

# Taking Security in Africa

A Comparative Guide for Investors

Nigeria

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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 Nigeria chapter was prepared with the help of Nigerian firm ALN | Aluko & Oyebo.

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# Types of Security Interests

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

### Shares

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

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

### Bank Accounts

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

### Land

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

### Contractual Rights

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

### Insurance Proceeds

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

The Central Bank of Nigeria (CBN)'s Foreign Exchange Manual prohibits a Nigerian resident (whether a corporate or a natural person) from assigning Nigerian residents' annuities and insurance policies to non-residents. To the extent that the CBN is not the insurance regulator in Nigeria and the restriction is contained in the Foreign Exchange Manual, this could be interpreted as a restriction on the ability of a non-resident to procure foreign exchange utilising the proceeds of enforcement in respect of an assignment of annuities and insurance policies belonging to Nigerian residents. In the absence of any certainty as to this interpretation, if a non-resident lender proposes to take security over residents' insurance policies, that lender would either: (i) appoint a local security agent to which the insurance proceeds are assigned on the lender's behalf; or (ii) require the borrower to establish an insurance proceeds account into which all insurance proceeds are paid, and then take security over that account.

The insurance regulator in Nigeria prohibits the assignment of reinsurance policies.

# Types of Security Interests

## Authorisations and Licences

Rights arising under authorisations and licences can be assigned by way of security to a secured party. However, since authorisations and licences are considered personal to the beneficiary or licence holder, an assignment or transfer of the beneficiary's or licence holder's rights to a third party as security requires the issuing authority's consent.

Accordingly, the terms of most authorisations and licences (including petroleum mining licences; petroleum prospecting licences; marginal field licences; power generation licences; aviation licences; shipping licences; communication licences; and mining licences issued in the oil and gas, power, aviation, shipping, telecommunications, and mining sectors, etc.) would usually prohibit the licence holder from mortgaging, charging, or otherwise encumbering its interest under the authorisation or licence without the issuing authority's prior consent.

## Intellectual Property

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

## Personal Property and Tangible Assets

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

## Can security be taken over future assets?

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

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

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

- **Statutory corporations:** The capacity of a statutory corporation to grant security over its assets will depend on the establishing statute of that statutory corporation. Where the establishing statute does not include an express right to grant security, the relevant statutory corporation would be prohibited from doing so.
- **Incorporated companies:** The ability of an incorporated company to grant security over its assets may be limited by the articles and memorandum of association of that company. Where a company's articles and memorandum of association are silent on the ability of that company to grant security, any such grant will be ineffective unless ratified by a resolution of its shareholders and/or its board of directors.
- **Trustees:** Generally, a trustee has power to grant security over any trust property, except where such power is expressly restricted by law or in the instrument of trust.
- **Adjudged bankrupts:** Under the Bankruptcy Act, a person's assignment (including an assignment by way of security) of their future or existing book debts will be void against the bankruptcy trustee as regards any book debts that have not been paid at the commencement of the bankruptcy, unless that assignment has been registered with the Chief Registrar of the Federal High Court in a register kept by the Chief Registrar for that purpose. Other circumstances under which a security interest could be set aside (including on an insolvency or a bankruptcy) are discussed further below.

# Types of Security Interests

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

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

**What about third-party security?**

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

# Perfecting Security Interests and Priority

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## Are there any asset-specific perfection requirements?

### Shares

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

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

Additional steps are required to be taken to perfect charged shares that are in dematerialised form and deposited with Nigeria's Central Securities Clearing System (CSCS). These steps include the secured parties: (i) submitting to the CSCS a memorandum which the chargor and chargee have jointly signed; and (ii) requesting the CSCS to place a lien on a specified number of the shares as well as an undated letter signed by the chargor authorising the lender to sell the shares where a default occurs.

### Bank Accounts

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

In practice, an account bank will usually require notification of a security interest over accounts the bank holds. Notifying the account bank of a charge over an account is recommended in any event.

### Land

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

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

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

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

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

# Perfecting Security Interests and Priority

## Contractual Rights and Insurance Proceeds

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

If the assignor is a company, an assignment of contractual rights and insurance proceeds is required to be registered at the CAC, where it is an assignment by way of security that would qualify as book debts.

