the extent permitted by any relevant laws.

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

Under Tanzanian law, rights to future assets can be granted as security mainly in the form of a floating charge. In most cases, however, where immovable assets are concerned, the validity of such security and the enforcement thereof may be challenged on the basis that the pledgor did not have title over such asset at the time of creation of the security.

2.2 FUNGIBLE ASSETS

As with security over future immovable assets, creation of security over fungible assets is difficult as it does not confer viable security interests on the pledgee unless charged by way of a floating charge in which case the charged assets are determined at the time of crystallisation.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

There are various types of commercial or quasi-security structures that are legally recognised under Tanzanian law. These include factoring or debtor finance structures, finance leases, hire purchase and instalment sales. Other than hire purchase, the rest of these structures are relatively new forms of commercial security or quasi-security in Tanzania.

4. Do company law rules or conventions affect taking security in your jurisdiction?

Section 57 of the Companies Act, Cap. 212 prohibits companies from providing financial assistance directly or indirectly for the purpose of or in connection with purchasing or subscription of their own shares, or the shares of their holding company.

Financial assistance includes the granting of loans, guarantees or security and the company and any officer that grants unlawful financial assistance is liable to a fine. A transaction in breach of the financial assistance rules is void. In addition to the above, directors of a company who permit the company to enter into a transaction which is not in the best interests of the company are in breach of their fiduciary duty towards the company and such transactions include granting of security or a guarantee for the purpose of or in connection with purchasing or subscription of its own shares, or the shares of its holding company.

5. Under which circumstances can a secured lender enforce its collateral?

Under Tanzania law, a secured lender can generally enforce its security following the occurrence of default or an event of default of either the principal obligation or any other obligations under the finance documents. Circumstances which constitute events of default generally include default of payment, breach of any financial or any other obligations under the facility, misrepresentation by the borrower and/or pledgor of the security, insolventy, occurrence of material adverse changes and the breach of covenants as may be specified in the relevant security document.

Once there is an event of default, the lender is required to notify the borrower and in the case of collateral issued by a third party, notify such third party of the occurrence and intention of the lender to enforce its collateral. In the case of a mortgage of immovable property, the lender cannot realise the collateral unless the relevant notices to the mortgagor have been issued in accordance with the provisions of the Land Act.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no legal restrictions in granting security over any form of property to foreign lenders.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

Under the laws of Tanzania mainland, no taxes are payable in connection with the granting and enforcement of security or granting a loan save for the nominal registration fees and stamp duty payable for the registration of the security documents. The amount currently payable under the Stamp Duty Act, Cap. 189 (Revised Edition, 2002) is TSH 10,000 (which is approximately USD 7). Where enforcement of security requires obtaining a court order entitling the lender to enforce the security, court fees are payable.
The requirement to obtain a court order when enforcing a security applies in the case of immovable property where such property is:

- a dwelling house;
- any land in actual use for agricultural purposes;
- any land in actual use for pastoral purposes; or
- any land where taking of physical possession peaceably is not possible.

The legal position in Tanzania Zanzibar is, however, different in so far as registration fees and stamp duty of security documents is concerned. The stamp duty payable for registration of a mortgage is calculated on the value of the facility. The current applicable rate is 1% of the value of the facility. Registration fees on the other hand is a fixed amount which is currently approximately TSH 36,000 (approximately USD 27).

**BANKRUPTCY**

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

The Companies Act generally provides for two types of company rescue procedures. These are by way of a scheme of arrangement and by judicial management covered. Part VII Chapter I and II of the Companies Act provide rescue procedures aimed at facilitating the rehabilitation of a company that is financial distress.

2. In what order are creditors paid on a company’s insolvency?

Section 367(1) of the Companies Act provides that preferential debts have priority to all other debts on a company’s insolvency. Under this section, priority debts include:

- Government taxes, local rates and customs and excise duties due from the company at the relevant date and having become due and payable within 12 months from the relevant date.
- All relevant Government rents that are not more than one year in arrears; wages and salaries of any employee not being a director in respect of services rendered to the company during four months before the relevant date.
- All amounts due in respect of any compensation or liability for compensation of employees being amounts which have accrued before the relevant date.

