




This newsheet is designed to inform our clients of recent developments in the law in Kenya, Uganda and Tanzania. If you would like us to e-mail it direct to any specific persons in your organisation please contact: Pamela Nabwire  
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## New Provision on Non-performing Loans a Blow to Kenyan Banks

The Banking (Amendment) Act, 2006 (the "Act") which came into force on 1<sup>st</sup> May 2007 proposes, inter alia, to limit the interest that may be recovered by banks and other financial institutions on defaulting loans. This provision will affect not only loans advanced after the date the Act came into force, but, additionally, loans made before the coming into force of the Act, including those that are already non-performing.

### Recovery of Interest on "Non Performing Loans"

The Act stipulates that the maximum amount that may be recovered by an institution from a non-performing loan is the sum of the following:

- the principal owing when the loan becomes non-performing;
- interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
- expenses incurred in the recovery of any amounts owed to the debtor.

Interest (including, therefore, default interest) which exceeds the principal amount owing when the loan becomes non-performing (and not, necessarily, the original principal amount advanced) will not be recoverable.

Accordingly, in the case where a debtor under a loan that was non-performing resumes payments on the loan and that loan again becomes non-performing, the principal and the interest owing will be determined with respect to the time the loan last became non-performing. By way of example, if a customer defaults in payment of a loan when the principal amount of the loan due is US\$.2 million, then resumes payment but once again defaults when the principal amount due is then US\$.1 million, the maximum amount of interest that the institution may recover will be limited to US\$.1 million.

It should be noted that the term "debtor" includes a guarantor and the term "loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person. In addition, the determination of when a loan is non-performing is assessed in accordance with guidelines issued by the Central Bank of Kenya ("CBK") from time to time.

## Determination of "Non-Performing Loans"

The Prudential Guidelines for Institutions Licenced under the Banking Act (the "Guidelines") issued by the CBK set out the criteria for determining non-performing loans. Under the Guidelines, a non-performing loan is defined as a loan that is no longer generating income or when it comes to the institution's knowledge that a credit facility will no longer generate income. Loans are non-performing when (i) principal or interest is due and unpaid for ninety (90) days or more, or (ii) interest payments for ninety (90) days or more have been re-financed or rolled-over into a new loan.

In addition, current accounts (overdrafts) and other credit extensions not having pre-established repayment programs are considered "non-performing" if:

- the balance exceeds the customer's approved limit for more than ninety (90) consecutive days;
- the customer's borrowing line has expired for more than ninety (90) days; or
- the account has been inactive for more than ninety (90) days, or credits are insufficient to cover the outstanding interest during the period.

In cases of loans which are already non-performing at the time the Act came into force, the maximum amount recoverable by an institution shall be the total of:

- the principal and interest owing on the day the Act comes into operation;
- interest in accordance with the contract between the debtor and the institution, accruing after the day the Act comes into force, not exceeding the principal and interest owing on such day; and
- expenses incurred in the recovery of any amount owed by the debtor.

## De-regulation of Business - Further Reforms Expected in 2007

The Working Committee on Regulatory Reforms for Business Activity in Kenya set up by the Government of Kenya in September 2005 (the "Committee") recently submitted its final recommendations to the Attorney General. The Attorney General has indicated that two (2) new Bills implementing the recommendations would be published. These are:

- (i) the Business Regulation Bill, 2007 which proposes to introduce an electronic register for licenses, maintain a database of all licenses in Kenya that can be accessed by investors and further to establish a Regulatory Reform Unit to monitor the need for licenses and to recommend reforms from time to time; and
- (ii) the Licensing Laws (Repeals and Amendment) Bill, 2007 to be presented together with the budget introducing further reforms to the licensing regime.

The Committee was required to seek comments from public bodies, licensing authorities, business associations and the private sector on which of the over 1,300 licences affecting business operations in Kenya should be retained, abolished or simplified.

The Committee comprised representatives of the Ministry of Finance, the Ministry of Trade & Industry, the Law Reform Commission, the Attorney-General, the private sector and was chaired by a renowned legal expert.

