LATHAM & WATKINS LLP

Taking Security in Africa

A Comparative Guide for Investors

South Africa

May 2024

About This Guide

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

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

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

This South Africa chapter was prepared with the help of South African firm ENS.

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Types of Security Interests

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

Shares

In South Africa, shares in companies are issued in certificated form (evidenced by a physical share certificate) or uncertificated form (transfer thereof takes place by way of electronic entry in a central securities depository). Security over certificated shares can be created by way of a pledge agreement. Security over uncertificated shares is created by way of a security cession agreement and notation in the pledgor's securities account. Note that the doctrinal nature of cession in *securitatem debiti* is akin to that of a pledge, or in respect of uncertificated, listed shares only, an outright transfer in security.

Bank Accounts

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

Land

Security over land and other immovable property can be created by a mortgage (commonly referred to as a mortgage bond) under the Deeds Registries Act 1937.

Contractual Rights

Security over rights arising under a contract or an agreement can be created by a security cession agreement.

Insurance Proceeds

A security interest over insurance proceeds can be created by a security cession agreement.

Authorisations and Licences

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

Intellectual Property

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

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

Personal Property and Tangible Assets

There are two categories of movable property: (i) corporeal movable property (such as machinery or equipment); and (ii) incorporeal movable property (such as a chose in action). Security over either category of movable property can be taken by a pledge, a general notarial bond (over all the debtor's movable assets), or a special notarial bond (over specific movable assets of the debtor). In addition, a lien may arise over corporeal movable property as a right to retain physical control of the asset to secure payment of a claim. In South Africa, notarial bonds are most commonly used. Unlike an outright transfer of a chose in action, a pledge does not give the beneficiary the right to use the chose in action in its business.

Types of Security Interests

Can security be taken over future assets?

The right to future intangible assets can be granted as security by way of a security cession agreement. The courts have adopted the notion of a cession in *anticipando*, whereby the security cession will effect a transfer of the future right when that right comes into existence, without the need for any further act of transfer, and neither party can unilaterally renege on the security cession in the interim period.

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

A grantor of security must have the requisite legal capacity to bind itself and/or its assets. This determination is made on a case-by-case basis. Some entities have limited capacity to grant security. These include public entities regulated by the Public Finance Management Act 29 of 1999, as amended from time to time, and insurers regulated by the Insurance Act 18 of 2017, as amended from time to time.

Further, the principle of *actor sequitur forum rei* applies in South African law such that the party giving security over assets cannot give more rights to the security than he holds himself.

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

While security trustees or security agencies are generally not established under South African law, an agency or trustee arrangement is recognised under South African law. The South African law of agency would govern such an arrangement. Consideration must be given to whether the agent or trustee has been given the proper authority to enforce security on behalf of its principal, and the extent of that authority. Practical issues must also be taken into account, for example, the registrar of Deeds for Immovable Property will not register a mortgage bond over land in the name of a trustee acting for and on behalf of underlying lenders.

What about third-party security?

A person or entity may grant security over its own assets to secure its own obligations or the obligations of a third party. This is often done by providing a suretyship and/or a guarantee for the obligations of the third party. Contracts of guarantee establish primary obligations that stand independently from any other debt or agreement. This distinguishes them from contracts of suretyship, which are accessory obligations. Accessory obligations are contingent upon the presence or creation of a valid and effective principal obligation. If the principal obligation is null or has been fulfilled, such as through payment or performance, such accessory obligations cease to exist.

Perfecting Security Interests and Priority

Are there any asset-specific perfection requirements?

Shares

There are no formal requirements regarding certificated shares. As a practical step to enable the enforcement of security, the share certificates, together with a share transfer form signed by the pledgor (and left blank as to transferee), are delivered to the pledgee. In accordance with the Financial Markets Act 19 of 2012, a pledge over uncertificated shares is established by way of electronic entry in the securities account where the shares are held, and an outright transfer occurs by debiting the transferor’s account and crediting the transferee’s account. An outright transfer may attract securities transfer tax unless certain rules, set out in the Securities Transfer Tax Act 25 of 2007 and as amended from time to time, are followed to qualify the transfer for an exemption.