Section 367(6) further provides that the above-mentioned preferential debts shall:

- Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.
- So far as the assets of the company available for payment of general creditors are sufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Whereas priority of preferential debts over floating charges is specifically provided for as stated above, the position of fixed charges is not specifically mentioned under the Companies Act. This being the case it is a settled principle that there is no basis of giving priority to preferential debts over fixed charges. Based on the above, debts secured by a fixed charged rank prior to all preferential debts and the latter rank prior to debts secured by a floating charge.

3. How is the priority between creditors, holding a security interest determined?

Where there are two or more creditors holding security interest over the same asset priority is ranked according to the order in which the security is registered and not according to the order in which the security is created unless a prior lender agrees in writing or in the case of a mortgage over immovable property, where an obligation in a prior mortgage to make further advances creates a right to tack. It is also possible to create a security interest over both moveable and immovable property in favour of multiple creditors and have those creditors by arrangement between themselves rank pari passu irrespective of the order in which the security interests have been registered.

**OTHER**

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

- Court of Appeal
- High Court of Tanzania; – Commercial Division – Labour Division – Land Division
- Resident Magistrates’ Courts and District Courts; and
- Primary Courts.

Due to the nature of its operations, the Commercial Division of the High Court is usually preferred for filing of disputes of a commercial nature as it was specifically established to assist in efficient determination in commercial disputes.

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Financial institutions lending and/or providing banking services to entities are required to ensure that the entities they lend to are not in violation of the Environmental Management Act, Cap. 191 Revised Edition, of 2002.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

Financial institutions lending and/or providing banking services to entities are required to ensure that the entities they lend to are not in violation of the Environmental Management Act, Cap. 191 Revised Edition, of 2002.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

A foreign entity advancing a loan to a local entity is not subject to any foreign exchange control rules or under any obligation to obtain any foreign exchange approvals. However, it is essential for such a lender to ensure that the borrowing entity’s approving bank obtains the Debt Record Number from the Bank of Tanzania thus permitting the local borrowing entity to transfer funds outside the country for purposes of repayment of the loan.
1. Are domestic borrowers in your jurisdiction allowed to engage in investment banking activities outside the jurisdiction?

Domestic borrowers are allowed to engage in investment banking activities outside the jurisdiction.

2. To what extent can banking products be offered, advertised, marketed, provided and advised upon to prospects/clients in your jurisdiction without the need for registration or filing, licensing or notification to any local governmental, regulatory, administrative or tax authorities?

2.1 MARKETING OF BANKING PRODUCTS

There is a general prohibition on marketing of specific products which is limited to only licensed institutions. An unlicensed institution may nevertheless circulate generic information; that is, information which does not refer directly or indirectly to specific products. In addition, advertisements in international magazines with circulation in Uganda are allowed, provided such advertisements are generic in nature, do not make specific reference to products or services and are not specifically directed to persons in Uganda.

An unlicensed institution may also respond to unsolicited requests from proposed clients/investors as this does not trigger a licensing requirement.

2.2 OFFERING/MARKETING OF SECURITIES

Generally, there is a prohibition for any person from offering securities to the public in Uganda, without issuing a prospectus in respect of the securities which, among other things, must be licensed and approved by the Capital Markets Authority and registered with the Registrar of Companies. This restriction applies to the offer of securities to persons in Uganda irrespective of whether the offer is on a cross-border basis; that is irrespective of where a resulting allotment occurs or where the issuer of securities is resident, incorporated or carries on business.

