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Taking Security in Ghana

A Comparative Guide for Investors

ABOUT THIS GUIDE

In light of Africa's sustained economic growth over the last decade, 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 the legal system particular to the jurisdictions in which the investment is being made.

Taking Security in Ghana - A Comparative Guide for Investors provides an overview of the types of assets over which security can be taken in Ghana, the different types of security, as well as the related procedures for the perfection and enforcement of such security.

This Ghana guide forms part of wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Ghanaian firm ENSafrica.

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GHANA

TYPES OF SECURITY INTERESTS

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

Shares

Security can be taken in 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 procedure for creating a mortgage.

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 oil mining licences, mining permits, electricity generation and distribution licences and rights under petroleum agreements) are considered to be personal to the beneficiary or licence holder, and therefore, 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 license, 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 charger 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 specific 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 power and authority to enter into the relevant security documents.

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, or 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 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 regarding the security interests should be 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.

PERFECTING SECURITY INTERESTS AND PRIORITY

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 chargor 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 charger, upon the expiration of a 30-day statutory notice period.

Bank Accounts

In the case of a fixed charge, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the chargee's consent. With a floating charge, the chargor is permitted to retain control of the charged accounts unless and until the charge converts into a fixed charge following the occurrence of a "crystallisation" event (as described in the account charge document).

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.

An instrument creating a mortgage over land in Ghana must be filed at the Land Registration Division of the Lands Commission under the terms of either the Land Registry Act 1962 (Act 122) if the land is within a non-registration district, or the Land Title Registration Law 1986 (PNDCL 152) if the land is in a registration district. As at the date of this note, the registration districts are Accra, Tema, Kumasi and parts of Winneba. This filing can only be made once any applicable stamp duty has been paid in respect of the instrument.

Furthermore, the Lands Commission's consent is required for the creation of a mortgage over land the State owns. 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.

Contractual Rights and Insurance Proceeds

In order to perfect an assignment of contractual rights, notice of the security interest must be given to the counterparty of the underlying contract. The failure to give notice to such counterparty does not invalidate the security assignment. 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.

In an assignment of the right to receive proceeds under an insurance policy, this means giving notice to the relevant insurer.

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 or insurer 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, to have the secured party endorsed as an additional loss payee on the insurance policy is also prudent.

Authorisations and Licences

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

Note, 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, the licensor must be notified of any assignment of rights under an intellectual property license agreement.

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

Stamp duty: Security documents must be stamped prior to registration within 28 days of execution (whether executed in Ghana or not). In the event of a delay in registering a security document, an extension of time to register the security document may be obtained from the High Court of Ghana. The extension is typically granted as a matter of course except if granting an extension will prejudice the legitimate interests of a third-party.

Subject to certain exceptions, the stamp duty payable on the principal security document in a transaction is 0.5% of the secured amount. A rate of 0.25% of the secured amount is charged for every additional security document. In practice, a security document is usually submitted to the stamp duties office for an assessment of the applicable stamp duty prior to payment of the duty and the stamping of the document.

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

In addition to any stamp duty that is payable, a nominal administration fee is payable on presentation of a security document to the stamp duties office.

- **Collateral Registry registration:** After stamping, under the Borrowers and Lenders Act 2008 (Act 773), any security document or instrument a company creates must be registered at the Collateral Registry within 28 days of creation. A failure to register a security document with the Collateral Registry may render the security interest void.

Nominal fees usually below US\$100 are payable.

- **Companies Registry registration:** After stamping, the particulars of any security document creating security over the assets of a Ghanaian registered company must also be registered at the Companies Registry under the Companies Act 1963 (Act 179). The security document must be registered at the Companies Registry within 28 days of the creation of the security interest. A failure to register a security document with the Companies Registry may render the security interest void.

Nominal fees usually below US\$100 are payable.

- **Lands Commission registration fees:** Applicable fees depend on the size of the land over which security has been created, but the fees are not significant.

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 security's date of creation.

Generally, the earlier created security interest ranks ahead of the later one. However, if a security interest is required to be registered with the Collateral Registry, Companies Registry or Lands Commission, a registered security interest has priority over an unregistered security interest.

Regarding assignments of contract rights, the timing of notification to the counterparty determines the priority of assigned interests.

A fixed charge on an asset and a security assignment would 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

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

The Borrowers and Lenders Act 2008 (Act 773) 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, and 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.

Other than with respect to land (on which see below), all realisations of charges over non-cash assets must be by way of auction sale.

Any disposal of land subject to a mortgage is typically permissible only under a court- approved sale arrangement or by an out-of-court auction organised in accordance with the Auction Sales Act 1989 (PNDC 230).

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

- Required to discharge reasonable costs the chargor incurred in realising the security;
- Required to discharge legal expenses to the extent the credit agreement permits
- Required to discharge the secured obligations
- The borrower owes to persons who have a subordinate charge in the secured assets
- The borrower owes any other person who has given the secured party notice of its interest in the secured assets

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. 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 license.

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

Generally, 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 require a local receiver to act on its behalf.

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: (a) Act 179 which applies to voluntary insolvency (also referred to as private liquidations), and (b) the Bodies Corporate (Official Liquidation) Act 1963 (Act 180) 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
 - 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 have been paid, the company's number 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 either:
 - A special resolution of the company
 - A petition to the Registrar of Companies by a company member or creditor
 - Conversion from a private liquidation (where it is determined that the company cannot, in fact, pay its debts)
 - A petition to the court by a member, creditor or Registrar of Companies

Note, 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 Companies Registries in respect of insolvency proceedings. Note, these registries are not available electronically or over the telephone.

Are "company rescue" or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Ghanaian law allows for a company to enter into an arrangement and compromise with its creditors, or undertake corporate restructuring. A company, for example, can 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?

Generally, an asset that is assigned or over which a fixed charge is created is not considered part of the company's assets for insolvency purposes. In this regard, insolvency proceedings will not affect a creditor's right to enforce its security. However, a company's assets that are subject to a floating charge will form part of the pool of assets the official liquidator will distribute during insolvency. Thus, preferred creditors such as employees and tax authorities will be paid before the floating charge holders are paid. The ability of a floating charge holder to enforce its rights over the security without recourse to the official liquidation process is, accordingly, significantly restricted.

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

- **Fraudulent preference:** The Company Insolvency Rules address situations in which a debtor may be deemed to have fraudulently ranked a creditor above other creditors in view of a forthcoming insolvency or bankruptcy proceedings.

Any charge registered after insolvency or winding up proceedings have commenced will be deemed to have been made with the intention of securing a preference for that creditor to the detriment of other creditors, and the liquidator may claw back the secured asset.
- **Floating charges:** Any floating charge on the undertaking or property of a company created within 12 months prior to the commencement of winding up proceedings against that company will be void unless one can prove that the company was solvent immediately after the charge was created.
- **Preferential creditors' rights:** Payments accruing to the company's preferential creditors have priority over any claim for principal or interest due on debts secured by a floating charge. Statutorily preferred debts include (i) remuneration not exceeding GHS6,000 owed to an employee in the four months preceding the commencement of the winding up, and (ii) tax liabilities owed to the State or a local authority that have become due.

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 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. Such a contractual agreement should be respected upon the company's insolvency.

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

Priority between creditors will be as follows:

- Secured creditors holding a fixed charge
- Preferential creditors
- Creditors with floating charges
- Unsecured creditors

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