

Nigeria

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Creating a charge over custody assets

Traditionally, loans are backed by collateral taken from borrowers mainly as a form of guarantee for repayment of debt or as a form of security to the lender in the event of insolvency of the borrower. In his book, *Custody of Investments: Law and Practice* (OUP, 2001), A O Austen-Peters suggests that the availability and/or pricing of loans in both the capital and money markets may depend on the borrower's ability to offer some form of security to the lender, especially security that will be effective in the insolvency of the borrower, such as shares and bonds or custody assets.

Austen-Peters argues that for creditors to be willing to accept custody assets as security for the debtor's obligations, at least two components must be met: the custody asset must be a type satisfactory to the secured lender; and the asset offered

must be susceptible to the intended or comparable form of security so that, in the case of real security, the creditor can assert a proprietary right to the assets offered as security and thereby protect itself from the consequences of the debtor's insolvency.

The rule relating to custodial arrangements in Nigeria (the 2011 Consolidated Rules of the Nigerian Securities and Exchange Commission) creates a direct relationship by requiring a custodian to avoid co-mingling individual client assets with other client assets or with the custodian's assets. The authors have argued elsewhere that the only way to ensure that the dematerialised assets of the investor are treated separately in the event of insolvency of a custodian is to create a trust.

Situations may, however, arise as under Rule 164 of the 2011 Consolidated Rules where assets are held in a central securities depository. Depending on the number of tiers of the relationship, the investor may have difficulty offering security interests to

creditors in relation to the pooled assets.

Among others, creating a charge is one method by which such pooled custody assets may be offered as security. A charge may take effect by agreement of the debtor and creditor to apply certain assets to the settlement of a debt and has the effect of encumbering the assets over which the agreement was made.

A charge may be fixed on particular assets of a debtor or floating over the whole or a specified part of a debtor's undertakings and assets, including present and future assets. Section 178(1) of the Nigerian Companies and Allied Matters Act 1990 (Cama) contemplates that until the security becomes enforceable and the holder (or court) appoints a receiver or manager or takes possession of such assets, or the company enters into liquidation, creation of a floating charge shall not preclude a debtor company from dealing with such assets.

This issue is yet to come before courts in Nigeria, but there is a possibility that charges made over assets comprised in custody arrangements, such as those in the pooled asset arrangement of a central securities depository, may be characterised as floating charges requiring registration within 90 days of creation pursuant to section 197 of Cama. Failure to register such charges may render them void against the liquidator or any creditor of the company.

In addition, section 197(2) of Cama requires companies to register charges made for the purpose of securing any issue of debenture as well as charges on book debts. Failure to register these charges or a floating charge renders the charge void against the liquidator or any creditor of the company.

Registration constitutes notice of the encumbrance on all persons who subsequently deal with the investor in relation to the charged assets and would protect such creditors' interests, subject always to other actions by intermediaries on the underlying asset, such as any claim on fees owed to an intermediary. Registration also assures the creditor of priority in relation to the underlying custody assets, especially where the assets are insufficient to satisfy all secured creditors, subject to competing interests.

In relation to the above therefore, it is advisable that parties dealing with assets in custody arrangements in Nigeria obtain appropriate counsel towards protecting their investment interests.

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