This restriction does not apply to offering securities within the private placement regime, which includes the offering of securities to not more than 100 persons, who are professional or experienced investors, such offer being made personally to each professional/experienced investor. A professional investor is defined to mean a person whose ordinary business or regular activity involves the buying and selling of securities, as a principal, and includes an underwriter, a bank and an insurance company, a fund manager, a broker, broker’s representative, a dealer, dealer’s representative, an investment adviser or investment adviser’s representative acting as principal, subject to any exception that may be prescribed by the Capital Markets Authority.

However, an unlicensed institution may explore the option of prospecting clients through a locally licensed intermediary, thereby dispensing with the licensing requirement. The unlicensed institution, through the locally licensed intermediary, must get a letter of no-objection from the regulator(s) of the locally licensed intermediary (i.e. the Central Bank and/or the Capital Markets Authority). This will also require that the unlicensed institution disclose its proposed activities in Uganda. It should be noted that the authorisation to use a locally licensed intermediary is obtained on a case-by-case basis and we cannot with certainty state whether or not such authorisation will be granted.
3. Are there any restrictions on persons in your country opening bank accounts/holding assets outside your country?
There are no restrictions on persons in Uganda opening bank accounts/holding assets outside the country.

4. Are there any local regulatory criteria on the type of corporate customers that may be targeted by foreign banks (i.e. companies, sectional title schemes, share-block schemes, real estate investment trusts, pensions funds, etc.)?
There are no restrictions on the type of corporate customers that may be targeted by foreign banks.

CORPORATE LOANS

1. Are there any requirements foreign lenders are required to comply with when advancing a loan to a domestic borrower in your jurisdiction?
Uganda has liberalised the capital account and therefore there are no licensing requirements or restrictions on a foreign lender domiciled outside Uganda advancing a loan in foreign currency to a borrower based in Uganda. The Foreign Exchange Act, of 2004 provides that all payments in foreign exchange made between a resident and non-resident must be made through a bank. Transfers into Uganda of sums of USD 10,000 and above are subject to reporting obligations under the Anti-Money Laundering Act, of 2013.

2. Are there any obligations domestic corporate borrowers are required to comply with when entering into a foreign loan?
There are no currency or exchange control restrictions to prohibit a domestic corporate borrower from contracting a foreign loan. However, the following obligations must be met:
- All repayments to the foreign lender are to be made through a bank and in accordance with the principles that govern international payments under the Anti-Money Laundering Act, of 2013.
- Under the Income Tax Act Cap, of 2000 (as amended), a withholding tax is imposed on every non-resident person who derives any interest from sources in Uganda. The domestic borrower is obliged to withhold tax on the interest on the foreign loan before remitting the interest to the foreign lender. Lenders from jurisdictions which have a double taxation treaty with Uganda may not be subjected to this tax.
- Where it has not been pronounced by a court of competent jurisdiction;
- Where it has not been given on the merits of the case;
- Where the judgment is contrary to public policy.

3. Are there any requirements and/or considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents?
There are requirements and considerations which may impact a foreign lender’s ability to enforce rights and obligations under a loan agreement and/or security documents.

3.1 SECURITY FOR COSTS
In any court action to enforce the rights and obligations under the loan agreement and/or security documents, the foreign lender may be required to post security for costs in cases where the foreign lender has no assets within Uganda.

3.2 FOREIGN JUDGEMENTS
A foreign judgement against a domestic borrower may be enforceable against the domestic borrower in Uganda depending on the country where the judgement was obtained.
Under the Reciprocal Enforcement of Judgements Act Cap 21, judgements obtained in superior courts in the United Kingdom and Ireland are enforceable, upon registration, in Uganda. Judgements from Commonwealth Countries that have legislative provisions in place for the enforcement of judgements of the High Court of Uganda in those countries may also be enforceable in Uganda. Foreign judgements from other countries may be enforceable by statutory order if substantial reciprocity will be assured with respect to enforcement by that foreign country of judgements given in superior courts in Uganda. There are circumstances under which a foreign judgement may not be enforced in Uganda because under the law the judgement is not deemed to be conclusive. These include:
- A foreign lender will not be able to enforce any foreign judgement obtained in relation to any immovable property in Uganda, as a suit to enforce rights in relation to immovable property must strictly be instituted in the court within the local jurisdiction where the property is situated. (Section 12 of the Civil Procedure Act).

