

ARTICLE SERIES

# AN OVERVIEW OF THE SECURED TRANSACTIONS IN MOVABLE ASSETS ACT, 2017 AND ITS IMPACT ON SECURED FINANCE TRANSACTIONS IN NIGERIA



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## INTRODUCTION

Financial institutions in Nigeria prefer immovable assets, like land, as security for loan repayment over movable assets. This is partially because lands and land transactions are regulated, and standard registries are established to keep records of all transactions, interests and encumbrances on the land. This way, it is easy to ascertain the ownership of the land at any point and ascertain any encumbrance on the land. It is a fact that capital is the bloodline of every business. Thus every business needs capital, whether equity or debt, to survive and thrive. Over 80% of businesses in Nigeria are micro, small and medium enterprises (MSMEs), and they find it challenging to raise capital because they have little access to immovable assets.

As private companies, most MSMEs[1] are restricted from raising capital from the public. Even when MSMEs exist as public companies, they are not well known in their industry. Consequently, raising equity capital (via issuance of shares) from the public may be arduous. Thus, MSMEs are left with very minimal opportunities/options for raising capital. It is this difficulty that the Secured Transactions in Moveable Assets Act, 2017 (STMA or the Act) was enacted to ameliorate.

The STMA came into effect on May 30, 2017. Prior to this, the security interest in moveable assets was regulated by

the Central Bank of Nigeria's (CBN) Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria Regulation 1 of 2015 (Regulation). The Regulation has similar provisions to the STMA; however, the significant difference is that while the Regulation completely excludes company charges, the STMA gives parties the right to use charges[2]. With the coming into effect of the STMA, transactions made under the Regulation will remain valid for just 180 days unless the financing statements for such transactions are registered and made compliant with the provisions of the STMA.[3]

The STMA provides the regulatory framework for creating, registering, maintaining, and regulating security interests in moveable assets. It established a national collateral registry for registering security interest in moveable assets and a mediation and dispute resolution panel as a first recourse in resolving disputes between transacting parties under the Act. The Act was enacted to make debt capital easily accessible to MSMEs that may not readily have an immovable asset (real property) to use as collateral for raising debt capital. This article analysed significant provisions of the STMA and its impact on secured finance transactions in Nigeria.

[1] Private companies, in general, are restricted from raising capital from the public.

[2] S. 2(3) STMA

[3] S.62(3) of the STMA Act, 2017

## **Objectives and Scope of Application**

The key objectives of the Act are to enhance financial inclusion in Nigeria, stimulate responsible lending to MSMEs using moveable assets as collateral and facilitate the perfection and realisation of a security interest in moveable assets. The primary concern of every lender/creditor is to invest, track their investment, perfect their security interest and realise their return on investment, while the concern of most MSMEs is to easily access credit facilities using the assets they have, which are primarily moveable assets like vehicles, equipment, account receivables, raw materials, inventory etc. as security. The Act took care of both the concerns of lenders and MSMEs (as borrowers), thereby creating a balance between their interests.

The Act applies to all security interests in movable assets created or transferred by an agreement that secures the payment or performance of an obligation. However, the Act does not apply to the right of setoff, interest in land (other than account receivables) or ships and aircraft since there are already established registries or governing law for same.

## **Security Interest and Security Agreement**

Finance parties will typically use a collateral agreement to create a security interest over movable assets of a borrower/grantor.

This interest may extend to cover the borrower's current and future assets. The STMA requires that assets that form the collateral must be adequately described, leaving no room for ambiguity. The security interest thereby created will extend to the traceable proceeds of the secured assets, even though the security agreement does not refer to the proceeds.

It should be noted that a unique feature of the STMA is that its provisions permit the effective creation of a security interest over a movable asset, even where there is an existing agreement that prevents/limits a grantor from creating such interest. The effect of this provision appears to disregard the concept of negative pledge under the Companies and Allied Matter Act (CAMA).

## **Perfection of Security Interest in Movable Assets**

Moveable asset was defined under section 63 to mean tangible and intangible property other than real property. Section 8 of the Act provides that a security interest in collateral is perfected when a financing statement for the security interest is filed and registered with the National Collateral Registry (NCR). Thus, mere possession of the collateral by a creditor does not translate into the perfection of the creditor's security interest in the collateral.

Also, no further steps will be required in perfecting the security interest in the proceeds of the collateral where such proceed is money, account receivables, bank accounts, negotiable instrument or is expressly stated/described in the financing statement.

### **The National Collateral Registry.**

The STMA established the NCR to register security interests in movable assets. The Collateral Registry is supervised and administered by a Registrar appointed by the Governor of the Central Bank of Nigeria. The STMA[4] mandates every public registry established by any Act of the National Assembly to oversee, warehouse or coordinate transactions in movable assets in Nigeria to be operated in a manner that creates an automated interface between that registry and the NCR. This provision was implemented to keep track of the collaterals and security interests created therein.

Just as searches can be conducted at the Land Registry to ascertain whether or not the land is encumbered and the extent of such encumbrance (if any), the public can also conduct a search on a moveable asset at the NCR using the unique identifier of the borrower/grantor and the serial number of the collateral.

[4]Section 2(1)(c) of the STMA Act

[5] S. 16 STMA Act, 2017

### **Registration of Security Interest**

In registering a security interest over movable assets, a financing statement is typically filed with the NCR and a unique registration number is generated and assigned to it. The date and filing time of such financing statements are also recorded for purposes of priority/ranking. When the financing statement is registered, the NCR issues a confirmation statement to the creditor, who will notify the grantor/borrower of the same.

