The Latest Developments in Data Privacy Across African & Middle Eastern Countries

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KENYA

O'Bang Law

What are the most used or most effective forms of security in your jurisdiction, and what factors influence their popularity or effectiveness?

Introduction

Kenya boasts a wide range of forms of security available to lenders that are both movable and immovable property serving as security.

The principle governing laws are the Land Registration Act, 2012 and Land Act, 2012 for immovable property and the Companies Act and the Movable Property Security Rights Act (MPSRA), 2017 for movable property.

Principle Security Forms

a) Legal Charge

A legal charge is the most preferred and popular security instrument, particular for immovable property collateral, particularly land and the permanent fixtures thereon if any. It is the gold standard form of security instrument.

It is a security interest or a registered legal right a lender holds over a property as a security for a debt owed and registered against the property legal title. The security form gives rise to a legal right that allows the lender to enforce the security and recover the debt through legal means such as repossession or selling the secured property.

Properties that can be charged include land (freehold & leasehold), buildings and structures permanently affixed, fixtures, interests in land (leases, easements and rights of occupancy).

Why is it favoured?

1. Offers the lender a legal interest recognized by law and enforceable.

2. The legal interest is superior against any other claims over unregistered security and survives claim against unsecured third parties.

b) Security Agreements (Movable Property)

Security agreements under the MPSRA are the primary instrument for taking security over movable property, for individual borrowers. Security agreements are the principal mechanism through which a lender takes security over specific movable assets (tangible and intangible) such as motor vehicles, equipment, or intellectual property. For corporate borrowers & lenders, however, security over movable property is more commonly taken by way of a debenture, as discussed below.

The security agreement extends to proceeds of the secured collateral and may cover future assets. Security right under the form arises by registering the agreement with the MPSR Registry, provided that the grantor has rights in the assets or the authority to encumber them.

c) Debentures

A debenture is a long-term financial instrument used by a company to raise operating or expanding capital, from investors, institutions with the promise to pay interest and pay principle at a specified date. They can be secured or unsecured, with secured debentures creating a legal charge tied to a specific identifiable asset or against a class of assets.

A debenture which is a category of a security instrument creates a fixed charge over specifically identified assets and a floating charge over the company's assets generally, including its movable property. The debenture is registered under the Companies Act (2015) in addition to registration under the MPSRA and remains the preferred instrument in corporate lending because it captures both present and future assets of the company in a single document.

d) Assignment

Basically, involves the transfer of rights or interest in assets to another party as collateral for a debt or obligation. It does not transfer ownership of the asset, only the right to receive benefits from the asset such as income. It is applicable when the title is not available yet or in cases where the asset is intangible, hence a legal charge cannot be created. Once the legal title is issued or is present the assignment is replaced by a legal charge.

e) Other security forms

Deposits/ Lien – Involves the lender taking physical possession the title documents to the asset to be used as collateral until the obligations are fully settled, preventing the owner from creating competing encumbrances.

Guarantee – A corporate or individual guarantee involves a contractual promise by a third party (the guarantor) to repay a debt if the borrower fails to do so.

Personal Guarantees and Indemnities – Often required from company directors or shareholders when lending to private companies. An indemnity in this case creates a primary obligation on the indemnifier to compensate the lender for the loss rather than simply guaranteeing another person’s obligation.

Factors to Consider when considering a Form of Security

i. Availability, nature and value of an asset (movable or immovable property)

ii. Priority of the security right created in claims by third parties

iii. Modes of enforcement of the security in cases of default

iv. Degree of control over the asset while it is still secured.

v. Legal and regulatory framework available for the asset securitization and perfection

How does your jurisdiction address cross-border security interests and recognition of security held by the foreign entities?

Introduction

Questions of cross-border security interests and recognition are resolved through an interplay of legal framework and regulations including the Land Act, 2012, Land Registration Act, 2012 and the Movable Properties Rights Securities Act (MPSRA), 2017. The legal regime for movable and immovable property differ significantly as discussed below.

Cross-Border Security Interests in Movable Property

Any security concerns relating cross-border security interest in movable property is governed and adjudicated under the MPSRA. Questions relating to the registrability, perfection, third party claims are governed by the MPSRA, irrespective of whether the security interest is held in favour of a foreign entity. The Act grants identical enforcement rights to Kenyan and foreign lenders, provided the security interest is registered under the Act.

