BOWMANS

THE VALUE OF KNOWING

BANKING ON AFRICA – FINANCING TRANSACTIONS ON THE CONTINENT

Contents

Introduction

We are delighted to provide to you the third edition of our 'Banking on Africa' guide. This guide 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.

Energy, security and affordability have recently become major issues for many African jurisdictions, this coupled with governments commitment to net zero targets and a desire to accelerate the development of low-carbon energy, has resulted in a significant increase of impact investing and ESG led financings. For all of these current economic factors, effective financing in Africa is has become even more significant as we grow in a sustainable manner.

We have therefore 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 alliance firms, Aman and Partners LLP in Ethiopia and Udo Udoma & Belo-Osagie in Nigeria, and special relationship firm in Uganda, AF Mpanga.

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.

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

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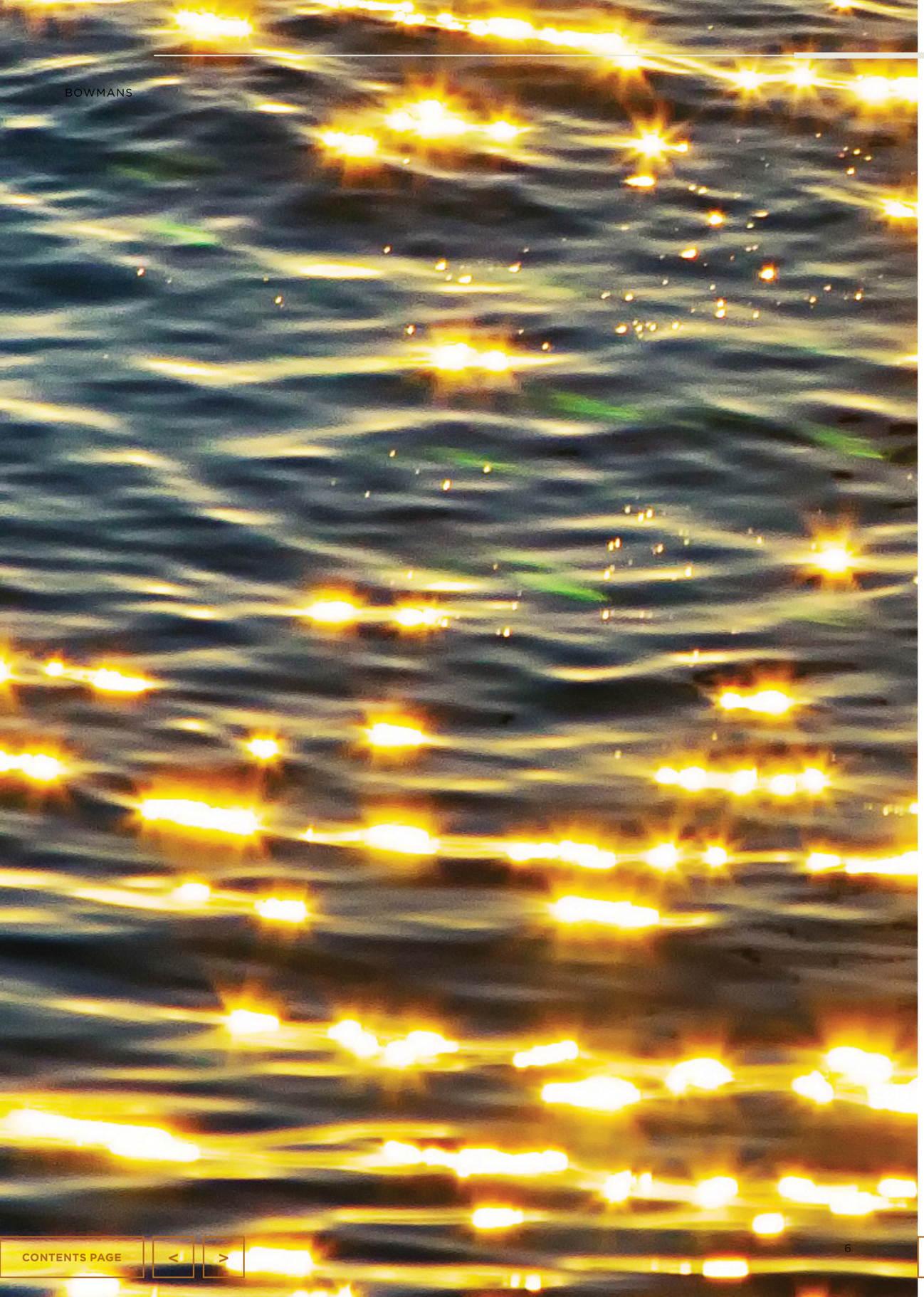


Our Banking and Finance Department

Bowmans specialises in complex domestic and cross-border finance transactions.

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 also well-known for our ability to close complex transactions in record time.

Our active presence in key African jurisdictions and deep relationships across the continent allow us to offer seamless cross-border solutions. Our depth of expertise enables us to provide advice across the entire capital structure of a transaction (from working capital facilities to hedging; equity financing to mezzanine debt).

We have become the trusted advisers to many of the leading African and international sponsors, alternative capital providers, corporate and investment banks, financial institutions, funds, venture capital providers, corporate borrowers, state-owned entities, regulatory bodies, governments and insolvency and business rescue practitioners.

The members of the team have extensive knowledge of, among others:

- Acquisition finance
- Asset finance
- Corporate finance
- ECA finance
- Leveraged finance
- Mining and resource finance
- Preference share funding
- Project Finance
- Real estate finance
- Secured lending
- Structured finance
- Subordinated and mezzanine funding
- Syndicated finance
- Venture capital

Banking and Finance Team of the Year - African Legal Awards, 2022

'Well-known group that undertakes a wide range of financial mandates incorporating acquisition finance, loan agreements and debt restructurings, as well as offering regulatory advice. Its diverse expertise includes sector-specific knowledge of the mining, telecoms, tourism and real estate industries.'
- Chambers and Partners, 2021

'Bowmans has direct representation in various countries which provides the team with the benefit of including local counsel services into their offering.'
- Legal 500, 2021

Our Firm

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

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With seven offices in five African countries and over 500 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 clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, our South African practice won the 2023 Chambers Africa Award for Law Firm of the Year in South Africa. In 2022, Bowmans won six IFLR Africa Awards including overall M&A Team of The Year; Jurisdictional Firm of the Year: South Africa; Loans Firm of the Year: South Africa; M&A Firm of the Year: South Africa; and Project Finance Firm of the Year: South Africa. We also advised on the deal named M&A Deal of the Year. At the 2022 Africa Legal Awards, we won four practice awards including Banking and Finance Team of the Year; Capital Markets Team of the Year; Tax Team of the Year and Transportation and Infrastructure Team of the Year.

Our Presence in Africa

Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

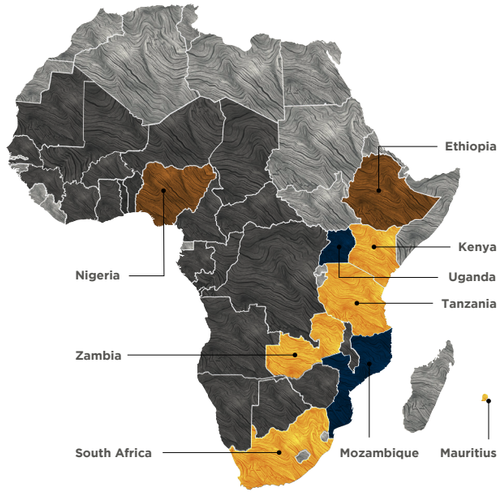
Currently, we have our own offices in five African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam) and Zambia (Lusaka).

We work closely with our Bowmans Alliance firms in Ethiopia (Aman & Partners LLP) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with firms in Mozambique and Uganda. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association of independent law firms in more than 125 countries, which gives us the ability to connect our clients with the best law firms in each of the countries represented.



Bowmans offices

Alliance firms

Special relationships

Significant transaction or advisory experience

Ethiopia

AMAN AND PARTNERS LLP

BANKING

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

Under current forex control laws, no one is permitted to engage in offshore investment using funds earned in Ethiopia unless one is furnished a special permission to do so by the forex regulator, the National Bank of Ethiopia.

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?

There is not any special competence or registration requirement to consult on bank products. However, providing tax advisory is subject to regulatory approval and securing registration and certification from the pertinent tax authority.

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

Yes, there are. It is part of the principle explained above in response to question no. 1. A national resident of Ethiopia is required to secure a permission from the National Bank of Ethiopia to open and maintain an offshore bank account; or enter in to any transaction that involves the payment or transfer of a currency other than the Ethiopian currency.

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.)?

An entity may not engage in providing banking services unless registered and secures, licence to do so. Such licence may not under current law be granted to foreign banks (or banks who have foreigners as shareholders). Therefore, in principle, foreign banks cannot target local businesses to provide to the latter any type of service. Accordingly, there is not any regulatory criteria on customers of 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?

As a general rule, foreign banks cannot advance loans to domestic borrowers. Exceptionally, and subject to regulatory approval by the National Bank of Ethiopia, some types of domestic entities are allowed to source foreign financing – the terms of which are subject to some restrictions. According to current regulation, domestic entities (i.e. entities registered in Ethiopia) that are allowed to source such financing are exporters, businesses engaged in a forex-generating business, foreign investors (i.e. entities owned wholly or partially by foreigners), manufacturers, agricultural machineries and liquid petroleum gas importers. Other types of local businesses may not source foreign financing.

With this background, there is no requirement imposed on the foreign lender whereas there are some conditions imposed on the domestic borrower – the fulfilment of which are a precondition to the permission and registration by the National Bank of Ethiopia of the foreign loan.

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

Unless specially waived by the National Bank of Ethiopia, foreign loans are required to comply with the below conditions:

- The foreign loan to equity proportion must not exceed 60:40 in the case of debts advanced to foreign investors, manufacturers, agricultural machineries and liquid petroleum gas importers;
- All-in-cost ceilings apply in the below manner:
  - maximum of six months SOFR for USD or equivalent in ESTR for Euro and SONIA for GBP plus 2% for debts maturing in a period up to three years;
  - maximum of six months SOFR for USD or equivalent in ESTR for Euro and SONIA for GBP plus 3% for debts maturing in a period from three to five years;
  - maximum of six months SOFR for USD or equivalent in ESTR for Euro and SONIA for GBP plus 5% for debts maturing in more than five years.

A loan contract fulfilling the above preconditions will entitle the borrower to repay in forex only if the borrower has in writing applied for NBE approval before contracting the loan and registering it at NBE after approval. Therefore, it must be noted that there is a two-step regulatory process: NBE permission before and registration after contracting the loan.

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?

If the foreign loan is contracted subject to the preconditions and terms discussed above, there are not any other requirements as such to enforce rights lawfully created. However, an important current consideration that may impact a lender's ability to enforce rights may be forex availability, which at times may be so acute as to be impossible to immediately get forex.