Bank Accounts

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

Land

The owner of the immovable property over which security is to be created, or a duly authorised conveyancer acting on the owner’s behalf, must execute a mortgage bond in the presence of the Registrar of Deeds. Registration is deemed upon the Registrar’s signature being affixed to the bond. The Registrar thereafter enters the mortgage in the appropriate register and endorses the registration of the bond against the title deed of the property burdened by the bond. A mortgage bond does not transfer title in the mortgaged immovable property to the creditor. It confers a limited real right on the creditor to have the immovable property sold in execution and the proceeds of that sale applied to settle or reduce the debt secured by the mortgage bond.

Contractual Rights and Insurance Proceeds

There are no specific requirements or formalities prescribed for establishing a security cession over contractual rights. The conclusion of a valid security cession agreement is sufficient to establish the security.

There are no specific requirements or formalities prescribed for establishing a South African law security interest in insurance proceeds. The conclusion of a valid security cession agreement is sufficient to establish the security. The pledgee should take possession of the policy documents.

Authorisations and Licences

Requirements in respect of security over authorisations and licences vary depending on the specific legislation under which the authorisation or licence is granted.

Intellectual Property

The security interest over trademarks, patents, and registered designs must be recorded against the trademark, patent, or design in the official registers maintained for that intellectual property right. In addition, the security interest must be recorded in writing and lodged with the Companies and Intellectual Property Commission (CIPC) with proof that the application has been served on the registered proprietor of the intellectual property right, together with any other parties recorded as having an interest in the intellectual property right. The prescribed forms to be completed and submitted differ depending on the nature of the right.

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

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

Perfecting Security Interests and Priority

Personal Property and Tangible Assets

The steps required to create and perfect security interest over movable property depends on the type of security that is created, as described below.

Pledge: A pledge is established by entering into a valid security cession agreement and, in the case of corporeal property, delivery of the pledged property to the pledgee. Except as set out below, no specific formalities are required to deliver incorporeal property. However, delivering certificates evidencing the incorporeal property, for example, is customary in order to grant the pledgee a measure of control over the pledged property. There are no registration or notification requirements for a pledge.

General notarial bond: A general notarial bond must be attested by a public notary and is established by registration at the deeds office — in accordance with the Deeds Registries Act 1937 within three months of the date of the bond's execution — in order for the notarial bond to be enforceable against third parties. However, the creditor only acquires a right over the bonded property under a general notarial bond upon taking possession of the property.

Special notarial bond: A special notarial bond must be attested by a public notary and registered at the deeds office that covers the area where the property is situated, within three months of the date of the bond's execution. A special notarial bond is perfected by possession of the assets over which security is held.

Lien: There are no specific perfection requirements for a lien. A lien is established by the existence of an obligation owing to the lien holder and the lien holder's possession of the asset over which the lien is held.

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

Conveyancers (in relation to mortgage bonds) and public notaries (in relation to notarial bonds) are entitled to charge fees for preparing bonds according to a prescribed tariff, which calculates a fee based on the sum secured by the bond on a sliding scale and range from 1.2% to 1.9% of the sum secured as the starting amount charged.

Nominal registration fees are payable for the registration of mortgage bonds, general notarial bonds, special notarial bonds, and security interests relating to intellectual property.

On enforcement of security, nominal fees are payable to the Sheriff of the court to the extent that the Sheriff will be required to attach property.

There are no exceptions or exemptions to making such payments; however, the level of fees payable to conveyancers and public notaries can be negotiated.

