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A BRIEF OUTLINE OF THE MOVABLE PROPERTY SECURITY RIGHTS ACT, 2017

1. Introduction

The Moveable Property Security Rights Act, 2017 (the “Act”) came into operation on 16th May 2017. The Act aims at facilitating the use of movable property as security for credit facilities and enhancing the ability of individuals and entities to access credit using moveable assets. To this end, the Act creates the office of the Registrar of Security Rights and sets out provisions in respect of the registration of security rights in movable property, the realisation process and related matters.

The Act repeals the Chattels Transfer Act and the Pawn Brokers Act and also amends or repeals certain provisions of the Agricultural Finance Corporation Act, the Stamp Duty Act, the Hire Purchase Act, the Business Registration Services Act, the Companies Act, 2015 and the Insolvency Act, 2015.

2.0 Nature of rights over moveable properties covered by the Act (Security rights)

A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation is defined as a security right under the Act. It is important to note that the Act adopts a “substance over form” approach as the Act classifies any such right in any agreement as a security right regardless of whether the parties have denominated it as a security right.

The Act also defines the right of the transferee in an outright transfer of a receivable as a security right.

The Act applies to security rights in moveable assets, including:

- a) Every transaction that secures payment or performance of an obligation, without regard to its form and without regard to the person who owns the collateral;
- b) Without limiting the generality of paragraph (a) above, a chattel mortgage, credit purchase transaction, credit sale agreement, floating and fixed charge, pledge, trust indenture, trust receipt, financial lease and any other transaction that secures payment or performance of an obligation; and

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- c) An outright transfer of a receivable subject to some qualifications contained in part VII of the Act.

The Act does not however apply to a security right in book-entry securities under the Central Depositories Act, 2000, the creation, lease or transfer of an interest in land, excluding a right to payment that arises in connection with an interest in or a lease of land, a security right in a vessel including a mortgage right subject to the Merchant Shipping Act, 2009, a security right in an aircraft subject to the Civil Aviation Act, 2013, and a lien, charge or other interest created by law (within the exceptions provided for in the Act).

3.0 The need for registration of a security right

3.1 Effectiveness against third parties

A security right in any movable asset is effective against third parties if a notice with respect to the security right is registered with the Registrar.

A security right in any proceeds is effective against third parties without any further action of the grantor and the secured creditor if the security right in the original collateral is registered with the Registrar and the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a deposit account.

For any other types of proceeds the security will be effective against third parties for ten working days after the proceeds arise continues to be effective after the expiration of the ten days, if the security right in the proceeds is made effective against third

parties by registration of an amendment notice.

If the secured creditor transfers a security right or a part of it, the secured creditor may register an amendment notice to reflect the transfer. A transfer of a security right is however effective whether or not an amendment notice has been registered.

3.2 Priority

As a general rule, priority among competing security rights created by the same grantor in the same collateral is determined according to the time of registration. This general rule is however subject to the following exceptions:

First, a security right created by a grantor is subordinate to a security right in the same collateral created by another person, if the grantor acquired the collateral subject to the security right created by the other person and made effective against third parties before the grantor acquired the collateral.

Second, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties subject to the right of a non-consensual creditor who has registered a notice with the Registrar.

Third, if a security right in proceeds of the collateral is effective against third parties as explained above, the priority of the security right in the proceeds is determined using the same date used to determine the priority of the security right in the collateral.

Fourth, if more than one security right extends to commingled goods, a security

right that is effective against third parties before the goods become commingled has priority over a security right that is not effective against third parties at the time the collateral becomes commingled goods.

It is important to note that knowledge of the existence of a security right in favour of another person on the part of a secured creditor does not affect its priority under the Act. A person may at any time subordinate the priority of its rights under this Act in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

4.0 Formal requirements of security agreements

In order for a moveable property to be used as a collateral, there must be a security agreement which is an agreement regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right; and an agreement that provides for the outright transfer of a receivable.

A security right is created by a security agreement provided that the grantor has rights in the asset to be encumbered or the power to encumber it. The security right in an asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

A security agreement must:

- a) be in writing and signed by the grantor;
- b) identify the secured creditor and the grantor;
- c) except in the case of an agreement that provides for the outright transfer of

a receivable, describe the secured obligation; and
d) describe the collateral in a manner that reasonably allows its identification.

5.0 Key definitions under the Act

Movable property is defined to mean tangible and intangible assets. A tangible asset is defined to mean all types of goods and includes motor vehicles, crops, machinery and livestock whereas intangible assets include receivables, deposit accounts, electronic securities and intellectual property rights.

