

ENABLING ACCESS TO CREDIT IN NIGERIA: THE SECURED TRANSACTIONS IN MOVABLE ASSETS ACT 2017

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Introduction

On 30th May 2017, the Acting President of Nigeria, Professor Yemi Osinbajo, signed into law the Secured Transactions in Movable Assets Act 2017 (“the Act”). The Act seeks to solve some of the biggest challenges that Micro, Small and Medium Scale Enterprises (MSMEs) face in accessing credit facilities for their businesses. The Act makes provisions that aim at facilitating the creation, registration, and realisation of security interests in movable assets. Movable assets as defined by the Act are tangible or intangible property other than real estate. It also establishes a National Collateral Registry.

The Act applies to:

- all security interests in movable assets which were created by an agreement that secures the payment or performance of an obligation;
- any person who is a creditor, borrower or grantor under the Act; and
- every public registry established by the National Assembly that is involved in transactions in movable assets in Nigeria.

The Act provides that security interests created by a grantor under the existing 2015 Central Bank of Nigeria (CBN) Regulations on the Registration of Security Interests in Movable Property by Banks and Other Financial Institutions 2015 (“the Regulation”) shall be deemed as having been made under the Act and shall continue to remain valid. However, parties to such transactions have a period of 180 days within which to fully comply with the provisions of the Act, including registering the relevant financing statements. Failure to do so will invalidate the transaction.

The highlights of the provisions of the Act are detailed below.

Creation of Security Interests

Part II of the Act provides for the creation of security interests including interests in accounts receivable. A security interest is a property right in a collateral that is created by agreement

and secures payment or other performance of an obligation, regardless of whether the parties have named it as a security interest or not. However, it does not include a personal right against a guarantor or other persons liable for the performance of the secured obligation. A security created under a security agreement can only grant an interest over the particular rights or interest that the grantor has in the collateral.

The security agreement must identify both parties and reflect their intention. It must also provide details such as the item, kind, type, year of manufacture or any description that adequately identifies the collateral; a statement that a security interest is taken in all the present and future assets of the grantor. The interest is valid regardless of any agreement **limiting the grantor's right to create such security interest. A Security interest is not** restricted to the collateral but also extends to any identifiable or traceable proceeds of the collateral regardless of whether it is described in the security agreement or not.

Establishment of the National Collateral Registry

The Act establishes the National Collateral Registry (“the Registry”) which shall be responsible for receiving, registering and storing information about security interests in movable assets; providing access to persons who may seek information on security interests from the Registry; and performing other functions prescribed by regulations made under the Act.

The creation of the Registry is an avenue for creditors to determine whether there are encumbrances on collateral. The Act is silent on the need to furnish subsequent creditors with information about existing charges on the collateral. The information in the Registry is however accessible as the Act states that a person is entitled to a search result upon payment of fees prescribed by regulations made under the Act. The criteria for conducting a search are the unique biometric-based identifier of the grantor and the serial number of the collateral. The creditor is responsible for diligently making enquiries from the Registry where no information is provided by the grantor or the borrower.

The Act provides a grievance procedure for persons aggrieved by any action or decision of the Registry. Where any person is aggrieved by any action or decision of the Registry, such person shall within 60 days of the decision give notice to the Registry to address the grievance. Where no response or an unsatisfactory response is received within 30 days, the person may appeal to the court.

Registration of Security Interests

Registration at the National Collateral Registry perfects a security interest created under the Act, and the Act clarifies that mere possession of the collateral does not connote perfection.

Where proceeds of the collateral described in the financing statement are in the form of money, account receivables, negotiable instruments or bank accounts, the security interest is automatically perfected without any further action by the grantor or creditor. MSMEs are not belaboured with the additional costs of stamping before registration as provisions of the Stamp Duties Act are not applicable to secured transactions under the Act. However, grantors that are companies are still required to register such charges with the Corporate Affairs Commission (CAC) as provided under the Companies and Allied Matters Act (CAMA).