Under MPSRA foreign entities can register a security interest over a movable asset. Perfection and priority are direct, the first security right to be registered takes priority over all subsequent creditors. Recognition is automatic upon registration. These features make MPSRA preferable for cross-border financing.

Cross-Border Security Interests in Immovable Property

Unlike the position of the law on movable property, that of immovable property is more restrictive. Article 65 of the Constitution limits ownership of immovable property to foreign persons. A foreign person can only own land under leasehold caped at a maximum of 99 years. This in turn impacts how security over immovable property can be held by a foreign person. A foreign person can only hold a security right over leasehold land, and such interest giving rise to the right must be registered.

For a foreign person to register a formal charge as a lender at the respective lands registry, the entity must hold a valid licence issued by the Central Bank of Kenya (CBK). Hence, foreign persons can only resort to equitable charges by retaining title documents to the immovable property until the borrower's obligations are discharged.

These equitable charges are recognised under Kenyan Law; however, the recognition of registered formal charges takes priority over these ones. Recognition of the equitable charge requires a court order.

Although Kenya recognizes foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Act, CAP 43, any issue or dispute relating to a cross-border security interest over land must be adjudicated to by a Kenyan court.

Recognition of Foreign Held Security

Kenya recognizes security held by foreign persons, with recognition tied to the security right gained by the foreign person being legal under Kenyan Law. The same must adhere to the Kenyan law and regulations on registration, and perfection to be accorded recognition.

For immovable property, recognition is largely tied with registration, with registration offering priority over other creditors.

For immovable property (tangible and intangible) the MPSRA is more cross-border oriented with the Act not restricting who may become a secured creditor. Recognition is automatic from registration in the MPSR Registry.

For tangible assets under MPSRA, Kenyan law governs whether the security is properly perfected and what priority it enjoys, but the underlying agreement is free to be governed by a foreign law.

Conclusion

The MPSRA offers a more foreign friendly framework for movable property that is well-suited to cross border entities. For Immovable property, however, largely remains a more constrained landscape for foreign entities.

How is the priority of competing security interests determined, and what mechanisms exist to protect a secured party's position against third-party claims?

Introduction

When multiple creditors hold competing security interest over the same asset or class of assets, the rank of the creditors is critical. The priority principle and framework for movable and immovable property apply differently, for the purpose the two classes of assets are governed by distinct statutory regimes. However, the underlying principle for both classes is that registration determines priority and provides protection against third parties claims.

Priority in Security Interests over Immovable Property

Priority over immovable property is governed by the Land Registration Act, 2012 and the Land Act, 2012.

Section 36(5) of the Land Registration Act (LRA) provides that interest appearing in the register shall have priority according to the order in which the instruments which led to the registration were presented for registration. Simply priority follows the order of registration. A registered security interest cannot be defeated or overtaken by unregistered security interests.

Section 28 of the LRA lists overriding interests that affect priority, they include trusts including customary trusts, rights of way, rights of water & profits subsisting at the time registration, natural rights of lights, air, water and support, rights of compulsory acquisition, entry, resumption, search and user conferred by any other written law. Any security interest must take into account the overriding interests existing at the time of registration as they have the ability to distort priority even where the security interests is registered.

Priority in Security Interests over Movable Property

The priority over movable property is governed by under the Movable Properties Security Rights Act (MPSRA), 2017.

Section 38 of the MPSRA provides that the priority among competing security rights created by the same grantor in the same security is determined accorded to the time of registration. Under the Act priority of a security right extends to all secured obligations, including obligations incurred after the security right becomes effective against third parties, with priority of a security right covering all collateral described in a registered notice.

For priority in respect of security rights in tangible assets commingled in a mass product, Section 43 of the Act provides that priority is accorded a security right effective against third parties before the goods are commingled. If more than one security right in commingled good is effective against third parties, the security interest ranks equally in proportion to the value of the collateral at the time it became commingled.

MPSRA allows the creation of a security right in tangible assets that are attached to the immovable property, with the resulting security interest having priority over competing interest created and made effective against third parties under movable property.

The Act recognises a non-consensual creditor – a creditor who has obtained a right in the collateral by operation of any law – a non-consensual creditor has priority over security right, before the security right is registered, but the creditor has to register a notice with the MPSR Registry.

