

# Secured Lending Comparative Guide



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📍 Zimbabwe Finance and Banking

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## 1 Legal framework

### 1.1 Beyond general commercial and contract laws, what other specific laws and regulations govern secured finance in your jurisdiction?

'Secured finance' refers to a type of financial arrangement involving some type of collateral as a condition for borrowing. In addition to the general commercial and contract laws, secured finance in Zimbabwe is governed by the following statutes:

- the Movable Property Security Interests Act [Chapter 14:35];
- the Public Finance Management Act [Chapter 22:19];
- the Public Debt Management Act [Chapter 22:21];
- the Deeds Registries Act [Chapter 20:05];
- the Banking Act [Chapter 24:20];
- the Insolvency Act [Chapter 6:07];
- the Money Laundering and Proceeds of Crime Act [Chapter 9:24];
- the Reserve Bank of Zimbabwe Act [Chapter 22:15];
- the Companies and Other Business Entities Act [Chapter 24:31]; and
- the Money Lending and Rates of Interest Act [Chapter 14:14]

### 1.2 Do any bilateral and/or multilateral treaties or trade agreements have particular relevance for secured finance in your jurisdiction?

Zimbabwe is a member of the Cape Town Convention on International Interests in Mobile Equipment and Aircraft Protocol (Proclamation 371/2003) and the Protocol to the Cape Town Convention on International Interests in Mobile Equipment, which regulate asset-based financing and leasing of aircraft equipment. Apart from this, no bilateral and multilateral treaties and trade agreements have particular relevance for secured finance in Zimbabwe.

### 1.3 Beyond normal governmental institutions, are there regulatory or tax bodies that play a particular role in secured finance your jurisdiction? What powers do they have?

There are none.

### 1.4 What is the government's general approach to secured finance in your jurisdiction? Are there government guarantee/support schemes available to lenders, and if so what are the qualifications to that support?

Generally, the government of Zimbabwe promotes secured lending, as it has put in place the necessary legal mechanisms to encourage secured lending in both the private and public financial sectors.

The Public Finance Management Act [Chapter 22:19] and the Public Debt Management Act [Chapter 22:21] regulate the powers of the government and public entities in relation to borrowing and the issuance of guarantees.

The government may provide guarantees in certain instances and subject to grant of the requisite approvals. In terms of Section 68 of the Public Finance Management Act [Chapter 22:19] as read with Section 20 of the Public Debt Management Act [Chapter 22:21], the minister of finance, economic development and investment promotion may, with the consent of the president, guarantee the repayment of a capital amount and the payment of expenses or charges incurred on or in connection with:

- any indebtedness or other financial obligation raised, incurred or established, as the case may be, inside or outside Zimbabwe by a person approved by the minister for purposes which, in the opinion of the minister:
  - will promote employment or the development of natural resources or the tourist industry; or
  - are otherwise in the public interest or in the interest of the economy of Zimbabwe; or
- any indebtedness or other financial obligation raised, incurred or established, as the case may be, outside Zimbabwe for the purposes of the trustee of the District Development Fund Act [Chapter 29:06] or a designated public entity or local authority.

Qualifications and conditions for government guarantee or support schemes, when available, are generally determined on a case-by-case basis. In some instances, the government may

provide guarantees or support schemes for projects of national importance such as large-scale infrastructure projects and road construction or for any other approved project.

## 2 Secured finance market

### 2.1 How mature is the secured finance market in your jurisdiction? Are the majority of the transactions purely bilateral and domestic, or is there an international syndicated market for secured financing under your domestic law?

The secured finance market in Zimbabwe is developed. There are statutes and institutions that regulate or monitor developments in this market.

The majority of secured finance transactions are bilateral and domestic. That said, in some large-scale projects, international banks and venture capital funds have partnered with local banks and local entities. In some instances, regional development banks such as the Africa Development Bank and the African Export Import Bank do lend and advance to local commercial banks for on-lending to, mostly, foreign currency earning companies through a back-to-back arrangement. In most cases, securitisation is by means of cession and assignment of receivables in offshore domiciled escrow or collection accounts.

There is no mature or formal syndication market, as that is on a transaction-by-transaction basis.

### 2.2 Are there any bodies in your jurisdiction/region that promote the use of standard documentation and best practices in secured finance transactions? If so, are these widely used and followed?

Other than the Reserve Bank of Zimbabwe and the Law Society of Zimbabwe, there are few specific bodies in Zimbabwe that are dedicated to promoting the use of standard documentation and best practices in secured finance transactions. The Reserve Bank of Zimbabwe is the primary regulator of financial markets and it regularly issues various standards, lending guidelines, risk management guidelines and best practices from time to time. The Law Society of Zimbabwe also issues guidelines on the registration of securities by lawyers.

