

LATHAM & WATKINS



# **Taking Security in Uganda**

## **A Comparative Guide for Investors**

## ABOUT THIS GUIDE

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

This Uganda guide forms part of wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Ugandan firm, Signum Advocates.



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# UGANDA

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## TYPES OF SECURITY INTERESTS

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

#### Shares

Security over shares in a Ugandan company can be taken by way of a share pledge agreement.

#### Bank Accounts

Security over the proceeds of a bank account can be taken by way of a fixed or floating charge.

#### Land

Security can be taken over land by way of a mortgage, charge or lien.

#### Contractual Rights

Security can be granted over contractual rights by way of an assignment, provided that there is nothing in the relevant contract that prohibits the granting of such security.

#### 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 Licenses

Security can be taken over authorisations and licences by way of a fixed or floating charge.

Security can only be granted once prior written consent of the line regulator has been obtained.

#### Intellectual Property

A company will typically take security over trademarks, copyrights and other intellectual property by way of a fixed or floating charge or by way of a licence under a copyright.

#### Personal Property and Tangible Assets

Security in the form of a fixed or floating charge, pledge or mortgage may be taken over personal property such as land or stock.

### **Can security be taken over future assets?**

Security can be taken over future assets.

### **Can security be taken generally over all of a person's/ entity's assets or is it necessary to take security over each individual asset, or each class of assets, separately?**

Under Ugandan law, depending on the type of assets, security may be taken over all the assets or each asset individually.

Debentures may cover more than one movable asset. Likewise, mortgages used for fixed assets such as land may cover two or more immovable assets. Further charges may also be created by means of a separate security instrument relating to the same asset or group of assets.

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

Generally, a company may grant or hold a security interest provided the company has sufficient capacity and authority.

There may be certain restrictions applicable to the granting of security interests by regulated industries, or applicable to a security interest that encumbers family land or martial property.

### **Are security trustees or security agencies recognised under Ugandan 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 Ugandan law. Provided the security trustee or agent is validly appointed, and the security granted in its favour has been properly perfected, the trustee's or agent's rights regarding the security interest should be enforceable.

### **What about third-party security?**

Under Ugandan law, where a person or entity proposes to grant security over its assets to secure the obligations of a third party, a power of attorney should be executed between the parties allowing the third party to take security. The power of attorney must specifically grant the third party the right to create security over property belonging to another person or entity. Alternatively, the parties may execute a tripartite agreement where the third party agrees to use their assets as security.

The ability to grant security over a company's assets to secure the obligations of a third-party is permitted only to the extent the company's constitutional documents authorise it to do so. Where a company borrows within its capital limits, a board resolution must be passed, however, where the company is borrowing beyond its share capital, an ordinary shareholder resolution must also be passed in addition to the board resolution. More stringent requirements apply in the case of public companies acting as borrowers. Most public companies in Uganda are listed on the securities exchange.

# PERFECTING SECURITY INTERESTS AND PRIORITY

## Are there any asset-specific perfection requirements?

### Shares

- **Registration:** Share pledges should be registered in accordance with the provisions of the Companies Act 2012 (the “Companies Act”). Generally, the chargee is required to register the pledge with the Companies Registry within 42 days of execution of the pledge.

Charges of any foreign company must be registered and will require notarisation of the security document prior to the registration.

- **Deposit of share certificates:** The borrower must deposit the relevant share certificates with the secured party together with the signed share transfer forms. The share pledge must be registered by the secured party and evidenced by means of a certificate of registration.

### Bank Accounts

A charge over a bank account must be registered as a debenture with the Companies Registry. In 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 a specified event occurring as set out in the account charge documents.

### Land

- **Charge:** Under Ugandan law, mortgages and charges over land must be registered at the Ministry of Lands Registry. There is no applicable time limit, although charges are only effective upon registration, and the date of registration determines the priority between the charges. Registration will be carried out once the Lands Registry receives two original copies of the charging instrument or mortgage deed, a copy of the certificate of title and in the case of companies, a copy of the company resolutions authorising the charge.

Individuals providing security for a company over their personal property, should also present the Lands Registry with an executed power of attorney in favour of the secured party. The power of attorney must be registered and commissioned by the Commissioner for Oaths in order to have effect. If the power of attorney is to be executed outside of Uganda, it must be notarised by a notary public in the place where it is executed and registered in Uganda.

In cases where a married individual is providing security over the matrimonial home, a declaration from the applicant must be provided, stating whether he/she is married. If so, a copy of the marriage certificate must also be provided to the secured party. In addition, evidence of spousal consent must be provided to the Land Registry.

Companies are however obliged under the Companies Act to keep a register of all charges created over its assets.

- **Deposit of title deeds:** The grantor of the security interest is required to deposit the title deeds with the secured party.

## Contractual Rights and Insurance Proceeds

Notice of the security interest must be given to the counterparty of the underlying contract for an assignment of contractual rights and insurance proceeds. Any debenture relating to insurance and contractual rights that is granted by a company, must be registered at the Companies Registry in order to perfect the security.

