MACFARLANES

AFRICAN INSIGHTS

TAKING GUARANTEES AND SECURITY IN AFRICA

This publication considers certain of the issues that lenders should be aware of when taking guarantees and security in respect of loans to African businesses.

We discuss some of the general principles involved and look at some specific jurisdictions with which we have had recent experience.

GUARANTEES AND SECURITY GENERALLY

If a lender wishes to enjoy special priority over a borrower's or guarantor's other creditors, it must take security over the borrower's and the guarantor's assets. Common types of security include a mortgage, a charge, an assignment, a cession, a pledge or a lien. These terms may in practice describe slightly different forms of security depending on the jurisdiction.

Regardless of how a security document is described, in order to be most effective it will generally need to be governed by the law of the country where the secured assets are located. This will often, but not always, be the local law of the company granting the security. In the case of a charge or a pledge over shares, for example, it should be governed by the local law of the company that issued the shares, not the local law of the company that owns the shares and that is granting the security.

The nature of the security available will therefore depend heavily on the relevant country's legal regime.

RELEVANCE OF THE LEGAL REGIME

African countries' legal regimes divide, broadly-speaking, between those based on common law and those based on civil law. The type of regime is likely to dictate how easy it will be to take and enforce security.

For example:

- Common law regimes tend to be the more flexible. In particular, they recognise the English concept of the floating charge. This makes it easier to take security over "future" assets, such as receivables which have not yet come into existence at the date of the contract. Civil law regimes may limit security to specified assets which the company already owns when the lender takes its security.
- Common law regimes tend to allow effective security to be taken over receivables without the need to notify the debtor, albeit a lender may still wish to notify the debtor in certain circumstances. In civil law regimes, a lender will tend to need to notify the debtor in order for its security to become effective.
- Common law regimes are also more lender-friendly when enforcing security. They often allow relatively quick and inexpensive forms of enforcement which do not require the intervention of a court. These might typically include the security holder itself being given the right to dispose of the asset concerned, or to appoint a receiver to do so. In civil law regimes, a lender who wishes to enforce would traditionally need to involve a court, which would be likely to make enforcement slower and more expensive. Some civil law countries have been prepared to modify their laws in this respect.

EXCHANGE CONTROLS

In a number of African jurisdictions a foreign lender taking security may also require an exchange control consent or other similar permission in order to remove currency from the jurisdiction on repayment or enforcement. Since the relevant consent can often take some time to obtain, a well-advised lender will wish to receive this before it grants the facility at the outset, and will make the application as early as possible to avoid later problems with timing.

Of the jurisdictions described in the examples below, exchange controls will be relevant for South Africa and Zimbabwe. They are not currently relevant for Ghana, Kenya, Nigeria or Zambia.

GHANA

Ghana follows the common law model and has a flexible regime for both the granting and enforcement of security.

Essentially, there are no types of property over which a borrower cannot grant security provided the borrower has an interest in the property concerned.

Guarantees must be in writing and signed by the guarantor or his authorised agent or representative except where there is evidence of a customary law to the contrary. However, provided these basic requirements are satisfied, guarantees can generally be enforced with ease.

Security may also be enforced with relative ease depending on the type of asset involved.

KENYA

Kenya also follows the common law and again has a flexible regime for both the granting and enforcement of security.

Anyone engaging in any transaction that requires a guarantee or a security document in respect of assets situated in Kenya would be wise to ensure that the document is prepared by an Advocate of the High Court of Kenya who is duly qualified and has a practising certificate for the year in question. A recent Kenyan case (*National Bank of Kenya v Wilson Ndolo Ayah*) has held that failure to do so could result in the security documents being declared invalid.

Kenya has recently passed both a new Companies Act and a new Insolvency Act. These are yet to come into force, but when they do so they are bound to have ramifications on the existing regime for the creation, perfection and enforcement of security.

NIGERIA

Nigeria also follows the common law model and again has a flexible regime for both the granting and enforcement of security.

The costs of taking security in Nigeria can be disproportionate where the security being created attracts ad valorem stamp duty or where it needs to be registered. For instance, a debenture which creates a fixed and floating charge over a company's assets is subject to duty of about 1.375 per cent of the amount being secured. Where an entire loan facility running into millions of dollars is declared as the "amount secured", therefore, the costs of perfecting the security, i.e. of taking all of the steps necessary to ensure that it will duly defeat any competing claims by third parties, could be very high. In order to reduce costs, the parties may decide not to perfect the relevant security for the entire loan facility, although this is not without its own risks.

The major challenge a claimant may have in enforcing guarantees and security is delays in the Nigerian judicial system. The comparatively slow judicial process may sometimes delay the enforcement of judgments already obtained.

Exchange control consents are not required as such when taking security in Nigeria. However, non-resident persons importing foreign currency into Nigeria in order to invest in a Nigerian enterprise are advised to do so through an authorised dealer in order to receive a Certificate of Capital Importation (CCI) evidencing the inflow from such authorised dealer.

The CCI gives the Nigerian borrower access to foreign currency at interbank exchange rates to repay the relevant loan. Without it, the Nigerian borrower will need either to rely on its own source of foreign currency income or reconvert Naira to foreign currency in the parallel exchange market which is usually at a higher rate. Therefore, where the Nigerian borrower's business does not generate foreign currency income, most foreign lenders insist that the borrower procures a CCI to ensure that it will have access to foreign currency to repay the debt.

SOUTH AFRICA

South Africa follows the common law model and has a relatively flexible regime for the granting and enforcement of security.

As an example, it is possible to take security over the whole or part of a pool of receivables such as a loan portfolio. A grant of security over part of a loan portfolio would be possible, including loans made in the future, provided it is sufficiently clear which loans would be caught by the security. This could be achieved by agreeing objectively identifiable criteria.

The security can allow the lender to enforce, whether by selling the entire portfolio of receivables to an appropriate third party buyer or by collecting in the debts itself, without the need for a court to be involved. However, the transfer and collection of certain regulated debts is prohibited where such debts have been "prescribed", i.e. have been extinguished under South African law through lapse of time.

In order for South African security to be enforceable, the foreign lender will need to obtain the prior approval of the Finance Surveillance Department of the South Africa Reserve Bank (FSD). Prior FSD approval is required for a person to transfer any assets (including cash and securities) out of South Africa. This is granted at the discretion of the FSD and can generally take around six weeks to obtain.

ZAMBIA

In general, Zambia also follows the common law model described above and accordingly also has a flexible regime for both the granting and enforcement of security.

Essentially, there are no limitations on the types of assets over which a borrower can grant security provided the borrower has an interest in the property concerned.

The basic requirements for a guarantee are equivalent to those already described for Ghana. It is worth noting that enforcement of the judgment of a foreign court may be difficult if there is no presidential order for recognition and enforcement of a foreign judgment issued with respect to that jurisdiction. However, arbitral awards are enforced with relative ease.

Security may also be enforced with relative ease depending on the type of asset involved.

For documents signed outside Zambia, a number of authentication requirements need to be adhered to for the document to be valid and binding. However, based on a recent Zambian case (*African Alliance Pioneer Master Fund v Vehicle Finance Limited*) where documents are signed in counterparty and the last place of signature is in Zambia, no authentication will be required as the document will be deemed to have been signed in Zambia.

ZIMBABWE

In general, Zimbabwe also follows the common law model described above and has a flexible regime for both the granting and enforcement of security.

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