

LATHAM & WATKINS



Taking Security in Mauritius

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

This Mauritius guide forms part of wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Mauritian firm BLC Robert & Associates.

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MAURITIUS

TYPES OF SECURITY INTERESTS

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

Shares

Security over the shares of a Mauritian company can be taken by way of a pledge or fixed charge

Bank Accounts

Security over a bank account is typically taken by the accountholder assigning its rights and interest in that bank account to the secured party or by way of a pledge.

Land

Security over land is taken by way of a mortgage or a charge (typically a fixed charge, but a floating charge can also be used)

Contractual Rights

Security over rights arising under a contract or an agreement can be taken by way of a pledge, a charge (if the beneficiary is an *Institution Agréées*) or an assignment.

Insurance Proceeds

Security over insurance proceeds can be taken by way of a fixed or floating charge (if the beneficiary is an *Institution Agréées*), an assignment or a pledge.

Authorisations and Licences

A security interest cannot be created over rights arising under authorisations or licences.

Intellectual Property

Security can be created over intellectual property or other intangible assets by way of a fixed or floating charge (if the beneficiary is an *Institution Agréées*) or a pledge.

Personal Property and Tangible Assets

Security over personal property can be taken by way of a charge (if the beneficiary is an *Institution Agréées*) or a pledge.

Can security be taken over future assets?

Security can be taken over future assets by way of a floating charge or pledge of receivables.

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

As a general rule, any person having the capacity to dispose of an asset or right can grant a security interest in that asset or right.

The nature of the security interest usually will determine who can legally hold that security interest. For example, certain security interests like certain share pledges can be created only in favour of banks established in Mauritius, while others such as fixed and floating charges can be created in favour of *Institution Agréées* (being entities involved in the provision of finance or banking services generally).

Are security trustees or security agencies recognised under Mauritian 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 Mauritian law, and a security trustee or agent can be appointed to hold security in trust on behalf of lenders and other secured parties. If a foreign security trustee or agent is validly appointed, no additional steps are required for Mauritian law to recognise the trustee or agent. In addition, provided that the security granted in favour of a trustee or agent has been properly created and perfected, the trustee's or agent's rights regarding the security interest should be enforceable. The Financial Services Commission must license any local entity acting as a security trustee.

What about third-party security?

Under Mauritian law, a person can grant security over his or her assets to secure the obligations of a third-party. If a person grants a fixed or floating charge over his or her assets to secure the obligations of a third-party, that person must first grant a guarantee (suretyship) in respect of that third-party's obligations.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

In the case of a pledge over the shares of a company that holds a global business license (which, generally, would be a Mauritian offshore company) that is granted in favour of a financial institution, a 'commercial pledge' can be taken. A 'special civil pledge' is taken when the beneficiary is a bank licensed in Mauritius. These are the two common forms of pledges, and in all instances, a pledge is taken by executing a written pledge agreement.

To perfect a special civil pledge or a special commercial pledge over shares, the pledgor must transfer the pledged shares by executing and remitting to the secured party (i) a transfer in guarantee documents; (ii) a transfer of shares form that is undated and executed in blank; (iii) the related share certificates if the shares are certificated; and (iv) an extract of the issuer's registers evidencing that inscription of the pledge in its books.

Such pledges over shares do not need to be registered with the Registrar General. However, the registration of the security interest is recommended to give the security document a *date certaine* (a date which cannot be challenged in court).

Bank Accounts

To perfect an assignment of rights and interest in a bank account or a pledge, a notice of the assignment or pledge must be given to the account bank. In addition, for the assignment, the execution of a *bordereau* will be required.