### 2.3 What significant secured finance transactions have taken place in your jurisdiction in recent times?

The following significant secured finance transactions have taken place in Zimbabwe:

- financing of the implementation of the Mbudzi Interchange and Divergence Routes Road Infrastructure Project through a syndicated structured facility by the contractors;
- financing of \$15 million provided in 2023 to NMB Bank from the Africa Development Bank to provide support to small and medium-sized enterprises as well as local

- corporations in Zimbabwe;
- o a \$25 million trade finance line of credit facility provided by the Africa Development Bank Group to the Central Africa Building Society of Zimbabwe for infrastructure development; and
- o agro-financing schemes established by CBZ Agro-yield (Private) Limited, First Capital Bank and Stanbic Bank to support local commercial farmers.

### 3 Secured finance providers

#### 3.1 Who are the key providers of secured finance in your jurisdiction? Is there a thriving alternative credit market (beyond bank lenders)?

In Zimbabwe, the key providers of secured finance are:

- o commercial banks;
- o agricultural banks;
- o building societies;
- o micro-finance institutions;
- o asset management companies;
- o venture capital funds; and
- o regional and international developmental lenders.

Beyond banks, there is a thriving alternative credit market in Zimbabwe. Venture capitalists are one of the most important sources of funding for businesses. Examples include:

- o Masawara;
- o Lamcent Capital;
- o Equities Nest; and
- o Nurture Capital.

Another source of credit for business is capital raising through real estate investment trusts, exchange traded funds and secondary bonds market, usually executed privately but in accordance with the Collective Investment Schemes Act [Chapter 24:19].

Further, credit unions/credit cooperative societies represent another thriving alternative credit market in Zimbabwe. These are member-owned financial cooperatives that provide a range of financial services to their members. Examples include:

- o the Zimbabwe Association of Microfinance Institutions;
- o the Zimbabwe National Association of Housing Cooperatives; and
- o the Zimbabwe Chamber of Informal Economy Associations.

### 3.2 What requirements and restrictions apply to secured finance providers in your jurisdiction? Do these vary depending on (a) the type of entity; (b) whether the lender is domestic or foreign?

The requirements and restrictions that apply to secured finance providers vary depending on the type of entity and whether the financier is domestic or foreign. Some of the requirements and restrictions include the following:

- Banks, micro-finance institutions and asset management companies must be licensed in order to provide their services.
- Banks must comply with:
  - prudential standards;
  - capital adequacy ratios;
  - reporting obligations; and
  - other regulations applicable to the banking sector.
- Banks are generally restricted from extending credit to officers, employees and shareholders, and their relatives.
- Private financiers cannot conduct banking business.
- Foreign players must:
  - procure an investment licence issued by the Zimbabwe Investment Development Agency; and
  - ordinarily, seek exchange control approvals.
- Offshore loans should be registered with the Reserve Bank of Zimbabwe as a requirement of law.

## 4 Secured finance structures

### 4.1 What secured finance structures are most commonly used in your jurisdiction?

The following secured finance structures are commonly used in Zimbabwe:

- Mortgage financing: Borrowers secure loans by mortgaging their immovable property as collateral.
- Corporate bonds/asset-based financing: This involves the use of movable or incorporeal assets as collateral for a loan.
- Project financing: This is commonly used for large-scale infrastructure or development projects.
- Commodity backed financing: This is prevalent in the agricultural and mining sectors, where the value of the underlying commodities is used as collateral.

- Trade financing: This involves the use of facilities such as letters of credit on a short-term basis.
- Receivables backed financing structures: These are most common for mining and agricultural borrowers, which in most instances are exporters.

## 4.2 What are the advantages and disadvantages of these different types of structures?

The advantages and disadvantages of the secured finance structures are set out in the following table.

Financing structure	Advantages	Disadvantages
Mortgage financing	<ul style="list-style-type: none"> <li>○ Enables property acquisition or development.</li> <li>○ Long repayment terms.</li> <li>○ Lower interest rates compared to unsecured loans.</li> </ul>	<ul style="list-style-type: none"> <li>○ Requires valuable property as collateral.</li> <li>○ Lengthy application and approval process.</li> <li>○ Potential foreclosure risks in case of default.</li> <li>○ Risk associated with improper securitisation of title.</li> </ul>
Bond/asset-based financing	<ul style="list-style-type: none"> <li>○ Flexibility in using various assets as collateral.</li> <li>○ Can be tailored to different industries and businesses.</li> <li>○ Allows access to capital based on asset value.</li> </ul>	<ul style="list-style-type: none"> <li>○ Valuation of assets may be subjective.</li> <li>○ Risk of asset depreciation affecting loan terms.</li> <li>○ Potential loss of assets in case of default.</li> </ul>

## Project financing

- Enables financing of large-scale projects.
- Limited recourse to project sponsors.
- Cash flows and project assets serve as collateral.
- Complex structure and documentation requirements.
- Requires thorough feasibility and risk assessment.
- Strict adherence to project milestones and cash-flow projections.