Under Section 47 of the Act, a security right created by way of acquisition has a priority over competing non-acquisitional security right, provided notice of acquisition of the security rights is registered under the Act. This is important for foreign entities where they acquire a business or company and security right and interests that exist before hand in favour of the company or business.

Under Section 80, the Act underscores that the applicable law relating to questions of priority of a security right in tangible assets is the law of the country in which the asset is located, for intangible asset is the law of the country in which the grantor is located and for electronic security is the law of the country in which the issuer is located.

Mechanisms to Protect a Secured Party Against Third Party Claims

The most important and fundamental protection against third party is prompt and timely registration of the security interests and subsequent timely renewals. As earlier discussed, a secured party needs to have priority against third party claims and the only way to acquiring priority is perfection and registration of the security interest.

It is also important, to add a clause in the respective agreement prohibiting the borrower from creating any further security interest without the first lender’s consent.

KUWAUT

Al-Hamad Legal Group

What are the most used or most effective forms of security in your jurisdiction, and what factors influence their popularity or effectiveness?

The legal framework governing security interests in Kuwait remains fragmented, with relevant provisions dispersed across the Civil Code, the Companies Law, and the regulations governing financial markets. In practice, the effectiveness of security primarily depends on the proper completion of registration or annotation formalities, thereby ensuring enforceability against third parties. In addition, effective control over the secured asset, whether through possession, notice, or restrictions on disposal, constitutes a key element in strengthening the position of the secured creditor.

In practice, financing institutions tend to rely on security structures that have demonstrated credit reliability, most notably real estate mortgages and pledges over shares or quotas, provided that they are validly created and duly registered so as to ensure enforceability against third parties. However, enforcement procedures remain, in most cases, subject to judicial oversight, which directly affects the speed and effectiveness of recovery.

In practical legal terms, the most widely used and effective forms of security are those supported by clear registration mechanisms and strict compliance with legal formalities. In this context, real estate mortgages remain the cornerstone of corporate and real estate financing, as they grant a proprietary right over the asset and priority over unsecured creditors, provided they are executed by way of an official instrument and duly registered to ensure third-party effectiveness (Civil Code, Articles 971–972, 993, 1000).

With respect to equity interests, pledges over shares and quotas are among the most common forms of security, as the law provides for a structured corporate publicity regime. In limited liability companies, this requires notarisation of the pledge agreement, registration in the commercial register, and notification to the relevant parties (Companies Law No. 1 of 2016, Article 102).

For shares, the pledge is perfected through entry in the shareholders' register, while listed securities are subject to annotation or trading restrictions through the clearing system, thereby enhancing the effectiveness of such security. (Companies Law, Article 174; Kuwait Clearing Company Regulations).

As for movable assets and cash flows, in the absence of a unified security registry, lenders favour structures that ensure effective control over the asset, such as possessory pledges, where enforceability arises from possession itself, (Civil Code, Article 1042),

or assignments/pledges of receivables through notification or acceptance combined with possession of the underlying instrument (Civil Code, Article 1054).

In certain cases, lenders also rely on cash collateral and contractual arrangements such as covenants, negative pledge clauses, and reporting obligations, particularly given the procedural risks associated with floating-type security over inventory or equipment.

Finally, Kuwaiti law restricts self-help enforcement mechanisms: clauses allowing automatic appropriation or sale of pledged assets without judicial process are generally deemed null and void. This reinforces the importance of properly structuring security from the outset and highlights that the effectiveness of security lies not merely in its existence, but in its enforceability in practice (Civil Code, Article 992).

Enforcement of security is subject to the supervision of the Execution Department of the Ministry of Justice and requires the existence of an enforceable title. Kuwaiti courts have consistently held void any agreements permitting direct appropriation of pledged assets without judicial procedures.

How does your jurisdiction address cross border security interests and recognition of security held by the foreign entities?

In relation to cross-border transactions, the approach adopted in the State of Kuwait is essentially pragmatic. Security created under a foreign law will have limited practical value within Kuwait unless the relevant steps for its completion or re-perfection are satisfied locally, whether by way of notarisation, registration, annotation, or through possession or notification, depending on the nature of the asset. This is because enforceability against third parties remains contingent upon compliance with the formal requirements prescribed under Kuwaiti law (Civil Code, Articles 993, 1042, 1054).