Land

- **Mortgage:** A mortgage over land is created under a deed prepared by a notary public. To perfect a mortgage over land, the notarial deed under which the mortgage was created must be registered and inscribed at the Conservator of Mortgages/Registrar General of Mauritius. If an entity holding a global business license grants the mortgage, the mortgage must be inscribed and registered within three months of the date of the notarial deed. Any other mortgage must be inscribed and registered within eight days of the date of the notarial deed.
- **Charge:** A fixed or floating charge over land is created by deed under private signature. A charge over land must be registered and inscribed with the Conservator of Mortgages/Registrar General of Mauritius. If an entity holding a global business license grants the charge, the charge must be inscribed and registered within three months of the date of creation. Any other charge must be inscribed and registered within eight days of the date of creation.

Contractual Rights

- **Pledge:** Security by way of a commercial pledge is created by entering into a deed, specifying the receivables that are being pledged and the amount secured. A commercial pledge over receivables is perfected by registering and inscribing the deed under which the pledge is created with the Conservator of Mortgages/Registrar General.
- **Charge:** The creation and perfection requirements for charges over contractual rights are the same as those that apply to charges over land.
- **Assignment:** Rights in respect of receivables arising under a contract may be assigned to a secured party, by the execution of a *bordereau*, which is a deed that sets out the details of the receivables to be assigned, the names of the parties and the amount secured. Executing a *bordereau* gives full force and effect to that assignment without the need for any further registration or other perfection formalities.

Insurance Proceeds

- **Pledge:** To perfect a civil pledge over an insurance policy an inscription must be made on the registers of the insurer that issued the insurance policy. The inscription must specify that the insurance policy is subject to a pledge, the name of the beneficiary of the pledge and the amount secured.
- **Charge/assignment:** Assignments and charges over insurance proceeds are perfected in the same manner as for contractual rights.

Intangible assets

- **Pledge:** A pledge in respect of intangible assets is created by executing a deed. To perfect a pledge over intangibles, the pledgor must transfer possession of the pledged assets to the secured party. Registration of the deed under which the pledge was created with the Conservator of Mortgages/Registrar General of Mauritius is recommended (and in the case of a civil pledge, is required).
- **Charge:** The creation and perfection requirements for charges over intangible assets are the same as those for charges over land.

Personal Property

- **Pledge:** The creation and perfection requirements for pledges over personal property are the same as those that apply to pledges of intangible assets.
- **Charge:** The creation and perfection requirements for charges over personal property are the same as those that apply to charges over land.

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

The only fees, costs and expenses payable in connection with the perfection of security are the registration and inscription fees payable to the Conservator of Mortgages/Registrar General, if applicable. These fees are capped at MUR51,000 (US\$1,700) per document, irrespective of the amount secured. No stamp duties are payable.

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

Security over a single asset can be granted to more than one creditor. Priority among secured parties is generally determined as follows — with respect to:

- Mortgages, priority will depend on the security interest's date of inscription at the Conservator of Mortgages/Registrar General
- Pledges, the creditor in possession of the pledged property has priority
- Fixed and floating charges, priority will depend on the security interest's date of inscription at the Conservator of Mortgages/Registrar General
- Assignments, the date of the *bordereau*

However, creditors may agree among themselves to contractually vary the order of priority or waive or subordinate their security interests to those of other creditors by entering into an intercreditor agreement or a *pari passu* arrangement.

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 procedure for enforcing security outside of bankruptcy or insolvency proceedings will depend on the type of security interest to be enforced. In each case, an event of default must have occurred under the loan arrangement, deed or other agreement under which the security interest was granted.