## Commodity/lease financing

- Enables financing based on the value of the underlying commodities or equipment.
- Provides liquidity to commodity producers.
- Can help manage cash-flow fluctuations.
- Exposure to commodity price volatility.
- Quality and storage risks associated with commodities.
- Limited diversification beyond specific commodities.

## Trade financing

- Facilitates international trade transactions.
- Mitigates payment and delivery risks.
- Enhances buyer-seller relationships.
- Relies on accurate documentation and compliance.
- Currency exchange rate risks in cross-border transactions.

## Receivables backed finance structures

- Potential increase in commodity prices, thus improving the value of the security.
- Effective for short-term borrowing.
- Fast and easy to set up.
- Sweeping arrangements in escrow accounts allow for the easy recovery of principal and interest.
- Fall in commodity prices.
- Depreciation of commodities before sale.
- Termination of offtake agreements.
- Commodities are easily affected by bad weather conditions or environment-related factors.

### 4.3 What other factors should parties bear in mind when deciding on a secured finance structure?

When deciding on a secured finance structure, parties should consider the following factors:

- Risk assessment: Evaluate the risk profile of the borrower and the collateral being offered. Consider factors such as:
  - the stability and value of the collateral;
  - the borrower's creditworthiness and repayment capacity; and
  - the industry-specific risks involved.
- Cost of financing and securitisation: Compare the interest rates, fees and charges associated with different secured finance structures. Consider the total cost of borrowing, including:
  - upfront fees;
  - ongoing costs; and
  - any penalties for early repayment.
- Repayment terms: Assess the repayment terms, including:
  - the duration of the loan;
  - payment frequency; and
  - flexibility in repayment options.

Consider whether the structure aligns with the cash-flow patterns and financial goals of the borrower.



- Collateral requirements: Evaluate the suitability and availability of collateral for the desired finance structure. Consider:
  - the value, liquidity and marketability of the collateral; and
  - any potential limitations or risks associated with using specific assets as security.
- Regulatory and legal considerations: Understand the regulatory framework and legal requirements associated with the chosen secured finance structure. Consider:
  - compliance obligations;
  - dispute resolution mechanisms;
  - documentation requirements; and
  - any specific regulations that may impact the financing arrangement.
- Relationship with the lender: Assess the reputation, expertise and reliability of the potential lender. Consider its:
  - track record in providing secured financing;
  - customer service; and
  - willingness to work with borrowers to meet their specific needs.
- Future flexibility: Consider the potential for future changes or refinancing needs. Evaluate the flexibility of the finance structure to accommodate changes in the borrower's circumstances, such as:
  - early repayment;
  - additional funding requirements; or
  - modifications to collateral arrangements.

## 5 Security

### 5.1 What types of security interests are available in your jurisdiction? Which are most commonly used and which are recommended (if different)?

The most common types of security interests are as follows:

- Immovable property: Mortgage, land use rights and lease rights.
- Movable property: Security rights can be created over:
  - corporeal assets;
  - incorporeal assets (shares, intellectual property, bank accounts);
  - agricultural produce;

- warehouse securitisation;
- land use rights; and
- assignment of movables.

Both immovable and movable property are commonly used. Securitisation of immovable property is recommended because it:

- provides real rights which are enforceable against the whole world; and
- ranks higher than unsecured creditors in the case of insolvency.

## 5.2 What are the formal, documentary and procedural requirements for perfecting these different types of security interests (ensuring that they are enforceable against debtors and third parties)?

The formal, documentary and procedural requirements for perfecting security interests in Zimbabwe can vary depending on the type of security interest. The following requirements are applicable:

- Mortgages and notarial bonds:
  - Documentation: Mortgages over real or immovable property and bonds over movable property typically require a written agreement, often in the form of mortgage bonds and notarial bonds.
  - Registration: To perfect a mortgage or notarial bond, it is essential to register it with the Deeds Registry Office. Registration provides public notice of the mortgage and ensures its enforceability against third parties.
- Pledge:
  - Documentation: A pledge agreement must be executed between the pledgor and pledgee. The agreement should:
    - detail the parties involved;
    - describe the pledged assets;
    - specify the terms and conditions of the pledge; and
    - outline the remedies in case of default.
  - Transfer of possession: To perfect a pledge, the possession of the pledged assets must be transferred to the lender or a designated custodian. The transfer of possession provides evidence of the existence of the pledge and makes it enforceable against third parties.
  - In the case of dematerialised shares, a pledge must be effected in a central securities depository.

- Assignment of receivables:
  - Documentation: An assignment agreement is required to establish the assignment of receivables.
  - Notice to debtors: To perfect the assignment, notice must be given to the debtors whose receivables are assigned. The notice informs the debtors that their obligations have been assigned to the lender and provides evidence of the assignment.
  