From an enforcement perspective, the key issue lies in the ability to convert a foreign title into a locally enforceable instrument. Foreign judgments are subject to enforcement proceedings before the competent Kuwaiti courts, provided that certain conditions are met, including the jurisdiction of the foreign court, compliance with due process, the finality of the judgment, the absence of conflict with any Kuwaiti judgment or with public policy, and the existence of reciprocity within a regulated framework (Civil and Commercial Procedure Law, Article 199).

The same framework applies to foreign arbitral awards, subject to an additional requirement that the dispute be arbitrable under Kuwaiti law, in addition to the enforceability of the award in the seat of arbitration (Civil and Commercial Procedure Law, Article 200).

This is without prejudice to the provisions of applicable international treaties (Article 203).

In this regard, the State of Kuwait is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, subject to a reciprocity reservation, whereby its application is limited to awards rendered in other contracting states.

In all cases, enforcement remains subject to the supervision of the Execution Department, thereby reinforcing the judicial nature of enforcement procedures in the State of Kuwait.

As to the recognition of security granted in favour of foreign entities, Kuwaiti practice generally accepts foreign lenders and banks as secured creditors, particularly in relation to pledges or security over listed securities. In this respect, the regulations of the Kuwait Clearing Company provide for mechanisms such as annotation, trading restrictions, and even the recognition of judgments or arbitral awards in certain transactions (Kuwait Clearing Company Regulations).

By contrast, the real estate sector remains subject to specific ownership restrictions, particularly at the enforcement stage, where due regard must be given to the limitations imposed on foreign ownership. Nonetheless, the legal framework has recently witnessed certain relaxations in favour of specific categories of entities, such as those licensed by the Kuwait Direct Investment Promotion Authority (KDIPA), listed companies, and regulated funds or vehicles, for operational or residential purposes. This may, in turn, impact the structuring of security arrangements and exit strategies (Decree-Law No. 7 of 2025).

How is the priority of competing security interests determined, and what mechanisms protect secured creditors against third-party claims?

The determination of priority in the State of Kuwait is primarily based on the date on which registration formalities are completed (or, where applicable, on the existence of control), in addition to the legal rules governing the ranking of rights. In relation to real estate mortgages, enforceability against third parties presupposes prior registration, and ranking is determined by the date and number of registration, such that secured creditors are paid in priority to unsecured creditors in accordance with their ranking (Civil Code, Articles 993, 1000, 1001).

As regards possessory security over movable assets, the law seeks to protect third parties by requiring that the pledged asset be held by the creditor or by an agreed third party as a condition for enforceability against them (Civil Code, Article 1042).

With respect to pledges over movable property, priority is determined by the date on which the instrument acquires a certain date, while enforcement remains, in practice, subject to judicial process, including obtaining court authorisation for the sale of the pledged asset, whether by public auction or at market value (Civil Code, Articles 1050, 1053).

In relation to receivables and personal rights, protection against competing assignments or pledges is achieved through notification or acceptance, together with possession of the instrument evidencing the debt, these being necessary elements for enforceability against the assigned debtor and third parties (Civil Code, Article 1054).

As for shares, the security is perfected through registration in the relevant register or, in the case of listed securities, through annotation with the clearing house. It is also necessary to take into account statutory super-priority rights, as judicial expenses incurred for the preservation, sale, or distribution of assets enjoy priority over all rights, including those of secured creditors (Civil Code, Article 1071).

The protection of the secured creditor is not limited to formal requirements, but extends to contractual and procedural mechanisms, including covenants, disclosure obligations, and early default triggers. Creditors may also seek precautionary measures where there is a serious risk affecting the security.

From an enforcement perspective, procedures are subject to the supervision of the Execution Department in accordance with the applicable legal framework (Civil and Commercial Procedure Law, Articles 204–206), and enforcement is typically carried out through the sale of real estate by public auction, the sale of movable assets with court authorisation, enforcement over shares through the clearing system, and the distribution of proceeds in accordance with the ranking of creditors.

The bankruptcy of the debtor does not extinguish the rights of the secured creditor; rather, the creditor retains priority in accordance with its ranking, subject to the constraints arising from insolvency proceedings and the stay of individual enforcement actions.