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

Yes. Nobody except the Federal Government of Ethiopia is allowed to hold more than 5% of the equity capital of banking and insurance 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?

All classes of movables, whether tangible or intangible, and immovable property serve as collateral in Ethiopia. Motor vehicles, construction machinery and buildings are the most common assets taken by way of collateral. The most common form of security granted is pledge for motor vehicle, construction machinery and mortgage for buildings and plants.

1.1 REAL ESTATE

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

Buildings and their intrinsic elements and accessories are deemed immovable property under Ethiopian law. While land is also considered immovable, it is, however, considered *extra commercium* and thus not subject to any sale or security.

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?

Mortgage is the form of security over immovable property or real estate. There are three forms of mortgage under Ethiopian law: legal mortgage (arises from the operation of the law and secures the right of the seller to be paid first), judicial mortgage (created by a court judgment), and contractual mortgage. All forms of mortgage have to be made in writing and shall be registered at the place where the immovable property is located.

1.2 TANGIBLE MOVABLE PROPERTY

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

In Ethiopia they are called corporeal chattels – having material existence with the quality to move by themselves or be moved by man without losing their individual characteristics. Yes. They include machinery, trading stock, aircraft, ships, motor vehicles, and all assets that are not buildings and land as well as their intrinsic elements and accessories.

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?

Non-possessory security is the form of security recently introduced, replacing the traditional possessory security or pledge. Currently, a simple written agreement between the security grantor and the security taker creates a valid contract; it is perfected through electronic registration of notice of security in the Collateral Registry.

1.3 SHARES AND FINANCIAL INSTRUMENTS

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?

Financial instruments are movable assets under Ethiopian law, and pledge is the most common form of security over such assets. But the traditional possessory security is now replaced by a reformed system. Security is created over these assets by a written contract between the two parties; it is perfected against third parties by possession of the instruments. But security rights over dematerialised instruments such as electronic security is perfected through a control agreement between the security grantor, the secured creditor and the issuer of the electronic security.

1.4 CLAIMS AND RECEIVABLES

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?

Same as above under 1.3 except that a security right is perfected through electronic registration of notice of security in the Collateral Registry.

1.5 INTELLECTUAL PROPERTY

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?

Same as above under 1.4.1. Note that a security right in a corporeal asset with respect to which intellectual property is used shall not extend to intellectual property, and a security right in an intellectual property shall not extend to the corporeal asset.

1.6 GENERAL BANKING FACILITIES

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 same as above. However, if security is over right of payment to funds credited to a deposit account, it is perfected by a control agreement between the security grantor (account holder), the secured creditor and the bank.

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

2.1 FUTURE ASSETS OR ASSENT TO BE CREATED

No. Security can be created over any type of asset: present or future.

2.2 FUNGIBLE ASSETS

No. A security agreement has to describe the collateral in a manner that reasonably identifies the collateral, and this description can be by specific listing, category, type, or quantity.

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

Financial lease, hire-purchase, sale with ownership right reserved serve the purpose of security but they are not commonly used in the market; the market prefers security over motor vehicles, construction machinery and over immovable (buildings) and plants.

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

Yes, there are many company law rules that affect security rights, such as (not exhaustive):

- creating legal security in some instances (such as in favour of the seller of a business over unpaid sale price which ranks above contractual security);
- distribution of proceeds of the sale of a business on which there is security interest;
- governance-related rules (such as the need for special powers of managers of a business to conclude security contracts);
- voting rights on pledged shares;
- registration of pledgee of shares; and
- in relation to bankruptc-related rules and proceedings (such as stay of enforcement, consent rights of secured creditors).

Be that as it may, please do also note:

- security can be given to any creditor; and
- registration is not a validity requirement to create a security agreement on movable assets including shares; registration of notice of security right is required to perfect it against third parties; in case of shares evidenced by documents, perfection is through possession; for electronic shares, perfection is through control agreement.
- Registration of mortgage is however mandatory for validity of security as well as for perfecting security created over immovable property.

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

When the debtor defaults. And events of default are not legally defined; they are subject to party autonomy.

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

No. There is no particular property over which security cannot be created to foreign lenders. (subject to forex control laws discussed above).

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

A security right granted on movable assets under the new law on Movable Property Security Right Proclamation No. 1147/2019 is free from payment of stamp duty, but the law on taking security over immovable assets remains to be the old regime in the Civil Code. So, stamp duty is payable on security over immovable property. However, by virtue of the circular of the Ministry of Finance, securities that guarantee loans taken by a licensed exporter to finance its export trade and those that guarantee loans taken by an investor with a valid investment licence for that particular investment activity are exempted from payment of stamp duties.

BANKRUPTCY

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

Yes, the new Commercial Code of Ethiopia (2021) has extensive provisions dealing with company reorganisation procedures but its practical applicability is not yet tested.

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

Secured creditors have absolute priority over all creditors, followed by the claims of those who provide finance during the insolvency proceeding, then comes the cost and expense of the insolvency proceeding. Claims of employees and tax claims come fourth and fifth in line. Unsecured creditors will be last on the list.

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

For security over movables, priority is determined on time of registration in the electronic collateral registry, but for security over immovable properties priority is based on date of registration where those registered on the same date rank concurrently.

OTHER

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

With Ethiopia, being a federal country, there are regional state courts and federal state courts. They entertain matters allocated to each by law. There is not overlap in their jurisdictions, even though Regional courts in some instances may by delegation entertain Federal matters.

Matters relating to the Commercial Code, banking and finance and fiscal issues (including forex) belong to the Federal courts. Matters related to secured transactions (including the securities in such matters) may, depending on some factors, belong to either the Federal courts or State courts. Depending on the amount the suit involves, different levels of the federal judiciary will have material jurisdiction over such matters. This way, suits having value of up to ten million Birr will be entertained by the First Instance Court and any amount in excess of that by the High Court. On appeal, decisions of the First Instance Court may be reviewed and heard at the High Court and, if the latter reverses it fully or partially, it may further be reviewed and heard by the Supreme Court. Any final decision is also subject to review for fundamental error of law by a special division called the Cassation Division of the Supreme Court.

Sophisticated matters, including finance-related matters, may pose serious challenges on the courts' abilities to properly understand and adjudicate such matters, as many agree. This is so given cumulative factors; the main ones being some of the laws being new and the market not being well accustomed to modern transactions.

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 restrictions and/or requirements that are specifically addressed to financial institutions providing financial services.

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 not restrictions and/or requirements that are specifically addressed to financial institutions providing financial services.

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

Please see above responses to questions in Section One (Banking).

Kenya

BOWMANS

BANKING

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 (**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 a 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, Kenyan 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, 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, 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 (**FRC**) established under the Proceeds of Crime and Anti-Money Laundering Act, 2009. The FRC became fully operational on 12 April 2012.
- Kenya has enacted a Prevention of Terrorism Act, 2012 and is party to the International Convention for the Suppression of the Financing of Terrorism (the **Convention**), which requires disclosure of information relating to suspicious accounts and/or transactions to the FRC or competent authorities under the Convention.

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 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 23 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 (Number 17 of 2015 Laws of Kenya) (**Companies Act**) are required to comply with corporate law requirements by obtaining all corporate authorisations in accordance with their 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 judgment 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, 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, such as the following.

Regulated Entities

- Acquisition of shares in certain regulated entities may require regulatory approval. These include banks and financial institutions licensed by the Central Bank of Kenya under the Banking Act (Chapter 488, Laws of Kenya), capital markets intermediaries licensed by the Capital Markets Authority under the Capital Markets Act (Chapter 485A, Laws of Kenya) and insurance companies regulated under the Insurance Act (Chapter 487, Laws of Kenya).

Minimum capital requirements

There are minimum local ownership and control restrictions that apply in certain sectors, thus inhibit the ability of a financial institution to convert debt into equity. These include:

Sector	Requirement
Insurance	Minimum local shareholding (including East African citizens) of one-third of the paid-up share capital is required in respect of insurance companies and 60% in respect of certain insurance intermediaries
Telecommunications	Minimum local shareholding of 30% of the issued share capital is required
Mining	There are distinctions in the Mining Act (Number 12 of 2016, Laws of Kenya) dependent on the size of the operation. For example, a small-scale operation is required to have local equity participation of at least 60%

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 70% 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 15% applies to offshore investments in quoted equities.

Agricultural Land

Approval from the Land Control Board or a Presidential exemption is required to obtain shares in companies holding agricultural property. A company which has a foreign shareholding may not acquire shares in a company that owns agricultural land.

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

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

Immovable property is broadly defined under Kenyan law as including land (whether covered by water or not), any estate, right, interest or easement in or over any land and things attached to the earth or permanently fastened to anything attached to the earth, and includes a debt secured by a charge on immovable property. Land in Kenya is classified as public, community or private land in the Constitution of Kenya, 2010, in terms of which 'private land' consists of the following:

- registered land held by any person under any freehold tenure;
- land held by any person under leasehold tenure; and
- any other land declared private land by an Act of Parliament.

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 enactment of a series of property laws over the past few years, Kenya now has a single system of registration under the Land Registration Act (Number 3 of 2012, Laws of Kenya) (the **Land Registration Act**) and Land Registration Act (Number 6 of 2012, Laws of Kenya) (the **Land Act**) for interests in real estate.

Security over registered real property may be granted in the following forms:

- a formal charge drawn in the prescribed form in accordance with the Land Registration Act taking effect upon registration at the relevant Lands Registry in Kenya; or
- an informal charge, which arises in instances where (i) a chargee accepts a written and witnessed undertaking or memorandum from a chargor; or (ii) a chargor deposits by way of security documents evidencing ownership of land or a right to interest in land.

Perfection formalities are applicable in respect of the formal charge, specifically:

(i) stamping for stamp duty in accordance with the provisions of the Stamp Duty Act (Chapter 480, Laws of Kenya) (the **Stamp Duty Act**);
(ii) registration with the Registrar of Companies in accordance with the Companies Act; and
(iii) registration with the relevant Lands Registry.

1.2 TANGIBLE MOVABLE PROPERTY

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

In terms of the Movable Property Security Rights Act (Number 13 of 2017, Laws of Kenya) (**MPSR Act**), 'tangible asset' refers to all types of goods and includes motor vehicles, crops, machinery and livestock.

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?

Security over tangible assets may be granted in the following forms:

- a fixed charge over specified tangible assets which are ascertainable; and
- a floating charge over tangible assets which are changing nature, for example, receivables and stock (inventory);
- pledges over movable assets capable of delivery, including negotiable instruments; or
- security over chattels, including motor vehicles.

The following perfection formalities would apply to the security:

(i) obtaining an exemption from stamp duty;
(ii) registration of the security interest at the Collateral Registry in accordance with the MPSR Act; and

(iii) in respect of a fixed or floating charge granted by a company, registration with the Registrar of Companies in accordance with the Companies Act.

