

Priority Issues in Post- Commencement Financing: A View from South Africa

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Outline

- Effect of commencement
- Financing needs
- Policy considerations
- Issues
- UNCITRAL
- Application of assets
- Evaluation



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Effects of Commencement

- Administration expenses
- Transfer/encumbrance of assets
- Stay of execution
- Avoidance transactions
- Contracts
- Security rights
 - Enforcement
 - After-acquired assets



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Financing needs

- Operational expenses
- Preservation of value
- New money?
- Restructuring debt/equity



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UNCITRAL

- Facilitate financing, provide incentive
- Establish priority over unsecured creditors
- Enable fresh security interests
- Protect existing security rights
 - Exception 1 – agreement
 - Exception 2 – court authority
- Survival upon conversion



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Policy considerations

Pro priority

- Efficiency – enhanced returns
- Normative concerns – weaker creditors
- Rescue – social impact

Contra

- Pari passu
- Vested rights
- Uphold bargains
- Prior in tempore



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Issues

- Authorization?
- Which debts?
- Dual capacity creditors?
- Kind of priority – limited assets?
- Internal ranking?
- Third-party assets? (UNCITRAL Secured transactions)



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Application of Assets in SA

JM + s435

- Costs of jm (including conduct of company's business)
- (Secured creditors)
- Post-jm in order of incurred
- Pre-jm preferred
- Pre-jm concurrent

Companies bill

- Administration expenses
- (Secured pre-c creditors)
- Employees (order incurred)
- (Secured post-c creditors)
- Unsecured post-c creditors
- Preferred pre-c creditors
- Concurrent pre-c creditors



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The tools required



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Evaluation

- Compliance with UNCITRAL guide
- Authorization?
- Protection of security?
- Classification of debts
- Flexibility
 - All or nothing/automatic
 - Order incurred
- Third party assets?



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