

1.0. INTRODUCTION

The Security Interest in Movable Property Bill, 2018 was introduced in Parliament by the Minister of Justice on the 27th March, 2018 and was, in accordance with rule 128 of the Rules of procedure of Parliament, referred to the Committee on Legal and Parliamentary Affairs for scrutiny.

The object of the Bill is to provide for the use of movable property as collateral for credit, to provide for the creation and perfection of security interest; to provide for rules for determining priority of claims among competing claimants; to provide for registration of security interest in movable property by notices; to provide for a register of interests in movable property; to provide for the enforcement of security interests, search of the register and for related matters.

2.0. BACKGROUND

The law relating to chattels securities in Uganda is the Chattels Transfer Act, Cap 70, common law and the doctrines of equity by virtue of the Judicature Act, Cap. 13. The Chattels Transfer Act has been on the Statute Book since 1978, and is largely based on the old English law and has rarely been put to use due to its archaic and complicated provisions.

In 2009, Government introduced in Parliament, the Chattels Securities Bill, 2009, with the intention of modernising the law relating to the use of movable property as security. The Bill was intended to overhaul the legal situation and to provide adequately, chattels securities law commensurate with Uganda's state of development and social circumstances and to promote private investment. Parliament passed the Chattel securities Bill into an Act in 2014. The Minister was obligated in section 1 of the Chattels Securities Act, 2014, to commence the Act by way of a statutory instrument, on a date the Minister appoints. To date, the Minister has not commenced the Chattels Security Act, 2014, meaning, the chattels Transfer Act, Cap 70 is still in force.

In 2018, Government introduced in Parliament, the Security Interest in Movable Property Bill , 2018, to mainly repeal the Chattels Security Act, 2014

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and to provide for the use of movable property as collateral for credit, to provide for the creation and perfection of security interest; to provide for rules for determining priority of claims among competing claimants; to provide for registration of security interest in movable property by notices; to provide for a register of interests in movable property.

The repeal of the Chattels Securities Act, 2014 was necessitated by the inadequacies in the 2014 Act, including-

- (a) the narrow scope of the types of movable assets that can be used as collateral;
- (b) the exclusion of judgement liens, negotiable instruments, debentures and intangible assets such as intellectual property rights, shares and securities;
- (c) the prescription of a manual register which according to international best practices may not be effective for putting third parties on notice on the actual or possible existence of a security interest; and
- (d) unnecessary formalities in creating and registering a security interest.

In 2016, Parliament enacted The Tier 4 Microfinance Institutions and Money Lenders Act, 2016, an Act that among others, repealed the money lender's Act, Cap 273 and regulated money lender's transactions and the creation of security interests in money lender's transactions.

2.1. METHODOLOGY

In considering the Bill, the Committee was guided by Rule 128 (2) of the Rules of Procedure of Parliament and therefore met and received memoranda from the following stakeholders;

1. The Ministry of Justice and Constitutional Affairs
2. Uganda Registration Services Bureau
3. Uganda Law Reform Commission
4. Uganda Microfinance Regulatory Authority
5. Uganda Association of Money Lender.

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3.0. GENERAL ANALYSIS OF THE SECURITY INTEREST IN MOVABLE PROPERTY BILL , 2018

The Committee analysed the proposals made in the Bill clause by clause and made its recommendations as below-

LONG TITLE

Whereas the Security Interest in Movable Property Bill contains a long title which describes some of the leading provisions of the Bill, its deficient in some matters of relevant importance to the Bill. The long title of the Bill doesn't include one of the most important aspects of this Bill, being, the repeal and replacement of the Chattels Security Act, 2014. This leaves the reader or the eventual user of the law to decipher from the provisions of the Bill , in clause 53, that the intention of the Bill is to repeal and replace the Chattels Security Act, 2014, thereby, affecting the appreciation of the provisions of the Bill .