A financing statement is the prescribed form in which information is provided for registration under this Act or any regulations made under it. It should contain the description of the grantor, details of the creditor, description of the collateral, maximum amount for which the secured obligation may be enforced and the period for which the registration is to be effective. The Act provides that it is the duty of the creditor or its agent, with the consent of the grantor in writing, to register the **financing statement**. **The grantor's consent can also be given before the conclusion of a security agreement.**

A financing statement is duly registered when the Registry assigns a unique registration number, date, and time to the financing statement, following which a confirmation statement is issued to the creditor by the Registry. A creditor can make amendments to a registered **financing statement by registering an 'amendment financing statement'**. **An amendment** containing the description of a new collateral or a new grantor must also be registered with **the grantor's consent in writing**. **A financing statement can be cancelled by a creditor upon the request of the grantor or borrower by the delivery of a cancellation statement within 15 working days of the receipt of the request.**

The order of priority for perfected security interests in the same collateral is determined by the order of registration. A security interest still maintains its perfection and priority where the collateral is transferred, and a creditor registers an amendment financing statement reflecting a new grantor within 15 days. Significantly, a lien created over goods subject to a security interest which arises from materials or services provided in the ordinary course of business shall have priority over the security interest.

The resultant effect of non-registration of a security interest or an ineffective financing statement is however not stated. An error in certain aspects of the financing statement shall render it ineffective, but it is unclear whether such security interest is completely invalid or if the creditor will have only an equitable interest in the collateral. If the only resolve of the creditor is the possession of an equitable interest in the collateral, this could have an impact on its priority ranking.

The Act also does not clarify the fate of security interests which were created under security agreements entered into before the Act came into force but are not within the purview of the Regulation. Where there are subsequent transactions secured using the same collateral and such interests are registered, it is uncertain what the consequence would be for the earlier security interest regarding priority. It is noteworthy that the Act is the applicable law for the creation, perfection and priority of a security interest in tangible assets located in Nigeria, and in intangible assets where the grantor is located in Nigeria.

It is an offence under the Act to knowingly provide false or misleading information concerning the registration, amendment or cancellation of a financing statement. A person upon conviction would be liable to a term of imprisonment for 1 year or a fine of N1,000,000 (One Million Naira) or both. Where the offender has obtained a financial benefit because of his conduct, the person shall fully indemnify the Registry and the person affected by his conduct. In the case of a corporation or partnership, the court may impose such penalty on every officer who facilitated or was responsible for the offence and also, the corporation, partnership or entity shall be liable to a fine of N1,000,000.00 (One Million Naira). The offences are tried by a court of competent jurisdiction.

Realisation of Security Interests

In the event of a default, a creditor may either exercise its rights under the security agreement or resort to an appropriate judicial remedy; the Act details which courts have jurisdiction in varying circumstances. The collateral may either be repossessed subject to legal proceedings or without legal proceedings where the grantor had already consented to surrendering it in the security agreement. Accounts receivable, money or negotiable instruments used as collateral may be collected by the creditor and applied to the satisfaction of the obligation secured by the security interest. The creditor is also empowered to render a collateral inoperative if it cannot be easily moved or storage facilities are not easily available.

The Act further establishes a Mediation and Dispute Resolution Panel and provides that in the event of a dispute, parties shall first resort to the panel for resolution of the dispute. Where a grantor is an individual who is neither a Nigerian citizen nor resident in Nigeria, the parties will be required to confirm in the financing statement that they have agreed to submit themselves to the mediation and arbitration mechanism provided under the Act as a first recourse.

The Act does not specify which courts have jurisdiction in any action arising from a transaction governed by the Act, but rather provides that a court in any State of the Federation that has jurisdiction to entertain commercial borrower and lender claims shall

have jurisdiction over such actions. However, this does not divest the Federal High Court of its exclusive jurisdiction in matters stated under Section 251 of the Constitution of the Federal Republic of Nigeria. In other words, where the action arising under the Act falls under matters stated in Section 251 of the Constitution, the Federal High Court still has exclusive jurisdiction, such as disputes relating to aviation or bankruptcy and insolvency.

CONCLUSION

The introduction of the Act into Nigerian law is a timely development that will pave the way for creditors to extend credit for the business development of the MSMEs. This is expected to boost activities of the MSMEs and should eventually translate into economic benefit for the nation as these companies would be able to take advantage of business opportunities, expand their operations and employ more people. It remains to be seen how this will affect the attitude of lenders towards borrowers who wish to secure facilities with movable assets that have higher depreciative value.