3.3 FOREIGN JUDGEMENTS AGAINST IMMOVABLE PROPERTY
A foreign lender will not be able to enforce any foreign judgement obtained in relation to any immovable property in Uganda, as a suit to enforce rights in relation to immovable property must strictly be instituted in the court within the local jurisdiction where the property is situated. (Section 12 of the Civil Procedure Act).

4. Are there any restrictions on financial institutions converting debt into equity?
There are no such restrictions.

SECURITY

1. What are the assets available as collateral in your jurisdiction and what are the most common forms of security granted over it?

1.1 REAL ESTATE

1.1.1 What is considered to be real estate/immovable property in your jurisdiction?
In Uganda, real estate/immovable property is defined to include land, buildings and all other things permanently affixed to the land; and incorporeal hereditaments which are the intangible rights in the land.

1.1.2 What are the most common forms of security granted over real estate and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?
The most common form of security over real estate is a legal or equitable mortgage over such real estate, in the manner stipulated under the Registration of Titles Act Cap 230 and the Mortgage Act Cap 229.
A legal mortgage is created by the signing of a mortgage deed by the registered proprietor and is perfected by registration of the mortgage deed on both the white page (original) of the title deed and the duplicate (owner’s copy) in the Land Registry.
An equitable mortgage may also be created over real estate, by the deposit by the registered proprietor of his or her certificate of title with a lender with intent to create a security thereon accompanied by a note or memorandum of deposit. In order to perfect the equitable mortgage, a mortgagee must register a caveat on both the white page (original) of the title deed and the duplicate (owner’s copy) in the Land Registry.

1.2 TANGIBLE MOVEABLE PROPERTY

1.2.1 What is considered tangible moveable property, for example, machinery, trading stock (inventory), aircraft and ships?
Tangible moveable property is property that has physical form and characteristics and which can be moved from one place to another or displaced. Under the Chattels Transfer Act Cap 70, moveable property is defined to include machinery (excluding motive powers, fixed powered machinery, pipes for steam, gas and water), book debts, stocks and the natural increase of stock (stock for example, sheep, goats, cattle, horses, pigs, poultry and other living animals), crops and wool.
1.2.2 What are the most common forms of security granted over it and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

The most common forms of security created over moveable property include:

- Pledge
  - A pledge is created by delivery of possession of the pledged assets to the creditor and is perfected by execution of a pledge agreement between the debtor and the creditor which is registered.

- Lien
  - The creditor obtains a legal interest in the debtor’s property over which the lien is created, which lasts until the debtor pays off the debt. This form of security is perfected by the creditor taking possession of the property over which the lien was created.

- Chattels mortgage
  - A chattels mortgage is created when the borrower secures the sum borrowed by executing a mortgage over chattels. It is perfected by registering the chattels mortgage in the manner provided for under the Chattels Transfer Act Cap 70. A registered chattels mortgage serves as notice to all persons that the chattels stated in the mortgage are security for the money so borrowed from the creditor.

1.3 SHARES AND FINANCIAL INSTRUMENTS

1.3.1 What are the most common forms of security granted over financial instruments, such as shares and other securities (both in certificated and in dematerialised form) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

1.3.1.1 Unlisted shares

- A share pledge is one form of security that can be created over shares. Security over unlisted shares is perfected by the deposit of the share certificate with the pledgee accompanied with a duly executed blank transfer form.

1.3.1.2 Listed shares

In June 2011, the Uganda Securities Exchange (USE) completed the process of immobilsing paper share certificates for all listed companies.

Security over listed shares is created and perfected by both the pledgor and pledgee signing a standard prescribed pledge form and submitting both forms for registration with USE. The effect of such registration is to bar the pledgor from trading and transferring the pledged shares until payment of the monies owed.