Some of the interim recommendations of the Committee have over the past two years been implemented through statutory amendments contained in the budgetary process, for example, the Licensing Laws (Repeals and Amendment) Act, 2006, which repealed and amended certain Acts which create the obligation to obtain licences. The licensing Acts repealed include the Trade Licensing Act to remove the requirement of obtaining trade licences for business entities.

Some of the stated aims of the reforms include:

- (i) reduction of the number of licensing requirements in Kenya and, by doing so, to make the licensing regimes more simple and transparent and focused on legitimate regulatory purposes;
- (ii) ensuring licenses which are necessary from a health, environment or safety perspective are simplified;
- (iii) reviewing business licences and all Government regulations impacting on business activities (start-up, operation and termination) which require active and official authorisation prior to or subsequent upon the commencement of business operations; and
- (iv) establishment of a permanent electronic registry for licences at the Attorney-General's Chambers and also putting in place a mechanism for quality review of licences in future.

In coming up with its recommendations, the Committee adopted the "guillotine process" under which licences are reviewed according to the following criteria: is it legal, necessary, business friendly, can it be simplified by conversion into a notification, amalgamation, reducing the target group,

reducing the reporting frequency, applying the silence is consent rule or by establishing time limits for responses.

The Attorney General is yet to publish the Bills, and it is anticipated that the many unnecessary licences and licensing requirements will be abolished.

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### Proposed New Companies Legislation in Kenya

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The Kenya Law Reform Commission (the "Commission") has recently circulated to stakeholders (lawyers, business associations, accountants etc.) for comment the Companies Bill, 2006 (the "Bill"). The Bill aims to reform the company law regime in Kenya. If enacted by the Kenyan National Assembly, the Bill will replace the current Companies Act (Cap. 486) which is based on the 1948 English Companies Act and has remained largely unchanged since it was enacted in 1959. It is generally accepted that the present Companies Act is out dated and does not cater for modern business and commercial practices.

The Bill's stated aim is to, inter alia, amend, simplify, streamline and consolidate the law relating to incorporation, registration, operation and management of companies, legal provisions relating to business names of all business entities and appointment of auditors. The Bill if enacted will introduce a number of radical and fundamental changes to the company law regime in Kenya. Although the purpose of the review of the companies' legislation includes consolidating and simplifying the current law on companies, the proposed draft contains 1007 sections (plus numerous schedules) whereas the current Companies Act contains 406 sections.

The move by the Commission to review companies' legislation in Kenya comes at a time when neighbouring Tanzania recently introduced new company law legislation. Tanzania's Companies Act (which is largely adapted from the English Companies Act of 1985 and the English Insolvency Act 1986) came into force on 1<sup>st</sup> March, 2006.

Once the Bill is formally published and introduced to the Kenyan National Assembly, we will endeavour to highlight its salient provisions in future editions of Legal Notes.

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### Developments in Public Procurement Law

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The Public Procurement and Disposal Act, 2005, (the "Act") which had been passed by the National Assembly in the year 2005 finally came into force on 1<sup>st</sup> January, 2007. In addition, the Minister for Finance has published the Public Procurement and Disposal Regulations, 2006, (the "Regulations") which provide for the specific procedures in relation to procurement by public entities (meaning or including the Government or any department of the Government, the courts, local authorities, state corporations, Central Bank of Kenya, co-operative societies and public universities).

### Entities Established under the Act

Various bodies have been established under the Act. These include the Public Procurement Oversight Authority (the "Authority") whose principal function is to oversee compliance with the Regulations by public entities. In addition, the Public Procurement Advisory Board has been created for the purposes of advising the Authority on exercise of its powers and performances of its functions, approving the Authority's budget and recommending the appointment of the Director-General who will be the chief executive officer of the Authority. A Public Procurement Administrative Review Board is also established for purposes of providing a mechanism for administrative review of procurement proceedings.

