

# A Critical Appraisal of Secured Transactions over Personal Property in Nigeria: Legal Problems and a Proposal for Reform

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## **Abstract**

The thesis contemplates the need for Nigerian policy makers to undertake a reform of secured transactions law to meet international best standards, building upon earlier, unsuccessful, efforts by lawmakers, and drawing upon international benchmarks. It critically analyses the Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulation No.1 2015) ‘CBNR’ published on 2 February 2015. The CBNR, with a primary aim of facilitating affordable credit, and to modernise secured transactions law through the use of personal property as collateral, has departed from its previous position which it inherited from England.

This thesis has drawn comparisons between the CBNR and prior reform initiatives particularly the Draft Law 2009 prepared by the Centre for the Economic Analysis of Law (CEAL). These reforms, which were not implemented, recommended wholesale changes to harmonise all existing secured transactions law in Nigeria. The CBNR does not follow this approach, but instead, adopts a piecemeal approach to reform. Correspondingly, this forms the framework within which this study has been undertaken with reference to whether a piecemeal or wholesale reform is now required.

This thesis has followed the International Finance Corporation (IFC) approach which focuses on a three-stage secured transactions reform strategy - modernisation of the existing legal framework; establishment of an electronic collateral registry; a concerted effort towards building capacity. With the assistance of international secured transactions legal frameworks such as the UNCITRAL Legislative Guide on Secured Transactions 2007, and its Registry Guide 2014, the CBNR has been benchmarked against these adaptable legal frameworks for the purpose of harmonising secured transactions law, in search of the international best practice which may be desirable for Nigeria. The thesis identifies and discusses at length several problems and inconsistencies associated with the CBNR, and the thesis makes suggestions for a wholesale reform of the Nigerian secured transactions law.

This thesis builds on existing knowledge on secured transactions law reform with particular reference, and usefulness, to sub-Saharan African countries and other developing countries that wish to attempt a similar reform of this nature.

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**ALL VIEWS EXPRESSED IN THIS THESIS ARE THOSE OF THE AUTHOR'S AND OF NONE OF THE ABOVE.**

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## **List of Abbreviations**

- ACCI - Abuja Chamber of Commerce and Industry
- BRIPAN - Business Recovery & Insolvency Practitioners Association of Nigeria
- BVN - Bank Verification Number
- CAC - Corporate Affairs Commission
- CAMA - Companies and Allied Matters Act
- CBN - Central Bank of Nigeria
- CBNR - Central Bank of Nigeria Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulation No.1 2015)
- CEAL - Centre for the Economic Analysis of Law
- CEG - Consultancy Expert Group
- CRR - Collateral Registry Regulations
- EBRD - European Bank for Reconstruction and Development
- ELA - Equipment Leasing Act
- EU - European Union
- IFC - International Finance Corporation
- IMF - International Monetary Fund
- ITC - International Trade Centre
- LFN - Laws of the Federation of Nigeria
- LUA - Land Use Act
- MAC - Mining, Agriculture and Construction
- MAN - Manufacturers Association of Nigeria
- MSMEs - Micro, Small and Medium Enterprises
- NBA-SBL - Nigerian Bar Association Section on Business Law
- NCR - National Collateral Registry
- NIALS - Nigerian Institute of Advanced Legal Studies
- OHADA - Organisation for the Harmonization of Business Law in Africa
- PMSI - Purchase Money Security Interest
- PPSA - Personal Property Security Act
- ST - Secured Transactions
- UCC - Uniform Commercial Code
- UK - United Kingdom
- UNCITRAL -United Nations Commission on International Trade Law
- UNIDROIT - International Institute for the Unification of Private Law
- USA - United States of America

## **Postscript**

By the time that the final version of this thesis had been submitted, the Committee on Commerce in the National Assembly of the Federal Republic of Nigeria had issued a Bill for an Act to provide for secured transactions, registration and regulation of security interest in movable assets. This Bill consolidates the work of the CBN to facilitate access to finance in the creation, registration and enforcement of security interest in movable property. The Bill was not available to the researcher at the time of writing this thesis. Where possible, the researcher has attempted at the late submission stage to include a few additional material to this thesis which reflected some of the terms of the Bill. However, due to limitations of time, this was a difficult exercise. Nevertheless, it is important to mention that the Bill, on the whole, contains provisions that reflects significant part of what was proposed by the CBN and upon which all of the work in this thesis is based.

## I. CHAPTER ONE

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‘It is of great use to the sailor, to know the length of his line, though he cannot with it fathom all the depths of the ocean.’

John Locke (1632 – 1704)

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### 1.1 Introduction

Access to finance plays a fundamental role in the international business arena. Businesses often require funding, and to obtain funding, sometimes, assurances such as security in the form of property will be required by the lender.<sup>1</sup> The primary purpose of holding a property as security helps to limit the lender’s risk of loss by providing for an alternative source of repayment which could have a positive impact in accessing low-cost finance.<sup>2</sup> This is even more useful to small enterprises especially when they have not garnered sufficient credit history to borrow through unsecured means which will often require no security.<sup>3</sup> Moreover, security provides the comfort of having priority over other lenders in the collateral (where multiple ‘security interest’<sup>4</sup> exists in the same asset).<sup>5</sup> Furthermore, in the event that a borrower suffers insolvency, the lender can readily fall back on the security for repayment of the loan. Overall, security over interest in property therefore, seeks to facilitate the availability of credit by aiding lenders to secure the advancement granted to borrowers.<sup>6</sup>

The ability to get credit can be a fundamental element in the life of a business. Micro, small and medium enterprises (‘MSMEs’), and large entities as well, require financial backing to develop their capital base, for example, start-up capital, acquisition of basic raw materials, purchase of goods and stock-in-trade, remuneration of employees, etc. Also, in agrarian societies, individuals such as farmers, require financial assistance to increase the

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<sup>1</sup> Carl W. Funk, ‘Secured Borrowing by Small Businesses’ (1958) 13 Bus Law 335.

<sup>2</sup> N. Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) 40 - 41.

<sup>3</sup> Hugh Beale, ‘Reform of Security over Moveable Property: A View from England’ (2012) Edin L Rev 278.

<sup>4</sup> ‘Collateral’ is the secured asset, while a ‘security interest’ is the interest of the lender (secured creditor) in the secured asset of the borrower, see Consumer Credit: Report of the Committee (Vol. 1 Cmnd 4596, London March 1971) para 5.2.11 henceforth ‘Crowther Report’; See para 1.1.1, below, for a comprehensive definition of ‘security interest’ and ‘secured transaction’.

<sup>5</sup> For example, Article 9-201 Uniform Commercial Code (‘UCC’), where it is stated that the security agreement can be enforced against a creditor, except, otherwise provided in the statute.

<sup>6</sup> Joanna Benjamin, ‘Securities Collateral’ in John De Lacy (ed), *The Reform of the UK Personal Property Security Law: Comparative Perspectives* (Routledge-Cavendish 2010) 231.



proceeds of their farms by purchasing good fertilizers, pesticides, farm equipment improvement, and construct an irrigation system. Lack of access to finance especially for low income businesses in the rural community can be a major constraint on economic growth and development for any emerging market.<sup>7</sup> On the flipside, the overarching goal of a competitive environment suitable for secured lending should aim to facilitate timely access to low-cost credit for borrowers, and from an economic standpoint, alleviate poverty. In the low and middle-income countries such as Nigeria, MSMEs are treated as catalyst for economic growth, and these MSMEs need to access affordable finance for the acquisition of capital equipment and latest technological gadget for their enterprises. The government has attempted to respond to the development changes in Nigeria, and one of its main goals was the establishment of the National Economic Empowerment and Development Strategy (NEEDS). Its aim was to provide cheap and easy access to finance for economic sustainable activities in order to reduce the financial costs many businesses faced, with a view of providing direct low-cost credit to the productive sector in an incentive to jump-start the private sector.<sup>8</sup>

Apart from economic factors which may hinder access to finance, other factors might also contribute to this problem such as the legal, institutional and regulatory frameworks. In some legal systems, the laws in relation to secured lending which has a direct impact on access to finance are fragmented across a number of legislative texts. To make matters worse, many of them have not been updated for several decades. As a result, businesses are faced with difficulties when seeking to harness the full value of their assets in a credit-lending transaction and even when they succeed, the laws and regulations are often too restrictive and inflexible. Where there is a reliable secured transactions legal framework, access to finance often improves.<sup>9</sup>

Security serves to promote a host of many other functions, including offering a certain amount of control over the collateral asset.<sup>10</sup> If the lender takes a borrower's specific asset as security for a debt, ordinarily, the borrower surrenders all exclusive control over that particular asset.<sup>11</sup> Generally, a lender will hesitate in advancing credit to a borrower, either

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<sup>7</sup> Some international conventions have identified the economic results of a secure and reliable business environment for the creation of security and enforcement of rights. An example is the Convention of International Interests in Mobile Equipment, signed at Cape Town, South Africa on the 16<sup>th</sup> November 2001.

<sup>8</sup> International Monetary Fund, *Nigeria: Poverty Reduction Strategy Paper – National Economic Empowerment and Development Strategy (NEEDS)* (December 2005) IMF Country Report No. 05/433, 53.

<sup>9</sup> World Bank, Regional Profile: Economic Community of West African States (ECOWAS) (Doing Business, World Bank: IFC 2012) 42.

<sup>10</sup> Gerard McCormack, *Secured Credit under English and American Law* (1st edn Cambridge University Press 2004) 7.

<sup>11</sup> *ibid.*

through a loan or payment facility, if he cannot be convinced that the advancement will be repaid at a stipulated time.<sup>12</sup> The security interest in the property avails the lender by avoiding the difficulty of needing to sue a defaulting borrower, which could involve obtaining a court judgement, and levying execution against the collateral. Furthermore, to a large extent, security control the borrower's use of the property in order to avoid any adverse dealings with the collateral, which might negatively impact on the lender's security interest.<sup>13</sup>

### 1.1.1 Secured Transactions

There is no universal definition of secured transactions, but, generally, a transaction can be regarded as secured when property is provided by the borrower (debtor) under the terms of a loan to the lender (secured creditor) to secure future repayment, with the lender being able to foreclose on the collateral if the borrower defaults on payment.<sup>14</sup> Subject to a few exceptions, most forms of property are amenable as the basis for the granting of security. The lender usually takes a 'security interest' in the property of the borrower.<sup>15</sup> The United Nations Commission on International Trade Law ('UNCITRAL') provides a near definition of the meaning of security interests. It uses the term 'security right' – as a property right in a personal property, created by agreement which secures payment or performance of an obligation, regardless of whether the transacting parties had delineated it as a security right.<sup>16</sup> In English law, security interest is not a common law term, but instead, it has been classified into different categories such as the equitable charge, lien, pledge and the bill of sale by way of security. In the recently drafted UK Secured Transactions Code, it is has been recommended that these categories should be abolished where all types of security would be recognised as a 'charge'.<sup>17</sup> Nonetheless, a 'charge' under Nigerian law whenever stated in

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<sup>12</sup> Increasing Access to Credit: Reforming Secured Transaction Law (International Trade Centre (ITC), Technical Paper BE-10-180.E 2010) para 1.1. The ITC is the joint agency of the United Nations (UN) and the World Trade Organisation (WTO).

<sup>13</sup> Aubrey L. Diamond, 'The Reform of the Law of Security Interests' (1989) 42 Current Legal Probs. 231, 232.

<sup>14</sup> In contrast, personal security is a personal obligation owed by a third party other than the debtor as security for the principal debtor's obligation, see Ulrich Drobnig, 'Present and Future of Real and Personal Security' (2003) 5 ERPL 623, 625.

<sup>15</sup> The European Bank for Reconstruction and Development (EBRD) Model Law identifies a security interest as a 'charge', while the United Nations Convention on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions uses the word, 'security right'. However, I will adopt the use of 'security interest' as is consistent with most international conventions and Nigerian commercial laws.

<sup>16</sup> United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Secured Transactions* (United Nations Publication, New York 2007) 13, henceforth 'ST Guide'.

<sup>17</sup> Richard Calnan, 'A Secured Transactions Code' (2015) BJIB & FL 473. See further the Financial Law Committee of the City of London Law Society first discussion paper on Secured Transactions Reform which

this thesis will be made in reference to companies' equitable charge only. Dahan explains secured transactions as:

an agreement – usually accessory to a credit agreement, present or past – which grants the creditor a right relating to property, the purpose of which is to improve the creditor's chance of getting paid or of receiving whatever else the debtor is required to do by way of performance of the contract...Such security may be possessory, where the creditor takes possession of the subject matter of the security, or non-possessory.<sup>18</sup>

A security interest can be classified as a right *in rem*, i.e. they can be enforceable against the whole world including third parties, creditors, liquidators and bankruptcy trustees, rather than against a person.<sup>19</sup> This right *in rem* (or proprietary interest) which is a real right, comprise the law of property, while rights *in personam* arises under the law of obligations.<sup>20</sup> Real rights are of two types: - general property rights which constitutes full and undivided ownership, and special property rights.<sup>21</sup> Security interests can be classified as special property rights such as a right to possession for example, a pledge. To grant a proprietary security interest, the borrower must own the collateral or must acquire some ownership rights before the security interest is created.<sup>22</sup> The security interest, however, cannot be regarded as 'absolute', because they do not confer ownership of the property on the secured creditor, but they are only granted as security for a pending obligation. Upon the performance of the agreed obligation, the property is retained by the owner.

The pledge, mortgage, charge and lien are some of the fundamental types of transactions over interests in personal property, particularly in common law jurisdictions, which can be taken as security by lenders.<sup>23</sup> Civil law jurisdictions often possess similar mechanisms for the taking of security. Examples include those in the German Civil Code 2002 which does not purportedly recognise the concept of floating charge over certain assets.<sup>24</sup> In England, security can be taken over identifiable and after-acquired assets owned by the borrower, without there being the need to perform another act of transfer after the

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was issued in November 2012, while a second discussion paper was issued in February 2014. A Draft Secured Transactions Code was published in July 2015 to provoke discussion on whether it will be feasible to enact a codified law on secured transactions  
<[http://www.citysolicitors.org.uk/index.php?option=com\\_content&view=category&id=129&Itemid=469](http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=129&Itemid=469)>  
last accessed 18 October 2016.

<sup>18</sup> Frederique Dahan, 'Secured Transactions Law in Western Advanced Economies: Exposing Myths' (2001) *BJIB & FL* 60, 61.

<sup>19</sup> Michael Bridge, *Personal Property Law* (3rd edn, Clarendon Law Series OUP 2002).

<sup>20</sup> John W. Salmon, *Salmond on Jurisprudence* (12th edn, 1966) 412.

<sup>21</sup> Edward I. Sykes and Sally Walker, *The Law of Securities* (5th edn, Law Book Co of Australasia 1993) 9; Sale of Goods Act 1979, s 61 (1).

<sup>22</sup> Ulrich Drobnig, 'Secured Credit in International Insolvency Proceedings' (1998) 33 *Texas Intl LJ* 53, 58.

<sup>23</sup> Roderick J. Wood, 'The Definition of Secured Creditor in Insolvency Law' (2010) 25 *BFLR* 341, 342.

<sup>24</sup> See Sec. 854 – 1295 German Civil Code (Bürgerlichen Gesetzbuches) 2002.

borrower has taken hold of the asset.<sup>25</sup> This possibility is absent from the statutory framework in Germany because it accommodates only separate and single individual transactions.<sup>26</sup> This feature of English law which permits the taking of future assets as security is one of the most important accomplishments of the English courts. Previously, this feature was not expressly prohibited by the common law, but what was required was that there be a new instrument of conveyance whenever any of the goods encumbered came into existence.<sup>27</sup> Equity did not require the creation of a separate conveyance for future assets but, once they came into existence, they were automatically encumbered under the original transaction agreement.<sup>28</sup> The English floating charge is a perfect example of a security device that applies this rule.

### **1.1.2 Problems with the Existing Law of Secured Transactions in Nigeria**

Nigeria has never had a coherent secured transactions law but it has been patient for too long. Arguably, the most significant attempt made by the Nigerian government to reform the law of secured transactions is the establishment of the Central Bank of Nigeria (CBN) Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulation No.1 2015) henceforth 'CBNR'.<sup>29</sup> However, there are suspicions that this law lacks coherence because the reform was done in a piecemeal fashion. An electronic National Collateral Register ('NCR') was created subsequently with the aim of recording security interests in personal property, but up till now, it is has been used sparingly.

Currently, the personal property security registry in Nigeria i.e. NCR which supposedly publicises security interests in the personal property of businesses in Nigeria does not encompass all types of security devices. Also, lenders in Nigeria rarely accommodate the possibility of small businesses granting security over personal property without it temporarily surrendering possession or control of the property to them as a result

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<sup>25</sup> *Tailby v Official Receiver* (1888) 13 App Cas 523; Equity will also recognise and enforce a charge if the collateral is identifiable – *Syrett v Egerton* (1957) 1 WLR 1130; (1957) 3 All ER 331.

<sup>26</sup> In Germany, it is difficult to take security over 'all future receivable' or 'all future property' without including an in-depth description of the secured property such as, the location of the secured property. However, in practice, the courts have recognised a flexible way of taking security in similar fashion to the floating charge in England, which possesses a broader scope.

<sup>27</sup> *Lunn v Thornton* (1845) 1 CBR 379, 13 ER 587.

<sup>28</sup> See *Tailby* (n 25).

<sup>29</sup> CBN Act 2007, s 1(2), states the principal objectives of the CBN which includes amongst others, to promote a sound financial system in Nigeria.

of the poor legal framework to protect their security interest. The closest legislation that was achieved which supports non-possessory security is the outdated Bills of Sale Act. The CBN, which has no legislative powers but only regulatory authority over banks and other financial institutions, has proposed reform initiatives against this outdated habit by virtue of the CBNR, but it is relatively new and it is yet to gain any traction. There are no transitional provisions under this law, which abolishes the continuous use of the security bill of sale. The law governing the security bill of sale is relatively inefficient and outdated in the sense that the registration system and the procedural requirements to perfect validation is unreasonably cumbersome.<sup>30</sup> Worse still, the courts in Nigeria have frowned against the prospect of creditor enforcement by way of self-help under the bill of sale regime.<sup>31</sup>

There is also the use of equitable charge by companies but it has its own drawbacks. Unincorporated entities are ineligible to grant security using the equitable floating charge security device. With corporations, equitable charges are not recognised under the CBNR as security interest.<sup>32</sup> Hence, there remains the problem of constructive notice of charges during the ‘invisibility period’ for registration, coupled with the likely possibility of a fixed charge being re-characterised as a floating charge.<sup>33</sup> As a result, businesses have resorted to other popular forms of title-based financing although they are yet to be fully developed in Nigeria due to lack of a standard regulatory framework capable of working in tandem with the CBNR.

There remain inconsistencies with the law on title-based financing particularly with the financial lease. Legislative changes need to be coordinated with existing regulations to ensure consistency, while avoiding conflicts or contradiction with the laws.<sup>34</sup> Looking closely, the CBNR has failed to do this even though it has tried to follow an integrated approach by permitting financing leases to be registered in the NCR.<sup>35</sup> The result would have been that a lessee can use the equity in the asset as security, whilst the same asset can be

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<sup>30</sup> Iyare Otabor-Olubor, ‘Stuck in a Time Warp: Security Interests in Chattel Mortgages and the Bills of Sale Legislation in Nigeria’ (2015) 26 ICCLR 345.

<sup>31</sup> *Ellochim Nig. Ltd v Mbadiwe* (1986) 1 NWLR (Pt. 14) 47, per Aniagolu JSC. However, this decision was overruled in *Awojugbagbe Light Industries Ltd v Chinukwe* (1995) 4 NWLR (Pt. 390) 379. Notwithstanding, it still remains unclear whether the courts will entertain the use of self-help where the collateral is personal property.

<sup>32</sup> Iyare Otabor-Olubor, ‘Reforming the Law of Secured Transactions: Bridging the Gap between the Company Charge and CBN Regulations Security Interests’ (2017) 17 JCLS 39.

<sup>33</sup> See *infra* Chapter 3, para 3.3.3.4; see also *Enterprise Bank Nigeria Plc v Cinderella Bakery & Agric Foods Industries Ltd* [2014] LPELR-23482 CA (Kaduna Judicial Division); *Fredrikov Petroleum Service Co Ltd v First Bank of Nigeria Plc* [2014] LPELR-22538 CA (Lagos Judicial Division); *Inter-contractors Nigeria Ltd. v National Providence Fund Management Board* (1988) 2 NWLR (Pt. 76) 280.

<sup>34</sup> Murat Sultanov, ‘Equipment Lease: Relevance of the Legal Framework – IFC Experiences and Practices’ (2012) 17 Unif L Rev 377, 385.

<sup>35</sup> CBNR, Art. 3 (2).

used as potential collateral for other creditors.<sup>36</sup> Had there been a provision in the CBNR to show that the registration and priority of a financial lease will be determined by the regulations under the CBNR alone, there would be no confusion as to whether financial lease should be governed by the CBNR or the Equipment Leasing Act (ELA) 2015.<sup>37</sup> Instead, two separate legal regimes currently govern financial leases, to the extent of registration and priority against competing claimants. ELA 2015 implements a title-registration scheme, while CBNR is wholly operated electronically and notice registration based. The rigid compartmentalisation of the various secured transaction laws shows that the different types of security interests should be harmonised to bring about predictability and transparency. These devices serve similar economic functions, whether they are characterised as real security or title-based financing devices. This thesis will recommend a strategy to harmonise these secured transactions laws in Nigeria by using international best practice rules as a viable benchmark.

## 1.2 Purpose of Research

The recognition of security interests in personal property can deliver noticeable goals in the quest for economic sustainable development for any economy. Security interests can reduce risks in financing businesses where the loan advancement is likely to be repaid when payment is due, or in the event of the borrower's default.<sup>38</sup> This assured likelihood of repayment, when taken into consideration, accomplishes a wider economic benefit for the developing country in that credit facilities will be readily available for borrowers where they would otherwise have been denied, and credit would be made available on better terms which could include low interest rate and longer maturity time for the loan.<sup>39</sup>

The main purpose of this study will be to investigate and evaluate the key issues which should be addressed in designing an effective and orderly secured transactions legal framework for Nigeria. Following the approach provided in a recent International Finance Corporation ('IFC') Report on secured transaction reform initiative,<sup>40</sup> this study will follow a similar pattern which will be built on three structural pillars: law reform of the secured

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<sup>36</sup> The Guide, Chapter IX, para. 100.

<sup>37</sup> See para 3.3.4.1, below.

<sup>38</sup> Pascale De Boeck and Thomas Laryea, Development of Standards for Security Interests in *Current Developments in Monetary and Financial Law* (Vol. 3 International Monetary Fund (IMF), April 2005) 1.

<sup>39</sup> *ibid.*

<sup>40</sup> International Finance Corporation, Secured Transactions and Collateral Registries (World Bank 2010). <http://www.ifc.org/wps/wcm/connect/793e79804ac10ff9ea69e4220e715ad/Secured+Transactions+and+Collateral+Registries+Brochure-English.pdf?MOD=AJPERES> last accessed 10 January 2017.

transactions framework; establishment of a collateral registry to record security interests in personal property; and a capacity building strategy to raise public awareness among stakeholders.<sup>41</sup> This novel approach to reform will contribute extensively to secured transactions law in Nigeria, and for other developing market economies that are yet to implement such reforms. An evaluative exercise will be undertaken, using ten criteria adapted from international best practice guidelines, to inform the proposal for reform. The discussion surrounding the legal reform proposed for this thesis will first deal with the nature of the various secured transaction law practices in Nigeria over personal property and how they can be reformed to enable MSMEs gain access to affordable credit in accordance with international best practices. This will help to stimulate and facilitate credit for businesses that do not have fixed assets such as land. An inefficient secured transaction system limited to immovable assets could lead to insufficient availability of credit, thereby, making it costly to procure, which might in turn stunt economic development.<sup>42</sup> A reform of this nature will help to diversify the type of assets acceptable as security in Nigeria, thereby improving the financial market share through profitable lending opportunities for banks and other financial institutions.

Additionally, implementation of secured transactions reform to enable businesses use personal property as security can contribute to private sector development by increasing the level of credit, while decreasing the cost of credit.<sup>43</sup> Subsequent discussion will evaluate the efficiency of the newly set-up NCR and whether it is a functional registry which can be utilised effectively to publicise security interests in personal property, while implementing strategies through public awareness programmes to facilitate training and dissemination routes in order for the new law to take effect. A modernised secured transactions law, as it is the primary intention of the reform envisaged for Nigeria in this thesis, should enable lenders taking security to secure their priority over the collateral against other creditors through fast, simple and easy steps. Also, there should be regulations in place to enable the secured party to investigate properly whether the borrowers asset is subject to an encumbrance. The necessary steps to perform this will include the development of an efficient collateral registry system to counter fraud through transparency of transactions capable of alerting unwary third parties thereby improving adequate access to finance and develop the credit loan system in Nigeria so as to benefit MSMEs. A pragmatic investigation

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<sup>41</sup> *ibid.*

<sup>42</sup> Hugh Beale, 'Secured Transactions' (2008) 14 *Juridica International* 96.

<sup>43</sup> IFC (n 40).

of secured financing practices in Nigeria will be carried out with the view to ascertaining which international reform practices will be necessary to stimulate economic growth and business efficacy in Nigeria.

### 1.3 International Legal Frameworks on Secured Transactions Law Reform

There have been several multilateral regulations, international conventions and global frameworks concerning the need for a better secured lending environment around the world to enhance the availability of finance to businesses. Some typical examples of these frameworks include the European Bank for Reconstruction and Development (EBRD) Model Law 2004, henceforth 'Model Law';<sup>44</sup> the Organisation for the Harmonization of Business Law in Africa (OHADA)'s Uniform Acts Organizing Securities 1997,<sup>45</sup> and later revised in 2010;<sup>46</sup> Convention on International Interests in Mobile Equipment 2001, developed under the supervision of the International Institute for the Unification of Private Law (UNIDROIT) for the financing of aircraft, railway equipment and space assets;<sup>47</sup> the United Nations Convention on the Assignment of Receivables in International Trade 2001,<sup>48</sup> a Guide to Movables Registries by the Asian Development Bank (ADB);<sup>49</sup> UNCITRAL Legislative Guide on Secured Transactions henceforth 'ST Guide';<sup>50</sup> the UNCITRAL Registry Guide on the Implementation of a Security Rights Registry henceforth 'ST Registry Guide',<sup>51</sup> UNCITRAL Model Law on Secured Transactions 2016, henceforth 'UNCITRAL

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<sup>44</sup> Model Law on Secured Transactions (European Bank for Reconstruction and Development (EBRD) 2004).

<sup>45</sup> Organization for the Harmonization of Business Law in Africa (OHADA) [Acte uniforme révisé portant organisation des sûretés](#) (*Revised Uniform Act Organizing Securities*), April. 1997, 3 Journal Officiel (JO) de l'OHADA (Official Gazette of OHADA) 1, available at <<http://www.ohada.com/actes-uniformes-revises/458/acte-uniforme-reviser-portant-organisation-des-suretes.html>> last accessed 2 March 2016.

<sup>46</sup> [Acte uniforme révisé portant organisation des sûretés](#) (*Revised Uniform Act Organizing Securities*), Dec. 15, 2010, 22 Journal Officiel (JO) de l'OHADA (Official Gazette of OHADA) 1, available at <<http://www.ohada.com/actes-uniformes-revises/938/acte-uniforme-reviser-portant-organisation-des-suretes.html>> last accessed 2 December 2016.

<sup>47</sup> CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL, 16 November 2001. Available at <<http://www.unidroit.org/instruments/security-interests/aircraft-protocol>> last assessed 4 March 2016.

<sup>48</sup> United Nations, New York, 2001.

<sup>49</sup> Law and Policy Reform at the Asian Development Bank (ABD) – A Guide to Movable Registries (December 2002).

<sup>50</sup> New York, 2010. For a general discussion on the ST Guide, see Benedict Foex, Luc Thevenoz and Spiros V. Bazinas (eds), *Reforming Secured Transactions: The UNCITRAL Legislative Guide as an Inspiration* (Schulthess, Geneva 2007); Gerard McCormack, 'American Private Law Writ Large?: The UNCITRAL Secured Transactions Guide' (2011) 60 ICLQ 597; Neil B. Cohen, 'Internationalising the Law of Secured Credit: Perspectives from the US Experience' (1999) 20 U Pa J Int'l Econ L 423; Ulrich Drobnig 'Study on Security Interests' (1977) 8 UNCITRAL Yearbook 171; Alejandro M. Garro, 'Harmonization of Personal Property Security Law: National, Regional and Global Initiatives' (2003) 8 Unif L Rev 357; Spiros Bazinas, 'UNCITRAL's Work in the Field of Secured Transactions' in Joseph Norton and Mads Andenas (eds), *Emerging Financial Markets and Secured Transactions* (Kluwer 1998).

<sup>51</sup> Vienna, March 2014.



Model Law',<sup>52</sup> and IFC Secured Transactions Systems and Collateral Registries, henceforth 'IFC Toolkit'.<sup>53</sup>

These so called 'soft laws' can be an effective framework for any developing economy e.g. Nigeria that wishes to embark on a secured transaction reform to improve its business environment. The legal difficulties associated with secured lending in Nigeria will be analysed in this thesis, while identifying the best possible international approaches which could be considered for Nigeria. To undertake a reform of secured transactions law, whether piecemeal or wholesale, it may entail the introduction of multilateral 'soft laws', while drawing comparisons with existing domestic law and previous reform initiatives in Nigeria. For example, the ST Guide has been used successfully as a tool for secured transactions law reform in some African jurisdictions.<sup>54</sup> For this reason, focus will be on multilateral regulations such as the ST Guide, EBRD Core Principles, and the IFC Toolkit, while other personal property security law developments that have taken place in other Commonwealth regions e.g. New Zealand would equally be considered.<sup>55</sup>

Despite the wholesome changes on secured transactions law in Nigeria, there is that anxiety about the implementation of the CBNR. The CBN would need to take long strides to address any shortcomings. Its success will depend largely on CBN's ability to engage with stakeholders and the ability to garner public support towards the realisation of the principles enshrined in the Regulation.<sup>56</sup> Furthermore, it would require the social, legal, political, cultural and economic efforts from the stakeholders that is, the commercial industry, private businesses and the government. There remains the question as to whether the CBNR meets international best standards, knowing fully well that the legal infrastructure in Nigeria still remains underdeveloped. A wholesome exportation of international laws to Nigeria will not suffice for an effective reform and implementation to take place. A harmonisation strategy will need to be effected methodically to avoid the irritation of existing legal doctrines.

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<sup>52</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html) accessed 10 December 2016.

<sup>53</sup> World Bank, January 2010

<https://www.ifc.org/wps/wcm/connect/c5be2a0049586021a20ab719583b6d16/SecuredTransactionsSystems.pdf?MOD=AJPERES> last accessed 10 January 2017.

<sup>54</sup> Malawi enacted a Personal Property Security Act ('PPSA') in 2013 which was inspired by the New Zealand PPSA 1999 and the ST Guide, see Marek Dubovec and Cyprian Kambili, 'Using the UNCITRAL Legislative Guide as a Tool for a Secured Transactions Reform in Sub-Saharan Africa' (2013) 30 *Ariz J Int'l & Comp L* 163.

<sup>55</sup> An Act administered by the Ministry of Business, Innovation, and Employment No 126, 1999, <http://www.legislation.govt.nz/act/public/1999/0126/latest/whole.html> last accessed 11 November 2016. For discussions on reforms that have taken place in Canada, see Michael G Bridge, Roderick A MacDonalds, Ralph L Simmonds and Catherine Walsh, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1999) 44 *McGill LJ* 567.

<sup>56</sup> See Chapter 7 on Capacity Building.

Multilateral organisations such as the UN have been attentive to the fact that there is a growing need for a global legal framework for secured lending.<sup>57</sup> The purpose behind a multilateral regulation is mainly to establish laws which can be adapted to the laws of the recipient jurisdiction. They could include model regulations ranging from instructive manuals, and legislative guiding principles, toolkits, draft frameworks, and detailed templates. As seen already, there have been several global multilateral regulations and frameworks governing secured transaction. The EBRD Core Principles, United Nations' ST Legislative Guide along with its Registry Guide and Model Law, and IFC Toolkit will make up the central part of the benchmarking evaluation in the thesis.

### **1.3.1 The EBRD Secured Transactions Framework**

The EBRD which recognised the importance of secured transactions law reform since its inception in 1991,<sup>58</sup> has had an international impact. While the EBRD remains the largest single investor in Central and Eastern Europe by investing in private enterprises notwithstanding its public sector shareholders, the EBRD has expanded its activities to Africa (Morocco, Tunisia and Egypt).<sup>59</sup> A fundamental objective of the EBRD is to encourage developing countries to adopt a modern secured transaction law while it offers technical assistance through the reform process.<sup>60</sup> The EBRD continues to encourage reform for the purpose of implementing a 'single framework' on secured transactions law in more than twenty countries in which it has operated.<sup>61</sup> A 'single framework' will depend on the type of assets and the function of the instruments. According to the EBRD Model Law, it connotes only one type of 'charge' in respect of all things or rights, thereby making the former distinction between the traditional security rights irrelevant since they are merged into one.<sup>62</sup> Dahan broadly explained that a 'single framework' could mean: -

‘One ‘security instrument’ that can pledge different types of assets; one security instrument that can pledge all, present and future assets; as set of rules governing instruments that serve the same economic function (such as mortgage or pledge); functional approach: ‘embracing

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<sup>57</sup> Heywood Fleisig, Mehnaz Safavian, Nuria de la Peña, 'Reforming Collateral Laws to Expand Access to Credit' (World Bank 2006) 96.

<sup>58</sup> See history of EBRD at <<http://www.ebrd.com/who-we-are/history-of-the-ebrd.html>> last accessed 18 December 2016.

<sup>59</sup> Frederique Dahan, 'The Power of Secured Transactions Law and the Challenge of its Reforms' in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013) 101.

<sup>60</sup> *ibid*, 102.

<sup>61</sup> Duncan Fairgrieve and Mads Andenas, 'Securing Progress in Collateral Law Reform: The EBRD's Regional Survey of Secured Transactions Laws in Central and Eastern Europe' (1999) 4 YB Int'l Fin & Econ L 413.

<sup>62</sup> EBRD Model Law, Art. 1.

under one legislative roof all forms of security and related devices that serve the common purpose of facilitating the recovery of debts from a disposal of personal property.’<sup>63</sup>

This ‘single framework’ possesses some similarity with the approach taken by the CBNR. Despite the CBNR’s audacious attempt of harmonising secured transaction laws in Nigeria, questionable issues remain as to what a modern secured transactions law should have. The EBRD Core Principles remains one of the major institutional framework for assessing a country’s secured transaction laws and for identifying areas in need of future reform. These principles represent the most basic and simplest essential requirements that a secured transactions law should have from a starting point. The aim of the EBRD Core Principles does not seek to overhaul a country’s secured transaction regime and neither does it impose any solution on a country as there may be various ways at arriving at a particular solution, but it seeks to indicate which ten favourable results should be achieved. The principles apply to only security interests over personal property.<sup>64</sup> They act as a reminder to lawmakers that the EBRD Model Law should not be wholly transplanted, but integrated methodically into their own legal system in view of designing a law to suit their domestic business circumstances. Although aimed at transition central and eastern European countries, the EBRD Core Principles could be applied to any market economy. References to EBRD in this thesis is borne out of the fact that alienation of customary property in Nigeria as discussed later in Chapter 2 shares distinctive similarities with the ancient Roman law system.

### **1.3.2 The UNCITRAL Secured Transactions Framework**

The key objectives of the ST Guide draws on and further develops objectives identified in reports and studies produced by other organisations including the EBRD Core Principles.<sup>65</sup> The ST Guide deals with credit institutions and individuals and businesses for the purpose of facilitating secured financing while using personal property as collateral. The ST Guide contains commentaries and recommendations on issues that need to be addressed by a recipient jurisdiction wishing to reform existing security interest laws over personal property, which may include assets such as goods, equipment, bank accounts, negotiable instruments,

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<sup>63</sup> Frederique Dahan, ‘A single framework governing secured transactions’ (EBRD Conference: Secured Lending in Commercial Transactions – Trends and Perspectives, London, 4 November 2013). <<http://www.ebrd.com/downloads/legal/secured/dahan10m.pdf>> last accessed 21 December 2016.

<sup>64</sup> John Simpson and Frederique Dahan, ‘Mortgages in Transition Economies’ in *Secured Transactions Reform and Access to Credit* (Edward Elgar 2008) 173.

<sup>65</sup> ST Guide, Introduction, para 12, 47.

inventory, etc.<sup>66</sup> The recommendations laid down in the ST Guide do not apply to high-value moving equipment such as aircraft, space objects and ships to the extent that they are governed by other national or international agreements.<sup>67</sup> The ST Guide does not apply to intellectual property to the extent of any inconsistency with existing domestic intellectual property law, or international agreements to which the adopting State is a party.<sup>68</sup>

The ST Guide follows similar approaches on uniform laws prepared by other organisations such as the EBRD. The ST Guide has been previously subjected to criticisms based on the fact that it may have been influenced by the UCC Article 9, thus making it a vehicle for a neo-liberal American agenda.<sup>69</sup> However, it should not be forgotten that the purpose of the ST Guide is to act as a ‘guide’ for the benefit of emerging markets wishing to reform their secured transactions laws. One of the question which needs to be asked is whether the ST Guide is useful for implementation by States, and not whether it has been influenced by a foreign jurisdiction.

States may decide to choose to use any part of the ST Guide as they see fit without having to adopt its recommendations completely, which contrastingly is usually the case with conventional hard law. For example, the terminology ascribed to the concepts and rules in the ST Guide do not need to be the same with the reforming State.<sup>70</sup> States only need to implement the recommendations of the ST Guide while making reference to their own existing legal structure to avoid adopting foreign terminologies which may cause confusion, thus disturbing the existing legal norms. States opting to adopt parts of the ST Guide will of course need to form a working group to analyse the local credit and legal frameworks within its territory, and thereafter modify the selected provisions to their various business circumstances.<sup>71</sup> The modification should be flexible enough to accommodate contemporary borrowing practices which may cut across all types of borrowers whether corporate entities,

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<sup>66</sup> Spyridon V. Bazinas, ‘The UNCITRAL Legislative Guide on Secured Transactions: Key Objectives and Fundamental Policies’ (2010) 42 UCCLJ 123, 125.

<sup>67</sup> ST Guide, recommendation 4 (a).

<sup>68</sup> ST Guide, recommendation 4 (b). It is important to note that a supplement to the ST Guide specifically focusing on security interests in intellectual property rights was prepared by UNCITRAL in 2010, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/ip-supplement.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/ip-supplement.html) last accessed 9 December 2016.

<sup>69</sup> The main controversy being that the method of registration as portrayed in the ST Guide follows the American model of ‘notice filing’, thus, making it practically different from the English system which currently operates transaction-filing, see Gerard McCormack, ‘American Private Law Writ Large? The UNCITRAL Secured Transactions Guide’ (2011) 60 ICLQ 597; Gerard McCormack, ‘Secured Transactions Law Reform, UNCITRAL and the Export of Foreign Legal Methods’ in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013).

<sup>70</sup> ST Guide, Introduction, para 76.

<sup>71</sup> International Finance Corporation, *Secured Transactions System and Collateral Registries* (World Bank, January 2010) 31, henceforth ‘IFC Toolkit’.

unregistered businesses, natural persons, etc., all sizes and structures of borrowers whether sole proprietorship or business names and different types of lenders.

The issue of re-characterisation of secured transactions has been dealt with by the ST Guide on the basis that regardless of the name ascribed to a transaction by contracting parties, it will effectively be re-characterised as security right, thereby operating a functional approach.<sup>72</sup> Thus, the ST Guide addresses the problem of the lack of transparency and certainty where various types of secured transactions are treated differently under separate laws, which indirectly creates gaps and inconsistencies.<sup>73</sup> Its objective is to create a law with a comprehensive scope, which covers all forms of secured transactions with a broad range of personal property and secured obligation.<sup>74</sup> The method of registration of security interest as portrayed in the ST Guide mirrors the American system of notice registration which is practically different from the English system which is transaction-filing.<sup>75</sup> The ST Guide takes no position as to whether the recommendation it provides should be enacted in a single law such as in a commercial code or civil code.<sup>76</sup> States wishing to adopt its recommendations are free to shape their laws in their own way to suit their legislative circumstance.

### **1.3.3 The IFC Secured Transactions Framework**

The IFC Toolkit provides technical advice to government delegates, donor institutions and other practitioners on the implementation of secured transactions law and institutional reforms in developing market economies around the world.<sup>77</sup> The IFC Toolkit addresses the most important aspects of secured transactions reform for emerging markets. It recognises the importance of implementing reforms based on recommendations outlined under the multilateral regulations as seen above.<sup>78</sup> It reveals that in order to harmonise existing rules on secured transactions, it is important to undertake a mapping exercise of the existing patchwork of laws which affect secured transactions.<sup>79</sup> This mapping exercise helps to: assist in evaluating the extent of the reform that is needed; assist law reform experts in

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<sup>72</sup> ST Guide, Chapter I, para 101.

<sup>73</sup> Spiros V. Bazinas, 'Acquisition Financing under the UNCITRAL Legislative Guide on Secured Transactions' (2011) 16 Unif L Rev 483, 484.

<sup>74</sup> *ibid.*

<sup>75</sup> Gerard McCormack, 'Secured Transactions Law Reform, UNCITRAL and the Export of Foreign Legal Methods' in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013) 41.

<sup>76</sup> ST Guide, Introduction, para 78 – 83.

<sup>77</sup> IFC Toolkit (n 71)

<sup>78</sup> IFC Toolkit (n 71) p 33.

<sup>79</sup> IFC Toolkit (n 71) p 38.

understanding modern laws governing secured transactions as it should be; establish a clear reference for the extent needed for reform of existing laws; and importantly, assist in deciding whether a piecemeal or wholesale reform should be implemented.<sup>80</sup>

In one of IFC's secured transactions law publications, three structural pillars were established which reflects their approach to secured transactions law reform in developing markets.<sup>81</sup> This approach has been adopted in this thesis. They are followed in this sequence:

1. Reform of the existing secured transactions law framework. A reform of this nature will shed light on the problems with the existing laws, while providing a solution to the problem through harmonisation and modernisation of existing laws using international accepted principles.<sup>82</sup>
2. Establishment of a single collateral registry to record security interests. Where there is a dysfunctional collateral registry, a thorough analysis of the property registry system should be carried out, which in addition could include a shift to an electronic registration, while reducing the cost of registration.<sup>83</sup>
3. A secured transactions law which is new and insufficiently used, as it is the case in Nigeria, should be introduced to stakeholders by way of raising public awareness events either through conferences, workshops or media outreach.<sup>84</sup>

#### **1.4 Potential Conflict of Interests between International Organisations and Nigerian Stakeholders**

In the quest for harmonisation and globalisation as discussed above, the movement towards a single global standard of convergence in the secured transactions law arena has shown that these intergovernmental organisations such as UNCITRAL and IFC have been able to implement their regulations in different legal systems. There is very little room for scepticism that they could potentially have conflicting developmental ideologies with national stakeholders including the government, domestic non-governmental organisations and private establishments. To avoid inconsistencies, the systematic study of the experiences seen in other jurisdictions can provide policymakers with up to date information for drawing

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<sup>80</sup> IFC Toolkit, 38.

<sup>81</sup> International Finance Corporation, Secured Transactions and Collateral Registries (World Bank 2010). <http://www.ifc.org/wps/wcm/connect/793e79804ac10ff9ea69e4220e715ad/Secured+Transactions+and+Collateral+Registries+Brochure-English.pdf?MOD=AJPERES> last accessed 10 January 2017.

<sup>82</sup> *ibid*, p 2.

<sup>83</sup> *ibid*, p 2.

<sup>84</sup> *ibid*, p 2.

conclusions about which rules work best.<sup>85</sup> This thesis has been advanced by Professor McCormack where he stated that “legal systems are mixed to a degree and the civil/common law divide seems especially irrelevant for the sphere of economic law covered by the legal origins literature”.<sup>86</sup> However, it is worth discussing the roles and potential impact the intergovernmental organisations could have on sovereign nations who attempt to standardise their domestic laws along the path of these international players.

It has been stated that where nations attempt to harmonise their existing laws while adopting international norms, this could lead to little or no opportunity for national autonomy and divergence.<sup>87</sup> This is because jurisdictional diversity can create opportunity for competition between sovereign legal orders whereas uniformity will eliminate this possibility while reducing the scope for innovation at national level because of the urge to gain international and widespread acceptance.<sup>88</sup> Regulations of intergovernmental organisations do not bind national governments as they are not considered to be ‘hard law’ which has the force of legal authority upon which a breach will attract sanctions. They are ‘soft ‘laws’ which is merely persuasive with room for national policymakers to manoeuvre.<sup>89</sup> The harbinger of these soft laws are often facilitated by global forces who are themselves constituted out of local circumstances which reflect the characteristics of a particular nation or coalition of nations.<sup>90</sup> It has been argued that powerful nations such as the United States of America (USA) have put their stamp on global secured transactions law reforms much more than less developed nations have done.<sup>91</sup> This has garnered criticism on the impact of Article 9 on the global economic homogenisation of secured transactions law. For instance, the ST Guide, an international instrument of law reform, has been considered as a tool by which the norms set out under Article 9 are used to reform secured transactions law globally.<sup>92</sup> Theoretically, the ST Guide reproduces key features of Article 9 such as notice registration and recognition of quasi-securities as having a super priority right.

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<sup>85</sup> Paul B. Stephan, ‘The Futility of Unification and Harmonization of International Commercial Law’ (1999) 39 *Va J Int’l L* 743, 746.

<sup>86</sup> Gerard McCormack, ‘UNCITRAL, Security Rights and the Globalisation of the US Article 9’ (2011) 62 *N Ir Legal Q* 485, 492.

<sup>87</sup> Pierre Legrand, ‘On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations’ (2002) 10 *Euro Rev Priv L* 61.

<sup>88</sup> Roger Van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’ in Stephan Grundmann and Jules Stuyk (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International 2002) 267.

<sup>89</sup> See para 1.3.2, above.

<sup>90</sup> Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press 2009) 19.

<sup>91</sup> Gerard McCormack, ‘American Private Law Writ Large? The UNCITRAL Secured Transactions Guide’ (2011) 60 *ICLQ* 597.

<sup>92</sup> McCormack (n 86) 502.

However, the legal system of a nation whether civil law or common law does not pose any hindrance to the introduction of a modern secured transactions law, irrespective of their domestic legal tradition or structure. The conceptual basis of a modernised secured transaction system facilitates its adoption in any legal system. Nations with different legal system have successfully adopted provisions of the ST Guide, and likewise, nations with one legal tradition have successfully shaped their laws on other nations with a different legal tradition e.g. Albania and Bosnia and Herzegovina (civil law nations) have modelled their secured transactions laws with that of Canada (common law).<sup>93</sup> Thus, with the progressive integration of nations into a global economy with the use of international instruments, it is inevitable that core intergovernmental organisations will look more like each other.<sup>94</sup> So long as law is an integral element of the framework, national laws would evidently become isomorphic.<sup>95</sup> These global actors of secured transactions, for example the IFC, have settled for inter-organisational corporation with significant convergence happening at a global standpoint which stemmed from uncoordinated and fragmented domestic laws leading to a fairly coherent global script possessing identical norms.<sup>96</sup>

The work of intergovernmental organisations on secured transactions law such as the ST Guide formulated by UNCITRAL are considered to represent international best practices.<sup>97</sup> The adoption of international best practices in Nigeria should naturally follow a path dependency model in search of a better solution, whether wholesale or piecemeal. This will allow policymakers to dig deep into the existing system rather than branch out completely into unfamiliar legal terrains. Of course, digging deeper might involve some degree of comparison with other legal instruments which may trigger development and cause the law to lead to certain results but the form that embodies these results is often determined by the legal doctrine in the State concerned, thus making the law develop in a path-dependent fashion.<sup>98</sup>

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<sup>93</sup> IFC Toolkit, 18. Note, however, that Quebec is the only Canadian province with a civil code.

<sup>94</sup> Halliday and Carruthers (n 90) 32 – 33.

<sup>95</sup> *ibid.*

<sup>96</sup> For instance, the IFC recognises that international guidelines produced by these intergovernmental organisations have been endorsed by a number of countries, and recommends that they should be used for secured transactions reforms by national governments, see IFC Toolkit, 33.

<sup>97</sup> Katharina Pistor, ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) 50 AJCL 97.

<sup>98</sup> Holger S. Spamann, ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law (2009) BYU Law Rev 1813.



Currently, Nigeria (common law nation) is a member state of UNCITRAL, together with other civil law nations such as Japan and France.<sup>99</sup> UNCITRAL has developed a sophisticated means of integrating diverse national interests, while observing customary legal values and obtaining inclusive representation among divergent and heterogenic legal systems.<sup>100</sup> The ST Guide, which is the main benchmarking tool for this thesis, is a perfect example of a well-crafted legitimate global script that can be used to advance convergence across legal systems. It rejects a “one size fits all” approach to global harmonisation and it acknowledges that there is no universal solution to reforming secured transaction laws because countries vary in their respective needs and situations.<sup>101</sup> The ST Guide makes no reference or illustration to the law of a particular nation as a model to be followed. It adopts a standard and universal vocabulary and with the added benefit of not expressly affiliating with any particular legal system, this opens the door for global adoption of its recommendations.<sup>102</sup> Where there are significant variations between national laws, the ST Guide has proffered alternative solutions for countries to address the issue, without identifying the countries.<sup>103</sup> It also goes further to discuss practical and juridical advantages and disadvantages of each alternatives. As a result, UNCITRAL has produced a legitimate global instrument while managing to link it to national laws without the force of hard law, thus making it acceptable to domestic policymakers without any conflicting interest. Proportionately, Nigeria as a member state has a right of representation in the advancement of this international regime.

### **1.5 Limitation of Scope**

The focus of this thesis will be on security interests taken over personal property in the form of collateral to access low-cost financial advancement. Security interests in assets can be classified and distinguished according to whether they are possessory or non-possessory, and also consensual or non-consensual. The scope of this work cuts across the above classes, specifically focussing on consensual security transactions. The types of personal property which may be acceptable as security in Nigeria are non-exhaustive and they could come in different forms such as intellectual property including software licence, and copyrights in

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<sup>99</sup> Nigeria has been a member state since 1968, see <http://www.uncitral.org/uncitral/en/about/origin.html> last accessed 12 February 2017.

<sup>100</sup> Halliday and Carruthers (n 90) 124 – 125.

<sup>101</sup> ST Guide, Introduction, para 76 – 79.

<sup>102</sup> Halliday and Carruthers (n 90) 157.

<sup>103</sup> *ibid*, 158.

motion pictures (movie financing), roving assets e.g. aircraft and ship; livestock; company shares; natural resources e.g. oil and gas; crypto-currencies e.g. bitcoin; furniture; office equipment; book debts; mining, agriculture and construction (MAC) equipment, etc. The extension of this thesis to analyse the nature of security over all these types of personal property would unnecessarily extend the scope of this work. Also, this thesis does not attempt to cover all secured transactions, but only deal with the most prominent ones commonly used in Nigeria. This thesis is produced specifically to deal with immediate challenges in secured transactions law in Nigeria in relation to how they are created, the method of registration of security interests to notify third parties of their existence, the priority of competing claims, and the formulation of public awareness activities for stakeholders.

First, a synopsis on the distinction between the different classes of security is important here. Afterwards, the different types of property will also be explained in order to reinforce our understanding of personal property security law, before later embarking on explaining which secured transactions will be included in this study. As explained already, this thesis does not seek to illuminate the nature of security interests in each and every type of personal property available in Nigeria. Rather, the objective is to identify them as points of reference in the exposition of secured transactions principles and practices in Nigeria.

### **1.5.1 Real Security, Personal Security, and Quasi-security**

Real security confers an interest in the debtor's assets or in those of a third party on the creditor.<sup>104</sup> The asset can be tangible or intangible. The creditor's right, protected by the real security, allows the creditor to take the security for the reimbursement of his debt and to even take it from the pool of assets as against other creditors and any trustee in bankruptcy.<sup>105</sup> In contrast, personal security which is not the focus of this thesis, can be created in a situation where the debtor has no valuable assets, or his assets are already encumbered, and the creditor does not wish to advance unsecured credit.<sup>106</sup> The debtor may then be required to get a creditworthy third-party to act as a surety to financially support him, and to pay any sum owed by the debtor if he dishonours the contractual agreement. These are the two fundamental classes of security.

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<sup>104</sup> Louise Gullifer, *Goode on Legal Problems of Credit and Security* (5th edn, Sweet & Maxwell 2013) 5 - 6.

<sup>105</sup> *Halliday v Holgate* (1868) LR 3 Exch 229, 302 per Willes J.

<sup>106</sup> Personal security can take the form of a surety ship or a contract of guarantee. But for the purpose of this study, focus will be mainly on real security.

Real security comes in two different forms: by consensual agreement with the borrower, or by operation of law without a consensual agreement. The focus of this thesis is on real security by consensual agreement, but discussion will also include ‘quasi-security’ interests in title-based transactions such as reservation of title devices e.g. financial lease.<sup>107</sup> Quasi-security devices are not generally recognised as real security devices but for the purpose of this thesis, they will be discussed alongside because they equally serve an economic function in providing finance to businesses.<sup>108</sup> They may take different legal forms such as in retention of title arrangements including hire purchase, sale and lease backs, and conditional sale, financial lease. In a quasi-security transaction, for instance a financial lease, the lessor has a right in the asset which is retained and not one which the lessee grants to him because only real security rights created by a borrower are regarded as security rights, and not those retained by the lender.<sup>109</sup>

### **1.5.2 Possessory Security Interest and Non-Possessory Security Interest**

A security interest is possessory where the property is in the possession of the lender e.g. lien and pledge.<sup>110</sup> It is mandatory for the lender to have unrestricted possession of the property,<sup>111</sup> but possession could sometimes limit the usefulness of these types of transaction because the borrower would be unable to deal or dispose of it for the operation of its business. There are certain situations where ‘constructive possession’ has been resorted to instead of actual possession.<sup>112</sup> Be that as it may, possessory security interest may prove to be impossible while dealing with intangible properties like choses in action.<sup>113</sup> Many businesses possess intangible asset like corporate shares and intellectual property rights, which can be used as collateral in the form of non-possessory security.

Possessory security interest may also arise by operation of law,<sup>114</sup> e.g. auctioneers lien, mechanics lien, and unpaid vendor’s lien where the ownership title in the encumbered

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<sup>107</sup> Quasi-securities are generally not classified as real security but they do serve the same economic function, see Hugh Beale, Michael Bridge, Louise Gullifer and Eva Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 1.20 – 1.25.

<sup>108</sup> Sue Wright, *The Handbook of International Loan Documentation* (2nd edn, Pelgrave MacMillan 2014) 43.

<sup>109</sup> LS Sealy and RJA Hooley, *Commercial Law: Texts, Cases and Materials* (4th edn, OUP 2009) 1082 – 1083.

<sup>110</sup> James L. Parks, ‘The Rights of a Pledgor on Transfers of a Pledge’ (1922) 6 *Min L Rev* 173.

<sup>111</sup> See *Babcock v Lawson* [1880] LR 5 QBD 284; *Hammonds v Barclay* (1802) 2 East 227; *Coggs v Bernard* (1703) 2 Ld Raym 909.