1.3.1.3 Government bonds/ treasury bills

Government of Uganda issues treasury bills and bonds. These are issued in a dematerialised form and are registered on the electronic registry of investors in Government securities called the Central Depository System (CDS).

Security over these bills and bonds may be created by either a pledge or a sale and repurchase agreement (repo).

In a repo, the borrower as owner of the bills or bonds sells them to a lender in consideration of the sum borrowed. The parties then agree that the borrower will repurchase the securities at an agreed later date at a repurchase price equal to the price at which they were sold, along with an additional payment equivalent to interest at an agreed rate. The repo is perfected by the actual transfer of the securities from CDS account of the borrower into the CDS account of the lender who then becomes the registered owner in the CDS.

On the repurchase date, the lender upon receipt of the sum borrowed re-transfers the securities into the names of the borrower whose CDS account is credited with the securities.

A pledge is created by filling in and filing a pledge form. The details of the pledge are then entered unto the CDS account of the borrower.

1.4 CLAIMS AND RECEIVABLES

1.4.1 What are the most common forms of security granted over claims and receivables (such as debts and rights under contracts) and how is security created and perfected (i.e. made valid and enforceable) in relation thereto?

Security may be granted over future assets. Such security would, however, be practically unenforceable against third parties until after the assets have been acquired. Upon the borrower acquiring the asset, the creditor gains immediate interest in the asset and can enforce its rights against third parties.

2.2 FUNGIBLE ASSETS

Security may be created over fungible assets by way of a debenture over the assets. Enforcement is often difficult due to the changing nature of the assets. It is common for lenders to provide for value thresholds over the pool of assets to be maintained at all material times during the existence of the security.

3. What type of commercial or quasi-security structures (i.e. legal structures used instead of taking security) are common in your jurisdiction?

In Uganda, the following are the common types of commercial or quasi-security structures:
- hire-purchase agreements;
- lease financing;
- instalment sales; and
- sale and repurchase and sale and lease back.

4. Do company law rules or conventions affect taking security in your jurisdiction?

Under the Companies Act, of 2012, a company may not give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security, any financial assistance to any person for the purchase or subscription of or for any shares in the company or if the company is a subsidiary company, in its holding company.

This rule does not apply where the lending of the money is part of the ordinary business of the company in question; the lending is in accordance with any scheme in place and the purchase or subscription is by trustees of the company or for shares to be held by or for the benefit of employees of the company, including salaried directors; the loans are to employees, other than directors, in order to enable them purchase or subscribe for fully paid shares in the company or its holding company to be held by the employees by way of beneficial ownership.
5. Under which circumstances can a secured lender enforce its collateral?

A secured lender can enforce its collateral upon failure of performance by the borrower or any covenant in the instrument/deed creating the security.

Under the Mortgage Act, of 2009, a mortgagee may realise his or her security under a mortgage by sale of the property where the mortgage deed gives express powers to the mortgagee to sell without applying to court; appointing a receiver to manage the mortgaged property until payment of the debt is made in full; taking possession of the mortgaged property; or by an application to the court to foreclose the mortgagee’s right to redeem.

Where the security is a debenture, a debenture holder has the right to appoint a receiver/manager in accordance with the powers conferred in the debenture deed. An unpaid creditor may also petition for the winding up of the company.

A holder of a chattels mortgage, pledge or lien may enforce such security by selling the chattels and applying the proceeds of the sale to satisfy the amount owed.

6. Are there any restrictions in granting security (over all forms of property) to foreign lenders?

There are no restrictions in Uganda relating to the granting of security over all forms of property to foreign lenders.

7. Are taxes or fees paid on the granting and enforcement of security or the granting of a loan?

The following taxes and fees are payable on the creation of security. These taxes and fees are paid at the point of perfecting the security by registration. A stamp duty of 0.5% of the total value of a debenture, equitable mortgage, mortgage deed is payable to the Uganda Revenue Authority upon registration of the same. An agreement relating to a pledge, hire-purchase attracts a stamp duty of 1% of the total value.