As regards centrally deposited securities, security is effected through annotation in the records of the clearing house and the imposition of trading restrictions pursuant to issued instructions, thereby ensuring effective control over the secured asset (Kuwait Clearing Company Regulations).

Conversely, it is necessary to take into account the existence of statutory priority rights, as judicial expenses incurred for the preservation, sale, or distribution of assets take precedence over all other claims.

Furthermore, the sale of securities in the context of enforcement requires compliance with specific formal procedures, including obtaining judicial approval and depositing the sale proceeds with the treasury of the Execution Department, in preparation for their distribution among creditors according to their ranking (Kuwait Clearing Company Regulations).

MAURITIUS

YKJ Legal

What are the most used or most effective forms of security in your jurisdiction, and what factors influence their popularity or effectiveness?

Mauritius operates under a hybrid legal system combining French civil law and English common law principles. Security interests and creditors' rights are primarily governed by the Civil Code, the Commercial Code, the Companies Act 2001 and the Insolvency Act 2009. While several security concepts derive from civil law traditions, fixed and floating charges are based on English law and are widely used in corporate financing structures.

The most common forms of security used in Mauritius include fixed and floating charges over corporate assets, mortgages over immovable property, share pledges, pledges over bank accounts, assignments of receivables and corporate guarantees. In cross-border financing transactions, lenders typically rely on a combination of fixed or floating charges together with share pledges and bank account pledges to secure their exposure. Fixed charges attach to specific assets, whereas floating charges extend to a shifting pool of present and future assets of the borrower and crystallise upon the occurrence of specified events of default.

These forms of security are popular due to the clarity of the statutory framework, the protection afforded to secured creditors under Mauritian law and the availability of efficient enforcement mechanisms, including the appointment of a receiver or receiver-manager without prior court intervention.

How does your jurisdiction address cross-border security interests and recognition of security held by foreign entities?

Mauritian law does not distinguish between domestic and foreign secured creditors. Foreign lenders may therefore take and enforce security over assets located in Mauritius in the same manner as local creditors, subject to compliance with applicable statutory formalities.

Security agreements governed by foreign law are generally recognised and enforceable in Mauritius, provided they constitute valid and binding obligations under their governing law and do not contravene Mauritian public policy. Where enforcement is sought through court proceedings, final and conclusive judgments of foreign courts may be recognised and enforced in Mauritius through the process of exequatur under Article 546 of the Code de Procédure Civile. Foreign arbitral awards are likewise enforceable pursuant to the relevant arbitration framework applicable in Mauritius.

One practical limitation arises where enforcement of security would result in the transfer of immovable property in Mauritius to a foreign creditor. In such circumstances, the Non-Citizens (Property Restriction) Act 1975 requires a non-citizen to obtain prior governmental approval before acquiring or holding immovable property in Mauritius.

How is the priority of competing security interests determined, and what mechanisms exist to protect a secured party’s position against third-party claims?

The priority of competing security interests in Mauritius is primarily determined by the nature of the security and the date of its registration or perfection. Fixed and floating charges created by companies must be registered and inscribed with the Conservator of Mortgages in accordance with the Civil Code and recorded in the company’s register of charges. As a general rule, priority between competing charges follows the order of inscription with the Conservator of Mortgages.

Share pledges are perfected through the execution of a transfer in guarantee and the inscription of the pledge in the company’s register of pledges. Pledges over bank accounts and assignments of receivables are typically created through a bordereau identifying the pledged asset and are perfected through notification to and acknowledgement from the relevant account bank or debtor.

Unless otherwise contractually agreed between creditors, priority generally follows the date on which the relevant security interest is perfected. Secured creditors therefore protect their position against competing claims by ensuring that the relevant registration, notification and inscription formalities are properly completed. Failure to comply with these formalities may affect the enforceability or ranking of the security against third parties.

MOROCCO

Westfield Morocco

What are the most used or most effective forms of security in your jurisdiction, and what factors influence their popularity or effectiveness?

In common moroccan businesses, the most efficient security interests are movable securities. Among these securities, pledge without dispossession (hereinafter referred to as « pledge ») constitutes one of the most efficient and widely used forms of collateral, for several reasons.