Recommendation

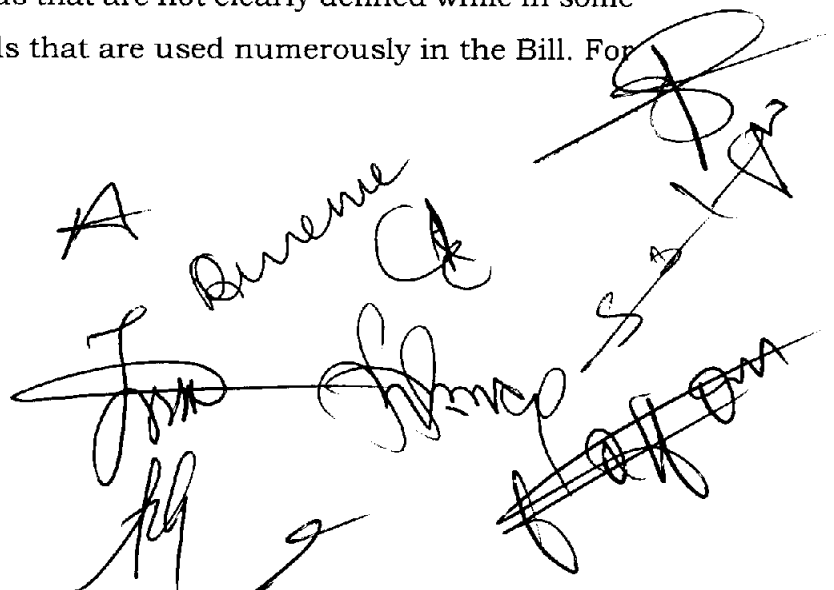
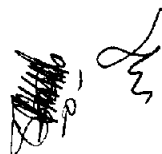
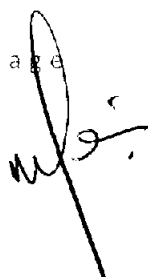
The Committee recommends that the long title should, in accordance with section 3 of the Acts of Parliament Act, include in the long title, the repeal of the Chattels Security Act since it one of the leading provisions of the Bill.

CLAUSE 3

Clause 2 of the Bill is the interpretation part of the Bill and defines the major words used in the Bill. The significance of the definition provision of the Bill cannot be over emphasised since it enhances the interpretation and understanding of the Bill.

Since the interpretation part of the Bill is central to the understanding of the Bill, it should be comprehensive enough to cater for all the major words used in the Bill and ensure that the words are defined clearly and precisely.

In this Bill, Clause 3 contains words that are not clearly defined while in some other instances, it leaves out words that are used numerously in the Bill. For instance,-



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1. "Collateral"

The definition is ambiguous since it extends the collateral to movable property that may be subject to the security interest at a future date. This definition is reproduced below-

"Collateral" means movable property that is subject to a security interest and includes movable property that may be subject to the security interest at a future date"

It appears that by the definition, a security interest can attach to movable property in future without it having attached to such property in the first place. This begs the question when such a situation may arise since the Bill doesn't prescribe when such arises.

Furthermore, the words **"and includes movable property that may be subject to the security interest at a future date"** are redundant and serve no purpose since the first part of the definition also covers the instances the second part intends to cover.

2. "Commingled Goods"

The definition of the word "commingled goods", is limited in nature since it relates to goods alone and not to funds or assets. It should be noted that the word "goods" is not defined in the Bill. More so, the words used numerously used are chattel or tangible asset. The manner in which the word commingled goods is used connotes that it is used in reference to goods alone yet the Bill broadly considers money and other intangible assets.

This begs the question as to whether funds held in an account on which proceeds are deposited, which proceeds arise from the disposal of a security interest can be referred to as commingled. In such a situation, since the security interest extends to the proceeds arising from the disposal of a security interest, such funds are commingled with funds which don't relate to the security interest. In such a situation, the definition of the word "commingled goods" wouldn't extend to funds deposited as described above because such funds are not, in the ordinary use of the word, goods.