<sup>112</sup> *Dublin City Distillery v Doherty* (1914) AC 823, 852 - Here, it was seen that a third-party bailee who acts as an agent of the pledgee, can hold goods on behalf of the pledgee who has no actual possession.

<sup>113</sup> Bridge (n 19) 4 – 5.

<sup>114</sup> *Re Molton Finance Ltd* (1967) 3 WLR 1561.

property will only pass after the buyer has completed purchase of the item or fulfilled other obligations as agreed between the parties.<sup>115</sup> In the case of a non-possessory security interest which could either be consensual or non-consensual, the lender will not usually be in possession of the property. They may include security bill of sale and equitable charge. By reason of the non-possessory nature of these security interests, they normally require formal registration in a public register to notify third parties of the existence of the security interest which serves to eliminate the notion of false wealth.<sup>116</sup>

### **1.5.3 Consensual Security Interest and Non-Consensual Security Interest**

A consensual security interest is an express contractual agreement usually between a creditor and debtor which might involve a contract obligation thus leading to the creation of a consensual security interest. It is the basis of many secured transactions. The terms and characterisation of the contract will ascertain if the parties had intended to enter into an agreement. The pledge, mortgage, equitable charge and contractual lien are the major types of consensual security interests.<sup>117</sup> There are also security interests that arise by operation of law which are non-consensual.<sup>118</sup> They are not created by contract, but arise when a party, usually the creditor, has performed services to the other party – the debtor. Examples of this form of security interests are the innkeeper’s lien, auctioneer’s lien over proceeds of the sale of debtor’s property, a mechanic’s lien over automobiles repaired which are still in the possession of the mechanic. The scope of this thesis borders around consensual security interests only.

### **1.5.4 Land and Personal Property**

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<sup>115</sup> Robert Bradgate, ‘Reservation of Title Ten Years On’ [1987] *Conveyancer* 434, 445.

<sup>116</sup> The effect of registration will usually lead to ‘perfection’ (or third-party effectiveness). Further discussions on perfection and effectiveness of security interest against third parties can be found in N. Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) Chapter 5.

<sup>117</sup> Gullifer (n 104) 31.

<sup>118</sup> Roderick J. Wood and Michael I. Wylie, ‘Non-Consensual Security Interests in Personal Property’ (1992) 30 *Alberta L Rev* 1055.

Property can either be land including fixtures permanently attached to it such as buildings.<sup>119</sup> Plants and trees which can also be affixed to land might not be regarded as land if they are continuously harvested on a termly basis,<sup>120</sup> or personal (movable) property which is any property other than land. Personal property is residual in nature and ownership can be easily transferred. Goode expresses the different characteristics between both types of property: land is immovable, rarely divisible in nature, mostly perpetual and is seldom used daily in business circulation because it is mostly required for permanent use, while personal property is sometimes perishable, can easily be transferred freely in the business world, and has a fixed monetary value.<sup>121</sup> The distinction between these two types of property carries deep historical roots which are explored in Chapter 2.

The focal point of this research excludes security interests in land, solely focusing on the use of personal property as security. Almost 80% of businesses in sub-Saharan African countries have very little access to affordable finance as a result of the type of collateral they have which is mostly personal property.<sup>122</sup> It has been estimated that roughly 99% of personal collaterals that are accepted by lenders in the USA would be refused by lenders in Nigeria.<sup>123</sup> It has also been shown in a recent study that 88% of loans provided to businesses in Nigeria require some form of collateral, while the percentage of firms not needing a loan amounted to only around 49%. In practice, lenders will only agree to provide credit to non-corporate entities if the credit will be secured by land. Where they do provide loan secured by personal assets to these non-corporate entities, possession of the asset is usually a mandatory requirement with very high interest rates. With access to finance remaining the biggest obstacle for businesses in Nigeria,<sup>124</sup> this doctoral research study will help to enlighten our understanding of personal property secured transactions in order to facilitate economic growth and financial stability in Nigeria.

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<sup>119</sup> Law of Property Act 1925, s 1 (1). Certain items should not be confused as to whether they constitute a fixture, e.g. a door key, as it was held in the case of *Elliott v Bishop* (1855) 156 ER 766 that a key will constitute a fixture due to its importance to the land and its continuous enjoyment.

<sup>120</sup> *Peel Land & Property (Ports No.3) Ltd v TS Sherness Steel Ltd* [2013] EWHC 1658 (Ch). A contractual obligation to construct to construct a steel-making plant on the premises will not vitiate the removal of the fixture; and they cannot also be regarded as property belonging to the landlord.

<sup>121</sup> Roy Goode, *Commercial Law* (3rd edn, Penguin Group, 2004) 29 - 30.

<sup>122</sup> IFC Toolkit, 6.

<sup>123</sup> Heywood Fleisig, Mehnaz Safavian and Nuria de la Peña, *Reforming Collateral Laws to Expand Access to Finance* (World Bank 2006) 7.

<sup>124</sup> Nigeria's New Collateral Registry Aims to Increase Access to Finance for Small Business (World Bank, 3 August 2016) <http://www.worldbank.org/en/news/feature/2016/08/03/nigerias-new-collateral-registry-aims-to-increase-access-to-finance-for-small-business> last accessed 12 November 2016.

#### 1.5.4.1 *Choses in Possession (Tangible Assets)*

Personal property, can either be classified as either choses in possession (tangible assets), or choses in action (intangible assets).<sup>125</sup> Choses in possession comprises of tangible personal assets.<sup>126</sup> A physical book is a chose in possession. Same applies to cars, jewellery, farm produce, etc. The size of the property is no hindrance as to whether it is indeed a chose in possession as far as it qualifies as such.<sup>127</sup> Under the English Statute of Frauds, choses in possession, when subject to a sale, or any similar transaction, can also be referred to as ‘wares, goods or merchandise’.<sup>128</sup>

#### 1.5.4.2 *Choses in Action (Intangible Assets)*

The other class of personal asset is the choses in action which embodies various types of intangible property.<sup>129</sup> They are the residual properties of personal assets when choses in possession have all been excluded. As the name suggests, choses in action cannot be easily possessed.<sup>130</sup> They can be further sub-divided into documentary intangibles and pure intangibles. Documentary intangibles are contractual instruments and documents that identify obligations between parties, making the performance of the terms of the agreement, executable through the medium of a written instrument.<sup>131</sup> A major feature of a documentary intangible is that it can be transferred using security devices e.g. by pledging documents together with other necessary endorsements.<sup>132</sup> Examples of documentary intangibles are negotiable instruments, warehouse receipts, company shares etc. Pure intangibles are choses in action that are not documentary intangibles. They may include goodwill, copyright, crypto-currencies, etc.

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<sup>125</sup> *Colonial Bank v Whinney* (1885) 30 Ch D 261, 285 – 266, per Fry LJ. ‘Choses’ within this context simply means ‘things’. It is also worth noting at this point that choses in action can take the form of documentary intangibles or pure intangibles.

<sup>126</sup> *Bridge* (n 19) 3.

<sup>127</sup> Large properties such as airplanes, yacht’s, ships, etc., fall into the category of choses in possession, irrespective of their size.

<sup>128</sup> Statute of Frauds 1677, s 17.

<sup>129</sup> *Torkington v Magee* (1902) 2 KB 427, 433 ‘A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it.’

<sup>130</sup> *ibid.*

<sup>131</sup> A negotiable instrument e.g. bill of exchange is an example of a documentary intangible. See *Crouch v The Credit Foncier of England Ltd* (1872-73) LR 8 QB 374.

<sup>132</sup> Documentary intangibles can constitute a chattel personal because the document is seen as a tangible ‘thing’, thus a chattel, see *Gullifer* (n 104) 56.

## 1.6 Exposition

A security interest may be classified as either legal or equitable. A legal interest may bind the whole world i.e. a right *in rem* and not just enforceable *inter partes*, while an equitable security only binds the whole world excluding a bona fide buyer of a legal interest in the same property for value without notice of the prior equitable interest.<sup>133</sup> For a legal security to take effect at law, it must be a present transfer of an existing asset to the lender and it must be made in conformity to its statutory requirements and formalities. On the other hand, an equitable security may involve - the transfer of after-acquired property, transfer of the property to a third party trustee on behalf of the creditor, no immediate transfer but merely an agreement for transfer or a declaration of trust by the borrower, or where the transfer does not reflect the formal requirements necessary for a transfer of legal title.<sup>134</sup> A legal interest takes priority even though it was created subsequent to the equitable interest provided that value has been given and the legal interest holder had no notice of the equitable interest.<sup>135</sup> Nigerian secured transactions law recognises this dichotomy. This thesis will encompass the most common forms of legal and equitable security interests taken over personal property in Nigeria.

### 1.6.1 The Pledge

The contract between a pledgee (lender) and pledgor (borrower) is consensual because it is usually entered into by mutual consent without complex formality. A pledge is created when personal property is delivered from the pledgor to the pledgee as security to offset a debt or performance of an agreed obligation.<sup>136</sup> The pledgor is the owner of the property while the pledgee could be a pawnbroker or creditor. The pledgee has possessory right in the property until the debt has been settled. Where the borrower defaults in repayment, the pledgee's right in the property can lead to the sale of the pledged property.<sup>137</sup> Also, the pledgee may, by common law, deliver the collateral to a third party for safe keeping without consideration, may sell or assign his interest in the collateral, or may convey his interest by way of pledge

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<sup>133</sup> McCormack (n 10) 39 – 40.

<sup>134</sup> Gullifer (n 104) 8.

<sup>135</sup> Erica Johansson, *Property Rights in Investment Securities and the Doctrine of Specificity* (Springer 2009) 74.

<sup>136</sup> *Halliday v Holgate* (1868) LR 3 Exch 299, 302 (per Willes J). To satisfy an obligation other than a debt, a pledge can be used as security. See *Australia and New Zealand Banking Group Ltd v Curlett & Ors* (1992) 8 ACSR 95.

<sup>137</sup> F. R. Mechem, 'The Foreclosure of Pledges' (1882) 15 Cent LJ 382, 383.

to another party.<sup>138</sup> A pledge instrument does not however require public registration like the mortgage bill of sale,<sup>139</sup> because the property remains in the pledgee's possession. The law does not require registration of a pledge agreement as there could be difficulties in ascertaining if the property is already encumbered unless the property has been delivered to the pledgee.

### **1.6.2 Lien over Personal Property**

A lien is a possessory right to hold and retain the tangible goods or property belonging to the owner until the debt owed to the possessor of the property has been paid.<sup>140</sup> The possessor of the property is called the lienholder. Common law liens over personal property comprises of the agency lien, bailment, innkeeper's lien, carriage of goods lien etc. while in Nigeria, there is also a statutory lien regulated by the UK Sale of Goods Act 1893, which governs the creation and enforcement of unpaid vendor's liens and stoppages in transit.<sup>141</sup> There are also other statutory liens arising under the Factors Act 1889,<sup>142</sup> as well as the Nigerian Railway Corporation Act 1990.<sup>143</sup>

### **1.6.3 Security over Assets of a Company by way of Equitable Charge**

Arguably, the first reported case of an equitable charge taken over present and future goods of a company is in the case of *Brown v Bateman*.<sup>144</sup> The equitable charge is a type of security without transfer of either full property or possession.<sup>145</sup> It is different from an equitable mortgage in that mortgage usually involves a conveyance of property to the mortgagee, but in the case of a charge, there is no conveyance and the creditor is only given equitable rights

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<sup>138</sup> *Donald v Suckling* (1866) LR 1 QB 585.

<sup>139</sup> Bills of Sale Act 1882, s 8. This is a received English law still applicable in some parts of Nigeria.

<sup>140</sup> *Nichols v Clent* (1817) 3 Price 547; 146 ER 348. *Skinner v Upshaw* (1702) 92 ER 3 per Lord Raymond, granting the defendant possession of goods until payment had been satisfied for his hire.

<sup>141</sup> Imran O. Smith, *Nigerian Law of Secured Credit* (1st edn, Ecowatch Lagos 2001) 190, 202. The Sale of Goods Act (SGA) 1893 still remains a received English law regulating the sale of goods in Nigeria, s 39 - 48 SGA.

<sup>142</sup> Factors Act 1889, also a received English law.

<sup>143</sup> Nigerian Railway Corporation Act LFN 1990, s 61.

<sup>144</sup> [1867] LR 2 CP 272.

<sup>145</sup> William J. Gough, *Company Charges* (2nd edn, Butterworths 1996) 38.



over the collateral as security for the loan.<sup>146</sup> It can confer an equitable interest as well as a proprietary interest in which case it will involve a subtraction from the ownership rights of the debtor.<sup>147</sup> As *Lord Hoffmann* put it in *Re Bank of Credit and Commerce International SA (No 8)*,<sup>148</sup> a charge is a security interest which does not confer title or possession to the creditor. Another distinction between a mortgage and a charge is that a mortgage will usually involve the conveyancing of title in the property to the creditor subject to a right of redemption, whereas a charge conveys no title but merely grants the creditor certain rights over the collateral as security for the advancement.<sup>149</sup> It is a mere encumbrance which can arise only in equity, and which gives the creditor equitable rights over the company's property without any form of ownership.<sup>150</sup>

In Nigeria, security over the assets of a company is given by a debenture instrument which can be secured by way of an equitable charge either with a fixed charge on an ascertainable and specific property of the company or by a floating charge over the whole or specific part of the company's assets.<sup>151</sup> Where security is taken over specialised type of property such as intellectual property (IP) rights, a charge can be effected by entry into the specialised IP register. The equitable company charge in Nigeria is governed by the Companies and Allied Matters Act ('CAMA') 1990 as amended.<sup>152</sup> It remains the most widely used legislation on corporate borrowing in Nigeria.

#### **1.6.4 The Chattel Mortgage (Security Bill of Sale)**

The bill of sale by way of non-possessory security is a device used to secure a debt. This should not be confused with a legal mortgage of chattels which may be created orally.<sup>153</sup> For roving assets, the legal mortgage must be in accordance with its prescribed form and registered in a specialist register. For instance, a mortgage over a ship will require registration in the register of ships mortgage,<sup>154</sup> while in the case of an aircraft, the mortgage would need to be registered in the International Registry under the Cape Town Convention

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<sup>146</sup> Registration of Security Interests: Company Charges and Property Other Than Land (Law Commission Consultation Paper No 164, 2002) para 2.14.

<sup>147</sup> *Re Price* (1931) 26 Tas LR 158, 160.

<sup>148</sup> [1998] AC 214, 226 (per Lord Hoffmann).

<sup>149</sup> *Re Bond Worth Ltd* [1980] Ch 228, 250 (per Slade J).

<sup>150</sup> *ibid.*

<sup>151</sup> *Inter Contractors Nig. Ltd v N.P.F.M.B.* (1988) 2 NWLR (Pt. 76) 280, 304.

<sup>152</sup> Laws of the Federation of Nigeria (LFN) 2004.

<sup>153</sup> *Reeves v Capper* (1838) 5 Bing NC 136.

<sup>154</sup> Merchant Shipping Act 2007, Part IV.

and Protocol.<sup>155</sup> For these type of assets, registration is a mandatory formality to acquire legal title and an unregistered interest will be postponed to an equitable interest.

If a security bill of sale is created by a natural person and made in writing, it must be in accordance with requirements of the bills of sale legislation, and if granted by a company, it will be registrable under section 197 (2) (c) CAMA. A bill of sale secured transaction is a written undertaking where the debtor transfers title by way of security to the creditor, and the personal property (chattel) remains with the debtor, but with no intention of transferring absolute possession or title to the creditor.<sup>156</sup> The English bills of sale statutes,<sup>157</sup> were transplanted to Nigeria, albeit with minimal changes, to govern chattel mortgages. However, most regions currently have their separate bills of sale laws.<sup>158</sup> The nature of a chattel mortgage is that the borrower has possession of the property with the intention of securing a loan, and this must be recorded in a public register in accordance with its prescribed statutory requirements. If the lender takes possession of the mortgaged property, this will be characterised as a pledge agreement and the lender may be seen as a mortgagee-in-possession.<sup>159</sup>

### 1.6.5 Financial Lease

A financial lease is a consensual title-based financing agreement which usually involves two parties – the lessor (creditor) and the lessee (debtor). The lessor reserves title to the property, usually an equipment, and is often regarded as the legal owner of the property, while the lessee is given the right to use the property in return for instalment fees payable to the lessor. The lessee has the right to use the property for a set period of time while been able to control the use of the property exclusively.<sup>160</sup> In most cases, the funds used to purchase the property is financed by the lessor of the equipment, or an independent third party who may be an affiliate of the lessor (a finance entity created by the lessor to facilitate lease transactions).<sup>161</sup>

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<sup>155</sup> Civil Aviation Act (Nigeria) 2006, s 73 (2).

<sup>156</sup> *Johnson v Diprose* (1893) 1 QB 512, 515 Lord Esher M.R.

<sup>157</sup> The Bills of Sale Act 1878, amended 1882 is a statute of general application in Nigeria and was formally adopted in Nigeria.

<sup>158</sup> For example, see Cap.13 Laws of Northern Nigeria 1963; Cap.1 Laws of Ondo State 1978 (applicable in Ondo and Ekiti State); Cap.1 Laws of Ogun State 1976; Cap.12 Laws of Oyo State 1978 (applicable in Oyo and Ogun State).

<sup>159</sup> Garrard Glenn, 'The Chattel Mortgage as a Statutory Security' (1939) 25 Va L Rev 316, 318.

<sup>160</sup> International Financial Reporting Standards, *Leases: Definition of a Lease* (IFRS, February 2015) 3 – 4, <http://www.ifrs.org/Current-Projects/IASB-Projects/Leases/Documents/Leases-Project-Update-February-2015.pdf> accessed 14 December 2016.

<sup>161</sup> ST Guide, Introduction, no. 22.

The lessor is then granted a security interest in the acquired equipment in order to retain the repayment of the loan advancement.<sup>162</sup> Equipment which can be leased includes construction equipment, agriculture equipment, trucks and vehicles, vessels and containers, business, office equipment, etc. The lessee is not usually given the option to acquire the property at the end of the term of the lease, but if the option thus arises, it will be one of either a hire purchase or a sale respectively.<sup>163</sup> Sometimes, the property may be sold while the lessee acts as the agent of the lessor and financier, and the proceeds transferred to the lessee.<sup>164</sup> In many cases where this arrangement is absent, the lessee will be given an option to re-hire the property.

### **1.6.6 Field Warehousing**

This is an inventory finance method of granting capital for warehouse stock and inventories on a secured basis.<sup>165</sup> A field warehouse arrangement involves a transaction between three main parties - a manufacturer in need of capital, an independent warehouse company, and a financial institution.<sup>166</sup> A simple illustration will be a situation where a manufacturer or merchant possesses raw materials or goods i.e. inventory. To obtain capital, he creates a security interest therein by leasing a portion of his premises to a warehouse company usually specialised in this arrangement, thereby, setting up a warehouse containing the raw materials subject to the interest. The manufacturer can erect barriers and fences to segregate this warehouse from other manufactured products, and puts signposts nearby, which shows that warehoused goods are not free of encumbrance. The warehouse company appoints an agent in charge of the goods in custody, and the warehouse receipts are pledged to a financial institution, which in turn advances credit to the manufacturer based on the security interest on the goods.<sup>167</sup>

### **1.6.7 Stocks and Shares as Security**

In view of the proprietary nature of shares in private and public companies in Nigeria, a security interest can be created over them. A legal mortgage can be created when the

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<sup>162</sup> *ibid.*

<sup>163</sup> Beale et al (n 13) 261.

<sup>164</sup> Beale et al (n 13) 262.

<sup>165</sup> Harold F. Birnbaum, 'Form and Substance in Field Warehousing' (1948) 13 LCP 579.

<sup>166</sup> Daniel M. Friedman, 'Field Warehousing' (1942) 42 Colum L Rev 991.

<sup>167</sup> The warehouse receipt is most often issued directly to the financial institution by the warehouse company.

mortgagor transfers his shares to the mortgagee.<sup>168</sup> The mortgagee then enters his name and particulars in the register as the security holder. The mortgagee will have a right to the share dividend in the event that the mortgagor is yet to have redeemed the mortgage, and because the company is not privy to the mortgage agreement between both contracting parties, the mortgagee's security interest in the shares will not be challenged.<sup>169</sup> The mortgagor has a reversionary right of redemption upon discharging the debt.<sup>170</sup> An equitable mortgage can also be created when the registered shares, usually in the form of a share certificate, is transferred to the mortgagee with or without a blank transfer form. Also, a share can be appropriated by the company which issued it, until it is fully paid for by the shareholder. This creates a lien which arises by operation of law on any unpaid shares and other accrued dividends.<sup>171</sup> A bank may possess its customer's share certificate, unless otherwise specified if the customer owes debts on loan advanced. This gives the bank a security over the share certificate excluding the sale of the shares or its appropriation.<sup>172</sup>

### **1.6.8 Assignment of Account Receivables**

Assignment of accounts receivable is an agreement between a lender which is usually a bank, and a borrower normally a business in which the latter assigns its customer account receivables that owe money to the lending establishment in return for a loan advancement.<sup>173</sup> By this arrangement, the assignee (bank) is given the right to collect the receivables of the assignor (borrower) if it fails to repay the loan at a specific time. A typical example will be where X owes some amount of money to Y, who runs a business venture, and Y requires urgent capital for the continuous operation of its business. Y who has no other valuable asset, asks for a loan from Z by using X's unpaid customer account as security. Z then carries out the necessary inspection, and advances the loan to Y upon full satisfaction that X's debt is good. In this tripartite arrangement, X is the debtor; Y is the assignor who is indebted to Z, while Z is the assignee. The assignment here is the transfer of debt by Y, owed by X to Z.

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<sup>168</sup> Smith (n 141) 263.

<sup>169</sup> Smith (n 141) 264.

<sup>170</sup> If any provision in a loan agreement purports to disqualify a mortgagor from redeeming the loan, that provision is null and void, see *Bradley v Carritt* [1903] AC 253.

<sup>171</sup> Smith (n 141) 271.

<sup>172</sup> Smith (n 141) 273.

<sup>173</sup> See generally, *United Nations Convention on the Assignment of Receivables in International Trade* (United Nations Publication, New York, 2004).

## 1.7 Methodology

A doctrinal approach to research has been implemented in this thesis, which has provided an in-depth understanding, in search of developmental solutions to further broaden our knowledge of secured transactions law in emerging financial markets. The research has been carried out using a range of domestic and international primary and secondary sources of law, outlining a comprehensive discussion pertaining to the existing literature on secured transactions such as multilateral regulations, official government consultative reports and publications, textbooks and monographs, journal articles, case law, and statutes.

The doctrinal and comparative research undertaken in this thesis entails an expansive investigation of the laws pertaining to security interest in Nigeria and the various secured transactions practices in Nigeria. A doctrinal approach will be applied at the starting point so as to understand how rules and regulations are related while looking at orthodox treatises and articles.<sup>174</sup> A functional comparative method will be necessary by deciphering the black-letter law which will be identified in other to paint a clear picture of security interest laws in Nigeria. With the aid of international soft laws, this comparative method in the form of benchmarking will support this thesis in proposing reforms of secured transactions law in Nigeria.

The Nigerian legal system is predominantly made up of customary law, sharia law and common law.<sup>175</sup> The English statutes of general application which were in force in England in 1 January 1900, doctrines of equity, and the common law, are applicable in Nigeria in so far as national circumstance and local jurisdiction would permit.<sup>176</sup> But where the law of the local jurisdiction is contrary to natural justice or equity and repugnant and directly incompatible to any law for the time being in force, then it shall be declared invalid.<sup>177</sup> Common law has been used as reference points in this thesis because it is prevalent in the Nigerian courts. It was transplanted from England, which is recognisable within several legal doctrines pertaining to contract law, consumer law, commercial law and company law – which are for the most part inseparable from secured transactions law.<sup>178</sup>

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<sup>174</sup> Also referred to as ‘black letter law’.

<sup>175</sup> Jacques Du Plessis, ‘Comparative Law and The Study of Mixed Legal System’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 483.

<sup>176</sup> Sec. 32 (2) & (3) of the Interpretation Act LFN 1990 ‘(2) *Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law. (3) For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*’

<sup>177</sup> Derek Asiedu-Akrofi, ‘Judicial Recognition and Adoption of Customary Law in Nigeria’ (1989) 37 *American J Comp L* 571, 578.

<sup>178</sup> A perfect example is the English Sale of Goods Act 1893 which is still applicable in Nigeria.

### 1.7.1 Approaches to Comparative Secured Transactions Law in Nigeria

The possibility of undertaking a comparative exercise can occur where the functions and tasks are seemingly identical.<sup>179</sup> The search for a better solution while doing comparative evaluation is practicable in so far as the legal systems and institutions to be compared stand on identical grounds.<sup>180</sup> Looking for the best solution involves finding the problems to be solved by the legal institution. Ralf Michaels expatiates on this by stating that for evolutionists, the problem in a society can lead to socio-legal changes and the solution is only a step forward to other future problems, while for a functionalist, a problem is functionally related to a legal institution and how they constitute one another.<sup>181</sup> According to Zweigert and Kötz, comparative law analyses coexisting legal systems concurrently.<sup>182</sup> Using this tool for research will afford a glimpse into the internal structures and formation of legal institutions which have developed over time, together with laws on security interest in Nigeria, typically observed in near details, the differences and similarities with other international instruments thereby expanding our understanding of secured transactions as a whole.

This research is carried out by means of a comparative legal analysis and international harmonisation of law, with a view in providing the best possible solution for Nigeria. This will be implemented by way of harmonisation of secured transactions laws with the help of benchmarking the Nigerian laws against international best practices, particularly the ST Guide.<sup>183</sup> The comparisons drawn in this thesis is achieved by using two different approaches in finding the best possible solution for reforming Nigerian secured transactions law. First, recommendations proposed in prior secured transaction law reforms in Nigeria particularly the Cuming Report and Draft Law,<sup>184</sup> which were once considered

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<sup>179</sup> Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J Eur & Comp L 111.

<sup>180</sup> Konrad Zweigert and Hans-Jurgen Puttfarcken, 'Critical Evaluation in Comparative Law' (1976) 5 Adel L Rev 343, 355.

<sup>181</sup> Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 366.

<sup>182</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press OUP 1998) 2.

<sup>183</sup> See para 1.3, above, for a general list of international legal frameworks on secured transactions law.

<sup>184</sup> Ronald C.C. Cuming and Yair Baranes, 'A Modern Secured Financing System involving Personal Property Collateral for The Federal Republic of Nigeria' (International Finance Corporation, 17 January 2004); Nuria de la Peña, Heywood Fleisig and Peter Winship, *Nigeria: First Draft Law on Security Interests in Movable Property*, (Washington DC, CEAL, October 2009) 'Draft Law'; Heywood Fleisig, Nuria de la Peña and Corey Loney, *Registry Assessment for Filing Security Interests in Movable Property, Prepared for Nigeria: Secured*

for implementation but never realised, will be incorporated in a doctrinal analysis in search of a workable path-dependent solution. Their recommendations were expansive in scope, and their purposes were amongst others, to investigate the feasibility of adopting a comprehensive secured transaction structure to create an enabling business environment in Nigeria, while providing for an electronic notice registration system. Support for this approach is borne out of the fact that the essential aspects for reform – legal framework, collateral registry, capacity building - were identified, investigated and discussed to a large extent, which reflects the proposal in their respective consultative reports. These reports serve as an adaptable framework to base this research on, while at the same time, this study establishes whether the recommendations for reform as previously reported in the Draft Law, should be considered for implementation into the CBNR.

In order to establish whether the recommendations identified in the Draft Law should be carried forward will entail a systematic and methodical evaluation of their recommendations, together with the CBNR. To fulfil this purpose, it has been established whether the CBNR is in line with internationally recommended best practices. This evaluative framework will necessitate, in great details, the applicability of the reform suggestions laid down by the international soft laws, using ten recommended criteria, for the implementation of secured transactions law reform strategies in Nigeria, while considering in hindsight, the provisions and recommendations of the previous reform initiatives. The CBNR will be benchmarked against these ten evaluative criteria based on the international legal frameworks for the purpose of ascertaining which legal feature in the Nigerian framework is in need of reform, and which direction should be taken using the international best practice standards. The prior reform initiatives have provided a path-dependent blueprint for comparison following a doctrinal analytical approach, while the international best practice rules have been adapted appropriately to fit within existing secured transaction practices in Nigeria through an international evaluative spectrum for the purpose of international harmonisation.

## **1.7.2 International Harmonisation of Secured Transactions Laws**

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*Finance for Movable Assets - Collateral Reform and Leasing Development* (Second Progress Report Washington DC, CEAL, March 2010).

It can be rightly state that while comparing institutions whether domestic or international, focus should be on what they do and not what they are.<sup>185</sup> It is worth noting that societal needs do not necessarily initiate legal institutions even though these institutions respond to societal needs. They may respond to the needs that were not expressly chosen for it and thus, they may serve as functional equivalent to the other institution.<sup>186</sup> A comparativist must be aware of the institutions to be compared with their distinctive roles. Many legal problems are universal in nature and each legal system has similar solutions to these problems via identical or different institutions. For example, in England, the primary legislation regulating the floating charge is the Companies Act 2006, while in Nigeria, it is CAMA. These are functional equivalent institutions of two different jurisdictions.

One of the dominant factor towards simplicity of domestic secured transactions law is the conscionable adoption of multilateral soft laws for the purpose of reforming secured transactions laws in recipient countries. This can be achieved by way of harmonisation. Leebron defines harmonisation as ‘making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar’.<sup>187</sup> Knowing fully well that the regulatory infrastructures on business law in developing countries still remain largely underdeveloped, the importance of effectively reforming their secured transactions laws to achieve international harmonisation by way of adapting these foreign regulations to suit their domestic orders is no easy task. The implementation of a reformed secured transactions law will usually involve the introduction of a new regulation and a public registration system for recording security interests created over personal property. Harmonisation could be feasible where there are social, political, cultural and economic efforts from stakeholders in the business and trade industry, the government, and those who understand the socio-economic terrain of the financial market.

Uniform multilateral regulations that seek to promote the modernisation of secured transactions law usually contain provisions to aid judicial interpretation in recipient country.<sup>188</sup> The aim of such harmonisation process is to facilitate investment and cross-border trade. These regulations can act as an example for developing economies to follow in pursuit of domestic reform. On the other hand, laws governing specific types of property should as well be modernised in order to improve economic stability for emerging financial

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<sup>185</sup> Michaels (n 181) 363.

<sup>186</sup> Michaels (n 181) 369.

<sup>187</sup> David Leebron, ‘Claims for Harmonisation: A Theoretical Framework’ (1996) 27 Can Bus LJ 63, 66.

<sup>188</sup> Orkun Akseli, ‘The Interpretation Philosophy of Secured Transactions Law Conventions’ (2013) 21 Euro Rev Priv L 1299, 1300.



markets.<sup>189</sup> In this thesis, the method of applying the international rules will be through harmonisation and not necessarily unification, because harmonisation involves the convergence of legal rules towards a common standard, even though harmonisation usually moves towards a unification of legal rules.<sup>190</sup> Further, UNCITRAL defines ‘harmonisation’ as a process through which domestic laws are streamlined to enhance predictability in cross-border commercial transactions, while ‘unification’ is a common legal standard regulating common aspects of international business transactions.<sup>191</sup> Thus, the notion of harmonisation in this thesis is centred on domestic harmonisation of secured transactions legal rules.

Harmonisation of secured transactions rules will bring about familiarity in the application of rules to the different concepts in secured transactions such as the creation, perfection and publicity of security interests for the purpose of providing transparency and certainty, while reducing cost of transaction for contracting parties. Harmonisation will not lead to changes in legal terminologies. For example, implementing the recommendations of the ST Guide will not alter the existing legal terminologies in the recipient country.<sup>192</sup> Rather than importing unfamiliar legal terms, this thesis will follow the accepted terminologies conversant with business activities in Nigeria, and where suitable, it will be adapted to suit the Nigerian business environment. A successful achievement of domestic harmonisation of secured transaction concepts – which is the purpose of this thesis - could usher in a unification of the rules of secured transactions globally in the near future in order to facilitate international trade.

### **1.7.3 Summary of Chapters**

The multifaceted character of secured transactions law in Nigeria which is incoherent will require an anatomical discussion of its key elements. This will be achieved in this thesis by first providing an expansive analysis in Chapter 2 on the concept of ownership and possession of property and the problems inherent in land collateral. This will provide a general overview of property interest in land in that the distinction between security interests in land and personal property is less clearly pronounced under Nigerian law, compared to the difference between land law and personal property law. Chapter 3 will introduce a

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<sup>189</sup> *ibid*, 1305.

<sup>190</sup> Gerard McCormack, *Secured Transactions and the Harmonisation of Law: the UNCITRAL Experience* (Edward Elgar 2011) 15 - 16.

<sup>191</sup> UNCITRAL [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html) last accessed 12 February 2017.

<sup>192</sup> ST Guide, Introduction, para 77.

discussion on the historical analysis on the types of security interests in personal chattels as seen under Roman law – the *fiducia*, *hypotheca*, and *pignus* - with a distinction drawn between them, with subsequent discussions on secured transaction practices recognised under Nigerian law such as the pledge, security bill of sale, finance lease, equitable charge. Subsequently, an expansive study will be undertaken in Chapter 4 which will deal with the recommendations and proposals which were the highlights of the previous reform initiatives. This central theme of this chapter will be to analyse which aspects of these recommendations may be suitable for future adoption. Further, Chapter 5 will seek to examine the provisions of the CBNR, while drawing comparison with the previous reform initiative. This exercise will also entail a critical analysis of the CBNR in light of benchmarking its provisions with international best practices on secured transactions promoted by UNCITRAL and EBRD. Thereafter, Chapter 6 will focus on arguably the most fundamental element of a secured transactions regime which is the operation of an efficient personal property collateral registry. The NCR will be examined while comparing its functional characteristics with the international standards particularly the ST Registry Guide. The next chapter i.e. Chapter 7 will introduce strategies to inform the community, through capacity building schemes, about the nascent secured transaction law and its operations. The final chapter i.e. Chapter 8 will provide a summary of the putative problems associated with the CBNR (if any), and in this chapter, it will be decided whether a wholesale or piecemeal reform is required.

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## II. CHAPTER TWO: THE HISTORICAL BACKGROUD OF TITLE AND POSSESSION OF PROPERTY IN NIGERIA

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### 2.1 Background

Title (ownership) and possession are two ubiquitous property law concepts affecting secured transactions law. To gain a firm understanding of these concepts, a historical analysis of them will be necessary to provide an appreciation of how and why they have since been applied in tandem with secured transaction laws. This historical knowledge will be particularly useful in this thesis in order to understand how commercial lending has evolved over the years, while identifying the problems with lending using land as collateral in Nigeria. Legal reformers and policy-makers in emerging markets, confronted with the responsibility of designing a modern secured transactions law, which may have developed in a way synonymous with lending in ancient times, will also benefit from this analysis.

The vast majority of discussions surrounding property title in many jurisdictions have elementary features similar to that of ancient Roman law. Nigerian customary practices and Roman law of ownership title vividly illustrates this. This may be a happy coincidence that similar principles occur in both legal systems but they also possess practical functionality which seems to be in tandem. Although Roman law did not directly influence customary practices in Nigeria, it shows nevertheless that the concept of title is relative and certain functions are common to several legal systems. Dias once claimed that the particular history of the evolutionary process of ownership title in a society is shaped by elements inherent in its immediate environment.<sup>1</sup> Hence, remedies that were once available in ascertaining ownership under the old customary practices can be found if a historical approach is taken as well. The essential use of Roman law, particularly in this study, is because it has many useful primitive modes of alienation of property similar to the customary laws in developing economies such as Nigeria which are still applicable today especially with possessory security.<sup>2</sup>

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<sup>1</sup> Reginald WM Dias, *Jurisprudence* (5th edn Butterworths, London 1985) 293.

<sup>2</sup> Customary laws in Nigeria are derived from indigenous norms and traditions practised by a particular group of people in a defined society. Sec. 32 (1), (2) Interpretation Act, Laws of the Federation of Nigeria (L.F.N.) 1990 specifies that the common law of England and doctrines of equity and statutes of general application which were in force in England in January 1900 are applicable in Nigeria. In this regard, National courts are bound by the common law except otherwise proposed by parties who wish to be subjected to customary laws.

## 2.2 Title and Possession of Property under Nigerian Customary Law and in Ancient Rome

If a thing is in abundance, such as sunlight, air, etc., the complicated procedure of finding property title will not arise.<sup>3</sup> Title remains the most important interest a person may have in personal property. The right of title is mostly exclusive and no other person may lay a valid claim against such titleholder.<sup>4</sup> Title right places the holder in control of the property and the power to alienate and dispose is exclusively held by the holder even if possession is lost.<sup>5</sup> There is a totality of rights enjoyed by a titleholder which includes the right to possession, the right to assign the property as security, the right to gain income from its sale or lease.<sup>6</sup>

Under Roman law, land and personal property had certain features which were recognised distinctively. Initially, the word ‘*res*’ was used to denote any property having a physical content, such as a tangible object, but later, the scope was widened to embrace a more comprehensive interpretation which comprised of any physical asset of commercial value. This interpretation was reflected by Gaius while distinguishing between the different characteristics of properties i.e. ‘*res corporales*’ and ‘*res incorporales*’.<sup>7</sup> Things that could be touched were the *res corporales*, while the things that could not be touched are the *res incorporales*.<sup>8</sup> This means that a right in a person’s property, such as a servitude, will be treated as an incorporeal property interest.<sup>9</sup> Under Nigerian customary laws, the right of servitude is a fundamental element and an ever-present feature in property alienation even up to this day. These rights, sometimes referred to as usufruct rights, are very similar to the

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Where the customary law is repugnant or directly incompatible with any law for the time being in force, then it will be rendered null and void.

<sup>3</sup> ‘Men would live exceedingly quiet if these two words, mine and thine were taken away’, Anaxagoras (500 BC – 428 BC).

<sup>4</sup> Benjamin O Nwabueze, *Nigerian Land Law* (Nwamife Publishers Ltd, Enugu 1972) 7.

<sup>5</sup> Jibril Idrisu, *Understanding Nigerian Land Law* (2nd edn ABU Press Ltd, Zaria Nigeria 2008) 12.

<sup>6</sup> *ibid*, 13. In *Jinadu v. Esurombi Aro* (2009) 4 MJSC (Pt. 111) 6, the Supreme Court opined that evidence of ownership of land is often exercised by the acts of persons laying claim to the land such as selling, renting, leasing or cultivating a portion or otherwise utilising the land beneficially. See also *Chukwu v. Amadi* (2009) All FWLR (Pt. 177) 7189. There are certain traditional concept of ownership which cuts across a bundle of rights such as *utendi*, i.e., right to use or enjoy, *abutendi*, i.e., right to abuse, consume or destroy, and *firendi*, i.e., a right to dispose or transfer, see Adefi Olong, *Land Law in Nigeria* (2nd edn Malthouse Press Ltd, Lagos 2011) 35.

<sup>7</sup> These right could take the form of a usufructuary right of a servitude, or personal obligations in contractual agreements, debts. Gaius states that although the property belonging to a beneficiary in an inheritance, the fallen fruits in the yard of a property encumbered in a usufruct may take the form of *res corporales* but the rights within which these elements are founded are incorporeal in nature, see W.M. Gordon and W.F. Robinson, *The Institutes of Gaius* (Book II: The Law Relating to Things Dockworth, London 2001) 12 - 14.

<sup>8</sup> *ibid*.

<sup>9</sup> A servitude involved the right of use such as the right of way of the property of another person usually the owner of the property. A servitude could only exist over a corporeal property.

Roman law concept. A usufruct right under Roman law was a reversionary right to use someone else's property or premises without altering or impairing its features.<sup>10</sup> The holder of a usufruct lacked absolute possession but could use the property and make use of its produce, while having the right to occupy and control the property and having the implied duty not to misuse the property, and to return it as it was in its original state.<sup>11</sup>

As far as any right in a thing has economic value, it could be classified as a *res*. Incorporeal property could not be possessed, because possession under the Roman law entails the physical holding of a property. This shows that these rights were not easily transferrable and the demerits were the inability to hold such rights as security during the early times.<sup>12</sup> The lack of substantive literature to analyse the transfer of property rights in incorporeal properties under the Nigerian indigenous customary laws could be as a result of the lack of development in this area. In view of the paucity of sufficient literature to characterise this distinction stemming from the pre-colonial era, the focus here will be shifted to title and possession over land in order to give a glimpse into how property was transferred and possessed long before the advent of the Nigerian State.

### 2.2.1 Conceptual Problems of Ownership Interest in Nigeria

The concept of title is mostly complex and has different connotation, but it has a primary certainty which centres on the exclusive right to enjoy property.<sup>13</sup> The idea of title in a typical Nigerian society seem to divide opinions as to whether land can actually be capable of individual ownership. Regarding the importance that has been placed on land as one of the most important assets under customary law, much controversy has surfaced as to the nature of title and the classic emphasis on individuals and individual rights. This is because absolute title in its strict meaning is alien to Nigerian customary law. And the rights of individual members often co-exists with other members of the community.<sup>14</sup>

If the property is a personal chattel, such as livestock, there may be absolute title if it was acquired and transferred according to the norms and traditions of the community which will vary according to each locality due to their differences in customary practices.

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<sup>10</sup> Andrew Borkowski and Paul de Plessis, *Textbook on Roman Law* (3rd edn, OUP 2005) 172.

<sup>11</sup> *ibid.*

<sup>12</sup> It could neither be acquired by the stipulated time requirement in a *usucapio* or transferable by a *traditio*.

<sup>13</sup> *Enimil v Tuakyi* (1952)13 WACA 10 (Ghana), Lord Cohen stated that ownership is more often than not, used loosely irrespective of whether the interest is a mere right of occupancy being held by the owner asserting the claim or sometimes, could actually denote an absolute ownership in the *res*. This looseness which he affirms may be as a result of the confused state of land law in West Africa as a whole.

<sup>14</sup> Taslim O Elias, *The Nature of African Customary Law* (2nd edn, Manchester University Press 1956) 164.

The Roman law had two different classifications of properties to determine how title was transferred. They were ‘*Mobilis*’ (movables) and ‘*Immobilis*’ (immovables).<sup>15</sup> They were further categorised into two distinctive classifications - *res Mancipi* and *res nec Mancipi*.<sup>16</sup> This was perhaps the most significant classification of property under ancient Roman law until its abolition by Justinian, c. 530 A.D.<sup>17</sup> *Res Mancipi* was land, beasts of burdens, slaves, rustic praedial servitudes i.e. right of way and water in suburban areas. The *res nec Mancipi* were all other things separate from the *res Mancipi* category. The draft animals in the *res Mancipi* category was restricted to horses, mules, donkeys and oxen excluding other animals and this was never amended to accommodate other animals such as elephants and camels probably because they had not yet been encountered by the Romans until the Middle Ages. At this point in history, Rome was a major commercial and agricultural empire and as a result of that, farm production was the norm which could have played a major role in its development. It could also be that due to family self-sustenance, it was useful to protect those things (beast of burdens, slaves, etc.) that were essential for daily existence. Hence, great importance was placed on the transfer of title in a *res Mancipi*.

### 2.3 Customary Practices relating to Ownership in Nigeria

One cannot hide the importance of property which aids human existence for the provision of shelter, fuel, agricultural produce, etc. In developing countries such as Nigeria,<sup>18</sup> land is seen as an important asset for investments and business transactions which supports the means of production thereby leading to economic growth.<sup>19</sup> Nevertheless, access to land is limited for MSMEs because of the many challenges in using land as collateral in Nigeria.<sup>20</sup> Title and possession of property will now be elucidated specifically for the purpose of this chapter.

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<sup>15</sup> See Table VI (IV) concerning ownership and possession in the XII Tables of Ancient Rome.

<sup>16</sup> Institutes of Gaius (n 7).

<sup>17</sup> The classification of things as *res Mancipi* and *res nec Mancipi* was finally abolished by Justinian in 530 AD because it served no practical importance, see Max Radin, ‘Fundamental Concepts of the Roman Law - XV’ (1925) 13 Cal L Rev 207, 208.

<sup>18</sup> The Economist, ‘How Nigeria’s Economy grew by 89% overnight’

<<http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-2>> accessed 4 January 2017.

<sup>19</sup> Jelila A Omotola, ‘Law and Land Rights: Whither Nigeria’, Inaugural Lecture Series, University of Lagos: UNILAG Press, June 29 1988, pg. 6; See also Johan Pottier, *Land Tenure and Land Reform in sub-Saharan Africa: Towards a Land Reform Agenda in African Centre for Technology Studies (ACTS)* (A Report of the Land Tenure and Conflict in Africa: Prevention, Mitigation and Reconstruction, ACTS Press, Nairobi 9 – 10 December 2004).

<sup>20</sup> The World Bank, ‘World Bank Supports Increased Financing for Medium & Small Businesses in Nigeria’ (25 September 2014) <http://www.worldbank.org/en/news/press-release/2014/09/25/world-bank-supports-increased-financing-for-medium-small-businesses-in-nigeria> last accessed 9 January 2017.

### 2.3.1 Grant of Property Rights by the Community under Indigenous Laws – The Communal Tenure System

Prior to colonialism in Nigeria, the entire territory was home to a vast number of traditional laws, customs and local doctrines. Local rules and customs slightly differed according to each community although the differences were minimal and often inconspicuous. When Britain later introduced the common law system as part of the colonisation process, the customary laws which already had deep roots in the native adjudicatory system could not be easily set aside but were allowed to operate side by side with the common law.<sup>21</sup> The customary practices which were derived from local rules and doctrines were very much recognised by the colonial judicial authorities as far as they portrayed equity and good conscience and were not repugnant to natural justice.<sup>22</sup> Under the old customary practice, land was viewed as special and sacred, belonging to God and which should be held by the family, clan, village or community and not by an individual.<sup>23</sup> ‘Communal’ in its ordinary meaning suggests a group of people living in a defined territory, sharing the same norms and beliefs. Under this system, to possess any land, the first person to prepare and cultivate it will establish possession and be able to have continuous use of it.<sup>24</sup> The individual could only cultivate the land and harness its resources if it is situated in his community or his area of lineage. The individual had a certain usufruct right similar to the Roman concept.<sup>25</sup> To borrow the words of the Privy Council in the famous case of *Amodu Tijani v. Secretary of Southern Nigeria*:

‘The notion of individual ownership is quite foreign to native ideas, land belongs to the community, the village or the family, never to the individual.’<sup>26</sup>

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<sup>21</sup> Many other countries in Africa also possess a mixed legal system e.g. Ghana, see Samuel Kofi Date-Bah, ‘Rights of Indigenous People in Relation to Natural Resource Development: An African’s Perspective’ (1998) 16 J Energy & Nat Resource L 389, 396.

<sup>22</sup> See for example, Supreme Court Ordinance (Gold Coast) 1876 s.19; Supreme Court Ordinance (Nigeria) 1914, sec.20. There came a dual system of land tenure recognised in Nigeria - land tenure system under the English law and customary land tenure system. This was prior to Nigerian Land Use Decree of 1978 which unified the system of land tenure and dealt a blow to communal ownership under the customary law system.

<sup>23</sup> N O Adedipe, J E Olawoye, E S Olarinde and A Y Okediran, ‘Rural Communal Tenure Regimes and Private Landownership in Western Nigeria’ in *Land Reform Bulletin* (1997) Nigeria.< <http://agris.fao.org/agris-search/search.do?recordID=XF1998082505>> accessed 25 February 2017.

<sup>24</sup> This system is regarded as the customary or traditional communal land tenure system practiced throughout Nigeria when land was once considered as a property for the community.

<sup>25</sup> Alexander Lee, ‘Roman law and Human Liberty: Marsilius of Padua on Property Rights’ (2009) 70 Journal of the History of Ideas 23.

<sup>26</sup> (1921) 2 AC 399, 405.

Nwabueze dissents from the above statement of the Privy Council. This is because, from his point of view, individual ownership was not alien to the old customary practices before the coming of the British.<sup>27</sup> He states that even though the community might have had a controlling interest over land situated in their communities, all family lands must have had a root of title once originating from an individual.<sup>28</sup> Given the above statement, the title of family land in traditional history can be traced to an individual owner who acquired such land,<sup>29</sup> but to discover who were the first owners of a village or community is almost an impossible task.

As time went on, these first possessors, who were seen as traditional rulers, chiefs, and (on their demise) ancestors, allocated property to heads of families and these family heads would then allocate lands for the benefit of their family as a whole.<sup>30</sup> Duties varied according to locality, but generally, the community leaders were saddled with the responsibility of maintaining the tribe's customs in accordance with the rightful use of land. This would be done in order to suit the community's need, such as by managing forests and land reserves across the community, ensuring that the rights of members are not overshadowed by respecting each and every community member's freedom. The chief was more often than not a mediator if and when problems arose between community members. Property was held by these chiefs only for the benefit of the community members.<sup>31</sup> The chief stood as a caretaker and trustee on behalf of the community, but never as an absolute owner.<sup>32</sup> This position was affirmed in the case of *Sobhuza II v Miller & Ors*<sup>33</sup> per Viscount Haldane, where he stated:

'Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.'<sup>34</sup>

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<sup>27</sup> Nwabueze (n 4) 32. See also *Okiji v Adejobi* (1960) 5 F.S.C. 44 where both parties alleged that the property in dispute once belonged to a certain individual named 'O' two hundred years ago but the Appellate court dismissed this contention by basing its doubts on the *Amodu Tijani* case.

<sup>28</sup> The community may even decide to treat their lands as jointly owned by the entire community members from the onset and may refuse to alienate to individual members to appropriate for themselves.

<sup>29</sup> *Ngwo v. Onyejani* (1964) 1 All NLR 352.

<sup>30</sup> The first possessor's were referred to as 'ancestors' who had the right to use the land, together with the present generation comprising of the immediate and extended family and future generations yet unborn.

<sup>31</sup> *Amodu Tijani v The Secretary, Southern Nigeria* (1921) 2 AC 399; see also *Sunmonu v Disu Raphael* [1927] AC 881, 883-884.

<sup>32</sup> Elias (n 14) 164.

<sup>33</sup> [1926] AC 518.

<sup>34</sup> *ibid*, 525. In *Omagbemi v. Numa* (1923) 5 NLR 17, the descendants of a traditional ruler claimed ownership title to land formally held by the ruler. It was held that the ruler never held the land as an individual owner but he was only a trustee for the community and therefore his children could not have title to the land.



The head chief or ruler is normally mandated to consult the most senior chiefs, who together with him constitute a traditional authority like a quorum. This idea that a ruler holds land in trust for the benefit of the entire community has been statutorily supported in Nigeria, where formerly, communal land had been declared vested in trustees duly appointed by the Minister for Lands under a properly drawn trust document,<sup>35</sup> but all lands by virtue of the Land Use Act 1978 are now vested in the Governor of each respective states.<sup>36</sup>

The communal tenure system is quite different from the English idea of absolute possession in fee simple, because title to land in Nigeria was for the community, and the chiefs and kings had no legal right as absolute owners over the property in their communities because they act only in a supervisory capacity. In England, the Crown has, in theory, an absolute title over all the lands and the subjects are merely tenants of the Crown.<sup>37</sup> In respect of the disposal or alienation of community land under customary practices, the consent of the community head and chiefs is usually required. No one can appropriate the land to himself nor can he treat the land as his own. From our understanding of communal ownership and with the controversy of separating individualism from communalism, the relationship between these two is invariably complex. They could both have rights with respect to the same property which often co-exist within a similar social context. Property particularly land is seen as communal, often encapsulates both those held individually and those which have no claim of right yet asserted, whether by family or by groups.

One of the oldest forms of land acquisition by possession was by conquest in war, although this is now rare in modern times. When land is conquered, the conqueror holds title to such land by right of conquest such as was seen in the case of *Mora v. Nwalusi*,<sup>38</sup> where a dispute arose between two communities, the *Amawbia* and *Awka*. The matter was regarding about 250 acres of land taken from the original owners, the *Norgu*, who were conquered in the war. The *Awkas* alleged that they laid siege and conquered the land all by themselves, while the *Amawbias* claimed that they were part of an allied force and that war had been waged by a group of communities. Thus, their share of the spoil was the 250 acres in dispute. The court ruled in favour of the *Amawbias*, because they were in ‘actual possession’ of the

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<sup>35</sup> The communal areas were particularly those located in the Old Western Region of Nigeria declared by the Minister of Lands to be within the operation of the law, see *Communal Land Rights (Vesting in Trustee) Law, 1959*.

<sup>36</sup> Land Use Act 1978, s 1.

<sup>37</sup> Max Gluckman, ‘Essays on Lozi Land and Royal Property’ (1945) 15 J Int’l Afr Inst 99, 100. These ‘tenants’ in England only had limited possession for a fixed period of time and nothing more. Once their tenure expired, they relinquished possession back to the Crown.

<sup>38</sup> (1962) 1 All NLR 681 (Privy Council).

land when the matter was commenced and that proof of possession following conquest could sufficiently establish ownership.<sup>39</sup>

Thus, the role possession plays together with title is of utmost importance under customary law, since a party cannot easily lay claim to a property he has no possession of, as seen in the above case. While title is a legal concept, possession often tends to be temporary and is essentially a matter of fact. A person enjoying possessory rights has the power to exclude any other person interfering with the property in his possession.<sup>40</sup> This possessory right may ripen into ownership through various means such as lapse of time or even by acquiescence or laches.<sup>41</sup> This has different morphological attributes similar to the Roman law system which gave an individual title referred to as '*dominus*'<sup>42</sup> through the *usucapio* system of acquisition.<sup>43</sup> *Usucapio* is an old private Roman law doctrine of acquisition of ownership, which operated by virtue of a time lapse requirement – an individual became the rightful owner of a property by holding it for a stipulated period of time, one year for personal property and two years for land.<sup>44</sup> *Usucapio* had great importance because it turned possession into title in the event that the conveyance procedure to the transferee was defective either because (i) a *traditio*<sup>45</sup> was used instead of the formal *mancipatio* or *cessio in iure*<sup>46</sup> to transfer a *res Mancipi*, or (ii) the transferor of the property

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<sup>39</sup> *ibid*, 684. See also *Kuma v Kuma* (1934) 2 WACA 178 (Ghana). Possession can either be actual as seen in the *Mora v Nwalusi* case, or constructive. In a constructive possession, because of certain purposes such as for maintenance, the law regards the holder of the property as having possession even if he does not.

<sup>40</sup> This right can be activated in the form of an action for trespass.

<sup>41</sup> Adverse possession was generally alien to Nigerian customary law but full ownership could be claimed only over fixtures such as structures, trees and plants that was fixed to the land, but the absolute right over the land is for the community or family as the case may be. A squatter will be regarded as having a limited right of adverse possession in the property and cannot claim ownership of the entire land under customary law, see Elias (n 14) 163, 166.

<sup>42</sup> Robert H Brophy, 'Emancipatos Feminae: A Legal Metaphor in Horace and Plautus' (1975) 105 Transactions of the American Philological Association 1, stating that the right the *dominus* has is only over a tangible thing and not over an intangible which was yet unrecognised by the Roman law system of ownership. The *dominus* was the master and lord of his household and could bring an action to secure his property against trespassers and unlawful meddlers. Hence, the *rei vindicatio* became the general proprietary remedy securing the rights of owners over their property.

<sup>43</sup> See Table VI in the Twelve Tables of Ancient Rome (Circa 250 B.C.). The *usucapio* is quite similar to adverse possession of property under the common law.