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

Creating a security interest over immovable property in favour of two or more creditors is possible. The ranking of the various creditors' security would have to be expressly stated in the mortgage bonds. In the absence of an express statement on the ranking of creditors' rights to the secured assets, the secured creditor whose security is registered first will presumably take priority. Regarding immovable property, a creditor can verify the priority of its security interest by inspecting the deeds register.

If more than one interest or limited interest is entered against the same uncertificated securities, priority must be granted to the interest or limited interest in the order entered in the securities account or central securities account. The order of priority in any interest or limited interest may be varied by agreement between the parties, but this variation is not effective against third parties.

The principle of *prior in tempore*, *potior in iure*, which means "first in time, greater in right" is applicable to security cessions. If there is a conflict between two or more security cessions, the *prior in tempore* principle implies that the security cession first in time will be preferred first in law. As such, the security interest of the first cessionary will not rank *pari passu* with the security interests of subsequent cessionaries. Subsequent cessionaries are only entitled to the balance of the proceeds once the first security interest is satisfied. The *prior in tempore* principle applies by operation of law, and it can only be varied if the party who was first in time agrees to have their rights subordinated.

Enforcement of Security

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

In a default or breach of the secured obligation, a secured creditor generally is entitled to enforce its security against the asset over which the creditor holds a security interest.

For a mortgage bond over immovable property, or a general notarial bond over all the assets of a person or entity, the secured creditor is first required to take possession of the secured assets — usually by way of attachment by the Sheriff of the High Court of South Africa — under a court order to that effect. After this, the secured creditor can sell the assets and apply the proceeds to discharge the outstanding obligation.

Except for mortgage bonds, general notarial bonds, and special notarial bonds, a secured creditor can, without having to obtain a court order and without notifying the security provider, enforce security by procuring the sale of the secured assets and applying the proceeds to satisfy the principal obligation — provided this is in a contractual agreement between the parties.

A court order would always be required to enforce mortgage bonds, general notarial bonds, and special notarial bonds.

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

There are no governmental or other consents required in connection with the enforcement of any category of security interest or against any type of asset. However, a party wishing to enforce security should consider exchange control implications and the legislation governing the asset that is the subject of a security interest.

Insolvency/Bankruptcy Proceedings

Overview

In South Africa, insolvency is regulated primarily by the Insolvency Act 24 of 1936 (Insolvency Act), as amended from time to time. Regarding companies, the Companies Act 71 of 2008 (Companies Act 2008) and the Companies Act 61 of 1973 (Companies Act 1973), together with the Companies Act 2008 (the Companies Acts, both as amended from time to time), would also apply.

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

Regarding insurers, the Insurance Act 17 of 2018, as amended from time to time, would apply, together with the Insolvency Act and the Companies Acts.

Winding-up or insolvency registers

No such registers exist in South Africa. A search can be conducted with the CIPC to determine whether a company is in the process of being wound up. However, this search is not always accurate because it provides no information as to whether a company is solvent, nor does it contain any information as to whether an insolvency application has been launched.

Are "company rescue" or reorganisation procedures available?

Prior to commencing insolvency proceedings there are various reorganisation procedures available under South African law:

Regarding companies, the Companies Act 2008 provides for: (i) business rescue proceedings; or (ii) compromises with creditors. The Financial Institutions (Protection of Funds) Act 28 of 2001 (Financial Institutions Act, or POF) provides for the curatorship — or a less invasive procedure known as "statutory management" — of certain "financial institutions" (as defined in section 1 of the POF Act). The Financial Sector Laws Amendment Act of 2021 (FLSA Act) repealed curatorship of banks under the Banks Act and introduced a system of resolution for certain designated financial institutions, including banks and systemically important financial institutions. It did so by inserting a new Chapter 12A (Resolution of Designated Institutions, or the Resolution Chapter) into the Financial Sector Regulation Act of 2017 (FSRA). The impact of the introduction of the new resolution regime is discussed in further detail below.

