

Ecobank

# Taking Security in Africa

A Comparative Guide for Investors

## Ghana

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# About This Guide

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

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

This guide provides an overview of the types of assets over which security can be taken, the different types of security, as well as the related procedures for the perfection and enforcement of such security in Africa. With contributions from leading local law firms, we focus on eight of the most active jurisdictions for foreign direct investment: Egypt, Ethiopia, Ghana, Kenya, Mauritius, Nigeria, South Africa, and Uganda.

This Ghana chapter was prepared with the help of Ghanaian firm ENSafrica Ghana.

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# Types of Security Interests

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

## Shares

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

## Bank Accounts

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

## Land

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

## Contractual Rights

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

## Insurance Proceeds

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

## Authorisations and Licences

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

## Intellectual Property

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

## Personal Property and Tangible Assets

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

## Can security be taken over future assets?

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

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

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

# Types of Security Interests

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

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

**What about third-party security?**

Under Ghanaian law, a company can grant security over its assets to secure the obligations of a third party, provided the necessary authorisations and consents are obtained, and the company's constitutional documents do not prohibit or restrict the grant of such security. However, a company may not grant security over its assets in favour of a third party if doing so will breach financial assistance rules or where there is no corporate/commercial benefit to the company in providing such security.

# Perfecting Security Interests and Priority

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## Are there any asset-specific perfection requirements?

### Shares

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

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

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

### Bank Accounts

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

### Land

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

Furthermore, the Lands Commission's consent is required for the creation of a mortgage over state land or stool land. In all other cases, subject to the terms of the relevant lease, the lessor's consent may be required in order to create a mortgage over land that is subject to a lease. For property owned by a married individual, written spousal consent is required.

### Contractual Rights and Insurance Proceeds

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

Except otherwise stated in the underlying contract, notice to the relevant counterparty is not required for the validity of the assignment. It is, however, usual to give such notice. If notice is not given, the assignor must be joined to any enforcement proceedings unless the court holds that to join the assignor to such proceedings will be impossible or impracticable.

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

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

# Perfecting Security Interests and Priority

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## Authorisations and Licences

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

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

## Intellectual Property

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

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

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

## Stamping

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

Under the Stamp Duty Act, all instruments subject to stamping must be stamped within two months of their execution or two months after it is first received in Ghana, where it is executed outside Ghana. Stamping is, however, a pre-requisite to registration of security at the Office of the Registrar of Companies and the Lands Commission. Thus it is essential that stamping

be completed as soon as possible after execution of the documents. Doing so will enable registration of the security within the time limits set under law.

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

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

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

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

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

# Perfecting Security Interests and Priority

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## Perfection of Security

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

## Registration at the Office of the Registrar of Companies

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

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

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

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

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

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

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

## Registration at the Collateral Registry

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

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

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



# Perfecting Security Interests and Priority

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

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

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

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

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

## Registration at the Lands Commission

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

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

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

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

## Registration of Guarantees

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

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

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

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

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

# Enforcement of Security

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

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

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

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

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

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

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

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

Out-of-court enforcement regarding any asset is generally permitted under Ghanaian law if the security has been registered with the Collateral Registry.

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

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

Governmental consents are only required prior to enforcement of security if the security is granted over an asset in which a Ghanaian governmental or statutory authority has an interest or is in respect of a governmental authorisation or licence.

# Enforcement of Security

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

Except in the case of specific sectors such as the petroleum and power sectors, where specific local content rules apply, there are no restrictions on who can enforce a security interest over assets in Ghana, provided that the person seeking the enforcement is the secured party, its trustee, agent, assignee, successor, or transferee. From a practical perspective, a secured party that is a foreign entity can engage a local receiver to act on its behalf in the enforcement of security.

# Insolvency/Bankruptcy Proceedings

## Overview

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

Primary legislation for bankruptcy and insolvency in Ghana in respect of limited liability companies is contained in: (i) the Companies Act 2019 (Act 992), which applies to voluntary insolvency (also referred to as private liquidations); and (ii) the Corporate Insolvency and Restructuring Act 2020 (Act 1015), which applies to an insolvent company (the Company Insolvency Rules).

### Members' voluntary winding up / private liquidation:

Voluntary liquidation is only available if the company is solvent. The members of a company may wind up the company if the:

- directors swear an affidavit that the company is solvent; and
- the company passes a special resolution to wind up the company voluntarily, with the resolution providing for the appointment of the liquidator.

After the company's debts (including any outstanding taxes) have been paid, the company's name is struck off the Companies' Register with notice published in a public gazette.

**Creditors' winding up:** If a company is insolvent, its liquidation must be by official liquidation whereby the company may be placed into receivership or be wound up by its creditors. Under Ghanaian law, official liquidation may be commenced by:

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

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

## Winding-up or insolvency registers

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

## Are "company rescue" or reorganisation procedures available?

A company may enter into administration restructuring procedures. A company may also enter into a scheme of arrangement with its creditors to reorganise the company's share capital or restructure its debts, including by debt-for-equity swaps. Not less than 75% of the company's shareholders and creditors, present and voting at their respective meetings, must approve a scheme of arrangement. The High Court must also sanction the scheme.

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

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

# Insolvency/Bankruptcy Proceedings

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

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

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

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

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

**Floating charges:** A floating charge on the property of the company is invalid if the winding-up of the company commences within 12 months of the creation of the

charge (unless it is proved that the company was solvent immediately after the creation of the charge), except to the amount of the cash paid to the company at the time of, or subsequent to, the creation of the charge and in consideration for the charge, together with interest on that amount at the yearly interest rate applicable to the 91-day government treasury bill. Note that in such case, the amount borrowed will become an unsecured debt.

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

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

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

# Insolvency/Bankruptcy Proceedings

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

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

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

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

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

A debt a company owes a creditor can be contractually subordinated to a debt which that company owes other creditors, and contractual subordination ordinarily is recognised and enforceable under Ghanaian law (including during insolvency of the company).

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

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

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