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In such a situation therefore, there is need to cater for such funds by defining the word commingled assets or funds. For instance, such a definition exists in the Movable Property Security Rights Act of Kenya, in section 2 and it is defined as follows-

"Commingled assets" means funds credited to a deposit account or money mixed with other money so that they ceased to be identifiable."

3. Document of title",

In the definition of the word "document of title", certain words used in the definition are redundant and with or without them the definition is discernable. The words "document of title are defined below-

"Document of title" means a document that authorises the delivery of tangible asset and satisfies the requirements of negotiability such as a Bill of lading and a ware house receipt"

The underlined words in the above definition are redundant since they add no value to the definition.

Furthermore, the above definition doesn't comprehensively define the word document of title. For instance, the Chattels Security Act defines the words "document of titles" in the following manner-

"document of title" means a document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the goods it covers; and includes a Bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods; and is issued by or addressed to a bailee and relates to goods in the possession of the bailee that are identified or are tangible portions of an identified mass;

The above definition was specific to the document it referred to since unlike the proposed definition, the definition is limited to-

- (a) document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the goods it covers;
- (b) is issued by or addressed to a bailee; and

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- (c) relates to goods in the possession of the bailee that are identified or are tangible portions of an identified mass;

The above definition clearly defines the document that is envisaged in the definition unlike the definition proposed in the Bill which appears to allow all documents as long as they are negotiable, without providing for the definition of what amounts to a negotiable document.

4. "Intellectual property"

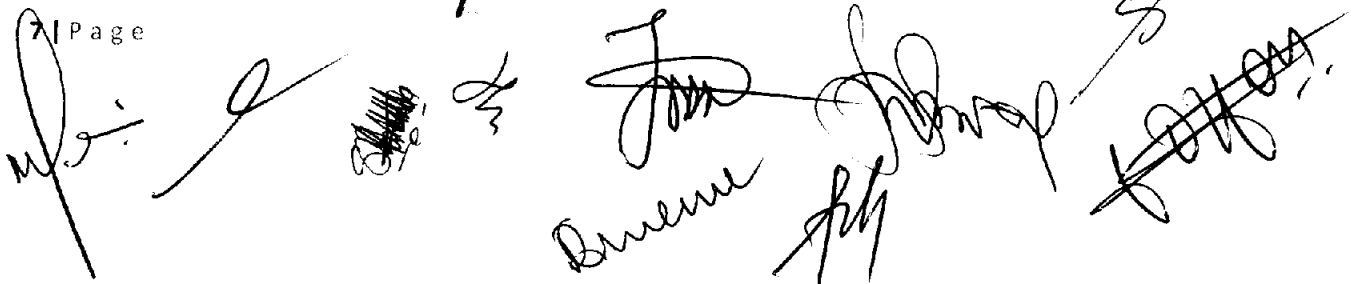
The definition of the word "intellectual property" is limited in scope and needs to be rethought. In the definition of the word intellectual property, the Bill outlines a non-exhaustive list of intellectual property rights some of which are not protected or recognised in Uganda. Even in that list, there are intellectual property rights that are ambiguous and not capable of exact definition. For instance, the list includes intellectual property rights such as "inventions in all fields of human endeavour and protection against unfair competition".

It is important to note that Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

In Uganda, the protected intellectual property rights are those listed in the Copyright and Neighbouring Rights Act, 2006, Trademarks Act, 2010 and The Industrial Property Act, 2014. These laws variously prescribe the intellectual property rights that are protectable and how these are protectable. The definition of the word intellectual property should be limited to only those rights that known to the laws of Uganda as listed in the Copyright and Neighbouring Rights Act, 2006, Trademarks Act, 2010 and The Industrial Property Act, 2014. For instance, such a definition exists in the Movable Property Security Rights Act of Kenya, in section 2 and it is defined as follows-

"intellectual property" means -

- (a) **copyright as defined in section 2(1) of the Copyright Act, 2001; No. 12 of 2001;**

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- (b) **industrial property rights as defined in section 2(1) of the Industrial Property Act, 2001; No.3 of 2001,**
- (c) **trade mark as defined in section 2(1) of the Trade Marks Act; and**
- (d) **any other related right;”**

By that definition, the Kenyan law only applies to intellectual property rights that are known to the laws of Kenya and should be adopted as the preferred definition in Uganda as well since it ensures certainty in the rights that can be used to create security interest.