The failure to give notice to a counterparty will affect the priority of the security interest but may not affect the validity of the security, unless the underlying contract or insurance policy requires the consent of the counterparty to be obtained.

## Authorisations and Licenses

Provided any necessary consent and/or no objection letter from the issuing authority/line regulator has been obtained, the charge can be perfected by registration of the debenture at the Companies Registry.

Any charge on licenses that is granted by a company, must be registered as a debenture with the Companies Registry.

## Intellectual Property

As with other contractual rights, any charge that is granted by a company, should be registered in accordance with the provisions of the Companies Act. The chargee is required to register the charge with the Companies Registry within 42 days of execution of the charge. In addition, the chargee is required to register the charge at the Registrar of Intellectual Property.

## Personal Property and Tangible Assets

- **Charge:** The charge must be registered with the Companies Registry within 42 days of execution of the charge, following the payment of the relevant stamp duty and registration fees.
- **Pledge:** The pledge can be perfected in the same manner described above under the Companies Act. In certain cases, movable property may also be required to be delivered to the secured party.
- **Mortgage:** The mortgage over personal property can be perfected in the same manner as land under the Companies Act.
- **Aircraft:** For aircrafts, the security interest is noted on the certificate of registration, which is issued by and registered at, the Ugandan Civil Aviation Authority. In the case of a company chargor, it is advisable that the charge is also registered with the Companies Registry.

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

- **Stamp Duty:** Subject to certain limited exemptions, stamp duty is payable on all security documents which relate either to (i) property situated in Uganda or (ii) a transaction which relates to a thing done or to be done in Uganda. If the security instrument is executed in Uganda it must be stamped within 45 days of execution. Any security instrument executed outside of Uganda must be stamped within 30 days from the date the security document is delivered to Uganda.

The person taking security bears the cost related to stamp duty, unless otherwise agreed. The failure to pay stamp duty on a security document can result in a fine not exceeding 10 currency points (approximately \$59) for each day the default subsists. Furthermore, the security document may not be validly registered and will be deemed inadmissible in the Ugandan courts.

Stamp duty is typically payable at a fixed or ad volarem rate. Ordinarily, security instruments are charged at a rate of 0.5% of the amount secured by any principal security document. Where there is more than one security instrument relating to the same transaction, the parties may elect a principal document which

shall attract stamp duty, such that any supplemental security will only attract nominal duty. However, where the various security instruments relate to different aspects of the same transaction and are capable of separation, each instrument is to be charged stamp duty separately.

In exceptional circumstances, an exemption from paying stamp duty may be obtained from the Minister of Finance upon application. This only applies if the industry where the entity seeks to invest is deemed to be a priority industry. In this case, stamp duty may be waived when perfecting security. The relevant Minister waives the duty by issuing a statutory instrument to that effect.

- **Companies Registry:** After stamping, all registrable charges a Ugandan company creates must be registered at the Companies Registry within 42 days of creation (i.e. typically the charging instrument's date of execution) via delivery of the prescribed form. A fee of UGX 100,000 (US\$29) for debentures and proof of payment of stamp duty.

Charges over assets situated in Uganda, and created by a foreign company with a place of business in Uganda, also must be registered at the Companies Registry within 42 days. Registration of the charge is affected by delivery of a notarised copy of the charge instrument, a completed prescribed form and the payment of a registration fee (as stated above) to the Companies Registrar.

- **Search fees:** Fees to search for the company file at the Companies Registry cost UGX 30,000 (US\$9).

### **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.

For a security over land and other types of assets, date of registration determines priority among creditors. The creditor who is registered first has priority over the other creditors.

Creditors can also enter into a security sharing agreement in which they agree to disregard priority as determined by the date of registration, and instead, agree to prioritise their security as set out in the security sharing agreement.

## ENFORCEMENT OF SECURITY

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

When a debenture is used to create a security interest, the terms of the debenture will typically set out the enforcement procedure and provide for the appointment of a receiver and/or manager to undertake the procedure.

In a charge over shares, a chargee would enforce its security interest by using the power of attorney and share transfer form (both granted to it by the chargor upon perfection) to transfer the shares to itself or a nominee. The chargee must then stamp the share transfer form and notify the Companies Registry of its newly acquired interest in the shares. The shares must be valued by a Certified Public Accountant and a report must be provided to the Companies Registry. Finally, the company secretary of the company whose shares were transferred must register the chargee in the company's register of members.