### Procurement Policies

The Act also includes provisions relating to the internal organization of public entities in relation to procurement. For instance, a public entity is required to establish procedures for the making of decisions in relation to procurement and establish a tender committee. A public entity is responsible for ensuring that the Act, Regulations and directions of the Authority are followed. The accounting officer is primarily responsible for ensuring that the public entity fulfils these obligations.

The Act provides for different procurement options to be used in different circumstances. The options identified include open tendering, restricted tendering, direct procurement, request for proposals and request for quotations.

The Act prohibits inducements, misrepresentations, fraudulent practices, collusion and influence on evaluations by persons involved in the procurement process. Procuring entities are also prohibited from entering into procurement contracts with certain persons. In particular, a procuring entity cannot contract with employees of the procuring entity or public servants or persons, including corporations, related to such employees or public servants. Once the procurement proceedings are complete, procuring entities are required to maintain such information relating to records and the publication of notices of contracts.

### Procurement by Defense Entities

The Act makes specific mention of defence-related procurements. It is thought that this is in response to the outcry witnessed in the recent past arising from corruption scandals in relation to defence and national security procurements. The Act requires that procurements and disposals by defence and national security organs shall comply with the provisions of the Act.

### Local Preference in Procurement

Another key development contained in the Act and Regulations is the discretion given to the Minister for Finance to give preferences and reservations in relation to certain procurements to local contractors and manufacturers.

Pursuant to section 39(8) of the Act, exclusive preference shall be given to citizens of Kenya where the funding is

100% from the Government of Kenya or a Kenyan body and the amounts are below the prescribed threshold. In addition, a prescribed margin of preference may be given in evaluation of bids to suppliers offering goods manufactured, mined, extracted or grown in Kenya or in relation to works, goods and services, where preference may be applied depending on the percentage of shareholding held by locals in the supplier on a graduating scale as prescribed.

The thresholds and margins of preference are set out in Regulation 28 of the Regulations. The current prescribed threshold is K.Shs.50 million for procurement in respect of goods or services and K.Shs.200 million for procurements in respect of works or services. The Minister for Finance has been quoted as saying that these provisions are aimed at ensuring that local industries, including small and medium enterprises, benefit from public procurement.

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### New Telecommunications Licensing Regime

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The Uganda telecommunications sector looks set to drive into yet a further boom following further liberalization of the sector. Hitherto dominated by MTN Uganda, Uganda Telecom Limited (UTL) and Celtel, the Uganda telecommunications sector has enjoyed spectacular growth since its initial liberalization. The tele-density rose from 0.27% to now in excess of 7%. Fixed lines are estimated to be up to 129,863 with mobile subscribers at 2,697,616 and payphones at 12,889<sup>1</sup>. In addition there are 153 licensed FM radios and 31 private television stations.

The licensing of MTN in 1998, was part of the privatization reforms in the telecommunications sector, following the enactment of the Uganda Communications Act leading to unbundling of the State Uganda Posts & Telecommunications Corporation into Uganda Telecom, Uganda Posts and the Uganda Communications Commission (UCC) and the entry of private players into the sector in full competition with the Government. Although Celtel had been licensed earlier in 1995, this was only in respect of mobile services, which it monopolized prior to the entry of MTN Uganda. Only UTL and MTN Uganda enjoyed national operator status allowing them to provide fixed, mobile and payphone services.

Following a sector review by the regulator, UCC, it was recommended that the sector be fully liberalized and opened to competition. This entailed a change in the licensing regime with new licenses being the Public Service Provider (PSP) License, Capacity Provider (CP) License, Special Permission to Construct (SPC) Infrastructure License and a General License (GL).

With the new regime having come into force in August 2006, already new players are in town causing a stir, with Warrid Telecom and HTS Uganda being the latest entrants both looking to provide a full public service.

The telecommunications sector has certainly been one of Uganda's privatization success stories. The combined effect of liberalization, a partial sale of the Government UTL and now yet further liberalization can only serve to reduce costs and provide greater choice to the Ugandan public.

<sup>1</sup> According to the Ugandan Communications Commission.