- **Mortgages:** A creditor can enforce a mortgage over immovable property, such as land, by serving the debtor with a *commandement*, which is a notice that, among other things, notifies the debtor that if it fails to pay the amount claimed, a seizure will be effected on the mortgaged property. The service of a *commandement* is done through a public or private registered usher. The seizure of the mortgaged asset cannot be effected until at least 10 days have elapsed since the date on which the *commandement* is served. The usher will then draw up a memorandum of seizure that must be registered and transcribed with the Conservator of Mortgages/Registrar General of Mauritius. A creditor that enforces a mortgage must also register and transcribe a memorandum of charges with the Conservator of Mortgages/Registrar General of Mauritius containing the desired conditions of sale. The property may then be seized and sold before the Supreme Court of Mauritius to the highest bidder.
- **Pledges:** The enforcement procedure with respect to pledges will depend on the type of pledge involved. A creditor seeking to enforce a regular civil pledge or a regular commercial pledge must apply to the Supreme Court of Mauritius for authorisation to realise the pledged assets or transfer ownership of the pledged assets to that creditor. Once the creditor receives authorisation, it may then serve on the debtor a *commandement* and follow the same procedure outlined above in respect of mortgages to seize and sell the pledged assets. To enforce a special civil pledge over shares, the creditor must serve notice on the debtor stating its intention to proceed with the transfer of the pledged shares. The creditor can then cause the pledged shares to be transferred after seven days of the notice being served. In a special commercial pledge over shares that is granted in favour of a financial institution, that financial institution can realise the pledged shares by completing and executing the share transfer form. No other formalities are required.
- **Fixed Charges:** A creditor can enforce a fixed charge that it holds over assets by appointing a public or private registered usher to seize the assets without the need to serve a *commandement* on the debtor. If the debt remains unpaid, for three weeks following the date of seizure, the creditor can then sell the seized assets by public auction (in the case of movable assets), or by serving a *commandement* in the same manner described above (in the case of immovable assets).
- **Floating Charges:** To enforce a floating charge, the floating charge must have crystallised. The crystallisation of a floating charge will occur if the creditor serves notice on the Conservator of Mortgages/Registrar General of Mauritius to create an inventory of all assets the debtor owns that are subject to the floating charge at the time of the notice. The creditor must also serve a notice on the debtor to inform the debtor of the commencement of seizure proceedings. Once the inventory is completed, a public or private registered usher must be appointed to carry out the seizure and sale of the charged assets in the same way as a fixed charge.

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

Except for the authorisations of the Supreme Court of Mauritius required for the enforcement of regular civil actions, no governmental authorisations are required for the enforcement of security under Mauritian law.

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

No.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

The insolvency regime for companies is set out in the Insolvency Act 2009 (the Insolvency Act), which covers the voluntary and involuntary (winding-up by court) insolvency procedures.

Certain statutory bodies may be excluded, in whole or in part, from the general insolvency legislation or may be subject to a separate insolvency regime that was enacted specifically for that particular statutory body.

For example, banks and other financial institutions are subject to the company rescue and insolvency regime in the Banking Act in priority to the general insolvency legislation. There is separate legislation similar to the insolvency regime in the Banking Act that applies to insurance companies.

Winding up or insolvency registers

A search carried out at the Bankruptcy Division of the Supreme Court of Mauritius or at the Registrar of Companies/Director of Insolvency should reveal any insolvency proceedings that are pending against a company. These searches cannot be conducted online or over the phone.

Are “company rescue” or reorganisation procedures available?

The laws of Mauritius allow for a company to be placed into voluntary administration, whereby the business, property and affairs of that company are administered in such a way that: (a) will provide an opportunity for the company or a substantial part of its business to continue existing; or (b) if there is no possibility for the company or a substantial part of its business to continue existing, will result in a better return for its creditors and shareholders than if immediate insolvency proceedings were commenced.

In voluntary administration, a person is appointed as the administrator of the company in administration. The company can appoint the administrator or, in certain circumstances, a liquidator, the holder of a charge over all or substantially all of the company's assets or a creditor on application to the court can make the appointment.

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?

A secured creditor must obtain leave of court before enforcing any security interest granted to it by a company subject to insolvency proceedings.

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

Under the Insolvency Act, the court can set aside any transactions made by, or any charge or security constituted over assets of, a company within two years of the commencement of insolvency proceedings and at a time when that company was insolvent.

Certain preferential creditors, which include tax authorities and workers, have super-priority over secured creditors (including holders of fixed charges) regarding the receivables from an insolvency.

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?

Yes.

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

Priority between creditors will be as follows:

- Super-priority preferential creditors
- Secured creditors holding a fixed/floating charge
- Other preferential creditors
- Unsecured creditors

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