Recommendations

1. The Committee recommends the following;

- 1. *for clarity, to substitute for the definition of words chattel, collateral, debtor, intellectual property and warehouse receipts.*
- 2. *for completeness, to insert a new definition on commingled assets and money lender.*

CLAUSE 4

Clause 4 of the Bill deals with the creation of security interest and it allows for the creation of a security interest by a grantor over any property, by written agreement entered into between a secured creditor and a grantor. It also prescribes when an agreement becomes enforceable.

The provision has a number of limitations as detailed below-

1. The provision goes beyond the traditional principles for the creation of security interest in as far as it doesn't limit the chattel to being used as security only as well as restricting the rights the secured creditor may exercise over the security interest.

For instance, section 9 (2) of the Chattel Security Act limited the transaction creating a security interest to only where the transaction is intended only as security, be a right that is enforceable against any person, be created by grant or declaration of trust and not by reservation and expressly specify a restriction on the control by the debtor over the assets.

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The above limitation is important because it restricts the transactions from which security interest may arise to only those ones where the parties intended it, thereby protecting the borrower from being exploited by the lender by using every transaction, whether intended or not, to create or give rise to a transaction envisaged under the Bill. Furthermore, it also keeps with the principles of security, one of which is a keen to the principle of mortgages which prescribes "once a mortgage, always a mortgage". In this principle, a security interest remains a security and should not be converted into something else.

In the Bill, the above principles are missing, thereby allowing the creation of security interests which go beyond the intention of the grantor thereby exposing such persons to abuse and exploitation. In the Chattels Security Act, section 9 (4) read as follows-

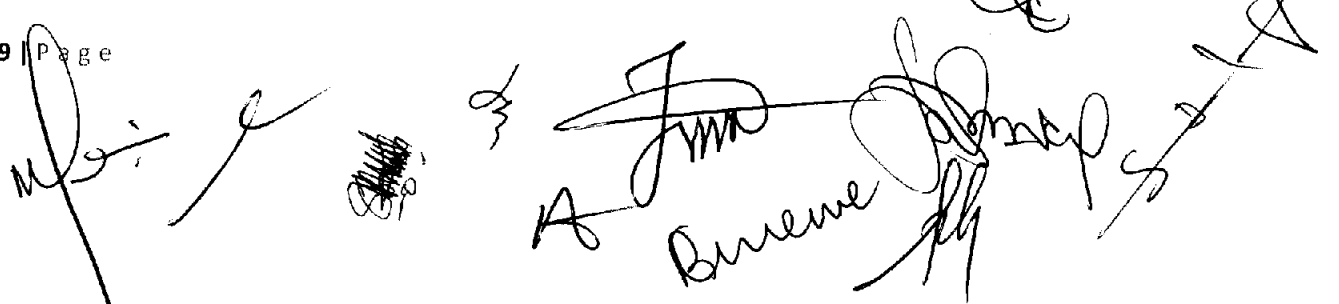
"A security interest shall be taken as given by a debtor to a creditor for the sole purpose of creating a security interest and shall not operate as a transfer of an interest in property from the debtor to the creditor."

The above provision meant that a secured party may not convert the security granted to him or her to operate as a transfer of the interest in the property. Indeed, it is common that a secured party may require the debtor to sign a transfer of title to him or her as a condition for the loan. In such a situation, the Bill doesn't offer any protection to the grantor yet such a transaction goes beyond the principle for which security interest is created. In the chattel security Act, section 9 (5) does offer some protection as follows-

"Where a debtor signs a transfer as a condition for a grant of a security interest under this Act, the transfer shall be void."