### Registration of a Stockbrokerage Firm in Uganda

Following the highly successful public flotation of shares in Stanbic Bank Uganda Limited there has been great interest from not only local but also foreign investors on how a person or company can obtain a stockbrokers licence on the Uganda Securities Exchange.

To obtain a stockbrokers licence on the Uganda Securities Exchange an applicant undertakes a two (2) stage process.

First an application must be submitted to the Capital Markets Authority of Uganda making full disclosure of the individual applicant or if it is a company making the application full particulars of the Company including names of the directors and company secretary.

Some of the requirements an applicant would be expected to furnish would include details of all its assets and liabilities, copies of balance sheet and a profit and loss statement, an auditors report, proof of adequate capital and adequate references.

**Fees:** On submission of an application an official fee of US\$.250.00 is payable together with an annual licence fee. A one off application fee of US\$.2,500.00 is also payable on submission of an application.

**Time:** The Capital Market Authority will make a decision on all applications within 45 days from the date the application is lodged.

Several companies are now considering listing on the Uganda Securities Exchange and there are good prospects for brokerage houses.

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### Telecommunications Regime in Tanzania

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The legislative framework in relation to the telecommunications industry in Tanzania is in the main contained in the Communications Act as amended by the Communications Regulatory Authority Act, 2003 (together the "Act"). Several regulations have been promulgated under the Act dealing with specific telecommunication sectors.

#### Licensing and Local Shareholder Requirements

The Act provides that no person is permitted to operate a telecommunications service in Tanzania unless the person is an eligible person and is licensed as a telecommunications services operator under the Act. However, the Act does not define who an eligible person is. By inference from the Licensing Regulations it would appear that a person is eligible if:

- in the case of a telecommunications licence, a local shareholder owns a minimum of thirty five percent (35%) of the applicant's shares;
- in the case of a contents service licence, a local shareholder owns a minimum of fifty one percent (51%) of the shares; and

- in the case of a postal licence, a local shareholder owns a minimum of thirty five percent (35%) of the shares.

The term "local shareholder" has not been defined in the Regulations although in practice is recognised as being a person who is a Tanzanian citizen.

The local shareholding restriction is a new introduction that did not exist under the old licensing regime. This has led to interpretational disputes for those service providers who wish to migrate to the new licensing regime but prefer to maintain their existing shareholding arrangements. The Regulations provide that any person who holds a licence that was issued before the converged licensing framework was adopted by the Tanzania Communications Regulatory Authority ("Authority") and requires that its licences should continue in its existing form or would like to migrate to the new licensing regime should notify the Authority. If the licensee wishes to migrate, a new licence will be issued on terms and conditions that do not detract from the rights held under its old licence and that do not confer on it any substantial rights that it did not have under the old licence. Such new licence is valid for a period equal in length as the unexpired portion of the old licence or the full duration of the new licence, whichever is longer.

#### Categories of Licences

There are four main categories of licences issued under what is known as the converged licensing framework adopted by the Authority:

- **Network facility licence** - authorizes ownership and control of electronic communication infrastructure such as earth stations, public payphone facilities, radio communications transmitters and links and satellite hubs used in conjunction with other network facilities.
- **Network service licence** - authorizes a person to operate electronic communication networks in order to deliver services and includes bandwidth services, broadcasting distribution services, cellular mobile services, access applications services and space segment services.
- **Application service licence** - authorizes reselling or procurement of services from network service operators. The salient feature of this licence is that the licensee does not own network infrastructure nor operate a network. Examples are internet providers, virtual mobile services provider, payphone services, PSTN, public cellular services, IP telephony, public payphone service, public switched data service.
- **Content service licence** - authorizes the provision of content such as satellite broadcasting, broadcasting terrestrial free to air TV, terrestrial radio broadcasting and other electronic media.

The four licence categories discussed above are issued in one or more of four market segments: **International market segment** – where the licensee is authorized to offer services from one or more of the four licence categories to the international market,

**National market segment** – where the licensee is authorized to offer services from one or more of the four licence categories to the national market, **Regional market segment** – where the licensee is authorized to offer services from one or more of the four licence categories to an administrative region within the country and **District market**.