First, the scope of a pledge is particularly broad and diverse, as it may cover various types of movable assets, including business concerns (fonds de commerce), goods such as vehicles, equipment, raw materials, but also contract rights such as accounts receivable, and financial instruments such as corporate shares, bonds, warrants and investments securities (art.1186 D.O.C). The effectiveness of this pledge also lies in the flexibility of its creation, which helps reduce costs, shorten procedural delays, and facilitate companies' access to credit. In this regard, a pledge is created and perfected by a notarial deed or by private agreement (art.1188 D.O.C.).

Furthermore, the registration of this pledge is ensured through a notice in the National Electronic Registry of Movable Securities (art.1191 D.O.C.). Such registration does not prevent the same asset from being subject to multiple pledges, as the registration determines the ranking of secured creditors. The effectiveness of this security interest is also reflected at the enforcement stage. When a formal notice to the debtor remains ineffective after a period of fifteen days, several mechanisms allow the creditor to enforce the collateral, including partial enforcement, whereby the creditor and the debtor may agree on a partial release (1201 D.O.C) of the pledge in the event of partial payment of the debt.

In addition, various enforcement methods may be provided, whether contractual or judicial: the parties may stipulate a pacte commissoire (art.1221 D.O.C.) , allowing the creditor to become the owner of the pledged asset in the event of the debtor's default, or they may agree that, failing payment, the encumbered asset will be sold through private auction or by private sale (art.1222 D.O.C.). In the absence of such arrangements, enforcement may also occur through judicial proceedings (art.1219 D.O.C), notably through a judicial sale of the pledged asset before the competent court or through judicial appropriation of the asset by the creditor, for instance in summary proceedings (art.1218 D.O.C.).

How does your jurisdiction address cross-border security interests and recognition of security held by foreign entities?

Moroccan law generally allows foreign entities, including foreign banks and financial institutions, to hold security interests over assets located in Morocco, provided that the security is constituted and perfected in accordance with Moroccan legal requirements. In practice, the principle of lex rei sitae applies (art.92 code de droit international privé), meaning that the law of the place where the asset is located governs the creation, validity, and enforcement of the security interest. Consequently, when the collateral is located in Morocco, the security must comply with Moroccan law and be registered in the appropriate registry in order to be enforceable against third parties. Foreign creditors therefore enjoy the same rights and protections as domestic secured creditors once these formalities are fulfilled. In cross-border financing transactions, it is common for the underlying loan agreement to be governed by foreign law, while the security interests over Moroccan assets are governed by Moroccan law in order to ensure their validity and enforceability locally. Furthermore, Moroccan courts may recognize and enforce foreign judgments relating to secured claims, subject to the exequatur procedure (430 Code de procédure civil) , which confirms the enforceability of foreign decisions within the Moroccan legal system.

How is the priority of competing security interests determined, and what mechanisms exist to protect a secured party's position against third-party claims?

The priority of competing security interests in Morocco depends on whether the collateral consists of movable or immovable assets, but in both cases the system relies primarily on publicity through registration and the chronological order of inscription. For movable assets, priority between competing security interests, particularly pledges, is determined according to the first-in-time rule, meaning that the creditor whose security interest is registered first in the National Electronic Registry of Movable Securities takes precedence over later creditors (art.1229 D.O.C). Registration establishes the ranking of secured creditors and determines the order in which they will be paid from the proceeds of the collateral upon enforcement.

It also serves as the main mechanism protecting the secured party against third-party claims, as publicity renders the security interest opposable to third parties, including other creditors, subsequent purchasers of the asset, and insolvency administrators. Moroccan law allows multiple security interests over the same asset, but their respective priority remains determined by the time of registration, thereby ensuring transparency and legal certainty for creditors. In addition, secured parties may strengthen their position through contractual enforcement mechanisms, such as a pacte commissoire or clauses allowing private sale of the collateral. In the context of insolvency proceedings, secured creditors benefit from a preferential right of payment over unsecured creditors, provided that their security interest has been properly constituted and registered.

For immovable assets, priority among mortgage creditors follows a similar principle: a mortgage creditor is paid from the proceeds of the judicial sale of the immovable property with priority over other creditors (art.197 Code de commerce) . The right of preference extends not only to the sale price of the mortgaged property but also to assets included within the scope of the mortgage, such as immovable accessories and the fruits accrued since the seizure. In accordance with the principle prior tempore, potior jure, when several mortgage creditors compete, their priority is determined by the chronological order of registration in the land registry (art.197 Code de commerce) ; if two creditors register simultaneously, they share the same rank and are paid proportionally. A mortgage creditor who has not yet been paid may also renounce his rank, proportionally to his claim, in favor of another mortgage creditor over the same property, provided that this does not prejudice the rights of other creditors (art.198 Code de commerce).