<sup>44</sup> Often referred to as *mobilis* (movable properties) and *immobilis* (immovable properties).

<sup>45</sup> Barry Nicholas, *An Introduction to Roman law* (A.M Honore and J Raz Ed., OUP 1962) 117.

<sup>46</sup> The *mancipatio* (emancipation) was a solemn method of conveyancing in early Rome used by the *Quirites* (full Roman citizens) and elites of the society. The grantor of an *ius quiritorium* was also referred to as the *dominus*, a house-master of the entire household. The *ius quiritorium* was a rare privilege of substantial importance in the passing and retaining of ownership in property. However there is no prohibition for it to be used for the transfer of a *res nec Mancipi* but it will serve no purpose because the transfer of a *res nec Mancipi* could be performed with a less-cumbersome mode of transfer such as the *traditio* as seen above. The *cessio in iure* meaning 'cession in court' was another *ius civile* method of transferring ownership in a *res Mancipi* to a transferee, see P.R. Coleman-Norton, 'Cicero's Contribution to the Text of the Twelve Tables' (1950) 46 The Classical Journal 51, 59. The *ius civile* were basic rules and principles of Roman law derived from the statutes within the city state such as Lex, constitution, and they were applicable only to Roman citizens but after 121

had no legal title and lacked ownership of the *res* which was purportedly conveyed to the transferee.<sup>47</sup> *Traditio* was an informal delivery with a particular cause as an intention which included possession of the *res* e.g. pledging stock inventories as a security for debt (*pignus*). The *traditio* was meant specifically to transfer property that was not caught by the *res mancipi*.<sup>48</sup>

*Usucapio* empowered the transferee of the property to acquire full title when the stipulated time had expired, subject to uninterrupted possession within the stated period which had to be proved. Moreover the possession had to be taken in good faith and must have been *ex iusta causa*, i.e. during the cause of a transaction, the property must have been capable of transfer and the property must not have been stolen or taken under duress.<sup>49</sup> The transferee had to have legal possession of the property which was the fundamental requirement for a *usucapio*. Detention only of the property would not suffice, there had to be physical possession as it is the case with the *pignus*.<sup>50</sup> The bailee is bound to return the property to the *dominus* unimpaired as soon as the servitude had expired.<sup>51</sup>

In the Nigerian context, community acquisition of land through conquest may not conclusively fulfil all the requirements of a valid *usucapio*. However, the focus here is on actual possession of the property without any form of interruption, which is after all one of the fundamental elements of a *usucapio*. If there are two parties in dispute to a particular piece of land and neither can prove title to the land, title will be determined by the possessor of the land at that particular point in time.<sup>52</sup> If the land in question is uncultivated, the

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*AD*, the Roman Emperor *Caracalla* reduced the importance of the peregrine ownership by granting citizenship to almost all the inhabitants of the Roman empire with the probable exception of slaves. The word '*ius civile*' in present times is used generically to denote a set of law peculiar to a given community. The *cessio in iure* was quite a formal procedure and somewhat cumbersome which made it unpopular compared to the *mancipatio* and it gradually faded away even before Justinian had abolished the concepts of *res mancipi* and *res nec mancipi*. In this procedure, the transferor and transferee would appear before a magistrate or urban praetor together with the thing agreed to be transferred. The transferee was required to grab the thing, perform the necessary requirements and utter similar words as if it was a *mancipatio*. If the transferor remained silent without any form of disagreement, this was a sign that he has accepted the transfer and his rights ceded whereupon the praetor announces the transferee as the new *dominus*, see Alan Watson, *Roman law and Comparative Law* (University of Georgia Press 1991) 46; Theodore Mommsen and Paul Krueger, *The Digest of Justinian* (Alan Watson English edn, Philadelphia 1985).

<sup>47</sup> An example of such transaction by a non-owner will be a purchase made by a bona fide buyer for value without notice of the defective title.

<sup>48</sup> Nicholas (n 45) 116 – 117.

<sup>49</sup> Nicholas (n 45) 122 - 123.

<sup>50</sup> Geoffrey MacCormack, 'Naturalis Possessio' (1967) 84 *Romanistische Abteilung* 47.

<sup>51</sup> William W. Buckland, *A Text-book of Roman Law from Augustus to Justinian* (Cambridge University Press, London 1921) 258 – 259, 268 - 269. It is worth noting at this point that a usufruct is an intangible interests to be held over the property of another and that property must be a tangible property i.e. praedial (land) or personal tangibles properties.

<sup>52</sup> The Nigerian Evidence Act L.F.N. 1990 as amended, Chapter 112, s 146, supports this principle by stating that the burden of proving title is on the person who is not in possession of the property.

conduct used to denote possession may vary. In *Wutaofei v. Daquah*,<sup>53</sup> the land in question was virgin bush and it was held that demarcation of it with pegs in all four corners constituted a sufficient act to warrant possession on behalf of the claimant. Where, however, possession does not exclude the whole world, the law does not protect it.

## **2.4 Pitfalls of the Customary Tenure System and the Land Use Act 1978 on Secured Transactions Law**

As seen already, individual land holding was generally detested by the community but there is some evidence to show that there were situations where individuals exerted significant control over property by tilling and farming, and as such, they were granted title rights.<sup>54</sup> Individual tenure could be granted in a labourer's favour, although the circumstances in which this happened could vary considerably according to each community. It was problematic to identify whether an individual could actually own land under customary law. Also, before land could be alienated either by way of security or outrightly, consensual authority must be actualised either through the head of the family or the king of the clan which perhaps marked the problematic issues on inalienability of land associated with the customary land tenure system in Nigeria.<sup>55</sup>

Unlike personal property which can be outrightly transferred with less cumbersome legal procedures, this was not the case with customary land. Before land could be assigned, the family members were usually in agreement before such transactions could be effective. With the level of hostility shown by customary law towards land alienation, this may have been primarily responsible for the uncoordinated nature of secured transactions law in Nigeria, which often leads to the high cost of obtaining credit due to excessively high interest rates on those who wish to rely on land as collateral for loan. The nuances of customary law on land could never adequately ascertain the viability of land title rights being held by group of people, in that there remained the danger of it being challenged or set aside altogether. The consequence of not acquiring the requisite consent was capable of rendering the whole transaction void.<sup>56</sup>

The interference of English law in the traditional land system caused certain difficulties because to convert title in land between the two systems was not without

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<sup>53</sup> (1931) 3 AR 596.

<sup>54</sup> Robert Mc C Netting, *Hill Farmers of Nigeria: Cultural Ecology of the Kofyar of the Jos Plateau* (University of Washington Press 1968) 167-168.

<sup>55</sup> Taslim O Elias, *Nigerian Land Law and Custom* (Routledge & Kegan Paul Ltd., London 1962) 172.

<sup>56</sup> *Sanusi v Daniel* (1956) 1 FSC 93, 95.

problems for the conveyancers.<sup>57</sup> It took several years before this problem could be minimised to a satisfactory level. First, the Land Use Decree (now Act) was enacted to unify the land use system that was already being practised in Nigeria. The use of land was rather complicated and there was no legislation to govern all lands in Nigeria common to both the northern and southern region.<sup>58</sup> One of the major problems inherent in the former system had to do with the problem of rapid urbanisation. After Nigeria gained independence in 1960, the economic status of citizens changed rapidly and the influx of job opportunities in the urban areas changed the developmental pattern of growth and migration. Structural changes were visible due to the urban population growth and with this sudden increase, local authorities and land administrators were under pressure to provide housing, improvement of environmental sanitation, and educational infrastructures.

Land officials and local government land administrators were not trustworthy as they made excessive profit from the exorbitant prices placed on urban land acquisition. Other land owners kept purchasing land they did not intend to develop and resell at a highly unregulated price value.<sup>59</sup> Those without a high level of income were affected because of the exorbitant land prices fixed by the racketeers. Only the financially privileged or elites could get grants to urban lands as a result. Sometimes, in extreme cases, violence ensued through self-help when extorted citizens looked to secure their interest in land, while sometimes the courts were left with no particular remedy to secure the interest of the defrauded, as evidenced in *Ogunbambi v. Abowab*,<sup>60</sup> per Verity J.

‘The case is indeed in this respect like many which come before the court: one in which the Olotu family either by inadvertence or design, sell or purport to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will purchase land from this family without the most careful investigation, for more often than not they purchase a law suit and very often that is all they get.’<sup>61</sup>

The discovery of petroleum in different parts of the country and the income generated from it kept increasing annually. Both the state and federal government saw the need to carry out mass developmental projects. This resulted for the need to acquire more lands for these projects.

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<sup>57</sup> *Balogun v. Balogun* (1943) 9 WACA 78; *Oshodi v. Balogun* (1936) 4 WACA 1.

<sup>58</sup> The diversity of customary laws on land tenure was difficult in its application due to lack of comprehensive legislation.

<sup>59</sup> This practice was more prevalent in the south where fraudulent sale was even in practice. Sometimes, land may be sold to different persons at the same time which gave rise to a multiplicity of court actions which could last many years such as in *Ariori & Others v Muraimo & Others* (1983) 1 Sup Ct Nig L Rep. 1, where the action commenced in in October 1960 but a re-trial was ordered by the Supreme Court in 1983.

<sup>60</sup> (1951) 13 WACA 222.

<sup>61</sup> *ibid*, 223.

The military government in the 1970s was not totally satisfied with the decentralised nature of land tenure system in the country. It did not reflect a good sense of national unity, which the country needed. The government found a remedy in a law to regulate and vest land management and control of all the lands in Nigeria in the government, thereby neutralising the powers which the traditional authorities had over customary lands. The government was to become the sole allocating authority over all lands situated in Nigeria both north and south.

#### **2.4.1 Problems with the Land Use Act 1978**

The then military administration set up an eleven-man panel to study the land tenure situation in Nigeria.<sup>62</sup> It was set-up to undertake an internal study of land use and conservation practice in Nigeria, to study and analyse the merits and the demerits of a unified land policy, to examine steps in the reform and development of future land use for the government and entire populace in both urban and rural areas and to make appropriate recommendations on these matters.<sup>63</sup> The main objectives are clearly stated in the preamble and text of the Land Use Act (LUA),<sup>64</sup> which came into force on 29 March 1978. Some of the objectives included, inter alia, the acquisition of lands situated in Nigeria for the federal, state and local government to be vested in the state governor, thus avoiding the situation of land being solely concentrated in the hands of a few by placing a limit of a half-hectare for alienations in urban areas, thereby eliminating the increase in litigation concerning matters of mortgage, charges, etc., by making it necessary for an alienator to obtain the consent of the governor first before such transaction could be lawful.<sup>65</sup> Other objectives of the Act were to limit the powers of traditional rulers over land alienation and, at the same time, weaken their traditional powers and status in respect to land. It was also seen as a means of promoting development by laying down terms of usage for a landholder. The Government now had the right to execute projects on undeveloped land without paying excessive compensation for such lands which were not yet acquired by the government prior to 1978.<sup>66</sup>

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<sup>62</sup> The panel was named the 'Land Use Panel' under the chairmanship of the late Justice Chike Idigbe, set-up on 26 May 1977.

<sup>63</sup> Report of the Land Use Panel 5 (1977).

<sup>64</sup> Land Use Act, Cap. L5, Laws of the Federation of Nigeria (LFN) 2004. Formerly called the Land Use Decree, No. 6, 1978, this has been redesigned as an 'Act' pursuant to the Adaptation of Laws Order, 1980. The content of both laws however remains largely the same.

<sup>65</sup> Idrisu (n 5) 86.

<sup>66</sup> *ibid*, 87.

The LUA was promulgated by the military regime in Nigeria and it is the most comprehensive land law which applies uniformly to all states within its territory.<sup>67</sup> Section 1 LUA vests all lands comprised in the territory of each defined state of Nigeria in the governor of that State, with the lands being held in trust and administered for the use and general benefit of all Nigerian citizens in accordance with the provisions of the Act, subject to occasional review.<sup>68</sup> In rural areas, land is held by the local government authorities while the governor is saddled with the responsibility of administering lands in urban areas.<sup>69</sup> The governor and local government authority have the power to grant a certificate of occupancy to evidence the alienation of rights.<sup>70</sup> The nature of a right of occupancy is not clearly stated in the Act, but it seems to be of a usufructuary nature with a tenure not normally lasting for more than ninety-nine years in leasehold as against absolute fee simple where land could be owned indefinitely.<sup>71</sup> It therefore means that no individual has absolute proprietary interest over any land, because all lands are held for a term of years determined by the government.

There is a conceptual problem with regards to the word ‘trust’ as seen in section 1. It is questionable whether the meaning of the ‘trust’ is used in a loose sense or if it involves legal connotations. However, it was established that the governor is an equitable trustee which will make the governor liable to account for the management of lands on behalf of beneficiaries.<sup>72</sup> Unfortunately, this power is open to political abuse where the governor can confirm certificates to only a selected few who require land in important strategic locations. Suffice to say, this scope remains unclear because legal titles being held prior to the promulgation of the LUA continues to vest on their title owners without being subject to the governors’ legislative powers, although the consent of the governor will be required if the land will be alienated.<sup>73</sup>

The certificate of occupancy which is issued by the governor is not a registrable document because it merely evidences a transfer which does not involve a transfer of interest

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<sup>67</sup> The Federal Republic of Nigeria was under the military leadership of Major-General Olusegun Obasanjo who ruled from January 16, 1976 to October 1, 1979 during which the *Land Use Decree* was promulgated. It was re-designated an ‘Act’ by the Adaptation of Laws Order, 1980.

<sup>68</sup> LUA s 1, Pursuant to s 49, land vested in the federal government or any of its controlling agencies is exempt from this declaration.

<sup>69</sup> LUA s 2 (1) (a), (b).

<sup>70</sup> The Governor is empowered to grant a Statutory Right of Occupancy to all persons seeking interests in land in urban and rural areas, while under section 6 the Local Government has the right to grant only Customary Right of Occupancy over land in non-urban areas, LUA s 5.

<sup>71</sup> *Okubule & Anor v Oyabgola & Ors* [1990] SC 187.

<sup>72</sup> This form of arrangement was regarded as a trusteeship in a loose sense, see *Kinloch v Secretary of State for India* (1882) 7 App Cas 619, 625 – 626.

<sup>73</sup> *Savannah Bank Ltd v Ajilo* (1989) 1 NWLR (Pt. 97) 305; see Oladipo O. Sholanke, ‘Is the Grant of Governor’s Consent under the Nigerian Land Use Act Automatic’ (1990) 34 J Afr L 42.

in land. The only document of transfer is this certificate issued by the governor and nothing more, thus making it a fragile and defeasible document with little worth.<sup>74</sup> Under sections 21 – 23, alienation whether through a charge or mortgage without the approval of the governor or local authority where appropriate may be declared null and void. The Act does not provide for how a mortgage shall be created but rather preserved the already existing laws subject to necessary modification to be in tandem with the Act.<sup>75</sup> However, equitable assignments in land such as those transferred by way of equitable charge would not require the consent of the governor. This is of little relevance because secured transactions are usually drafted in such a way as to reimburse the lender by foreclosing or selling the collateral if the borrower defaults, but since this is not possible without the consent of the governor if the collateral involves land, no interest can pass validly without permission. In a nutshell, the LUA has played a fundamental role in curbing fraudulent land transactions, but it has stifled economic growth and development since the use of land as security cannot be totally relied on by contracting parties. As stated by Justice Nnamani:

Aspects of the Act which has brought untold hardship include the provisions relating to the issue of certificate and grant of consent to alienate. Both can take years and the applicant is subject to the vagaries of bureaucratic action which demand survey plans, interminable fees, documents and a lot of to and froing. These cumbersome procedures have adversely affected economic and business activity and make industrial take off a matter very much in the future.<sup>76</sup>

## 2.5 Concluding Remarks

In a nutshell, land collateral in Nigeria is an acceptable asset for security but the cumbersome nature involved is hostile towards business practices in Nigeria, and MSMEs are affected the most in reality. According to the Doing Business Economic Survey 2017, registering property in Nigeria requires around 12 different procedures, takes 69.6 days and costs 10.5% of the property value.<sup>77</sup> Not all land registries located at different parts of Nigeria are fully computerised and the cost of procuring a property lawyer is relatively expensive. The advantage of MSMEs using personal properties to circumvent this problem is far-reaching. Land still remains widely used as it is a valuable form of security as well as its attractiveness to lenders, but only large-scale borrowers can afford to provide land as security on a sustainable basis. This is not the case with MSMEs. The use of personal property can be

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<sup>74</sup> *Dzungwe v Gbishe* (1985) 2 NWLR 528.

<sup>75</sup> LUA, s 22 requires the consent of the governor before a deed of mortgage can be executed.

<sup>76</sup> Augustine Nnamani, 'The Land Use Act – 11 Years After' (1989) 2 *Gravitas Bus L Rev* 31, 39.

<sup>77</sup> World Bank Doing Business 2017: Economic Profile Nigeria (2017) 64.



harnessed by MSMEs by using their inventory, livestock, crops, machinery, equipment, etc. as a security so long as legal reforms are streamlined to support the business environment. In order to pursue a reform of this sort which will enable MSMEs and sole-traders to apply for loans with their personal property, an expansive discussion would need to be undertaken in the next chapter in respect to the types of secured transactions recognised in Nigeria.

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### III. CHAPTER THREE: A CRITICAL REVIEW OF SECURED TRANSACTIONS LAWS IN NIGERIA

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#### 3.1 Preamble

Personal property is usually granted as security if there is lack of sufficient land to secure a loan, although security over land is easier to monitor since it is immovable.<sup>1</sup> Nevertheless, land used in secured transactions in Nigeria has several limitations which has been highlighted in the previous chapter. This chapter will focus on the legal background of personal property secured transactions laws in Nigeria, its economic developments, features and factors that triggered its historical evolution leading to the various modern security devices been used today. Currently, the different domestic rules and regulations on secured transactions do not provide any flexibility for business enterprises.<sup>2</sup> For example, the CAMA has been quite disappointing on the aspect of the equitable charge granted by companies and, for the time being, no reasonable effort has been exerted by the Nigerian government to reform it.<sup>3</sup> A harmonised legal framework could be the answer to facilitate the use of personal property as collateral in order to rectify the difficulties associated with personal property financing, while also clarifying rules of priority.

The idea of encumbering personal property differs according to each legal systems. However, they can be traced far back to the middle ages in the process of ‘reception’ of Roman law during the Justinian era where the essential idea of real security was that the debtor is obliged to transfer interest in the *res* in exchange for an advancement.<sup>4</sup> Roman law on personal property security was divided into three distinct categories: *mancipatio cum fiducia* (or *fiducia*), *pignus*, and *hypotheca*.<sup>5</sup> Basically, these interests could either grant ownership title to the lender, who could as well take possession of the borrower’s asset subject to redemption after the agreed obligation has been carried out by the borrower (*fiducia*), or borrower retains ownership of the property but grants indefeasible possession to the lender until the debt is realised (*pignus*), or borrower retains both title and possession

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<sup>1</sup> Alex Johnson Jr, ‘Adding another Piece to the Financing Puzzle: The Role of Real Property Secured Debt’ [1991] Loy L A L Rev 335, 340.

<sup>2</sup> Most States of the Federation have their own separate bills of sale law and pawnbroker’s law.

<sup>3</sup> Iyare Otabor-Olubor, ‘Reforming the Law of Secured Transactions: Bridging the Gap between the Company Charge and CBN Regulations Security Interests’ (2017) 17 JCLS 39.

<sup>4</sup> Roger J Goebel, ‘Reconstructing the Roman Law of Real Security’ (1961) 36 Tu. L Rev 29.

<sup>5</sup> Ernst Rabel, ‘Real Securities in Roman Law’ (1943) 1 Seminar Jurist 32.

of the property but publicises the interest to inform third parties of the security in the collateral (*hypotheca*).<sup>6</sup> Third parties regarded the *fiducia* holder as the owner of the goods because the lender had legal power to alienate the property.<sup>7</sup>

With personal property, the *fiducia* was gradually replaced by the *pignus* which is synonymous with the common law system of pledge, in the sense that the borrower could protect his interest by an *actio in rem*. The lender could not vest legal title in a third party, but could take possession of the property by way of praetorian edicts.<sup>8</sup> The borrower could not make use of the property unless by way of lease or leave *in precario*.<sup>9</sup> The main difference between the *pignus* and the *hypotheca*, which are the widely used types of security devices in tangible personal property under Roman law, was the nature of the possessory rights of the lender and borrower.<sup>10</sup> In real terms, the *pignus* is a possessory security interest, while the *hypotheca* is non-possessory which operated like the common law ‘charge’. As will be discussed later in this chapter, the nature of these security devices resembles modern secured transactions.

The industrial age brought about major developments in the law of secured transactions. The UK Bill of Sale Acts 1878/1882 governed the conditional bill of sale (or chattel mortgage). It was created in the latter part of the 19th century as a non-possessory security device for individuals,<sup>11</sup> and unincorporated businesses,<sup>12</sup> to allow them make use of their encumbered asset even though the creditor takes indefeasible proprietary security interest in the asset i.e. if it is formally registered in its standard form and attested accordingly.<sup>13</sup> The equitable charge, a similar type of non-possessory security, was developed by the English courts to allow corporations to grant security over their fixed and ambulatory assets until the point at which it crystallises into a fixed charge, at which point,

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<sup>6</sup> Harry R Sachse, ‘Purchase Money Security in Common Law and the French System of Civil Law’ (1969) 15 McGill LJ 73, 74.

<sup>7</sup> The debtor could bring an action against the creditor for wrongful sale, but this was only an *in personam* right which could not enable the debtor to recover possession of his property.

<sup>8</sup> Goebel (n 4) 29 - 30.

<sup>9</sup> Goebel (n 4) 30.

<sup>10</sup> Willem J Zwolve, ‘A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods’ in Eva-Maria Keininger (ed), *Security Rights in Movable Property in European Private Law* (Cambridge University Press 2004).

<sup>11</sup> Agricultural charges created by a farmer are outside the scope of the Bills of Sale Acts - Agricultural Credit Act 1928, s 8 (1).

<sup>12</sup> A floating charge over farm stock created by a registered industrial or provident society would be treated as a bill of sale, but other than this, it will be exempt from the Bills of Sale Acts, if registered with the Financial Service Authority within twenty-one days of its execution, see Industrial and Provident Act 1967, s 1 as amended by financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI2001/2617 and Financial Service and Markets Act 2000 (Consequential Amendment and repeals) Order SI 2001/3649.

<sup>13</sup> Hugh Beale, Michael Bridge, Louise Gullifer and Eva Lomnicka, *The Law of Security and Title-based Financing* (2nd edn, OUP 2012) 429 – 432.

it attaches on the assets of the company.<sup>14</sup> English law recognises four basic security interests which can be granted over personal property: the mortgage, charge, lien and the pledge. Recent reform undertaken by the Financial Law Committee of the City of London Law Society (CLLS) in England recommends that there should be a single form of security interest which will be referred to as a ‘charge’, which will apply to both land and personal property.<sup>15</sup>

In the USA, various secured lending arrangements were developed after the chattel mortgage was introduced. Upon the enactment of the Uniform Commercial Code in the mid-20th century, the US secured transaction system followed a federal unified approach ‘Article 9’ Code on secured transactions, which is based on ‘substance over form’ principle.<sup>16</sup> Essentially, what this means is transactions whether possessory or non-possessory, which in substance grants security interest over personal property will be subject to Article 9 regardless of how the agreement has been described.<sup>17</sup> All recognised forms of lien and pledges are treated as security interests. For example, a purported financial lease could be treated as a secured sale if it has the characteristics of a secured sale, and thus a secured transaction, and how each secured transaction is determined will depend on the facts of each case.<sup>18</sup>

Looking at the gradual upsurge of legal reforms around the world and even in neighbouring African countries,<sup>19</sup> it will be too modest to say that there is no urgent need for a reform of secured transactions law in Nigeria. The reason for the malaise has led to many institutional reforms during the colonisation phase of Nigeria, and subject to the

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<sup>14</sup> For further commentaries on the nature of the equitable company charge, see generally, Eilis Ferran, ‘Floating Charges - The Nature of the Security’ (1988) 47 CLJ 213; Robert Pennington, ‘The Genesis of the Floating Charge’ (1960) 23 Mod L Rev 630; Stephen Atherton and Riz Mokal, ‘Charges Over Chattels – Issues in the Fixed/Floating Charge Jurisprudence’ [2005] Comp Law 10; George F Curtis, ‘The Theory of the Floating Charge’ (1941) 4 Uni Toronto LJ 131; John Armour and Sandra Frisby, ‘Rethinking receivership’ (2001) 21 OJLS 73; Louise Gullifer, *Goode on Legal Problems of Credit and Security* (5th edn, Sweet & Maxwell 2013); John Armour, ‘The Chequered History of the Floating Charge’ (2004) 13 Griffith L Rev 25; Sarah Worthington, ‘Floating Charges - An Alternative Theory’ (1994) 53 The Cambridge Law Journal 81; George L Gretton, ‘Registration of Company Charges’ (2002) 6 Edin L Rev 146.

<sup>15</sup> Richard Calnan, ‘A Secured Transactions Code’ [2015] BJIB & FL 473.

<sup>16</sup> Yoram Keinan, The Evolution of Secured Transactions (2002) *World Development Report: Institutions for Markets, Discussion Papers*, 10 – 11.

<sup>17</sup> Grant Gilmore, ‘Security Law, Formalism and Article 9’ (1968) 47 Neb L Rev 659.

<sup>18</sup> Gregory E Maggs, ‘Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code’ (2000) 71 U Colo L R 541, 561.

<sup>19</sup> Marek Dubovec and Benjamin Osei-Tutu, ‘Reforming Secured Transactions Laws in Africa: The First African Collateral Registry in Ghana’ (2013) 45 UCCLJ 77; Marek Dubovec and Cyprian Kambili, ‘Using the UNCITRAL Legislative Guide as a Tool for a Secured Transaction Reform in Sub-Saharan Africa: The Case of Malawi’ (2013) 30 Ariz J Int’l & Comp L 163.

reception of English secured transactions laws in Nigeria.<sup>20</sup> The task here would be to identify these laws – both received English law and domestic laws. The study will attempt to investigate the effects of the laws, while, at the same time, exploring the complex patterns of legal doctrinal changes which were triggered by their application.

### **3.2 The Nature of the Secured Transactions System in Nigeria**

Security is important in financial transactions involving secured transactions. Lenders hold property as security because it is viewed as a reliable method of advancing credit, upon careful evaluation of the borrower as to whether the expense justifies the return.<sup>21</sup> Offering security can aid the successful completion of a transaction whereby loan is advanced particularly in large financial arrangements such as in construction contracts and mineral exploitation. Credit lending is the soul of any developing economy which practically sustains the lives of consumers and businesses.<sup>22</sup> Credit availability is necessary to finance commercial enterprises and consumers.<sup>23</sup> Limited access to finance is a major business constraint and it is among the top three limitations in the growth of a private sector.<sup>24</sup> In most economies, around 22% of their capital stock of business is in immovable assets, while the remaining 78% are typically personal property.<sup>25</sup>

Emerging markets e.g. Nigeria continue to face difficulties in gaining access to affordable credit due to stringent financial regulations placed by lenders because they prefer land as security.<sup>26</sup> Applications for credit are often rejected due to ‘inadequate’ or ‘unsuitable’ collateral. In many instances, businesses are discouraged from applying for loans because of the strict requirements often requested by the lender.<sup>27</sup> As a result, lenders prefer to advance credit only to businesses they have studied and observed and those that

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<sup>20</sup> Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Laws Ends Up in New Divergences’ (1998) 61 Mod L Rev 11, 12.

<sup>21</sup> David Allan, ‘Securities: Some Mysteries, Myths and Monstrosities’ (1989) 15 Monash U.L.R. 341, 342.

<sup>22</sup> Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) henceforth ‘Cork Report’, para 10.

<sup>23</sup> Commercial enterprises here is used loosely to connote all forms of businesses including partnership, unregistered businesses, limited liability companies, sole proprietorship, etc.

<sup>24</sup> Alejandro Alvarez de la Campa, ‘Increasing Access to Credit through Reforming Secured Transactions in the MENA Region’ (2011) The World Bank Policy Research Working Paper WPS5613 <<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5613>> accessed 14 December 2016.

<sup>25</sup> International Finance Corporation, Secured Transactions System and Collateral Registries (World Bank, January 2010) henceforth ‘IFC Toolkit’.

<sup>26</sup> Mehnaz Safavian, Heywood Fleising, Jevgenij Steinbuks, *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance* (March 2006) The World Bank Group Private Sector Development Vice Presidency, Note Number 307.

<sup>27</sup> Heywood Fleisig, Mehnaz Safavian, Nuria De La Pena, ‘Reforming Collateral Laws to Expand Access to Finance’ (World Bank edn Washington DC, World Bank 2006) 1 - 2.

have been well documented over the years. In practice, borrowers would need to pledge some form of collateral in order for their loan application to be granted, and most often, it will be rejected due to a lack of a regulatory framework to support personal asset security.<sup>28</sup>

The cost of securing adequate finance for businesses is indirectly influenced by the laws affecting secured transactions. Commercial laws including secured transactions rules and regulations in Nigeria were derived from English law, including the common law and statutes.<sup>29</sup> For instance, Lagos State in Nigeria possesses a Bill of Sale Law (B2 Laws of Lagos State) which controls the autonomous transfer of right, title and interests in personal property.<sup>30</sup> This law has glaring similarities with the English Bill of Sale Act 1923 but it is currently not commercially feasible in light of recent economic advancements.<sup>31</sup> Local legislation, court rules and customary law are also integrated into the Nigerian legal system and they work side by side with received English laws in matters relating to business and commerce.<sup>32</sup>

For all that, the Nigerian Constitution vests authority in Parliament to enact national legislation to regulate business, commerce and trade in Nigeria.<sup>33</sup> The provisions stipulated by the Constitution include, inter alia, carriage of goods and persons by air, bankruptcy and insolvency, banking, borrowing money within or outside Nigeria for the Federal Government or provincial State, bills of exchange and promissory note, industrial and commercial monopolies.<sup>34</sup> Unfortunately, there seems to be no uniform set of rules to regulate secured transaction law over personal property in Nigeria such as those present in Ontario Personal Property Security Act ('PPSA') and the United States Uniform Commercial Code Article 9, henceforth 'UCC Article 9'. The closest that has yet been achieved is the establishment of the nascent CBNR, which is the focus of this thesis.

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<sup>28</sup> *ibid* 7 – 8.

<sup>29</sup> Taslim O Elias, 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 Mod L Rev 356.

<sup>30</sup> Iyare Otabor-Olubor, 'Stuck in a Time Warp: Security Interests in Chattel Mortgages and the Bills of Sale Legislation in Nigeria' (2015) 26 ICCLR 345.

<sup>31</sup> The exportation of this English law has almost been commented in other reformed jurisdiction such as in New Zealand as stated by Duggan and Gedye: '*The law relating to security over chattels and intangibles in New Zealand is in a mess... The principal reason for the mess is that New Zealand inherited the English Bills of Sale legislation (itself a mess) and the relevant provisions of the companies legislation (an incomplete security system) and adapted them to local needs, sometimes in a desultory way.*' Anthony Duggan and Michael Gedye, 'Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change' (2009) 27 Penn St. Int'l L. Rev. 655, 659 – 660. Nevertheless, the present secured transactions law in New Zealand has been enacted as a Personal Property Securities Act 1999 which is in parallel to Article 9 of the United States Uniform Commercial Code.

<sup>32</sup> Charles Mwalimu, *The Nigerian Legal System* (Vol. 2 Private Law Peter Lang, New York 2009) p. 399.

<sup>33</sup> The Nigerian Constitution 1999 as amended, Article IV Second Schedule.

<sup>34</sup> *ibid*, see Part I Exclusive Legislative List, Part II Concurrent Legislative List.

Some African countries, especially the francophone nations, must be commended for taking a bold step by adopting the OHADA Uniform Act Organising Securities, henceforth ‘OHADA Law’ uniform law to regulate their secured transactions.<sup>35</sup> The objective of OHADA Law is to facilitate investment and trade, both locally and internationally, in order to integrate and harmonise the business laws applicable to large business market in those African member states.<sup>36</sup> Nigeria, being a predominantly common law nation, cannot be a member of OHADA, which currently does not have any common law country as a member, save for Cameroon which operates both common law and civil law, while the other member nations operate civil law.<sup>37</sup> Nigeria will be better off reviewing and possibly reforming its own secured transactions laws along recommended international best standards.

Nigeria is not only a nation with a large population,<sup>38</sup> but also one with abundant natural resources,<sup>39</sup> which displays features of potential economic development. This creates the need for a modern secured lending infrastructure. Sustainable investment and development will be difficult to achieve without, a stable secured transactions law that protects private property or investment, as well as protection of property rights. These parameters are essential for secured transactions to thrive in a developing economy such as Nigeria. Since secured transactions laws in Nigeria are not fully developed, financial institutions that engage in credit lending remain unwilling to accept diverse range of collateral. For this reason, it is important to examine the various lending devices in Nigeria in order to identify the possible problems associated with them.

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<sup>35</sup> OHADA is a French acronym for ‘*Organisation pour l’Harmonisation en Afrique du Droit des Affaires*’, which means ‘Organisation for the Harmonization of Business Law in Africa’, created on October 17, 1993 in Port Louis, Mauritius. It is currently made up of seventeen African states namely: Benin Republic, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. However, there are different challenges to harmonising International Business Laws in Africa due to the diverse political differences found in each jurisdiction, see Charles M. Fombad, ‘Some Reflections on the Prospects for the Harmonisation of International Business Law in Africa: OHADA and Beyond’ (2013) 59 (3) *Africa Today* 51, 54 - 57.

<sup>36</sup> To maintain these objectives as set out by OHADA, it has a structured institutional system such as those we have within a sovereign state: Assembly of Heads of State and Government, the Council of Ministers (political bodies) and the Permanent Secretariat make up the Executive saddled with the responsibility of coordinating with the Council of Ministers and to assist in the preparation and monitoring of the procedure for the adoption of the uniform Acts. For efficiency, two other specialized bodies augment the institutional system - Common Court of Justice and Arbitration of OHADA (CCJA) and Regional Higher School of Magistracy (ERSUMA).

<sup>37</sup> Akere T Muna, ‘Is OHADA Common Law Friendly?’ (2001) 3 *Int’l L Forum du Droit Int’l* 172.

<sup>38</sup> Deborah Potts, ‘Challenging the Myths of Urban Dynamics in Sub-Saharan Africa: The Evidence from Nigeria’ (2012) 40 *World Development* 1382.

<sup>39</sup> Musa Jega Ibrahim, ‘Growth Prospects of Oil and Gas Abundant Economies: The Nigerian Experience (1970 – 2000)’ (2008) 35 *Journal of Economic Studies* 170.

### 3.3 The Existing Secured Transaction Practices in Nigeria

Customary property laws which were discussed in Chapter 2 while dealing with the nuances of property title and possession were not sophisticated enough to sustain novel security devices created over land in the advent of industrialization. As a result, security devices have been more adaptable to personal property as compared to immovable property. It is imperative that recognised security devices have to be adaptable and new ones designed to meet a modern platform for collateral lending.<sup>40</sup> It may be unsurprising that English law played an important role in bridging this gap during colonisation as common law concepts were transplanted and applied in tandem with local laws. The impact of these laws has not been totally extinguished and many Nigerian laws are still attached to English jurisprudence. Be that as it may, the widely used security devices that create security interests over personal property in Nigeria, whether subject to the CBNR or not, will now be discussed below.

#### 3.3.1 Mortgage of Personal Property

The ‘chattel mortgage’ security involves the collateral in possession of the borrower, and it was once frowned upon by English law where it was detested as being a fraudulent conveyance and void against purchasers and other creditors without notice.<sup>41</sup> This doctrine dates as far back as *Twyne’s Case*.<sup>42</sup> This is because personal property, unlike land, if in the possession of the borrower does not furnish third parties with sufficient notice in that it is capable of having the appearance of false wealth. As time went on, these principles were gradually modernised. It became more difficult for a borrower to pledge all personal property as security, especially when the property was manufacturing equipment and stock inventory. Denying the borrower use of the property restricted them from making use of the asset in their businesses, which in turn led to difficulties in paying the debts. The chattel mortgage was created to allow the borrower to remain in possession for the duration of the loan.

The chattel mortgage is one of the first English secured transactions law introduced in Nigeria. It takes the form of a consensual security intended to secure a loan with personal property which remain in the possession of the borrower. It can also be referred to as a ‘bill

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<sup>40</sup> Grant Gilmore, ‘The Secured Transactions Article of the Commercial Code’ (1951) 16 Law & Cont. Problems 27, 29.

<sup>41</sup> Grant Gilmore, *Security Interests in Personal Property* (Vol. 1 The Law Book Exchange Ltd, New Jersey Reprint 1999) 24.

<sup>42</sup> (1601) 3 Coke 80; See *Mace v. Cammel* [1831] Lofft 782, 783. ‘...at common law a secret transfer is always a badge of fraud’.



of sale to secure a debt'.<sup>43</sup> A bill of sale can be described as comprising written documents or instruments through which personal chattels are transferred from one person to another.<sup>44</sup> Actually, there are two different types of bills of sale - security bill and absolute bill. A security bill, sometimes called 'conditional bill' or 'bill by way of security' is a document given as security to secure a debt by encumbering the personal property of the mortgagor.<sup>45</sup> An absolute bill of sale normally results in the total transfer of the personal chattel.<sup>46</sup>

If the lender takes possession of the chattel from the onset, then it is basically a pledge. Considering the movable nature of personal property, there exists the possibility of perpetuating fraud by selling or taking a loan from another creditor.<sup>47</sup> Thus, the reputed ownership rule pursuant to the Bankruptcy Act 1914 was devised to enable trustees in bankruptcy and unsecured creditors of the mortgagor to appropriate the collateral in the event of default.<sup>48</sup> In such a situation, the mortgagor will be treated as the reputed owner by unsuspecting creditors who have no apparent knowledge of an earlier mortgage over the mortgagor's property.<sup>49</sup> This is because actual possession of the property is not intended to be transferred to the mortgagee in a security bill of sale transaction.<sup>50</sup>

The Bills of Sale Act 1854 was the first legislation on chattel mortgages in the UK, and its main purpose was to combat fraudulent transactions such as those that allows the mortgagor to remain in possession without registration in a public register.<sup>51</sup> This Act was never applied in Nigeria. Mortgages of personal property in Nigeria was only ever subject to the UK Bills of Sales Acts 1878<sup>52</sup> and 1882 (Amendment) Act,<sup>53</sup> and the UK Bills of Sale

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<sup>43</sup> Garrard Glenn, 'The Chattel Mortgage as a Statutory Security' (1939) 25 Virg L Rev 316.

<sup>44</sup> Aubrey Diamond, 'Hire-Purchase Agreements as Bills of Sale' (1960) 23 Mod L Rev 399, 404-405. In *Allsopp v Day* (1861) 7 Hurl & N 457, it was stated by Wilde B. at p 465 that '...a bill of sale means an instrument by which the property passes.'

<sup>45</sup> An example of a security bill of sale is the logbook loan, see Duncan Sheehan, 'The Abolition of Bills of Sale in Consumer Lending' (2010) 126 LQR 356, 357.

<sup>46</sup> *ibid.*

<sup>47</sup> Iwan R Davies, 'Ostensible Ownership and Motor Vehicle Financing in England: Antipodean Insights' (1994) 9 JIBL 474.

<sup>48</sup> Bankruptcy Act 1914, s 38 (2) (c). See Claud HM Waldock, *The Law of Mortgages* (2nd edn, Stevens London 1950) 75.

<sup>49</sup> *ibid.* The Bankruptcy Act 1914 which is an old English Statute was never applied in Nigeria. See *Halliday v Alapatira* (1881) 1 Nigerian Law Report 1, 4-5. Bankruptcy law in Nigeria comprises of the Bankruptcy Act 1979 Cap. 30 Laws of the Federation of Nigeria (LFN) 2004 and received common law principles from England.

<sup>50</sup> See dictum of Chancellor Kent in *Cortelyou v Lansing* (1805) 2 Caines Cases Err 200, 201, '(...) delivery is essential to a pledge, but a mortgage of goods is, in certain cases valid without delivery.'

<sup>51</sup> This was the first legislation requiring registration of bills of sale, see *Cookson v Swire* (1884) 9 App Cases 653, 664 – 666; Also see appeal judgment of Cockburn CJ in *Brantom v Griffiths* (1877) 2 CPD 212, 214; See Graham S McBain, 'Repealing the Bills of Sale Acts' (2011) 5 JBL 475, 483.

<sup>52</sup> United Kingdom Bills of Sale Act 1878, 41 & 42 Vict., c31; United Kingdom Pub. Gen Acts (1878).

<sup>53</sup> United Kingdom Bills of Sale Act 1882, 45 & 46 Vict., c43; United Kingdom Pub. Gen Acts (1882).

Acts 1890<sup>54</sup> and 1891,<sup>55</sup> which forms a substantial part of the received English secured transactions law applicable in Nigeria. These Acts were implemented in Nigeria by virtue of section 1 of the Nigerian Bills of Sale Act 1923:

‘This Ordinance may be cited as the Bills of Sale Ordinance and shall be read as one with the Bills of Sale Acts 1878 and 1882 as amended by the Bills of Sale Acts 1890 and 1891. Provided that, whenever the provisions of the said Acts shall be inconsistent with the provisions of this Ordinance, this Ordinance shall prevail.’<sup>56</sup>

These received laws applied to Nigeria as a whole, except for those states created from the old Western Region. These old Western Region states are governed by the Bills of Sale Law 1958.<sup>57</sup> Presently, various states in Nigeria have imported the UK Bills of Sale Acts and re-enacted them as state Bills of Sale laws with very little alterations.<sup>58</sup> It is important to note that the absolute bill of sale as explained above is regulated by the UK Bills of Sale Act 1878, while the (Amendment) Act 1882 applies specifically to security bills which also incorporates some intrinsic provisions of the 1878 Act.<sup>59</sup>

### 3.3.1.1 Conformity to Statutory Provisions of the Bills of Sale Laws

Where a borrower wished to create a mortgage over his personal property, a bill of sale will need to be prepared and it must comply with provisions laid down under the bills of sale law. Due to the similarity in features of the bills of sale laws across Nigeria, the federal Bills of Sale Act 1923,<sup>60</sup> has played a fundamental role in the subsequent enactment of the various bills of sale laws. Hence, the provisions of the Federal Act can be said to be *in pari materia* with those of the State laws. The Act encompasses the transfer and registration of personal chattels as security for debt. This Act applies to every bill of sale executed on behalf of the

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<sup>54</sup> United Kingdom Bills of Sale Act 1890, 53 & 54 Vict., c53; United Kingdom Pub. Gen Acts (1890). This statute was promulgated to exempt certain types of hypothecation letters from the ambit of the Bills of Sale Act 1882.

<sup>55</sup> United Kingdom Bills of Sale Act 1891, 54 & 55 Vict., c35; United Kingdom Pub. Gen Acts (1891). An Act to amend the Bills of Sale Act 1890.

<sup>56</sup> The Federal law for the Bills of Sale is the Bills of Sale Act (BSA) 1923, cap. 27 Laws of Nigeria 1958. This law is however not included in the Laws of the Federation of Nigeria (LFN) 2004. The BSA 1923 re-enacted the United Kingdom Bills of Sale Act 1878 and (Amendment) Act 1882.

<sup>57</sup> The Western Region Bills of Sale Law 1958, 1 Laws of the Western Region of Nigeria (LWRN) Ch 11, 1959.

<sup>58</sup> See for example Cap. 12 Laws of Lagos State, 1994; Cap. 1 Laws of Ogun State, 1976; Cap. 13 Laws of Northern Nigeria, 1963; Cap. 1 Laws of Ondo State, 1978 (applicable in Ondo and Ekiti states); Cap. 27 Laws of Bendel State, 1976 (applicable in Edo and Delta States); Cap. 12 Laws of Oyo State, 1978 (applicable in Oyo and Ogun States).

<sup>59</sup> In *Swift v Pannell* (1883) 24 Ch D 210, where it was affirmed by Fry J. that the 1882 Act does not apply in respect of absolute bills of sale. See, in particular, Donald B Murray, ‘When is a Repeal not a Repeal?’ (1953) 16 Mod L Rev 50, 56 – 58.

<sup>60</sup> Cap. 27, Laws of the Federation of Nigeria (LFN) 1958.

holder/mortgagee.<sup>61</sup> Personal chattels are defined under its parent Act, the 1878 Act, to mean furniture, goods and articles capable of complete transfer by way of delivery, growing crops and fixtures (when separately assigned or charged) and trade machinery.<sup>62</sup>

The Act does not outline what interpretation is to be given to the word ‘goods’ according its provisions. However, if the dictum of Atkin L.J. in *Stephenson v Thompson* is followed, then ‘personal chattels’ and ‘goods’ could mean the same thing.<sup>63</sup> Also, the definition of ‘crops’ under section 4 will only come within the confines personal chattel if they are severed, irrespective of whether they are natural crops or industrial crops.<sup>64</sup> Regardless of whether the crops are assigned or charged with other goods, they must be separate from land if they are to be considered as a personal chattel.<sup>65</sup> That stated, Nigeria is a predominantly agrarian society. Because of this situation, many MSMEs, especially those in the business of agriculture, are likely to possess crops. As a result of this, lenders may prefer to hold an interest in industrial crops such as agricultural seeds, due to their long lasting nature, in contrast to natural crops.<sup>66</sup> The strict requirement necessary to validate a bill of sale means that it is not practicable for a natural person to create an ‘all asset’ security over their personal property.<sup>67</sup>

Section 4 of the BSA 1878 includes a comprehensive list of documents that come within the jurisdiction of the Act.<sup>68</sup> Under this section, the phrase ‘and other assurances of personal chattels’ seems rather inconclusive to determine what it may include. Arguably, it is imperative that it be construed *ejusdem generis* with the foregoing classifications as

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<sup>61</sup> Bills of Sale Act 1923 s 1(2), the holder/mortgagee can exercise this right with or without notice given to the mortgagor of his intention to take the encumbered property as identified in the instrument. It is worth noting that this statute applies to only bills of sale executed on or after its commencement.

<sup>62</sup> 1878 Act, s 4.

<sup>63</sup> See *Stephenson v Thompson* (1924) 2 KB 240, 249. ‘*In connection with the word ‘chattels’ – goods and chattels - I think it is admitted that it covers in substance the whole of personal property as far as I know, nobody has been able to draw a real distinction between goods and chattels: they are over and over again stated as synonymous*’, per Atkin L.J.

<sup>64</sup> *Re Phillips* (1880) 16 Ch D 104.

<sup>65</sup> *Roberts v Roberts* (1884) 13 QBD 794.

<sup>66</sup> In Nigeria, the National Agricultural Seeds Act 1992 s 36 as amended, defines agricultural seeds to include ‘*cereals, legumes, oil, grass, forage, root, fibre or any other kind of crop seed or seedling commonly recognised within Nigeria as agricultural seed, lawn seed, vegetable seed, forestry seed and seedlings, horticultural seeds and seedlings, ornamental seeds, seed mixtures and all planting materials as the Minister may designate from time to time.*’

<sup>67</sup> Company Security Interests (Law Commission, Consultation Paper No 296, July 2005) para 1.50.

<sup>68</sup> Bills of Sale Act 1878, s 4, the Act includes bills of sale, transfers, declaration of trust without transfer, inventory of goods with receipt thereto attached, assignment, receipts for purchase money of goods, powers of attorney, authorities or licenses to take possession of personal chattel as security to offset a debt, and other assurances.

prescribed by the provisions of section 4, although a non-consensual lien arising by operation of law should not be included within this definition.<sup>69</sup>

The primary purpose of the (Amendment) Act 1882 was to protect innocent parties particularly consumers from signing complex documents because of their lack of understanding considering the complex nature of the 1878 Act, and as a result, strict compliance to the formality of the 1882 Act remains very rigid and failure to follow its guidelines could totally void the transaction.<sup>70</sup> In fact, the United Kingdom Department for Business Innovation and Skills (BIS) earlier stated that the strict formal requirements of the bills of sale renders it inappropriate for lending in the 21st century.<sup>71</sup> Section 9 of the (Amendment) Act 1882 clearly states:

‘A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed’<sup>72</sup>

This requirement is difficult to achieve due to the confusing language being used in the schedule. This was demonstrated in *Chapman v Wilson*,<sup>73</sup> where a purported bill of sale drawn up by a lawyer was rendered void for lack of compliance with the provisions of the Act. Additionally, this provision is not in tandem with the Nigerian Consumer Contract (Unfair Terms) Bill,<sup>74</sup> which requires that written terms of a contract must be in clear and intelligible language in order to protect illiterate consumers who are not skilled in deciphering complex documents.<sup>75</sup> The protection of illiterates in Nigeria is governed by the Illiterate Protection Act 1958,<sup>76</sup> with its purpose to protect illiterates who execute documents while making sure that they adequately comprehend terms and requirements of documents in which they sign. The bills of sale laws in Nigeria did not remove the provision of section 9 above while drafting their laws, and instead, transplanted it verbatim. Perhaps, the Consumer Bill, before enactment, could consider adopting section 69 UK Consumer Rights

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<sup>69</sup> *Re Vulcan Ironworks Co. Ltd* (1888) 4 TLR 312. See also the dictum of Lindley L.J. in *Newlove v. Shrewsbury* (1888) 21 Ch D 41, 45 where His Lordship stated that the document expressing the agreement between both parties must be an assurance of some kind of transfer of property rights from the grantor to the grantee.

<sup>70</sup> Louise Gullifer and Sophia Hurst, ‘Bills of Sale Acts: Ripe for Reform’ (2013) 28 BJIB & FL 685.

<sup>71</sup> Department for Business Innovation and Skills (BIS), A Better Deal for Consumers: Consultation on Proposal to ban the use of Bills of Sale for Consumer Lending (December 2009) para 35 – 38.

<sup>72</sup> (Amendment) Act 1882 s 9.

<sup>73</sup> [2010] EWHC 1746.

<sup>74</sup> A Bill for an Act to regulate unfair terms in consumer transactions, prevention of continued use of unfair terms in consumer contracts, and assessment of unfair terms in Nigeria. See also Consumer Rights Act 2015 which has been enacted for similar purposes in the UK.

<sup>75</sup> Group 19, Regulation 7, Analysis of Terms Breaching Regulation 7.

<sup>76</sup> Cap.83 Laws of the Federation 1958. Charles J in *Ntiashagwo v Amadu* [1959] WRNLR 273 defines an illiterate person as ‘a person who is unable to read with understanding and express his thoughts by writing in the language used in the document made or prepared on his behalf’.

Act 2015 which allows the interpretation most favourable to the consumer to prevail in situations where there is ambiguity in the meaning of a word.

### 3.3.1.2 *Registration of Security Bill of Sale and Priority Rules*

It is important for the mortgagor to grant security over goods easily and speedily. In order to accomplish this effectively, there needs to be a transparent system of registration so that the mortgagee can alert third parties of their interest in the collateral. Also, registration can help third parties to investigate if there is an interest already taken by another creditor in the same property. The bill of sale registration system in Nigeria does not fulfil these requirements. To pass the validity test, a bill of sale must be registered in its statutory form.<sup>77</sup> Once a bill of sale is executed and attested by the parties and their witnesses, registration must take place within seven clear days.<sup>78</sup> The State High Court Registry serves as a bill of sale registry and the Chief Registrar of the High Court is the Registrar of bills of sale.<sup>79</sup> The bills of sale laws has laid down registration procedures which must be followed strictly. A bill will not be void for late registration if the delay was due to the fault of the registry after the particulars of registration had been submitted within the requisite period of seven days.<sup>80</sup> A bill will also not be void for repayment if not registered within seven days of execution, but only void as a security for a loan.<sup>81</sup> The procedure to register a bill of sale is provided under section 10 of the Bills of Sale Act 1878 and incorporated into section 8 of the (Amendment) Act 1882.

The Registrar is required to enter the registration particulars of the bill, such as the type of instrument i.e. whether a security bill or an absolute bill, the date of registration of the bill of sale, affidavit of renewal where applicable in addition to including the name, residence and description of the witnesses and the mortgagee and mortgagor.<sup>82</sup> Registration remains valid for a duration of five years and will thereafter become void unless an affidavit has been sworn for renewal with the Registrar stating the date of the bill of sale and its last renewal including the particulars of the parties thereto and that the bill of sale remains

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<sup>77</sup> (Amendment) Act 1882, s 8. Registration is to be effected after attestation. This section is to be construed along with s 10 of the Principal Act (Bills of Sale Act 1878). See Bills of Sale Law, Bendel State 1976, s 18.

<sup>78</sup> (Amendment) Act 1882, s 11.

<sup>79</sup> See the various High Court Civil Procedure Rules.

<sup>80</sup> In *International Bank for West Africa v Azubuikwe* (1972) NCLR 37, it was held that if the grantee has submitted all required documents to register the bill of sale and the required registration fees has been paid in full within the stipulated time being seven days, the bill of sale shall be taken as having been duly registered on time and will not be voidable for delayed registration if such delay was by result of default of the Registry.

<sup>81</sup> The grantee can therefore bring an action for specific performance or to recover money owed by the grantor in so far as unregistered bill complies with the statutory form.

<sup>82</sup> See Schedule Form annexed to the (Amendment) Act 1882. See for example Schedule Form B in the Bills of Sale Law, Rivers State, Nigeria, Cap. 15, 1999.

subsisting.<sup>83</sup> If the mortgagor is a company, where it rarely happens, the security bill of sale will require registration in the charge register at the Corporate Affairs Commission (CAC) as a company charge pursuant to section 197 of CAMA.

The Act does not state who is saddled with the responsibility of registering the bill of sale, but it would seem that any prudent mortgagee would make all effort to register the bill considering the severe of failing to register. However, there are feasible remedies available to the mortgagee which can be enforced when there has been a statutory breach as laid down in section 7 (Amendment) Act 1882.<sup>84</sup> The chattel cannot be sold until five days have lapsed, pending which the mortgagor is given time to redeem the collateral by paying the agreed loan with additional cost and interest.<sup>85</sup> This presents a window of opportunity for the mortgagor to redeem the collateral even after the initial lapse of time.<sup>86</sup>

Priority will be determined by the order of their registration dates where two or more security bills of sale are given in the same collateral.<sup>87</sup> However, an unregistered absolute bill of sale takes priority over a subsequent registered security bill of sale because an absolute bill transfers complete title to the mortgagee and as such, the security bill leaves no title for the grantor to use as a security.<sup>88</sup> A security bill takes priority over an earlier unregistered security bill.<sup>89</sup> There is a seven day period to register a bill of sale failing which it could be defeated by any third party who will take free of the security interest.

### 3.3.1.3 Attachment of After-acquired Goods

Except for the fact that the provisions of the Bills of Sale Laws in Nigeria are difficult to navigate, businesses are also unable to completely take advantage of the position the security

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<sup>83</sup> Bills of Sale Law, Rivers State, Nigeria, Cap. 15, 1999, s 23; Bills of Sale Law, Bendel State, Nigeria 1976, s 20.

<sup>84</sup> The mortgagee's power of seizure is restricted to the circumstances laid down in (Amendment) Act 1882, s 7. The circumstances include default in periodic payment as agreed between the parties, grantor's subsequent bankruptcy, and fraudulent removal of goods from the premises thereby making it inaccessible to the grantee, failure to remit to the grantee without reasonable cause the last receipts and rates regarding the goods, and execution levied against the goods of the grantor under any court judgement.