The regulatory regime in Tanzania in relation to the telecommunication sector is relatively new. Operators are likely to face a degree of regulatory uncertainty and should appreciate that certain legal provisions are vague.

### Creation and Registration of Mortgages over Ships

The Merchant Shipping Act 2003 (the “MSA”) and the Merchant Shipping (Registration and Licensing of Vessels) Regulations, 2005 (the “Regulations”) consolidate the laws relating to ownership and registration of vessels and other matters related to maritime law in Tanzania. The MSA and the Regulations apply to all ships under the Tanzanian flag wherever they may be situated. The MSA and the Regulations also govern how a ship or a share in a ship may be given as security.

#### Creation of a mortgage over a ship or shares in a ship

In accordance with the MSA, a ship or a share in a ship can be provided as security for a loan or discharge of any other obligation as long as the ship has been registered. This security is referred to as a mortgage. A mortgage can also be created over a ship which is still under construction.

There is an obligation to register every Tanzanian ship which is fifty (50) gross tons or over and owned by either a national of Tanzania, individuals or corporations hiring or leasing a ship for a period of time to nationals of Tanzania and individuals or corporations in *bona fide* joint venture shipping enterprise relationships with nationals of Tanzania.

#### Procedure for creating a mortgage over a ship or shares in ship

The instrument creating the mortgage has to be in a form prescribed by the MSA and the Regulations. The instrument then has to be presented to the Registrar of Ships in Dar es Salaam (the “Registrar”) for it to be recorded in the Register of Ships (the “Register”) which contains details of all vessels registered in Tanzania. The Registrar upon receiving the mortgage, records the date and time of creation of the mortgage in the Register. This is important for the mortgagee as it not only records the mortgagee’s interest but also determines the ranking of its security. In the case where there is more than one mortgage registered over the ship, priority of the mortgages will be determined in accordance with the date on which each mortgage was recorded in the Register and not the date of the mortgage. It is therefore in the best interest of a mortgagee to ensure that the instrument creating its mortgage is presented to the Registrar for recording promptly in order to ensure priority over other mortgagees (if any).

The MSA and the Regulations also aim to protect the interest of the mortgagee. They provide that if the mortgage instrument prohibits the creation of further mortgages over the ship or the shares in the ship without prior consent of the mortgagee, the

Registrar shall make a note to that effect on the Register and shall not register any other mortgage unless consent in writing from the existing security holder is provided. Any subsequent mortgage which is registered in violation of this provision would be null and void. A similar rule applies if there is a provision in the mortgage deed prohibiting transfer of the ship or any share in the ship(s) without consent of the mortgagee. Every mortgagee would be advised to have such a clause in its mortgage instrument and ensure that these restrictions are noted in the Register at the time of registration.

### Tanzania’s New Companies Act, 2002: Insolvency Provisions

Tanzania’s new Companies Act 2002 came into force on 1<sup>st</sup> March 2006, although certain subsidiary legislation under it has not yet been issued or brought into force. The new Act replaces, subject to certain savings, the whole of the Companies Ordinance (Cap 212).

The provisions of the new Act relating to company formation, constitution, management, operations, and reconstruction and amalgamation are broadly modelled (with significant variations) on the UK Companies Act 1985, those relating to company insolvency, including directors’ accountability, on the UK Insolvency Act 1986 (ignoring subsequent amendments) and those relating to director disqualification on the UK Company Directors Disqualification Act 1986. We propose to highlight in this and subsequent editions of Legal Notes the salient provisions relating to company insolvency and directors’ responsibility, accountability and disqualification.

