



CM ADVOCATES LLP



FLOATING CHARGES IN KENYA: *How well are lenders protected?*

A floating charge is a form of security created over a class of assets of a company rather than over a specific identified asset. Unlike a fixed charge, which attaches to particular asset and generally restricts the chargor's ability to deal with that asset without the chargee's consent, a floating charge is capable of attaching to assets as they change from time to time.

Floating charges are useful in commercial lending because they cover changing assets such as stock, receivables and cash, while allowing the borrower to deal with them in the ordinary course of business until crystallisation or enforcement.

However, for lenders, the important question is not simply whether the security creates a floating charge, but whether it creates a qualifying floating charge under the Insolvency Act. The distinction matters

because a qualifying floating charge allows the lender to appoint an administrator without first obtaining a court order, enabling timely intervention to preserve the borrower's business and assets and pursue recovery within the statutory insolvency framework.

WHAT MAKES IT 'QUALIFYING'? – THE INSOLVENCY ACT, 2015

Under Section 534 of the Insolvency Act, 2015, a floating charge is a qualifying floating charge where it is created by a document which states that section 534 applies to the floating charge; or purports to empower the holder of the floating charge to appoint an administrator of the company.

The scope of the security is also important. Section 534(3) contemplates a holder of a qualifying floating charge where the relevant debenture or combination of securities relates

to the whole or substantially the whole of the company's property.

Accordingly, the mere use of the words "floating charge" in a debenture does not automatically confer the statutory right to appoint an administrator.

This distinction was considered in *I&M Bank Limited v ABC Bank Limited & Another [2021] KEHC 12977 (KLR)*, where the High Court considered whether a debenture constituted a qualifying floating charge for purposes of section 534. The Court held that the relevant debenture did not satisfy section 534(2) and consequently the lender could not appoint an administrator under that provision. The purported appointment was held to be null and void. This decision highlights an important drafting lesson requiring a lender to expressly create the statutory rights it intends to exercise rather than assume that general enforcement language will be sufficient. It is also important for lenders to ensure that the security documentation clearly identifies the nature of the remedy being created and the statutory basis upon which it may be exercised.

LENDERS' POWERS UNDER QFCs: THE POWER TO APPOINT AN ADMINISTRATOR

The principal advantage of a QFC is the statutory power to appoint an administrator. Section 534(1) provides that the holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company without the lender first obtaining an administration order from the Court. However, this power is not absolute.

First, the floating charge relied upon must be enforceable. Section 536 restricts the appointment of an administrator where the

relevant floating charge is not enforceable.

Second, where there is an earlier qualifying floating charge, the statutory priority and notice requirements must be observed under Section 535. The QFC holder seeking to appoint an administrator must as such take account of any prior qualifying floating charge holder.

Third, the appointment must be properly documented and lodged in accordance with the Act. Section 537 requires the holder appointing an administrator to lodge a notice of appointment with the Court together with the prescribed documents. The notice must include a statutory declaration confirming, among other matters, that the appointer is the holder of a qualifying floating charge; each floating charge relied upon is enforceable; and the appointment is made in accordance with the Insolvency Act. In *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & Another [2019] KEHC 9320 (KLR)*, the High Court considered the operation of sections 534, 537 and 538 and held that the appointment of administrators takes effect when the compliant notice of appointment is lodged with the Court.

The holder of the QFC must also notify the administrator and the persons prescribed by the Insolvency Regulations, who include Court, Official Receiver, directors, contributories and creditors of the company. Failure to comply with the statutory notification requirements may attract legal consequences.

ADMINISTRATION AND RECOVERY: WHAT CAN LENDERS EXPECT?

Section 522 sets out the objectives of administration, which include maintaining the company as a going concern; achieving a better outcome for creditors as a whole than

would likely be achieved through immediate liquidation; or realising property for distribution to secured or preferential creditors.

Although a QFC holder may initiate the administration process, the administrator is generally required to act in the interests of the company's creditors as a whole. In ***I&M Bank Limited v ABC Bank Limited & Another***, the Court noted that an administrator is an officer of the Court and has responsibilities to the general body of creditors, unlike a receiver-manager appointed under a debenture.

Appointment therefore does not guarantee priority or full repayment. The lender's recovery remains subject to competing securities, insolvency expenses, preferential claims and the statutory allocation for unsecured creditors, as outlined below.

1. Fixed security generally takes priority over floating security

Where the same asset is subject to competing security interests, the nature and timing of the respective securities will be critical. A properly created and perfected fixed security will generally provide the lender with a stronger proprietary claim over the specific asset than a floating charge.