2. The Bill does not take into account the provisions of the Land Act Cap 227 as far as family land rights are concerned. The land Act, section 39, requires the consent of a spouse or children in certain transactions such as those envisaged under this Bill. Section 39 is reproduced below-

"39. Restrictions on transfer of land by family members

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(1) No person shall—

- a). sell, exchange, transfer, pledge, mortgage or lease any land;
- b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or
- (c) give away any land inter vivos, or enter into any other transaction in respect of land—

(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;

(ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age;

(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority, except with the prior written consent of the committee;

(iv) in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee”

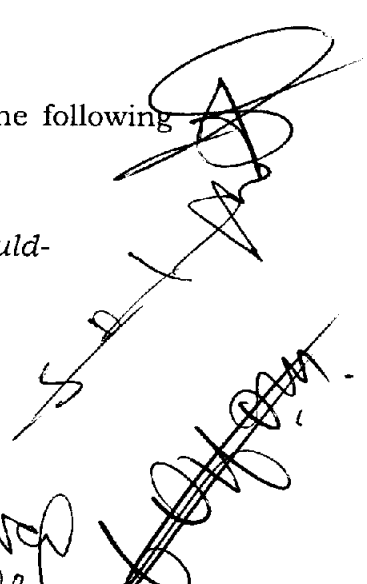
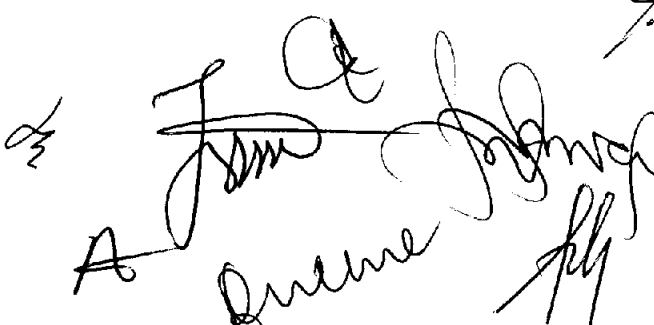
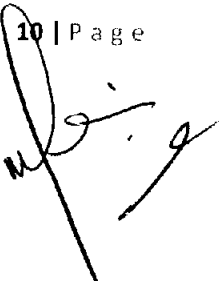
The requirement in section 39 is absolute and where it is not followed, court has voided such transactions. The failure to subject this Bill to the provisions of the land Act may affect the enforceability of transactions arising from the provisions of this Bill. It should be noted that the Chattels Security Act, section 9 (6) used to subject transactions under that Act to section 39 of the Land Act, thereby, requiring the strict compliance with the land Act in transactions subject to the Act.

Recommendations

Clause 4 of the Bill should stand part of the Bill albeit with the following amendments-

(a) *Require, for a transaction to create a security interest, it should-*

- (i) *be intended only as security;*
- (ii) *be a right that is enforceable against any person;*



- (iii) *be created by grant or declaration of trust and not by reservation; and*
 - (iv) *expressly specify a restriction on the control by the debtor over the assets.*
- (b) *Subject the provisions of the Bill to the Land Act, mortgage Act and the Tier 4 Microfinance Institutions and Money Lender's Act, 2016.*
- (c) *Require security interest to be for the sole purpose of creating a security interest and not to operate as a transfer of an interest in property from the debtor to the creditor.*
- (d) *To enhance the protection of grantors, avoid any traction that has the effect of acting as a transfer of property from the grantor to the secured party.*
- (e) *For completeness, include the following provisions from the Chattels Security Act. These are sections 10, 11, 12,13,14,15 and 16.*

CLAUSE 6

Clause 6 of the Bill which prescribes that the security interest in tangible assets continues in commingled goods. As already pointed out, the provision only applies to commingled goods and doesn't extend to money deposited in an account yet such accounts can be used as security.

This will create a problem of tracing of proceeds of the disposal of a security interest when the proceeds are deposited in an account.