Certain additional formalities may also apply under applicable laws in specialised transactions, for instance:

- ***Aviation laws***
  The details of security over Kenyan-registered aircraft are submitted to the Director-General of the Kenya Civil Aviation Authority pursuant to the Civil Aviation Act (Number 21 of 2013, Laws of Kenya), the International Interests in Aircraft Equipment Act (Number 27 of 2013, Laws of Kenya) and 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 which Kenya has acceded to.
- ***Maritime laws***
  Security over ships and shares in ships requires registration under the Merchant Shipping Act (Number 4 of 2009, Laws of Kenya).

1.3 SHARES AND FINANCIAL INSTRUMENTS

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 shares may be created in the following ways:

- ***Certificated shares***
  Security over certificated shares may be created by way of:
  (i) charge, which may be:
    - a fixed charge restricting any dealings with the shares; or
    - a floating charge permitting dealings with the shares prior to the occurrence of specified crystallisation event, (the charge is usually accompanied by the statutory form that is used for registration of the security at the Registrar of Companies); or

  (ii) memorandum of deposit of the shares, pursuant to which, among other documents, the original share certificates together with signed blank share transfer forms are delivered to the lender/security agent to hold by way of security.
- ***Book-entry securities***
  Security over dematerialised shares may be created by way of:
  (i) pledges registered in accordance with the Central Depositories Act (Number 4 of 2000, Laws of Kenya) (**Central Depositories Act**) through delivery of a duly completed and signed Securities Pledge Form (CDS 5) to the Central Depository and Settlement Corporation (CDSC); or
  (ii) floating charges pursuant to section 42(6) of the Central Depositories Act, which permits the granting of floating charges over book-entry securities created under common law (the floating charge would be accompanied by the statutory form for the Registrar of Companies referred to above).

Enforceability of the security will be subject to the following perfection formalities:

- security taken by way of charge (whether fixed or floating) is perfected in respect of book-entry securities by:
  - obtaining stamp duty exemption in respect of the security document;
  - registration at the Registrar of Companies (if applicable) and the Collateral Registry; and
  - section 42(6) of the Central Depositories Act permits the creation of floating charges over book-entry securities created under common law, whereby the floating charge would be accompanied by the statutory form for the Registrar of Companies;
- security taken by way of a memorandum of deposit is perfected by:
  (i) delivery of, among other documents, the original share certificate and signed blank share transfer forms to the lender/security agent to hold as security;
  (ii) obtaining an exemption from stamp duty exemption in respect of the security; and
  (iii) registration of the security at the Collateral Registry; and
- security over book-entry securities taken by way of a memorandum of deposit is perfected by delivery of a duly completed and signed Securities Pledge Form (CDS 5) to the CDSC. The CDSC will then record the pledged securities and will freeze the securities in the pledgor's account.

1.4 CLAIMS AND RECEIVABLES

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 normally created by way of a fixed or floating charge or an assignment. The security is perfected by:

(i) obtaining an exemption from stamp duty;
(ii) notification of the security interest with the Collateral Registry in accordance with the MPSR Act;
(iii) in respect of a fixed or floating charge granted by a company, registration with the Registrar of Companies in accordance with the Companies Act; and
(iv) giving notices of the assignments to the applicable debtors/counterparties in accordance with the MPSR Act.

1.5 INTELLECTUAL PROPERTY

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

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 are normally created by way of a fixed or floating charge or an assignment. The security is perfected by:

(i) obtaining an exemption from stamp duty;
(ii) notification of the security interest with the Collateral Registry in accordance with the MPSR Act;
(iii) in respect of a fixed or floating charge granted by a company, registration with the Registrar of Companies in accordance with the Companies Act; and
(iv) giving notices of the assignments to the applicable debtors/counterparties in accordance with the MPSR Act.

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

In terms of the Land Control Act (Chapter 302, Laws of Kenya), a Land Control Board will not permit an acquisition or transfer of agricultural land or shares in a private company that owns agricultural land to a foreign lender to foreign investors on enforcement of security over agricultural land or shares in a private company that owns agricultural land.

Generally in respect of other classes of assets:

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

There are generally no restrictions. Security over future assets can be granted by way of a fixed and/or floating charge.

2.2 FUNGIBLE ASSETS

There are generally no restrictions. 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.

Perfection formalities will apply to certain of these structures, such as guarantees, finance leases and hire purchase agreements.

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

The Companies Act prohibits public 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 other obligations under a loan, misrepresentation by the borrower and/or any other obligor and insolvency. Other events of default may be specified by a lender in the relevant loan or 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 also required in terms of the Land Act and Land Registration Act in the case of security over immovable property and under the MPSR Act in the case of security interests over movable assets.

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 Constitution of Kenya, 2010, 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?

The following taxes and fees are applicable:

Withholding tax

Interest, including any commission, discount, commitment and other fees, payable under a loan agreement is subject to income tax in Kenya. Unless the payee enjoys specific exemption, payments of such sums are subject to withholding tax at the rates from time to time in force. However, any grossing-up provisions under the loan agreement would be enforceable against a borrower.

Stamp duty

On the granting of security, stamp duty may be payable or exempted in Kenya in accordance with the Stamp Duty Act depending on the nature of the security and on assessment by the Collector of Stamp Duties, as follows:

- on a principal security, stamp duty at the rate of 0.1% of the principal amount secured;
- on a supplemental security, nominal stamp duty (approximately USD 3);
- on a collateral security, stamp duty at the rate of 0.05% of the principal amount secured; and
- an exemption for stamp duty is extended to securities over movable assets pursuant to the MPSR Act.

Registration fees

Registration fees of up to KES 14 000 (approximately USD 140) currently apply at the Registrar of Companies with respect to debentures or charges.

BANKRUPTCY

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

Schemes of arrangement exist as a company rescue or reorganisation procedure outside of insolvency and receivership proceedings. This is where a solvent company, its shareholders and its creditors can enter into reorganisation arrangements to restrict debt and provide financial relief.

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-broking 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?

The order of creditor ranking on a company's insolvency in Kenya is similar to that applicable under the UK Companies Act, 2006. The order of preference is as follows:

1. Secured creditors with fixed charges.
A creditor that holds a valid fixed charge (provided that it was created as a fixed charge and is not a crystallised floating charge) over a company's asset is entitled to the proceeds of the realisation of that asset in satisfaction of the liability due to it from the company. The holder of such a valid fixed charge will suffer no deductions in an insolvency process from the realisation of property secured by his or her fixed charge other than where there are prior ranking fixed charges over the same property or he or she agrees that disposal costs incurred by the liquidator or administrator may be taken from them.

2. The following preferential debts:

a. First priority
   i. remuneration and expenses of the liquidator/administrator;
   ii. in the case of a creditor who protects or preserves assets of the bankrupt or company for the benefit of the creditors of the company by the payment of money or the giving of an indemnity;
   iii. the amount received by the liquidator or administrator by the realisation of those assets, up to the value of that creditor's unsecured debt;
   iv. the costs incurred by that creditor in protecting, preserving the value of, or recovering realised assets; and

b. Second priority
   i. wages and salaries payable to employees in respect of services provided to the company during the four months before the commencement of the liquidation;
   ii. holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the liquidation;
   iii. redundancy compensation owed to employees that accrues before, or because of, the commencement of or liquidation;
   iv. employment taxes in the form of statutory deductions on behalf of the employees including amounts payable to the Kenya Revenue Authority (**KRA**) in accordance with the Income Tax Act

(Chapter 470, Laws of Kenya) (taxes on employment rank as the highest (second priorityclaims) as they are agency taxes being that employment tax is not a tax of the company but a tax of the employee being paid the terminal benefits (also, the role of the company is to deduct and remit tax on behalf of the employees for employment tax);

v. adherence with orders for reimbursement of the Industrial Court;
vi. all amounts that are by any other written law required to be paid in accordance paid by the buyer to a seller on account of the purchase price of goods; and

c. Third priority:
i. Withholding taxes (withholding taxes paid to residents and non-residents as well as excise duties and import duties which rank after employment taxes as third priority claims; while not provided for value added taxes (if any are due) could also be placed here as they are agency taxes, that is, the company's role in value added tax is to charge, collect and remit to the KRA).

3. **Floating charge holders**. They are only allowed to distribute 80% of the net assets of the company in accordance with the waterfall, with the rest (20%) being made available to the satisfaction of unsecured debts.
4. **Unsecured creditors**. Unsecured creditors are the ordinary debts of the company which are neither secured nor preferential. If there are insufficient funds to pay all of the unsecured creditors, they rank and abate equally.
5. **Corporation tax** (ranking equally with unsecured creditors). This is not provided for in the Insolvency Act, hence it is assumed that it ranks equally with unsecured creditors.
6. **Interest on debts**. Once all the creditors have been paid in full any surplus is first used to pay interest on debts from the date of liquidation. This interest is to be paid to all creditors equally regardless of whether their debts ranked equally for the payment.
7. **Shareholders**. Any surplus after payment of debt and interest goes to the members according to the rights attached to their shares.

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

Priority amongst secured creditors is generally determined in the following manner:

- in respect of registrable securities including debentures, charges and security over shares, by reference to the date of registration;
- in respect of choses in action (such as a debt or a beneficial interest in a trust) or an equitable interest, by reference to the date of notice of the security to third parties; or
- the provisions of any deed of priority or inter-creditor agreement entered into amongst secured creditors.

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, 2010, which vests judicial authority on the courts and tribunals established by the Constitution and other Acts of Parliament. 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 Employment and Labour Relations 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 forum in which a suit is filed depends on the pecuniary value of the claim and where the cause of action arose in terms of geographical jurisdiction.

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 Competition Act, of 2010 promotes and protects effective competition in the Kenyan market. The Act applies to all persons engaging in trade, including banks and financial institutions. The Act prohibits restrictive trade practices, unfair and misleading market conduct. Prohibited restrictive trade practices include any agreement, decision or concerted practice which divides markets by allocating customers, suppliers, areas or specific types of goods or services, or otherwise prevents, distorts or restricts competition.

The Act specifically prohibits any entity that provides banking, micro-finance, insurance or other related services from imposing unilateral charges and fees if the charges and fees in question had not been brought to the attention of the consumer prior to provision of the service. Financial institutions should be aware of the Consumer Protection Act, 2012 (**CPA**) which also regulates credit agreements. The CPA specifically prohibits the imposition of default charges on a borrower under a credit agreement, other than reasonable charges reflecting the costs incurred by the lender.

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 Management and Co-ordination Act, 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 140001:2004 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.

Mauritius

BOWMANS

BANKING

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

There are no restrictions on Mauritian domestic borrowers to engage in investment banking activities outside Mauritius provided that the proposed investment banking activities are offered outside Mauritius.

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?