<sup>85</sup> (Amendment) Act 1882 s 13. The mortgagee must pray the court for an order allowing the seizure of the mortgagor's property before any lawful seizure can be appropriately implemented – (Amendment) Act 1882 s 7. The chattel cannot be removed and must remain in the premises of the grantor, see *Adedoyin v Bank of the North Ltd* (1976) 2 FNL 238. See also *Johnson v Diprose* (1893) 1 QB 512.

<sup>86</sup> Bills of Sale Law, Bendel State, Nigeria 1976, s 13; Bills of Sale Law, Rivers State, Nigeria, Cap. 15, 1999, s 11.

<sup>87</sup> Bills of Sale Act, 1878, s 10. A bill of sale unregistered after the required time is totally void as security. (Amendment) Act 1882, s 8.

<sup>88</sup> *Tuck v Southern Counties Deposit Bank* (1889) 42 Ch D 471.

<sup>89</sup> *Edwards v Edwards* (1876) 2 Ch D 291. Bills of Sale Act, 1878 s 10.

bill of sale has to offer under the law. For instance, as present in many domestic bills of sale laws, the Bills of Sale Law of Rivers State provides:

‘Save as hereinafter mentioned, a security bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale’.<sup>90</sup>

This means that future goods cannot be used as security under the Bills of Sale Law. This limitation is tantamount to a rejection of the fluctuating assets as a valid form of security which contravenes modern commercial lending practices.<sup>91</sup> As a result, the reality of the matter is that the mortgagor must gain corporate status before granting security interest over future asset. The law does not explain how it will apply to unborn offspring. It does not elaborate on whether the security interest will attach to such offspring. On top of that, the security interest will then need to be recorded in the charge register. The ambiguous provision stifles business transactions that rely on after-acquired asset as viable collateral, thereby disregarding business growth of unincorporated businesses. This could lead to unnecessary pressure to incorporate in order to grant after-acquired goods, and since most of these businesses operate as sole traders or micro-businesses, corporate registration fees and duties payable towards attainment of corporate status may leave them with little or no working capital to operate as a corporate entity.

### 3.3.2 The Pledge

The pledge of personal property is a real security device and it is one of the oldest form of consensual security which mirrors the Roman *pignus*.<sup>92</sup> It has been asserted that the pledge is by far amongst the oldest security devices.<sup>93</sup> A pledge involves the transfer of property from one person to another in return for a sum of money.<sup>94</sup> The party who advances credit is called the pledgee or pawnbroker, while borrower is often referred to as the pledgor.<sup>95</sup> In *Labode v Otubu*,<sup>96</sup> Mohammed Uwais CJN quoted Halsbury’s Laws of England, stating that

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<sup>90</sup> Bills of Sale Law, Rivers State, Nigeria, Cap. 15, 1999, s. 8; See also Bills of Sale Law, Bendel State, Nigeria, 1976, s 10. This provision is derived from the (Amendment) Act 1882 s 5.

<sup>91</sup> Roy Goode and Laurence Gower, ‘Is Article 9 of Uniform Commercial Code Exportable? An English Reaction’ in Jacob Ziegel and William Forster (eds), *Aspects of Commercial and Comparative Law: Sales, Consumer Credit, and Secured Transactions* (McGill University Oceana Publications Inc. 1968) 306.

<sup>92</sup> Roy Goode, ‘Security: A Pragmatic Conceptualist’s Response’ (1989) 15 Monash Uni. L. Rev. 361, 362.

<sup>93</sup> Robert A. Riegert, ‘Secured Transactions Part I’ (1984) 89 Com LJ 7.

<sup>94</sup> Edem M. Abasiokong, ‘Pledging Oil palms: A Case Study on Obtaining Rural credit in Nigeria’ (1981) 24 Afr Studies Rev 73.

<sup>95</sup> *ibid.*

<sup>96</sup> (2001) 7 NWLR (Pt. 712) 256.

a 'pledge is interchangeable with pawn and both have been defined to mean a bailment of personal security as security for some debt or engagement.'<sup>97</sup> In other words, a pledge transaction is created when property is transferred from the pledgor to the pledgee as security for financial obligation.

The principal law governing the pledge of chattels in Nigeria is English case law, and the Pawnbrokers Act 1958,<sup>98</sup> which has now metamorphosed into several State domestic laws in Nigeria. Common law rules continue to regulate pawn transactions together with these pawnbroker laws, and these State laws are only applicable so long as the loan granted by any pawnbroker is not in excess of forty naira (a little less than twenty British pence).<sup>99</sup> The pledge of goods under the Pawnbrokers Act has become less significant in recent times. However, in circumstances where the loan exceeds forty naira, the English pledge may be created by the parties with rights and liabilities enforceable under common law. The Act re-enacted the Pawnbrokers Act 1877 of the United Kingdom.<sup>100</sup> The first local law applicable in Nigeria derived from the UK was the Pawnbrokers Act No 18, 1912 which was then applicable to the Colony of Southern Nigeria.<sup>101</sup> It was then re-enacted in 1917 as the Pawnbrokers Act No. 35, 1917 and later consolidated and re issued in 1948 as chapter 165, Laws of Nigeria, Ch. 165, 171, and finally as chapter 146 of the Laws of the Federation of Nigeria and Lagos.<sup>102</sup> Section 2 of the Pawnbrokers Act defines a pawnbroker to include 'every person who carries on the business of taking goods in pawn'.

The chattel mortgage differs from the pledge in that possession of the collateral is transferred to the lender when the security is created, and the taking of possession by way of pledge validates the agreement.<sup>103</sup> Pledge depends on possession, and without possession, it fails to exist as a pledge which leaves it in danger of it been categorised as a chattel mortgage, and the security interest voidable if it fails the registration requirement under the Bills of Sale Act. The advantage of the pledge is that the lender has control over the borrower's property through the right of possession and thus minimises risk by limiting the possibility of defrauding a third party by the 'debtor in possession' appearance associated with the chattel mortgage or charge where the borrower may appear as the reputed owner of the property. The pledgee therefore has only possessory rights in the chattel to the extent of debt

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<sup>97</sup> *ibid*, 276.

<sup>98</sup> 5 LFN & L Ch 146, 1958.

<sup>99</sup> Pawnbrokers Act 1958, s 2; See Mwalimu (n 32) 415.

<sup>100</sup> 35 & 36 Vict., c.93.

<sup>101</sup> See generally Southern Nigeria Ordinances (1910 – 1912).

<sup>102</sup> Mwalimu (n 32) 417.

<sup>103</sup> Gilmore (n 41) 5.



owed which amounts to a lien, with the title in the property remaining with the pledgor.<sup>104</sup> The property which is in the possession of the lender does not transfer title in the property but the right to hold or use (usufruct right) for the duration of the pledge agreement. In a bailment transaction, according to the old common law, the bailee loses the lien if he parts with possession of the property, except if possession was granted to a third-party to be held on behalf of the bailee.<sup>105</sup>

It is a primary requirement that the pledgee obtains and remains in possession of the collateral which must be capable of transfer by delivery.<sup>106</sup> Thus, an asset can be pledged so long as it is movable. In other words, it must be movable in nature and can be delivered to effect possession. Typical examples of assets that can be pledged include, inter alia, motor vehicles, office equipment and jewellery. Property which can be pledged may be confined to tangible personal property, but certain choses in action can be pledged if they can be transferred and delivered, such as where they are evidenced in a document of title e.g. share certificate.<sup>107</sup> The result of this characterisation is that immovable assets such as land and buildings are incapable of being pledged.<sup>108</sup>

The pledge, unlike the chattel mortgage, does not require registration like the security bill of sale. A pledge can be created by parol, although there would normally be a document to evidence the terms and conditions of the transaction. In *Re Hardwick*,<sup>109</sup> it was held that where goods are pledged as security for a loan and the pledgor signs a document to record the pledgee's rights, it will not constitute a registrable interest under the Amendment Act 1882. Also, a pledge is not subject to registration in the charge register if executed by a company, by reason of it being that there are no expression that it may apply to pledges, because registration under CAMA - only applies to charges and mortgages created by companies.<sup>110</sup>

The major reason why a pledge is not subject to registration is purely because the pledge transaction is possessory in nature, thus making registration irrelevant, since the purpose of a registration system is to publicise non-possessory security interests to protect third party purchasers and creditors. Encumbrances over a registered security interests such

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<sup>104</sup> *Donald v Suckling* (1866) LR 1 QB 585.

<sup>105</sup> James L Parks, 'The Rights of a Pledgor on Transfers of a Pledge' (1922) 6 Minn L Rev 173, 174.

<sup>106</sup> Richard Calnan, *Taking Security* (1st edn, Jordan Publishing Ltd 2006) 17.

<sup>107</sup> Mike Fox and Michael Thompson, 'The Pledge: Taking Security over Shares' [2010] F & CL 1.

<sup>108</sup> The pledge of land is only 'theoretically' possible in England but it once existed in the early days in the form of *mortuum vadium* or 'dead pledge' and *vidam vadium* or 'living pledge'. See Enefiok Essien, 'Lending on Land Mortgage on Pledge Security in Nigeria: A Minefield for Secured Lenders' (1998) 10 Afr J of Intl & Comp L 496, 498.

<sup>109</sup> [1886] L.R. 17 QBD 690.

<sup>110</sup> CAMA, s 197 (1), (2) (d), and (11).

as a bill of sale can be investigated by carrying out a search in the bill of sale registry since the lender is not in possession of the property. However, because the pledgee is in possession of the collateral and will most likely continue to be in possession until the debt has been repaid, then public disclosure is of no relative importance.<sup>111</sup>

### 3.3.3 The Equitable Charge

The courts in Nigeria do not treat equitable charges differently from the English courts, and they still continue to adhere to common law doctrines in regards to company law rules. CAMA is the only statute in Nigeria that regulates companies' security interests over land and personal property. It provides that a company may charge or mortgage its undertakings, uncalled capital or property as collateral for a loan advancement and may issue debentures, debenture stock and other forms of security for a loan.<sup>112</sup> An equitable charge over a company's asset can be created by issuing a deed of debenture which could be a fixed or floating charge as seen in the case of *Inter-contractors Nigeria Ltd. v National Providence Fund Management Board*

‘A debenture consists of a debt owed by the company to another secured by a deed which prescribes the condition of the realisation of a debt. A debenture may be created over the fixed or floating assets of a company.’<sup>113</sup>

Equitable charges are consensual security interests i.e. they arise by written agreement between the parties. An equitable charge involves the creation of an equitable interest in a property in favour of a chargee (creditor) by way of security to discharge a monetary liability.<sup>114</sup> The chargee is equipped with only an equitable action and cannot obtain an absolute title in the property of the chargor (debtor).<sup>115</sup> The charge simply creates an encumbrance on the asset.

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<sup>111</sup> *Re Hall, Ex P. Close* (1884) 14 QBD 386, 391.

<sup>112</sup> CAMA, s 166.

<sup>113</sup> (1988) 2 NWLR (Pt. 76) 280, 292. See also *Union Bank of Nigeria v Tropical Foods Ltd* (1992) 3 NWLR (Pt. 228) 231 CA.

<sup>114</sup> Calnan (106) 49.

<sup>115</sup> According to Millett J. in *Re Charge Cards Services Ltd* [1987] Ch 150, 176 ‘the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt.’

### 3.3.3.1 *The Fixed Charge*

In *Illingworth v Houldsworth*,<sup>116</sup> a fixed charge, sometimes referred to as a specific charge, was explained as a charge which fastens on specific or ascertained property such as land and ship.<sup>117</sup> However, this is no longer the situation in that a fixed charge can be taken over non-specific assets and it can as well be charged over book debts.<sup>118</sup> Previously, a fixed charge could not be secured against future goods and intangible assets as a result of their ambulatory nature.<sup>119</sup> A holder of a fixed charge has a right akin to a legal mortgagee as seen in *Awojugbagbe Light Industries v Chinukwe*,<sup>120</sup> where it is explained that the chargee is bestowed rights such as the ability to appoint a receiver, take possession, foreclosure on the property, or sell the collateral. For a fixed charge to take effect, it must clearly describe what it seeks to secure, and if it is an after-acquired asset, it must be stated that the charge will fasten on the asset the moment they are acquired by the company.<sup>121</sup> A fixed charge prevents the chargor from disposing off the collateral during the course of business without the chargee's express consent. Another major disadvantage of the fixed charge is that the chargee cannot lay claim to other properties owned by the chargor except for those specifically identified in the charge document, and worst of it all, the collateral secured by the fixed charge could be destroyed or depreciate in value and the chargee may be left with little or no security.

### 3.3.3.2 *The Floating Charge and the Concept of Crystallisation*

As the name suggests, the floating charge is an equitable interest which 'floats' over all or any of the company's property which constitutes items capable of changing their natural form during the course of acquisitions and disposals made by the company.<sup>122</sup> It is non-possessory security by creation, and the company is given freedom to deal with the encumbered asset in its ordinary course of business.<sup>123</sup> The nature of a floating charge can be likened to the Roman law *hypotheca*. Property such as book debts and intellectual property (IP) can be granted as security following section 178 (1) CAMA which states that

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<sup>116</sup> [1904] AC 355.

<sup>117</sup> *ibid.*, at p 358 (per Lord MacNaghten); *Fredrikov Petroleum Service Co Ltd v First Bank of Nigeria Plc* [2014] LPELR-22538 CA (Lagos Judicial Division).

<sup>118</sup> *Siebe Gorman & Co Ltd v Barclays Bank Ltd* (1979) 2 Lloyd's Rep 142; *Holroyd v Marshall* (1862) 11 ER 999.

<sup>119</sup> *Re Atlantic Medical Ltd* [1993] BCLC 386.

<sup>120</sup> (1995) 4 NWLR (Pt 390) 379.

<sup>121</sup> *Re Keenan Bros Ltd* [1985] IR 401.

<sup>122</sup> *Union Bank of Nigeria v Tropic Foods Ltd* (1992) 3 NWLR (Pt. 228) 231.

<sup>123</sup> *Edward Nelson & Co v Faber & Co* (1903) 2 KB 367; *Re Yorkshire Woolcombers' Association Ltd* (1903) 2 Ch 284.

a floating charge is an equitable charge over the whole present and future assets of the company. Regarding intangibles such as IP rights, the need to grant security over these types of property is economically important. Under Nigerian law, transfer of IP rights are recorded in the government offices responsible for registering these rights. If granted by a corporate enterprise, they are registrable as an equitable charge pursuant to section 197 CAMA. In essence, a floating charge can be secured over after-acquired property which can be encumbered automatically without the need for the chargee to undertake further action.<sup>124</sup> It is not possible for an unincorporated business or natural person to grant a floating charge over its assets, because the Bills of Sale Act 1878 states that a security bill of sale is void except against the grantor in respect of personal chattels not adequately described in the schedule annexed to the bill,<sup>125</sup> or in respect of any personal chattels not owned by the grantor as at the time of executing the bill.<sup>126</sup>

A floating charge could be taken over all the assets of a company which therefore means that, in enforcement, a chargee is in a good position to appropriate all the assets of the company, that were not encumbered by an earlier fixed charge or mortgage, towards the satisfaction of the company's debt.<sup>127</sup> The 'licence theory' which allows the company to make use of its asset for the duration of the loan, has particularly found judicial favour in Canada and Australia,<sup>128</sup> where it has been argued that the power to grant the chargor a licence to deal with the property is derived from the chargee.<sup>129</sup> Further, there is an alternative theory which empowers the company to deal with its after-acquired assets, since a floating charge does not attach to any asset in particular until a crystallisation event occurs.<sup>130</sup> Nevertheless, the implication of this theory does not affect the chargee's right of

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<sup>124</sup> George L Gretton, 'Reception without Integration? Floating Charges and Mixed Legal Systems' (2003) 78 Tul L Rev 307, 313–14.

<sup>125</sup> Bills of Sale Act 1878, s 4.

<sup>126</sup> Bills of Sale Act 1878, s 5.

<sup>127</sup> Louise Gullifer, 'The Reform of the Enterprise Act 2002 and the Floating Charge as a Security Device' (2008) 46 Can Bus LJ 399, 400.

<sup>128</sup> *R v Consolidated Churchill Copper Corporation* (1978) 5 WWR 652. In the Australian case of *Hamilton v Hunter* (1982) 7 ACLR 295, 304, Holland J. opined that 'it is possible to say that (...) there is an implied licence by the mortgagee to the mortgagor to dispose of its assets but the licence is limited to the common purpose of the parties.'

<sup>129</sup> Pennington cites *Re Borax Co., Foster v. Boraz Co* (1899) 2 Ch 130; *Davey and Co. v. Williamson and Sons Ltd.* (1898) 2 QB 194, per Lord Russell CJ at 200; *Re Crompton and Co. Ltd., Player v Crompton and Co. Ltd.* (1914) 1 Ch 954, per Warrington J at 964 which earlier expresses the operation of the 'licence theory'; See also Robert Pennington, 'Genesis of the Floating Charge' (1960) 23 Mod L Rev 630, 645.

<sup>130</sup> Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2nd edn, The Federation Press 2002) 500. A decision was reached *obiter* in *Wily v St George Partnership Banking Ltd* (1999) 17 ACLR 279, 282 – 283, 288, per Finkelstein JJ and Sackville J. that a floating charge gives the chargee an equitable proprietary interest in the collateral. See *Tricontinental Corporations Ltd v Commissioner of Taxation* (1988) 12 ACLR 421, 430 per GN Williams J; *Atkins v Mercantile Credits Ltd* (1986) 10 ACLR 153.

action against the chargor if the property is dealt with in a manner separate from the course of the company's business.<sup>131</sup>

A debtor company can pass good title in the collateral to a third party purchaser and the purchaser will have good title and will take free of the charge, but the money received from the sale will still be encumbered by the floating charge.<sup>132</sup> Where the money is used in the purchase of an asset for the business of the debtor company, that asset is subject to the charge, but the seller of the asset will receive the purchase money free of the charge.<sup>133</sup> A company may grant a fixed charge over the assets also comprised in a floating charge, and it would take priority over the floating charge, except where there is an express negative pledge clause in the charge debenture restricting the company from granting security ranking *pari passu* or in priority over the floating charge.<sup>134</sup>

So long as the floating charge has not crystallised, the company is free to deal with the assets as it would during the course of its business.<sup>135</sup> Crystallisation simply means the attachment of assets of the company, which were once floating, upon the happening of an actual event prescribed or recognised by law.<sup>136</sup> This attachment puts an end to the apparent authority conferred on the company to deal with the assets comprising in the security. Gough argues that it is a process of converting security from being floating in character into being fixed or specific.<sup>137</sup> Thus, it can be deduced that the security is dormant while the charge floats pending crystallisation, but it becomes active when crystallised occurs.<sup>138</sup> Once crystallisation occurs, the power of the company to deal with the assets is nullified, because the crystallised charge fastens on the assets specified in the debenture. The term 'crystallise' was mentioned in section 178 (2) (1) CAMA, which lays down three events which may trigger it. They are -

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<sup>131</sup> *ibid Atkins v Mercantile Credits*, 157 per Hope JA stating that even before the interest becomes specific and attached to the collateral, the creditors are entitled to an injunction restraining the company from parting with the property except in the ordinary course of its business. In *Barcelo v Electrolye Zinc Co.* (1932) 48 CLR 391, 420, it was also affirmed per Dixon J. that a floating charge is not a future security interest but one that presently affects the entire assets of the company as stipulated in the debenture instrument.

<sup>132</sup> Imran O Smith, *Nigerian Law of Secured Credit* (1st edn Ecowatch, Lagos 2001) 304.

<sup>133</sup> *ibid.*

<sup>134</sup> Carl S. Bjerre, 'Secured Transactions Inside out: Negative Pledge Covenants, Property and Perfection' (1998) 82 Cornell L Rev 305, 306.

<sup>135</sup> Ji Lian Yap, 'Reconsidering Receivables' (2001) 32 Comp Law 297, 298.

<sup>136</sup> Smith (n 132) 321.

<sup>137</sup> William J Gough, *Company Charges* (2nd edn Butterworths 1996) 135.

<sup>138</sup> See *Re Standard Manufacturing Co* (1891) 1 Ch 627, 640 'A debenture-holder has, by virtue of his debenture, really only an inchoate right to the chattels charged: the debenture is a floating security—a security changing from day to day; and its nature is such that no right attaches to any property comprised in it until it is put into active operation by the debenture-holder, who then converts it from what may be termed a "dormant" security into an 'active' security. Until the security is made 'active' there is no charge'; See also *Re Victoria Steamboats Ltd* (1897) 1 Ch 158, 161.

- (a) The security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters into possession of such assets; or
- (b) The court appoints a receiver or manager of such assets on the application of the holder
- (c) The company goes into liquidation.

Section 178 (2) (2) states further:

On the happening of any of the events mentioned in subsection (1) of this section, the charge shall be deemed to crystallise and to become a fixed equitable charge on such of the company's assets as are subject to the charge, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again to become a floating charge.

When the crystallisation event occurs, the chargee may realise the security by the appointment of a receiver or manager. Thereafter, the collateral that was once available to the company but now encumbered by the floating charge becomes fixed as a result of crystallisation, and remains under the control of the receiver or manager. The company does not lose title of the charged assets even after the crystallisation of the charge.<sup>139</sup> Once crystallisation occurs, the power of the company to deal with the assets during the course of its business is taken away because the charge upon crystallisation fastens on the asset. Crystallisation of a floating charge will not crystallise any future charge granted by the company to other creditors, nor does it discontinue the company's business, but it normally bars the company from disposing of the collateral unless expressly agreed by the chargee who may have to 're-float' the security.<sup>140</sup>

### 3.3.3.3 *Negative Pledge Clause*

The negative pledge clause is a documented promise which seeks to protect a floating charge holder that, as long as part of the debt remains undischarged, the company would not create any security ranking equally or higher than the charge holder.<sup>141</sup> It is a special form of covenant intended to fill the void, to which the freedom to carry on business of the company during its ordinary course has given rise. It provides nothing more than a contractual promise which applies to the borrower.<sup>142</sup> The negative pledge limits the powers of the company to deal with the encumbered property, thereby protecting the security interest of the chargee and, at the same time, binds third parties provided the third party had notice of the terms of

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<sup>139</sup> *United Bank of Nigeria v Tropic foods Ltd* (1992) 3 NWLR (Pt. 228) 231, 234.

<sup>140</sup> Roy Goode, *Legal Problems of Credit and Security* (3rd edn, Sweet & Maxwell 2003) 134.

<sup>141</sup> Matthew H Hurluck, 'New Approaches to Economic Development: The World Bank, the EBRD, and the Negative Pledge Clause' (1994) 35 Harv Int'l LJ 345, 347.

<sup>142</sup> David Allan, 'Negative Pledge Lending – Dead or Alive? How to Re-invent the Mortgage' (1990) 8 JIBL 330.

the negative pledge clause.<sup>143</sup> The negative pledge clause is recognised under CAMA under section 179 where it is provided:

‘A fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge and persons in whose favour such later charge was granted had actual notice of that prohibition at the time when the charge was granted to him.’

This purpose of this provision is to reinforce the protection given to a chargee. A negative pledge clause does not amount to a security interest,<sup>144</sup> and it does not exclusively prohibit a third party purchaser or creditor from acquiring a security interest over the collateral, but it merely confers on the chargee a cause of action against the company for damages in the event that the company breaches the covenant.<sup>145</sup> Be that as it may, a negative pledge clause confers a superior priority on the chargee against a third party creditor. For a negative pledge to be effective, the third party dealing with the company must not only have notice of the charge, but also the negative pledge clause.<sup>146</sup> Its main purpose is, hitherto, to preserve the chargee’s priority over a fixed charge holder.<sup>147</sup> Nonetheless, the chargee must prove that the third party was aware of the existence of the negative pledge.

#### 3.3.3.4 *Registration of Charges*

Registration of security interest helps to circumvent the possibility of undisclosed or hidden encumbrances. The information recorded in a charge register provides creditors and other persons dealing with the company with the means to assess its creditworthiness, and to assist liquidators in deciding whether or not a charge or mortgage is valid.<sup>148</sup> The importance of having an organised registration system not only improves the speed and transparency of taking security, but secured creditors will be confident in advancing loans to debtors.<sup>149</sup> In order for an effective registration system to perform this function, it is important that the registration process must fulfil these necessary requirements.<sup>150</sup>

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<sup>143</sup> *Cox v Dublin City Distillery Co* (1915) 1 IR 345.

<sup>144</sup> *Fire Nymph Products Limited v The Heating Centre Pty Ltd (in liquidation)* (1992) 7 ACSR 365.

<sup>145</sup> Bjerre (n 134) p 308.

<sup>146</sup> Ji Lian Yap, ‘Constructive Notice and Company Charges’ (2010) 10 JCLS 265, 269. See also *Siebe Gorman & Co. Ltd v Barclays Bank Ltd* (1979) 2 Lloyd’s Rep 142.

<sup>147</sup> Karen Hogg, ‘Floating Charges and Automatic Crystallisation’ (1988) 1 Corp & Bus LJ 68, 74.

<sup>148</sup> Hamish Patrick, ‘Charge Registration Reform – Further BIS Consultation’ (2011) 14 SLT 81; George Gretton, *Reform of Security Over Movable Property: The Discussion Paper in Outline* (2012) 16 Edin L Rev 261, 262.

<sup>149</sup> José Angelo Estrella-Faria, ‘Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage’ (2009) 14 Unif L Rev 5, 16.

<sup>150</sup> Getting Credit (World Bank 2015) <<http://www.doingbusiness.org/data/exploretopics/getting-credit/why-matters>> last accessed 9 December 2016.

There is a requirement for a company and the CAC to hold separate charge registers to records charges.<sup>151</sup> The particulars of registration are contained in these registers which offers the chargee a higher priority over third party claimants. A charge taken over land must also be registered at the state or local government land registry where the land is situated and the consent of the State Governor or his representative is often required if there is a possibility of title passing to the chargee as in the case of a mortgage.<sup>152</sup> However, if an equitable charge by way of security is taken over land with a reversionary right in the property bestowed on the company, the charge to satisfy the debt will not require the Governor's consent for it to be valid.<sup>153</sup>

It is required by the law in Nigeria that an instrument executed in relation to any property located in the country must be stamped as a prerequisite for court admissibility, except during criminal proceedings.<sup>154</sup> Thus, all charge instruments, whether fixed or floating debentures over land or personal property, must be stamped pursuant to the Stamp Duties Act 1990.<sup>155</sup> However, there is a potential litigation trap in this requirement: this is whether stamping is a pre-condition for registering a charge instrument? CAMA does not explain the process of stamping or the time within which it is required that a charge instrument to be stamped. However, the decisions in earlier cases concerning documentary compliance by companies are to be followed, the Registrar cannot refuse to register an unstamped document.<sup>156</sup> In *Kehinde & Anor v Registrar of Companies*,<sup>157</sup> it was held that the Registrar cannot refuse to register a document after the required company legislation has been complied with on the basis that the company failed to comply with another law.

Every company is mandated to keep a copy of every charge instrument, a register of debenture holders and a register of charges.<sup>158</sup> Under section 190, every company is required

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<sup>151</sup> CAMA, s 7.

<sup>152</sup> LUA, s 22. All land in Nigeria is compartmentalised into State or Local Government land according to its proximity to the State capital. Document of title in State land is called the Statutory Right of Occupancy while the document of title to Local Government land is called the Customary Right of Occupancy. The place of registration of a security interest in land is determined by whether the land is governed by the Statutory Right of Occupancy or the Local Government Customary Right of Occupancy. If the property covered by the Statutory Right of Occupancy, the registration will be effected at the State Land Registry while if the property is covered by the Customary Right of Occupancy, then registration will be effected at the Local Government Registry, see Adeoye Adefulu and Nnamdi Esionye, 'An Overview of Nigeria's Land Use Amendment Bill' <http://www.mondaq.com/Nigeria/x/81844/agriculture+land+law/An+Overview+Of+Nigerias+Land+Use+Amendment+Bill> last accessed 20 September 2016.

<sup>153</sup> *Okuneye v FBN Plc* (1996) 6 NWLR (Pt 457) 745; *Olalomi Industries Ltd v Nigerian Industrial Development Bank* (2009) 16 NWLR (Pt 1167) 266 SC.

<sup>154</sup> Stamp Duties Act, CAP 441 LFN 1990, s 22 (4). Any unstamped instrument cannot be tendered in evidence except for criminal proceedings.

<sup>155</sup> *ibid.*

<sup>156</sup> *Lasisi v Registrar of Companies* (1976) 7 SC 73.

<sup>157</sup> (1979) 3 LRN 213; (1979) 5 FRCR 10.

<sup>158</sup> CAMA s 190, ss. 191 - 193.



to keep a copy of every instrument creating any charge over its assets which requires registration at the registered office save for a copy of series of debentures will suffice in this regard. The particulars recorded in the charge register must give a short description of the property charged, the amount of the charge, and in some instances, the names of the persons entitled therein.<sup>159</sup> Section 193 (1) CAMA states that in the case of debenture issued to creditors, the issuing company must maintain a register of the debenture holders. Additionally, section 193 states that the entry should contain the following information: - names and addresses of the debenture holder, the principal of the debenture held by each of them, the amount or highest amount payable on the debenture redemption, the issue price and amount paid up on the debenture, the date on which the name of each debenture holder was registered, the date on which a creditor ceased to be a debenture holder. The above entries must be made within thirty days of the conclusion of the transaction or within thirty days after the creditor ceases to be a debenture holder.

Public disclosure of companies' assets and undertakings need not only be done by searching the company's internal register, because a thorough search at the CAC charge register is also capable of ascertaining the borrowing status of a company. The company has a duty to send to the CAC Registrar, the particulars of every charge created by it and of the issues of debentures of a series requiring registration under section 197. Registration may also be effected by any person interested in the charge and that person is entitled to recover financial cost involved in the registration from the company.<sup>160</sup> Non-registration will make the charge void against third party claimants.

Section 197 (1) provides that every charge created by a company pursuant to section 197 (2) must be registered within ninety days of its creation, otherwise such a charge will be ineffective against security interests of third party claimants. The prescribed particulars together with the charge instrument must be delivered for effective registration within the stipulated ninety days. The obligation to repay the loan is not extinguished and it will be enforceable but subject to other claimants.<sup>161</sup> In spite of the ninety day requirement to register a charge, discretion is sometimes given by the courts to extend registration time if it can be established that failure to register on time was due to accidental omission,

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<sup>159</sup> The registration details need not include names of the persons entitled in cases of securities to bearer. See CAMA, s 191 (1). Failure in fulfilling the above requirements by an officer of the company i.e. wilfully and knowingly authorises the omission of details subject to registration is liable to a fine, see CAMA, s 191 (2).

<sup>160</sup> CAMA, s 199 (1), (2).

<sup>161</sup> Hence the charge will not be rendered void for all purposes, '(...) but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money thereby secured shall immediately become payable,' see CAMA, s 197 (1).

inadvertence or if it is just and equitable to extend registration time.<sup>162</sup> This ninety day period to register can be problematic for third parties. An inspection of the charge register before the lapse of the ninety days ‘invisibility period’ will not disclose any trace of creation of charges in the register where a registrant has decided to register a few days before the ninety days expires. A third party claimant will not be aware of the chargee’s security interest in the collateral.

Charges which can be created by a company over its assets or undertakings requiring registration is listed under section 197 (2) CAMA.<sup>163</sup> This list, as at the time it was created, might have provided creditors with a viable means of taking security over a company’s assets, but it is incomplete in that, if a charge created by the company does not fall within its scope, then registration is not required. This happens to be the case with non-consensual securities such as those arising by operation of the law e.g. an unpaid seller’s lien.<sup>164</sup> In addition to the aforementioned omission, certain future income might not fall into the category of ‘book debts’, e.g. profits from Private Finance Initiative (PFI) projects.<sup>165</sup> Crypto-currencies such as bitcoin owned by companies are not subject to registration under section 197 (2). CAMA does not explain the meaning of ‘book debts’. Nevertheless, a book debt could mean ‘debts due or to become due to the company in respect of goods supplied or to be supplied or services rendered or to be rendered by the company in the course of the company’s business.’<sup>166</sup> This definition categorically embodies book debts received during the course of the company’s dealings. If we are to apply this concise definition, a contingency debt such as a debt on insurance policy will not be treated as a charge on book debts.<sup>167</sup> On the list of registrable charges provided by CAMA, it seems obvious that charges created by a company and not those arising by operation of law are registrable. Hence, an unpaid seller’s lien arising by operation of law is not a registrable charge.<sup>168</sup>

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<sup>162</sup> *Development Finance v Registrar of Companies* [1973] NCLR 497.

<sup>163</sup> The list of registrable charges states as follows: ‘A charge for the purpose of securing any issue of debentures; a charge on uncalled share capital of a company; a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; a charge on land, wherever situate, or interest therein, but not including a charge for rent or other periodic sum issuing out of land; a charge on book debts of the company; a floating charge on the undertakings or property of the company; a charge on calls made but not paid; a charge on ship or aircraft or any share in a ship; a charge on goodwill, on a patent or a licence under a patent, on trademark or on a copyright or a licence under a copyright.’

<sup>164</sup> *London and Cheshire Insurance Co. Ltd. v Laplagrene Property Co. Ltd.* [1971] Ch. 499. Be that as it may, a charge not registrable at the CAC must still be recorded in the charge register of the company, see CAMA s 191 (1).

<sup>165</sup> A PFI project will not be registrable unless it is in the form of a book debt.

<sup>166</sup> A Review of Security Interests in Property’ (Department of Trade and Industry, London 1989) ‘Diamond Report’, para 23.9.22.

<sup>167</sup> See, *Paul & Frank v Discount Bank (Overseas)* [1967] Ch 348.

<sup>168</sup> *London and Cheshire* (n 164) 513.

To effect registration, the registrant must deposit a copy of the instrument creating the charge in addition to providing the required particulars of registration at the CAC.<sup>169</sup> Thus, there are two documents which must be tendered at CAC – a form prepared by CAC where information about the parties and transaction is recorded and a copy of the debenture instrument creating the charge. Upon the registration of the charge at CAC, the Registrar will issue a certificate of registration if all requirements have been complied with by the parties and such certificate is a *prima facie* evidence that the necessary requirements were met.<sup>170</sup> If it is later found that the charge contained some inaccuracies, or it misstates the date of creation of the security or even omitted a class of property covered by the security, the certificate of registration is enough evidence that the requirement has been fully satisfied.

### 3.3.4 The Financial Lease as a ‘Quasi-security’ Device

As opposed to a lender providing loan to a business upon the business providing collateral, the financial lease transaction is more or less designed towards a seller providing credit in the form of property, or purchase price for property.<sup>171</sup> The financial lease is a ‘quasi-security’ because they can be seen as an equivalent to a real security device because they have similar economic function of financing a business entity by means of reserving title in sale transactions, instead of an ordinary loan advancement.<sup>172</sup> Lease financing could be designed in such a way as to function as a security agreement. For instance, a reservation of title seller may decide to disguise his interest in the goods without registering a security interest, or the grantee may wish to benefit from tax advantages by utilising the benefits of title in the goods through instalment sale such as in a finance lease arrangement. A financial lease can serve a security purpose, and thus, would qualify as a security in a legal sense with a functional approach of taking security, but an operating lease will not qualify as such. Their difference is not always so clear-cut. Nigerian legal practice recognises the financial lease as a type of reservation of title device, along with the hire purchase and conditional sale. Purportedly, there exists other forms of quasi-securities such as consignment, field warehousing and sale and leaseback but the focus here will be on financial lease as it represents arguably the most widely used quasi-security device in Nigeria.<sup>173</sup>

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<sup>169</sup> CAMA, s 197.

<sup>170</sup> CAMA, s 198 (2).

<sup>171</sup> Consumer Credit: Report of the Committee (Vol. 1 Cmnd 4596, London March 1971) henceforth ‘Crowther Report’, para 1.2.14 (v).

<sup>172</sup> Crowther Report, para 5.2.7.

<sup>173</sup> *Communique Issued at the 14th National Lease Conference* (Equipment Leasing Association of Nigeria, 10 November 2016) <http://elannigeria.org/cOmmunique-issued-at-the-14th-national-lease-conference-organised->

Leasing of personal property has been in practice since the ancient times in the Sumerian City of Ur, about 2010 B.C. which was then a major commercial centre, and they involved the rental of farm tools leased to farmers by priests, who then stood as government authorities.<sup>174</sup> Also, in 1750 B.C., Hammurabi in his famous code of laws acknowledged the existence of lease of personal property.<sup>175</sup> However, modern leasing is believed to have started in the USA in the 1950's, from where it later spread to Europe and then the Far East in Japan in the 1960's, and thereafter the rest of the world in the 1970's.<sup>176</sup> The leasing industry in Nigeria represents a viable opportunity for businesses to access cheap and affordable credit to support long-term sustainability. The leasing of equipment is relatively young in Nigeria but it has nevertheless contributed to the socio-economic development especially where the purchase of industrial goods has now become relatively expensive for MSMEs.

In many small and middle-income countries, the financial leasing industry has not been fully explored as an alternative for financing businesses. There is a high demand for lease of equipment's in such economies compared to other more advanced and industrialised countries that have already expanded their leasing industry.<sup>177</sup> Leasing allows businesses to make use of equipment's which they cannot purchased outrightly, while using the financial benefits arising from the leased equipment as a means to pay the lease instalment payment.<sup>178</sup> Additionally, leasing of personal assets helps businesses to manage their financial resources prudently since they can use the retained cash for other pressing needs such as employee remuneration, developing marketing strategies, procuring raw materials etc., with a higher return on investment, as against investing in immediate property acquisition which could stifle their business operations.<sup>179</sup> In promoting MSMEs in developing economies, financial leasing has a huge role to play in reducing poverty by generating capital and labour, while maintaining a sustainable business environment for the economy. There are basically two types of equipment lease recognised under Nigerian law – the finance lease and operating lease. Section 2 Equipment Leasing Act ('ELA') 2015 states:

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[by-the-equipment-leasing-association-of-nigeria-elan-held-on-thursday-10th-november-2016-at-sheraton-lagos-hotels-ikeja-lagos/](http://by-the-equipment-leasing-association-of-nigeria-elan-held-on-thursday-10th-november-2016-at-sheraton-lagos-hotels-ikeja-lagos/) last accessed 20 December 2016.

<sup>174</sup> Alexandra Bolea and Roxana Cosma, 'Leasing as a Modern Form of Business Financing' in Jan Polcyn (ed), *Progress in Economic Sciences* (Nr 2, PWSZ Poland 2015) 295, 296.

<sup>175</sup> *ibid.*

<sup>176</sup> Equipment Leasing Association of Nigeria, *Lease Financing in Nigeria* (2nd edn, ELAN Publication Lagos 2015) 2.

<sup>177</sup> International Finance Corporation, *Global Leasing Toolkit: An Introduction* (World Bank 2011) 5.

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

- 2.—(1) an equipment lease agreement shall be in writing containing—
  - (a) A statement to the effect that the lessor and lessee have agreed to enter into—
    - (i) A finance equipment lease, or
    - (ii) An operating lease, or
    - (iii) Any other specified variant of either (i) or (ii) above;

Their differences lie in the rights and obligations of both parties, the risks and benefits, differences in accounting treatment, and in tax treatment.<sup>180</sup> What this means is that they can be distinguishable looking at different perspectives from the industry, legal, accounting and tax basis.<sup>181</sup> In financial leases, the lease agreement provides that the lessor retains title to the equipment for the duration of the lease term but title is transferable to the lessee at the end of the lease term automatically i.e. if the lessee is given the purchase option usually provided in the agreement.<sup>182</sup> In *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) Plc*, the distinction was further explained succinctly,

‘An operating lease involves the lessee paying a rental for the hire of an asset for a period of time which is normally substantially less than its useful economic life. The lessor retains most of the risks and rewards of ownership of an asset in the case of an operating lease. A finance lease usually involves payment by a lessee to a lessor of the full cost of the asset together with a return on the finance provided by the lessor. The lessee has substantially all the risks and rewards associated with the ownership of the asset, other than the legal title. In practice all leases transfer some of the risks and rewards of ownership to the lessee, and the distinction between a finance lease and an operating lease is essentially one of degree.’<sup>183</sup>

A financial lease could take various forms which could involve two parties – the lessor and lessee, or three parties - a third party financier, the lessor and lessee. Whereas, an operating lease or ‘true lease’ is designed to temporarily transfer possession and right of use of the asset from the lessor to the lessee without amortizing the full cost of the asset or outrightly assigning proprietary interest in the property.<sup>184</sup> The lessee leases the equipment for short-term use of the equipment which the lessor has on hand, and the lessor recovers capital outlay on the equipment from multiple rentals for the entire life of the equipment with the maintenance cost and risk of obsolescence borne by the lessor.<sup>185</sup>

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<sup>180</sup> *Lease Financing in Nigeria* (n 176) 9–10.

<sup>181</sup> *ibid.*

<sup>182</sup> ST Guide, Introduction, para 26; See also Herbert Kronke, ‘Financial Leasing and its Unification by UNIDROIT – General Report’ (2011) 16 Unif L Rev 27; See *Lease Financing in Nigeria* (n 176) 10.

<sup>183</sup> (2000) 4 All ER 734, 737, CA.

<sup>184</sup> ST Guide, Introduction, para 26.

<sup>185</sup> Olatunji E. Sule and Sarat I. Amuni, ‘Equipment Leasing as a Source of Finance for Small and Medium Scale Entrepreneurs in Nigeria’ (2014) 2 (3) Int’l J. of Management Excellence 247, 250.

### 3.3.4.1 *Financial Lease under the Equipment Leasing Act 2015*

For a finance lease to be valid, it must be writing to evidence the estimated price of the equipment, that the equipment is being acquired by the prospective lessor on behalf of the lessee in connection with the lease agreement, a statement that the prospective lessee selected the equipment, or selected the supplier or manufacturer with or without relying on the skill and judgment of the prospective lessor.<sup>186</sup> To validate the lease, a body known as the Equipment Leasing Registration Authority ('Registration Authority') is responsible for registering equipment lease agreements.<sup>187</sup> In this register, the equipment lease agreement containing the particulars of the lessor, the lessee and equipment shall be recorded, and this register shall be open to the public for inspection upon payment of a prescribed fee.<sup>188</sup>

The financial lease must be registered with the Registration Authority in its prescribed form not later than fourteen days after the commencement of the lease agreement.<sup>189</sup> The effect of a registered lease constitute sufficient notice to third parties of the fact and terms of the lease, and failure to register shall make it be void against any third party acting in good faith, for value without notice of the lease agreement.<sup>190</sup> There is a statutory requirement for the lessor to conspicuously inscribe or affix his name on the leased equipment,<sup>191</sup> but whether this requirement is mandatory with failure to do so capable of invalidating the agreement is unclear.

Upon registration of the agreement, the lessor remains as the legal owner of the equipment regardless of whether the equipment has been fixed to land or building of another person, and this implied ownership shall take priority over any claim brought by the lessee, lessee's creditor or third party.<sup>192</sup> For the duration of the lease, a lessee is prohibited from using, sub-leasing, assigning a pledge, mortgage, charge, or creating any encumbrance which contravenes the legal ownership of the lessor with a third party, and any of such prohibited agreement shall be ineffective against the lessor.<sup>193</sup> However, the rights of the lessor shall take priority against the lessee's creditor and all other third parties, except as

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<sup>186</sup> ELA, s 2 (2).

<sup>187</sup> ELA, s 9 (1) (b).

<sup>188</sup> ELA, s 12 (1) – (2).

<sup>189</sup> ELA, s 13 – 14. The prescribed form to register equipment lease shall by Form A of the First Schedule to the Act (ELA 2015) accompanied by evidence of conformity to s 6 of the Act.

<sup>190</sup> ELA, s 16 - 17.

<sup>191</sup> ELA, s 18. This requirement can be likened to the Russian Civil Code, Art. 228 (2) which provides for the labelling of pledged asset indicating that it is encumbered. This system of publicising a security interest is likely to be ineffective for choses in action for reason being that they are intangibles, see Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry (EBRD 2004) para. A3.

<sup>192</sup> ELA, s 19.

<sup>193</sup> ELA, s 20.

against a bona fide purchaser for value of the equipment under an unregistered lease.<sup>194</sup> Again, whether a holder of a judgment lien will be subject to a lessor's ownership right was not considered in this law. Additionally, there is no clear distinction as to which of the provisions will apply to financial lease and which applies to operating lease. There is no provision to show whether a lessor can assign or subrogate his right to a third party, other than the odd fact that a lessor must be a corporate entity.<sup>195</sup> Worryingly, the CBNR also makes regulatory provision for the registration of financial lease in the NCR,<sup>196</sup> thus leading to confusion as to whether a lease of this kind, which is obviously a purchase money security interest (PMSI), should be registered in the NCR as it should ordinarily be, or be registrable with the equipment lease Registration Authority as required under the section 9 (1) ELA.

### 3.4 Conclusion

The aforementioned secured transactions are integral aspects of business financing in Nigeria as they provide MSMEs with flexible methods of accessing capital. Nevertheless, these devices are not without avertable constraints such as the inconsistencies in the registration system of financial lease as seen above. These type of inconsistencies will continue to hinder the availability of credit in Nigeria where there are conflicting laws over the same security interest. Further, financial institutions are often not inclined to part with funds for the benefit of individuals and business seeking loan advances owing to the apparent lack of cohesive regulatory framework to govern secured lending. According to a 2014 survey, only about 7% of business enterprises in Nigeria had an active line of credit compared to the Global Enterprise Survey average of 36.5%, meaning that Nigeria continues to lag behind compared to other countries.<sup>197</sup>

Ideally, a good security secured transactions law should cater for the granting of security over a wide range of available assets in the widest possible circumstance as they become available. Controversially, the CBNR does not apply to equitable charges granted by companies.<sup>198</sup> Again, the CAC registration system does not apply to individuals and

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<sup>194</sup> ELA, s 21.

<sup>195</sup> 'No person shall carry on the business of equipment leasing unless it is a limited liability company and the Memorandum and Articles of Association of the company shall have express provision to carry on the business of equipment leasing' see ELA, s 6 (1) (a).

<sup>196</sup> CBNR, Art. 3 (2).

<sup>197</sup> The World Bank Group, 'Micro, Small and Medium Businesses Get \$500 Million Boost from World Bank Group and Development Partners' (25 September 2014)

<<http://www.worldbank.org/en/news/feature/2014/09/25/micro-small-and-medium-businesses-get-500-million-boost-from-world-bank-group-and-development-partners>> last accessed 8 November 2016.

<sup>198</sup> CBNR, Art. 3 (3) (b).

unincorporated enterprises but there is a system in place which supports these non-corporate establishment –the bills of sale laws. Problematically, the requirements of the bill of sale for the purpose of granting security is often bypassed in practice because of its strict requirements and cumbersome nature, and that is likely to continue with the CBNR now in force. In addition, because of the unfamiliar nature of the security bill of sale in Nigeria, businesses have resorted to quasi-security transactions which furnishes a party with an option of purchasing the personal property from the lender.

A conventional secured transactions regime should exhibit harmonised set of rules via an institution charged with the responsibility of regulating principles of personal property security interests. In truth, the CBNR has attempted to perform this function, but it seems there remains some difficulty in their fulfilment of this task. The CBNR is expected to promote responsible and prudent lending to MSMEs, encourage financial institutions to accept a wider range of personal assets as security for loans, establish an efficient registration regime and a transparent realisation of security interests in personal assets, and also to create a defined framework for the establishment of a central collateral registry. The crux of the matter is that the CBNR would create a wider pool of assets that can be used as collateral and also, it can be utilised by not only corporate bodies as it is the case with CAMA, but also by unincorporated enterprises and private consumers. However, looking closely at the nature of these diverse secured transactions used in Nigeria as discussed already in this chapter, it is questionable whether the CBNR is robust enough to accommodate their distinctive features to the benefit of creditors and debtors. In order to appreciate the context of upon which the CBNR has been formulated, it is of utmost important to dig deep into past reform initiatives which may have impacted on the present situation on secured transactions law reform in Nigeria. The investigation which will be carried out in Chapter 4 will provide a wide opportunity to appreciate the debate surrounding the previous reform initiatives, while identifying the recommendations that should be seriously considered for future reforms.



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## IV. CHAPTER FOUR: REFORM INITIATIVES PRE-CBNR: THE CUMING REPORT 2004 AND DRAFT LAW 2009

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### 4.1 Introduction

The previous chapter bordered exclusively around the various types of security devices popularly used in Nigeria, and so far, the continuous use of these security devices shows that they have unprecedented value to businesses. However, there remains the problem of their efficiency to current economic practices. Economists have argued that it is practically impossible to devise a valid method of measuring the real economic impact of introducing a new secured transactions law,<sup>1</sup> although, they agree that secured transactions continues to play a fundamental role in addressing some institutional problems such as adverse selection, moral hazard and uninsurable risk.<sup>2</sup> Adverse selection is the descriptive term used to describe the process by which lenders to screen out potentially bad debtors by assessment of the soundness of their business plan, and information on the value of their collateral.<sup>3</sup> Moral hazard describes the extent of the risk of the possibility that the borrower could abscond with the unpaid debt (but security provided by the borrower could indirectly lead to a better interest rate on the loan, as it can save lender from costs incurred in policing the transaction).<sup>4</sup> Uninsurable risk describes unforeseen contingencies that could lead to bad debts (but these also may be mitigated by providing security which could secure as an alternative means of repayment).<sup>5</sup>

Usually, the anxious lender will always wonder about the possibility of the borrower defaulting on loan payments. Lenders will often be deterred from providing finance except where there is an efficient legal framework for the possibility of enforcing their rights in personal property upon the borrower's default. When an economy is underpinned by strong legal rights to protect lenders and borrowers, together with cohesive and harmonised secured

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<sup>1</sup> John Simpson and Joachim Menze, 'Ten Years of Secured Transactions Reform' in *Focus on Secured Transactions* (EBRD's Office of the General Counsel, Secured Transaction Project) 26. Available at <<http://www.ebrd.com/downloads/research/law/lit002b.pdf>> last accessed January 28, 2017.

<sup>2</sup> Joseph E Stiglitz and Andrew Weiss, 'Credit Rationing in Markets with Imperfect Information' (1981) 71 *Amer Econ Rev* 393.

<sup>3</sup> *ibid*, 402.

<sup>4</sup> *ibid*.

<sup>5</sup> Heywood Fleisig, 'The Economics of Collateral and Collateral Reform' in Frederique Dahan and John Simpson (eds), *Secured Transactions Reform and Access to Credit* (Edwards Elgar 2008) 81.

transactions law, entrepreneurs' access to finance will be easily facilitated.<sup>6</sup> Legal structures through which personal property can be utilised effectively as collateral could significantly improve access to finance in emerging markets.<sup>7</sup> Nigeria happens to be an emerging market and is currently one of the fastest growing economies in the world and it currently ranks at 44 out of 190 economies globally on the ease of getting credit according to the most recent Doing Business Report 2017.<sup>8</sup>

Nonetheless, there remains certain barriers to using personal property as collateral. For example, small businesses frequently need to purchase personal assets – equipment, merchandise inventories, vehicles, etc. – to keep their businesses afloat. But the cost of financing such assets on credit may require them to make a down payment and also transfer the property to the lender as collateral, and if the borrower decides to secure the loan by personal guarantee, the finance granted in return may be insufficient and likely too expensive to finance the purchase of such assets.<sup>9</sup> From a transnational perspective, almost 80% of private establishments in sub-Saharan African countries have no access to finance mostly due the type of collateral they have which are normally personal assets.<sup>10</sup>

The Nigerian government has since recognised that there are various economic constraints suffered by MSMEs in successfully accessing low-cost credit and as a result, they have introduced a number of reform initiatives and regulations with the help of international organisations. The most recent, which is the CBNR, was formulated to domestically harmonise security interest laws over personal property in Nigeria. Prior to the establishment of the CBNR, extensive reform measures were undertaken to reform secured transactions laws in Nigeria, by the IFC, an institution of the World Bank Group. This mission was carried out in 2003, and later outlined in a seminal report championed by Professor Ronald C.C. Cuming and Yair Baranes in 2004, hereinafter 'Cuming Report'.<sup>11</sup> The purpose of this mission was to assess the feasibility of establishing a modern secured transaction system involving personal property in Nigeria. The Report included recommendations towards the modernisation of security interests in Nigeria by examining the existing secured transactions laws (pledge, equitable charge, chattel mortgage, quasi-

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<sup>6</sup> World Bank, *Regional Profile: Economic Community of West African States (ECOWAS)* (Doing Business, World Bank: IFC 2012) 42.

<sup>7</sup> IFC Toolkit, 6.

<sup>8</sup> World Bank Group, 'Doing Business 2017: Equal Opportunity for All – Economic Profile Nigeria' (World Bank: Washington DC) 81.

<sup>9</sup> Heywood Fleisig, 'The Right to Borrow' (World Bank Viewpoint Note No. 44, April 1995).

<sup>10</sup> IFC Toolkit, p 6.

<sup>11</sup> Ronald CC Cuming and Yair Baranes, 'A Modern Secured Financing System involving Personal Property Collateral for The Federal Republic of Nigeria' (International Finance Corporation, 17 January 2004).

security devices, etc.) and also the various personal property registry systems, inclusive of the process of registration and court procedures applicable to the enforcement of secured transactions, in view of enacting a federal legislation on security interests involving personal property.

Following the Cuming Report, a draft legislation on security interests in personal property was formulated under the supervision of the Centre for the Economic Analysis of Law (CEAL) in 2009, hereinafter ‘Draft Law’.<sup>12</sup> The Draft Law was produced to usher in a modern and unified system of taking security in Nigeria. In consonance with the Draft Law, another report was also prepared by CEAL<sup>13</sup> hereinafter ‘CEAL Registry Report’ in 2010 to explain the technical, economic and organisation logic behind the possible adoption of an electronic notice registration system for implementation of the Draft Law. The first aspect of this chapter would be to provide a general discussions on the essentiality of the recommendations of the Cuming Report, followed by a section-by-section overview of the Draft Law.

#### **4.1.1 Cuming Report 2004**

Prior to 2004, there were no significant developments pertaining to secured transactions law reform in Nigeria. The fragmented laws on secured transactions did not provide uniform set of rules on the creation, perfection, registration and enforcement of security interests over personal property. In practice, MSMEs in Nigeria relied on financial lease, sale and leasebacks and hire purchase agreements rather than usual forms of real security such as the bill of sale and pledge respectively. The reason for the conspicuous avoidance of these transactions by many businesses was mainly because of various negative factors such as the overly-complex bill of sale law which has no place in the modern commercial world, the pledge has so far proved to be a true security device but it is not versatile enough to accommodate fluctuating assets used in the course of businesses.

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<sup>12</sup> Nuria de la Peña, Heywood Fleisig and Peter Winship, *Nigeria: First Draft Law on Security Interests in Movable Property*, (Washington DC, CEAL, October 2009). CEAL is a non-for-profit research institute that provides legal and economic analysis of public policy issues. CEAL has undertaken projects with organizations including the World Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Asian Development Bank, International Monetary Fund (IMF), Organization of American States, and with the governments of Honduras, Nicaragua, Romania, Jamaica, Ukraine, and El Salvador.

<sup>13</sup> Heywood Fleisig, Nuria de la Peña and Corey Loney, *Registry Assessment for Filing Security Interests in Movable Property, Prepared for Nigeria: Secured Finance for Movable Assets - Collateral Reform and Leasing Development* (Second Progress Report Washington DC, CEAL, March 2010) 1.