- Floating charge:
  - Documentation: A floating charge is typically created through a written agreement such as a debenture.
  - Registration: There is no requirement to register a debenture.
  
- Hypothecation:
  - Documentation: A written agreement, such as a hypothecation agreement, is needed to establish the hypothecation of movable assets.
  - Notice and control: While possession of the assets may remain with the borrower, it is essential to have mechanisms in place to ensure that the lender has effective control over the hypothecated assets. This can involve the borrower providing notice to third parties and implementing control measures to prevent disposal or unauthorised use of the assets.

### 5.3 What are the main types of collateral used as security in your jurisdiction and what specific points should be borne in mind regarding each?

The main types of collateral include the following:

- Immovable property (land and buildings):
  - Ownership documentation: There is a need to ensure that the borrower has clear ownership rights and legal title to the property being offered as collateral.
  - Valuation: It is important to conduct a proper valuation of the property to determine its current market value and assess its adequacy as collateral for the loan.
  - Encumbrances: It is crucial to:
    - investigate any existing encumbrances, such as mortgages or liens, on the property; and
    - ascertain their priority in relation to the proposed loan.
  
- Movable property (eg, vehicles, equipment):

- Identification and description: It is important to clearly identify and describe the movable assets being pledged, such as vehicles, equipment, inventory or financial instruments. Ownership documents must also be verified.
- Condition and maintenance: Assessment of the condition and maintenance of the assets to ensure their value and usefulness as collateral is also vital.
- Possession and control: Determining whether possession or control of the assets will be transferred to the lender or a designated custodian as part of the security arrangement is further of great significance.
  
- Receivables:
  - Verification: It is important to verify the existence and authenticity of the receivables being assigned as collateral.
  - Notice to debtors: Providing proper notice to the debtors whose receivables are assigned to inform them of the assignment is vital.
  - Quality of receivables: Evaluation of the creditworthiness and reliability of the debtors to assess the quality and collectability of the assigned receivables is also crucial.
  
- Commodities:
  - Quality and quantity: Verify the quality and quantity of the commodities being pledged as collateral, particularly in sectors such as agriculture or mining.
  - Storage and handling: Consider the storage and handling requirements of the commodities to ensure their preservation and marketability.
  - Market volatility: Evaluate the potential price volatility and market risks associated with the pledged commodities.

#### 5.4 Can security be taken over property, plant and equipment in your jurisdiction? If so, how?

Yes, security can be taken over property, plant and equipment in Zimbabwe.

The most common ways to take security over such assets are:

- notarial bonds (general and special covering);
- pledges; and
- lease financing.

#### 5.5 Can security be taken over cash (including bank accounts generally) and receivables in your jurisdiction? If so, how?

Yes, security can be taken over:

- bank accounts, which can be secured through pledges or charges; and
- receivables, which can be secured through assignment.

## 5.6 Can security be taken over company shares in your jurisdiction? If so, how?

Yes, security can be taken over company shares. This can be achieved through a pledge of shares and debt-to-equity option arrangement.

## 5.7 Can security be taken over inventory/moveables in your jurisdiction? If so, how?

Yes, security can be taken over inventory/movables. The procedure is outlined in the Movable Property Security Interests Act [Chapter 14:35]. First, the parties must execute a security agreement. Second, before filing for the registration of the security agreement, there is a need to obtain express authority in writing from the debtor authorising registration of the same. The rationale behind this requirement is arguably to establish that whoever is surrendering the property has done so voluntarily without any duress, undue influence or other illegal means. Thereafter, either party must submit the notice to register the property to the Collateral Registry Office. The registrar in the Collateral Office will register the collateral on settlement of the applicable registration fees.

## 5.8 What charges, fees and taxes (including notary and similar fees) arise from the perfection of a security interest? Do these vary depending on the type of assets used as collateral?

The charges, fees and taxes associated with perfecting a security interest can vary depending on the type of asset used as collateral. The charges include the following:

- Filing or registration fees: Fees associated with filing or registering the security interest with the Deeds Registry Office. These fees can vary depending on the type of collateral.
- Notary fees: Fees for notarisation and authentication of documents.
- Conveyancing fees: Fees due to a conveyancer on the transfer of the property.
- Search fees: It is common practice to conduct searches at the Deeds Registry Office to ensure that there are no prior security interests or liens on the collateral.
- Stamp duties or transfer taxes: These may be imposed on the transfer of assets.
- Collateral management fees: For warehouse receipting and securitisation of commodities.

## 5.9 What are the respective obligations and liabilities of the parties under the security documents?

The obligations and liabilities of the parties under security documents can vary depending on the specific terms and conditions outlined in the agreements themselves. However, general obligations and liabilities commonly associated with security documents include the following:

- Obligations of the borrower:
  - repaying the loan;
  - providing accurate information regarding the ownership, value and condition of the collateral;
  - maintaining and protecting the collateral; and
  - paying for the registration costs.
- Obligations of the lender:
  - providing the necessary funding;
  - preserving the collateral; and
  - complying with notice and default provisions.