Banking Products

The Bank of Mauritius requires all financial institutions to submit any advertisement (which includes any material, written, published, broadcast or otherwise), containing an invitation to make a deposit or obtain other financial services or information such as might lead directly or indirectly to the making of a deposit not less than seven days before the intended date of publication or other dissemination.

Financial Products

In terms of non-banking financial products, only licensees of the Financial Services Commission shall publish or cause to be published an advertisement in connection with the conduct of an activity or provision of a service which requires a licence, approval, authorisation or registration under the relevant statutory acts. In addition, advertisements for financial products on the internet must be submitted to the Financial Services Commission in advance of it being displayed, where so required under any applicable laws.

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

There are no restrictions on legal persons or natural persons in Mauritius opening bank accounts or holding assets outside the country. However, the Declaration of Assets Act, 2019 requires persons working in the public sector in Mauritius to declare their assets held outside Mauritius.

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 currently no local regulatory criteria 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?

Provided that the foreign lenders are not carrying banking business in Mauritius, there are no requirements to comply with when advancing a loan to a Mauritian domestic borrower.

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

There are no obligations that corporate borrowers are required to comply with when entering into a foreign loan. However, corporate borrowers are required to obtain all applicable corporate authorisations in accordance with their constitution and/or applicable laws.

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 which apply to foreign lenders accessing Mauritian courts on domestic claims where loans or security agreements are governed by Mauritian laws. It is, however, highlighted that where the lender is a foreign party and does not own any immovable property in Mauritius, it may be required to provide security for its costs upon an application by the defendant. In the event that a foreign judgment is rendered against a Mauritian borrower, this foreign judgment can be enforced in Mauritius by way of exequatur, provided that application for exequatur meet the prescribed criteria.

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

According to the Banking Act, 2004, a financial institution can only convert debt into equity in the course of the satisfaction of debts due to it by the default of the debtor.
This conversion is, however, subject to the approval of the Bank of Mauritius and such shareholding must not exceed 30% of the financial institution's current capital base (with the shareholding being valued at its fair market value or, where it is not practicable to determine the fair market value, at a valuation approved by the Bank of Mauritius).

SECURITY

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

Assets available as collateral in Mauritius	Common forms of security granted over it
Shares	Pledge, fixed charge and/or floating charge
Land (immovable property)	Mortgage, fixed charge and/or floating charge
Receivables	Assignment of receivables
Bank account	Privilege, pledge, floating charge
Intellectual property	Pledge, fixed charge and/or floating charge
Business assets (including furniture, equipment and tools)	Pledge, fixed charge and/or floating charge

1.1 REAL ESTATE

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

Immovable property can be defined as any freehold or leasehold immovable property (land and building) and includes any right to such immovable property.

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 forms of security granted over real estate are:
- Mortgage; and
- Fixed charge and/or floating charge.

Mortgage: the creation and perfection
- Creation of a legal mortgage over an immovable property is governed by our Civil Code, the creation and perfection of which is as follows:
  1. It is created by way of a deed before a notary.
  2. The precise nature and location of the immovable property burdened by the mortgage must be specified in the deed
  3. The secured amount must also be stated in the deed. If the existence of the debt is subject to the satisfaction of certain conditions, or if its value cannot be determined, the creditor must expressly declare an estimated value for the debt in the deed.
  4. A memorandum (bordereau) setting out details of the mortgage must be annexed to the deed.
  5. The deed of mortgage and the memorandum (bordereau) must be drafted using the prescribed formatting.
  6. The deed of mortgage together with the memorandum (bordereau) must then be inscribed, within the prescribed delay, in the registers of the Conservator of Mortgages.

Fixed and/or floating charge: the creation and perfection
1. A fixed and/or floating charge can only be granted in favour of an *institution agréée*, i.e. an approved financing institution, as per the Institution Agréées Regulations 1988.
2. A fixed charge must clearly identify and list the assets which are to be encumbered by the fixed charge, while a floating charge can generally be granted over the assets of the chargor, and includes future assets.
3. The fixed and/or floating charge is executed between the secured party and the pledgor and can be either by way of notarial deed or under private signatures.
4. A memorandum (bordereau) setting out details of the fixed and/or floating charger must be annexed to the agreement.
5. The fixed and/or floating charge and the memorandum (bordereau) must be drafted using the prescribed formatting.
6. The fixed/floating charge together with the memorandum (bordereau) must then be inscribed, within the prescribed delay, in the registers of the Conservator of Mortgages.

Ranking takes effect as from the date of inscription of the deed of Mortgage or Fixed/Floating Charge with the Conservator of Mortgages.

1.2 TANGIBLE MOVABLE PROPERTY

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

Tangible movable assets generally include machinery, inventory, aircrafts, ships, motor vehicles and professional, industrial and agricultural equipment.

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 granted on tangible movable assets are:
- pledge (under the Civil Code),
- fixed charge and/or floating charge (provided that the beneficiary is an *institution agréée*);
- pledge over business assets (under the Commercial Code); and
- mortgage of aircraft and ships.

Possessory pledge
This pledge is created under Article 2073 of the Civil Code and can be created by way of notarial deed or under private signatures.
The pledge must include the amount due by the pledgor and the nature of the property/goods given in pledge. The pledged asset must be handed over by the pledgor either to the creditor or to an agreed third party, who will hold a security interest over the pledged asset.
Upon execution, the pledge must be registered with the Registrar General of Mauritius within the prescribed delay.

Non-possessory pledge
This pledge is created under Article 2095 of the Civil Code and can only be created over motor vehicles and professional, industrial and agricultural equipment. This pledge can be created by way of notarial deed or under private signatures.

In a non-possessory pledge, the pledgor retains possession of the pledged assets, although upon registration of the pledge, the pledgor is deemed to have transferred title to the creditor and retains the pledged asset for the benefit of the creditor. Upon execution, the pledge must be registered with the Registrar General of Mauritius within the prescribed delay.

In addition to the above procedures, where a pledge is created on a motor vehicle (under Article 2100 of the Civil Code), a duplicate of the registered pledge agreement must be filed with the National Transport Authority for inscription in motor vehicle register.

Fixed charge and floating charge
The creation and perfection are as set out in 1. above.

Pledge over Business Assets (*Nantissement de Fonds de Commerce*)
This pledge is created under Article 130 of the Commercial Code and can be created over the trade name, the right to lease, the business goodwill, the commercial furniture, the equipment used for the commercial exploitation of the business, the patents, the licences, trademarks, industrial designs and generally all intellectual property rights attached to the business.
This pledge can be created by way of notarial deed or under private signatures.
Upon execution, the pledge must be registered and inscribed with the Registrar General of Mauritius within the prescribed delay.

Mortgage of aircraft and ships
The Mortgage of aircrafts and ships are subject to specific regimes under the Commercial Code.
Mortgage of aircrafts and ships can be created by way of notarial deed or under private signatures.
Upon execution, the Mortgage must be registered and inscribed with the Registrar General of Mauritius within the prescribed delay.

1.3 SHARES AND FINANCIAL INSTRUMENTS

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 are:
- pledge under the Civil Code
- pledge under the Commercial Code
- fixed and/or floating charge (provided that the beneficiary is an *institution agréée*).
- special pledge in favour of a bank.

Pledge under the Civil Code – creation and perfection
This pledge can be granted over financial instruments, such as shares, issued only by a domestic company.
1. The pledge of shares agreement is executed between the pledgor, the company in which the shares are pledged and the pledgee.
2. The pledge is validly created and binding on third parties by a simple transfer in guarantee entered in the register of shares given in pledge.
3. The transfer in guarantee instrument must be signed by the pledgee, the pledgor and the secretary of the company in which the shares are being pledged in respect of the pledged shares.
4. The company secretary is required to procure the delivery of the following to the pledgee:
   a. a certificate of inscription, signed by the company secretary of the Company, attesting that the particulars of transfer in guarantee have been inscribed in the registers of that company; and
   b. an updated register of shares given in pledge.
5. Registration of a pledge under the Civil Code with the Registrar General is compulsory.

Pledge under the Commercial Code – creation and perfection
This pledge can be granted over financial instruments, such as shares, issued only by an institution approved by the Financial Services Commission of Mauritius or a company holding a Global Business Licence.
1. The pledge of shares agreement is executed between the pledgor, the company in which the shares are pledged and the pledgee.
2. The pledgor is required to procure the delivery of the following to the pledgee:
   a. a signed and undated blank share transfer form;
   b. share certificates (if any) and other instruments evidencing or representing the pledged shares; and
   c. a transfer in guarantee instrument signed by the pledgee, the pledgor and the secretary of the company in which the shares are being pledged in respect of the pledged shares.
3. The company secretary is required to procure the delivery of the following to the pledgee:
   a. a certificate of inscription, signed by the company secretary of the company, attesting that the particulars of transfer in guarantee have been inscribed in the registers of that company; and
   b. an updated register of shares given in pledge.
4. Registration of the pledge is only at the option of the pledgee; non-registration will not affect the validity and enforceability of the pledge under Mauritian law.

Fixed Charge and Floating Charge – creation and perfection
The same procedures as set out in 1. above will apply.

Special pledge in favour of a bank – creation and perfection
This pledge can be granted over financial instruments, such as shares, issued only by a company. This pledge can be granted only in favour of a bank (set up under the Banking Act).
1. The pledge of shares agreement is executed between the pledgor, the company in which the shares are pledged and the bank.
2. The pledgor is required to procure the delivery of the following to the bank:
   a. a signed and undated blank share transfer form;
   b. share certificates (if any) and other instruments evidencing or representing the pledged shares;
   c. a transfer in guarantee instrument signed by the pledgee, the bank and the secretary of the company in which the shares are being pledged in respect of the pledged shares.
3. The company secretary is required to procure the delivery of the following to the pledgee:
   a. a certificate of inscription, signed by the company secretary of the company, attesting that the particulars of transfer in guarantee have been inscribed in the registers of the that company; and
   b. an updated register of shares given in pledge.
4. Registration of the pledge is only at the option of the bank; non-registration will not affect the validity and enforceability of the pledge under Mauritian law.

1.4 CLAIMS AND RECEIVABLES

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 claims and receivables are:
- a pledge over claims and receivables;
- an assignment of claims and receivables by way of security; and
- a floating charge (given that the beneficiary is an *institution agréée*).

Pledge over claims and receivables – creation and perfection requirements under the *Code de Commerce*
1. The pledge over claims and receivables is executed between the pledgor and the pledgee.
2. The pledge agreement must designate the claims and receivables being pledged and the amount due by the pledgor.
3. To be binding against the debtor of the pledged receivable, the pledge over claims and receivables must be notified to the debtor or the latter must intervene in the act. Otherwise, only the pledgor receives valid payment of the debt.