Moreover, where a mortgaged property is sold in the course of insolvency proceedings, the mortgage creditor is paid from the sale proceeds after privileged creditors but before lower-ranking mortgage creditors, according to the established order of registration (art.632 Code de commerce).

SOUTH AFRICA

Knowles Husain Lindsay Inc.

What are the most used or most effective forms of security in your jurisdiction, and what factors influence their popularity or effectiveness?

South African law recognises a wide range of security mechanisms derived from both common law and statute. These forms of security are designed to provide creditors with varying degrees of protection and enforceability, with their effectiveness largely dependent on compliance with formal requirements and the nature of the underlying asset.

The general approach adopted by local financiers is to obtain as much security as possible and accordingly finance transactions involve a variety of ancillary agreements. The most common forms of security are cession of claims, pledge, notarial bonds over movable assets and mortgage bonds over immovables.

The choice of security is largely driven by assets the debtor has available as collateral as well as creditors appetite for additional formalities and costs.

For example, to the extent that the debtor has an encumbered immovable property, a mortgage bond registered in favour of a creditor will provide such creditor with a real right ensuring a secured and preferential claim against public in general. Such mortgage bond, however, requires a registration at the local Deeds Office (a local body tasked with keeping register of real rights such as ownership of security) and such registration is subject to a formal process and payment of costs.

In contrast, the cession of claims (e.g. book debts) in security is achieved contractually with no additional registration costs or formalities. It doesn't, however, provide similarly strong protection.

Pledge of shares, also a very popular form of security, is similarly achieved through contractual arrangement but requires the creditor obtaining possession (effected through handing over of share certificate). The security over other corporeal assets through special (over a specific asset) or general (over assets of a person generally) does not require transfer of possession, but it must be registered at the Deeds Office.

In short, variety of security is available to cater for specific circumstances and commercial practicalities.

How does your jurisdiction address cross-border security interests and recognition of security held by foreign entities?

South African entities are subject to the exchange control regulations administered by the South African Reserve Bank (SARB) through its Financial Surveillance Department (FSD). FSD performs number of its functions acting through its authorised dealers (main commercial banks).
What follows the provision of security by the South African entities in favour of non-residents, whether to secure its own indebtedness or that of a third party, is subject to a prior approval by FSD. Lack of such approval will result in the creditor not being able to repatriate the proceeds following the liquidation of security.

The Cross-Border Insolvency Act enables South African courts to recognise foreign insolvency proceedings and seek satisfaction from South African assets of the debtor. Once recognised, courts may grant extensive relief, including authorising foreign representatives to administer or realise those assets.

How is the priority of competing security interests determined, and what mechanisms exist to protect a secured party's position against third party claims?

The determination of priority between competing security interests in South African law is fundamentally governed by the old principle of "prior in tempore potior in iure" meaning that earlier-established rights take precedence over later ones.

In the context of immovable property priority is primarily determined by the order of registration in the Deeds Registry. Mortgage bonds rank according to their registration sequence, with the first bondholder enjoying preference over subsequent bondholders in the distribution of proceeds. Although this system is generally rigid, it allows for flexibility through waivers of preference, whereby a bondholder may contractually subordinate their ranking in favour of another creditor.

For movable property, the Security by Means of Movable Property Act 57 of 1993 distinguishes between special and general notarial bonds. Special notarial bonds create real rights upon registration and enjoy priority based on the registration date. In contrast, general notarial bonds only become effective against third parties upon perfection, typically through possession of the secured assets. This distinction underscores the importance of compliance with formal requirements in securing and preserving priority.

Finally, the insolvency framework under the Insolvency Act 24 of 1936 provides the key mechanism for protecting secured creditors against third-party claims. Upon sequestration or liquidation, a “concursus creditorum” arises, freezing the rights of all creditors and ensuring orderly distribution according to established priorities. Together with the public registration system, this framework ensures transparency, fairness, and the effective protection of secured interests.