## Authorisations and Licences

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

## Intellectual Property

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

## Aircrafts, Ships, and Vessels

**Consents:** In creating a mortgage over ships and vessels, written consent must be obtained prior to creating a mortgage over a ship or vessel that is registered in Nigeria by submitting an application to the Director General of the Nigerian Maritime Administration and Safety Agency (NIMASA). The application for consent must be accompanied with the board resolution of the mortgagor authorising the creation of the mortgage, a duly stamped deed of mortgage as well as the payment of NGN 35,000 to obtain the consent form and a consent fee of NGN 50,000 per vessel.

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

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



# Perfecting Security Interests and Priority

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

### Stamp Duty

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

The stamp duty payable on a legal mortgage or a debenture deed is 0.375% of the secured amount. In practice, a security document is usually submitted to the Stamp Duties Commissioner for an assessment of the applicable stamp duty prior to paying the duty and stamping the document. However, vessel and ship mortgages are exempt from payment of stamp duties in Nigeria.

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

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

Generally, a failure to stamp a security document does not render the security document or the security interest created thereunder void or invalid. However, the Stamp Duties Act provides that no instrument executed in Nigeria, or wheresoever executed relating to any property situated or any manner or thing done or to be done in Nigeria, will be admissible in evidence, except in criminal proceedings. Nor will they be available for any purpose whatsoever unless duly stamped in accordance with Nigerian law in force at the time when the instrument was first executed. Legal practitioners in Nigeria have interpreted this to mean that a security document is inadmissible in evidence in civil proceedings unless it is stamped. A corollary of this is that any security document that is required to be registered with the CAC or any other government body must be stamped prior to its submission for registration. Thus, in relation to registrable security documents, if the documents are not stamped, they will not be accepted for registration and non-registration would render the security void against a liquidator or creditor of the company. On the other hand, if the security documents are not registrable, a failure to stamp will simply render them inadmissible in evidence until they are stamped.

### CAC Registration

Under the Companies and Allied Matters Act 2020 (CAMA), any security document or instrument under which a company creates a mortgage or charge (whether fixed or floating) must be registered at the CAC within 90 days of that mortgage's or charge's creation. A failure to register a registrable security document with the CAC will render the mortgage or charge thereunder void against a liquidator or any creditor of that company.

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

# Perfecting Security Interests and Priority

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## Consent and Registration Fees on Mortgages Over Land

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

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

## Registration at the NCR

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

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

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

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

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

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

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

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

# Enforcement of Security

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

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

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

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

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

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

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

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

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

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

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

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

# Insolvency/Bankruptcy Proceedings

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## Overview

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

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

## Winding-up or insolvency registers

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

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

The CAMA introduces the concept of administration in respect of companies in Nigeria. This involves managing the affairs of a company by an administrator with the sole objective of rescuing the company, achieving a better result for the company's creditors and realising property in order to make a distribution to one or more

secured or preferential creditors. An administrator may be appointed by: (i) order of court; (ii) the holder of a floating charge; or (iii) the company or its directors. The duration of appointment of an administrator automatically ceases to have effect at the end of the period of one year from the date on which the administration took effect, except if extended in accordance with the CAMA.

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

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

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



# Insolvency/Bankruptcy Proceedings

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

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

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

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

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

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

**Preferential creditors' rights:** The ranking or priority of a secured party in whose favour a floating charge is created may be restricted or set aside with respect to preferential creditors where the assets of the company are insufficient to satisfy the preferential debts. Statutorily preferred debts include local rates, charges, taxes, and pay-as-you-earn deductions; deductions under the Nigerian Social Insurance Trust Fund (formerly known as the National Provident Fund); wages and salaries; accrued holiday remuneration; and compensation due to workers. These amounts would rank equally among themselves or rateably if a company's assets are insufficient.

Other than payments to preferential creditors, secured assets fall outside of the debtor's assets that are available to the general pool of creditors, and these secured assets are used to satisfy the claims of the relevant secured parties. This position has been recently clarified in the Business Facilitation Act 2023, which states that the holder of a fixed charge shall have priority over other debts of the company including preferential debts.

# Insolvency/Bankruptcy Proceedings

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

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

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

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

Creditors will rank in the following order of priority:

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

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