The Cuming Report was prepared by delegates of IFC which began in November 2003 during a visit to Lagos and Abuja.<sup>14</sup> The intention behind this Report was to streamline the fragmented laws on secured transactions by establishing one personal property security law regime, thereby replacing the existing patchwork of inadequate state and federal laws dealing with security interests in personal property.<sup>15</sup> The purpose of the Cuming Report significantly differed from the previous laws, which were dominated by the form attributed to each transaction by contracting parties in that the legal outcome varied categorically depending on whether the transaction was, for instance, a conditional sale, security bill of sale, or a financial lease.

The first phase of the research mission was to gather key information in order to ascertain the possibility of establishing a modern secured transaction system. This included an examination of the current personal property registration schemes, registration procedures, and court enforcement systems of secured transactions.<sup>16</sup> During this mission, it was emphasised by the Nigerian representatives of the banking and business sector that the main reasons why personal property were rarely accepted as collateral was because of inadequate substantive laws, lack of reliable sources of information to identify liens on personal properties, and enforcement procedures of security interests by the Nigerian courts was inefficient and unpredictable.<sup>17</sup> It also was proposed that a computerised notice registration system should be implemented for all types of security interests whether granted or taken by natural or legal persons, and there was a general consensus on this issue which was widely accepted by representatives of the public sector.<sup>18</sup>

The proposed ‘unified law’<sup>19</sup> was set to focus less on traditional concepts and approaches and more on implementing a policy designed to encourage growth in consumer and business financing markets in Nigeria.<sup>20</sup> It was also recommended in this Report that a four-phased reform program for dealing with security interests in personal property should be considered.<sup>21</sup> The four phases of the reform which could be found in the Action Plan of the Report<sup>22</sup> includes – a law reform scheme designed to modernise existing Nigerian law; to establish a modern, central and computerized registration system that can be utilized by

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<sup>14</sup> Cuming Report.

<sup>15</sup> Cuming Report, Recommendation 1.

<sup>16</sup> Cuming Report, 7.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> In view of enacting a federal law to regulate personal property security interests in Nigeria, the Cuming Report was prepared to provide a new secured financing system, hereinafter ‘Unified Law’.

<sup>20</sup> Cuming Report, 7.

<sup>21</sup> *ibid.*

<sup>22</sup> Cuming Report, Annex V – Action Plan and Budget, 142.

domestic lenders and international investors; create a capacity building and public awareness campaign for operators of the registry, business and legal communities and the general public; and lastly, to establish a system for monitoring and assessing the viability and impact of the new system.<sup>23</sup> The Cuming Report provides several recommendations with respect to the four phases listed above.

First, all security interests created under the proposed unified law would be characterised like a 'fixed charge' even though they could attach to all present and after-acquired personal properties of the grantor, regardless of the type of transaction the parties have designated it to be.<sup>24</sup> This would have meant that the current distinction between fixed charges and floating charges would be absent. The identification of security interests would then be based on economic function rather than its traditional legal form or language given to it.<sup>25</sup> Hence, security interests under the unified law was to be inclusive of, but not exclusive to, the equitable charge (secured debentures), conditional sales contracts, financial lease, charges on personal property (hypothecation), hire purchase, security bills of sale, and all other recognised forms of secured transactions. For example, hire-purchase agreements would remain subject to the Hire Purchase Act 1965, but would then be subjected to the registration and priority rules of the unified secured transactions law.<sup>26</sup> The hire-purchase is a quasi-security device,<sup>27</sup> but nonetheless, it was deemed as a method of secured financing for the purpose of harmonisation of personal property security law in Nigeria. The same can also be said for conditional sale and financial lease transactions which will then operate uniformly with regards to registration and priority rules.

Several recommendations were made and it was agreed that parties should be free to use any form of agreement which reflects the intention of creating a security interest in personal property. This was an important feature of the Cuming Report which provided for the possibility of taking security in constantly changing assets such as inventories and book debts.<sup>28</sup> Obviously, this would provide freedom of contract for parties in that they will not be restricted in using any type or quantity of collateral to secure a debt, secured creditors would be able to take security over after-acquired property, securing of later advances as

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<sup>23</sup> Cuming Report, 8.

<sup>24</sup> Cuming Report, 52 and 72.

<sup>25</sup> Cuming Report, Recommendation 5.

<sup>26</sup> Cuming Report, Recommendation 6.

<sup>27</sup> Roy Goode, 'The Private Initiative and Security for Payment under English Law' (2002) 54 RIDC 41, 48.

<sup>28</sup> Cuming Report, 35.

agreed between the parties would be possible, while tacking the priority status of later advances to the security interest as earlier secured would also be possible.<sup>29</sup>

Priority status would be determined either through registration of the security interest in any type of collateral inclusive of intellectual property right and negotiable instruments, by surrendering of possession for example pledging of property or warehouse receipts, or by operation of law as in the case of judgment liens.<sup>30</sup> Additionally, it was recommended that security interests in intellectual property, including all economic rights associated with such properties, will be recorded in the proposed 'Secured Transactions Registry', a creation of the uniform law, and not at the administrative intellectual property offices which were earlier responsible for recording such rights.<sup>31</sup> In addition, priority status may be granted in some situations where registration cannot be effected or when possession cannot be totally surrendered.<sup>32</sup> Examples of such situations could be where the property is part of proceeds from an original collateral, thus, making it difficult for the secured creditor to determine in advance what the proceeds might actually be. To solve this problem, it was expressly recommended that the proposed law should give a period of fifteen days during which the secured creditor may amend the registration to reflect the proceeds as part of the original collateral without losing the earlier priority status.

It was also argued that attachment of the security interest to the collateral after the security interests comes into existence or the date the security agreement is signed should not determine priority status.<sup>33</sup> Rather, priority status would only be gained from the date of registration of the security interest.<sup>34</sup> The concept of attachment on collateral gives the secured creditor an *in rem* right against the grantor and not necessarily against all third party claimants. Also, attachment will not automatically lead to priority over third party claimants in that before a security interest attaches, there must have been an existing security agreement between the parties, the grantor must have real rights in the collateral, value must have been given by the secured creditor, and the secured creditor or his agent must have taken possession of the collateral, or, the security agreement must have been signed by the grantor which will contain an identifiable description of the collateral.<sup>35</sup> On the other hand, the Report stated that registration (perfection) could be effected before or after attachment

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<sup>29</sup> Cuming Report, Recommendation 8.

<sup>30</sup> Cuming Report, 37 -39.

<sup>31</sup> Cuming Report, Recommendation 9.

<sup>32</sup> *ibid.*

<sup>33</sup> Cuming Report, 40.

<sup>34</sup> Cuming Report, 39.

<sup>35</sup> Louise Gullifer, *Goode on Legal Problems of Credit and Security* (5th edn, Sweet & Maxwell 2013) 63 - 64.

which normally provides the secured creditor with a predictable time of priority regardless of the changing circumstance of the security agreement without a need to amend the financing statement so long as it does not affect major information.<sup>36</sup>

Pertaining to special priorities for purchase money creditors, super priority would be given to them as against ordinary secured creditors.<sup>37</sup> This is because a purchase money creditor who has provided capital for the procurement of property on behalf of a grantor should be given a superior priority to that particular property, because without this priority, a purchase money creditor would hesitate in providing finance to the grantor, who may have an existing encumbrance that contains an after-acquired clause which could automatically attach to future assets. Thus, it was recommended for the unified law that there should be a special priority rule for purchase money creditors who have perfected their security interest by registration regardless of whether registration was effected after other secured creditors had taken security over the debtor's after-acquired properties.<sup>38</sup> Relatively, it was also considered that security interests, other than a PMSI, would be subject only to tax obligations, rates and other debts such as non-consensual liens owed to public institutions, which have been recorded in the Secured Transaction Registry before the creation and registration of the security interest.<sup>39</sup> This transparency serves to avoid surprises as a result of the existence of hidden encumbrances arising out of obligations owed to public institutions and government bodies in these establishments will need to register their liens before the security interest will be effective. If the liens are not recorded in the Registry, a third party creditor will take free of the security interest held by these public establishments. However, other than a PMSI, the claims of each unpaid employee for a specified amount would take priority over other types of security interests.<sup>40</sup>

There is provision for the enforcement of security interests under the unified law through self-help and receivership. Ordinarily, enforcement through court proceedings will be an effective way of settling secured transaction disputes, but in Nigeria, it is an open secret there are often delays in the enforcement of property rights. Alternatively, with regards to self-help, while the court will not be entirely excluded from involvement, the use of dispute resolution mechanisms was recommended.<sup>41</sup> It was expressed that the unified law

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<sup>36</sup> Cuming Report, 82.

<sup>37</sup> Cuming Report, 44 and 51.

<sup>38</sup> Cuming Report, Recommendation 12.

<sup>39</sup> CAMA, s 494 provides that taxes, rates, unpaid salaries of labourers and workmen, deductions under the National Provident Fund Act (Cap No. 88), wages due to services rendered by employees of companies, shall be given priority to all other debts. See Cuming Report, Recommendation 16.

<sup>40</sup> Cuming Report, Recommendation 16.

<sup>41</sup> Cuming Report, 63.

should provide for the option of settlement of disputes by arbitration where any of the parties may elect to refer the dispute to an arbitrator.<sup>42</sup> Also, under the unified law, the secured creditor will be provided with the opportunity of realising the secured loan by disposing the assets in good faith. This will be achieved where reasonable notice is given to the grantor before disposition of the collateral, by taking possession of the collateral without breach of peace or an unlawful act, and remitting the balance after a legitimate sale of the property has been conducted as prescribed.<sup>43</sup> Regarding enforcement of security interest, it was suggested that the use of receivership should be implemented in the unified law, and it should not be confined to situations where the grantor is a corporate entity.<sup>44</sup> Hence, natural persons and unincorporated businesses will also benefit from a receivership regime synonymous with what is found under section 387 – 400 CAMA. In this context, a secured creditor will be able to appoint a receiver or manager if there is a clause in the secured agreement providing for such power, or the court may choose to appoint a receiver or manager if requested.<sup>45</sup>

In the previous chapter, it was established that a secured creditor could take security by way of fixed charge or floating charge over the personal property of a company.<sup>46</sup> Radically, the Report recommended that there will be no distinction between the fixed and floating charge as all security interests taken will be deemed as specific ‘fixed’ charges capable of being granted by corporations and natural persons.<sup>47</sup> Thus, section 178 and 179 CAMA will no longer be applicable to any security agreement not discharged or terminated before the unified law comes into force, except to the extent that they apply to floating charges on land.<sup>48</sup> Also, registration of equitable charges after the enactment of the unified law will no longer be required, and all registrations created under section 197 – 207 CAMA would be treated as registration under the unified law for a specific period upon which they would have to be recorded into the register.<sup>49</sup> The security bill of sale laws were also

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<sup>42</sup> Cuming Report, 65 – 66; Recommendation 22. Arbitration proceedings will be subject to the s 2 – 36 Arbitration and Conciliation Act (ACA) 1988, CAP A18, LFN 2004. Where parties cannot agree on the appointment of an arbitrator, a Judge of the Federal High Court may give directions, Cuming Report, Recommendation 21.

<sup>43</sup> Cuming Report, Recommendation 18.

<sup>44</sup> Cuming Report, 60 - 61.

<sup>45</sup> Cuming Report, 61.

<sup>46</sup> CAMA, s 178 - 179.

<sup>47</sup> Cuming Report, 72 - 73.

<sup>48</sup> Cuming Report, Recommendation 29.

<sup>49</sup> Cuming Report, Recommendation 30.



considered and it was recommended that it should no longer be recognised as a form of security interest in personal property after the unified law has been enacted.<sup>50</sup>

#### *4.1.1.1 A Central Electronic Registration System: Transaction Filing vs. Notice Registration*

The Cuming Report suggested that there should be a single and central online registry for recording security interests in personal property created in any part of Nigeria.<sup>51</sup> This would include registration of all types of secured transactions involving both legal and natural persons.<sup>52</sup> This is not the first registration system in Nigeria operating under similar arrangements. The CAC is responsible for the registration of company charges but it does not cater for quasi-securities or security interests granted by natural persons.<sup>53</sup> Currently, registration at CAC is carried out through ‘transaction-filing’ method, that is, the secured creditor lodges a copy of the security instrument in the registry. At CAC, the secured creditor submits the particulars of registration together with the charge instrument in documented format for manual or electronic filing.<sup>54</sup> When a search is requested by an interested party, the registrar produces the agreement itself or a summary of the recorded transaction as the case may be.<sup>55</sup> To an extent, this method has worked genuinely but it would be problematic where there is a large volume of security interests to be registered. Secondly, the publicity of sensitive business information is another problem which the transaction-filing system does not circumvent especially where a business competitor is an interested third party conducting the search.

Lest we forget, it has been reiterated that the unified law seeks to operate a functional approach to taking of security.<sup>56</sup> It was suggested that this approach will be supported with the use of ‘notice registration’ system for publicising security interests involving both natural

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<sup>50</sup> Cuming Report, Recommendation 31. Currently, in Nigeria, a bill of sale can be granted either by way of security (chattel mortgage) or by outright assignment of the personal chattel, see for example Bills of Sale Law Cap B2 Vol. 1, Laws of Lagos State 2003.

<sup>51</sup> Cuming Report, 78.

<sup>52</sup> In actuality, it is near impossible to find a legal system that encompasses all security devices over all types of personal property governed by a single secured transactions statute. As a result, many legislative regimes have excluded ship mortgages and aircraft financing from the ambit of their secured transactions law because these large assets have special laws applicable to them. See for example, New Zealand PPSA 1999, s 23 (e); s 23A.

<sup>53</sup> CAMA, s 7, s 197; Companies and Allied Matters (Fees) Regulations 2003, s 6 – 7. The CAC is a creation of CAMA, formed in 1990 after the dissolution of the Company Registry, an internal department within the Federal Ministry of Trade which was once responsible for the administration of the repealed Companies Act 1968. The general function of the CAC is to regulate the formation and management of corporate establishments in Nigeria.

<sup>54</sup> *ibid.*

<sup>55</sup> Cuming Report, 81.

<sup>56</sup> Cuming Report, Recommendation 5.

and legal persons.<sup>57</sup> The Nigerian transaction-filing system at the CAC contrasts significantly with some other developed regimes which operates the notice registration system, for example, the UCC Article 9. The Cuming Report suggested that notice registration should be adopted in Nigeria upon the enactment of the proposed unified law. Both types of registration systems differ in that the transaction-filing system requires the registration of the agreement while notice registration requires the registration of an intention to register before or after attachment of the security interest.<sup>58</sup> The notice registration (or notice-filing) system first gained recognition in the US.<sup>59</sup> The underlying feature of notice registration helps to relieve secured creditors from the onerous duty of repeated filings which can be equated with transaction-filing registration schemes.<sup>60</sup>

Notice registration helps to save file storage cost where the security interest is filed manually, while providing an opportunity for 'blanket registration', that is, the possibility of perfecting subsequent security agreements with a single financing statement.<sup>61</sup> This indirectly eliminates the need to make repeated filings because one single registration will apply to subsequent agreements between the same parties.<sup>62</sup> For instance, Creditor A decides to register his security interest after encumbering the book debts of Debtor B by notice registration. In the event that Debtor B requires additional credit, Creditor A need not register the additional credit as a separate security interest. The terms of the first security agreement can be amended to reflect continuous obligations made between Creditor A and Debtor B, so long as the changes in the subsequent amendment does not affect vital information, for example, the identity of the parties. The notice registered on the register is used to invite further enquiry rather than provide a summary of the transaction. Additionally, the intention of notice registration is not to inform searchers of the terms of the security agreement between the secured creditor and the grantor, but merely to alert searchers to the possibility that the secured creditor may have encumbered the collateral of the grantor. This registration system would allow secured creditors and those carrying out searches total control over the timing of registration and search, and margin for error will be reduced since contracting

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<sup>57</sup> Cuming Report, 81.

<sup>58</sup> Discussion Paper on Registration of Rights in Securities by Companies (Scottish Law Commission Discussion Paper No 121, October 2002) 8.

<sup>59</sup> Douglas G Baird, 'Notice Filing and the Problem of Ostensible Ownership' (1983) 12 JLS 53; Douglas G Baird, 'Security Interests Reconsidered' (1994) 80 Virg L Rev 2249; Jeffrey W Morris, 'The Fruits of Mischievous Seeds: Notice Filing Under Article 9 and the Continuing Problem of Trade Names' (1985-1986) 11 U Dayton L Rev 241.

<sup>60</sup> Grant Gilmore, *Security Interests in Personal Property* (Vol. 1 The Law Book Exchange Ltd, New Jersey Reprint 1999) 463 - 498.

<sup>61</sup> Anthony Duggan, 'A PPSA Registration Primer' (2011) 35 Melb U Rev 865, 872 - 873.

<sup>62</sup> Cuming Report, 82.

parties need not rely on a registry staff to manually enter or scan information into the online register.<sup>63</sup>

As exemplified under Article 9,<sup>64</sup> it was recommended in the Cuming Report that the information required to complete a valid notice registration will be sufficient if it provides an identifier of the secured creditor, an identifier of the grantor and a description of the collateral without the necessity of including the amount secured.<sup>65</sup> Specifically, registration-search criteria will be distinguished by name of the business in the case of unincorporated businesses; for natural persons, the identifier would be the father's name, traditional name, English name and date of birth; corporate enterprises would be identified by their RC Number; while tangible collaterals not held or transferred for sale during the course of the grantor's business would be identified by unique identifiers such as serial numbers, for example, oil and mining machineries, farm equipment's and motor vehicles.<sup>66</sup> Where the goods are not specific and normally changing as it is the situation with livestock and raw material assets, buyers of such property, in good faith, will take free of the creditor's security interest in so far as the sale occurred during the ordinary course of the grantor's business.<sup>67</sup> Be that as it may, it was asserted that alternative methods of searching and accessing the register should be provided since not every interested person may have access to the internet. Hence, registrations and searches should be permitted from other locations which have made special arrangements with the Registry such as government and private agencies.<sup>68</sup>

Computerising the register as against paper filing avoids the probable risk of mistake during transcription. There is always the possibility that a person, normally staff of the registry, could make registration mistakes which could prove costly. For instance, if the staff mistakenly registers the grantor's first name as 'Marin' instead of 'Martin', this may result in the security interest unsearchable. This raises a fundamental question: who would be responsible for this type of error: the registry, the searcher, or the registrant of the security interest? While the Registry cannot guarantee the validity of the notice information provided by parties, losses suffered as a result of operational errors, omissions or malfunctions of the registration system software and hardware will be borne by the Registry.<sup>69</sup> Nevertheless,

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<sup>63</sup> Cuming Report, 79.

<sup>64</sup> UCC Article 9-502.

<sup>65</sup> Cuming Report, Recommendation 36.

<sup>66</sup> Cuming Report, Recommendation 40.

<sup>67</sup> Cuming Report, 88 – 89.

<sup>68</sup> Cuming Report, 79 – 80.

<sup>69</sup> Cuming Report, 91 – 92.

legislative intervention may be required in situations where the searcher or the secured creditor will bear the risk. Where the searcher would bear the risk, legislation may need to include a provision stipulating that the registration is effecting from the time the financial statement (notice) is recorded in the register, or conversely, the risk may be borne by the secured creditor if legislation provides that registration will remain ineffective until the notice information is entered correctly.

#### *4.1.1.2 Collateral Registry Operation and Fees*

Since the operation of the Registry would most likely affect legal and economic rights of parties, it was recommended that it should be a creation of legislation and remain under the control of the federal government of Nigeria.<sup>70</sup> With the possibility of implementing a notice registration system already discussed above, it was opined that the proposed unified law may delegate the operation of the collateral registry to the CAC, but with updated computer facilities.<sup>71</sup> Although, registration by transaction-filing will continue to be permitted, it was envisaged that the bulk of registration will be undertaken by notice registration, thus minimising the workload earlier experienced by CAC while reducing the number of required staff to enter data in the register.<sup>72</sup> Alternatively, it was also stated that the CBN may also operate the Registry as it is a highly secure institution, but due to the fact that central banks rarely operate collateral registries and since they do not interact with the general public at large, the CBN operating the registry was viewed not to be wholly feasible.<sup>73</sup> It was further recommended that there should be further investigations about the efficacy of using non-governmental organisations under government supervision to operate the register.<sup>74</sup> The Registry operations, of course, would need to be financed and a viable source of such finance will normally be received from registration fees.<sup>75</sup> This would cover the cost of operating the Registry, but it stipulated that it must not be used as a vehicle for making profit or gaining additional revenue by the government, while consequently, no stamp duties will be charged for registration.

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<sup>70</sup> Cuming Report, Recommendation 43.

<sup>71</sup> Cuming Report, 99.

<sup>72</sup> *ibid.*

<sup>73</sup> Cuming Report, 100 – 101.

<sup>74</sup> *ibid.*

<sup>75</sup> Cuming Report, 97.

#### 4.1.1.3 *Training and Public Awareness, Monitoring and Impact Assessment and Project Implementation Strategy*

It was recommended that training programs should be undertaken in order to provide diverse opportunities for interested parties (judges, registry staff, private and public counsel, and executive officers, etc) to learn and understand how the Registry will operate.<sup>76</sup> This would be carried out mostly through workshops and other public awareness programmes. Familiarity with the secured transaction and registration system might help in stimulating an increase in credit demand as it is important that the public are aware of the operations of the secured transactions law and the technicalities of searching the register.<sup>77</sup>

The Cuming Report recommended that there should be a monitoring system for assessing the impact of the unified law and the Registry, with a proposal for a report prepared bi-annually containing an impact of the system on lending including recommendations for further improvement of the unified law and the secured transactions registry.<sup>78</sup> In respect of project implementation, it was proposed that a Consultancy Expert Group (CEG) composed of persons who are professionals in secured transaction law reform projects should be set up in order to facilitate its implementation.<sup>79</sup> The main duties of the CEG would be to produce and submit a law reform proposal and to provide support during the implementation of the action plan towards the creation of the secured transactions registry.<sup>80</sup>

## **4.2 Analysing the Work of CEAL on Secured Transactions Law in Nigeria: Draft Law 2009 (and CEAL Registry Report 2010)**

In October 2009, CEAL published a Draft Law,<sup>81</sup> reflecting the majority of recommendations laid down in the Cuming Report 2004. The Draft Law was inspired by the work of UCC Article 9 and the ST Guide.<sup>82</sup> Other international sources referred to in this analysis are generally consistent with, but not completely synonymous with, the provisions of the Draft Law. Where relevant, this analysis explains the probable reasons for a particular

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<sup>76</sup> Cuming Report, Recommendation 44.

<sup>77</sup> Cuming Report, 106 – 107.

<sup>78</sup> Cuming Report, Recommendation 45.

<sup>79</sup> Cuming Report, Recommendation 46.

<sup>80</sup> *ibid.*

<sup>81</sup> See Nuria de la Peña, Heywood Fleisig and Peter Winship, *Nigeria: First Draft Law on Security Interests in Movable Property*, (Washington DC, CEAL, October 2009), 'Draft Law'.

<sup>82</sup> The ST Guide serves as a 'comprehensive blueprint for states wishing to modernise their secured transactions regimes', see Richard M. Kohn, 'Promoting the Implementation of the United Nations Convention on the Assignment of Receivables in International Trade and the UNCITRAL Legislative Guide on Secured Transactions', Comments at the Congress to Celebrate the 40th Annual Session of UNCITRAL (Vienna, 9–12 July 2007).

approach, while discussing the policy rationale behind the Draft Law. However, the views and opinions in the Draft Law do not necessarily represent those of the Nigerian government, but only for the purposes of discussion, towards enacting a uniform legislation on personal property security as recommended by the Cuming Report.

#### **4.2.1 Part I - General Provisions**

It was stated in the Draft Law that the proposed legislation will be referred to as ‘Security Interests in Movable Property Act’ to provide for the creation, priority, registration and enforcement of security interests in personal property.<sup>83</sup> The proposed reforms stated in the Draft Law is applicable to all security interests in personal property, both tangible and intangible, in Nigeria regardless of its form or denomination, thus accepting their economic purpose as functional equivalents.<sup>84</sup> The existence of the law would not repeal all the previous laws which governed security interests, except those that are contrary to the provisions of the Draft Law.<sup>85</sup> The scope of the Draft Law encompasses all security interests in personal property created by agreement that secure payment or other obligatory performances.<sup>86</sup> For the avoidance of doubt, a security interest will be deemed as synonymous to a security right, interest or charge in personal property inclusive of fixtures which secures payment or performance of an obligation.<sup>87</sup> This was the first ever attempt to unify and codify all security interest laws in personal property in Nigeria under one statutory enactment. It was even alleged that the Draft Law, if enacted, would be ‘the most comprehensive and advanced in the world!’<sup>88</sup> Sadly, this Law which was deemed impeccable was not enacted into legislation in Nigeria. If successfully enacted and implemented, it would have positively impacted on business access to finance in Nigeria. Financial institutions would have been able to lend while minimising the risk normally associated with unsecured lending because they would be protected by statutory provisions,

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<sup>83</sup> Draft Law, preamble.

<sup>84</sup> *ibid.*

<sup>85</sup> Draft Law, para 92.5.

<sup>86</sup> Draft Law, para 1.1.

<sup>87</sup> Draft Law, 8. The term ‘security interest’ as used in Article 9 of the Uniform Commercial Code (UCC) is not often referred to in continental Europe as equivalent to ‘security right’ which is the term commonly used instead in that it is recognised that an ‘interest’ is not equal to a right. However, the Draft Law and CBNR does not differentiate between both terms.

<sup>88</sup> Heywood Fleisig, Nuria de la Peña and Corey Loney, *Registry Assessment for Filing Security Interests in Movable Property*, Prepared for Nigeria: Secured Finance for Movable Assets - Collateral Reform and Leasing Development (CEAL Second Progress Report, Washington DC, March 2010) summary I, ‘Registry Report’.

where the existing substantive property and commercial laws have so far proved to be deficient.

One of the main reasons for proposing a Draft Law was to replace the Nigerian statutory provisions on equitable charges (section 178 – 182 CAMA), thereby establishing a comprehensive and functional approach in taking security in personal property owned by corporations as suggested in the Cuming Report.<sup>89</sup> For instance, it was reiterated in the CEAL Registry Report that the CAC was not adequately utilised for registration of equitable charges to the extent that when compared with other countries, about 1,800 charge registrations are done at the CAC as against one million in Romania.<sup>90</sup> Although in reality, due to administrative expenses, there are charges that exist which are not filed at the CAC, and are only filed when the grantor is on verge of insolvency leading to loss of priority against third party claimants who may have already perfected their security interest.<sup>91</sup>

As proposed in the Cuming Report, it was reiterated again that electronic-based notice registration would be introduced in the proposed legislation which will bring about faster and cheaper filing of security interests, safer system of publicity, and, certainty in determining priority based on the time of registration.<sup>92</sup> Of course, there are other methods of providing the public with notice of security interests, including newspaper announcements, online media and other public postings, but their effectiveness was deemed to be rather limited and the cost of publication with these systems was likely to be more expensive than notice registration.<sup>93</sup> Besides, a secured creditor relying on public announcement and advertisements may lose priority against subsequent creditors as a result of difficulties associated with predicting the exact hour and minute the third party will receive the notice especially where the communication system is poor especially in rural locations in Nigeria.

The Draft Law does not apply to ships, land except for rules governing fixtures, lien arising by operation of law except for filing of notice of their existence, aircraft and other mobile equipment's as defined in international conventions to which Nigeria is a signatory.<sup>94</sup> An example of such Convention is the Convention on International Interests in Mobile Equipment,<sup>95</sup> which is divided into separate protocols for three different types of mobile

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<sup>89</sup> Draft Law, 1 (see commentaries); Cuming Report, Recommendation 5.

<sup>90</sup> CEAL Registry Report, summary ii. The lack of use was attributed mostly to evasion of taxes and filing fees, negligence and ignorance on the part of corporations, complex transaction-filing procedures, and administrative problems at the registry which indirectly leads to frustration, or, a combination of these factors.

<sup>91</sup> CEAL Registry Report, 1.

<sup>92</sup> CEAL Registry Report, summary iii.

<sup>93</sup> CEAL Registry Report, 12.

<sup>94</sup> Draft Law, p 7.

<sup>95</sup> Cape Town, 2001 < <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> > last accessed 3 November 2016.

equipment (space objects,<sup>96</sup> railway rolling stock<sup>97</sup> and aircraft<sup>98</sup>). Nigeria has ratified the Convention and the Aircraft Protocol, thus making it a recognised law in Nigeria. In contrast, although certain excluded types of asset for instance, land, in the Draft Law extends to a type of proceeds for instance, rent, so the Draft Law will apply to the security interest in the receivable except to the extent that the law governing the type of asset states otherwise.<sup>99</sup>

#### **4.2.2 Part II - Creation of Security Interests**

The procedure for creation of security interests in personal property must be satisfied in order for it to be effective between the parties. The parties may either be natural or legal persons.<sup>100</sup> The Draft Law does not specify the legal personality of a secured creditor, hence, a secured creditor could be a corporation, financial institution, pawnbroker, private moneylender or an individual in so far as the secured transaction is undertaken for commercial purposes.<sup>101</sup> The Draft Law states that security interest shall be created by an agreement (unless otherwise provided in this law) between the grantor and secured creditor, which may also be created in fixtures, such as generators and water pumps not permanently attached to land, and proceeds of letters of credit.<sup>102</sup> Also, a security interest created in personal property will continue to exist even though the personal property becomes attached to land.<sup>103</sup>

It is mandatory for the party in possession of the collateral to take reasonable care in preserving the collateral and its value, while being reimbursed for reasonable expenses incurred for preserving the collateral, and to make reasonable use of the collateral in his possession, and may apply the proceeds generated by the collateral to the payment of the secured debt.<sup>104</sup> Practically, irrespective of whether the property is in the possession of the grantor or secured creditor, the responsibility of ensuring that the asset is preserved in a

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<sup>96</sup> <http://www.unidroit.org/english/conventions/mobile-equipment/spaceassets-protocol-e.pdf> last accessed 12 December 2016.

<sup>97</sup> <http://www.unidroit.org/english/conventions/mobile-equipment/railprotocol.pdf> last accessed 12 December 2016.

<sup>98</sup> <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> last accessed 12 December 2016.

<sup>99</sup> Draft Law, 7.

<sup>100</sup> Draft Law, para 16.1.

<sup>101</sup> For instance, where a furniture company provides inventories for the purpose of furnishing the home of a natural person on credit, the agreement would not be categorised as a secured transaction, but rather, a consumer transaction.

<sup>102</sup> Draft Law, para 9.4.

<sup>103</sup> ST Guide, chapter 2, para 96 – 99, 126 – 127; Recommendation 13, 21 and 27.

<sup>104</sup> Draft Law, para 10.1; ST Guide, chapter 6, para 24 – 34, 126 – 127; Recommendation 111, 113 (a), (b). It was commented in the reform meeting that this provision may be too sophisticated to be applied in Nigeria, thus making it subject to abuse.



responsible manner should apply to both parties. The secured creditor is also entitled to inspect the encumbered property in the grantor's possession.<sup>105</sup> This entitlement may only be applicable if there is an agreement between the parties.<sup>106</sup>

For a security interest to be effective, it is required that it must be reduced into writing and signed by the grantor, even in the absence of consideration, in so far as the grantor has right or power to transfer the property as collateral.<sup>107</sup> However, it is also required that the writing and signature, whether electronic or not, must satisfy the requirements of the Evidence Act.<sup>108</sup> Collateral must be sufficiently described in the security agreement by genre, by specific asset, or by encumbering 'all present and after acquired movable property'.<sup>109</sup> A security agreement may take security in future advances such as money, credit or interests payable by the grantor.<sup>110</sup> This could also include costs incurred and expenditure made during the protection, maintenance, preservation or repair of the collateral.<sup>111</sup>

In Nigeria, save for the floating charge, future assets cannot be taken as security as it is sometimes impossible to describe it since it is intangible.<sup>112</sup> The floating charge provides flexibility to corporate enterprises for the purpose of taking securities over their present and future assets, while it continues to carry on its business activities as it normally would on a daily basis.<sup>113</sup> Similarly, the approach of the Draft Law is significantly parallel in its flexibility in taking security in that it recognises security interests in future assets.<sup>114</sup> Thus, at least in theory, natural and legal persons would be able to grant present and future assets as security. In this instance, the secured creditor may obtain the future property as security which becomes effective when ownership rights in the specified collateral, as set out in the agreement, is transferred to the grantor.<sup>115</sup> Whether this categorisation can also automatically extend to a replacement of the original collateral is disputable within this law, but in a wider

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<sup>105</sup> Draft Law, para 10.2; ST Guide, Chapter VI, para 24 – 34.

<sup>106</sup> Draft Law, 11, Commentaries.

<sup>107</sup> Draft Law, para 12.

<sup>108</sup> Draft Law, para 12.2. The Evidence Act referred to in this Draft Law pertains to the old statute - Evidence Act 1945 - which is no longer applicable at this present time. This Act did not recognise as evidence computer generated documents and documentary executions in electronic format, although in a few instances, the court through discretionary exceptions allowed its acceptance in court, see *Festus Sunmola Yesufu v ACB* (1976) 4 SC 1; *Elizabeth Anyaebosi v RT Briscoe (Nig.) Ltd* (1987) 3 NWLR 84. Be that as it may, the new Evidence Act 2011, section 93, has now provided for electronic proof of execution of documents.

<sup>109</sup> Draft Law, para 13.1.

<sup>110</sup> Draft Law, para 14.1

<sup>111</sup> *ibid.*

<sup>112</sup> For example, the Bills of Sale Act, Lagos State 2003, s 10, prohibits the taking of security over after-acquired personal chattels of a grantor. Only legal persons (corporate enterprises) can grant floating charges over future assets such as book debts – CAMA, s 197 (2).

<sup>113</sup> CAMA, s 197 (1); Cuming Report, para 3.2.3.

<sup>114</sup> Draft Law, para 15.1.

<sup>115</sup> *ibid.*

context, it may well be that a replacement could also be classified as a future asset, depending on how the security agreement is drafted.<sup>116</sup>

In furtherance of the flexibility afforded to a grantor, before default, there is no restriction in administering or disposing the collateral and its proceeds in any manner which may include sale, lease or grant of subsequent security.<sup>117</sup> This is one of the basic features of personal property because when they are sold, leased or even licensed, the grantor often receives, in exchange of the collateral, money, tangible properties, or intangible properties. The tangible properties could be goods while the intangibles could be account receivables. These proceeds are usually referred to as ‘proceeds of disposition’.<sup>118</sup> During the course of business, where the property has been acquired by a third party purchaser or lessee with or without notice of the existence of the security interest, the third party will take the property free of the existing security interest.<sup>119</sup> This principle will also be applicable even though the purchaser or lessee is aware of any restrictive covenant which prohibits any assignment of the collateral.<sup>120</sup> However, if title is passed to a third party after the grantor has defaulted, the purchaser or lessee’s title will most likely be defective. Where the grantor carries on his business in the absence of default, the collateral may be validly subjected to a judgment lien which may be levied during a judgment enforcement proceeding.<sup>121</sup>

The secured creditor usually has the right to seize and dispose the collateral if the grantor fails to perform the agreed obligation as set out in the security agreement. The secured creditor’s security interest in the property remains attached to the collateral even after the property has passed to a third party, and the security may be enforced by requesting the collateral proceeds received by the grantor from the disposition, or by taking possession of the collateral from the third party.<sup>122</sup> The third party who did not take the collateral free of the security interest will be deemed to have acquired a defective title from the grantor. In the event that the secured creditor wishes to enforce his right over the collateral together with the proceeds, the amount secured by the original collateral and the proceeds would be limited to the value of the collateral as at the time the collateral was granted.<sup>123</sup> Where a restrictive clause in the secured agreement is structured in such a way that it seeks to activate

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<sup>116</sup> IFC Toolkit, 20.

<sup>117</sup> Draft Law, para 18.1.

<sup>118</sup> Increasing Access to Credit: Reforming Secured Transaction Law (ITC Technical Paper BE-10-180.E, Geneva 2010) 40.

<sup>119</sup> Draft Law, para 18.3.

<sup>120</sup> *ibid.*

<sup>121</sup> Draft Law, para 18.2.

<sup>122</sup> Draft Law, para 20.1; See also UCC Article 9, 315 (a) – Secured party’s rights on disposition of collateral and in proceeds.

<sup>123</sup> Draft Law, para 20.2.

immediate payment and enforcement of the debt upon the grantor providing another security interest in the same collateral, the clause will be void.<sup>124</sup> Covenants that prohibit the assignment of a right to payment, or one requiring the account debtor's consent before being payable, or a covenant creating a default in agreement whenever a right to payment is assigned will also be rendered void.<sup>125</sup>

If the security interest covers all the grantor's property, both existing and future, or all the grantors property of a specific type, the grantor is entitled to ask for the particular type of property which is serving as the collateral.<sup>126</sup> For this purpose, the grantor will need to provide to the secured creditor an approximate valuation or description of the collateral to be approved by the secured creditor.<sup>127</sup> A response must be provided to the grantor no later than thirty calendar days after which the approximate valuation or collateral description settled by the grantor becomes effective against assignees who may have relied on the grantor's statement.<sup>128</sup> Once a security agreement has been completed, a party would be free to recover either possession of the once-encumbered property, or have unrestricted access to them, or both. In addition, the security interest may be terminated by the secured creditor by releasing all or some of the security interest or by judicial order.<sup>129</sup> No later than forty calendar days following the termination of the security interest, the secured creditor must send a notice of discharge to the registry for archiving.<sup>130</sup> Upon demand, the secured creditor would need to convey the property back to the grantor, that is, if all commitments have been fulfilled, by making full payment of the loan or as otherwise agreed.<sup>131</sup> Upon termination, the agreement comes to an end. Failure to comply with the requirement of termination may render the secured creditor liable for any incidental or consequential damages caused to the grantor set as a specified sum.<sup>132</sup>

#### **4.2.3 Part III - Publicity and Priority**

Countries without an effective and predictable priority system often account for an average of 30 – 32% gross domestic product (GDP) for credit to the private sector compared with an

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<sup>124</sup> Draft Law, para 19.1

<sup>125</sup> Draft Law, para 19.2.

<sup>126</sup> *ibid.*

<sup>127</sup> Draft Law, para 21.1.

<sup>128</sup> Draft Law, para 21.2; UCC Article 9, 210 - Request for accounting; request regarding list of collateral or statement of account.

<sup>129</sup> Draft Law, para 22.2 (a) & (b).

<sup>130</sup> Draft Law, para 22.3.

<sup>131</sup> Draft Law, para 22.4; ST Guide, Recommendation 112.

<sup>132</sup> Draft Law, para 22.5.

average of 60% for countries where security interests are perfected with a clear predictable system.<sup>133</sup> The need for publicity for priority purposes still remains one of the most fundamental aspects of any secured transactions law.<sup>134</sup> Unreformed systems do not have a complete set of priority rules. Priority for competing claims in collateral often pose problems especially where different laws provide for different registration systems leading to inconsistencies as it is the case in Nigeria. For instance, where a grantor pledges a leased property in lieu of an advancement from a pledgee who is unaware of the existence of the lease upon searching the collateral registry, who would have priority – the pledgee or the lessor? Also, the value of the collateral is most likely to depreciate as a result of inconsistency with priority rules irrespective of whether the collateral has a high market value.

Registration leads to publicity of the security interest in a property, and when this happens, then it is deemed to be ‘perfected’ against third party claimants.<sup>135</sup> The existence of a registered security interest cannot be rebuffed by another creditor on the basis of lack of awareness of its existence so long as it has been validly registered.<sup>136</sup> Also, perfection could also confer priority on the secured creditor since a person who first takes a security interest in a collateral may be given priority over other subsequent security interest holders in the same collateral.<sup>137</sup> This is an equitable principle which is often referred to as the ‘first in time rule’.<sup>138</sup> The Draft Law applies to any security interest in personal property and will be effective against third party claimants so far as the security interest has been electronically registered in the online register.<sup>139</sup> Previously, evidence produced from online transactions under the Nigerian Evidence Act was inadmissible as it failed to recognise documentary evidence produced electronically.<sup>140</sup> During the time CEAL produced this Draft Law, the

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<sup>133</sup> Mehnaz Safavian, Heywood Fleisig and Jevgenijs Steinbuks, *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance* (Private Sector Development Viewpoint, No. 307, World Bank, March 2006).

<sup>134</sup> See generally, Homer Kripke, ‘The Last Event Test for Perfection of Security Interests under Article 9 of the Uniform Commercial Code’ (1975) 50 NYU L Rev 47; Terry Anderson, Marianne Culhane and Catherine Lee Wilson, ‘Attachment and Perfection of Security Interests under Revised Article 9: A “Nuts and Bolts” Primer’ (2001) 9 ABI L Rev 1; Roy Goode, ‘Security in Cross-Border Transactions’ (1998) 33 Tex Int’l LJ 47; Millard H. Ruud, ‘Perfection of Security Interests under Article 9 of the Uniform Commercial Code—How? When? Where? How Often?’ (1965) 44 Tex L Rev 724; Steven Weise, ‘Perfection by Possession: The Need for an Objective Test’ (1992) 29 Idaho L Rev 705.

<sup>135</sup> Philip R Wood, *Comparative Law of Security Interests and Title Finance* (2nd edn, Sweet & Maxwell 2007) 140.

<sup>136</sup> Draft Law, para 24.3.

<sup>137</sup> Richard Calnan, *Taking Security* (1st edn, Jordans Publishing Ltd 2006) 7.19.

<sup>138</sup> *ibid.*

<sup>139</sup> Draft Law, para 24.1.

<sup>140</sup> Draft Law, para 24.2.

admissibility of electronic evidence in Nigeria was under consideration, but fortunately, the situation is no longer the same and electronic evidence is now admissible.<sup>141</sup>

As earlier stated, a security taken in a property will be effective against its proceeds, but its priority ranking will only be effective if the security interest has been made public by registration, if the proceeds have been described generically in the notice or where the proceeds consist of money, negotiable instruments, right to payment of funds or receivables.<sup>142</sup> If the proceeds are not described generically in the register, and do not consist of money, negotiable instrument, receivables or rights to payment of funds, the security interest priority ranking will remain effective against the proceeds of the collateral for only a limited period of time after the proceeds arise.<sup>143</sup> As regards security interests in inventory, the security interest that is filed first will have priority regardless of whether it is an after-acquired inventory or a specific item of that inventory.<sup>144</sup> Between a security interest in inventory and a security interest in account receivable, priority will be given to the security interest registered first.<sup>145</sup>

Where a financier has taken a purchase money security interest in the grantor's crops or proceed of crops, and given for value to enable the grantor to produce the crops, or provided revenue to purchase the crops six months prior to when the crops start growing, the financier will have priority over any previous security interest in the crops or its proceeds if the security has been perfected at or before the time of the loan.<sup>146</sup> Where unanticipated proceeds arise and the registered description in the register is not wide enough to cover such proceeds, the ranking of the perfected security interest extends to cover such proceeds if the secured creditor amends the financial statement to accommodate and describe the proceeds within fifteen calendar days.<sup>147</sup> Relatively, a security interest created by a seller or financier of a collateral which was acquired for the grantor will have priority over previous liens and security interest on the collateral, if before possession is transferred to the grantor, the financier or seller of the collateral filed a notice of the security interest in the register, and the seller or financier notifies the previous secured creditors of the sale and the security interest on the collateral.<sup>148</sup> It may as well occur that the financier of the collateral will be

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<sup>141</sup> The Evidence Act 1945 did not afford parties the possibility of presenting electronically-produced evidence. The new statute has now provided for electronic proof of execution of documents, Evidence Act 2011, s 93.

<sup>142</sup> Draft Law, para 27.1; ST Guide, Chapter VI, para 120 – 127; Recommendation 39.

<sup>143</sup> Draft Law, para 27.2; ST Guide, Chapter VI, para 87 – 96; Recommendation 40.

<sup>144</sup> Draft Law, para 28.1.

<sup>145</sup> Draft Law, para 28.2.

<sup>146</sup> Draft Law, para 29.1 (b).

<sup>147</sup> Draft Law, para 30.1

<sup>148</sup> Draft Law, para 29.1 (a).

unable to contact and notify all the creditors of the registered security interest. However, for this rule to be effective, it is vital that immediately after registration, the information must be made available instantly by any means necessary. This provision recognises that a higher priority ranking should be afforded to creditors who may have acquired goods for the grantor by way of PMSI. Since their security interest may conflict with the security interest of other creditors, their priority is deemed superior because they finance the acquisition of the goods on behalf of the grantor without which the other claimants will have no collateral to foreclose in the first place. The problem lies in the fact that it does not indicate how priority will be determined where there are two separate financiers of one collateral.

In the absence of a security agreement, a lien arising by operation of law including tax liens due to the State will only have priority over subsequent security interest and previously unperfected security interests from the time the notice of the lien is filed in the register.<sup>149</sup> A warehouse bailee who has a lien for fees and expenses incurred has priority over a secured creditor's security interests only from the time the lien has been publicised in the register.<sup>150</sup> Before this lien can take effect, a receipt of the warehouse goods must also be filed in the register.<sup>151</sup> Judicial liens can be enforceable over an asset and will have priority over other secured creditors only from the time that the judicial lien has been registered by the judgment creditor.<sup>152</sup>

Once the debt has been discharged, the secured creditor or the agent of the secured creditor who has possession of the collateral, operating in the capacity of a bailee, must return the collateral to its owner.<sup>153</sup> Unless agreed otherwise, the secured creditor or its agent in possession of the collateral will be accountable for its loss or deterioration during the period of refusal to return it, or unjustified refusal to accept payment for its return.<sup>154</sup> Where a security interest in a personal property is registered against third parties and later becomes attached to another personal property, its rank in priority will not be affected even after attachment.<sup>155</sup> This same principle will be applicable to commingled goods wherein if the collateral is registered before the goods are manufactured, processed and commingled with other goods that the identity might be lost, its ranking in priority continues in the product or mass.<sup>156</sup>

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<sup>149</sup> Draft Law, para 32.1; Cuming Report, para 4.2.7.7.

<sup>150</sup> Draft Law, para 32.2.

<sup>151</sup> *ibid.*

<sup>152</sup> Draft Law, para 33.1.

<sup>153</sup> Draft Law, para 35.1.

<sup>154</sup> Draft Law, para 35.2.

<sup>155</sup> Draft Law, para 37.1; ST Guide Chapter III, para 99 – 101; Recommendation 34 (b)(ii).

<sup>156</sup> Draft Law, para 37.2; ST Guide Chapter III, para 108 – 111; Recommendation 34 (b)(iii).

#### 4.2.4 Part IV - Online Notice Registration of Security Interests

Generally, creditors depend on information to determine the creditworthiness of borrowers, while policing the transaction and actions of borrowers during the lifetime of the loan.<sup>157</sup> Access to information regarding security from the register increases the volume of overall lending.<sup>158</sup> Registration is probably the most effective method of publicising the existence of property encumbrances.<sup>159</sup> For decades, paper registration has been the main source of publicising registered information in Nigeria but they are not without disadvantages such as:-

- i. The filed documents could be destroyed, for example, by fire, water or pests;
- ii. The time required to search and identify them from a pile makes it cumbersome, and costly in terms of employee remuneration;
- iii. Storage of files require large space which may not always be readily available;
- iv. Indexes are prone to errors since they are created manually;
- v. Paper documents are susceptible to forgery;
- vi. Public access to paper documents are restricted since access to filed documents will only be available where it is located.

Therefore, to avoid disputes between parties and registry officials, the need to access registered information in a speedy and efficient manner is a requirement of any modern secured transaction regime. One of such efficient ways may be through an online registration system to record security interests in personal property.<sup>160</sup> Of course there are already existing public registers such as the CAC company charge register, intellectual property registries, bill of sale High Court registries, and equipment lease registry, but their archives do not operate uniformly. The proposed uniform register will eliminate fragmented registries thereby promoting transparency, certainty and ease of access to information especially where the collateral involved, for example, account receivables, cannot be physically encumbered. The main advantage of such a comprehensive register will be to allow the public unrestricted access to registered information without incurring too much cost, while being accessible remotely.<sup>161</sup> Permitting public access will mean that any person can access the register electronically.

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<sup>157</sup> Gerard McCormack, 'Secured Transactions Law Reform, UNCITRAL and the Export of Foreign Legal Models' in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013) 41.

<sup>158</sup> *ibid.*

<sup>159</sup> N. Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) 175.

<sup>160</sup> CEAL Registry Report, 1- 4; Draft Law, para 39.1.

<sup>161</sup> Draft Law, para 40.1.

It is not expressly stated under the Draft Law whether documentary filing will continue to be used in the event that there is limited internet access for electronic filing. Obviously, persons living in rural areas are moRE likely to encounter problems such as lack of constant electricity and poor access to internet services.<sup>162</sup> However, private information business services might be set up for this purpose, to copy, at no cost, and sell registered information at a reasonable cost, in an organised and regulated way for third parties.<sup>163</sup> In addition, it will be the responsibility of the State or a delegated administrative body to supervise the electronic register. Where there is damage to the register, or loss of recorded collateral information, their liability will be limited to system malfunction.<sup>164</sup> For the general benefit of secured creditors, it is important that where an error or omission has been detected, especially when it relates to the identity of the grantor which could lead to postponement of the secured creditor's priority position, the secured creditor should take reasonable steps to register any correction immediately. If the secured creditor fails to register the correction, his priority position may be ineffective against other creditors if the grantor suffers insolvency.

The CEAL Registry Report considered the efficacy of implementing the pro-American notice registration system for the electronic register.<sup>165</sup> The notice registration system applies where notice of the existence of the security or the intention to create a security is registered and not the entire transaction.<sup>166</sup> This system of registration means that the creditor is required to register only limited information concerning the transaction such as the names and legal addresses of the contracting parties or their representatives and the description of the collateral.<sup>167</sup> In the absence of an existing security agreement, a notice that is registered will be void. Basically, perfection will be effected by registering a notice of the agreement in the register.<sup>168</sup> To be specific, the notice becomes effective the moment the information is filed in the register.<sup>169</sup> As expected, registration would be quick and easy which will not necessarily contain all the information in the agreement.<sup>170</sup> The register will

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<sup>162</sup> CEAL Registry Report p 30.

<sup>163</sup> CEAL Registry Report p 9.

<sup>164</sup> Draft Law, para 44.1; ST Guide, Recommendation 56.

<sup>165</sup> CEAL Registry Report, 12 – 17; The notice filing system can also be found in other jurisdictions such as Ontario, Canada (Personal Property Security Act R.S.O. 1990).

<sup>166</sup> Richard Calnan, 'What Makes a Good Law of Security?' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 447.

<sup>167</sup> CEAL Registry Report, 12; Draft Law, para 45.1.

<sup>168</sup> Draft Law, para 42.1.

<sup>169</sup> Draft Law, para 50.1; ST Guide, Chapter IV, para 102 – 105; Recommendation 70.

<sup>170</sup> Spyridon V Bazinas, 'The Influence of the UNCITRAL Legislative Guide on Secured Transactions' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 41.



be centralised and it will provide minimum electronic verification which will be done by the creditor or the agent of the creditor.<sup>171</sup> The cost of filing, if any, will be substantially low without any hidden taxes, stamp duties or fees other than the normal administrative fees negotiated between parties for administering the filing process of the security interest.<sup>172</sup>

The overriding objective of notice registration is to circumvent the process of filing voluminous documents with too much information, as against the transaction filing method which requires the filing of the transaction itself. Recording less information lowers filing costs and simplifies the registration process.<sup>173</sup> This system also promotes more privacy as the enquiring party is only provided with basic information that a security interests exists. It was also stated that there should be no review of registrations to check authenticity or legality by legal administrators before a security interest in registered.<sup>174</sup> Hence, there would be no government guarantee of checking the accuracy of the notice statement prior to registration. It was argued that the need to appoint a state employee or administrator to perform this duty is unnecessary due to the fact that it will take a longer time to review the originality and authenticity of filed documents, plus the cost of paying for the review and registration may be high.<sup>175</sup> All things considered, the general perception of the operation of the notice registration system seem to have been accepted with optimism based on how it has adequately functioned in other parts of the world.

If the notice of the security does not adequately identify the collateral, the registration will remain effective that is if the description does not mislead a reasonable searcher.<sup>176</sup> The Draft Law does not state how third parties will be affected by an incorrect statement pertaining to the duration of registration and amount so secured in the registered notice. However, the ST Guide states that third parties relying on such statement should be protected from the effects of such discrepancies in notice statements relating to the duration of registration and the maximum amount secured.<sup>177</sup>

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<sup>171</sup> Draft Law, para 42.2 - 42.3.

<sup>172</sup> Draft Law, para 42.4.

<sup>173</sup> Heywood Fleisig, Mehnaz Safavian and Nuria de la Peña, 'Reforming Collateral Laws to Expand Access to Finance' (The World Bank 2006) 39.

<sup>174</sup> CEAL Registry Report, 17.

<sup>175</sup> CEAL Registry Report, 15 - 16.

<sup>176</sup> Draft Law, para 46.2.

<sup>177</sup> ST Guide Chapter IV, para 78 – 80; Recommendation 64 – 66.

#### 4.2.5 Part V - Enforcement

A secured transactions law that does not enable a secured creditor to legally and reasonably enforce the security is more or less useless to say the least. Reasonable expectations, honesty and observance of fair dealing during the course of realisation and enforcement of security interests should be demonstrated by contracting parties.<sup>178</sup> Parties are bound to always uphold honesty and in no case is this reasonable expectation subject to any exception.<sup>179</sup> Ultimately, the courts have the responsibility of deciding what conduct satisfies this requirement by looking primarily at best practices carried out in the international arena. However, subject to the above provisions, the grantor may decide to waive any of its rights (for instance, the right to be notified during an auction or sale of the collateral) as provided by the Draft Law's enforcement procedures and may agree with the secured creditor on such right waiver.<sup>180</sup> Realistically, the waving of such rights can only be done after default in payments or obligations. Any person who challenges the effectiveness of the agreement based on any irregularity of the above provisions will bear the burden of proof.<sup>181</sup> Parties who breach enforcement procedures such as wrongful repossession and wrongful sale will be held liable for damages.<sup>182</sup> It was stated that where other wrongful acts are not covered by the Draft Law, the recommendations outlined in the ST Guide would cover such cases.<sup>183</sup>

After default, a secured creditor may use judicial or extrajudicial methods to take possession of the collateral, sell or dispose of the collateral, or render the collateral unusable while in the possession of the grantor. During disposition of the collateral, a grantor or other interested persons have the right to ask the court for relief if the secured creditor violates proper enforcement procedures.<sup>184</sup> The Draft Law did not indicate which court would have jurisdiction to entertain matters regarding the enforcement of security interests in personal property. Nevertheless, the State High Court of the location of the collateral will most likely be the place to commence and hear proceedings of this nature.<sup>185</sup>

Proceedings will be heard and conducted under expeditious procedures as provided by law.<sup>186</sup> The exercise of one post-default right by the secured creditor will not extinguish

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<sup>178</sup> Draft Law, para 54.1. The Draft Law objected to the generic use of 'good faith' as a standard for enforcement and has purportedly used the definition found in UCC Article 1-201 (b) (20) instead.

<sup>179</sup> Draft Law, para 54.2.

<sup>180</sup> Draft Law, para 55.1.

<sup>181</sup> Draft Law, para 55.3; ST Guide, Chapter VIII, para 16 – 17; Recommendation 135.