## 5.10 What other considerations should be borne in mind by all counterparties when perfecting a security interest in your jurisdiction?

When perfecting a security interest, additional considerations that all counterparties involved should bear in mind include the following:

- Legal requirements: The parties must understand and comply with the legal requirements for the creation, perfection, registration and enforcement of security interests.
- Perfection: The parties must take the necessary steps to perfect the security interest according to the applicable legal requirements. This may involve registration, filing or other formalities to establish priority over other creditors and protect against competing claims.
- Due diligence: The creditor must conduct thorough due diligence on the collateral and the borrower/grantor to assess the value, condition and enforceability of the security interest. This may include:
  - examining ownership records;
  - conducting valuations;
  - performing title searches at the Deeds Registry Office;
  - reviewing financial statements; and
  - analysing other relevant information.
- Documentation: Both parties must ensure that the security documents are properly drafted, executed and legally binding. The documents must:

- clearly define the rights, obligations and remedies of the parties; and
  - accurately reflect the intentions and agreements of all parties involved.
- Notice to third parties: Proper notice of the security interest must be provided to relevant third parties, such as other creditors or potential buyers of the collateral. This can help to establish priority and avoid disputes regarding the enforceability of the security interest.
  - Default and enforcement: The creditor should understand the rights and remedies available in the event of default by the borrower/grantor. It must be aware of the legal processes and procedures for enforcing the security interest, including any applicable timeframes or notice requirements.

## 6 Guarantees

### 6.1 What types of guarantees are available in your jurisdiction? Which are most commonly used and which are recommended (if different)?

There are basically two types of guarantees:

- Primary/independent/demand guarantee: This is a guarantee in terms of which the liability of the guarantor to pay is normally not dependent upon default of a principal debtor.
- Traditional/true/surety guarantee: This is a guarantee in terms of which payment or alternatively performance obligation is triggered only by actual default on the part of the principal debtor.

Both types of guarantees are commonly used in Zimbabwe. The choice of guarantee depends on factors such as:

- the nature of the transaction;
- the preferences of the parties involved; and
- the specific requirements of the situation.

Examples of guarantees include:

- personal guarantee/surety;
- performance guarantee;
- maintenance or defects liability bonds;
- bank guarantee;
- letter of credit; and
- corporate guarantee.

Personal sureties and bank guarantees are generally more commonly used due to:

- their widespread acceptance; and
- the ease of implementation.

## 6.2 What are the formal, documentary and procedural requirements to perfect a guarantee?

The formal, documentary and procedural requirements to perfect a guarantee are as follows:

- a written contract (a guarantee must be express; it cannot be presumed);
- a clear description of the guaranteed obligations;
- execution of the contract; and
- notarisation (if required by the parties).

## 6.3 What charges, fees and taxes (including notary and similar fees) arise from the perfection of a guarantee?

The following fees and taxes may arise from perfection of a guarantee:

- legal and notary fees, which are charged in terms of the Law Society of Zimbabwe Tariff of Fees for Legal Practitioners;
- stamp duty (where applicable); and
- financial advisory and deal structuring fees.

## 6.4 What are the respective obligations and liabilities of the parties under the guarantee?

- Guarantor:
  - The guarantor is liable for the guaranteed obligations in the event of default by the principal debtor.
  - In the event of default, the guarantor may be called upon to fulfil those obligations on behalf of the principal.
- Principal debtor:
  - The principal debtor is primarily responsible for performing the obligations stated in the underlying contract or agreement.
  - In the event of default, the creditor may recover from both the principal debtor and the guarantor.
- Creditor:
  - The creditor can only enforce the guarantee up to the guaranteed obligations.



- Where the primary obligation has fallen due, the guarantor may demand that the creditor sue the principal debtor first, unless the guarantee renounced the benefit of excursion.

## 6.5 What other considerations should be borne in mind by all counterparties when taking the benefit of a guarantee in your jurisdiction?

When considering the benefit of a guarantee in Zimbabwe, all counterparties involved should bear in mind the following considerations:

- The nature of the collateral (eg, movable or immovable): This is important as it helps the parties to understand which legal framework will govern the guarantee.
- Capacity and authority: It is necessary to ensure that the party providing the guarantee has the legal capacity and authority to do so.
- Financial standing: Assess the financial standing of the guarantor. One must evaluate the guarantor's ability to honour the guarantee in case of default by the principal debtor.
- Documentation: Ensure that the suretyship agreement is properly documented and executed. It must clearly define the rights, obligations and responsibilities of all parties involved.
- Governing law: It is important to expressly determine the governing law for any disputes that may arise under the guarantee agreement.
- Notice requirements: It is crucial to understand the notice requirements stipulated in the guarantee agreement. Any notices, claims or demands must be properly communicated in accordance with the agreement.
- Limitations and exclusions: Consider any limitations or exclusions specified in the guarantee agreement.
- Duration and termination: Determine the duration of the guarantee and any provisions for termination.

