<u>THE TAKING OF SECURITY BY MULTIPLE LENDERS – *Mark McKee (Commercial Partner)*</u>

The financing of major projects or infrastructure is often taken by a consortium of banks rather than one financial institution.

Where a consortium of lenders finances a project or infrastructure, it is often impractical for the borrower to grant security to each of the individual lenders as there is often a need to register security. This can be both an expensive and cumbersome process where there are multiple lenders involved.

Under English Law the solution to this challenge is to have a security trustee to collectively hold security for and on behalf of all lenders. In practice, this usually means that the borrower will grant or create security in favour of the security trustee itself to be held in trust for the lenders.

The English Law concept of a security trust is however problematic under Botswana Law. Reason being is that in order for security to be valid or lawful under Botswana Law a principal obligation must exist between the grantor of the security and the security trustee. This obligation does not normally exist under the security trustee arrangement, as the security trustee takes the security as trustee or agent for the lenders and not as security for an obligation owed or due to itself.

There is a further complication under Botswana Law with respect to the taking of security over immovable property by a security trustee. In terms of Section 52 of the Deeds Registry Act, no mortgage bond may be passed in favour of an agent of a principal. A security trustee could conceivably be seen to be an agent of the lenders and consequently any bond taken over immovable property is invalid by virtue of Section 52 of the Act.

One solution to having a security in Botswana held collectively by a trustee or agent is for the lenders to set up a Special Purpose Vehicle ("SPV") in the form of a company and have this SPV hold the security on their behalf. To create valid and binding security the SPV enters into an arrangement with the lenders and borrowers in terms of which:

1. The SPV guarantees the obligations of the borrower ;and

2. In turn, the borrower indemnifies the SPV for the obligations it assumes under the guarantee. The obligations of the borrower under the indemnity are then secured through the granting of security to the SPV.

An alternative solution is to create a parallel debt obligation in the finance documents in terms of which the borrower is indebted to the security trustee. The parallel debt will be in an equivalent amount to the debt owed to the lenders and will be secured by the granting of security directly to the security trustee.