Business Rescue

"Business rescue" — defined in section 128(1)(b) of the Companies Act 2008 — relates to: (i) proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for temporary supervision of the company; (ii) a temporary moratorium on the rights of claimants against the company; and (iii) the development and implementation of a plan to either rescue the company by restructuring its affairs to maximise the likelihood of the company continuing to exist and be solvent. If the company cannot so continue, it relates to a plan that results in a better return for the company's creditors or shareholders than would result from the company's immediate liquidation.

The test for whether a company is "financially distressed" set out in section 128(1)(f) of the Companies Act 2008 is satisfied if it appears reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or if it appears reasonably likely that the company will become insolvent within the immediately ensuing six months.

The Companies Act 2008 provides for the appointment of a business rescue practitioner to oversee the company during business rescue proceedings.

Compromise

Section 155 of the Companies Act 2008 provides for a compromise between a company and its creditors, regardless of whether the company is financially distressed.

A company's board of directors or liquidator (if the company is being wound up) can propose an arrangement or a compromise of the company's financial obligations to all of its creditors, or to all of the members of a class of the company's creditors.

The company's board of directors or liquidator, as applicable, is required to deliver the proposal to every company creditor or to every member of the relevant

Insolvency/Bankruptcy Proceedings

class of creditors, and to the CIPC. The proposal will be adopted if supported by a majority in number representing at least 75% of all the creditors or class of creditors who are present and voting at a meeting called for that purpose.

Curatorship or Statutory Management of Financial Institutions

Under section 5 of the Financial Institutions (POF) Act, the registrar can apply to the High Court "on good cause shown" to have a curator appointed to take control of and manage the business of a "financial institution". The definition of "financial institution" in section 1 of the Financial Institutions (POF) Act, excludes banks and any other designated institution (which are designated in terms of the FSRA) and includes (unless so designated) collective investment schemes, hedge funds, insurers, securities dealers, and any entity that is licenced to provide financial services in terms of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS), or is a "representative", as defined in FAIS, of such an entity.

No meeting of creditors results from curatorship or statutory management. Therefore, the secured party's contractual rights will not automatically be stayed by reason of a curatorship or statutory management of a financial institution (as defined). However, while a financial institution is under curatorship, the High Court can stay all legal actions against the financial institution or issue any other order regarding the curator's powers and duties.

Replacement of Bank Curatorship by the South African Resolution Regime

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

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

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

Insolvency/Bankruptcy Proceedings

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

At the commencement of insolvency proceedings, a moratorium is placed on the enforcement of security against the insolvent company.

Once insolvency procedures commence, a secured creditor holding movable or immovable property as security may not as a general rule realise that security itself but must deliver it to the liquidator of the insolvent debtor for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator that the creditor holds the security before the second meeting of creditors. Once the liquidator realises the secured property, the liquidator must pay the proceeds (less the liquidator's fees) to the secured creditor, in preference to other creditors.

Section 83 of the Insolvency Act provides for alternative procedures regarding the realisation of certain types of property held as security. For example, if the property consists of securities, a bill of exchange, or a foreign financial instrument, the creditor can, before the second meeting of creditors, sell the property through an authorised user or a stockbroker (or if the creditor is a stockbroker, through another stockbroker).

Except in respect of master agreements defined in section 35B of the Insolvency Act, after realising the property, the secured creditor must forthwith pay the net proceeds to the liquidator. Provided that the secured creditor can prove a valid claim against the insolvent's estate, the secured creditor will be entitled to a payment out of the proceeds of such realisation.

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

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

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

Under the Insolvency Act, a court can, at the liquidator's insistence, set aside certain transactions entered into by an insolvent person/entity prior to its liquidation. These are referred to as impeachable dispositions. A disposition is a transfer or abandonment of rights to property, and can include, among other things, a mortgage over immovable property, a cession, a pledge, or a special notarial bond. Sections 26, 29, and 30 of the Insolvency Act do not apply to dispositions under certain master agreements. Section 35B of the Insolvency Act 1936 defines agreements containing standard terms and published by the ISDA (mentioned above), the International Securities Lending Association (ISLA), the ICMA (mentioned above), and the Bond Market Association (TBMA) as "master agreements".