## 7 Financial assistance

### 7.1 What requirements and restrictions apply with regard to the provision of financial assistance in your jurisdiction? What specific implications do these have for secured finance transactions?

The following requirements and restrictions apply with regard to the provision of financial assistance in Zimbabwe:

- Financial assistance by commercial banks:
  - Lending activity should follow prudent written lending guidelines and limits issued by the Reserve Bank of Zimbabwe (Section 15 of the Banking

Regulations (SI 205/2000)).

- Banks:
  - are restricted from extending credit to their officers, employees and shareholders on terms and conditions that are more favourable than those on which the institution, applying criteria normally applied in the banking industry, would extend credit to other persons of the same financial standing; and
  - must not extend credit exceeding prescribed amounts or thresholds (Section 35 of the Banking Act [Chapter 24:20] as read with Section 16 of the Banking Regulations).
  
- Financial assistance by limited liability companies: According to Section 123 of the Companies and Other Business Entities Act [Chapter 24:31], a limited liability company is not required to give – whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise – any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company, unless:
  - such assistance is given in accordance with a special resolution of the company; and
  - immediately after such assistance is given:
    - on a fair valuation, the company's assets – excluding any asset resulting from the giving of the assistance – exceed its liabilities; and
    - it is able to pay its debts as they become due in ordinary course of its business.

In the context of secured finance transactions, the prohibition on financial assistance may impact the ability of a company to provide security or guarantees for the obligations of a borrower or a related party in the aforesaid circumstances.

## 8 Syndicated lending

### 8.1 Is the concept of an agent or trustee recognised in your jurisdiction? If not, how is security taken for multiple lenders?

The concept of an agent-trustee relationship is generally recognised under the laws of Zimbabwe. Under syndicated lending, multiple lenders may agree to be represented by a lead party, acting as agent, for ease of executing a transaction. However, in terms of Section

48 of the Deeds Registries Act [Chapter 20:05], no mortgage bond or notarial bond may be passed in favour of any person as the agent of a principal.

## 8.2 What requirements and restrictions apply with regard to syndicated lending in your jurisdiction?

Apart from general contract law requirements, no special requirements and restrictions apply to syndicated lending. Suffice it state that if the lenders intend to carry on the business of a moneylender, they must first obtain a moneylender's licence in terms of Section 3 of the Moneylending and Rates of Interest Act [Chapter 14:14].

## 8.3 What other considerations should be borne in mind by all counterparties when engaging in syndicated lending in your jurisdiction?

The following considerations should be borne in mind by all counterparties when engaging in syndicated lending:

- the number of lenders and their participation interest;
- the capacity of the trustee/agent in coordinating and managing the execution of the transaction and engaging with the borrower(s);
- the loan structure, including:
  - the types of loans;
  - interest rates;
  - the repayment schedule; and
  - other salient terms;
- the credit risk of the borrower; and
- security for the loan.

## 9 Taxes, charges and fees

### 9.1 What taxes and similar charges are levied in the secured finance context in your jurisdiction? Do these vary depending on whether the lender is a domestic or foreign entity?

Depending on the nature of the transaction, the following taxes and charges may be payable:

- stamp duty levied in terms of the Stamp Duties Act [Chapter 23:09];
- capital gains tax levied on the sale of a specified asset; and
- legal and notarial fees charged in accordance with the Law Society of Zimbabwe Tariffs of Fees for Legal Practitioners.

The tax rates and charges can vary depending on whether the lender is a domestic or foreign entity, as the following examples illustrate:

- Income tax: Different rates may apply to residents and non-residents.
- Withholding tax: Rates may differ for payments made to non-residents, such as dividends, interests and royalties.
- Double taxation relief: There may be a double taxation agreement between Zimbabwe and the foreign country in which the lender resides.
- Real estate: Foreign lenders can be granted security over real estate subject to obtaining exchange control approval from the Reserve Bank of Zimbabwe, as stipulated in Exchange Control Act Regulations Statutory Instrument 109/1996.

## 9.2 Are any exemptions or incentives available?

No special exemptions and incentives are available for secured finance transactions.

## 9.3 What other significant costs will be incurred by the counterparties in entering into a secured finance transaction? Do these vary depending on whether the lender is a domestic or foreign entity?

There are no other significant costs to note, apart from legal and financial advisory fees which depend on the nature and complexity of the transaction.

## 9.4 What strategies might the counterparties consider to mitigate their tax and other liabilities in the secured finance context?