Assignment by way of security – creation and perfection under the *Code de Commerce*
1. The assignment of claims and receivables is executed between the assignor and the assignee.
2. A memorandum, known as a bordereau, which witnesses the assignment and forms part of the perfection requirement thereof under the *Code de Commerce*, must be executed by the assignor and may be registered in the interest of the assignee with the Registrar General.
3. The registered bordereau must thereafter be delivered to the assignee by the assignor.
4. A notice of assignment of the claims and receivables is executed by the assignor must be sent to the counterparties.
5. Each counterparty generally signs and delivers to the assignee an acknowledgement of the notice of assignment.

1.5 INTELLECTUAL PROPERTY

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 intellectual property are a pledge or a fixed charge and/or floating charge (given that the beneficiary is an *institution agréée*).

The creation and perfection requirements of the pledge are set out in 1. above.
The creation and perfection requirements of the fixed charge and/or floating charge are set out in 1. above.

1.6 GENERAL BANKING FACILITIES

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?

Kindly refer to 1.4.

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

Security can generally be granted over any type of assets to the extent permitted and highlighted in this document or as restricted by law.

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 form of quasi-security is a letter of undertaking ('*promesse de porte fort*') whereby a party will undertake or commit to execute an obligation if the debtor fails to do it. Another form of quasi-security is an autonomous guarantee ('*garantie autonome*') under the Commercial Code which is a banking commitment by which a financial institution undertakes to make, for the benefit of a beneficiary and at the latter's request, the payment of a sum, up to an amount agreed in this commitment, without the possibility to defer this payment or raise a dispute for any reason whatsoever.

Other forms include:
- general guarantee;
- sale and leaseback;
- hire purchase; and
- finance lease.

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

When taking security in Mauritius, the following elements will be relevant for consideration:
Transfer of shares: Sale or transfer of shares may be subject to pre-emptive rights, which could affect enforcement of share pledges. As such, necessary waivers will need to be obtained prior to creation of a pledge.
***Institution agréées*:** A fixed charge and a floating charge can only be granted in favour of an *institution agréée*, i.e. an approved institution, as per the Institution agréées Regulations 1988.
Financial assistance: A company is not allowed to provide a loan, a guarantee or a security for the purposes of the acquisition of its own shares, without first complying with the mandatory requirements of the Companies Act.

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

A secured lender can generally enforce its collateral according to the terms of the security agreement. A collateral is generally enforceable on an event of default of the borrower or the grantor, which may include a default of payment, breach of any financial or any other obligations under a facility agreement, misrepresentation by the borrower and/or grantor, insolvency and occurrence of material adverse changes, and any other events of default which may have been specified in the facility agreement and/or the relevant security document.

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

There are generally no restrictions in granting security to foreign lenders. However, the enforcement process may be affected by the type of asset which is given in security.

For instance, where underlying security involves immovable property/real estate, the foreign lenders will need to obtain prior approval of the Prime Minister's Office (under the Non-Citizens (Property Restriction Act, if they were to hold such immovable property/real estate in their own name or indirectly by taking over shares in a company which holds such immovable property (for instance, through a share pledge) upon enforcement of such security.

It is also relevant to note that the granting of a fixed and/or floating charge can only be in favour of an *institution agréée*, i.e. an approved institution, as per the institution agréées Regulations 1988 (which would require that a foreign lender must be a financing institution).

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

Upon granting of a security, registration duty will be payable upon filing for registration and/or inscription. Such filing is made at the time of creation of the security and not at the time of enforcement.

However, crystallisation of a floating charge or enforcement of share pledges drawn under the Civil Code will entail further costs in terms of taxes or fees.

BANKRUPTCY

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

In terms of company rescue and reorganisation, measures under the Companies Act such as a compromise between the company with its creditors, amalgamation procedures and scheme of arrangement by a creditor or a shareholder in relation to the company, are available and further, as a formal restructuring procedure, the administration of the company under the Insolvency Act.

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

The Insolvency Act provides the following ranking of claims of preferential creditors:
1. Cost of the liquidator, including, among others:
   a. fees, expenses and remuneration of (i) the official receiver (ii) the liquidator (iii) a trustee of a proposal under the Insolvency Act
   b. reasonable costs of a person who applied to court for adjudication in case of bankruptcy or for an order in case of a liquidation
   c. out of pocket expenses incurred by a committee of inspection
   d. rent incurred by the official receiver or liquidator in relation to the debtor's property, let or tenanted to the official receiver or liquidator;
2. Amount due to the government and its agencies. This includes the Mauritius Revenue Authority, the Registrar General or to any local authority as regards taxes, registration duty, customs duty and other charges, dues or duties;
3. Wages or salaries due to employees up to a maximum amount of Rs. 30 000;
4. Costs of compromises by the company with its creditors under the Companies Act;
5. Payments made *pari passu* with first ranking fixed and floating charges and mortgages inscribed for more than three years;
6. Ranking *pari passu* with the aforementioned paragraph is compensation for unjustified dismissal and payment for termination of employment under the relevant employment legislation;
7. Unpaid rent to any landlord of the debtor for the period of six months preceding the date of adjudication or commencement of winding up;
8. First ranking fixed and floating charges and mortgages inscribed for less than three years.
9. Claims of victims of an accident, including medical and funeral expenses and damages for temporary incapacity;
10. Other privileges, securities and creditors such as claims pertaining to the cost incurred by a creditor for the preservation of any movable of debtor, unpaid vendor's privilege or lien and privileges for architects and builders;

11. Amounts due to the government and its agencies in relation to all other arrears due and unpaid in relation to taxes, charges and dues for over three months in the period not exceeding four years prior to adjudication or commencement of winding up; and
12. All other unsecured creditors' claims that have been proved in the bankruptcy or winding-up.

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

Ranking of priority between creditors is dependent on the order in which the security is registered or inscribed. However, as set out above, some secured creditors enjoy a superior ranking than others by virtue of the nature of their security or the type of security they hold (e.g. a fixed and floating charge inscribed for more than three years ranks higher than the same security which has been inscribed for less than three years).

OTHER

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

Mauritius enjoys a hybrid legal system, which combines the British common law principles and procedures and civil law practices, in turn derived from the French civil code.

However, the business/corporate legislation is derived from its commonwealth counterparts. For instance, the Companies Act and Insolvency Act are both derived from the New Zealand counterparts, while security provided under our laws is governed by the Civil Code and Commercial Code.

The judicial system in Mauritius is two tiered, the Supreme Court and subordinate courts.
The Supreme Court is the highest court of first instance and is composed of the Chief Justice, the Senior Puisne Judge and nineteen puisne judges. The various divisions which form part of the Supreme Court are the Master's Court, the Family Division, the Commercial Division, the Criminal Division, the Mediation Division and an Appellate jurisdiction (from decisions of the subordinate courts).

The Supreme Court also sits as the Court of Civil Appeal and the Court of Criminal Appeal to hear and determine appeals from decisions of the Supreme Court.

The Judicial Committee of the Privy Council is the final court of appeal of Mauritius, whereby applicants apply to the Judicial Committee of the Privy Council to appeal decisions of the Court of Appeal or of the Supreme Court of Mauritius.
The Supreme Court is also vested with the powers and authority to exercise its jurisdiction as a Court of Equity.

Subordinate courts consist of the Intermediate Court, the Industrial Court, the various district courts across the island, the Bail and Remand Court and the Court of Rodrigues.

The District Court has jurisdiction to hear cases of an amount up to and not exceeding Rs. 250 000 (USD 6 250), the Intermediate Court, an amount above Rs. 250 000 (USD 6 250) up to Rs. 2 million (USD 50 000) and the Supreme Court has unlimited jurisdiction to hear and determine any civil matters (including claims exceeding Rs. 2 million (USD 50 000)) and criminal proceedings.

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?

Competition Act
Competition law in Mauritius is regulated by the Competition Act, 2007 (**Competition Act**) and by the guidelines made thereunder, and the authority which regulates and promotes competition in Mauritius and sanctions restrictive business practices is the Competition Commission of Mauritius.

The Competition Act applies to every economic activity within, or having an effect within, Mauritius or a part of Mauritius.

Restrictive business practices under the Competition Act are collusive agreements, abuse of monopoly situations and merger situations. In the context of the banking services being provided to Mauritian entities, the relevant practices sanctioned under the Competition Act are collusive agreements and practices which would otherwise prevent, restrict or distort competition. Examples of such collusive practices are price fixing, market sharing, output restrictions, bid rigging and resale price maintenance.

Findings of collusive agreements and practices may result in financial penalties, not exceeding 10% of the turnover of that Mauritian entity for that particular year, up to a maximum of five years.

COMESA Competition Regulations
The Common Market for Eastern and Southern Africa (**COMESA**) has put in place a regional competition regime/policy in view of capturing anti-competitive practices which adversely affect trade within its economic bloc.

With Mauritius, being part of the COMESA, financial institutions lending and/or providing banking services to entities in Mauritius must also be aware of potential issues which may be triggered by the COMESA Competition Regulations as the regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the COMESA economic bloc.

Under these regulations, restrictive business practices are also prohibited, being deemed incompatible with the COMESA market which consists of all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states of the COMESA and have as their object or effect the prevention, restriction or distortion of competition within the COMESA market.

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 primary legislation catering for the protection of the environment is the Environment Protection Act, 2002 (**EPA**). The EPA sets out a licensing regime requiring either a preliminary environmental report (**PER**) or an environmental impact assessment (**EIA**) licence before certain activities can be carried out. The PER is required for smaller projects, while the EIA is for larger ones, having potential environmental impact.
Other regulations have been passed to deal with specific environment-related issues and include:

- The Environment Protection (Banning of Plastic Bags) Regulations 2020;
- The Environment Protection (Control of Single Use Plastic Products) Regulations 2020;
- The Environment Protection (Display of Fuel Consumption and CO^2 Emission Label) Regulations 2019;
- The Environment Protection (Environmental Standards for Noise) Regulations 1997;
- The Environment Protection (Standards for Hazardous Wastes) Regulations 2001; and
- The Environment Protection (Effluent Discharge Permit) Regulations 2003.

When financing the development of projects on the island, financial institutions need to ensure that relevant licences have been duly obtained by the Ministry of Environment and Sustainable Development and that any project finance will not be in contravention with any of the aforementioned laws and regulations.

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

The Foreign Exchange Control Act has been suspended by the Finance Act, 1994. Consequently, there are currently no foreign exchange control restrictions in Mauritius.

Nigeria

UDO UDOMA & BELO-OSAGIE

BANKING

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 from the official foreign exchange market only 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 of the activities.

This means that a domestic borrower will have to source foreign currency with which to fund any transaction that it proposes to enter, or has entered, into with an entity outside Nigeria to meet its obligations under such a contract.

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?

Section 78 of the Companies and Allied Matters Act, 2020 (**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 78 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.

Section 8 of the Banks and Other Financial Institutions Act, 2020 (**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, 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, circulars or advertisements published or disseminated by a newspaper, radio or television broadcasting, cinematograph or any other means.