2. Preferential creditors may rank ahead of a floating charge holder

The Insolvency Act gives certain claims preferential status. Section 473 provides that, in specified circumstances, liquidation expenses have priority over claims to property comprised in or subject to a floating charge. Accordingly, even a properly registered floating charge may not result in the lender receiving the full proceeds of the charged assets.

3. A portion of the assets is reserved for unsecured creditors

Section 474 of the Insolvency Act provides for a portion of the company's net assets subject to a floating charge to be made available for the satisfaction of unsecured debts where the statutory conditions apply. Under regulation 96 of the Insolvency Regulations, 2016, the prescribed portion is twenty per cent of the company's net assets, subject to the statutory framework and the prescribed minimum threshold. This requirement is however subject to statutory exceptions. In particular, a floating charge holder may apply under section 474(5) for an order for an order exempting it from the requirement or modifying its application on grounds that it unfairly harms its interests.

The practical lesson is that "secured" does not necessarily mean "paid first in full."

COMMON PITFALLS FOR LENDERS

1. Poor Drafting

A lender's rights are only as strong as the security documentation creating them. As illustrated in ***I&M Bank Limited v ABC Bank Limited & Another (supra)***, assuming that a debenture creates a qualifying floating charge can undermine enforcement. Lenders should therefore ensure that the debenture satisfies section 534 of the Insolvency Act.

2. Failing to Register the Charge

Creation of a charge and registration of a charge are distinct steps. Under section 878 of the Companies Act, 2015, a company-created charge is required to be lodged for registration within the statutory period, currently thirty days from creation.

Failure to register may render the charge ineffective against a liquidator, administrator

or creditor. Although courts may extend time where justified—as in *In re Mukirai Perfumes – Kenya Limited [2026] KEHC 284 (KLR)* and *In re Diamond Trust Bank Kenya Limited [2026] KEHC 4049 (KLR)*—lenders should prioritise timely registration.

3. Overlapping or Conflicting Charges

A company may have more than one lender and may grant multiple charges over its assets. This creates an important question: **who has priority?**

The answer may depend on factors, such as, the nature of each charge; the date of creation; the date and validity of registration; contractual subordination or priority arrangements.

The existence of a prior QFC is particularly important where another lender intends to appoint an administrator. Section 535 requires compliance with notice requirements for prior QFC holders before appointing an administrator. Lenders should therefore conduct Companies Registry searches before lending and periodically review existing securities for long-term or revolving facilities.

4. Misunderstanding the Lender's Role in Administration

The statutory objectives of administration are creditor-focused. The administrator is required to act in the interests of the creditors as a whole. This is an important distinction from traditional enforcement through a receiver appointed solely under a security instrument.

In *Pine Care Limited & 2 Others v Rao & 2 Others [2024] KEHC 8192 (KLR)*, the Court recognised the administrator's role

as the company's agent, exercising statutory powers over property subject to a floating charge. Lenders should therefore distinguish their right to initiate administration from the administrator's independent responsibility to conduct it.

5. Ignoring Statutory Notice Requirements

The appointment of an administrator by a QFC holder has significant consequences for the company and its creditors. The Insolvency Act and Insolvency Regulations therefore prescribe filing, notification and publication requirements. As illustrated in *Midland Energy Limited v George Muiruri (supra)*, these are substantive requirements, and non-compliance may expose the appointment to challenge.

FINAL THOUGHTS

Qualifying floating charges offer lenders valuable protection, including the power to appoint an administrator without first obtaining a court order. Their effectiveness, however, depends on careful drafting, timely registration and compliance with statutory enforcement procedures.

A QFC also does not guarantee priority or full repayment. Competing securities, insolvency expenses and statutory allocations can affect the lender's ultimate recovery. Lenders should therefore treat security documentation as part of an ongoing recovery strategy, supported by regular reviews and timely legal advice when a borrower shows signs of financial distress.

HOW CAN WE HELP?

The Debt Recovery, Restructuring and Insolvency team at **CM Advocates LLP** prides itself in having a wide variety of

resources, skills and experience in commercial lending, debt recovery, enforcement of securities, insolvency and restructuring.

We advise lenders on the preparation and review of security documentation, perfection and registration of charges, enforcement strategy, appointment of administrators, debt recovery and insolvency proceedings.

We also assist creditors in navigating competing securities, administration

moratoria, asset realisation and other issues arising in financially distressed situations.

We are practical and innovative in our approach and offer timely, commercially focused legal solutions. We would be delighted to receive your feedback and inquiries and offer our services in this and any other of our practice areas.

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