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The Insolvency Act provides for the following impeachable dispositions:

Disposition Without Value

In terms of section 26 of the Insolvency Act, a court may set aside an insolvent company's disposition of property provided such disposition is not made for value. A court will set aside such a disposition if the liquidator proves that:

- more than two years before the liquidation of the insolvent's estate, the insolvent made a disposition of property and that, immediately after the disposition was made, the insolvent's liabilities exceeded its assets and the disposition was not made for value; or
- within two years of the liquidation of the insolvent's estate, the insolvent made a disposition of property not for value, unless the person claiming under or who benefited by the disposition proves that, immediately after the disposition was made, the insolvent's assets exceeded its liabilities.

In either case, if it is proved that at any time after making the disposition the insolvent's liabilities exceeded its assets by an amount less than the value of the property disposed of, the disposition may be set aside to the extent of such excess.

Voidable Preferences

Section 29 of the Insolvency Act provides for the setting aside of a disposition of an insolvent person or entity's property made six months prior to the date of liquidation and which has the effect of preferring one creditor above another, if, immediately after the disposition, the liabilities of the insolvent person or entity exceed the value of its assets. In these circumstances, a court can set aside the disposition.

The setting aside of such a disposition may be avoided if the person or entity in whose favour the disposition was made can prove that the disposition was made in the ordinary course of the insolvent person or entity's business, and that the disposition was not intended to prefer one creditor above another.

Undue Preference to Creditors

Section 30 of the Insolvency Act provides that if an insolvent person/entity, prior to its liquidation, made a disposition of its property at a time when the insolvent's liabilities exceeded its assets with the intention of preferring one of its creditors above another, that disposition can be set aside.

Collusive Dealings

Section 31 of the Insolvency Act provides for the setting aside of dispositions where the insolvent person/entity, prior to its liquidation and in collusion with another person, disposed of its assets in a manner that prejudiced the insolvent's creditors or preferred one creditor over another.

Fraudulent Dispositions

In addition to the Insolvency Act, dispositions of property prior to liquidation or sequestration can be set aside at common law, if the insolvent and the recipient of the alienation had the common intention of prejudicing other creditors. For an action to be successful, the third party that acquired the asset must: (i) have had actual knowledge of the fraud; or (ii) have not given value for the asset.

Preferential Creditors

The Insolvency Act creates preferences regarding the following claims over an insolvent estate (among others):

- costs of liquidation (section 97);
- costs of execution (section 98);
- salary or remuneration of employees (section 98A);
- statutory obligations (section 99);
- income tax (section 101); and
- claims of holders of general notarial bonds and certain special notarial bonds (section 102).

Insolvency/Bankruptcy Proceedings

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

Contractual subordination provisions agreed between creditors of a company are legally recognised if the company should become insolvent. This is subject to the qualification that they are not dispositions that can be set aside, and subject to an exception for uncertificated securities.

The Insolvency Act provides for mandatory netting of master agreements, which cannot be contracted out of as an intercreditor matter. As of the date of liquidation of the company's estate, all unperformed obligations arising out of "master agreements" are automatically terminated. These unperformed obligations include obligations regarding assets in which ownership has been transferred as security. The values of the unperformed obligations are calculated at market value as at the date of liquidation or sequestration, and the market values so calculated are netted against one another so that a net amount payable is determined.

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

The Insolvency Act and the Companies Act regulate the ranking of security in circumstances of insolvency. The order of priority for the ranking of creditors on the insolvency of a company is typically as follows:

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

The Insolvency Act does not prescribe any special priority between secured creditors, since each creditor has a secured claim on a particular asset. If different creditors hold security over the same asset, the secured creditor that took security earlier in time than the other will have a higher-ranking claim regarding that asset.

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