Generally, 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'. The exception to this is in relation to foreign collective investment schemes. Section 195(2) of the ISA provides that anyone who solicits investment in a foreign collective investment scheme which is not approved by the SEC, is liable to a penalty of not less than NGN100 000 and a further penalty of NGN5 000 for every day the contravention continues.

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 be unable 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.

In addition, the Value Added Tax Act was amended by the Finance Act, 2020 and now requires a non-resident person that supplies goods or services to a person resident in Nigeria to include VAT in his or her invoice. Section 2(1) of the Value Added Tax Act (as amended) (**VAT Act**) provides for tax to be charged and payable on all supplies of goods and services in Nigeria. Section 2(2) describes taxable goods and services supplied in Nigeria as goods and services consumed or otherwise utilised in Nigeria. A taxable supply is deemed to take place in Nigeria where the service is provided to and consumed by a person in Nigeria, regardless of whether the service is rendered within or outside Nigeria or whether or not the legal or contractual obligation to render such service rests on the person within or outside Nigeria.

Section 10(2) of the VAT Act requires a non-resident person that makes taxable supply of goods or services to Nigeria to register and obtain a Tax Identification Number (**TIN**). Under the new regime, what triggers VAT registration is a supply of goods and services by a non-resident company to Nigeria. A non-resident person is deemed to have made a supply of services to Nigeria if the service is provided to and consumed by a person in Nigeria, regardless of whether the service is rendered within or outside Nigeria or whether or not the legal or contractual obligation to render such service rests on a person within or outside Nigeria (Section 2(3)(b)(ii) of the VAT Act).

The loan agreement would ordinarily contain a tax gross up provision which would obligate the Nigerian borrower to withhold and remit the VAT due on the invoice to the Federal Inland Revenue Service (FIRS) in the currency of the transaction.

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

Save for those 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 the company with the requisite borrowing powers, and ensure 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%. Since 1999, recipients that are resident in countries with which Nigeria has an effective double taxation treaty and receive interest from Nigeria are entitled to a 2.5% reduction on the generally applicable withhold tax (**WHT**) rate of 10% on the interest derived from Nigeria.

Recently, the Minister of Finance, Budget and National Planning approved the discontinuation of the unilateral application of a uniform WHT rate of 7.5% on dividends, interest and royalties paid by residents of Nigeria to residents in a double taxation treaty country. Only countries that were expressly granted this reduced rate of withholding under their double tax treaty will be entitled to this lower rate of withholding. The only double tax treaties that entitle foreign residents to the lower tax are South Africa, China, Spain, Singapore and Sweden. The tax, when withheld from interest and paid over to the Federal Inland Revenue Service, will be the final tax payable to the Nigeria 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 S8) Laws of the Federation of Nigeria of 2004 (**Stamp Duties 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, give 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 judgment (a 'foreign judgment') in a court other than a Nigerian court, the lender can enforce the judgment in Nigeria. A lender can enforce such judgment in the Nigerian courts by virtue of either the Reciprocal Enforcement of Judgment Act (Chapter 175) LFN, of 1958 (in the case of the judgments of an English court) or the Foreign judgments (Reciprocal Enforcement) Act (Chapter 35) LFN of 2004. A foreign judgment 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 judgment; 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 judgment.

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 model law and its rules.

In addition, it should be noted that the competition commission's approval will be required where the exercise of a power of sale over shares in a company results in a change of control in the business. In addition to this, depending on the nature of the business the approval of its regulator may be required.

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, movable 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

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 and/or buildings that the law deems such property to have become part of the land.

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 mortgagor 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 mortgagor, 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 L5) 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 Stamp 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 chargee, 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 MOVABLE PROPERTY

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

Tangible movable 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.

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 movable property owned by a company in Nigeria are a mortgage, charge and a pledge.

MORTGAGE

A mortgage of a tangible movable 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 movable 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 222(1) 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 movable property.

PLEDGE

A pledge is the deposit of goods or other tangible movable property (or of negotiable instruments), and in certain cases of the documents of title to such goods or other tangible movable 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

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 depositary for listed shares) so that the interest of the mortgagee in the specified shares can be noted.

1.4 CLAIMS AND RECEIVABLES

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

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

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 section 1.4.

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

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 default, the lender or its nominee (rather than the original licensee) 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 leasebacks, 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 requirements 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'
  Section 658 of the CAMA recognises the hardening period rule. The CAMA provides that where a company, within a specified period, does or procures anything to be done (including any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property or shares of the company) which has the effect of putting a person, being one of the company's creditors or a surety or guarantor, in a position of undue advantage, such act shall be deemed a preference of that person and be invalid. In the case of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), the relevant time is the period of two years ending with the onset of insolvency, and in any other case, the relevant time is the period of three months ending with the onset of insolvency. The CAMA also provides that a preference given to any person is not invalid unless the company which gave the preference was influenced, in deciding to give it, by a desire to put any person, being one of the company's creditors or a surety or guarantor in a position of undue advantage.
- 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, failing 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 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, amounts 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?

Yes. The reorganisation procedures available and practised in Nigeria include the following:

- Scheme of Arrangement and Compromise (Chapter 27 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 27 of CAMA, for the purpose of embarking upon a shareholders' or creditors' scheme of arrangement with a view to reorganising the company or restructuring its debts.
- By virtue of Section 715 of CAMA 2020, 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.
- Company's Voluntary Arrangement Sections 434–442 of the CAMA provides for Company's Voluntary Arrangement (**CVA**), which provides an alternative arrangement to companies facing financial challenges to conveniently structure the repayment of debts to their creditors. Unlike other company rescue options, a CVA allows directors to remain in control of the affairs of the company while the company continues to conduct its business. Also, approval by creditors of a company to a CVA only binds the company and all unsecured creditors (including unsecured creditors that do not agree to the CVA). Secured creditors who do not consent to the CVA, on the other hand, are not bound by the CVA and can enforce their security notwithstanding the CVA. Under a CVA, the directors are required to prepare a proposal, embodying the debt restructuring plan. The proposal will name an insolvency practitioner to act as a nominee. The nominee is required to submit a report to the Federal High Court opining on its viability and whether meetings of creditors and members should be convened to consider the proposal. Unless the court orders otherwise, the nominee would convene the meetings. The meetings may approve the proposal, with or without modifications. Where the creditors' meeting and the members' meeting take similar decisions, the decisions will become effective. Where there are differing decisions from the meetings, a member may apply to Federal High Court within 28 days of the decisions, for the decision taken at the members' meeting to have effect. The court may grant such application or make any other order it deems fit.
- Administration
  As an alternative or a precursor to winding up, administration provides the possibility for a company to survive its financial troubles and continue trading as a going concern. Immediately once the appointment of an administrator takes effect,
  no legal action (including legal proceedings, execution, distress, etc.) may be instituted or continued against the company or the company's property, except with the permission of the Federal High Court or the consent of the administrator. This moratorium protects the company from enforcement proceedings and legal action from its creditors, thereby enabling the administrator focus on implementing measures that are aimed at rescuing the company.
- 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 CAMA. The proposed merger must be approved by 75% of the shareholders present and voting at a meeting convened by the Federal High Court, and the merger must be sanctioned by the Federal High Court.
  Where the above conditions are met, the merger becomes binding on the companies even before the court sanction is filed at the CAC. The court sanction must, however, be filed at the CAC within seven days.

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 that has not crystallised, irrespective of whether the fixed charge was created before or after the floating charge. Where, however, a fixed charge is created subsequent to a floating charge, and the holder of the fixed charge had 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; or
- 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 statutorily 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 Minister 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, 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 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. 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, Port Harcourt, Sokoto, Owerri, Akure, Ekiti, Yola and Makurdi, thus bringing the total number of judicial divisions to sixteen. 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 duly 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 except 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 questions of Islamic personal law which the Court is competent to decide in accordance with the Constitution. The Court comprises a grand khadi 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 customary law and comprises a president and a number of judges as may be prescribed by the National Assembly and State Houses of Assembly, 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 to note that while the machinery to curb these defects can be improved, it is 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?

We have the Federal Competition and Consumer Protection Act, 2018 (**FCCPA**) which regulates competition, mergers and acquisitions in Nigeria and also protects the interests of consumers. Specifically, section 65 of the BOFIA provides that the provisions of the FCCPA will not apply to the operations of banks or other financial institutions licensed by the CBN. It further provides that the provisions of sections 92(1), (2) and (3), 94 and 98 of the FCCPA will apply to a merger, acquisition or other forms of business combination which involves banks, specialised banks or other financial institutions to the extent that all references to the Federal Competition and Consumer Protection Commission (FCCPC) in the FCCPA will be interpreted as a reference to the CBN. The BOFIA also empowers the CBN governor to make additional rules for mergers or acquisitions involving banks, specialised banks and other financial institutions.

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, 2007, Environmental Impact Assessment Act (Chapter E8) 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 Nigerian Sustainable Banking Principles Guidance Notes (**NSBPGN**);
- Nigeria Sustainable Principles Power Sector Guidelines (**NSPPSG**);
- Nigeria Sustainable Banking Agriculture Sector Guidelines (**NSBASG**); and
- Nigeria Sustainable Banking Principles Oil and Gas Sector Guidelines (**NSBPOGG**).

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 includes seeking to avoid, minimise or mitigate negative impacts on the environment and local communities in which they operate and promote potential impacts where possible, integrating environmental and social considerations into decision-making processes to avoid, minimise or mitigate negative impacts, respecting human rights, among others.

The NSBASG provides 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 NSBPOGG and NSPPSG 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 assessments 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 of 2004 (**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 transfer.

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
        - (e) 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. judgment 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.

South Africa

BOWMANS

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, 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, 1990 (**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, 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 65(1) of the Collective Investment Schemes Control Act, 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 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.

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 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 receiver). 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 IVB 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.

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 PE 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 to furnish the South African defendant with security for the costs the defendant may incur in defending the proceedings.

A South African court will not give effect to a foreign choice of law clause in a security document granting security over movable 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 conferring 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 judgment in a foreign jurisdiction, the South African courts will give effect to such foreign judgment 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 judgment 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 judgment 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 must 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 business strategy, the use of comparable data.

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

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, 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).

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, 1937 (**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 fulfil his or 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 MOVABLE PROPERTY

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

Under South African law, movable 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 movable property. A further distinction is drawn between corporeal (tangible) movable property which can be handled or touched and incorporeal (intangible) movable property which cannot be touched (for example, intellectual property, book debts and shares).