To mitigate tax and other liabilities in the secured finance context, counterparties might consider the following strategies:

- leveraging double taxation agreements to avoid double taxation; and
- engaging in tax planning so as to structure transactions in a tax-efficient manner.

## 10 Judicial enforcement

### 10.1 In the event of default, what options are available to enforce a security interest or guarantee? Is self-help available in your jurisdiction in connection with the enforcement of security (if so, in what circumstances) or must enforcement action be pursued through the courts?

In the event of default, a lender can:

- enforce a security interest or guarantee through the courts; and
- have a hypothecated security declared executable.

These proceedings are generally known as foreclosure proceedings. Once a lender obtains a court order, it can execute upon the security. Self-help for the purposes of enforcing security is not permitted at law, as it is against public policy. A security interest registered in terms of the Movable Property Security Interests Act [Chapter 14:35] can be enforced through a speedy judicial remedy known as provisional sentence proceedings.

## 10.2 How long does the enforcement process generally take and what steps does this typically involve? Do these vary depending on any applicable requirements or restrictions (eg, requirement for public auction or regulatory consents)? Do these vary depending on whether the lender is a domestic or foreign entity?

The time taken for an enforcement action varies depending on whether the action is opposed. If the process is not opposed, it can take approximately two weeks to obtain relief. However, if such enforcement is opposed, the process may take longer – approximately three months to a year. The timelines do not depend on whether the lender is a domestic entity or a foreign entity. The timelines may, however, be affected by interlocutory applications.

## 10.3 What other considerations should be borne in mind when enforcing a security interest or guarantee in your jurisdiction?

The following considerations should be borne in mind:

- Legal framework: Understanding the applicable legal framework, enforcement procedures and any other relevant laws.
- Priority of claims: Considering the priority of claims – especially in insolvency or bankruptcy situations, where secured creditors typically have priority over unsecured creditors.
- Costs: Understanding the costs associated with enforcement, such as:
  - legal fees;
  - court costs; and
  - any potential auction or sale expenses.
- Regulatory compliance: Ensuring compliance with all regulatory requirements.
- Impact on business relationships: Considering the potential impact on business relationships when enforcing security interests.
- Exchange control regulations: Understanding the impact of exchange control regulations on:
  - the repatriation of funds; and
  - the conversion of currencies.

## 10.4 Are direct agreements with contractual counterparties well understood in your jurisdiction?

Yes. A direct agreement is essentially a contract between the lender(s), the project company and the procuring entity giving lender(s) some rights over the borrower's agreements. While the term 'direct agreement' is not generally used in Zimbabwe, the phenomenon is quite common, especially in public-private partnership projects.

## 10.5 What other avenues are available to a lender to safeguard its position in connection with security or guarantees?

Lenders may consider entering into an intercreditor agreement in terms of which they combine their interests to bolster their powers and achieve a mutually beneficial solution. The intercreditor agreement will define the rights and priorities of the multiple lenders.

# 11 Bankruptcy

## 11.1 How (if at all) do bankruptcy proceedings impact on the enforcement of security by a creditor?

In Zimbabwe, bankruptcy proceedings or insolvency proceedings are governed by the Insolvency Act [Chapter 6:07]. These proceedings can impact the enforcement of security by a creditor in the following ways:

- **Moratorium on claims:** Creditors are subject to a temporary moratorium on their claims against the company, which means that they cannot initiate or continue litigation or enforcement actions against the company's property during the rescue process without the consent of the business rescue practitioner or leave of court. More particularly, a claim based on a guarantee cannot be enforced against an insolvent company without leave of the court.
- **Restructuring of debts:** The proceedings may involve the restructuring of the company's debts, which could affect the terms and conditions under which creditors will be repaid.
- **Participation in a rescue plan:** Creditors have the right to participate in the development and approval of the rescue plan, which will outline how the company's affairs will be restructured.
- **Ranking of claims:** The rescue proceedings may affect the ranking of claims, with secured creditors generally having priority over unsecured creditors.
- **Potential for compromise:** Creditors may need to compromise on the amounts owed to them to facilitate the rescue of the company.

## 11.2 In what circumstances can antecedent transactions be unwound for preference? What other similar measures apply in this regard?

Where a company is undergoing liquidation, the following antecedent transactions are considered voidable dispositions which are at risk of legal challenge:

- alienation of property by an insolvent entity without the consent of a liquidator, except where the third-party purchaser acted in good faith (Section 22 of the Insolvency Act [Chapter 6:07]);
- disposition of property not made for value except for the specified exceptions (Section 24 of the Insolvency Act);
- disposition of property which has the effect that any one of the creditors receives a benefit to which it would not have been entitled had the insolvent estate been under liquidation at the time the disposition was made, except for specified exceptions (Section 26 of the Insolvency Act); and
- any transaction entered into by an insolvent entity before or after liquidation in collusion with another person for disposing of property belonging to the insolvent estate in a manner which had the effect of prejudicing the creditors or preferring one creditor above another (Section 27 of the Insolvency Act).