The Mortgage Act 2009 governs the enforcement of a charge over land. The chargee can commence enforcement proceedings only if the chargor has been in default for at least 45 days. The chargee may then serve a demand notice upon the chargor, following which, if the default has not been remedied within 30 days, the chargee may serve a notice of default to the chargor. Provided the default has still not been remedied within 45 days of the service of the notice of default, the chargee may then either:

- sue for the amount due;
- appoint a receiver of the income from the property. The chargee is required to serve an additional 15 working days' written notice to the chargor, prior to appointing a receiver;
- lease the land. The chargee is required to serve an additional 15 working days' written notice to the chargor, prior to granting a lease on the land;
- take possession of the land. The chargee is required to serve an additional 5 working days' written notice to the chargor, informing them of the intention to take possession of the whole or part of the land; and/or
- sell the land by private contract or public auction. The chargee is required to serve an additional 21 working days' written notice to the chargor, informing them of the intended sale. Where sale is to be conducted by public auction, a publicly advertised notice of the auction must be placed in a newspaper of wide circulation for 30 days from the date of the first advert.

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

No court, governmental or other consents are required for enforcement of security.

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

There are no such restrictions.

# INSOLVENCY/BANKRUPTCY PROCEEDINGS

## Overview

Insolvency in Uganda is governed by the Insolvency Act 2011 ( the “Insolvency Act”).

This section deals with bankruptcy and insolvency law as it applies to incorporated companies only. This section does not cover the insolvency of statutory corporations, banks or insurance companies, which are subject to special insolvency legislation under the laws that regulate the licensing of such institutions.

- **Members’ voluntary liquidation:** The directors of the company must make a declaration of solvency, confirming that the company is able to pay its debts within 12 months from the commencement of voluntary liquidation proceedings. The members of the company in a general meeting must appoint one or more liquidators for the purpose of liquidating the company’s affairs and distributing its assets. Upon the liquidator’s appointment, all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance. A liquidator will then be appointed to conduct the formal winding-up of the company.

As soon as practicable after the company’s liquidation is completed, the liquidator must prepare an account of the liquidation showing how it has been conducted and how the company’s property has been disposed (the “Liquidator’s Account”). Within 30 days of preparing the Liquidator’s Account, the liquidator must convene a general meeting of the company and the company’s creditors. The liquidator must ensure that the notice for the meeting is published once in the Uganda Gazette. The liquidator must lodge with the Companies Registry a copy of the notice. Within 14 days of the meeting, the liquidator must lodge with the Companies Registry a copy of the Liquidators Account together with a return giving details of the holding of the meeting and the meeting date.

- **Creditor’s voluntary liquidation:** The creditors and the company can nominate an authorised insolvency practitioner to be a liquidator for the purposes of liquidating the company’s affairs and distributing its assets.
- **Liquidation by court:** A company may be wound-up by petition to court if:
  - The company has been served with a statutory demand and is unable to comply with the demand;
  - The company is unable to pay its debts as they fall due; or
  - The company has agreed to make a settlement with its creditors or entered into administration.

## Winding up or insolvency registers

The Companies Registry maintains all winding up records and relevant registers.

## Are “company rescue” or reorganisation procedures available?

Yes, such procedures are available under the Companies Act and the Insolvency Act.

- **Amalgamation procedure:** Two or more companies (each a “Pre- Amalgamated Company”) may amalgamate and continue as one company. The amalgamated company inherits all property, rights, privileges, shareholder’s interests, business and liabilities of each Pre - Amalgamated Company.

A board resolution of each Pre-Amalgamated Company will be required to approve the procedure and the directors in favour will proceed to certify that the following conditions of the Companies Act have been met:

- Each Pre-Amalgamated Company has provided an amalgamation proposal and a set of proposed incorporation documents of the amalgamated company.
- The amalgamation is in the best interests of the members and will be solvent at the time at which the amalgamation is effective.

Following receipt of the board resolutions, the members of each Pre-Amalgamated Company will then proceed to hold a special resolution to approve use of the amalgamation procedure.

All documentation must then be registered at the Companies Registry within 10 working days after the resolution is passed to amalgamate.

- **Compromise or arrangement:** The court can sanction the compromise or arrangements between a company and its creditors. A compromise is binding on a liquidator in circumstances where a company has begun the winding-up process.

A company intending to make arrangements with their creditors may apply to court for an interim protective order (a moratorium). Under the Insolvency Act, an order is valid for 14 days.

Provisional administrators are appointed on the date of the passing of an interim protective order, to investigate the company's business and ensure survival of the company.

### **Are there any entities excluded by law from bankruptcy proceedings?**

Under both the Insolvency Act and Companies Act, the law on bankruptcy only applies to individuals and companies. The following entities are excluded from bankruptcy proceedings:

- The Government of the Republic of Uganda;
- Local governments;
- Social Security Funds;
- National Parastatals and Statutory Corporations;
- Non- Governmental Organisations;
- Public Trusts; and
- Public-Private Partnerships.

### **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?**

No, a secured creditor will still be able to enforce its security.

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

No, there are no preference periods, claw-back rights or preferential creditors' rights.

### **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?**

Debt a company owes a creditor can be contractually subordinated to debt owed to other creditors, and contractual subordination is typically recognised under Ugandan law in the event of 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 first fixed charge
- Preferential creditors
- Creditors with floating charges
- Unsecured creditors.

## FOR MORE INFORMATION

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