<sup>182</sup> Draft Law, para 56.1; ST Guide Recommendation 136.

<sup>183</sup> *ibid*; Draft Law, para 56.1 (Commentaries).

<sup>184</sup> Draft Law, para 57.1.

<sup>185</sup> See for example, High Court of the Federal Capital Territory (FCT) Abuja, Civil Procedure Rules (CPR), Order 10 (1).

<sup>186</sup> Draft Law, para 57.2.

the possibility of exercising another right, and a post default right exercised in respect to collateral will not prevent the exercise of another post-default right with respect to the agreed obligation, and vice versa.<sup>187</sup> Notice of sale of the collateral must be in writing and in a language reasonably expected to inform its recipients about its content, and the notice must include a statement that the grantor is entitled to an account of the amount owed, and a statement informing the grantor of its right to redeem the collateral.<sup>188</sup> Following on from the limitations in the provisions of the CEAL Registry Report which dismissed the option of a government guarantee scheme for the purpose of reviewing the financial statement before registration, the grantor will be better protected if the notice for extrajudicial disposition is written in the same language used in the security agreement.<sup>189</sup> If the language differs, the notice of disposition may be voided altogether.<sup>190</sup> Further, notice must be provided to all secured creditors who have filed against the same collateral, and to the secondary owner of the collateral if it is not primarily owned by the grantor.<sup>191</sup> Excluding goods deemed perishable which may be sold instantly, it is a requirement that this notice is sent within five calendar days before the collateral is disposed, and the notice must mention the date, time, place and terms of the disposition.<sup>192</sup>

Enforcement may not always be possible through court procedures especially if the property is in the grantor's possession. Unreformed legal systems with slow court enforcement procedures will likely make the security less attractive due to high cost and delay in enforcement, especially when the enforcement takes place outside insolvency.<sup>193</sup> It is even estimated that judicial enforcement proceedings in unreformed systems normally take between one to three years, by which time the collateral may have depreciated in value, expired or even lost.<sup>194</sup> Hence, secured creditors should be able to foreclose their security speedily without a court order such as the use of self-help. The Draft Law specifies that the effect of default on the part of the grantor could result in the secured creditor taking possession of the collateral or its proceeds, or other documents representing the collateral by

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<sup>187</sup> This right will only be applicable to the extent that there is no prohibition on the exercise of a post-default right after a prior right has been effected. See Draft Law, para 58.2 – 58.3.; ST Guide, Chapter VIII, para 32 – 35; Recommendations 143 - 144.

<sup>188</sup> Draft Law, para 59.1 – 59.2.

<sup>189</sup> CEAL Registry Report, 15 - 16.

<sup>190</sup> Draft Law, para 59.3.

<sup>191</sup> Draft Law, para 67.1.

<sup>192</sup> Draft Law, para 67.2 – 67.4.

<sup>193</sup> Hugh Beale, 'The Uncitral Legislative Guide: Some Conclusions' in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013) 284.

<sup>194</sup> Fleisig (n 173) 42.

peaceful means.<sup>195</sup> The use of physical force and intimidation is expressly prohibited and an officer of the law such as a policeman or public official should not accompany the creditor when exercising enforcement rights through self-help.<sup>196</sup> Such is the importance of this option that it was typified in favour of the secured creditor based on the mandatory requirement to specify the availability of self-help which must be boldly stated, in upper case, in the security agreement.<sup>197</sup> Additionally, if the collateral cannot be recovered by peaceful means, judicial process would need to be instituted by the secured creditor.<sup>198</sup> However, if the collateral is in the possession of a third party and the secured creditor has a higher ranking priority as against right of the third party, the collateral must be conveyed back to the secured creditor for enforcement, and during this period, no other creditor may request the possession of the collateral.<sup>199</sup> In actuality, it may not always be reasonable to resort to self-help where the collateral involved pertains to things which are necessities for survival, for instance, beasts of burden for farmers, or medical equipment for an invalid. Pursuant to the Nigerian Bankruptcy Act 1979 as amended, it specifies that the grantor, who in this situation may already be an undischarged bankrupt, should not lose possession of certain established properties worth up to a certain amount, which himself and his family depend on for survival.<sup>200</sup>

Collateral may be sold by the secured creditor regardless of whether the grantor has possession and the buyer will take the property free of the grantor's right of possession.<sup>201</sup> All reasonable expenses incurred during repossession, and up to the full amount owed, may be paid to the secured creditor to redeem the collateral at any time before its sale.<sup>202</sup> Upon fulfilling this obligation, the secured creditor must stop any enforcement procedure and return the collateral to the grantor.<sup>203</sup> Where the grantor is unable to redeem the collateral as a result of default, the sale or disposition must be commercially reasonable, and such disposition may be through publicised auction, sale in an open market, or under any other

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<sup>195</sup> Draft Law, para 60.1.

<sup>196</sup> Draft Law, para 60.2 – 60.3.

<sup>197</sup> 'IN CASE OF DEFAULT, THE CREDITOR MAY USE SELF-HELP IN TAKING POSSESSION OF THE COLLATERAL', see Draft Law, para 60.4.

<sup>198</sup> Draft Law, para 64.

<sup>199</sup> Draft Law, para 61.1 – 61.2.

<sup>200</sup> Bankruptcy Act (Nigeria) 1979, s 41 (2) (b), as amended by Bankruptcy Amendment Decree 1992, '*the tools (if any) of his trade and the necessary wearing apparel and bedding of himself and his family dependent on and residing with him, to a value, inclusive of tools and apparel and bedding, not exceeding N1000 in the whole.*'

<sup>201</sup> Draft Law, para 62 and 66; 73.1 – 73.2.

<sup>202</sup> Draft Law, para 63.

<sup>203</sup> *ibid.*

commercially reasonable circumstance.<sup>204</sup> The enforcement must be undertaken and concluded within a reasonable time scale, and unless agreed otherwise between the parties, the secured creditor is prohibited from purchasing the property.<sup>205</sup> After exercising enforcement rights and the secured creditor is unsure as to whether another creditor is entitled to payment from the surplus, the secured creditor is required to remit the surplus to a competent authority or a deposit fund.<sup>206</sup> The position of the secured creditor may later become ‘unsecured’ where the fixed proceeds, as agreed in the security agreement, after enforcement are not sufficient to pay the entire indebted sum, and of course the grantor would remain liable for the remaining sum.<sup>207</sup>

Upon completion of the sale, the proceeds shall be applied first to the expenses resulting from the maintenance, repossession, or preservation of the collateral, then payment of the capital and interest on the obligation secured by the senior security interest whether it became due or not, and afterwards, surpluses would be distributed to the other secured creditors in the order specified in Part III of the Draft Law pertaining to the date and time of registration even if their secured obligation has not become due.<sup>208</sup> An unsecured creditor would only receive payment only if a secured creditor has been paid in full.<sup>209</sup> Where the secured creditor and grantor have fraudulently connived to alter the order of distribution of the proceeds, such distribution would be void, except where subordination agreements have been agreed between secured creditors.<sup>210</sup> The remainder of the proceeds must be turned over to the grantor or its representative within three calendar days, and if payment cannot be performed, then the payment must be deposited at a bank account and the grantor must be informed immediately.<sup>211</sup>

Security on bank deposit can be enforced after the grantor has defaulted, and the secured creditor has notified the financial institution on its intent to draw from the deposit account.<sup>212</sup> A copy of the secured agreement must be attached to the notice and the secured creditor will need to instruct the institution on the amount to withdraw.<sup>213</sup> Upon providing notice, the institution would then need to verify that the security interest has been registered

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<sup>204</sup> Draft Law, para 65.1 – 65.3.

<sup>205</sup> Draft Law, para 68 – 69.

<sup>206</sup> Draft Law, para 72; ST Guide, Chapter VIII, para 152 – 155; Recommendation 153.

<sup>207</sup> Draft Law, para 70.

<sup>208</sup> Draft Law, para 74.1 – 74.2.

<sup>209</sup> *ibid.*

<sup>210</sup> Draft Law, para 74.4 – 75.1.

<sup>211</sup> Draft Law, para 74.3.

<sup>212</sup> Draft Law, para 76.1.

<sup>213</sup> The Draft Law did not specify the method of effecting notice, but presumable, it should be in writing since the secured agreement is required to be ‘attached’ to the notice. See Draft Law, para 76.2.

in the online register, ascertain its priority ranking, and check that the identity of the grantor correlates with that held in the institution's records.<sup>214</sup> Once these conditions have been fulfilled, the institution may continue to accept deposit orders to the account but payment orders would be dishonoured after receiving notice from the secured creditor, after which the secured creditor would be paid from the deposit.<sup>215</sup> Where another creditor has a higher priority in accordance with the provisions of this Draft Law, the institution must give the sums held in the bank account to the creditor with the highest ranking whose debt has not been paid.<sup>216</sup>

Further, the secured creditor has a right to sell the goods represented in a negotiable document of title pledged as security, and the proceeds may be distributed to offset the debt owed by the grantor.<sup>217</sup> An enforcement claim may be brought by the secured creditor against the endorsers or guarantors of the negotiable document if it remains unpaid.<sup>218</sup> Similarly, an assignee of account receivables may use reasonable means to take possession of documentation of the receivables and collect the receivables that constitute the security, or transfer or assign to another person the right to receive payment that constitute the security up to the amount of the obligation, and the surplus would be returned to the other creditors.<sup>219</sup> When receivables are assigned, the assignee must take steps to notify the account debtors, and the registered notice must specify the amount payable, the identity of the assignee, and the method and place of payment.<sup>220</sup> Payment would then be made to the assignee, but the account debtors may request proof of the assignment (a copy of the assignment's filing in the register should be sufficient), and if the assignee is unable to provide such proof, the account debtors may continue to pay the assignor.<sup>221</sup>

Pertaining to insolvency, the security interest of the secured creditor will not be postponed regardless of whether the business of the grantor is being wound up or bankruptcy proceedings have begun.<sup>222</sup> After all requirements of registration and publicity has been satisfied in accordance with the Draft Law, the secured creditor may request the trustee in

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<sup>214</sup> Draft Law, para 76.3.

<sup>215</sup> Draft Law, para 76.4 – 77.1.

<sup>216</sup> Draft Law, para 76.4.

<sup>217</sup> Draft Law, para 78.1.

<sup>218</sup> Draft Law, para 78.2.

<sup>219</sup> Draft Law, para 79. The Draft Law explains 'account receivable' to mean the rights to receive payment for goods sold or services rendered, excluding portfolios of bank loans. See Draft Law, 5 – 6. As of this moment, Nigeria is not yet a signatory to the United Nations Convention on the Assignment of Receivables in International Trade 2001. <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=X-17&chapter=10&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=X-17&chapter=10&lang=en)> last assessed 2 December 2016.

<sup>220</sup> Draft Law, para 80.1.

<sup>221</sup> Draft Law, para 80.3 – 80.4.

<sup>222</sup> Draft Law, para 80.5.

bankruptcy to allow him take possession of the collateral.<sup>223</sup> The trustee in bankruptcy may then order the liquidator or manager, depending on the legal personality of the grantor, to give possession to the secured creditor.<sup>224</sup> Upon taking possession, the secured creditor may exercise his security right without intervention from the trustee in bankruptcy, liquidator or manager.<sup>225</sup> The secured creditor is required to disburse any surplus through the liquidator or manager in favour of the debtor.<sup>226</sup> Failure to abide to the above provisions regarding reasonable enforcement will normally be met with penalties, for example, indemnifying the grantor for damages for wrongful possession, or forfeiting up to thirty percent of the amount of the debt.<sup>227</sup>

#### **4.2.6 Part VI – International transactions**

Under the Draft Law, parties are free to choose the jurisdiction and law of any country to govern their security agreement, while perfection and priority of security interest in tangible collateral will be governed by the law where the tangible collateral is located.<sup>228</sup> If the tangible collateral is used in more than one State, the law of the State of the grantor will take precedence.<sup>229</sup> Regarding priority of claims in a negotiable document of title in the secured creditor's possession, the applicable law will be the law of the State in which the document is located.<sup>230</sup> Equally, the creation, perfection, and priority of a security interests in intangible collateral will be governed by the law of the State in which the grantor is located.<sup>231</sup> For the purpose of conflict-of-laws, the location of the grantor will be the place of residence or place of incorporation.<sup>232</sup>

#### **4.2.7 Part VII – Final and transitory provisions**

It was considered that the Draft Law would repeal existing secured transactions laws and their related provisions. First, CAMA sections 178 – 182 and sections 197 – 201 pertaining to the equitable charge would become inapplicable, while section 173 would be amended by

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<sup>223</sup> Draft Law, para 80.6.

<sup>224</sup> *ibid.*

<sup>225</sup> Draft Law, para 80.7.

<sup>226</sup> Draft Law, para 80.8.

<sup>227</sup> Draft Law, para 81.1 – 81.4.

<sup>228</sup> Draft Law, para 85.1 – 86.1; ST Guide, Chapter X, para 15 – 25; Recommendation 203.

<sup>229</sup> Draft Law, para 86.2.

<sup>230</sup> Draft Law, para 86.4.

<sup>231</sup> Draft Law, para 88.1; ST Guide, Chapter X, para 39 – 54; Recommendation 208.

<sup>232</sup> Draft Law, para 90.1; ST Guide, Chapter X, para 73 – 78; Recommendation 219.

deleting paragraph (5).<sup>233</sup> All related provisions concerning the Bill of Sale Act would be repealed particularly those relating to hypothecation or chattel mortgage and its registration process with the State Chief Registrar.<sup>234</sup> Also, company charges and mortgages in shares and other personal property that come within the ambit of the Draft Law would also be repealed, and all provisions that are contrary to the provisions of the Draft Law will be repealed.<sup>235</sup> Thus, reference to ‘fixed or floating charge’, ‘hypothecation of security bill of sale’, ‘chattel mortgage or equitable mortgage’, ‘pledge’ against property will be considered a reference to security interest under the Draft Law.<sup>236</sup> The Bankruptcy Act 1979 will also be amended by adding: ‘(c) all property subject to a security interest in property within the scope of application of the Security Interests in Movable Property Act, which shall be enforceable out of court in accordance to such Act’.<sup>237</sup>

### 4.3 Conclusion

The discussions laid out in this chapter comprises of both possessory and non-possessory security interests without much differentiation in their priority rules. Specifically, the most apparent feature of the Draft Law is the adoption of notice registration which is quite a stark contrast to how interests in other types of properties such as land are registered as seen earlier in Chapter 2. There may be certain problems which must be noted. First, there are various security interests filing systems in the country which may have to be linked and coordinated together especially the equipment lease registry which has just recently been created. Again, not all the previous registration systems were electronic so they will all have to be transcribed electronically. Also, internet access in Nigeria would need to be dramatically improved to reflect the advantages of the notice filing system.

Fundamentally, the idea of functionalism runs across the Draft Law as recommended in the Cuming Report. The generic unitary concept of the idea of functional equivalent rejects the compartmentalisation of security interests which is still notorious with the English common law system. The English common law system, which has so far been synonymous with the previous Nigerian secured credit regime, operates on the basis of freedom of contract as against the notion of a generic form of secured transaction. However, the

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<sup>233</sup> Draft Law, para 92.1 – 92.2. Section 173 (5) CAMA states: ‘A charge securing debentures shall become enforceable on the occurrence of the events specified in the debentures or the deed securing the same.’

<sup>234</sup> Draft Law, para 92.3.

<sup>235</sup> Draft Law, para 92.4 – 92.5.

<sup>236</sup> Draft Law, para 92.5.

<sup>237</sup> Draft Law, para 93.2.



similarities between real securities and quasi-securities could now be eliminated, at least with regards to secured transactions in that the Draft Law accommodates the definition of security to apply to security interest created by agreement that secure the performance of an obligation. As a result, the traditional categories of ascribing secured transactions will no longer be needed.

While this radical change of massive proportions which could have shook the very foundations of business law in Nigeria, having been advocated by the designers of the Cuming Report and Draft Law, it will come as a surprise that their recommendations were not wholly implemented. For example, the CBNR explicitly mentions that only a financial institution may be a secured creditor under its regulations. For the time being, this is good law. This CBNR provision specifically disqualifies any other type of secured creditor, including natural persons wishing to operate as loan sharks. This serves to protect innocent borrowers, in the absent of an efficient consumer protection law in Nigeria, from unscrupulous lenders who would otherwise take advantage of the position of borrowers, in addition to the possibility of unregulated lender's charging excessive interest on loans. The Draft Law failed to recognise this possibility. The next chapter will focus on this nascent CBNR law on secured transactions, with discussion on how it can be compared with international best practices on secured transactions law. Where appropriate, it will also be evaluated with the provisions and recommendations of the Draft Law, while at the same time, thorough a doctrinal approach, identify aspects of the Draft Law that may be useful (if at all) for adoption in the reform process.

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## V. CHAPTER FIVE: THE CBNR 2015 AND INTERNATIONAL LEGAL FRAMEWORKS ON SECURED TRANSACTIONS LAW

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### 5.1 Prelude

Secured transaction law reform initiatives that took place in Nigeria with the assistance of IFC,<sup>1</sup> and the CEAL,<sup>2</sup> have been carefully discussed in the previous chapter. The recommendations set by the representatives of these international organisations seem to have now been jettisoned. If the Draft Law was implemented into statute as promised, it would have potentially ushered in an increase in access to finance for the benefit of MSMEs in Nigeria. Against this backdrop, one of the challenges facing Nigeria still remains the reform of regulatory practices on secured transactions. A general consensus exists which shows that legal and administrative schemes relating to secured transaction law impacts directly on access to finance.<sup>3</sup> Developing countries e.g. Nigeria continue to face problems in funding the investment they need for private sector growth. Foreign, domestic, and private funding ameliorates some of these problems of seeking finance for investment but these services alone cannot guarantee the needs of domestic investment.<sup>4</sup> Funding investment also requires loans from the financial sector – both banks and non-banks. This can undoubtedly be achieved by an efficient regulatory scheme to protect security rights in personal property.

The CBNR was set up to achieve the aforementioned purpose.<sup>5</sup> Arguably, the establishment of this CBNR will serve to improve MSME borrowing in Nigeria, thereby making it the most comprehensive law on secured financing in Nigeria. In order to identify the strengths and weaknesses of this new regime, it is of utmost importance to benchmark

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<sup>1</sup> Ronald CC Cuming and Yair Baranes, 'A Modern Secured Financing System involving Personal Property Collateral for The Federal Republic of Nigeria' (International Finance Corporation, 17 January 2004).

<sup>2</sup> Nuria de la Peña, Heywood Fleisig and Peter Winship, *Nigeria: First Draft Law on Security Interests in Movable Property*, (Washington DC, CEAL, October 2009).

<sup>3</sup> Organisation for Economic Co-operation and Development (OECD), *Financing Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation* (2<sup>nd</sup> OECD Ministerial Conference on SMEs, June 2004, Istanbul, Turkey) < <http://www.oecd.org/cfe/smes/31919231.pdf> > last accessed 1 February 2017.

<sup>4</sup> Heywood Fleisig, 'The Economies of Collateral and of Collateral Reform' in Paul U. Ali and Carolyn Boyle (eds), *Secured Finance Transactions: Key Assets and Emerging Markets* (Globe Law and Business & Globe Business Publishing Ltd, London 2007) 81.

<sup>5</sup> Nigeria's New Collateral registry Aims to Increase Access to Finance for Small Business (World Bank, 3 August 2016) <http://www.worldbank.org/en/news/feature/2016/08/03/nigerias-new-collateral-registry-aims-to-increase-access-to-finance-for-small-business> last accessed 12 December 2016.

its provisions with internationally recognised multilateral regulations which would assist towards the improvement of its laws. For example, the economic efficacy for the enhancement of its registration system i.e. the NCR, and priority of security right holders, can be revealed by comparing the CBNR with international benchmarks in search of the best practices in lieu of harmonisation of secured transactions law.<sup>6</sup> Be that as it may, the benchmarking process will be based on the ST Guide and EBRD Ten Core Principles for a Secured Transactions Law, henceforth ‘EBRD Core Principles’.<sup>7</sup> These international ‘soft laws’ are among the most ambitious efforts in the international harmonisation of security transactions laws worldwide. Likewise, attention could be given to other reformed countries such as New Zealand,<sup>8</sup> where it becomes necessary. Before undertaken this benchmarking exercise, the main provisions of the CBNR will first need to be explained.

## **5.2 Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulation No.1 2015) (‘CBNR’)**

The objective of improving the legal framework for secured transactions in Nigeria represents an economically-oriented commercial inventiveness which aims to create an enabling environment for secured lending. In February 2015, the CBN passed the CBNR with the intention of harmonising all secured transaction laws over personal property in Nigeria. The CBN is a public institution responsible for promoting a sound financial system in Nigeria. By virtue of the CBN Governor, it made these rules for the purpose of improving access to finance for MSMEs with the use of personal property as collateral. The establishment of the CBNR gives effect to the harmonisation of secured transactions laws in Nigeria.

The main difference between the CBNR and the Draft Law is that the latter promotes the total unification of the secured transaction law in a wholesale fashion, thus bringing all laws under one statutory regime, while the CBNR proposes to harmonise the existing legal patchwork on secured transactions, through a piecemeal strategy, only to the extent of their creation, registration and enforcement rules without regard to some other forms of secured transactions e.g. the floating charge. Primarily, the CBNR provides for the operation of the

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<sup>6</sup> Registration and priority of security interests will be undertaken in Chapter Six.

<sup>7</sup> The European Bank for Reconstruction and Development (EBRD), Core Principles for a Secured Transactions Law (July 2010) <http://www.ebrd.com/documents/legal-reform/secured-transactions-core-principles-english.pdf> last accessed 2 December 2016.

<sup>8</sup> An Act administered by the Ministry of Business, Innovation, and Employment No 126, 1999. See <http://www.legislation.govt.nz/act/public/1999/0126/latest/whole.html> last accessed 12 January 2017.

NCR.<sup>9</sup> The Banks and Other Financial Institutions Act (BOFIA) 2004 (as amended)<sup>10</sup> remains the primary legislation for regulating banks, banking and other financial institutions in Nigeria. Section 57 BOFIA 2004 empowers the Governor of the CBN is to ‘make regulations and give full effect to the objects and Objectives of the Act’ and also to enhance the operation and control of all institutions under the supervision of the CBN. This secondary law making responsibility of the CBN in drafting laws to regulate secured transactions is the first to have been conducted in Nigeria. This does not however imply that the CBNR will have primary authority to enact subsequent legislation on this subject.

### **5.2.1 Introduction and Scope of the CBNR**

Largely, the CBNR serves to provide a regulatory structure for getting credit secured with personal property,<sup>11</sup> for the creation and perfection of security interests, and for the realisation of security interests on collateral.<sup>12</sup> The Regulation also provides for the establishment and operation of a Collateral Registry.<sup>13</sup> Contrary to the Draft Law which did not restrict the grant of credit based on the legal personality of the lender, the CBNR restricts the nature of the lender to only banks and other types of financial institutions such as micro-finance banks, discount houses and finance companies. Nonetheless, any type of person can be a grantor of security interest inclusive of MSMEs.<sup>14</sup> The vast majority of businesses in Nigeria are MSMEs which reinforces the primary intention of the CBNR i.e. to boost investment in businesses, while allowing them access low-cost finance. Personal property often account for the vast majority of collaterals owned by MSMEs, and as a result, the launch of the CBNR and NCR will encourage lenders and investors to provide finance to businesses.

The scope of the CBNR applies to all security agreement that secures payment or performance of an obligation, regardless of the name ascribed to the transaction, whether a pledge, bill of sale by security, contractual lien, or financial lease so long as it resembles a security agreement.<sup>15</sup> Any security created under this law will however remain subject to any priority created in favour of a third-party under a separate existing legislation. For

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<sup>9</sup> National Collateral Registry (Frequently Asked Questions) <https://www.ncr.gov.ng/Home/Faq> last accessed 22 November 2016.

<sup>10</sup> Banks and Other Financial Institutions Act (BOFIA) 2004, Cap B3 LFN 2004.

<sup>11</sup> CBNR, Art. 1 (1) (a).

<sup>12</sup> CBNR, Art. 1 (1) (b) and (c).

<sup>13</sup> CBNR, Art. 1 (2).

<sup>14</sup> CBNR, Art. 1 (3).

<sup>15</sup> CBNR, Art. 3 (1).

instance, a secured creditor who has a perfected lien under the CBNR will not have priority over an existing floating charge holder because the law governing corporate borrowing in Nigeria is separate from the CBNR which happens to be CAMA. Rather controversially, paragraph 3 (4) (b) of the CBNR states: these Regulations shall not apply to ‘charges required to be registered under the Companies and Allied Matters Act’.<sup>16</sup> This provision is completely at variance with the position of the Draft Law regarding company charges, which earlier proposed to give effect to the company charge as a security device.<sup>17</sup> The CBNR has not provided any justification for its omission. The CBNR does not possess the statutory authority to take over the registration of company charges, and of course, registration of charges under CAMA also includes equitable charges over land which is outside the scope of the CBNR. Nonetheless, it is unfortunate that in the process of harmonising secured transaction laws in the country, one of the most fundamental security devices – the company equitable charge - was purposely left out by the CBNR.

Also, the CBNR is not applicable to right of set-off,<sup>18</sup> and transactions relating to the creation and transfer of any interest in land.<sup>19</sup> It does not state whether it will apply to any interest created by a transfer, mortgage or assignment in personal property governed by a law where a registry has already been established, such as the Registry Authority which is a creation of ELA 2015, to registering financial lease in equipment. As it stands, there are two separate financial lease registers operating at the same time which shows a continuous lack of coordination of secured transactions laws in Nigeria.

### **5.2.2 Creation of Security Interests**

Contracting parties are free to create any security agreement and it will become effective according to its contractual terms as agreed in the security agreement.<sup>20</sup> Where a security agreement is created before a security interest is taken in a property, the security interest shall be effective the moment the grantor acquires a right to the property without a written consent or an additional act of the grantor in so far as the property has been adequately described in the security agreement.<sup>21</sup> The grantor’s right in the property cannot be exceeded

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<sup>16</sup> For a critical analysis on this issue, see Iyare Otabor-Olubor, ‘Reforming the Law of Secured Transactions: Bridging the Gap between the Company Charge and CBN Regulations Security Interests’ (2017) 17 JCLS 39.

<sup>17</sup> Draft Law, para. 92.1 – 92.2.

<sup>18</sup> CBNR, Art. 3 (3) (a).

<sup>19</sup> CBNR, Art. 3 (3) (c).

<sup>20</sup> CBNR, Art. 4 (1).

<sup>21</sup> CBNR, Art. 4 (2).

while granting a security interest in the property to the secured creditor.<sup>22</sup> An account receivable can as well be granted as security and it will be effective between the grantor and secured creditor as well as against the third party account debtor notwithstanding any prior agreement that limits the ability of the grantor to assign payment rights in the receivable in order to create a security interest.<sup>23</sup> Hence, any restriction on an assignment of receivables agreed between a financier and the grantor will be ineffective in the creation of a security interest.

The minimum required information in a security agreement are: a reflection of the intention of the parties to create a security interest, both parties must be identified, the obligation secured must be described including the maximum amount for which the security interest is enforceable, the collateral must be described adequately, and tenure of the obligation secured must be indicated.<sup>24</sup> A description of the collateral will be deemed adequate if it is described by item, kind, type or category; or a statement that a security interest is taken in all of the grantor's property, both present and future.<sup>25</sup> That is to say, the secured obligation can be held over changing assets as it is with the floating charge. For example, if the collateral is livestock (cow) which supposedly secures one million naira, the security interest will be deemed to be described adequately if it merely states 'one million naira worth of cow', instead of specifically identifying the breed or colour of the cow as it would normally be if it were taken by a bill of sale. A security interest will also automatically continue in the proceeds of the collateral so far as they are identifiable and traceable, irrespective of whether the agreement described the proceeds.<sup>26</sup> Hence, if the collateral is a cow, the offspring's of the cow can be granted as security even though the offspring's are yet unborn so long as they can be identifiable, for instance, based on the speculated time they will be born.

The idea of perfection according to the CBNR will only occur when the financial statement in respect of the security has been registered in the NCR.<sup>27</sup> As it normally happens, a security interest is created by a private agreement between the secured creditor and the grantor, and third parties will have no knowledge of it. For this agreement to be effective against third parties, there must be a public notice of it, hence the need for it to be registered

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<sup>22</sup> CBNR, Art. 5 (1).

<sup>23</sup> CBNR, Art. 5 (2).

<sup>24</sup> CBNR, Art. 6 (a) – (e).

<sup>25</sup> CBNR, Art. 7 (2).

<sup>26</sup> CBNR, Art. 7 (3).

<sup>27</sup> CBNR, Art. 8; see NZPPSA 1999, s 40 (1) for definition of 'attachment', and s 41 (1) (a) and (b) for explanation on when 'perfection' can occur in New Zealand; see also UCC Article 9, 308 (a).

for perfection to occur. Possession alone will not constitute perfection. For the security interest to be effective against third party claimants, it must be registered regardless of whether it is a possessory or non-possessory security interest.

### 5.2.3 Collateral Registry

In greater details, a critical analysis on the implementation of a workable collateral registry will be undertaken and analysed in the next chapter which will be dedicated to the efficacy of the electronically-operated NCR. The establishment of the electronic register is a significant aspect of the CBNR reform, hence it requires a dedicate chapter. The reason for an extended discussion is because the NCR will be analysed alongside CEAL's Registry Report,<sup>28</sup> and the ST Registry Guide 2014,<sup>29</sup> thus identifying and reviewing the practical methods of registering security interests in personal property in relation to perfection and priority. Nevertheless, a general overview of security interest registration in the NCR will be explained here in lieu of an in-depth discussion in the next chapter.

Art. 9 (1) CBNR, the CBN establishes, maintains and operates the NCR. The CBN Governor will appoint a Registrar to supervise and administer the operations of the NCR,<sup>30</sup> and the Governor may issue guidelines to govern the functions and operations of the Registry.<sup>31</sup> Registration will be effected after the financing statement is registered electronically.<sup>32</sup> Where a security agreement has been created, it is deemed that the grantor has authorised the registration of a financing statement.<sup>33</sup> Financing statement in this law means a prescribed electronic Form which provides information to effect, amend, cancel or continue a registration of security interest.<sup>34</sup>

Human intervention through any employee of the NCR to verify the registration of a financing statement is not necessary.<sup>35</sup> Registration will be rejected by the online system if it is not submitted in its prescribed Form, or the information required is omitted, or where the registration fees are unpaid.<sup>36</sup> The required time for the financing statement to be

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<sup>28</sup> Heywood Fleisig, Nuria de la Peña and Corey Loney, Registry Assessment for Filing Security Interests in Movable Property, Prepared for Nigeria: Secured Finance for Movable Assets - Collateral Reform and Leasing Development (Second Progress Report, Washington DC, CEAL, March 2010) hereinafter 'Registry Report'.

<sup>29</sup> Guide on the Implementation of a Security Rights Registry (UNCITRAL, March 2014) hereinafter 'ST Registry Guide'.

<sup>30</sup> CBNR, Art. 9 (2).

<sup>31</sup> CBNR, Art. 9 (3).

<sup>32</sup> CBNR, Art. 9 (4).

<sup>33</sup> CBNR, Art. 10.

<sup>34</sup> CBNR, Art. 2 (1).

<sup>35</sup> CBNR, Art. 11.

<sup>36</sup> CBNR, Art. 11 (4).

registered is not stated in the CBNR. However, with notice registration system, there should normally be a clear option for the possibility of registration before or after the security agreement has been concluded.<sup>37</sup>

It is the responsibility of the secured creditor to confirm the accuracy and legality of the information sent for registration.<sup>38</sup> Information which is required in the financing statement includes: debtor type description whether small, medium or large business; registration number if it is a registered business name or a corporation; if a natural person, the biometric based unique identifier, name gender, address, telephone number and date of birth; name and address of the secured creditor or his representative; collateral description; maximum amount for which the secured obligation may be enforced; and the time frame for which the registration will be effective.<sup>39</sup> There may be more than one grantor or more than one secured creditor, in which case, the required information must be entered separately but in the same financing statement.<sup>40</sup>

The NCR will register the financing statement with a unique registration number, and a particular date and time will be assigned to it.<sup>41</sup> The NCR must as soon as possible issue a confirmation statement to secured creditor who submitted the financial statement after registration has been completed successfully.<sup>42</sup> A registration will have no effect if there is a misleading error in the biometric-based identifier of the grantor, or where the information cannot be retrieved in a search as a result of an incorrectly entered serial number.<sup>43</sup> However, where there is an error in the address or name of the debtor or the secured creditor, the registration shall remain effective.<sup>44</sup> Additionally, an incorrect description of the collateral will not necessarily render the registration effective with respect to other collaterals which have been sufficiently described.<sup>45</sup>

Regarding post-registration amendments, an amendment that adds a new grantor, and modifies the amount of the secured obligation will be effective as to the added grantor, and the new amount secured will only take effect from the date and time the amendment financing statement is registered.<sup>46</sup> It is stipulated that the secured creditor must fulfil certain

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<sup>37</sup> See NZPPSA 1999 s 146; see UCC Article 9, 502 (d).

<sup>38</sup> CBNR, Art. 12 (1).

<sup>39</sup> CBNR, Art. 12 (2).

<sup>40</sup> CBNR, Art. 12 (3); see UCC Article 9, 503 (4) (e).

<sup>41</sup> CBNR, Art. 14 (1).

<sup>42</sup> CBNR, Art. 14 (2); see NZPPSA 1999 s 145.

<sup>43</sup> CBNR, Art. 15 (1); see NZPPSA 1999 s 149 - 150.

<sup>44</sup> CBNR, Art. 16 (1) & (2).

<sup>45</sup> CBNR, Art. 16 (4).

<sup>46</sup> CBNR, Art. 18 (1) & (2); see UCC Article 9, 512 (c), where it goes further to state that if the amendment financing statement purports to delete or fails to provide the name of the new grantor, or where it deletes



conditions before such amendments can be completed such as provision of initial financing statement registration number, indication of the purpose of the amendment and which information is to be included or deleted as the case may be, and the identity of the secured creditor must be ascertained and noted.<sup>47</sup>

Where there is no commitment to make further advances and all obligations have been performed under the security agreement, registration may be cancelled by the secured creditor by filing a cancellation statement within fifteen working days after receiving demand from the grantor.<sup>48</sup> The cancellation statement should include the registration number of the financing statement to which the cancellation relates, and the identification of the secured transaction authorising the cancellation.<sup>49</sup> Where the secured creditor does not authorise the cancellation, the grantor may appeal to the Registrar, notice of which should be provided to the secured creditor for an opportunity to reply which must be done within seven days before a decision is made by the Registrar.<sup>50</sup> The decision of the Registrar will normally be final unless otherwise determined by a law court.<sup>51</sup>

Any interested person may obtain a printed information provided by the secured creditor without the need to justify or demonstrate the reasons for the search, and the NCR upon receiving payment of the prescribed fee, shall issue a printed search result in the form of a certificate which shall be conclusive evidence of the existence of the information while noting the time and date of its issuance.<sup>52</sup> Searches may be carried out by reference to the Company registered name or number if it is a Company, Cooperative or Registered Business; and in the case of a natural person, the biometric unique identifier; and serial number of the collateral.<sup>53</sup> The fees payable for initial registration is 1000 Naira; for renewals and amendments, the amount is 500 Naira; for searches and search certificate issuance, the amount is 500 Naira.<sup>54</sup> The fees prescribed above are amendable and may be subject to review from time to time by the CBN Governor.<sup>55</sup>

At this point, it is worthy of note that a year before the CBNR was published, a similar Regulation referred to as the Collateral Registry Regulations ('CRR') 2014 was

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information regarding the names of the secured creditor without providing a new name, such amendment will be ineffective, UCC Article 9, 512 (e). A similar provision is not included in the CBNR.

<sup>47</sup> CBNR, Art. 18 (3) & (4); See: UCC Article 9, 512 (a).

<sup>48</sup> CBNR, Art. 19 (1) & (2).

<sup>49</sup> CBNR, Art. 19 (3).

<sup>50</sup> CBNR, Art. 19 (4) & (5).

<sup>51</sup> CBNR, Art. 19 (6).

<sup>52</sup> CBNR, Art. 20 (1) & (2).

<sup>53</sup> CBNR, Art. 21.

<sup>54</sup> CBNR, Art. 22 (1).

<sup>55</sup> CBNR, Art. 22 (2).

produced by the CBN.<sup>56</sup> It reflected most of the CBNR provisions and as a matter of fact, the CBNR is a revised version of it. The main differences were in the possibility of a secured creditor perfecting a security interest outside of registration, and the nature of legal personality of the secured creditor. The law stated that a security interest could be perfected by way of actual possession of the collateral.<sup>57</sup> Also, the CRR stated that any type of person, whether legal or natural, could be a secured creditor.<sup>58</sup> These provisions are however absent from the CBNR.

#### **5.2.4 Priorities between Security Interests**

Basically, a perfected security interest will have priority over an unperfected security interest.<sup>59</sup> Subject to certain exception laid down in Articles 27 – 34, ascertainment of priority between competing claims in the same collateral will be determined by their order of registration.<sup>60</sup> However, the CBNR did not elaborate further as to the priority status when two or more competing claims are unperfected. A solution to this problem could be that priority should be determined by the order of creation of the security interest.<sup>61</sup>

Priority of original collateral will continue into its proceeds, and the priority of security interests in respect of its secured obligations and advances, whether present or future, shall be the same.<sup>62</sup> Also, a transfer of security interest from a secured creditor to an assignee does not affect priority in that it will remain effective without registering an amendment financing statement.<sup>63</sup> The security interest acquired by the assignee will have similar ranking in priority with that of the assignor (secured creditor) which was earlier registered. The secured creditor may subordinate its priority in favour of another person which will become effective without registering a financing statement in the NCR, since such an agreement does not adversely affect rights of a person who is not party to the agreement.<sup>64</sup> For instance, SC 1 and SC3 may enter into a subordination agreement without the knowledge of SC2. So long as SC2's contractual right is not adversely affected, the agreement between SC1 and SC3 will be valid. Also, a PMSI will have priority over a non-PMSI if the holder

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<sup>56</sup> Collateral Registry Regulations (CRR) was published by the CBN in September 2014.

<sup>57</sup> CRR, 23 (2).

<sup>58</sup> CRR, 3 (2).

<sup>59</sup> CBNR, Art. 23 (1), Art. 8.

<sup>60</sup> CBNR, Art. 23 (2).

<sup>61</sup> NZPPSA s 66 (c).

<sup>62</sup> CBNR, Art. 24.

<sup>63</sup> CBNR, Art. 25; see NZPPSA s 69; see UCC Article 9, 310 (c).

<sup>64</sup> CBNR, Art. 26; see NZPPSA s 70 (1).

of the PMSI has perfected its security when the debtor takes possession of the collateral.<sup>65</sup> Again, perfected security interests in collateral that becomes manufactured and comingled in a product or mass leading to loss of identity of the collateral, its priority shall remain as perfected with the product or mass.<sup>66</sup> If there are more than one perfected security interest in the goods before they become part of the product or mass, the security interest would rank equally in proportion according to the value of the goods at the time they became part of the product or mass.<sup>67</sup>

Unless there is evidence that a third party assignee might have colluded with the grantor, the assignee of money from an encumbered deposit account takes the money free of the secured creditor's perfected security interest.<sup>68</sup> A bank's right of set-off will also have priority over such perfected security interest that extends to the deposit account.<sup>69</sup> In practice, the right of set-off will be enforceable especially if the bank happens to be the secured creditor, and the deposit account held by the bank will be viewed as conclusive proof that the bank has total control of the account.

A transferee of a document of title or negotiable instrument will have priority as against a perfected security interest in the document or instrument if the transferee has provided value, acquired the document of title or negotiable instrument without knowledge that the transaction would have breached a security interests in relation to it, and is in possession of the document of title or negotiable instrument.<sup>70</sup> The underlying economic policy behind this provision is to allow the continuous negotiability of instruments while providing limited restriction in order not to hamper trade activities. However, it may be that the transferee's priority will not be postponed irrespective of whether there was actual notice of a security interest in the document of title or negotiable instrument, unless of course the transferee was aware that the transfer which was concluded during the course of the business of the transferor (grantor) and is in direct breach of the security agreement between the secured creditor and the transferor.<sup>71</sup>

An assignee of an account receivable will be subject to the terms and agreement between the account debtor and the assignor and any defence or claim arising thereto,<sup>72</sup> and also, other claims and defences in favour or against the account debtor such as a right of set-

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<sup>65</sup> CBNR, Art. 27; see NZPPSA s 73 (1); see UCC Article 9, 324 (a).

<sup>66</sup> CBNR, Art. 28 (1); See: NZPPSA s 82.

<sup>67</sup> CBNR, Art. 28 (2).

<sup>68</sup> CBNR, Art. 29 (1).

<sup>69</sup> CBNR, Art. 29 (2).

<sup>70</sup> CBNR, Art. 30.

<sup>71</sup> See for example NZPPSA s 96 (2).

<sup>72</sup> CBNR, Art. 31 (1) (a); see NZPPSA s 102 (1) (a).

off that happens to accrue before the account debtor receives notification of the assignment,<sup>73</sup> unless the account debtor has entered an enforceable agreement with the assignor not to assert defences to claims arising out of the contract.<sup>74</sup> In other words, the assignee cannot ‘take what he does not have’ i.e. acquiring a better right which the assignor never had since he is directly stepping into the position of the assignor and will thereby become subject to all defences against the assignor. Regarding priority between competing assignees of account receivables, priority will be determined according to the time of registration in the NCR regardless of the time when the account debtor has been notified of the assignment.<sup>75</sup>

Where a buyer or lessee acquires goods for value and takes possession, the lessee or buyer will take the goods free of any unperfected security interest.<sup>76</sup> A buyer of goods purchased in the ordinary course of business of the seller, and the lessee of goods leased in the ordinary course of business of the lessor shall take the goods free of any security interest created by the seller or lessor unless the buyer or lessee has knowledge that the transaction constitutes a breach of the agreement under which creates the security interest.<sup>77</sup> Hence, knowledge that the transaction will be tantamount to a breach, which disqualifies the buyer or lessee thereby making the title defective. This provision may as well apply to consumers who purchase inventories from retail stores. Notwithstanding, a lienholder in possession of goods subject to another security interest after services have been provided in the ordinary course of business shall have priority over that security interest.<sup>78</sup>

### **5.2.5 Realisation of Security Interests**

After default, a secured creditor may choose to enforce rights provided in this Part and those provided in the secured agreement, or the secured creditor may resort to any available judicial procedure.<sup>79</sup> For instance, the secured creditor may decide to sell the collateral in a public auction or obtain a judicial order to repossess the collateral. It is the responsibility of the secured creditor to notify the grantor if there are plans to repossess the collateral once there is a default.<sup>80</sup> The notice must be delivered by either ‘hand, courier service, registered mail, or other means agreed by the parties.’<sup>81</sup>

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<sup>73</sup> CBNR, Art. 31 (1) (b); see NZPPSA s 102 (1) (b).

<sup>74</sup> CBNR, Art. 31 (2).

<sup>75</sup> CBNR, Art. 31 (3).

<sup>76</sup> CBNR, Art. 32 (1).

<sup>77</sup> CBNR, Art. 32 (2); see NZPPSA s 53 (1).

<sup>78</sup> CBNR, Art. 33; see NZPPSA s 93 (a).

<sup>79</sup> CBNR, Art. 34 (3).

<sup>80</sup> CBNR, Art. 35 (1); see UCC Article 9, 607 (a) (1).

<sup>81</sup> CBNR, Art. 35 (2).

During a ten day period, the notice of default must be sent to the grantor, and the secured creditor may then take possession of the collateral, or may render the collateral inoperative or unsellable if it is incapable of removal for repossession.<sup>82</sup> Collateral may be difficult to remove for example due to its nature (weight or size), or, lack of adequate storage facility.<sup>83</sup> The secured creditor may only proceed under this provision pursuant to judicial process, or without any judicial process if there is a prior agreement between both parties to relinquish possession without a judicial order.<sup>84</sup> If the secured creditor decides to enforce without court assistance, with the help of law enforcement agencies, the secured creditor must enforce his right of possession peacefully.<sup>85</sup> To achieve peaceful repossession, the grantor may be required to assemble the collateral and make it available in a designated place as agreed.<sup>86</sup> The secured creditor may as well decide to dispose of the collateral in the premises of the grantor but must not cause unnecessary inconvenience.<sup>87</sup>

A secured creditor may collect and enforce his security interest against an account receivable, money or negotiable instrument taken as collateral to satisfy the loan if the grantor has defaulted,<sup>88</sup> and, the secured creditor may notify the account debtor and draw payment even prior to default.<sup>89</sup> Due to the liquidity of these types of assets, they may be collected without any physical interruption of the grantor's business, but of course, notification of collection should be provided to the persons that owe payment to the grantor so as to make direct payment to the secured creditor instead. Ordinarily, it is discretionary whether the secured creditor should always notify the account debtor for payment collection because, for example, a factor may purchase and collect the receivables from the account debtors irrespective of whether or not the grantor has actually defaulted.

The secured creditor may dispose the collateral by sale, lease, license, or by other possible forms of disposal in its condition or after it has been prepared and processed in a commercially reasonable way.<sup>90</sup> The sale could be carried out privately, in an auction, public tender or other methods as provided in the security agreement,<sup>91</sup> and there is a duty owed to

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<sup>82</sup> CBNR, Art. 35 (3); see UCC Article 9, 609 (a).

<sup>83</sup> CBNR, Art. 36 (1).

<sup>84</sup> CBNR, Art. 35 (4); see UCC Article 9, 609 (b).

<sup>85</sup> CBNR, Art. 35 (5).

<sup>86</sup> CBNR, Art. 35 (6).

<sup>87</sup> CBNR, Art. 36 (2); see NZPPSA s 111 (2).

<sup>88</sup> CBNR, Art. 37 (1); see NZPPSA s 108. This provision under the NZPPSA specifies that a secured creditor who wishes to collect and realise the collateral in satisfaction of the debt should usually have priority over all other secured creditors.

<sup>89</sup> CBNR, Art. 37 (2).

<sup>90</sup> CBNR, Art. 38 (1).

<sup>91</sup> CBNR, Art. 38 (2).

the grantor to obtain a fair price from the sale or disposal.<sup>92</sup> Not less than ten working days must have lapsed within which the secured creditor is required to notify interested parties i.e. grantor and other secured creditors, about the purported sale of the collateral.<sup>93</sup> The requirement to provide notice within the stipulated time will not be applicable if the collateral could perish within ten working days of repossession, if the secured creditor honestly believes that the collateral will decline in value if not disposed of immediately, or the cost of protection and storage of the collateral is disproportionately higher in relation to its overall value, the collateral consists of inventory or farm products, and if it is in a manner earlier described under Art. 36 (1).<sup>94</sup>

All security interests held by other subordinate creditors over the collateral of the grantor will be extinguished once the collateral has been sold by the secured creditor.<sup>95</sup> The buyer of such collateral will take free of any subordinate security interest, but may be subject to a security interest having a higher priority than the seller of the collateral. Within fifteen working days after the successful sale of the collateral, the secured creditor has a duty to provide to the persons entitled to receive a notice of sale, a written statement accounting for the amount of the proceeds of sale, the amount of the costs and expenses incurred of the sale, and the balance owned by the grantor to the secured creditor or by the secured creditor to the grantor.<sup>96</sup> This ensures economic efficiency and transparency in the disposal process of the collateral.

Before the secured creditor applies the proceeds of the sale of the collateral towards the satisfaction of the debt or other obligations, it is required that the proceeds should be channelled towards the cost and expenses of the sale, and other reasonable expenses which may have been incurred as to the extent as provided for in the security agreement.<sup>97</sup> For example, where goods are sold by an auctioneer, the auctioneer will have to be remunerated first before the remaining amount can be applied to satisfy the debt. Where the disposal of the collateral generates a surplus, the secured creditor is mandated to pay the surplus in an order starting from the subordinate secured creditors that have a perfected security interest according to their priority in registration, and thereafter, the grantor.<sup>98</sup> In the event that a dispute arises as to who is entitled to receive payment, the secured creditor may pay the

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<sup>92</sup> CBNR, Art. 38 (3).

<sup>93</sup> CBNR, Art. 39 (1).

<sup>94</sup> CBNR, Art. 39 (2).

<sup>95</sup> CBNR, Art. 40; see NZPPSA s 115.

<sup>96</sup> CBNR, Art. 41; see NZPPSA s 116.

<sup>97</sup> CBNR, Art. 42 (1).

<sup>98</sup> CBNR, Art. 42 (2); see NZPPSA s 117.

surplus into court.<sup>99</sup> In that case, the court will determine the order in which creditors are entitled to the surplus. If there is a deficiency in the amount required to offset the debt, the grantor remains liable for it.<sup>100</sup>

Before collateral is disposed by the secured creditor, the grantor, any person owing payment, or other secured creditor may redeem the collateral by fulfilling all the obligations in the security agreement, and paying all other reasonable costs incurred by the secured creditor.<sup>101</sup> The grantor has a special right of priority in redemption of the collateral against all other interested parties.<sup>102</sup> At any time before the secured creditor decides to dispose the collateral, the grantor may reinstate the security agreement by paying the sum in arrears, remedy any other default which may have happened, and pay a reasonable sum which may have been incurred by the secured creditor.<sup>103</sup> Primarily, the grantor will be unable to reinstate a security agreement more than twice a year unless agreed otherwise.<sup>104</sup> It is important to note that unlike redemption which is available to both the grantor and other creditors, reinstatement is available only to the grantor.<sup>105</sup>

### **5.2.6 Rights and Duties of the Parties (and Registration of Security Interests in Good Faith within Commercial Reasonableness)**

All rights, duties and obligation which may arise under the CBNR would be conducted in good faith in accordance with commercial reasonableness.<sup>106</sup> Ultimately, the court will decide what conduct will satisfy good faith and commercial reasonableness looking objectively at the established practices in the business and consumer sector. Notice registration system does not require the signatures of both parties before a security interest can be registered in the collateral register, but a person who registers an unauthorised record will be liable for damages.<sup>107</sup> A person will not be acting in bad faith merely because of his knowledge of existence of a security interest, unless the person acting is aware that any action which is taken would be at variance with the rights of the secured creditor.<sup>108</sup> Where

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<sup>99</sup> CBNR, Art. 42 (3); see NZPPSA s 118 (1).

<sup>100</sup> CBNR, Art. 42 (4).

<sup>101</sup> CBNR, Art. 43 (1); See UCC Article 9, 623 (a) & (b).

<sup>102</sup> CBNR, Art. 43 (2).

<sup>103</sup> CBNR, Art. 44 (1).

<sup>104</sup> CBNR, Art. 44 (2).

<sup>105</sup> *ibid.*

<sup>106</sup> CBNR, Art. 45 (1); See NZPPSA s 25 (1).

<sup>107</sup> Gerard McCormack, 'Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code' (2003) 24 Comp Law 69, 72.

<sup>108</sup> CBNR, Art. 45 (2); See NZPPSA s 25 (2).

a person fails to discharge duties as imposed by the CBNR, the person to whom that duty is owed has a right to recover consequential damages resulting from such failure.<sup>109</sup>

The inclusion of an obligation of good faith and commercial reasonableness can be traced far back to the Roman law *actio bonae fidei*.<sup>110</sup> Where the performance of good faith and the need to act reasonably is required under the contract has been expressly defined, the parties would be bound by not only by the terms inscribed in the security agreement, but by the terms that would be naturally implied into the agreement concerning what the parties ought to do or what they ought not to have done in good faith.<sup>111</sup> The performance of good faith under the CBNR falls within the limits of commercial reasonableness between contracting parties. Thus, it means that the contractual performance should always be made in good faith by the party owing performance to the other party who is being owed the same, and the performer must be willing and ready to fulfil this obligation. In contrast, while English law developed tests for good faith purchase, it did not provide a basic positive duty of good faith imposed on contracting parties.<sup>112</sup>

The requirement of good faith in this part falls under the test for good faith performance. For example, the searcher of the registry will not be informed if the registration relates to a legitimate or sham security agreement. The searcher may have to take additional steps to confirm the validity of the information provided in the register. The CBNR bears this problem as there is no express requirement to satisfy the NCR that contracting parties have entered into a security agreement in good faith. The only function of the NCR will be to ensure that the financing statement portrays all the mandatory information required under Art. 12 CBNR. The responsibility for the accuracy and legal sufficiency of the information recorded is borne by the secured creditor, and neither will the NCR modify or delete any information in the financing statement. Unlike the pre-CBNR laws where transaction-filing was used, staff of the NCR will not compare the information in the agreement with the financing statement. The result of this is that since registration will be conducted electronically, the notice registration has been carefully designed to ensure that the online portal rejects an incomplete financing statement where required fields have been left blank.<sup>113</sup>

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<sup>109</sup> CBNR, Art. 46 (1); See NZPPSA s 176 (1); See UCC Article 9, 625 (b). Be that as it may, nothing in Art. 46 will limit or affect any liability which a person might incur under any other Nigerian law, see CBNR, Art. 46 (2).

<sup>110</sup> Max Radin, 'Fundamental Concepts of the Roman Law - I' (1924) 12 Cal L Rev 481, 490.

<sup>111</sup> E Allan Farnsworth, 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' (1963) 20 U Chi L Rev 666, 668.

<sup>112</sup> Raphael Powell, 'Good Faith in Contracts' (1956) 9 Current Legal Probs. 16.

<sup>113</sup> See NCR User Manual.



The ST Guide provides some solutions to this problem. The grantor could authorise the secured creditor to register the financing statement at the time the security agreement is signed.<sup>114</sup> Alternatively, the grantor may provide the secured creditor with such authorisation in a separate document even before the security agreement has been concluded. In any case, the grantor provides authorisation to file the financing statement along with the collateral description either before or after the agreement is signed, but a mere oral communication will not be sufficient.<sup>115</sup> To avoid dispute in future, it is highly advisable that the authorisation should be reduced in writing and signed by the grantor.<sup>116</sup> Art. 8 CBNR is vague on the issue of when exactly registration will amount to perfection. Literally, it seems that registering a financing statement could, on its own, lead to perfection regardless of whether it was expressly authorised to be registered or not. Nonetheless, if the grantor is against registration of the financing statement, the grantor may request the secured creditor to cancel the financing statement which must be done within fifteen working days upon receiving the demand, but only after all obligations may have been discharged or where none existed in the first place.<sup>117</sup> Besides, identification of the registrant will also be requested in the ‘secured creditor profile’ online page to authorise a client account in the event that registration was unauthorised.<sup>118</sup> Also, since natural persons cannot act as secured creditors under the CBNR as they must be either banks or other types of licensed financial institutions,<sup>119</sup> the risk of registering a security interests against the grantor without any authority is minimised due to the regulated nature of these financial institutions in Nigeria by the CBN. However, additional steps will need to be taken against any unauthorised or falsified information registered by a dishonest person. Such steps could include punishment on conviction, to a fine for a set sum or to imprisonment for a short term, or to both. The CBNR should consider making additional provisions along this line against falsification of information or unauthorised registration.

The secured creditor has the responsibility of providing a confirmation statement of registration to the grantor no later than fifteen working days after it has been received from the NCR.<sup>120</sup> The confirmation statement may be provided in the same manner as seen under

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<sup>114</sup> ST Guide, Recommendation 71.

<sup>115</sup> *ibid.*

<sup>116</sup> Marek Dubovek and Cyprian Kambili, *A Guide to the Personal Property Security Act: The Case of Malawi* (Pretoria University Law Press, South Africa 2015) 69.