Legal fees and court bailiff fees may also be incurred in enforcing security.

BANKRUPTCY

1. Are company rescue or reorganisation procedures (outside of insolvency or receivership proceedings) available and practised in your jurisdiction?

No, there are no other forms of company rescue or reorganisation procedures outside of insolvency or receivership proceedings available and practised in Uganda.

2. In what order are creditors paid on a company’s insolvency?

Creditors of an insolvent company are paid in the following order:

- Under the Insolvency Act, of 2011, in the winding up of a company, there shall be paid in priority to all other debts: all taxes and local rates due from the company at the relevant date; all rents payable to the Uganda Land Commission or a district Land Board; all wages or salary of any clerk or servant, not being a director, in respect of services rendered to the company four months before the relevant date; all amounts due in respect of any compensation or liability for compensation under any law for the time being in force in Uganda relating to the compensation of workers; and all amounts due in respect of contributions payable by the company under the National Social Security Fund Act.
- the costs of liquidation;
- claims of secured creditors which shall be paid in accordance with the order in which they were created that is the first in time shall be paid first;
- floating charge holders;
- unsecured creditors;
- interest of all debts proved in winding up of the company; and
- repayment of capital to shareholders.

Note: Where the insolvent company is a financial institution or a micro finance institution, a different order of preference would apply as follows:

- payment shall first be made to the Deposit Protection Fund;
- secondly, to the liquidator for all expenses of the liquidation;
- payment to employees for all wages and salaries due net of any liabilities to the institution;
- payment to secured creditors in pari passu;
- payment to depositors for deposits in excess of the protected deposit amount;
- payment to other creditors to rank in pari passu; and
- finally to shareholders of the institution in accordance with their respective rights and interest.

3. How is the priority between creditors, holding a security interest determined?

Primarily, priority is determined by the date of registration. However, the creditors may enter into a security sharing agreement to agree on the priority of the respective securities or a subordination agreement.

OTHER

1. Briefly set out the structure and comment on the general efficacy of the judicial system in your jurisdiction.

The legal sector in Uganda comprises of various institutions concerned with the provision of legal services, the administration of justice and the enforcement of legal instruments or orders. The main institutions, as established by the 1995 Constitution of the Republic of Uganda, include the Ministry of Justice and Constitutional Affairs, the Judiciary, the Parliament, the Uganda Police Force, the Uganda Law Reform Commission, and the Uganda Human Rights Commission. Furthermore, there are the legal education institutions such as faculty of law, Makerere University, the Law Development Centre, professional bodies such as the Uganda Law Society, the Judicial Service Commission, and other organisations involved in legal sensitisation, and advocacy.

The Judiciary is an independent legal organisation comprised of Courts of Judicature as provided for by the Constitution. The Judiciary is entrusted to administer justice in both civil and criminal matters through courts of judicature including the Supreme Court, the Court of Appeal, the High Court and other courts or tribunals established by Parliament. The highest court in Uganda is the Supreme Court. The Court of Appeal is next in hierarchy and it handles appeals from the High Court but it also sits as the Constitutional Court in determining matters that require Constitutional interpretation. The High Court of Uganda has unlimited original jurisdiction.

Subordinate Courts include Magistrates Courts, and Local Council Courts, Qadhis’ courts for marriage, divorce, inheritance of property and guardianship, and tribunals such as those established under the Land Act (Cap 227).

2. Are there any competition law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

There are no competition law restrictions or requirements that a financial institution in Uganda should be aware of.

3. Are there any environmental law restrictions or requirements that financial institutions lending and/or providing banking services to entities in your jurisdiction must be aware of?

There are no environmental law restrictions or requirements that a financial institution in Uganda should be aware of.

4. Are there any foreign exchange control rules relevant to banking products and/or lending in your jurisdiction?

There are no foreign exchange control rules relevant to financial institutions lending in Uganda.