The principal new features are the following:

- Greater accountability on the part of directors (in addition to their liability to be disqualified on the ground of unfitness), including the imposition of a new form of civil liability, called “wrongful trading”.
- The introduction of new company rescue mechanisms called “Administration” and “Company Voluntary Arrangement”.
- The splitting of the company receivership regime between “Administrative Receivership” and ordinary (non-administrative) receivership.
- The requirement for a person acting as liquidator, nominee/supervisor of a company in a voluntary arrangement, administrator or administrative receiver (each known by the generic term “insolvency office holder”) to have the requisite professional qualification and practical experience as an “insolvency practitioner”.
- The introduction of a new category of a voidable antecedent transaction, namely “transaction at an undervalue”, and also the reform of the law relating to voidable preferences, aimed at making it easier to establish, and invalidate floating charges.

In this edition, we touch on a major introduction to the rescue mechanisms under the administration process.

### Administration

When insolvency looms, the most important need of a company is for some breathing space within which to try to work out a plan for the rescue of the company's business or at least for achieving optimum realisation of its assets. For this purpose it is essential that the rights of creditors and counter parties to take enforcement action against the company are suspended or frozen so as to avoid a distraction in the directors' efforts to work out a plan. Under the old company legislation, there was no satisfactory facility for imposing such a "freeze", short of putting the company into liquidation, which in effect would be a precursor to a company's death rather than its rescue revival.

Under the new "Administration" procedure, it is now possible to obtain speedily such a "freeze" (which, incidentally, is more extensive than that available in a liquidation). Where a company is, or is likely to become, unable to pay its debts, an application can be made to the court by the company or its directors or any of its creditors for an "administration order".

The freeze comes into effect as soon as the application is filed and continues during the period of administration after the court makes the administration order (which it would make if satisfied about the likelihood of the survival of the company and the whole or part of its business as a going concern or a scheme of compromise or arrangement being effected or a more advantageous realisation of the assets being achieved than in a liquidation). Under the order, an insolvency practitioner is appointed as administrator, who would eventually prepare his plan (which could include a proposal for a scheme of arrangement or a company voluntary arrangement) and seek its approval by a creditors' meeting. The administrator has extensive powers and statutory aids available in the performance of his functions.

There are, however, certain restrictions against the use of this procedure. It is not available in the case of an insurer or a bank. More importantly, a creditor who is entitled to appoint an administrative receiver can "veto" the administration procedure by appointing such a receiver under his charge before the court makes an administration order. Briefly, a person who is entitled to appoint an administrative receiver is a person who has the benefit of a floating charge over all or substantially all the assets and properties of a company.

### Company Voluntary Arrangement ("CVA")

The procedure of a formal arrangement or compromise under the old legislation, commonly known as a "scheme of arrangement" (which would be binding on all creditors, including dissenting creditors, once approved by a meeting of creditors, or each class of creditors, by the requisite majority in value and approved by the court) has been retained in the new legislation. However, that procedure has in practice been found to be too complex, cumbersome and expensive for small and medium-sized companies mainly due to the active involvement of the court and the possible need for meetings of separate classes of creditors. By contrast, the new CVA procedure is much simpler and less expensive, avoiding separate class meetings and the court's active involvement. It can be proposed by the directors or, if the company is in administration or liquidation, by the administrator or liquidator and, once approved by a creditors' meeting with the requisite majority in value, is binding on all creditors, subject to a limited right of any dissenting creditor to apply to the court for relief within a specified period if the proposal is unfairly prejudicial to him.

A CVA is administered and implemented under the supervision of an insolvency practitioner called "the Supervisor". During the formative stage of the CVA, he is called "the Nominee". Both a scheme of arrangement and a CVA can be either "free-standing" or promulgated during, and with the benefit of, a freeze brought about by a preceding administration order or liquidation as discussed above.

### Administrative Receivership

A receiver who is appointed over the whole or substantially the whole of the company's property secured by a floating, or a mixed floating and fixed charge by its holder, is now described as an "administrative receiver". The new legislation invests in him extensive powers and statutory aids with regard to the realisation of assets. He is required to keep the unsecured creditors informed on the progress of the receivership, through a creditors' committee or otherwise, and to discharge preferential creditors. As we have seen above, his appointment also prevents an administration order being made.

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