<sup>117</sup> CBNR Art. 19; ST Guide, Recommendation 72.

<sup>118</sup> NCR User Manual, p. 8 – 12; ST Registry Guide, para 96.

<sup>119</sup> CBNR, Art 2 (1).

<sup>120</sup> CBNR, Art. 47 (1).

Art. 35 (2).<sup>121</sup> Further, a grantor has the right to request the secured creditor to send or provide to any person, at a designated address of his choosing either: a summary of the secured agreement that creates or provides for a security interest, written statement of the amount and terms of payment of the indebtedness, a detailed list of the collateral unless the security interest has been taken over the grantors personal properties, or an account statement indicating the amount payable for the satisfaction of the secured obligation.<sup>122</sup> Since the NCR provides only limited information about encumbrances, a third party will need additional information in order to reach a prudent decision as to whether to purchase the grantors goods or give a loan to the grantor. Thus, Art. 48 (1) imposes some kind of fiduciary duty on the secured creditor to provide additional information. Whether it is mandatory that such information must come directly from the secured creditor is disputable, however, due to information privacy, the secured creditor may provide the information to the grantor who in turn may provide it to the third party enquirer.

Where the secured creditor decides to no longer have any interest in the obligation secured or in the collateral, the secured creditor must disclose to the grantor, the name and address of the immediate successor in the interest or transferee, and the latest successor in the interest or transferee if known.<sup>123</sup> The CBNR does not state whether a transfer of secured obligations should be recorded in the NCR. Hence, a secured creditor may sell the secured loan to another creditor and may not have registered an amendment, although, it will be prudent for the transferee to register an amendment statement. If this is to happen effortlessly, the secured creditor will need to inform the grantor, on the grantor's request, that the secured obligation has been assigned to a third party, and the identity of the assignee should be provided to the grantor. The secured creditor must comply within ten working days of receipt of the request.<sup>124</sup> The secured creditor may charge the grantor for reasonable cost of providing such information, and the grantor shall be entitled to only one response free of charge for every six months.<sup>125</sup>

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<sup>121</sup> CBNR, Art. 47 (2).

<sup>122</sup> CBNR, Art. 48 (1); See NZPPSA s 177 (1).

<sup>123</sup> CBNR, Art. 48 (2).

<sup>124</sup> CBNR, Art. 48 (3); See NZPPSA s 178, subject to s 179.

<sup>125</sup> CBNR, Art. 48 (4). Under NZPPSA s 180, the grantor is not required to pay a fee for any information requested. Only a third-party is required to pay 'reasonable cost' of procuring the information.

### **5.3 Arguments for and against International Harmonisation of Secured Transaction Laws: Benchmarking the CBNR with International Best Practice Guidelines**

Looking back at the CBNR, it can be seen that the scope of its provisions are wide-ranging, which arguably covers many of the existing security devices recognised in Nigeria. Nevertheless, it is important to establish whether it can be a useful regulation to support secured transaction in Nigeria based on recommendations advanced by international best practices. With the assistance of the EBRD Core Principles, and the recommendations of the ST Guide together with other broad policy frameworks of UNCITRAL for an effective and efficient secured transactions law, a path-dependent comparative analysis will need to be undertaken, and proposals for a reform of the Nigerian secured transactions law will be laid out and considered here. These soft laws will be used as a benchmark against the provisions of the CBNR, which at face value, seems to be fraught with some legal deficiencies. This benchmarking exercise will be founded on ten distinct criteria, adapted to fit the Nigerian context, as set out by these soft laws. The extent to which the benchmarking exercise should be conducted to facilitate international harmonisation of rules on secured transactions will be discussed below.

It has been reiterated that an efficient secured transactions laws should facilitate low-cost access to credit thereby improving the availability of credit.<sup>126</sup> While this premise remains valid for the sake of empirical studies on transitional economies which suggests that poor collateral-based legal regimes are as a result of the inefficiency of their secured lending laws,<sup>127</sup> there have been arguments that these developing economies resort to informal methods of accessing credit.<sup>128</sup> While the position of developing economies can be mitigated through law reform measures, there remain controversies surrounding the extent of influence of domestic laws such as Article 9 on the reform process of secured transaction laws globally.<sup>129</sup> It has been mentioned that a move of national laws towards the path of Article 9 is a product of spontaneous convergence towards a harmonised legal order.<sup>130</sup> The framework of this thesis does not follow path of Article 9 but rather the UNCITRAL legal

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<sup>126</sup> See Chapter 1, para 1.1, above.

<sup>127</sup> Heywood Fleisig, 'Economic Functions of Security in a Market Economy' in Joseph Norton and Mads Andenas (eds), *Emerging Financial Markets and Secured Transactions* (Kluwer, London 1998) 15.

<sup>128</sup> Douglas W Arner, *Financial Stability, Economic Growth and the Role of Law* (Cambridge University Press 2007).

<sup>129</sup> Gerard McCormack, 'UNCITRAL, Security Rights and the Globalisation of the US Article 9' (2011) 62 *N Ir Legal Q* 485.

<sup>130</sup> Gerard McCormack, 'Convergence, Path-dependency and Credit Securities: The Case against Europe-wide Harmonisation' (2010) 10 *Global Jurist* 1, 10.

frameworks particularly the ST Guide which has also been criticised for been heavily shaped by American jurists and too close in tone with Article 9.<sup>131</sup>

While harmonisation of secured transaction laws will arguably facilitate credit for businesses, it has been mentioned that international models such as the ST Guide used as a tool for reform may bring about resistance in the recipient country which will mitigate against the prospect of it gaining widespread acceptance globally.<sup>132</sup> The reason for this may be because these economies are path-dependent in the sense that their political, economic and cultural, including social and commercial norms should generate the need to alter their legal rules from within which would be shaped by their legal doctrines which would then result in the law to develop this way without external interference.<sup>133</sup> Thus, the law would adapt to new demands and circumstances by adapting existing legal concepts rather than introducing new ones entirely in a wholesale manner. Convergence theorists on this subject lobby to promote the advantages of Article 9 as the basis for global law reform for secured transactions, and behind this view is that Article 9 is basically superior to other models, and that regardless of several national path-dependent schemes, the law should converge towards the most appropriate model.<sup>134</sup>

The modernisation and harmonisation of secured transactions cannot be separated from cultural attitudes and preferences of public policy in that they vary among economies irrespective of whether the transplanted legal norms may appear related to the recipient State.<sup>135</sup> The commercial law of a country is usually closely aligned with its history and development and the replacement of indigenous provisions with supranational rules may correlate to discarding the historical legacy of the country.<sup>136</sup> Law in general is the spirit of a nation and should not be separated from its immediate society because of its intimate relationship with national expectations.<sup>137</sup> For example, a trade credit agreement between a retailer and supplier cannot be regulated only within the confines of commercial law especially where the existence of a security interest may impact on a third party purchaser. Where the retailer becomes bankrupt, policy issues would arise which must be considered by the State concerned. Where the goods of the retailer are to be distributed to satisfy the

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<sup>131</sup> *ibid*, 11.

<sup>132</sup> Gerard McCormack, 'American Private Law Writ Large? The UNCITRAL Secured Transactions Guide' (2011) 60 ICLQ 597, 598.

<sup>133</sup> McCormack (n 130) 12.

<sup>134</sup> McCormack (n 132) 598.

<sup>135</sup> Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 245.

<sup>136</sup> Stephen Weatherill, 'Why Object to the Harmonization of Private Law by the EC?' (2004) 12 Euro Rev Priv L 633.

<sup>137</sup> McCormack (n 132) 600.

debt owed to the supplier who would usually be a secured purchase money creditor if the security interest has been perfected, this process may need to reflect the social goals within the country. This national element of path-dependency cannot be ignored while pursuing a modernised and harmonised reform agenda. However, there is a way to fulfil this agenda without jeopardising local policies because some of the local rules may be a liability to the economy and not worth keeping. This involves a systematic benchmarking of the current Nigerian system against international secured transactions soft law rules e.g. UNCITRAL legal frameworks.

Often, law reform in one jurisdiction may reflect, to some extent, changes that may have happened in another jurisdiction.<sup>138</sup> This could be as a result of unprecedented developments in its society or its desire to improve the economic and social welfare within the country. Improved economic welfare can lead to generation of capital for businesses thereby empowering the nation to actively participate in international trade, with harmonisation of secured transactions law serving as a means towards this end. UNCITRAL explains harmonisation to mean a process through which domestic laws are modified to enhance predictability in cross-border transactions.<sup>139</sup> Thus, harmonisation might be seen as intrusive albeit minimally on the legislative sovereignty of a nation through the identification of common values among existing domestic rules.<sup>140</sup> It has even been asked why global harmonisation should be pursued where many nations do not have a harmonised set of domestic laws in the first place.<sup>141</sup> It was further mentioned that harmonisation imposes one particular set of rules and principles, which more often benefits the instigator.<sup>142</sup> Be that as it may, the question here is whether harmonisation of domestic secured transactions law should bring about wholesale changes to legal doctrines enshrined in the Nigerian legal system, and what tools may be used in this agenda without irritating the existing doctrines.

Secured transactions laws that are inadequate do not respond to market-led innovations and technological advancements while national regulations are usually insufficient to cope with international developments when called upon.<sup>143</sup> For this purpose, UNCITRAL has adopted a flexible technique with a functional approach to modernise and

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<sup>138</sup> Pierre Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' (2002) 10 Euro Rev Priv L 61.

<sup>139</sup> UNCITRAL [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html) last accessed 12 February 2017.

<sup>140</sup> Gerard McCormack, *Secured Transactions and the Harmonisation of Law: the UNCITRAL Experience* (Edward Elgar 2011) 17.

<sup>141</sup> William van Caenegem, 'Ignoring the Civil Law/Common Law Divide in an Integrated World' in William van Caenegem and Mary Hiscock (eds), *The Internationalisation of Legal Education: The Future Practice of Law* (Edward Elgar 2014) 147.

<sup>142</sup> *ibid.*

<sup>143</sup> McCormack (n 130) 17.

harmonise secured transactions in international trade law.<sup>144</sup> These techniques can be categorised into three broad categories: contractual, explanatory and legislative. The latter category can be further distinguished either as legislative guides, model laws, conventions or model provisions. This focus of this benchmarking exercise is on the legislative guide (i.e. ST Guide) as a tool for reform of Nigeria's domestic secured transactions law. The reason for opting to use this tool is because it can provide a set of possible statutory solutions to different issues which is not necessarily a single set of model rules for every issue. The ST Guide discusses the advantages and disadvantages of every policy choices at length which can assist the reader to choose the most appropriate solution depending on each national context without interfering with existing domestic laws.<sup>145</sup> The ST Guide can also be used by a national legislature as a standard for law reform to review the adequacy of their laws, to update, and to develop new laws.<sup>146</sup>

The EBRD does not possess a similarly robust legislative manual (or guide) such as the ST Guide. The closest that has been achieved internationally is the EBRD Model Law. The legal provisions of the CBNR is not benchmarked against the Model Law for various reasons. First, the terminologies used in this model law varies significantly compared to the Nigerian context. For example, references to the 'enterprise charge' under the model law does not necessarily equate to the equitable charge granted by companies in Nigeria. In Nigeria, the company charge could be taken over both movable and immovable property. Also, the word 'charge' if used in Nigeria as seen under the model law would likely cause confusion if it is used outside the corporate environment. The common terminology is 'security interest' which encompasses all types of creditor rights (excluding the company charge and some reservation of title agreements) as seen under the CBNR. Also, the concept of notice registration is not recognised under the Model Law. The Model Law follows the path of transaction-filing which involves the submission of a registration statement within 30 days of execution of the security (charge), and it does not allow advance registration prior to attachment.<sup>147</sup> In general, the Model Law has been drafted as a basis to assist central and eastern European countries to develop their secured transaction laws and it is compatible with civil law concepts which underlie many countries in Europe.<sup>148</sup>

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<sup>144</sup> Question of Coordination: Direction of the Work of the Commission (UNCITRAL 14<sup>th</sup> Session A/CN.9/203, June 1981); Alternative Methods for the Final Adoption of Conventions Emanating from the Work of the Commission (UNCITRAL 14<sup>th</sup> Session A/CN.9/204, June 1981).

<sup>145</sup> A Guide to UNCITRAL: Basic Facts about United Nations Commission on International Trade Law (United Nations Vienna 2013) 16.

<sup>146</sup> *ibid.*

<sup>147</sup> EBRD Model Law, Art. 8 and 33.

<sup>148</sup> EBRD Model Law, see Introduction.

Nonetheless, the EBRD's law reform on this subject does not rest solely on the implementation of the Model Law, but rather, it has gone ahead to develop a set of principles which should be present in a modern secured transactions law. These Core Principles are ten general rules (or law reform goals) with the idea of providing guidance as to what a national legislation should aim for rather than providing the relevant law unlike the Model Law.<sup>149</sup> The ST Guide has a large number of recommendations comparable to the EBRD Core Principles, which also follow the same lines as the ST Guide eleven key objectives which have been produced specifically for the modernisation of harmonisation of secured transactions law. Their objectives, principles and recommendations have some significant overlap and they have been used extensively as a tool against which the provisions of the CBNR has been benchmarked. They will now be discussed below.

### **5.3.1 Limiting the risks associated with credit security**

Security should ordinarily reduce the risk of giving credit, leading to an increased availability of credit on improved terms. Where a secured transactions law does not protect the parties by reducing the risk of giving credit, then the law will serve very little purpose.<sup>150</sup> As often reiterated, the primary purpose of a secured transactions law is to boost economic growth. A law which protects lenders against credit risks will provide an increase in the availability of credit for borrowers with possibly improved terms. Similarly, the ST Guide states that secured credit should be made readily available.<sup>151</sup> An effectively set up debtor-creditor regime within a secured transaction framework will allow loans to be extended at lower credit rates where there is less risk of default.<sup>152</sup> Again, uncertainty in court rulings and enforcement orders increases the risk level in getting credit thus reducing the willingness to rely on security in personal assets.<sup>153</sup>

The CBNR does not specifically mention whether the security agreement should be in writing, or whether an oral agreement will suffice. The UNCITRAL Model Law on

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<sup>149</sup> Jan-Hendrik Röver, 'The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions' (2010) 15 Unif L Rev 479, 485.

<sup>150</sup> Massimo Pedrazzini and John Simpson, 'The Legal Framework for Secured Credit: A Suitable Case for Treatment' [1999] BLI 127, 131. See EBRD Core Principle I.

<sup>151</sup> ST Guide, Terminology and Recommendations - Key Objectives 1 (a).

<sup>152</sup> IFC Toolkit, 13.

<sup>153</sup> IFC Toolkit, 22.

Secured Transactions 2016, henceforth ‘UNCITRAL Model Law’<sup>154</sup> provides a solution to this problem. It states that where the secured creditor is in possession of the property, the agreement may be oral.<sup>155</sup> However, since possession can never lead to perfection under the CBNR, the security agreement must then be in writing as recommended by the UNCITRAL Model Law.<sup>156</sup> The Draft Law also mentions the need to prepare the security agreement in writing to give the secured creditor a greater level of protection, instead of orally, which is the least desirable method of creating a security interest.<sup>157</sup>

Generally, the CBNR has provided for a harmonised framework for secured transactions to regulate the creation, registration and priority of secured transaction laws in Nigeria.<sup>158</sup> This regime has the capacity to boost the economy and its impact will be far-reaching. Borrowers can now access low-cost credit with their personal property, while lenders can realise their security interests in collateral,<sup>159</sup> regardless of whether it has been perfected, although subject to postponement if third party creditors have perfected first.

### **5.3.2 Simple and affordable method of creating security interests**

In some emerging markets such as Nigeria, the grantor does not have an absolute right to use or possess the collateral as it is the case with a pledge. In practice, businesses try to circumvent this problem by utilising other types of transactions to finance their business such as retention-of-title arrangements which often proves to be useful. With such arrangements, the debtor who may be the lessee if it is a financial lease, does not have title in the personal property because title will be vested in the lessor.<sup>160</sup> The ST Guide reiterates that an efficient secured transactions law should enable a quick, cheap and simple way of creating proprietary security right without depriving the grantor the use of the assets.<sup>161</sup> This principle is premised on promoting a simple and affordable method of taking security,<sup>162</sup> while the collateral remains with the grantor, which is a highlight of a modern secured transactions law. If the purpose of a secured transactions law is to maximise economic efficiency, the process of creating security interests should be simple, quick and inexpensive.

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<sup>154</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html) accessed 10 December 2016.

<sup>155</sup> UNCITRAL Model Law, Art. 6 (4).

<sup>156</sup> UNCITRAL Model Law, Art. 6 (3).

<sup>157</sup> Draft Law, para 12.1.

<sup>158</sup> CBNR, Art. 1 (1).

<sup>159</sup> CBNR, Art. 1 (3).

<sup>160</sup> Equipment Lease Act (‘ELA’) 2015 (Nigeria), s 20 – 22.

<sup>161</sup> ST Guide, Key Objectives, 1 (c); Recommendation 2.

<sup>162</sup> EBRD Core Principle II.



As it is the case under the CBNR, where the encumbered property is a fluctuating asset for example, a written consent is not needed to encumber any additional interests bearing from the original agreement.<sup>163</sup> This is particularly the case with inventories and account receivables where the grantor sells and acquires new assets during the course of business. It will be time-wasting and cumbersome to request the grantor's consent as a condition of creating a security interest every time new inventory is acquired. The security interest will be valid so long as it properly describes the collateral in the financing statement. Besides, a mandatory requirement to specifically define the secured asset will most likely prevent future and fluctuating assets from being taken as collateral. For instance, the asset description in the financing statement may be drafted as 'all present inventory now owned and hereinafter possessed and acquired.' This creates a simple and more efficient way of taking security over inventories and receivables in particular.

The CBNR requires minimum information for the registration of the financing statement,<sup>164</sup> thus eliminating the need to file the secured obligation together with all other statement of particulars as it is currently done at CAC for company charge registration. This process simplifies the process of registering financing statement. Delay, uncertainty and unpredictability will more often than not, have adverse effects on secured transactions.<sup>165</sup> These factors often lead to a rise in cost of getting credit. Where legal procedures for creating security interests are slow and complex, the cost of credit will be higher and the economic impact will be negatively felt. The security should give rights in the collateral (*in rem* rights), and not only *in personam* rights against the borrower.<sup>166</sup> The CBNR has sought to eliminate unnecessary formalities once present in the previous regimes, the security bill of sale for example. Parties can obtain security interests in a simple and efficient way.<sup>167</sup> In addition, it provides for a single method of creating security interests over personal property rather than a multiplicity of security devices for different types of asset, and at the same time, it permits the use of future assets as collateral without additional documentation or actions by the parties involved.<sup>168</sup>

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<sup>163</sup> CBNR, Art. 4 (2).

<sup>164</sup> CBNR, Art. 12 & 13; ST Guide, Recommendation 14.

<sup>165</sup> Frederique Dahan, 'The Power of Secured Transactions Law and the Challenge of its Reforms' in N. Orkun Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge University Press 2013) 107.

<sup>166</sup> The EBRD Core Principles and the CBNR do not cover personal securities such as guarantees.

<sup>167</sup> ST Guide, Recommendation 1 (c).

<sup>168</sup> CBNR, Art. 4 (3), 7 (2) (b); ST Guide, Recommendation 13 – 22.

### 5.3.3 Enforcement of security in satisfaction of claim over third party claimants

If the grantor defaults, the secured creditor should be able to have the encumbered assets realised and to have the proceeds applied towards satisfaction of the claim prior to other creditors.<sup>169</sup> Enforcement may require physical seizure and disposal of the collateral if it is a tangible property, but for intangible properties, for example, enforcement may be in form of a demand by the secured creditor on the grantor or third-party account debtor to satisfy the obligation.<sup>170</sup> A secured creditor has the option of rendering the collateral inoperative if the asset is of a kind which cannot easily be moved from the grantor's premises or the storage facility to house the asset is unavailable.<sup>171</sup>

The CBNR does not provide any situation whereby the creditor assigns his proprietary right in the collateral to a purchaser if the collateral is with the grantor. The Draft Law proposed a solution whereby a purchaser would be granted the same right to realise the security interests as if that right had been assigned by the secured creditor.<sup>172</sup> Under this provision, the secured creditor may sell the collateral to a buyer where the grantor refuses to submit possession, and the purchaser will have an equal right to take possession as the creditor once had.<sup>173</sup> If the purchaser or assignee wishes to repossess the collateral, it may then become important for the original secured creditor to provide sufficient notice to the grantor. This is very important in that the transfer of security interest does not require registering an amendment statement in the NCR,<sup>174</sup> and the grantor will be unable to confirm the genuineness of the transfer. Again, the ambit of Art. 25 (2) CBNR which states that transfer of security interests will remain effective without registering an amendment financing statement will need to be clarified properly. The researcher's opinion here is that either the CBNR should now mandate the registration of amendment financing statement in such a situation in order to promote transparency, or the secured creditor must inform the grantor in writing about the transfer to a third party failing which the third party will be unable to repossess the collateral.

Part V CBNR has expressly mandated the disposition of collateral to be undertaken in the most commercially reasonable way either by sale, lease, license or other form of

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<sup>169</sup> EBRD Core Principle III.

<sup>170</sup> Ronald CC Cuming, Catherine Walsh and Roderick J. Wood, *Personal Property Security Law* (2nd edn, Irwin Law Inc 2012) 225.

<sup>171</sup> CBNR, Art. 36 (1).

<sup>172</sup> Draft Law, para 62.

<sup>173</sup> *ibid.*

<sup>174</sup> CBNR, Art. 25 (2).

disposal.<sup>175</sup> This Part helps to facilitate efficient realisation of a secured creditor's security interest.<sup>176</sup> A secured creditor may realise his security interest under the CBNR if the collateral has been disposed thereof and all other subordinate security interest in the same collateral held by third party creditors shall become extinguished.<sup>177</sup> In conclusion, it is vital that the exact nature of the proprietary right which is assigned by way of security has to be defined within the ambit of the domestic law in which it is to operate. Conversely, if it is to be effective, it needs to be in relation to the creditor's claim in remedy towards speedy recovery of the debts over the collateral.

#### **5.3.4 Quick enforcement at market value of the assets given as security**

The ST Guide recommends that upon default in payment, the method for the enforcement of security rights should be clear, simple and efficient, capable of being realised in good faith and in a commercially reasonable way.<sup>178</sup> This principle of enforcement is also intertwined with the EBRD Core Principle in the realisation of security interests.<sup>179</sup> A modern secured transactions law should provide for expeditious enforcement proceedings to accommodate circumstances where the secured creditor, grantor or a third party with an enforcement right applies to a court or other authority with respect to the exercise of post-default rights.<sup>180</sup> There should be efficient, inexpensive, reliable and transparent methods (both judicial and extrajudicial) for enforcing security interests. It should allow for the recovery of possession of the collateral, the possibility of the secured creditor purchasing the collateral in total (or partial satisfaction of the debt), and prompt realisation of the value of the collateral in a commercially reasonable way in good faith.<sup>181</sup> The procedures and practice of enforcing a security interest needs to be favourable to the secured creditor, otherwise the secured creditor may require additional security, or increase the interest rate at the disadvantage of the grantor. Often, a secured creditor who wishes to enforce its security interest will need to obtain a court order and follow a specified process to dispose of the collateral to satisfy the

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<sup>175</sup> CBNR, Art. 38 (1), Art. 45 (1) & (2).

<sup>176</sup> ST Guide, Recommendation 1 (h).

<sup>177</sup> CBNR, Art. 40.

<sup>178</sup> ST Guide, Recommendation 131.

<sup>179</sup> EBRD Core Principle IV.

<sup>180</sup> ST Guide, Recommendation 138.

<sup>181</sup> Principles for Effective Insolvency and Creditor/Debtor Rights Systems (The World Bank, Revised 2015) A8.

obligation.<sup>182</sup> More often than not, the process of realising the collateral through this process can be time consuming and expensive.

The CBNR provides for the realisation of the security interest.<sup>183</sup> The CBNR allows for the use of self-help only if the grantor consents to it.<sup>184</sup> In the event of default, the secured creditor has the option of enforcing his rights in the security as provided under Part V of the CBNR, either by a court action or without court action so long as notice has been given to the grantor.<sup>185</sup> By court action, a judicial order would have to be obtained to take possession of the collateral. If the proceeds are to be realised without court action, the grantor must consent in the agreement to relinquish possession of the collateral.<sup>186</sup> There is no elaborate detail on how the creditor may enforce the security interest with consent, and without judicial assistance, but the Draft Law has provided for a way of incorporating and effecting it appropriately. It states that the security agreement should boldly include ‘IN CASE OF DEFAULT, THE CREDITOR MAY USE SELF-HELP IN TAKING POSSESSION OF THE COLLATERAL.’<sup>187</sup>

Where such an inscription is incorporated in the security agreement, the researcher believes that it should no longer be necessary to provide notice of repossession to the grantor as stated in Art. 35 (1) CBNR. Under such circumstance, ideally, it should be under the discretion of the secured creditor as to whether prior notice is issued to the grantor. In fact, it has been recommended that after default, notice of realisation may or may not be provided to the grantor,<sup>188</sup> but the researcher believes that notice should not be given at all because it would alert other creditors who may then obstruct the enforcement process. Worse still, it could be abused by a dishonest grantor who may have no intention of relinquishing possession of the collateral for realisation purpose as they could abscond with the collateral. Again, section 109 NZPPSA allows the secured party to take possession of the collateral when the debtor is in default.<sup>189</sup> It does not explicitly mention whether notice of the secured creditor’s intention to repossess is necessary before enforcement can be effected. Due to policy issues, the researcher argues that notice to repossess should be at the creditor’s discretion.

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<sup>182</sup> For example, see High Court of the Federal Capital Territory (FCT) Abuja, Civil Procedure Rules (CPR), Order 10.

<sup>183</sup> CBNR, Art. 34 (2).

<sup>184</sup> CBNR, Art. 35 (4) (a).

<sup>185</sup> CBNR, Art. 35.

<sup>186</sup> CBNR, Art. 35 (4).

<sup>187</sup> Draft Law, para 60.4.

<sup>188</sup> See generally ST Guide, Chap. VIII 39 – 42; Recommendation 149.

<sup>189</sup> See specifically, NZPPSA s 109 (1) (a).

In addition, the researcher recommends that prior to realisation, the secured creditor should file a statement (which the researcher will now referred to as ‘enforcement statement’) in the NCR for this purpose which will identify the secured creditor, the debtor and the collateral. The enforcement statement should also indicate the particular method which the secured creditor wishes to use in disposing off the collateral. The purpose of this enforcement statement will be to inform third parties that collateral may be realised on the secured creditor’s behalf without the need to specify the exact date of repossession. After all, the notice of sale of the collateral, after repossession, will provide the information needed to third parties before the collateral is finally disposed to inform other creditors and allow the grantor to redeem.<sup>190</sup>

The Draft Law indicated that the secured creditor may not enforce the security by strict foreclosure unless the parties had agreed otherwise in the secured agreement.<sup>191</sup> Where this happens, any deficiency balance will be terminated. This possibility of strict foreclosure is surprisingly absent from the CBNR. The ST Guide and UNCITRAL Model Law recognise this concept which can be agreed by both parties but only after default in payment, and the secured creditor will have to propose such arrangement in writing in view of total or partial satisfaction of the debt.<sup>192</sup> The secured creditor would then need to notify other affected parties with rights in the collateral such as third party assignees and creditors about the proposal which must specify the amount owed and the amount of the obligation it seeks to satisfy.<sup>193</sup> The researcher believes that the option of strict foreclosure should be adopted by the CBNR in that where strict foreclosure takes place after it has been agreed between the parties, any deficiency balance should become extinguished.

### **5.3.5 The security interest should continue to be effective and enforceable after the bankruptcy or insolvency of the grantor**

One of the main reasons why a secured creditor provides financial advancement in return for security is for protection in the insolvency of the grantor.<sup>194</sup> If there is any possibility of loss of priority upon insolvency, this could reduce the value of the security. To protect the creditor’s security interest, commencement of insolvency proceedings should not displace

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<sup>190</sup> CBNR, Art. 39.

<sup>191</sup> Draft Law, para 69.

<sup>192</sup> ST Guide, Chap. VIII 156 – 159; UNCITRAL Model Law, Art. 80.

<sup>193</sup> UNCITRAL Model Law, Art. 80 (2) (b).

<sup>194</sup> EBRD Core Principle V.

the law applicable to secured transactions.<sup>195</sup> Unfortunately, there is no provision in the CBNR that deals with enforcement of security in the insolvency of the grantor. Where a grantor suffers insolvency or is declared bankrupt, the law which governs these positions remains the Bankruptcy Act 1979 as amended<sup>196</sup> and the Companies Winding-Up Rules 2001,<sup>197</sup> although the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill 2015 is currently under legislative consideration for future enactment.

The ST Guide recommends that where there is a perfected security interest, the insolvency law of the State should enable the secured creditor to take actions after the commencement of the insolvency proceedings either to maintain or preserve the effectiveness of the security interest to the extent permitted under the secured transactions law which may be subject to avoidance provisions.<sup>198</sup> Similarly, a security interest with priority under any law other than insolvency law should continue and remain unaffected in insolvency proceedings unless another claim is given priority in the insolvency law, and such superior claim should be expressly set forth in the insolvency law.<sup>199</sup> The Cuming Report previously recommended that the proposed secured transactions legislation should provide a defined priority structure between secured creditors with unperfected security interests, unsecured creditors without any form of security, and trustees in bankruptcy.<sup>200</sup> Implementing this arrangement would mean that an unperfected security interest in collateral would be postponed to a person who enforces security through judgment, including execution, garnishment, or charging order.<sup>201</sup> Also, a security interest which has not been registered prior to the date of bankruptcy or appointment of a liquidator will be void against a trustee in bankruptcy or liquidator.<sup>202</sup> The power of the trustee in bankruptcy will take precedence over any non-judgment enforcement measure not completed by the time the assignment was made or when the receiving order was issued.<sup>203</sup>

Further, paragraph 80 (5) Draft Law stipulates that a creditor's security interest shall not be postponed irrespective of whether the grantor's business is being wound up or bankruptcy proceedings has been instituted against him. After all requirements of registration and publicity have been fulfilled, to enforce the security interest against third-

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<sup>195</sup> UNCITRAL Model Law, Art. 94.

<sup>196</sup> Bankruptcy Act 1979, LFN 2004.

<sup>197</sup> Companies Winding-Up Rules 2001, LFN 2004.

<sup>198</sup> ST Guide, Recommendation 238; See UNCITRAL Insolvency Guide, Recommendation 87.

<sup>199</sup> ST Guide, Recommendation 239; See UNCITRAL Model Law, Art. 35; See UNCITRAL Insolvency Guide, Recommendation 188.

<sup>200</sup> Cuming Report, Recommendation 13.

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*

<sup>203</sup> Cuming Report, para 4.2.7.4; See Bankruptcy Act (Nigeria) 1979 as amended, s 43.

parties, the secured creditor may repossess the collateral or request the trustee in bankruptcy to allow him take possession of the collateral.<sup>204</sup> The trustee in bankruptcy may then order the liquidator or manager, as the case may be, to grant possession to the secured creditor. Upon taking possession, the secured creditor may enforce his security interest without intervention from the trustee in bankruptcy, liquidator or manager.<sup>205</sup>

The secured creditor is mandated to disburse any surplus through the liquidator or manager in favour of the grantor.<sup>206</sup> However, any security interest that is created after the commencement of the restructuring of the business or after declaration of bankruptcy will be ineffective unless it was authorised by the trustee in bankruptcy or in other cases as provided by law.<sup>207</sup> These provisions under the Insolvency Guide and Draft Law will need to be seriously considered, and possibly adopted, by the CBNR. The use of security should be encouraged in the widest possible range of circumstance and this includes setting up an effective insolvency law regulation in view of circumstances such as winding up and bankruptcy.<sup>208</sup> A successful implementation of the CBNR can only be achieved if enforcement is predictable in the event of a grantor's insolvency or bankruptcy.

### **5.3.6 Taking, maintaining and enforcing security interests should be inexpensive**

Generally, the price of credit will appreciate if the cost of procuring security is expensive. Delay in transaction together with uncertainty and high expenditure will more often than not, lead to high cost of granting security, hence, it is important that the cost of taking and maintaining security should be inexpensive.<sup>209</sup> The grantor will be affected the most by the cost of security if there are difficulties due to delay, uncertainty and complexity of the transaction. An ideal secured transactions law should eliminate all unnecessary formalities such as registration of security agreement. There should be a single functional method of creating security interests rather than a multiplicity of security devices for different types of asset since they perform the same or similar functions.<sup>210</sup>

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<sup>204</sup> Draft Law, para 80.6.

<sup>205</sup> Draft Law, para 80.7.

<sup>206</sup> Draft Law, para 80.8.

<sup>207</sup> Draft Law, para 80.9.

<sup>208</sup> Jan-Hendrik Röver, 'The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions' (2010) 15 Unif L Rev 479, 493.

<sup>209</sup> EBRD Core Principle VI.

<sup>210</sup> ST Guide, Recommendation 8.

This is where the CBNR seems to have failed its expectations. First, it states that it will apply to all security interests in personal property,<sup>211</sup> but then goes ahead to limit its scope by leaving out equitable charges granted by companies from its ambit.<sup>212</sup> There is also conflicting laws with regards to the financial lease in that there are two national regulations, and registers – NCR (security interests) and Registration Authority (equipment lease), now responsible for the registration of financial lease.<sup>213</sup> The implication of this with regards to registration and search fees is that those dealing with corporate debtors may need to search up to three separate registers to investigate whether the security which they issue has been encumbered. There are two set of fees to pay: - 500 Naira per search in the NCR, and another 1000 Naira if it is electronic search or 2000 naira if it is a manual paper search on the charge register in CAC,<sup>214</sup> in addition to other search fees payable at the lease registry. The registration process could have been streamlined by the CBNR in order to eliminate the possibility of encountering unexpected secret encumbrances, while making searches more affordable for third parties. A standalone registration would avoid the payment of double fees.

Regarding the identification of the collateral, the CBNR clearly states that a security interest shall operate automatically over identifiable or traceable proceeds of the collateral, irrespective of whether the security agreement had included a description of the proceeds.<sup>215</sup> The purpose of this provision is to reduce the monitoring costs of the secured creditor, thus reducing the cost of credit, as the CBNR automatically extends the security interest to any proceeds bearing from the collateral such as sale profit or offspring (if the security is livestock) of the collateral. Art. 35 (6) CBNR states that the secured creditor may require the grantor to assemble the collateral for repossession in order to make it available to the secured creditor at a designated place. This affords the creditor an opportunity to take the collateral at a convenient place without incurring cost of searching for the collateral if the grantor defaults.

Additionally, the idea of strict foreclosure as discussed above is an important aspect of cost effective enforcement which the CBNR failed to consider. The ST Guide recognises enforcement through strict foreclosure.<sup>216</sup> Before the secured creditor can retain the collateral

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<sup>211</sup> CBNR, Art. 3 (1).

<sup>212</sup> CBNR, Art. 3 (2) (b).

<sup>213</sup> See para 3.3.4.1, above, and para 5.3.7, below.

<sup>214</sup> Summary of Fees and Forms (Corporate Affairs Commission) <<http://new.cac.gov.ng/home/summaryof-fees-and-forms/>> accessed 30 December 2016; The fees prescribed in Art 22 (1) CBNR are subject to review from time to time by the CBN Governor, see CBNR, Art 22 (2).

<sup>215</sup> CBNR, Art 7 (3).

<sup>216</sup> ST Guide, Recommendation 156 – 159.



to extinguish the obligation, interested persons must be notified about this arrangement, and the grantor should be given a choice whether to accept this form of enforcement or refuse altogether.<sup>217</sup> Where the grantor refuses, the secured creditor will have no choice but to pursue enforcement through other means.<sup>218</sup> Any interested person should be given an opportunity to make an objection against the strict foreclosure and must provide proof as to why the secured creditor should be precluded from implementing strict foreclosure. Although strict foreclosure was not expressed in great detail in the Draft Law,<sup>219</sup> it should have been considered for the CBNR. It is an important aspect of enforcing security but care must be taken regarding the type of property which can be retained by strict foreclosure. For instance, it will be unreasonable to contemplate a secured creditor strictly foreclosing on the consumer goods of the grantor. It is important that this is clearly specified from the onset. In conclusion, the remedy of strict foreclosure is likely to minimise enforcement cost.

### **5.3.7 Security should be available over all type of personal property taken, obligations, or type of persons granting or taking security**

A person, whether natural or artificial, should be able to grant security over all types of personal property.<sup>220</sup> In the same context, a modern secured transactions law should allow security over all types of obligations i.e. fluctuating assets, present assets and future debts.<sup>221</sup> Where a secured transactions law accommodates all types of obligations such as future and fluctuating amount as they become available after attachment, property received by the grantor will not require new security interest to be registered.<sup>222</sup> The CBNR adopts this notion.<sup>223</sup> In other words, security can be created regardless of whether the parties have named the security agreement as chattel mortgage, hypothecation, possessory pledge, contractual lien, etc. For this purpose, there would be one universal security interest with a purportedly harmonised law regulating it when it involves creation, perfection, and rules of priority.<sup>224</sup> Thus, an artificial or natural person may create a security interest whether a consumer, farmer, micro-business, company or partnership.

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<sup>217</sup> ST Guide, Chapter VIII, para 65 – 66.

<sup>218</sup> ST Guide, Chapter VIII, para 67.

<sup>219</sup> See Draft Law, para 69.

<sup>220</sup> EBRD Core Principle VII.

<sup>221</sup> *ibid.*

<sup>222</sup> Increased Access to Credit: Reforming Secured Transaction Law (ITC Technical Paper Doc. No. BE-10-180.E, Geneva 2010) 36.

<sup>223</sup> CBNR, Art. 3 (1).

<sup>224</sup> *ibid.*

Regarding corporate enterprises, the CBNR does not recognise the equitable charge as security interest for the purpose of this law.<sup>225</sup> This clearly contravenes the provisions of the Cuming Report which recommended that floating charges and fixed charges should be treated as a security interest, while sections 197 – 207 CAMA should no longer apply to company charges except to the extent that it applies to charges and mortgages on land created after the proposed law comes into force.<sup>226</sup> The Draft law mirrors this recommendation to the extent that section 178 – 182 and 197 – 210 should become inapplicable.<sup>227</sup> Logically, the omission of the company charge cannot be justified. The continuous use of charge documents and its terminologies would create unnecessary risks for creditors and investors. However, the researcher recommends that the concept of the company charge should remain, but instead, they should be subject to the registration and priority rules of the CBNR. For the purpose of insolvency and restructuring, some provisions in CAMA, Companies Winding-Up Rules 2001 and Companies Regulations 2012 that deal with distribution of corporation assets and proceeds on liquidation may still need to recognise the concepts of fixed and floating charge. These statutes provide for the allocation of assets during corporate restructuring.

To make matters worse, the CBNR states that the NCR will be responsible for registering financial leases without realising that there was a separate legislative Bill on financial lease.<sup>228</sup> It failed to recognise during its draft process that a legislative Bill was under consideration (now passed into law) which has now created a Registration Authority specifically for operating and financial lease.<sup>229</sup> What is left now is that there are two laws regulating the registration and priority of financial leases. A harmonised publicity rule applicable to all types of security interests would have offered predictability in priority, which could have led to improved access to finance without necessarily irritating the already embedded legal concepts and recognised property and commercial law doctrines.<sup>230</sup> A wholesale reform of the registration and priority rules of the CBNR and other types of security interests including the company charge and financial lease should be seriously considered in order for this new regime to avoid encountering unnecessary problems. In the event that these types of security devices cannot be recorded by the NCR, a viable solution

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<sup>225</sup> CBNR, Art. 3 (3) (b).

<sup>226</sup> Cuming Report, para 4.2.12.3.

<sup>227</sup> Draft Law, para 92.1.

<sup>228</sup> CBNR, Art. 3 (2).

<sup>229</sup> Equipment Leasing Act ('ELA') 2015, a federal legislation, now oversees the registration and priority of equipment leases, ss. 7, 12, 13, 21.

<sup>230</sup> Giuliano G Castellano, 'Reforming Non-Possessory Secured Transactions Law: A New Strategy' (2015) 78 Mod L Rev 611 – 613.

could be for the charge register and financial lease register to reform their specialised registration regimes, in the form of adopting a notice registration system to enable cross-registration and cross-searching of security interests,<sup>231</sup> although this should only be a short term solution in the interim.

It is also important that all types of creditors are treated fairly. With respect to PMSI's, a transparent system of establishing priority should be possible. The CBNR treats PMSI's as a security interest which can gain priority in the same collateral created by the same debtor if it is perfected when the debtor takes possession of the collateral.<sup>232</sup> The CBNR states that a PMSI means '(a) a right taken by a financial institution who provides credit to enable the debtor to acquire the collateral if such credit is in fact used; and (b) a right of a finance lessor'.<sup>233</sup> This very bare definition does not explain what the right of a financial lessor may contain but what can be understood from this meaning is that the CBNR does not try to re-characterise title-based devices such as the financial lease as a secured transaction. Interpreting the rights (and priority) of a purchase money creditor as provided shows that that a PMSI in collateral and its proceeds shall have a certain type of super-priority over a non-PMSI in the same collateral created by the same borrower if the PMSI is perfected when the borrower receives the collateral.<sup>234</sup>

As seen already, a purchase money creditor may have a super-priority in the collateral and its proceeds over other claimants created by the same debtor if the PMSI is registered when the debtor receives the collateral.<sup>235</sup> This approach permits the seller to finance the acquisition of collateral while retaining title in the collateral ahead of third party claimants.<sup>236</sup> Without this super priority protection, a purchase money creditor will be automatically subordinate to an earlier perfected security interest securing present and future rights.<sup>237</sup> In essence, the financial lease for instance, maintains its nature as a traditional financing device, but yet, purportedly relies on the same rules applicable to security interests under the CBNR. This is somewhat indistinguishable from UNCITRAL's categorisation of 'non-unitary approach' in recognising secured transactions, as against a 'unitary approach' which is recommended by the ST Guide whereby it re-characterises and denominates acquisition security rights (including retention-of-title rights and finance lease rights) as

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<sup>231</sup> ST Guide, Chapter IV, para 117; ST Registry Guide, para 66.

<sup>232</sup> CBNR, Art. 27; Draft Law, para 29.1 (a).

<sup>233</sup> CBNR, Part I, para 2 (1).

<sup>234</sup> CBNR, para 27.

<sup>235</sup> CBNR, Art. 27.

<sup>236</sup> ST Guide, Chapter IX, para 56 – 58.

<sup>237</sup> N. Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) 234.

security rights.<sup>238</sup> The CBNR does not adopt the unitary approach, but nevertheless, recognises financial lease as a functional equivalent to a real security in that it performs a similar economic function of reserving title, as a title-based device, for the lessor on equipment and machinery.

### **5.3.8 Publication of security interests should be quick and effective**

Where the secured creditor is in possession of the collateral, this will not amount to perfection and it will be postponed to third party claims because only registration can give perfection. A public registration system can ensure that third parties are well informed in advance about the existence of an encumbrance.<sup>239</sup> The importance of this principle is that creditors tend to increase the cost of giving credit where there is no remote possibility of hidden encumbrances which could adversely affect their priority status in the event of the grantor's insolvency.<sup>240</sup> Unless there is some sort of requirement to register and publicise secret encumbrances, creditors will hesitate in giving credit because of the possibility of losing priority.

The CBN has the responsibility of operating the NCR and it is responsible for the registration of security interests in personal property, and with this system, priority can be established.<sup>241</sup> The process of registration is carried out electronically without the need for registry staff to supervise the financing statement.<sup>242</sup> An integrated and easily accessible computerised register without the intervention of the NCR staff reduces cost of registration because several processes will not be required: acceptance of document to register by staff, revision of document for any errors, and entry of the financing statement data by the registry

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<sup>238</sup> ST Guide 2007, Chapter. I, para. 111; See Alejandro Garro, 'Creation of a Security Right, Pre-default and Obligations of the Parties, Acquisition Financing: Summary of the Guide's Recommendations' (UNCITRAL – 3rd International Colloquium on Secured Transactions, 1 March 2010) < [https://www.uncitral.org/pdf/english/colloquia/3rdSecTrans/Alejandro\\_Garro\\_Edited-sum.pdf](https://www.uncitral.org/pdf/english/colloquia/3rdSecTrans/Alejandro_Garro_Edited-sum.pdf) > accessed 17 December 2016, para 13 '*...some legal systems may be reluctant, for various reasons, to recharacterize acquisition financing devices as secured transactions. Thus, the Guide leaves it free to States to either adopt a so-called "unitary approach", subsuming all transactions serving security functions, irrespective of how they are denominated (retention of title, financial leases, etc.), into a unitary and generic notion of "security right" (thus mirroring Article 9 of the UCC and the PPSA of Canada, New Zealand and other common-law jurisdictions). Alternatively, States may opt for a so-called "non-unitary approach", maintaining the traditional characterization of retention of title and other acquisition financing devices, yet applying to those transactions the same rules that apply to security rights insofar as the creation, effectiveness against third parties, priority, and other financing aspects of the transaction.*'

<sup>239</sup> EBRD Core Principle VIII.

<sup>240</sup> Gerard McCormack, 'The Priority of Secured Credit: an Anglo-American Perspective' [2003] JBL 389.

<sup>241</sup> CBNR, Part III.

<sup>242</sup> CBNR, Art. 111.

staff.<sup>243</sup> Additionally, there will be no need for storage space of documents as it was the case with transaction-filing where registration documents were filed manually. This, electronic notice registration makes searches and registration in the NCR easier and faster.<sup>244</sup>

The NCR has been established for this purpose but it does not integrate interests in company charges, and there are question marks as to whether certain types of equipment lease – financial leases in particular – should be recorded in the NCR or with the Registration Authority.<sup>245</sup> Hence, before a secured creditor provides credit to a grantor, the type of transaction would first need to be ascertained thoroughly in order to determine in which register to investigate the collateral. Afterwards, the legal personality of the grantor will also need to be determined since if it is a company granting its inventory as security for instance, there is a very high possibility that it should be registered as an equitable charge and not as a CBNR security interest. These type of restrictions that sets limitations based on the type of borrower serves no useful public policy purpose and they may even undermine good public policy practices. A large share of the population of businesses in Nigeria are registered entities, and the greater the potential economic importance of companies are affected, the greater the economic impact of the limits on their access to finance.

The register should be accessible quickly with little risk of error. There are certain features currently present in the process of searching such as the compulsory physical presence of searcher. Often, searchers will only have access to records in the registries only if they appear in the filing office.<sup>246</sup> Usually, they cannot enquire by fax, mail, telephone or the internet.<sup>247</sup> This is totally unnecessary, and almost impossible to effect where the searcher is abroad. Requiring physical appearance increases the cost to search the register which invariably restricts public access. Information in the registry should be deemed public information without any unjustifiable restriction. There should be no requirement to state the purpose of the search.<sup>248</sup> A modern secured transactions law should have a clear and concise procedure for registration of security interests and search procedures which should be widely available to interested persons.<sup>249</sup> Company charges and all types of quasi-security interest so long as they grant some form of security interest to the secured creditor should be

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<sup>243</sup> CEAL Registry Report, 24.

<sup>244</sup> CEAL Registry Report, 4.

<sup>245</sup> See Chapter 3, para 3.3.4.1; See also CBNR, Art. 3 (3) (b); Equipment Leasing Act 2015, s 9.

<sup>246</sup> CEAL Registry Report, 30.

<sup>247</sup> *ibid.*

<sup>248</sup> In New Zealand for example, the searcher is required to state the purpose of the search and where the search contravenes the outlined statutory reasons deemed legal, the searcher will be liable for an action under s 66 Privacy Act 1993 – see NZPPSA s 173 – 174.

<sup>249</sup> ST Guide, Chapter IV.

registered in the NCR. To achieve this purpose, the registration system needs to be established in a manner that registration and search processes are simple, cost and time efficient, workable and publicly accessible without unnecessary restriction to its services.<sup>250</sup> Additionally, the CBNR limits only licensed financial institutions including banks to act as secured creditors under this law.<sup>251</sup> To this end, the NCR has failed to establish a satisfactory regime for the publication of recognised security interests across all types of property and for the benefit of all types of secured creditors.

### **5.3.9 Established priority rules on third-party competing claims over assets transferred in the ordinary course of business of the grantor**

In general terms, buyers and lessees of goods may be subject to a perfected security interest where the grantor sells encumbered goods in its possession. The buyer has the opportunity of checking the register to ascertain whether or not there is an existing security interest in the goods. However, this improbable solution is clearly not practicable at least in the best interest of business operations. In theory, it is important to protect buyers from prior security interest holders even if the buyer could have known about the existence of the security interest. Sometimes, even where there is an effective method of recording security interests for which the law provides such as the NCR, instances might arise where the encumbered asset is sold in the ordinary course of business which may not require a purchaser to inspect the register before acquiring such asset.<sup>252</sup> The grantor, in the case of a non-possessory security interest, will be free to deal with the goods in the ordinary course of business. In actuality, this is one of the major strengths of the floating charge.<sup>253</sup> Although, what could be classified as ordinary course of business will depend on the circumstance of each situation.<sup>254</sup>

For the collateral to pass freely to a third party during the ordinary course of business of the grantor, it is recommended that the secured creditor must have authorised the sale or disposition in the security agreement,<sup>255</sup> and such transfer will not be affected by the security interest.<sup>256</sup> However, the need to seek authorisation from the secured creditor will not be

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<sup>250</sup> ST Guide, Recommendation 54.

<sup>251</sup> National Collateral Registry (NCR) <https://www.ncr.gov.ng/Home/Faq> last accessed 4 February 2017.

<sup>252</sup> EBRD Core Principle IX.

<sup>253</sup> *Illingworth v Houldsworth* [1904] AC 355; *Re Yorkshire Woolcombers' Association Ltd* (1903) 2 Ch 284.

<sup>254</sup> *Hubbuck v Helms* (1887) 56 LT 232; *Edward Nelson & Co. v Faber & Co.* (1903) 2 KB 367; *Re Anglo-American Leather Cloth Co. Ltd* (1880) 43 IT 43.

<sup>255</sup> ST Guide, Recommendation 80 (a).

<sup>256</sup> ST Guide, Recommendation 80 (b).

necessary where the seller, lessor or licensor, transfers the property either by way of sale, lease or license during the course of business provided that at the time of such transaction, the transferee (buyer, lessee, licensee) has no knowledge that such a transfer would violate the rights of the secured creditor under the security agreement.<sup>257</sup>

The law needs to offer protection to buyers of collateral by providing assurances that the title acquired will not be defective. The CBNR expressly states that an unperfected security interest will be defeated by a subsequent purchase completed for value.<sup>258</sup> Also, a buyer of goods sold in the ordinary course of business or the lessee of goods leased in the ordinary course of business of the lessor will take the goods free of any security interest created by the seller or lessor unless the buyer or lessee is aware that such transaction is in breach of the security agreement which created the security interest.<sup>259</sup> Although it is highly unlikely that the rights of a buyer of goods sold during the course of business of the seller will defeat the rights of a purchase money creditor e.g. a financial lessor who registers in the specialised lease register.<sup>260</sup> Unless it has not been recorded in such register, the purchase money creditor could have his rights postponed and the third party transferee will take free of the security interest.<sup>261</sup>

The researcher recommends that the CBNR should consider the above recommendations. This could be further achieved by including a specific purchase price of collateral upon which the purchase money creditor will take priority over the buyer if the goods purchased on behalf of the debtor is beyond that amount.<sup>262</sup> For example, the law could state that the purchase price of asset subject to a PMSI, if sold during the course of business will exceed 50,000 Naira, then the buyer will be expected to search the NCR and if the buyer fails to carry out a search and thereafter realises that the asset purchased was not free of encumbrance, then it will be subject to the PMSI so long as it has been perfected in the NCR.<sup>263</sup>

### **5.3.10 The security agreement should be flexible and adaptable enough to their respective needs**

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<sup>257</sup> ST Guide, Recommendation 81 (a) – (b).

<sup>258</sup> CBNR, Art. 32 (1).

<sup>259</sup> CBNR, Art. 32 (2).

<sup>260</sup> ST Guide, Recommendation 77 - 78

<sup>261</sup> ST Guide, Recommendation 78

<sup>262</sup> See Draft Law, para 34.1.

<sup>263</sup> Draft Law, para 34.2.

Parties should be able to adapt their security agreement to their respective needs, and it is not the purpose of the law to dictate its contents. The law should be there to facilitate the operation of secured transactions while ensuring that necessary protection is in place to avoid unfair prejudicial treatment between the grantor, creditor and third parties.<sup>264</sup> At the bare minimum, the law should cover all types of transactions that have the effect of creating security in personal property, both present and future.<sup>265</sup> In so far as harmonisation of secured transactions law is concerned, this has been poorly achieved as discussed already. Although, there may be instances where certain types of transactions are best excluded due to practicality or public policy reasons. For instance, it will be commercially inappropriate to permit the grant of security in future salary.

Also, permitting a consumer to grant security in consumer goods as a prerequisite for getting credit may also be undesirable. In a country like Nigeria with poor consumer protection laws, a general security in consumer property is very much likely to be abused by unscrupulous creditors.<sup>266</sup> Although, this possibility need not outrightly prohibit consumers from benefitting from the new secured transactions regime. For instance, the CBN should take into consideration whether a PMSI arrangement may benefit a consumer. The researcher strongly believes this could be possible. To this effect as provided in the Cuming Report, it can be stated that:

‘A security agreement providing for a security interest in consumer goods is void to the extent that it gives to the secured party an interest in property referred to in section 41(2) of the Bankruptcy Act and such other property as is specified in regulations that is necessary for the debtor to maintain himself (herself) and his (her) family. This should not apply where the security interest in the property is a purchase money security interest;  
If a debtor, who is in default under a security agreement that provides for a security interest in consumer goods, has paid at least 2/3 of the total amount of the obligation secured, the secured party should be prohibited from seizing the consumer goods, but the obligation of the debtor to pay the balance of the obligation should not be affected;  
Where a secured party who has a security interest in consumer goods of a debtor, without reasonable excuse fails to comply with the requirement of this law to give notice to the debtor or in any other way violates the rights of the debtor as provided in this law, the debtor should be deemed to have suffered damages in the amount of (XX) Naira.’<sup>267</sup>

Where the majority of the purchase price has been paid by the debtor, the purchase money creditor should be prohibited from seizing the consumer goods of the debtor, but the law does not state whether judicial proceedings can be instituted to recover the remaining sum

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<sup>264</sup> EBRD Core Principle X.

<sup>265</sup> Principles for Effective Insolvency and Creditor/Debtor Rights Systems (The World Bank, Revised 2015) A3.

<sup>266</sup> Although certain household personal properties cannot be subject to bankruptcy enforcement proceedings - Bankruptcy Act (Nigeria) 1979, s 41 (2) (b), as amended by Bankruptcy Amendment Decree 1992.