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 movable property are:

- A pledge, which is a type of mortgage of movable 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 movable property to the pledgee or its agent. Title to the movable 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 movables as security for a debt or other obligation. The general notarial bond is applicable to all movable property in the possession of the debtor (mortgagor). However, a general notarial bond does not, in the absence of attachment of the property before insolvency, 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) movable 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 Movable Property Act, 1993 (**Security by Means of Movable Property Act**), and registered under the Deeds Registries Act. In terms of the Security by Means of Movable Property Act, the movable 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 Movable Property Act. Special notarial bonds (once registered) constitute a form of real security over the movable 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 movable 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, 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, 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, 1998. Security over a South African ship which is neither registered nor capable of being 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

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 movable 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 movable property to the pledgee or its agent. Title to the movable 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) movable property in favour of a creditor (cessionary). It can either be structured as:

- generally in the form of a cession *in securitatem debiti* 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, 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 pledgee 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 movable property or cessionary of a right in movable property pledged or ceded to secure a debt; and
- a pledge or cession *in securitatem debiti* effected in respect of uncertificated securities is effective against third parties.

1.4 CLAIMS AND RECEIVABLES

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 section 1.3 above. There are no specific perfection requirements as the Act, 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

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 movable property. The deed of security must be recorded against the relevant mark in the Trademarks Register (established in terms of the Trademarks Act, 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, 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

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 section 1.4).

There are no specific perfection requirements for a cession in security, as the Act, cession itself is sufficient to perfect the security, save the issues relating to notification of transfer and the splitting of claims, as described in 1.4.

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

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 anticipando*.

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, 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 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 movable 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 movable 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 warehousing structures where the collateral agent of the lenders receives and controls the commodities in a warehouse, as pledgee.

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, 2008 (**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 securitatem debiti*, a pledge or a special notarial bond, the secured creditor can, without prior judgment against or excussion 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 executie*). An agreement of *parate executie* in respect of movables pledged and delivered to the secured creditor is valid, provided (i) the agreement itself is not unconscionable or against public policy, and (ii) the circumstances at the time of enforcement favour the exercise of the *parate executie* 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 taxes or fees paid on the 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 practised 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, 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 PREFERENT CREDITORS

Preferent 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 pre-determined order as set out in the Insolvency Act. Preferent 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 preferent creditor.

2.4 CONCURRENT CREDITORS

Concurrent creditors are paid from any proceeds of unencumbered assets that remain after preferent 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 movable asset to more than one creditor, as pledge is perfected by the delivery of the movable 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[1] mitigate the inherent risk involved in money lending by taking security from their borrowers[2]. 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[3]. However, in the event of default by the borrower, the bank would acquire/take possession of 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 89 of 1998 (as amended) (**Competition Act**). Section 12(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'[4]. 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 –

a. beneficially owns more than one-half of the issued share capital of the firm;
b. 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;
c. is able to appoint or to veto the appointment of a majority of the directors of the firm;
d. 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]);
e. 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 the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
f. in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
g. 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).'

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, trusts 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

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 state-owned finance institutions but for purposes of this note, we only refer to registered banks. It is important to note that this Update does not apply to other financial institutions, for example asset managers.**
3. **This assumes that the financing transaction does not include certain minority protections which would confer control over the asset or business on the lendor. This differs on a case-by-case basis and as such, we advise that competition advice be sought in each instance.**
4. **A 'firm' is defined broadly to include a 'person, partnership or a trust'.**
5. **The Competition Act has been amended to take into account the repeal of the Companies Act 61 of 1973 by the Companies Act 71 of 2008. This is regardless of whether the transaction involves only shares.**

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[6]) 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 threshold 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)[7] 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?

Legislation in South Africa that could incorporate lender liability for environmental damage includes the National Environmental Management Act 107 of 1998 (section 28) (**NEMA**), National Water Act 36 of 1998 (**NWA**) (section 19) and the National Environmental Management: Waste Act 59 of 2008 (**NEMWA**).

Section 28 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 undertaken; or… any other 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'[8]).

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[9]. Such an order can be directed at the landowner or the person who undertook the activity which may have caused the contamination[10].

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[11].

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 ordered in respect of the land[12]. 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[13]); 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[14] 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, 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 FSD of the SARB or a South African authorised dealer 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

6. **This is regardless of whether the transaction involves only shares.**
7. **The Competition Tribunal may impose an administrative penalty if the parties to a notifiable merger have implemented a merger without the approval of the relevant competition authority. A penalty imposed in terms section 59(1) of the Competition Act may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.**
8. **NEMA section 28(9) and the NWA section 19(6) respectively**
9. **Part 8 of Chapter 4 of NEMWA. 'Contaminated' is defined in NEMWA to mean 'the presence in or under any land, site, buildings or structures of a substance or micro-organism above the concentration that is normally present in or under that land, which substance or micro-organism directly or indirectly affects or may affect the quality of soil or the environment adversely'.**
10. **NEMWA sections 36 to 39.**
11. **NEMWA section 40.**
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**

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 schemes (**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.

Tanzania

BOWMANS

BANKING

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 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, 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 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 of 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 of 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 judgment obtained from a foreign jurisdiction can be enforced in Tanzania only if the country from which such a judgment has been obtained is listed in the Schedule to the Foreign Judgments (Reciprocal Enforcement) Act Cap. 8 (Revised Edition of 2002). Unless this condition is met, Tanzanian courts would not enforce any judgment 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

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.

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 of 2002) (**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 (**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 peaceably is not possible.

1.2 TANGIBLE MOVABLE PROPERTY

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

Generally, security over tangible movable property is covered under the Companies Act and the Chattels Transfer Act Cap. 210 (Revised Edition of 2002) (**Chattels Transfer Act**). The types of movable assets governed by the Chattels Transfer Act include any movable 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 movable property which covers property that can physically be handled or touched including aircraft and ships on the one hand, and incorporeal/intangible movable property includes property that cannot be touched such as goodwill or intellectual property, book debts and shares on the other hand.

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 movable property which are common under Tanzanian law include cession in security which is a way of granting security over incorporeal/intangible movable 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.

1.3 SHARES AND FINANCIAL INSTRUMENTS

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?

As with most intangible movable assets, security over financial instruments is usually created by way of a pledge or a cession in security, or a combination of these. To the extent that the financial instruments are evidenced by certificates, the certificates should be delivered to the lender with the relevant resolutions and transfer forms to perfect the security.

1.4 CLAIMS AND RECEIVABLES

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 way of assignment. In the case of a company, the assignment must be registered in accordance with section 96 of the Companies Act Cap. 212 in order to ensure perfection.

Another option in taking security over claims and receivables is by cession in the security. With this option there are no specific perfection requirements as the Act, cession itself is sufficient to perfect the security.

1.5 INTELLECTUAL PROPERTY

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 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

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 Tanzanian 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 movable assets, charge over shares, pledges, etc.

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

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 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 Tanzanian 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, insolvency, 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 of 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. The registration fee 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 in 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 over 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 movable 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 are required to ensure that the entities that they lend to are not in direct violation of anti-trust laws as provided in the Fair Competition Act, 2003 and the regulations made thereunder (**FCA**). The FCA provides for the establishment of the Fair Competition Commission which is the main body vested with the necessary powers to enforce the provisions of the FCA, the rules and orders made thereunder.

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.

Uganda

AF MPANGA

BANKING

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, 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, 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, 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.

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 JUDGMENTS

A foreign judgment against a domestic borrower may be enforceable against the domestic borrower in Uganda depending on the country where the judgment was obtained.

Under the Reciprocal Enforcement of Judgments Act Cap 21, judgments obtained in superior courts in the United Kingdom and Ireland are enforceable, upon registration, in Uganda. Judgments from Commonwealth countries that have legislative provisions in place for the enforcement of judgments of the High Court of Uganda in those countries may also be enforceable in Uganda. Foreign judgments from other countries may be enforceable by statutory order, if substantial reciprocity will be assured with respect to enforcement by that foreign country of judgments given in superior courts in Uganda. There are circumstances under which a foreign judgment may not be enforced in Uganda because under the law the judgment is not deemed to be conclusive. These include:

- 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 on the face of the proceedings it appears to be founded on an incorrect view of international law or a refusal to recognise the laws of Uganda in which that law is applicable;
- where the proceedings on which it is based are opposed to natural justice;
- where it has been obtained by fraud;
- where it sustains a claim founded on a breach of any law in force in Uganda; and
- where a judgment is contrary to public policy.

3.3 FOREIGN JUDGMENTS AGAINST IMMOVABLE PROPERTY

A foreign lender will not be able to enforce any foreign judgment 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).

3.4 IMMUNITIES

There are certain entities that are entitled to immunity from suit or attachment. The assets of the Government of the Republic of Uganda enjoy full immunity from attachment.

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

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.

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, 2009.

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 MOVABLE PROPERTY

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

Tangible movable property is property that has physical form and characteristics and which can be moved from one place to another or displaced. Under the Security in Movable Property Act, 2019, movable property is defined to include goods, tangible assets, investment securities, money, negotiable instruments and documents of title. Tangible assets means property that can be completely transferred by delivery or property in respect of which a valid document of title exists.

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 movable 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 interests 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 Security in Movable Assets Act, 2019. 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

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?

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.

LISTED SHARES

In June 2011, the Uganda Securities Exchange (**USE**) completed the process of immobilising paper share certificates for all listed companies. This changed the process of creating and perfecting security over shares for 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.

GOVERNMENT BONDS/TREASURY BILLS

The 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 into the CDS account of the borrower.

1.4 CLAIMS AND RECEIVABLES

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 charge may be created over receivables and perfected by attachment when an agreement is signed between the borrower and lender, in which the lender agrees to lend the borrower a certain sum of money and takes from the borrower identifiable claims or receivables as security. Under the Companies Act, 2012, if the receivable is a book debt, the charge has to be registered in accordance with the provisions of Companies Act governing charges.

1.5 INTELLECTUAL PROPERTY

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 the Companies Act Cap. 2012, a charge may be created on the goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright, in order to secure repayment of the money borrowed. The charge is perfected by the registration at the Companies Registry of the instrument creating the charge, as well as the particulars of the charge, within 42 days after its creation. In addition, the chargee is required to register the charge with the Registrar of Security Interest in Movable Property.

1.6 GENERAL BANKING FACILITIES

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 general banking facilities in Uganda is in the form of charges and debentures which are created and perfected in the ways explained above but more specifically by registration of the charge with the Companies Registry and or the Documents Registry.

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

2.1 FUTURE ASSETS OR ASSETS TO BE CREATED

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 an 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;
- finance leasing;
- instalment sales;
- sale and repurchase; and
- sale and leaseback.

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

Under the Companies Act, 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 to 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, 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 mortgagor'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 of the security by registration. A stamp duty of 0.5% of the total value of a mortgage 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. A nominal stamp duty of about USD 4 is paid on all further mortgages and on debentures. 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, 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, Qadhi courts for marriage, divorce and inheritance of property. The Local Council Courts and Qadhi Courts are however not active. Uganda also has specialised courts that deal with specialised matters such as the Industrial Court to deal with labour disputes and the Tax Appeals Tribunal to hear tax matters. Generally, the judicial system may be relied upon to adjudicate matters although there are cases of corruption and unreasonable decisions. There is also a problem of case backlog with cases being concluded within 2–5 years generally.

