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A Review Of The Nigerian Collateral Registry Act 2017

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Introduction:

On 30th May, 2017 the Acting President of Nigeria, Professor Yemi Osinbajo assented to the Bill on Secured Transactions in Movable Assets Collateral Registry Act). [1] Although the Central Bank of Nigeria CBN had previously issued guidelines on the establishment of the collateral registry, [2] hitherto, there had not been any legislation on the subject. This Act codifies CBN's earlier guidelines, and retains the same Registry.

The Act aims to provide for the registration and regulation of security interests in movable assets, [3] by enhancing financial inclusion in Nigeria, stimulating responsible lending to MSMEs and facilitating access to credit secured with movable assets. [4]

Objectives of the Act:

Most MSMEs hardly make it through their first 5 years of existence because of insufficient capital. [5] Funds are necessary for the smooth running of any business. MSMEs are unable to access loans from banks because of the stringent collateral policies and the commercial banks preference for land as collateral. Usually, such land or landed property must have a certificate of Occupancy and the Consent of the Governor of the State where the land is situated must first be obtained. [6] These stringent requirements hinder MSMEs access to credit.

The Collateral Registry Act is innovative in resolving such funding problems as account receivables (the right to receive value arising from an obligation owed by an account debtor to the borrower including book debts, but excluding negotiable instruments) can be collaterised.

Scope of the Act:

The Act applies to all security interests in movable assets created by an agreement and all financing and operating leases entered after the commencement of the Act. [7] Movable assets are defined to mean tangible or intangible property other than real property. [8] Goods include tangible movable as well as farm products, inventory, equipment, and consumer goods. [9]

Security transactions consummated prior to the commencement of this Act are only valid for 180 days after the commencement of the Act without registration. [10] There is no penalty prescribed for non - registration in the Act. The transaction is however, only deemed as

perfected upon registration and constitutes notice to third parties and priority is granted upon registration.

A security interest is created by a security agreement (i.e., loan agreement) between a borrower and a creditor, [11] the loan agreement must reflect the intention of both parties to create a security interest, identify the parties, describe the total loan sum, describe the collateral and the duration of the loan. [12]

The collateral must be adequately described, [13] in terms of item, kind, type or category, year of manufacture or any other description that can identify the collateral or a statement that the security interest covers present and future assets of the borrower. The security interest also extends to identifiable or traceable proceeds of the collateral, notwithstanding that the agreement does not include that clause. [14] This is essentially an expression of the principle of 'after – acquired property' at common law. [15] The security would cover identifiable proceeds and goods that have been co-mingled. [16] Perfection occurs when a financing statement has been registered at the collateral Registry, but possession alone does not perfect the security interest. [17] The Act retains the establishment of a National Collateral Registry in the Central Bank of Nigeria CBN [18] and interests already registered at the Registry remain valid.

The registration of the financing statement will include a unique registration, number, date and time assigned to it by the Collateral Registry. [19] The financing statement will include a description of the parties, collateral and the tenure of the loan. [20]

A confirmation statement will be issued by the Registry to the creditor who files the financing statement, [21] and the executed loan agreement serves as consent of the borrower. [22]

The registration will be ineffective if there is an error in the unique identification number of the borrower or if the serial number of the collateral cannot be retrieved. [23]

A search can be conducted at the registry using the unique biometric-based identity of the borrower or the serial number of the collateral. [24] Priority of security interest is according to the order of registration; [25] however, a financial institution's right of set-off shall have priority over a perfected security that extends to a deposit account. [26] This provision is an incentive to financial institutions as they are assured of priority in the realization of their security.

The creditor can notify the borrower of his intention to realize the security by hand, courier service, electronic mail or registered mail. [27]

The realization of the security interests can be achieved by resorting to judicial remedy or without a court order, [28] if the borrower consented to relinquishing possession without a court order in the security agreement. In our view, this exclusion does not bar the borrower from seeking judicial remedy if the transaction is marred with fraud.

The prudent thing for a savvy creditor to do is to include the clause relinquishing possession without the court order in the loan agreement. This will prevent needless litigation. The creditor may request for assistance from the Nigerian Police having jurisdiction where the collateral is located [29] upon presentation of the security agreement and duly certified confirmation statement.

It is an offence to knowingly provide false or misleading information to the Registry, [30] and upon conviction, the offender is liable to imprisonment for 1 year or a fine of N100, 000.00 or both. [31] It is also an offence for the borrower of a registered asset to dispose of the asset to a third party without disclosing the fact of the encumbrance. [32]

Conclusion:

This Act will further improve secured credit transactions and financing for the MSMEs. This is because their inventory, equipment and other movable assets can be collaterised to assure them of access to credit to expand their business and also for the smooth running of the business. The Act has set out to achieve one of the objectives set out in the National Policy on MSMEs which is to broaden the scope of acceptable collateral for MSME lending. [33] MSMEs are the drivers of the economy and lack of access to finance impairs their positive impact on the economy. The focus had been too long on land as a secured asset and this legislation is a welcome development.

Footnotes

1 http://www.nassnig.org/document/download/8198 accessed on 14th July 2017.

2 The Collateral Registry Regulations 2014.

3 Preamble.

4 Section 1 (a-f).

5 http://nigerianstat.gov.ng/pdfuploads/SMEDAN%202013_Selected%20Tables.pdf accessed on 7th June 2017.

6 Before the mortgage of such land as required by the Land Use Act 1978, Cap. L5 LFN 2004.

7 Section 2(a- c).

8 Section 65.

9 Ibid.

10 Section 62 3 .

11 Section 3 1 .

12 Section 5(a-e).

13 Section 6 1 .

14 Section 6 2 .

15 Holroyd v. Marshall 10 H. Cas. 191 1862 , codified in Section 178 CAMA Cap. C20 LFN 2004.

16 Section 7 1 , 2 .

17 Section 8 1 , 2 .

18 Section 10, as stated earlier, the CBN had issued the Collateral Registry Regulations 2014.

19 Section 12 2 .

20 Section 14.

21 Section 12 3 .

22 Section 13 2 .

23 Section 16.

24 Section 22.

25 Section 23.

26 Section 29.

27 Section 41 2 .

28 Section 41 4 (b).

29 Section 41 5 .

30 Section 58 1 .

31 Section 58 1)(a).

32 Section 58 2 .

33 https://www.smedan.gov.ng/images/PDF/MSME_National-Policy.pdf accessed on 7th June 2017.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.