Each collateral and grantor is assigned a unique identification number for ease of identification. The Corporate Affairs Commission's (CAC) registration number or other registration number assigned by a competent regulatory authority is used to identify corporate entities. For individuals who are Nigerian citizens, the unique identification number generated from approved biometric-based identification (containing personal information such as full name, gender, date of birth, address and phone number) and other details like full names, address and phone numbers are used to identify each grantor. Where the grantor is neither a Nigerian citizen nor resident, such grantor's name and unique international passport identification number or any other id number that the Central Bank of Nigeria may prescribe is used for identification purposes. An error in the grantor's unique identification or serial number of the collateral is capable of rendering a registered financing statement ineffective. [5]

## Release of Asset

A financing statement shall be valid until the expiration of the terms specified therein or cancellation of same, whichever comes first[6]. The duration may also be renewed or extended before expiration by amending the financing statement[7].

## Priority of Interest

The security interest of a secured lender over collateral will have priority over that of an unsecured lender, however, secured lenders whose interests have been perfected will have priority over an unperfected security interest, subject to certain specific exceptions provided in the Act.

## The Realisation of Security Interest

Upon a default event by a borrower/grantor, the creditor may enforce its right under the Act, the security document, the Companies and Allied Matter Act, or any other law governing the transaction and may resort to any appropriate judicial remedy.

## Dispute resolution

In the event of disputes under the Act, the first recourse shall be to the Mediation and Dispute Resolution Panel established by the STMA. The panel shall constitute three mediators.

## Challenges and Recommendation

Certain provisions of the STMA imply that creating a security interest over a movable asset will be effective even when an existing agreement prevents/limits a grantor from creating such interest. Where an earlier security agreement contains a negative pledge, and a new creditor, with notice of the negative clause, proceeds to advance the loan to the borrower using the same assets as security, the initial creditor may sue the subsequent creditor for inducement of breach of contract, even though the new arrangement may be effective under the STMA. Under section 204 of CAMA 2020, a person is deemed to have notice of a negative pledge/prohibition where a notice indicating the existence of such prohibition is registered with the CAC.

Section 29 of the STMA gives a financial institution priority over perfected security interest in respect of a deposit account to set off amounts it is owed, notwithstanding a prior security interest on such account. This is so regardless of when the right of setoff arose or when the debt accrued. This right of setoff may be in respect of an overdraft or any loan advanced to a customer/borrower by the bank. The borrower can enter an arrangement with its bank to claim that such customer is indebted to the bank, thereby preventing a secured perfected creditor from realising its secured interest in the deposit account.

[6] S. 18(1) STMA

[7] S. 18(1) STMA

To avoid this, a lender may demand an agreement be executed between the borrower, its bank and the creditor, wherein the bank will waive its right under section 29 of the STMA in favour of such lender in respect of the borrower's deposit accounts.

Another challenge of the STMA is the difficulty the provisions of section 24 may pose on new lenders with respect to the security interest of existing perfected creditors over future advances having priority over an existing advance made by such new lenders. However, to avoid such a situation, a new lender can insist that an intercreditor agreement be entered into with the existing lenders to prevent the lenders from granting any further advance to the grantor without the consent of such a new lender. Other modalities can also be put in place to ensure that any further advance by the existing lenders is subordinated to that of the subsequent lender, provided that a cap be placed on the total amount that can be advanced using the asset as collateral.

Under CAMA 2020, while a subsequent fixed charge will have priority over a floating charge except where a negative pledge is contained in the instrument creating the floating charge (and same has been filed at the CAC or the fixed charge has notice of same), it appears that under the STMA, what matters is the time of registration of security interest, irrespective of whether it is a fixed or floating charge.

This may amount to a conflict between the CAMA and the STMA and may create some form of issues during enforcement.

It is a fact that before the enactment of the Act, other statutes exist to regulate certain finance transactions such as the Equipment Leasing Act 2015, Bill of Sale Law, Sale of Goods Act, CAMA and the Hire Purchase Act 1968. The STMA appears very wide in scope as it applies to all assets other than real property; however, it did not expressly repeal the abovementioned statutes. In the case of matters falling outside the scope of the statutes mentioned above but within the scope of the Act, it is unlikely that problems will arise. However, where assets are potentially covered by both the STMA and any of the abovementioned statutes, it is presently unclear whether the STMA effectively establishes a parallel regime or whether it will be regarded as covering the field sufficiently to preempt or supersede the other law.

## **CONCLUSION**

The enactment of the STMA is a commendable development; however, there is a need for the general public to be enlightened about the operations of this Act to enable potential buyers and creditors to conduct a proper search at the NCR, just as a search will ordinarily be conducted at the land registry for land transactions,

to ensure that a moveable asset they are trying to purchase or accept as security is not encumbered, and where encumbered, the extent thereof.

Some public registries like the CAC have started complying with the provisions of section 2(1) (c) of the STMA to ensure a proper interface with the NCR. The CAC now requires that information relating to the moveable assets used, a high level description of the moveable assets, the serial number or chassis number of the collateral and the BVN of the business owners/board of directors be filed alongside Form CAC 8 while registering charges in line with section 197 of CAMA. With this development, a single search can be conducted at the NCR to identify any encumbrance on a moveable asset. More registries are advised to follow suit.

Considering the nature of a movable asset and its potential of depreciating, to save time and cost of enforcement, parties can agree that all disputes be resolved at the Dispute Mediation Panel established under the Act, and the panel's decision be made final. Also, clauses should be put in place in structuring the agreement to allow the creditor to enforce its security interest without first obtaining a Court order. For further clarification and structuring advice, please contact the author.



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