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, Section 19(1) of the Financial Institutions Act restricts or limits a group of related persons from collectively owning more than 5% in the shareholding of a financial institution without express approval from the Central Bank in writing.

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?

Yes, the National Climate Change Act, 2021 provides for climate change litigation. Section 25 of the Act provides that a person may apply to the High Court for relief against, among others, a

private entity whose action or omission threatens or is likely to threaten efforts towards adaptation to, or mitigation of, climate change. The Section goes on to provide that in addition to any other orders the Court may deem appropriate, the Court may also order: the prevention, halting or discontinuance of any act or omission; compensation to a person who has suffered loss and/or compel a government entity to take measures to reverse an act or perform an act that was omitted. The Section extends the right to bring such a legal action to even those who have not necessarily suffered personal injury.

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 in Uganda relevant to a financial institution.

Zambia

BOWMANS

BANKING

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 Zambia.

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?

Providing and offering banking products
The Banking and Financial Services Act, 2017 limits the offering and provision of banking products to entities that are licensed as banks or financial institutions. Providing and offering banking products without a banking licence is an offence and is liable to a fine not exceeding ZMW 150 000 (approximately USD 6 637).

Advertising and marketing banking products
The Bank of Zambia, however, has power under the Banking and Financial Services Act, 2017 to prescribe rules relating to the advertising of banking products. These rules may prohibit certain advertisements and prescribe the contents of the adverts on banking products in Zambia. The Bank of Zambia is yet to issue the advertisement rules.

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 Zambia opening bank accounts or holding assets outside Zambia.

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 local regulatory criteria 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?

There are no requirements which foreign lenders are required to comply with when advancing a loan to a domestic borrower in Zambia. The relationship between the foreign lender and a domestic borrower is governed or regulated by contract law.

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

There are no statutory obligations on domestic corporate borrowers. However, a domestic corporate borrower must obtain the necessary corporate approvals in accordance with its articles of association.

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?

In the event that a lender obtains a judgment in a foreign jurisdiction, said judgment cannot be enforced in Zambia by mere registration. Foreign judgments are subject to regulation under common law which requires re-litigation of the matter with the judgment as the cause of action or under the Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia (**Foreign Judgments Act**) which permits enforcement by registration where there are reciprocal arrangements between the nations involved. The countries with which Zambia has reciprocal arrangements and which are recognised by order of the President are limited. Thus, arbitration is a recommended form of dispute resolution.

Arbitral awards will be enforced by the Zambian courts if rendered by a recognised arbitral institution rendering an award under the auspices of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958.

Security documents in relation to assets situated in Zambia are required to be prepared by Zambian counsel for registration with the public registries in Zambia. Where documents are executed outside Zambia, authentication of the signatures on the such documents may be achieved by taking the following steps:

(a) execution of the document(s) before a Notary Public in the country of execution who should verify the signature and the seal of the parties to such document(s) and thereafter, presentation of the document(s) to the consular office in Zambia which has to issue a certificate of authentication confirming the authority of the Notary Public (this is not a requirement for a document executed in Ireland or the United Kingdom);

(b) verification of the signatures on the document(s) by the British Consul-General, Consul or Vice-Consul in the country of execution which verification is evidenced by way of the signature and seal of office of the British Consul-General, Consul or Vice-Consul being appended to such document(s); or

(c) execution of the document(s) by the last signatory from within Zambia.

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

There is no restriction. However, a tax referred to as property transfer tax will be payable. Further, if the company operates in a regulated sector such as mining, telecommunication or the financial sector, regulatory approval may also be 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

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

Under Zambian law, any land (whether the land is virgin, bare or has improvements (except the minerals)) or any property that cannot be moved and includes an object so firmly attached to the land that it is regarded as part of the land.

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 be taken by way of a mortgage. A mortgage is a security interest under which title (legal or equitable) in the asset is transferred to the mortgagee, coupled with a power to sell the secured asset following a default. A mortgage involves the transfer of title to an asset by way of security, on the express or implied condition that title will be re-transferred to the mortgagor when the secured obligations are discharged.

A legal mortgage is created by execution of a mortgage deed and is perfected by registration at the Companies Registry and the Lands and Deeds Registry at the Ministry of Lands under the Companies Act No. 7 of 2017 and the Lands and Deeds Registry Act Cap. 184 of the Laws of Zambia, respectively. Whilst an equitable mortgage is created by the deposit of the certificate of title relating to the land with the lender.

1.2 TANGIBLE MOVABLE PROPERTY

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

Tangible movable assets comprise property that can be handled physically and every form of movable property, including inventory, equipment, consumer goods, accession, negotiable instruments, negotiable documents and money.

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 over tangible movable assets are as follows:

- a pledge, where the pledgee maintains actual or constructive possession of the asset. Because possession is key, a Zambian law pledge can only be taken over assets that that are ascertainable. Possession can be either actual or constructive, such as through the use of a collateral manager or other agent. Where a pledge is created by actual possession, registration is not required under the Movable Property (Security Interest) Act No. 3 of 2016 (**Movable Property Act**);
- a fixed and floating charge – the degree of control that can be exercised on the asset will determine whether the charge should be fixed or floating. A fixed and floating charge must be registered on the Collateral Registry created under the Movable Property Act.
- a mortgage or fixed charge - this is appropriate for tangible assets such as an aircraft. The document creating security over aircraft must be registered at the Zambian Civil Aviation Authority.

1.3 SHARES AND FINANCIAL INSTRUMENTS

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 over assets such as shares is a share charge. A share charge is created by agreement and perfected as follows:

(a) depositing the share certificates comprising the shares with the lender; and
(b) registering the share charge with the Collateral Registry under the Movable Property Act.

In relation to listed securities and government bonds, the most common form of security is a pledge which must be perfected by registering the pledge with the Lusaka Securities Exchange Central Securities Depository (**LuSE CSD**) and the Bank of Zambia Central Securities Depositary.

1.4 CLAIMS AND RECEIVABLES

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 in relation to claims and receivables is an assignment. An assignment is created by agreement and perfected by:

(a) the assignment being absolute and in writing;
(b) express notice of the assignment being given to the counterparty from whom the assignor would have been entitled to receive or claim the chose in action; and
(c) registration of the assignment on the Collateral Registry.

1.5 INTELLECTUAL PROPERTY

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 created in relation to claims and receivables in intellectual property is an assignment which must be perfected as provided in 1.4.1.

1.6 GENERAL BANKING FACILITIES

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 created in relation to debts and rights under contracts is an assignment which must be perfected as provided in 1.4.

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

Under Zambian law, security can be granted over all types of assets. However, security over permits, mining rights or licences that are issued in relation to a regulated entity may be difficult to enforce as the grant or enforcement of security may require the approval of a regulator. Furthermore, there may be local ownership restrictions where security is granted over shares in companies in which local ownership restrictions apply.

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;
- finance leases;
- hire purchase; and
- instalment sales.

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

Under the Companies Act, 2017, a company is prohibited from giving financial assistance to any person for the purpose of acquiring shares in the company. Whilst public companies are completely prohibited from providing financial assistance, the rules may be relaxed for private companies. For example, a private company may provide financial assistance if the financial assistance is to a wholly owned subsidiary of the company or the assistance is approved by a special resolution of the company.

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

The circumstances under which a secured lender may enforce its collateral will depend on the terms of the security document. These events 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 a material adverse change.

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?

Registration fees are payable when a security is being registered at the Companies Registry, the Collateral Registry and the Lands and Deeds Registry. Registration fees will also be payable on the enforcement of a security document registered on the Collateral Registry.
Taxes are generally not payable except in instances where the enforcement involves the transfer of shares in a company.

BANKRUPTCY

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

The Corporate Insolvency Act, 2017 provides for schemes of arrangement and business rescue proceedings. A scheme of arrangement is available whether a company is financially distressed or not.

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

Under the Corporate Insolvency Act, secured creditors are paid first and thereafter the following are paid in priority to all other unsecured debts:

- liquidation costs;
- employees' wages or salary, accrued leave, severance pay equal to three months' pays;
- amounts due by way of workmen's compensation;
- all government taxes
- all government rents not more than five years in arrears;
- rates payable to local rates due at the relevant date; and
- all unsecured creditors.

For banks and financial institutions licensed under the Banking and Financial Services Act, 2017, the priority after payment of secured creditors is as follows:

- expenses incurred in the process of compulsory winding up or dissolution;
- depositors whose deposit claims are—
  - (i) covered by a deposit protection scheme; and
  - (ii) not covered by a deposit protection scheme;
- taxes and rates dues;
- wages and salaries of employees of the financial service provider, excluding executive employees, senior management and other categories of staff that the Bank of Zambia may determine, for a period of three months;
- charges and assessments due to the Bank of Zambia; or
- other claims against the financial service provider in an order of priority that the Court may determine on application by the Bank of Zambia.

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 on the relevant registry, that is, the Collateral Registry, the Lands and Deeds Registry and the Companies Registry.

OTHER

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

The judicial system in Zambia is governed by the Constitution of Zambia as amended in 2016 (**Constitution**). The Constitution establishes superior courts, namely, the Supreme Court, the Constitutional Court, the Court of Appeal and the High Court. The subordinate courts are the magistrates' courts. The majority of commercial civil suits are heard and determined by the High Court as the subordinate court's jurisdiction to hear civil matters is limited to claims below ZMW 100,000 (approximately USD 4 545). An appeal from the decision of the High Court lies to the Court of Appeal and then to the Supreme Court. The Constitutional Court deals only with questions arising from the Constitution. Decisions of the Constitutional Court are not appealable.

The rule of *stare decisis* is applicable in Zambia and therefore 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?

The Banking and Financial Services Act, 2017 prohibits anti-competitive conduct amongst financial service providers. Financial service providers are prohibited from colluding with other financial service providers with respect to:

- the rate of interest to be levied on a deposit or a credit facility;
- the amount of a charge for the provision of a financial service;
- provision of, or refusal to provide, banking or financial services in a manner that restricts competition in the financial sector.

The Banking and Financial Services Act, 2017 further prohibits financial service providers from compelling a person to contract for another service with the financial service provider or another person as a condition for receiving a banking or financial service from the financial service provider. Furthermore, a financial service provider must not compel a customer to use the financial service provider's choice of a supplier of any service or goods.

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 main environmental requirement is under the Environmental Management Act, 2010, which requires that a proprietor of a project which is likely to have an impact on the environment to undertake an environmental impact assessment (**EIA**) and obtain approval from the Zambia Environmental Management Agency before commencing the project. A borrower undertaking a project which is likely to have an impact on the environment must obtain an EIA as the EIA will be a requisite to other operational permits.

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

There are no exchange control rules in Zambia.

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