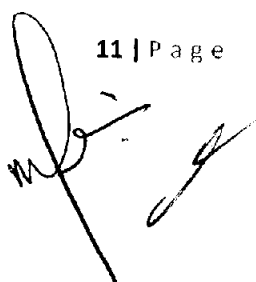
Therefore, there is need to expand clause 6 to include bank accounts as well. Such a provision exists in the Movable Property Security Rights Act of Kenya, in section 9 and it extends the principles applicable to commingled goods to apply to commingled assets.

Recommendation

The Committee recommends that Clause 6 stands part of the Bill albeit with the following amendments-

- (a) *The headnote should include commingled assets*

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negotiable instruments or right to payment of funds to a bank account. To explain this, if a person X is granted collateral of a vehicle and the grantor exchanges that vehicle for another vehicle, he or she may not recover the proceeds of that exchange, being the vehicle the grantor received if the provisions of clause 9 are complied with.

- (2) the provision might allow for unjust enrichment since it perfects the proceeds of sale as well as extending the right of the secured creditor to the collateral without limiting the amount the secured creditor may recover. This means that the secured creditor may not only recover both collateral and proceeds but there is no limit to the value he or she can recover.
- (3) The provision further imposes an additional obligation on the secured creditor to perfect the proceeds of sale where they are not in form of money, accounts receivables, negotiable instruments. This means that in case of proceeds arising from the disposal of a collateral not being in the form of money and say is in kind, the secured party must perfect such proceeds in one of the mechanisms prescribed in the Bill, including registration, control or attachment. If the provisions of this Bill are to be complied with, such a secured creditor may find it difficult to perfect such proceeds because clause 8 of the Bill requires for one to perfect a collateral, there must be an agreement between the grantor and the secured creditor. Therefore, since the Bill is silent on how the perfection of such proceeds is to be done especially in light of clause 8, sub clause 3 of clause 9 of the Bill might be impossible to enforce.

Recommendation

Clause 9 should stand part of the Bill albeit with the following amendments-

1. *Expand the provision to allow*
 - (a) *the proceeds to arise from any form and not limit it to arise from a sale only;*
 - (b) *the proceeds to be in any form, including in-kind;*

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2. *In sub clause (3), automatically allow for the perfection of proceeds without imposing additional requirements on the secured creditor.*
3. *Limit the amount the secured creditor is entitled to, to the market value of the collateral at the date of the dealing rather than being open.*
4. *Include provisions on continuity of perfection, protection of purchasers of goods and Protection of purchasers of chattel paper, negotiable instruments, documents of title and securities.*

CLAUSE 13

Clause 13 of the Bill deals with the registration of security interest and allows for the registration of a security interest by a secured or judgement creditor before the creation of a security interest. The provision also allows for the grantor to authorise the registration of an initial notice prior to the registration of the initial notice but the secured creditor, lien holder or judgement creditor may register an initial notice without authorisation.

Whereas the provision is well intentioned, it may face some enforcement challenges as explained below-

Sub clause 2 which allows for the registration of a security interest before it is created conflicts with the clause 8 (1) of the Bill since it clause 8 (1) only allows for the registration of a security interest after it has been created. It is important to note that a security interest may arise through the agreement of the parties or through a court process or lien. In case of agreement of parties, the provision assumes that a person can have a right to register a security interest over a person's property where there is no agreement creating such a security interest. In case of judgement creditor, the provision assumes one can register a security interest before a judgement debt arises. Therefore, the registration of a security interest before it is created appears to give a person interest in someone's property before or without such interest being created. This is likely to be abused.

Sub clause 3 of the provision of the provision is ambiguous since its not clear on its intentions and may be interpreted in a number of ways. It appears to

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suggest that a grantor may authorise the registration of an initial notice prior to its registration. This then appears to mean that the registration of an initial notice must be authorised by the grantor yet sub clause 1 gives the secured creditor or lien holder or judgement creditor the right to register an initial notice once a security interest is created. This means that the authorisation envisaged in sub clause 3 do not arise except if they relate to the proposed sub clause 2 which allowed for the registration of a security interest before it arises. This provision needs to be rethought.

Sub clause 4, just like sub clause 3 appears to suggest that a grantor or judgement debtor may authorise the registration of an initial notice yet such a right cannot be limited by the grantor in light of sub clause 1 of clause 13.