Generally, the remedies or measures available for challenging voidable transactions include:

- instituting legal proceedings to set aside a transaction;
- pressing criminal charges; or
- applying for the removal of a liquidator.

These provisions are designed to:

- ensure the equitable treatment of all creditors; and
- prevent the dissipation of a company's assets to the detriment of the constituency of creditors.

### **11.3 Are any types of entities excluded from the bankruptcy regime in your jurisdiction? If so, what alternative regimes apply?**

No type of entity is excluded from insolvency proceedings. However, there is an alternative regime for state-indebted companies regulated by the Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27]. Where a state-indebted company has become insolvent, the responsible minister may issue a reconstruction order to place the company under reconstruction. Under reconstruction proceedings, the company will be managed by an administrator appointed by the minister, the objective being to rescue the company from its financial distress and avoid liquidation.

## **12 Governing law and jurisdiction**

### **12.1 What law typically governs secured finance agreements in your jurisdiction? Do any specific requirements apply in this regard?**

The common law and statutory law of Zimbabwe generally govern secured finance agreements.

**12.2 Is a choice of foreign law or jurisdiction valid and enforceable? In the case of a choice of foreign law of jurisdiction, will any provisions of local law have mandatory application? Are submission to jurisdiction provisions that operate in favour of one party only enforceable?**

The Zimbabwean courts can only enforce Zimbabwean law. A choice of foreign law or jurisdiction in a contract is enforceable only where the parties submit to arbitration. However, for the purposes of recognition and enforcement of an arbitral award, the parties will resort to the local law. By virtue of the application of principles of sanctity and privity of contract, there are no restrictions with regard to submission to jurisdiction provisions that operate in favour of one party only.

**12.3 Are waivers of immunity enforceable in your jurisdiction?**

Yes, waivers of immunity are enforceable. See the Supreme Court judgment in *Minister of Foreign Affairs v Jenrich* SC 73/18.

**12.4 Will foreign judgments or arbitral awards be enforced in your jurisdiction? If so, how?**

Yes, foreign judgements and arbitral awards may be enforced in Zimbabwe.

Zimbabwe ratified and domesticated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The enforcement of foreign arbitral awards is governed by the Arbitration Act [Chapter 7:15], which largely mirrors the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. An arbitral award, irrespective of the country in which it was made, may be recognised and enforced upon application by a party in writing to the High Court of Zimbabwe. See Articles 35 of the Model Law to the Arbitration Act [Chapter 7:15].

Foreign civil judgments sounding in money from designated countries may be enforced in Zimbabwe in terms of the Civil Matters (Mutual Assistance) Act [Chapter 8:02]. In terms of Civil Matters (Mutual Assistance) (Designated Countries) Order SI 65/98, the designated countries are:

- Australia;
- Dominica;
- Germany;
- Ghana;
- Portugal;
- South Africa;



- o Italy;
- o Zambia;
- o the Slovak Republic; and
- o Bulgaria.

Under the common law, the grounds for registration or refusal of such were set out in *Tiiso Holdings (Pty) Limited v Zimbabwe Iron & Steel Company Limited* HH 95- 2010, where the court pointed out as follows:

*Under the common law, the general requirements for the recognition and enforcement of foreign judgments may be summarised as follows:*

- the foreign court in question had the requisite international jurisdiction or competence according to our law;*
- the judgment concerned was final and has the effect of res judicata according to the law of the forum in which it was pronounced;*
- the judgment must not have been obtained by fraudulent means;*
- it must not entail the enforcement of a penal or revenue law of the foreign State;*
- it must not be contrary to public policy in this country; and*
- the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.*

## 13 Trends and predictions

13.1 How would you describe the current secured finance landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

The legislative landscape has evolved considerably over the last decade. Various changes which have come into effect include:

- o the introduction of the Victoria Falls Stock Exchange; and
- o the enactment of the Movable Property Security Interests Act [Chapter 14:15], which paves the way for the effective use of movable property as collateral for financing.

No changes or new laws are expected in the coming 12 months.

## 14 Tips and traps

14.1 What are your top tips for the smooth conclusion of a secured finance transaction in your jurisdiction and what potential sticking points would you highlight?

For the smooth conclusion of a secured finance transaction in Zimbabwe, our top tips are as follows:

- Conduct thorough due diligence to understand the borrower's financial health and the value of the collateral.
- Ensure compliance with relevant laws.
- Engage legal and financial experts for ease of execution of the transaction

Potential sticking points to be aware of include the following:

- Anticipate and adapt to legal and regulatory changes.
- Be prepared for potential challenges in enforcing security interests, especially in case of default or insolvency.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*