A grantor is defined to mean a person who creates a security right to secure his own obligations or that of another person, a buyer or transferee, lessee, or licensee of a collateral that acquires rights subject to a security right and a transferor in an outright transfer of a receivable.

The definition of a grantor now encompasses individuals and corporate bodies. The Act therefore applies to all movable security rights created by all juristic persons and is not limited to individuals.

The Act provides for a credit purchase transaction which is termed as a hire-purchase agreement, a conditional sale agreement, a chattel leasing agreement or a retention of title agreement.

The Act further provides for a credit sale agreement which is defined as an agreement for the sale of goods under which payment of the whole or a part of the purchase price is deferred and a security interest in the goods is created or provided for in

order to secure the payment of the whole or a part of the purchase price.

The Act goes further to describe a financial lease as a lease under which at the end:

- a) The lessee automatically becomes the owner of the asset that is the object of the lease;
- b) The lessee may acquire ownership of the asset by paying no more than a nominal price; or
- c) The asset has no more than a nominal residual value.

6.0 Enforcement of a security right

With respect to the enforcement of a security right, once the debtor fails to pay or perform a secured obligation, the grantor and the secured creditor may exercise any right:-

- a) under Part VII of the Act including instituting a suit for payment, appointment of a receiver, leasing, taking possession or selling of the moveable asset;
- b) provided in the security agreement; or
- c) provided under any other written law.

The grantee may exercise the rights of enforcement regarding the movable property as such as re-possession, sale and leasing and the exercise of such a right would not extinguish the right to also pursue the grantor or any other person who owes payment in regard to any other default on the secured obligations.

It is important to note that if the security right has been created under a hire purchase

agreement, the secured creditor may enforce its rights only in accordance with the Hire Purchase Act.

The applicable law is the law chosen by the grantor and a secured creditor and in the absence of a choice of law the applicable law is the law governing the security agreement.

The law applicable to a security right in a tangible asset is the law of the country in which the asset is located while the law applicable to an asset of a type ordinarily used in more than one country is the law of the country in which the grantor is located.

7.0 Third Party effectiveness of a prior right

Section 92 (1) of the Act provides that security rights which were effective prior to the enactment of the Act would continue to be effective until the earlier of the time of their effectiveness against third parties ceasing in the prior laws or the expiration of nine (9) nine months after coming into effect of the Act.

Accordingly where security rights were created before the coming into effect of the Act and the term of such existing securities exceeds nine months after the coming into effect of the Act, they would cease to be effective against third parties unless the grantee registers a notice under the Act.

A grantee of an existing security right would be required to register the security right before the expiry of the nine months to ensure that the security right continues to be effective against third parties.

8.0 Conclusion

The procedure for conducting searches, registration of notices, access to information by the public and assigning of unique identifiers to grantors and secured creditors is prescribed by Regulations. The Regulations were gazetted on 24th May, 2017. The Regulations provide that the registry shall be an electronic registry and members of the public who wish to transact must establish a user account with the registry to allow them access the registry.

The Act has deleted the provisions on the creation of the Registrar of Hire Purchase Agreements under the Hire Purchase Act and accordingly, hire purchase agreements are now to be registered in accordance with the provisions of the Act.

The Act has also amended certain provisions of the Companies Act by introducing securities in addition to charges which are created by way of security rights. The Act has therefore provided for a double obligation on companies to register charges on movable property in accordance with the terms of the Companies Act and to also register security rights under the Act. Companies are also mandated to keep registers of charges and of security rights created pursuant to the Act.

Although the Act has made provisions for the creation of multiple securities over one movable asset, the practicality of this provision

would be difficult. The Act has made no provisions regarding the handling of ownership documents of movable assets. The current practice is for grantees to be jointly registered as owners with the grantor. If this system of joint registration is to continue, it would be difficult to include a third grantee as a co-owner with the grantor and the initial grantee. In the event that a subsequent grantee is also not co-registered, it would be difficult to enforce the security by way of sale of the movable asset where the asset is in the joint names of the grantor and the prior grantee. Financiers can now create securities over movable property without the burden of insisting on joint ownership of the assets with the grantor. This would minimise the current risk and exposure to financiers where they are enjoined in claims against owners of movable properties.

With respect to motor vehicles, financiers or other persons are now required to conduct double searches. The first search would be conducted at the National Transport and Safety Authority (NTSA) to determine ownership of the motor vehicles and the second search would be conducted at the registry of movable property security rights to ascertain whether the motor vehicle is encumbered. This requirement would also be applicable to all other movable property that have ownership documentation which are covered by the Act as explained above.



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