Recommendations

In light of the above, The Committee recommends that sub clauses 2, 3 and 4 are redrafted to prescribe condition precedence for registration of notices under this Act and to require authorisation of the grantor every time a notice is to be registered.

CLAUSE 16

This provision prescribes the information required for registration of an initial notice. The provision requires the initial notice to contain a unique identification number and address of the grantor, the unique identification number and address of the secured creditor or representative of the secured creditor, a description of the collateral and the date and period of perfection of the registration. The provision also requires for the separate registration of a grantor or secured creditor where there are more than one of the earlier mentioned persons.

The provision has a number of enforcement challenges as explained below-

- (a) The provision appears to suggest that the notice is not capable of being rejected. Once a notice is filled, it is immediately registered, meaning that a person objecting to the registration does so after the fact of

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- registration. This provision is lopsided to favour the person registering the notice rather than the person who might be objecting to the interest.
- (b) The provision appears to apply only to the registration of security interests granted by way of agreement and not to others, such as the registration of a lien or judgement debt. This assertion is based on the fact that the provision uses the words "grantor" in paragraphs (a) and (b), and "secured creditor" in paragraph (b), which words are defined in clause 2 to exclude judgement debtors and creators of liens and to specifically refer to a person in whose favour a security is created under a security agreement. This means that the provision doesn't prescribe the information that a judgement creditor or a lien holder has to include in the notice for the same to be registered. This will affect the registration of judgment debts and liens since the provisions are not drafted to cater for such security interests.
- (c) The information required to be included in the notice needs to be rethought since some of it cannot be obtained by the person seeking to register the notice. It is important to note that the notice will be initiated by the person seeking registration and in such a situation, he or she cannot possibly include in the notice a unique identification number of the grantor, secured creditor or representative of the secured creditor. For continuity and consistency, these unique numbers should ordinarily be provided by the registrar at the time of registration rather than allow a person originating the notice to prescribe the same. Whereas it appears to suggest that a secured creditor and intending grantors are to be assigned a unique identification number which they will use every time they are registering a notice or being a grantor, granting a security interest, the provision do need prescribe how they unique numbers will be generated and assigned prior to applying for registration. Whereas it appears that there might be some form of registration from which a unique identification number is to be assigned which is then used during the process of registering a notice, this is not clearly spelt out in the provisions of this Bill.

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- (d) The Bill doesn't prescribe the form the notice is to take. This means that there will be no uniformity in the notices since there is no prescribed format for the notice.
- (e) Whereas the Bill requires the description of the collateral as well as allowing the creation and registration of multiple interests in a collateral, the provisions of the Bill appear to be silent on value of the collateral, the amount of loan advanced to the grantor as well as the maximum amount of money the secured creditor may claim from the grantor in case of default. These matters are important since they put third parties on notice in cases where the grantor intends to create more than one security interests over the same collateral, help in protecting the grantor from exploitation and guide the determination of value at the time of disposal of the collateral in case of sale.
- (f) The provision somehow waters down the provisions of Part V of the Tier 4 Microfinance Institutions and Money Lender's Act. It should be noted that whereas the transactions envisaged in this Bill are broader, the majority of these are basically money lending transactions.

Apart from those transactions involving financial institutions, the other transactions involving the advancement of loans by a company in money leading business might be considered a money lender's transactions under the Part V of the Tier 4 Microfinance Institutions and Money Lender's Act. This then means that persons involved in such a transaction needs to comply with the provisions of Part V of the Tier 4 Microfinance Institutions and Money Lender's Act including-

- (a) Section 78, which requires such persons to be companies; and
- (b) Section 79 be in possession of a license issued by the Authority;

Even where a person, who not being a money leader with the provisions of the Tier 4 Microfinance Institutions and Money Lender's Act, advances a loan to a person, he or she may be considered a money leader under the provisions of the section 98 (1) (a) if the security for repayment of the loan and the interest on the loan is effected by

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