<sup>267</sup> Cuming Report, Recommendation 20.



in the consumer goods from the debtor. Nevertheless, there are likely to be very few problems in relation to abuse of debt collection through this means since a purchase money creditor, or other potential creditors for that matter, can only be banks and licensed financial institutions.<sup>268</sup>

The CBNR explicitly renders the inclusion of restrictive covenant in an account receivable void against third parties in relation to the security agreement if it limits the grantor's rights to assign its receivables, including to create a security interest.<sup>269</sup> Sometimes, parties may wish to rely on certain prohibitions in their secured agreement which may have the effect of making any unauthorised assignment of the collateral. Similarly, the Draft Law prohibits the effect of restrictive covenants in secured transactions by stating that such restriction will be void if payment is required on demand of any of the secured obligation, or payment of a fee is required when the grantor gives a second security in the same collateral.<sup>270</sup> Additionally, where an agreement making rights to payment non-assignable or requiring the consent of the account debtor before it can be assigned, or creating a default if the right to payment is assigned, such an agreement is void as well.<sup>271</sup>

## **5.4 Conclusion**

This chapter has provided an in-depth discussion on the recent enactment of the CBNR. The first part involved commentaries on the CBNR with references drawn from other jurisdictions. The provisions of the CBNR was further benchmarked against two institutional regulations on secured transactions law as provided by UNCITRAL and EBRD. This comparative exercise has demonstrated that when the CBNR needs further improvement having been benchmarked against the provisions of the ST Guide and EBRD Core Principles. An example of this relates to the exclusion of the company charge from the scope of the CBNR. Worst of it all is that the CBNR directly contradicts the provisions of ELA 2015 in relation to the registration and priority of financial lease.<sup>272</sup> This will lead to inconsistencies between both laws which could prevent businesses benefitting from equipment leasing in Nigeria. The researcher's opinion is that major improvements needs to be made surrounding several issues including the equitable charge granted by companies and the financial lease.

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<sup>268</sup> CBNR, Art 2 (1).

<sup>269</sup> CBNR, Art. 5 (2).

<sup>270</sup> Draft Law, para 19.1.

<sup>271</sup> Draft Law, para 19.2.

<sup>272</sup> See Chapter 1, para 1.1.2, above.

The recommendation is that the CBNR should take responsibility for their registration and priority rules to promote consistency in their operations as security devices. Also, there is no provision in the CBNR that deals with enforcement of security interest upon the insolvency of the grantor. This omission could be partly owing to the impending insolvency legislation which is being considered for enactment by the National Assembly. Looking carefully at the CBNR provisions, it seems rather paradoxical, and unfortunately so, that recognition was never given to the reform initiatives of the Draft Law and Cuming Report during the process of drafting the CBNR. The Draft Law is at face value, a more robust law than the CBNR. However, its failure was partly due to the fact that it was too sophisticated for the Nigerian business environment which up until now has never encountered such a radical proposal for a reform of this magnitude.

In addition, it seems as if UNCITRAL and EBRD did not recognise the inherent problems with consumer protection laws in developing countries such as Nigeria in the process of producing their secured transactions frameworks. There are no limitations on the type of lenders who may qualify as a secured creditor as it seems any type of person may equally qualify as a secured creditor. The recommendation laid down by the Draft Law also failed to take this into consideration. It is vital that the position of lenders would need to be regulated so as to avoid exploitative lenders from taking advantage of the secured transaction regime where there are no express penalties imposed on lenders acting in bad faith. For this policy reason, the CBNR recognises only financial institutions including banks as secured creditors. This would allow consumers, who are not business enterprises, to access credit without fear of molestation for failure to repay their loans since it can only be recoverable by regulated and licensed financial institutions. Thus, enforcement would likely be carried out only through legal means. Notwithstanding, the major reason why the Draft Law was jettisoned was partly due to a change in government which, more often than not in Nigeria, often leads to a change in administration of national projects. The next chapter will involve a comprehensive analysis of the NCR based on what the 'perfect' collateral registry should entail as recommended by the ST Registry Guide.

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## VI. CHAPTER SIX: REGISTRATION OF SECURITY INTERESTS IN PERSONAL PROPERTY (NOTICE REGISTRATION SYSTEM)

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### 6.1 Background

Erstwhile in Chapter 5, recommendations for reform of the CBNR were proposed which the government should consider to enable businesses gain access to low-cost finance. Simultaneously, one of such improvements which will be vital to this reform process is the establishment and a successful operation of a collateral registry. Ideally, a collateral registry serves the purpose of effecting publicity of security interests. Ordinarily, publicity can be effected either by registration, or by transfer of possession to the secured creditor.<sup>1</sup> The principle of publicity ensures that a security interest which has been created cannot be kept secret to avoid a later denial of obligations between parties, and also, it gives information to a broad class of third parties who may need it, such as creditors, outright assignees, liquidators, trustees in bankruptcy, etc.<sup>2</sup> The justification for this principle is that third parties who rely on the grantor's assets as security need a reliable way of identifying which property has been encumbered.<sup>3</sup> Previously, in order to protect vulnerable third parties, transfer of personal property without the creditor taking possession was seen to be ineffective against third parties, but this rule has long been modified to allow the property to remain with the grantor where the security interest has been made public by recording it in a collateral registry.<sup>4</sup>

Where a collateral is personal property and the security is non-possessory, there is always a risk that the property can be transferred without the secured creditor's knowledge. Possessory security interests do not need to be registered since the collateral will not be in the grantor's possession. The allowance afforded to non-possessory security interest holders in taking security creates a necessity to register such security interest in order to provide third parties with necessary information relating to the collateral.<sup>5</sup>

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<sup>1</sup> Discussion Paper on Registration of Rights in Security by Companies (Scottish Law Commission, Discussion Paper No 121, October 2002) 1.

<sup>2</sup> *ibid.*, 2.

<sup>3</sup> Douglas G Baird, 'Notice Filing and the Problem of Ostensible Ownership' (1983) 12 JLS 53, 54.

<sup>4</sup> *ibid.*

<sup>5</sup> Yoram Keinan, 'The Evolution of Secured Transactions' (Working Paper 27827, World Bank 2001) < <http://documents.worldbank.org/curated/en/2001/09/2893207/evolution-secured-transactions> > last accessed 14 October 2016.

In the past, registration of title was not a requirement under Roman law, but there was a system of registration which existed in ancient Egypt, and to some extent, in Greece.<sup>6</sup> Russia established a unified personal property registration system for the first time in 1995.<sup>7</sup> Jersey now has its own regime, which surprisingly is older than many other regimes in Europe including Bulgaria and Armenia.<sup>8</sup> Recently, in Australia, a unified electronic registration system for personal property was established in 2012.<sup>9</sup> In the United Kingdom, there is no unified system of registering security interests. In fact, the singular concept of security interest is not recognised, but merely a fragmentation of several security devices (and registration systems) which may be utilised in taking security. The Financial Law Committee of the City of London Law Society (CLLS) in its recent reform project, is considering an arrangement for a singular registration of ‘charges’ in its Discussion Draft Secured Transactions Code.<sup>10</sup> It has been recommended that the secured transactions registration system will be based on the company charge registration system at Companies House.<sup>11</sup> This project is in collaboration with the Secured Transactions Law Reform Project which has the aim of also examining the need to shape and reform English law on secured transactions which would significantly affect the method of registering security interests in personal property.<sup>12</sup>

## **6.2 Perfection of Security Interest**

It is very necessary for a secured transactions law to provide adequate protection of security interests regardless of whether the secured creditor is in possession of the collateral or not. This can be effected through perfection. Perfection means the taking of necessary steps to secure, so long as it legally permissible, the effectiveness and priority of a security interest against potential third party claimants.<sup>13</sup> Perfection may be required to achieve priority over other secured creditors but it does not always guarantee super priority over all subsequent

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<sup>6</sup> Roger Goebel, ‘Reconstructing the Roman Law of Real Security’ (1961) 36 Tul. L Rev 29, 63.

<sup>7</sup> Elizabeth Summers, ‘Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe’ (1997) 23 Rev CEE L179, 197.

<sup>8</sup> Security interests in Jersey were previously governed by the Security Interests (Jersey) Law 1983, but this has now been changed since the introduction of the Security Interests (Jersey) Law 2012 which deals with security interests over intangibles, see generally, Paul J. Omar, ‘The New Framework for Security Interests in Jersey: Scope and Formations Rules’ (2014) 25 ICCLR 331.

<sup>9</sup> <https://www.ppsr.gov.au/transitional-provisions>

<sup>10</sup> Richard Calnan, ‘A Secured Transactions Code’ [2015] BJIB & FL 473.

<sup>11</sup> *ibid.*

<sup>12</sup> <https://securedtransactionslawreformproject.org/> last accessed 4 January 2017.

<sup>13</sup> Company Security Interests: A Consultative Report (Law Commission, Consultation Paper No 176, August 2004) para 2.15.

creditors such as title-based sellers or a purchaser of goods in good faith.<sup>14</sup> Without perfection, the security interest will be vulnerable in insolvency, and possibly voidable against third parties.

The CBNR provides for perfection by registration, but it does not recognise the possibility of perfection by possession (present under the CRR),<sup>15</sup> or control, or by tagging. This is because only banks and other licensed financial institutions are recognised as secured creditors under the CBNR.<sup>16</sup> A notice was circulated by the CBN in June 2016 to this effect.<sup>17</sup> Financial institutions in Nigeria operating under the supervision of the CBN comprise of; development finance institutions, bureaux-de-change establishments, commercial banks, discount houses, merchant banks, micro-finance banks, non-interest banks, and, finance companies.<sup>18</sup> Although the ambit of this chapter is focused on registration of non-possessory security interests in particular, it is however important to discuss briefly other means of perfection such as possession, control and tagging.

### 6.2.1 Perfection by Possession

When security is taken by a secured creditor, and the grantor is denied possession of the collateral, this will amount to a possessory security interest which could take the form of a pledge. This will allow the secured creditor to have the right to realise the asset upon default of the obligation.<sup>19</sup> It may also take the form of a lien with the secured creditor having no right to sell the collateral.<sup>20</sup> This may be accomplished by the secured creditor or his agent by taking the asset from the grantor.<sup>21</sup> The CRR, which was later revised and published as CBNR, stated that ‘the priority between perfected security interests in the same collateral created by the same debtor shall be determined by the order of registration or possession whichever occurs first.’<sup>22</sup> What this means is a security interest can indeed be perfected by possession.

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<sup>14</sup> *ibid*, para 3.86.

<sup>15</sup> See Chapter 5, para 5.2.3, above.

<sup>16</sup> There are some inconsistencies between the previous CRR and the CBNR as to the type of person that may stand as secured creditor. CRR Art. 3 (2) purportedly states that any type of person may be a secured creditor. However, the CBNR requires that only banks and licensed financial institutions can take security - see <<http://www.cbn.gov.ng/Out/2016/FPRD/SECURED%20TRANSACTION%20&%20NATIONAL%20COLLATERAL%20REGISTRY%20FOR%20MSME%20FINANCING%20IN%20NIG.pdf>> accessed 6 January 2017.

<sup>17</sup> See <<https://www.ncr.gov.ng/Home/Faq>> accessed 22 December 2016.

<sup>18</sup> <<http://www.cbn.gov.ng/Supervision/finstitutions.asp>> accessed 7 December 2016.

<sup>19</sup> Palmer, *Bailment* (2nd edn, Thompson Reuters 1991) 1382 – 1383.

<sup>20</sup> *Tappenden v Artus* (1964) 2 QB 185.

<sup>21</sup> Increasing Access to Credit: Reforming Secured Transaction Law (International Trade Centre (ITC) Technical Paper BE-10-180.E, Geneva 2010) 49.

<sup>22</sup> CRR, Art. 23 (2).

While it may well be usual that the secured creditor would be in possession of the security to achieve perfection against third parties, however, there may be instances where another person (for instance, a solicitor, a warehouseman, etc.) holds the collateral. This arrangement is not uncommon in business transactions in Nigeria as the secured creditor may appoint a manager to set up a warehouse in the grantors' business premises, and this arrangement will determine how the collateral will be stored, and there will be visible signs posted to warn third parties about the warehouse arrangement. In such circumstances, the security interest will not be perfected by possession unless the third party manager is the appointed agent of the secured creditor. Dispossessing the grantor also helps to eliminate the appearance of false wealth in that once the grantor loses possession, the security interest becomes effective against third party claimants.<sup>23</sup> It serves no purpose to require its registration since third parties would ordinarily be put on notice since the grantor is not in possession. While possession is recognised as an alternative means of achieving perfection, it does not serve normal commercial purposes because businesses often require the use of their equipment and inventory in their day to day business to generate capital.<sup>24</sup> Again, perfection by possession of intangibles will be practically impossible for example, security interests in crypto-currencies. Nevertheless, the CBNR has explicitly stated that perfection can only be achieved through registration,<sup>25</sup> hence, a secured creditor who relies only on possession without registration would have his security interest postponed to that of a third party claimant.

### **6.2.2 Perfection by Control**

An alternative method of achieving perfection which is also absent from the CBNR is by putting the collateral within the secured creditor's control. Under the CRR, where the collateral is a negotiable instrument representing tangible property, control or possession will be sufficient in achieving perfection.<sup>26</sup> Another example which could have been used to achieve this purpose i.e. control of collateral would be funds in a deposit bank account.<sup>27</sup>

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<sup>23</sup> Increasing Access to Credit (n 21) 49.

<sup>24</sup> N Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (Routledge 2011) 192.

<sup>25</sup> CBNR, Art. 8.

<sup>26</sup> CRR, Art. 30; ST Guide, Recommendation 51 – 53.

<sup>27</sup> The Draft Law did provide a situation whereby a security interest in bank account may be realised in favour of the secured creditor, but however, this did not lead to perfection as it cannot be classified as 'control' where there is a mandatory requirement that such security interest must have been validly registered before the grantee could foreclose, Draft Law, para 76.

The ST Guide recognises control as a means of perfecting a security interest.<sup>28</sup> The secured creditor can be understood to have control of the collateral in the sense that he can cause the asset to be realised on default without seeking the consent of the grantor.<sup>29</sup> This could take the form of a limitation to withdraw from bank account where the secured creditor may have an agreement with the grantor and the bank, that the bank will act as an intermediary, and will only withdraw funds in relation to the bank account upon the secured creditor's express approval. The deposit account is not the encumbered asset. Rather, it is the 'grantor's right to claim performance of the bank's obligation to pay the value of the funds credited to the grantor's bank account'.<sup>30</sup>

The researcher's opinion is that the CBNR should in future consider the efficacy of adopting this system of achieving perfection. The reason is because it eliminates the need to register this type of security interest. A secured creditor who wishes to provide loan to a grantor upon the security of payments to the grantor's bank account will not lend without first reaching an agreement with the bank, and to this effect, the bank will reveal the existence of a third party encumbrance, if any, to the secured creditor.<sup>31</sup> The researcher recommends there should be no need to register if the secured creditor takes control of the grantor's bank account, but otherwise, registration must be effected if the grantor has some degree of control of the account.

Control can be automatic if the secured creditor is the bank. Here, the bank account will be in favour of the bank/secured creditor. This is commonly referred to as a 'charge-back'. At common law, it was held in *Re Charge Card* that it is conceptually impossible for a bank to take a charge over its customer's account.<sup>32</sup> This decision has now been effectively reversed in *Re Bank of Credit and Commerce International SA (No 8)*.<sup>33</sup> Since this is indeed possible, the question is whether the CBNR should recognise this type of transaction and whether it should be registered if the collateral can be controlled by the bank/secured creditor? Again, as seen from the above, it will be unnecessary to require registration because any prudent third party creditor wishing to provide loan to the grantor can discover from the secured creditor about the existence of the security interest. UCC Article 9 provides for the possibility of taking a security interest in a deposit account which could be perfected by

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<sup>28</sup> ST Guide, Recommendation 34 (a) (v).

<sup>29</sup> Philip R Wood, *Comparative Law of Security Interests and Title Finance* (2nd edn, Sweet & Maxwell 2007) 148.

<sup>30</sup> ST Guide, Chapter III, para 138.

<sup>31</sup> Registration of Security Interests: Company Charges and Property Other than Land (Law Commission Consultation Paper No 164, London June 2012) para 5.52.

<sup>32</sup> [1987] Ch 150.

<sup>33</sup> [1998] AC 214, 225 – 228.

control, and it specifically states that it does not have to be perfected by registration.<sup>34</sup> Another similar arrangement could be that the secured creditor may replace the grantor during foreclosure and become the bank customer, thus effectively taking possession of the grantor's account.<sup>35</sup> This may be referred to as 'negative control' whereby the grantor will no longer be able to deal with the account as it used to.<sup>36</sup> Where this happens, the grantor cannot utilise the money in the deposit account.

### **6.2.3 Perfection by Tagging**

This is another physical means of achieving publicity of security interest which could be by tagging the collateral.<sup>37</sup> The CBNR does not provide for this option. This system can be carried out by ascribing a visible label or tag on the secured asset indicating that it is not free of encumbrance.<sup>38</sup> This method of perfection will obviously not be practical for intangible property. It will be appropriate for tangibles especially equipment, vehicles and livestock. It does have its drawbacks for example, the need to inspect every item in the inventory and where there is a multitude of assets e.g. livestock, this method could prove to be an onerous task for the secured creditor. There is also a risk that the tag could be removed by the grantor. Where an efficient collateral system exists, tagging may not be the best option to effect public notice, although the parties should be allowed to agree to it consensually if circumstances warrant its adoption.<sup>39</sup>

### **6.2.4 Perfection by Registration: the National Collateral Registry (NCR)**

The gist of this chapter, for the most part, borders around the registration of security interests in personal property. The main objective of registration is to make the security interest effective against third parties wherever they are located if registered electronically. The beneficiary of registration will usually be for the secured creditor who has provided credit, as well as third parties that deal (or wish to deal) with the grantor in respect of the collateral.<sup>40</sup> Within this scheme, the grantor retains possession of the collateral while the debt remains outstanding. Such an arrangement allows the secured creditor to register the existence of the security interest which otherwise will be unknown to third parties. The CBNR has provided

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<sup>34</sup> UCC Article 9 – 314.

<sup>35</sup> ST Guide, Chapter III, para 141.

<sup>36</sup> Akseli (n 24) 198.

<sup>37</sup> Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry (EBRD 2004) A3, hereinafter 'Publicity Principles'.

<sup>38</sup> Russian Civil Code, Art. 338 (2).

<sup>39</sup> Publicity Principles, A3.

<sup>40</sup> Increasing Access to Credit (n 21) 48.



for the establishment of a NCR, along with a NCR User Manual which was published in May 2016.<sup>41</sup>

Art. 9 (1) CBNR states that a collateral registry shall be established, maintained and operated by the CBN. The CBN Governor will have the power to appoint a Registrar to supervise and administer the operations of the NCR,<sup>42</sup> and the Governor may issue guidelines to govern the functions and operations of the Registry.<sup>43</sup> In reality, the NCR will differ significantly from other property registries in Nigeria, in that:

1. A security interest can be perfected when a financing statement has been registered in the collateral registry;<sup>44</sup>
2. The financing statement will be registered electronically;<sup>45</sup>
3. Staff of the registry including the registrar shall not interfere or verify whether authorisation for registration has been properly granted, or whether the information in the financing statement is valid;<sup>46</sup>
4. The information required in the financing statement will be used to indicate the capacity of the grantor whether MSMEs; if it is a company, corporate or business name (the company/RC number); if it is a natural person (the national identity card or international passport), gender, name, address, phone number and date of birth of the debtor; name and address of the secured creditor or its agent; description of the collateral; maximum amount for which the obligation will be enforced; the time period for which the registration will remain effective;<sup>47</sup>
5. The financing statement would also include a brief description of the collateral that will reasonably allow its identification, and it will be sufficient if the collateral is described either by item, kind, type or category and year of manufacture; or a statement that a security interest has been taken over the debtor's present and future property.<sup>48</sup>

Public notice of a security interest will protect the secured creditor against third party claims in the collateral. This approach of registering the security interest to activate perfection reduces the cost of excessive due diligence, while at the same time eliminating the possibility

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<sup>41</sup> National Collateral Registry of Nigeria, (May 2016)  
<<https://www.ncr.gov.ng/docs/NCR%20User%20Manual.pdf>> 'NCR User Manual' last accessed 8 December 2016.

<sup>42</sup> CBNR, Art. 9 (2).

<sup>43</sup> CBNR, Art. 9 (3).

<sup>44</sup> CBNR, Art. 8.

<sup>45</sup> CBNR, Art. 9 (4).

<sup>46</sup> CBNR, Art. 11 (1).

<sup>47</sup> CBNR, Art. 12 (2).

<sup>48</sup> CBNR, Art. 13 (1 - 2).

of getting trapped as a result of secret encumbrances that may otherwise lead innocent third parties into financial ruin. This justification is described as follows:

‘But the existence of the security interest will not necessarily be known to a third party who is himself proposing to acquire an interest in the asset, or to other unsecured creditors, particularly where the debtor remains in possession of the asset, or where the asset is intangible. To safeguard such people the law usually requires the secured party to give some form of public notice designed to bring the security interest to the notice of subsequent purchasers or encumbrancers, or unsecured creditors.’<sup>49</sup>

### **6.3 A Modern and Unified Notice Registration System for Nigeria**

Ideally, security interests in personal property should be effectively publicised at reasonable cost and easily accessible to interested persons. A reliable public collateral registry is essential to promote workable conditions for secured financing.<sup>50</sup> Where several registries concurrently exist as it is the case in Nigeria, it is indeed necessary that the registration system is integrated and interconnected so that all notices captured under the secured transactions law can be quickly and easily retrieved.<sup>51</sup> The successful implementation of the CBNR is predicated on the establishment of a modern collateral registry which should be operated centrally and electronically. First, it should be determined whether there is an existing registry which records personal property, or if there is one which may be adapted to fit this purpose.<sup>52</sup> If there is no existing registry which may be adapted to fit this purpose, then a secured transaction registry may be set up.<sup>53</sup> As of this moment, Nigeria has a registry which records equitable charges granted by companies i.e. the CAC, while the NCR records security interests other than the company charge.<sup>54</sup>

In hindsight, the function of the NCR could be extended to encompass the registration of company charges in personal property. It is quite important to have a standalone registration system which will provide simplicity and transparency.<sup>55</sup> There remains the option of coordinating all the personal property registries where information can be shared seamlessly but such a scheme has not yet been implemented at this scale in relation

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<sup>49</sup> Louise Gullifer, *Goode on Legal Problems of Credit and Security* (5th edn, Sweet & Maxwell 2013) 77.

<sup>50</sup> Principles for Effective Insolvency and Creditor/Debtor Rights System (World Bank, Revised 2015) see Executive Summary.

<sup>51</sup> *ibid.*

<sup>52</sup> IFC Toolkit, 61.

<sup>53</sup> *ibid.*

<sup>54</sup> CAMA, s 197.

<sup>55</sup> Currently, there is the bill of sale registry in a few States e.g. Lagos State, intellectual property registries, a decentralised CAC Registry in different States, and very recently, the Registry Authority for equipment leases (applicable to corporations only).

to personal property security interest registration in Nigeria. The current CAC charge registration system is not without flaws, but simplifications and improvements could have been made in order for it to come within the scope of the NCR, such as a reform of its transaction-filing system to a notice registration system.

Staff of the CAC have good legal and administrative background in the essentials of running a modern registry system especially now that electronic documents are generally acceptable for charge registration.<sup>56</sup> A notice registration system for the charge register can be managed effectively with the provision of appropriate computer technology and additional training of staff as required. Fundamentally, the NCR provides a unique time of filing for security interests registered over personal property in Nigeria. The charge register can be easily designed along this line to integrate the company charge into its registration system. For legal and administrative convenience as highlighted above, it is the researcher's opinion that there should be a single registration regime to record all types of security interests over personal assets including the company charge and financial leases. In furtherance of this discussion, and to support the researcher's arguments, reference will be made to the ST Guide, ST Registry Guide,<sup>57</sup> and the CEAL Registry Report.<sup>58</sup>

#### **6.4 Characteristics of the NCR**

The CBNR provides for the establishment of an online register, in addition to guidelines for the operational and administrative duties of the registry staff.<sup>59</sup> Financing statements submitted in any part, from any location, whether in Nigeria or abroad, will be remotely and centrally stored in the NCR to enable searchers to easily retrieve information from a single source.<sup>60</sup> There is no justification for dual filing (notice filing and transaction filing). The NCR will operate on a 24/7 basis except for brief periods to undertake scheduled maintenance. Online registration and searches contributes to speedier registration and search process because when information is submitted in paper format, registrants would have to wait until a registry staff had fed the information into the database and thereafter the information becomes searchable by third parties before it can be effective.<sup>61</sup>

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<sup>56</sup> Cuming Report, para. 5.1.10.3.

<sup>57</sup> Guide on the Implementation of a Security Rights Registry (UNCITRAL, March 2014) 'ST Registry Guide'.

<sup>58</sup> Heywood Fleisig, Nuria de la Peña and Corey Loney, Registry Assessment for Filing Security Interests in Movable Property, Prepared for Nigeria: Secured Finance for Movable Assets - Collateral Reform and Leasing Development (Second Progress Report, Washington DC, CEAL, March 2010) 'CEAL Registry Report'.

<sup>59</sup> CBNR, Part III.

<sup>60</sup> <<https://www.ncr.gov.ng/Search/Search/Search>> last accessed 2 February 2017.

<sup>61</sup> ST Registry Guide, para 84.

The security obligation that creates or provides for a security interest is not required to be submitted for registration. All that is required is submission of a financing statement which is commonly referred to as notice registration.<sup>62</sup> The PPSA regimes of New Zealand and Australia, and also Canada, and even Malawi, have adopted this system.<sup>63</sup> In Nigeria, there are certain registries popularly referred to as ‘title registers’ that record titles and liens over land such as land registries, and incorporeal property registries such as patent and trademark registries. Usually, these registries record ownership rights in the property taken as security. Avoidance of registration will indicate that the apparent holder has not been furnished with any title in the collateral, or the rights purported to be held in the collateral are merely equitable rights which could become subordinate to future third party interests. Typically, registration of these security interests mandatorily requires submission of the agreement itself such as with the land registration system. Where a person searches these title registers, the search is mostly in relation to the amount owed to a lender on the collateral, but with a notice filing collateral registry, the searcher will be more interested in the type of property used as collateral, the extent of the asset as a security interest, and the number of creditors having an undischarged claim over the collateral.

#### **6.4.1 Time of Registration of a Financing Statement**

Registration of a financing statement will leave the security interest unperfected if both parties have not agreed to the terms of the security agreement. The Draft Law made provisions to this effect in that a notice registration will be ineffective unless the grantor has entered into a security agreement.<sup>64</sup> The CBNR does not provide for this condition, but rather, requires that so long as a financing statement in respect of the collateral has been duly registered in the NCR, the security interest will be deemed to be perfected.<sup>65</sup> The ST Guide recommended that third party effectiveness (perfection) will only be achieved after the secured creditor has created a security interest and steps must be taken afterwards to perfect it such as registration or taking possession.<sup>66</sup> The researcher recommends here that the CBNR should consider incorporating this requirement as stated under the Draft Law and the

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<sup>62</sup> ‘The purpose of filing is to put the public generally on notice of a prior interest in collateral so that inquiry can be made’ see *Bank of Utica v Smith Richfield Springs* (1968) 58 Misc.2d 114.

<sup>63</sup> See generally, Marek Dubovec and Cyprian Kambili, ‘Using the UNCITRAL Legislative Guide as a Tool for a Secured Transaction Reform in Sub-Saharan Africa: the Case of Malawi’ (2013) 30 *Ariz J Int’l & Comp L* 163; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (2nd edn, Irwin Law Inc 2012); Anthony Duggan, ‘A PPSA Registration Primer’ (2011) 35 *Melb UL Rev* 865.

<sup>64</sup> Draft Law, para 51.1.

<sup>65</sup> CBNR, Art. 9 (1).

<sup>66</sup> ST Guide, Recommendation 13 – 14.

ST Guide in order to avoid a situation whereby a secured creditor simply registers a financing statement without the consent of the grantor, thus limiting the grantor's ability to access finance from other creditors who would assume that the property is not free of encumbrance.

#### **6.4.2 Contents of a Financing Statement**

As noted already, registration of security interest with the NCR provides notice of the security interest, and to inform searchers about the necessary information needed to make further enquiries. In actuality, the searcher only needs to know the identity of grantee, what type of security interest has been taken, and when it was taken.<sup>67</sup> At its bare minimum, the financing statement should provide for these information. In reality, the financing statement may not cover more than a single page whereas the security agreement is likely to run on several pages.

It could as well happen that the secured creditor may wish to submit details of the security agreement (or extracts thereof) as part of the financing statement for registration.<sup>68</sup> Registrants need to be cautious about this practice of submitting too much details of the security agreement for registration because the circumstances of the transaction may change and details included may not reflect the exact obligation afterwards, and, such changes may necessitate amendments to the financing statement which may be costly.<sup>69</sup> In addition, failure to amend the statement might lead to loss of priority, and, there remains the danger that providing too much information will make the financing statement vulnerable to errors leading to imperfection of the security interest.<sup>70</sup> Art.12 CBNR lays down certain information which the secured creditor must provide in the registration of the financing statement. They are:

- ‘12—(1) the secured creditor submitting a financing statement for registration must ensure that all information that is required by these Regulations is provided legibly in the fields designated for entering information of that kind.
- (2) The secured creditor shall provide in a financing statement the following information—
  - (a) Debtor type description: individual, micro, small or large business;
  - (b) In the case of a Company, Co-operative or registered Business Name, the unique identification number which shall be the Corporate Affairs Commission registration number of these types of debtors;

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<sup>67</sup> NCR User Manual, 89.

<sup>68</sup> See *re Management by Innovation Inc.* (2005) 321 BR 744

<sup>69</sup> Marek Dubovek and Cyprian Kambili (n 63) 111.

<sup>70</sup> See *Maxus Leasing Group, Inc. v Kobelco America, Inc.* [2007] WL 655779 2-3.

- (c) In the case of an individual, the unique identification number derived from approved biometric based identification, gender, name, address including telephone and date of birth of the debtor;
- (d) the name and address of the secured creditor or a representative of the secured creditor;
- (e) a description of the collateral;
- (f) the maximum amount for which the secured obligation may be enforced ; and
- (g) the period of time for which the registration is to be effective.’

#### 6.4.2.1 *Identification of the grantor*

Individuals may pool assets and apply for a loan together but the financing statement must identify each grantor.<sup>71</sup> This is necessary to ensure that a search of the NCR using the identifier of any one of the grantors will retrieve the required information with regards to a grantor who is been searched.<sup>72</sup> Art. 12 (2) (a) - (c) informs the secured creditor on how to identify the grantor. Where the grantor is an artificial person e.g. Company or Co-operative they will be identified by their unique identification RC number provided to them by CAC.<sup>73</sup> If the grantor is an individual, the biometric based unique identifier e.g. bank verification number (BVN), name, gender, address, telephone number and date of birth; name and address of the grantee or his representative; collateral description; maximum amount for which the secured obligation may be enforced; and the time frame for which the registration will be effective will be needed to file the financing statement.<sup>74</sup>

The correct identification of the grantor is quite important and it could have a significant effect on the security interest if it is incorrectly entered. The secured creditor should not only rely on one correct identification detail of the grantor especially in a country like Nigeria where individuals could have different names registered in different identification documents. All known names should be registered along with other vital details where necessary such as the BVN.<sup>75</sup> There are other important methods of identifying the grantor as required under Art. 12. They include address which should be the physical address, and electronic address (email) where applicable.<sup>76</sup> This will assist the grantee in distinguishing grantor’s that bear similar names, unless they both have the same address, which in any case is unlikely to occur as a result of separate BVN’s. This address will be important for the secured creditor when submitting notices to the grantor. The address of

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<sup>71</sup> NCR User Manual, 33.

<sup>72</sup> ST Registry Guide, para 162.

<sup>73</sup> CBNR, Art. 12 (2) (c); ST Guide, Recommendation 60.

<sup>74</sup> CBNR, Art. 12 (2) (c); ST Guide, Recommendation 59.

<sup>75</sup> ST Registry Guide, para 167.

<sup>76</sup> ST Registry Guide, para 182.

where the collateral is located is not particularly relevant since it is movable, but rather, the address of the grantor, and the grantor's place of business is important here.

#### 6.4.2.2 *Identification of the secured creditor*

Art. 12 (2) (d) CBNR states the identification requirements seen above is as well applicable to a secured creditor. However, in the case of a secured creditor, the registrant who is usually the secured creditor may identify in the financing statement an agent or representative on his behalf. The representative will usually be named as the secured party in the financing statement. This is intended to preserve the privacy of the actual secured creditor. The rights of the secured creditor will not be weakened since the grantor has an existing contractual relationship with the secured creditor.<sup>77</sup> Third party rights will not be affected so long as the agent or representative identified in the notice is authorised to act on behalf of the secured creditor in any communication or dispute in connection to the security interest to which the registered notice relates.<sup>78</sup> There is no requirement for the representative to have an economic interest in the security agreement, and the representative may not necessarily be an individual, but it may be for instance a legal firm acting on behalf of the secured creditor.

Essentially, this approach may also benefit arrangements in the form of syndicate financing where multiple lenders may be involved in taking a PMSI. In such a situation, the lenders may choose to remain anonymous, thereby appointing a representative to be named as the secured creditor instead. Where the security interest is granted to the syndicate of financiers, the agent or trustee as the case may be would be a 'representative' of the syndicate, but where a security interest is granted to the representative even though it may be a nominal security interest, he would be regarded as a 'secured creditor'.<sup>79</sup> It is important to note that a third party service provider e.g. a law firm who submits a notice on behalf of a secured creditor or a syndicate of financiers does not automatically act as a representative/agent nor as a secured creditor unless the service provider's name is also inserted in the name field under the secured creditor's profile section as the secured creditor.<sup>80</sup>

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<sup>77</sup> ST Registry Guide, para 186.

<sup>78</sup> *ibid.*

<sup>79</sup> ST Registry Guide, para 187.

<sup>80</sup> *ibid.*

#### 6.4.2.3 *Description of the collateral*

If the security agreement does not contain an adequate description of the collateral, a security interest cannot be created.<sup>81</sup> For example, if the security agreement describes the collateral as ‘all computers in the warehouse’ when in actuality, the grantor actually owns a warehouse that contains only mobile telephones, such a description will be inadequate. Art. 7 (2) requires that an adequate description must satisfy certain requirements,<sup>82</sup> but it does not particularly explain to what extent it will be adequate. The description of collateral for the financing statement under Art. 12 (2) (e) CBNR is more relaxed in comparison to the description in the aforementioned provisions which related to the security agreement. Whether generic descriptions such as ‘all asset in the inventory’ would suffice remains questionable. Since the CBNR has not explicitly stated whether such generic description will be adequate for financing statement registration, registrants should take note and provide additional specifications for their security interests.

The importance of describing the collateral adequately enables third parties dealing with the grantor such as purchasers, creditors, judgement creditors and insolvency administrators, to determine which asset is encumbered by the security interest, and for the purpose of determining their status in priority.<sup>83</sup> A generic description may put the searcher on notice but the searcher would not know if the entire assets of the grantor was encumbered or only a portion of it. The problem with such a situation is that the searcher would need to conduct further enquiries which could take additional and unnecessary time. Again, too much information about the collateral may create confusion, and thus render the financing statement ineffective if it happens to mislead the searcher. The secured creditor need not describe the nature of any proceeds in the financing statement. All that is required is that the security interest automatically extends in the identifiable and traceable proceeds of the collateral irrespective of whether the security agreement contained a description of the proceeds,<sup>84</sup> but subject to certain limitations set forth under Art. 7.

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<sup>81</sup> CBNR, Art. 6. (1) (d) and 7 (1).

<sup>82</sup> CBNR, Art. 7 (2) - A description is adequate if the collateral is described by— (a) item, kind, type or category ; or (b) a statement that a security interest is taken in all of the debtor’s present property and those acquired after signing of the security agreement.

<sup>83</sup> ST Registry Guide, para 190.

<sup>84</sup> CBNR, Art. 7 (3); 13 (2) (b).



#### 6.4.2.4 *The maximum amount secured on the collateral*

The CBNR does not require the actual amount secured on the collateral to be indicated in the financing statement. However, the NCR User Manual actually specifies that the maximum amount secured must be indicated in a mandatory section which must be completed as part of the financing statement registration.<sup>85</sup> The reason why the CBNR does not reflect this condition as seen in the User Manual is incomprehensible, but by and large, registrants will be required to fill in the maximum amount of their loan. This eliminates any situation whereby the secured creditor states a maximum amount secured which is ridiculously more than what was credited to the grantor, thus, limiting the ability of the grantor to get new credit from another secured creditor in the same encumbered asset.<sup>86</sup>

#### 6.4.2.5 *Consequence of error and rejection of financing statement*

Art. 15 and 16 CBNR explains the role of the NCR in accepting or refusing registration of a financing statement. The unique identification number of the grantor e.g. an incorrect Bank Verification Number (BVN), or where the serial number of the collateral which causes the security interest not to be retrieved upon a search, will render the registration ineffective against third party claimants. This section restates the implied administrative role of the NCR which is to ensure that a valid financing statement is submitted in the required Form, in addition to all required information that will activate notice of the security interest, and after the registration fee has been paid.

The test of registration error applies to two specific aspects of registration: (1) serial number of the collateral, and (2) identity of the grantor. A material error with respect to the serial number of the collateral, if it seriously misleads the searcher, might render the registration ineffective only in regards to that specific collateral having the supposedly incorrect serial number,<sup>87</sup> and an error in the unique identification of the grantor might render the registration ineffective only against that particular grantor.<sup>88</sup> Where there is an error in the name or address of the grantor, or error in the maximum amount stated for which the collateral secures, or an error in the name or address of the secured creditor, these discrepancies will not render the registration ineffective.<sup>89</sup> Additionally, an incorrect description of some of the collateral will not generally render the registration of the other

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<sup>85</sup> NCR User Manual, 32.

<sup>86</sup> ST Registry Guide, para 201.

<sup>87</sup> CBNR, Art. 15 (2), Art. 16 (4).

<sup>88</sup> CBNR, Art. 15 (2).

<sup>89</sup> CBNR, Art. 16 (1) – (3).

collateral ineffective if it was sufficiently described.<sup>90</sup> In substance, if there are two grantors registered in the financing statement, and one of them was identified incorrectly, the financing statement will not be void and will remain effective against the other grantor identified correctly. In the same vein, a collateral wrongly identified by serial number will not render the registration void against another collateral in the same financing statement correctly identified.

#### 6.4.2.6 *Duration of registration*

Art. 17 relates to the time duration of the effectiveness of the financing statement, and its expiration, cancellation and extension. A valid financing statement which has been registered will be effective until either it expires or until it is cancelled, whichever occurs first.<sup>91</sup> Art. 17 (2) permits the secured creditor to extend or renew by an amendment of the financing statement before the registration lapses. What this means is that the financing statement will be effective for a period of time, and if that period is about to expire but the obligation which it secures has not been satisfied, the secured creditor may extend the period of effectiveness by registering an amendment financing statement. There is no restriction as to when a financing change statement to extend the duration of the obligation must be registered, thus it may even be registered shortly after the initial financing statement was registered.

The Registry Guide provides that registration of amendment notice will not result in the deletion or modification of information in the registered notice to which the amendment notice relates.<sup>92</sup> This is reflected in the CBNR where it states that information should not be deleted from the NCR, whether or not an amendment financing statement cancelling the registration has been filed.<sup>93</sup> Expired registration will continue to be maintained in the NCR and searchable by interested parties for six months following expiration, and expired or cancelled registration will be identified as such in the search. Six months after the financing statement has expired, registered notices will no longer be publicly accessible and they will be forwarded to a private archive from which it may be retrieved only by the NCR.<sup>94</sup>

The CBNR does not provide for a situation whereby a financing change statement submitted to extend the effectiveness of a financing statement is submitted after the initial

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<sup>90</sup> CBNR, Art. 16 (5).

<sup>91</sup> CBNR, Art. 17 (1); ST Guide, Recommendation 69.

<sup>92</sup> ST Registry Guide, para 150.

<sup>93</sup> CBNR, Art. 17 (3).

<sup>94</sup> CBNR, Art. 17 (4).

period for extension has lapsed. The question remains whether such late registration would be accepted by the NCR, and if it is not accepted, what would be the effect of a new registration on the priority of the security interest in the initial registration? Ordinarily, the secured creditor would be at risk of losing priority to a competing claimant, and even so, would be exposed to the rights of a bankruptcy trustee who would challenge the priority of the secured creditor in such a situation.

#### 6.4.2.7 *Amendment of registration*

Art. 18 provides for situations where a registration can be amended by the grantee to modify the transactional arrangement with the grantor while the financing statement remains registered. Art. 18 (2) states that an amendment that adds collateral, adds a new grantor, or modifies the maximum amount of the secured obligation is effective as to these aforementioned changes only from the date and time when the amendment financing statement is registered. For example, it may state that a security interest will be perfected with respect to the collateral identified in the initial financing statement from the time that financing statement was registered. A security interest in another collateral added to the initial registration with an amendment financing statement will only be deemed perfected from the time the amended financing statement is registered. A secured creditor who wishes to register an amended financing statement must provide the registration number of the initial financing statement to which the amended version relates;<sup>95</sup> must indicate the propose of the amendment whether to add, change or delete information;<sup>96</sup> where information is to be added, must also indicate the additional information;<sup>97</sup> and where information is to be changed or deleted, must enter the information to be changed or deleted.<sup>98</sup>

However, the requirements stipulated in the User Manual is different from the above circumstances in the CBNR in that it provide for three basic instances which could warrant an amendment: (1) Update; (2) Assignment; and (3) Subordination.<sup>99</sup> On the aspect of update, it states that updating a financing statement may involve the addition, deletion, editing, update or change to the maximum amount secured, expiry date, secured creditor, debtor or collateral.<sup>100</sup> Regarding the assignment or transfer of a financing statement from the

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<sup>95</sup> CBNR, Art. 18 (3) (a).

<sup>96</sup> CBNR, Art. 18 (3) (b).

<sup>97</sup> CBNR, Art. 18 (3) (c).

<sup>98</sup> CBNR, Art. 18 (3) (d).

<sup>99</sup> NCR User Manual, 51.

<sup>100</sup> NCR User Manual, 51.

registrant to another party (transferee), upon the successful submission of the transfer, the financing statement must be sent to the ‘Transferee Authoriser’ for authorisation before the assignment can be registered.<sup>101</sup> After it is successfully registered, the financing statement should be moved from the transferor account to the transferee account. Furthermore, when subordinating a financing statement, it entails the transfer of priority on the registered collateral from the registrant, who would have been given the role of a Financing Change Statement Officer or Subordinate Officer, and would be able to subordinate to another third party.<sup>102</sup> As a matter of fact, the instances whereby a financing statement can be amended under Art. 18 (3) CBNR are actually encapsulated in the User Manual, but only that the instances enunciated in the User Manual, at face value, are more clearly defined.

#### 6.4.2.8 *Cancellation of registration*

As in the case of amendment, the secured creditor has the power to cancel a registration upon the registration of a cancellation statement.<sup>103</sup> A cancellation does not need to be authorised by the grantor.<sup>104</sup> The secured creditor must register a cancellation statement within fifteen working days of receiving a demand from the grantor but only after all the obligations pursuant to the security agreement have been discharged with no pending commitments.<sup>105</sup> The effect of cancellation, unlike an amendment statement, is to remove all registered notices to which it relates from the NCR;<sup>106</sup> and the cancellation is effective only with respect to the registrant that in fact authorised it.<sup>107</sup>

It is required that a cancellation statement must include in the designated field of the cancellation notice, the initial financing statement registration number of the registration to which the cancellation statement relates.<sup>108</sup> Also, the identity of the secured creditor must be included in the cancellation statement;<sup>109</sup> and if the secured creditor fails to cancel the registration within fifteen days, the grantor may appeal to the Registrar stating why the registration should be cancelled, and notice of which shall be provided to the secured creditor before a final decision is made by the Registrar.<sup>110</sup> Consequently, the secured creditor does

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<sup>101</sup> NCR User Manual, 56.

<sup>102</sup> NCR User Manual, 60.

<sup>103</sup> CBNR, Art. 19 (1).

<sup>104</sup> ST Registry Guide, para 243.

<sup>105</sup> CBNR, Art. 19 (2).

<sup>106</sup> NCR User Manual, 67.

<sup>107</sup> CBNR, Art. 19 (7).

<sup>108</sup> CBNR, Art. 19 (3) (a).

<sup>109</sup> CBNR, Art. 19 (3) (b).

<sup>110</sup> CBNR, Art. 19 (4).

not have an automatic duty to cancel the registration upon full satisfaction of the secured obligation but must do so within fifteen days. If the secured creditor refuses to cancel within the stipulated period upon request from the grantor, the secured creditor shall have the right to respond within seven working days of receipt of notice.<sup>111</sup>

#### 6.4.2.9 Search of the NCR Archive

Records in the NCR can be accessible to anybody that searches it electronically. A searcher would be able to obtain a printed search result of the information in accordance with the required information under Art. 12 without the need to demonstrate or justify the reason for the search.<sup>112</sup> Some developed jurisdictions require the searcher to provide a reason for the search.<sup>113</sup> The researcher acknowledges that this is not relevant because the security agreement is not registered with the financing statement.

The searcher could be a registered user or a third party public user. The register shall, upon request and payment of the search fees i.e. 500 Naira,<sup>114</sup> issue a printed search result for the searcher which shall be conclusive evidence of the existence of the registered information in the NCR as of the date and time it was issued.<sup>115</sup> The originated search result shall either indicate that no registrations were retrieved against the search or shall provide all registrations searchable in the NCR at the date and time when the search was carried out.<sup>116</sup> Searches can be carried out by reference to the serial number of the collateral if the collateral is identifiable with a serial number,<sup>117</sup> or registered number in the case of a Company, Co-operative or Registered Business Name.<sup>118</sup> Where the grantor is an individual, a unique identification number e.g. BVN will be more appropriate.<sup>119</sup> The fees payable for initial registration of security interest is 1,000 Naira, while renewal and amendment costs 500 Naira.<sup>120</sup> Nevertheless, these fees as well as the preferred mode of payment may be reviewed from time to time by the CBN Governor.<sup>121</sup>

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<sup>111</sup> CBNR, Art. 19 (5).

<sup>112</sup> CBNR, Art. 20 (1).

<sup>113</sup> This procedure is common in Australia and New Zealand, although in New Zealand, it is more common to searches where the grantor is an individual, see generally Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths 2012) 129.

<sup>114</sup> CBNR, Art. 22 (1) (c).

<sup>115</sup> CBNR, Art. 20 (2).

<sup>116</sup> CBNR, Art. 20 (3).

<sup>117</sup> CBNR, Art. 21 (c).

<sup>118</sup> CBNR, Art. 21 (a).

<sup>119</sup> CBNR, Art. 21 (b).

<sup>120</sup> CBNR, Art. 22 (1) (a – b).

<sup>121</sup> CBNR, Art. 22 (2).

### 6.4.3 Justification for a Notice Registration System

The notice registration system allows the secured creditor to file a notice that there is an intention to take a security interest in the debtor's personal property and the notice must describe the nature of the security interest and collateral in the financing statement.<sup>122</sup> This registration system allows the secured creditor to file a notice either before or after the security agreement has been executed and it is also possible for a single notice to cover more than one security agreement.<sup>123</sup> There have been arguments that the notice registration system usually leads to underproduction of valuable information from the archive in that a searcher will not know whether a particular registration relates to the actual transaction or to an intended transaction that was never completed.<sup>124</sup> However, the reduced information on the financing statement is not quite as significant as compared to what is required in the first place. The transaction-filing system does not accommodate the registration of security interest without the existence of a security agreement. The distinction between these two systems were explained in the following terms:

The most characteristic difference between notice filing and traditional systems of registration is that notice filing is parties-specific rather than transaction-specific. What is filed are not the details of a particular security but notice that certain parties have entered into, or may in future enter into, a secured transaction in relation to specified property. This approach has certain implications. A notice may be filed in advance of the transaction and the proposed transaction may never take place. The same notice may serve a series of connected transactions. And the information given on the register is necessarily rather general in character, being an invitation to further inquiry rather than a full account of the right in security.<sup>125</sup>

It gained its popularity after the enactment of the UCC Article 9, however, it can be traced far back to 1933 where it was introduced by Karl Llewellyn in the Uniform Trust Receipts Act, followed by the Factor's Lien Acts.<sup>126</sup> Notice registration has proved to be successful internationally in different jurisdictions inclusive of specialised registration systems, such as patent and trade mark registries,<sup>127</sup> registration systems for high-value mobile equipment

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<sup>122</sup> Gerard McCormack, 'Personal Property Security Law Reform in Comprehensive Perspective – Antipodean Insights' (2004) 33 *Comm L World Rev* 3, 13.

<sup>123</sup> *ibid.*

<sup>124</sup> Richard Calnan, 'The Reform of the Law of Security' [2004] *BJIB & FL* 88, 89.

<sup>125</sup> Discussion Paper on Registration of Rights in Securities by Companies (Scottish Law Commission Discussion Paper No 121, October 2002) 8.

<sup>126</sup> Grant Gilmore, *Security Interests in Personal Property* (Vol. 1 The Law Book Exchange Ltd, New Jersey Reprint 1999) 468.

<sup>127</sup> Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (UNCITRAL 2011).

covered by the Cape Town Convention on International Interests in Mobile Equipment and its Protocols,<sup>128</sup> and even the Draft Common Frame of Reference (DCFR).<sup>129</sup>

An important aspect of notice registration is its compatibility with electronic filing which could be done online by the click of a computer button. This is a more attractive and efficient method compared to the paper-based transaction-filing model. This does not necessarily mean that notice registration cannot be done on physical paper in that the Article 9 notice filing system which dates from the 1950s were not designed for general computer use.<sup>130</sup> The registration system was paper based. As a matter of fact, transaction-filing is not incompatible with online registration. In a Law Commission Report,<sup>131</sup> it was suggested that notice registration had the tendency to achieve the following:

1. Electronic notice filing could make registration and searching process fast, simple and cheap.
2. Where notice registration is operated on a company charge registration scheme, the risk of an error in filing leading to invalidation of the security interest will be minimal because companies are assigned a unique registration number.
3. A general description of the collateral will be adequate. This can reduce the risk of registering inaccurate information and also protect third parties because the security interest will be void against third parties where it has not been perfected correctly.
4. Notice registration allows the filing of the security interest before the agreement comes into existence in order to protect the priority of the secured creditor.
5. The time of registration would generally determine the priority of each competing security interest in the same collateral with an exception for a PMSI which will enjoy a super priority over pre-existing security interests but subject to certain requirements.
6. The distinction between the fixed and floating charge will become irrelevant and the uncertainty surrounding them will disappear in practice. The floating charge will be subsumed by a single type of security interest that will have the characteristics of a floating charge but fewer disadvantages to the secured creditor.

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<sup>128</sup> <https://www.internationalregistry.aero/ir-web/> last accessed 11 February 2016.

<sup>129</sup> Study Group on a European Civil Code and the Research Group on EC Private Law (Christian von Bar and Eric Clive edn Sellier, 2009) Book IX, Chapter 3, section 3, subsection 2.

<sup>130</sup> Gerard McCormack, 'The Law Commission Consultative Report on Company Security Interests: An Irreverent Riposte' (2005) 68 Mod L Rev 286, 291.

<sup>131</sup> Company Security Interests: A Consultative Report (Law Commission, Consultation Paper No 176, August 2004) 22 - 23.

The main purpose of notice registration is to alert third parties and potential assignees as to the existence of a security interest.<sup>132</sup> Notice registration is not necessary in the creation of a security interest, but it is merely a notification that a security interest has (or may) be created in future.<sup>133</sup> The NCR does not require the submission of the actual security agreement, but a financing statement to notify third parties of the security interest. The first instance where notice registration was considered for adoption in Nigeria was by Professor Cuming which culminated in the formulation of the Cuming Report, and Draft Law, which was produced in view of enacting a PPSA-style legislation to govern personal property security in Nigeria.<sup>134</sup> The Cuming Report recommended that there should be a single, central registry which should be operated electronically for the publication of security interest in personal property created anywhere in Nigeria.<sup>135</sup> The CBNR similarly reflects this notion that the NCR shall accept financing statements in the prescribed Form where it has been transmitted electronically.<sup>136</sup> Compliance to the registration procedure is generally necessary for the security interest to be effective against third party claimants.<sup>137</sup> The notice registration under the NCR can be applied to a range of security interests and functional equivalent security devices such as reservation of title clauses in sale of goods contract. This notice registration system brings about a wholesale change to the registration of security interest in personal property in Nigeria.

The use of technology in electronic notice registration will make the registration process easier, cheaper and quicker. The low cost of registration and search will make it feasible for secured creditors i.e. banks and other licensed financial institutions to get information about a debtor's property. It obviates the necessity of making repeated registration where there are series of transactions between the parties and where the collateral changes from day to day.<sup>138</sup> The financing statement will be effective to encompass transactions under a security agreement that did not exist or was not contemplated by the parties at the time the financing statement was registered provided that the description in the financing statement is broad enough to cover the collateral concerned.<sup>139</sup> Nevertheless, there

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<sup>132</sup> Gerard McCormack, 'Reforming the Law of Security Interests: National and International Perspectives' [2003] *Sing J Legal Stud* 1, 18.

<sup>133</sup> *ST Registry Guide*, para 123.

<sup>134</sup> See generally para 4.1, above.

<sup>135</sup> Cuming Report, Recommendation 35.

<sup>136</sup> CBNR, Art 9 (4).

<sup>137</sup> Philip R Wood (n 29) 150.

<sup>138</sup> Gerard McCormack, 'Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code' (2003) 24 *Comp Law* 69, 71.

<sup>139</sup> *ibid*, 72.



are several features that needs to be present before an electronic notice registration system can be said to be of modern standards. They are:

#### *6.4.3.1 Certainty and predictability*

An online notice register should at least encompass notices of all types of security interests.<sup>140</sup> An integrated and computerised notice registration system can deliver speed, accuracy and low cost of registration for the benefit of public access to the register.<sup>141</sup> The CBNR does not provide for transaction-filing registration, and it does not expressly indicate whether paper registration is completely prohibited, but it does specify that registration particulars should be transmitted electronically.<sup>142</sup> Since notice registration will be uniformly implemented, this will bring about consistency and predictability in the registration scheme. Nevertheless, the CBN should seriously consider taking up registration of equitable charges granted by companies, or where this is impossible, the current CAC charge register should be upgraded to a notice registration system especially now that charges can be recorded electronically.<sup>143</sup>

Art. 9 (6) CBNR limits the NCR's liability for any disruptions to maintenance, technical and security constrains. Yet, the CBNR could have at least elaborated on the circumstances under which electronic access to the register may temporarily be unavailable.<sup>144</sup> Suffice to say, a near-exhaustive list would provide additional certainty, but in reality, it may not cover all possible circumstances. A list which is only indicative might provide more clarity but with less certainty. Certain unforeseen circumstances such as flood, fire, war, an unexpected breakdown in the central network connection, may justify a suspension of services.

The ST Guide acknowledges that information contained in a registered notice should be removed promptly from the registry once it is no longer effective or when a cancellation notice is registered.<sup>145</sup> It is required that this information is archived and capable of being retrieved in future if necessary.<sup>146</sup> In a situation whereby cancelled or expired notice remains searchable in the online portal, this may lead to legal uncertainties for third party searchers,

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<sup>140</sup> Everett T Wohlers, 'The Registry: Essential Element in Secured Lending' (2001) 18 *Ariz J Int'l & Comp L* 711, 712.

<sup>141</sup> CEAL Registry Report, summary vi.

<sup>142</sup> CBNR, Art. 9 (4).

<sup>143</sup> Companies Regulation 2012, s 5 (3) and s 11.

<sup>144</sup> ST Registry Guide, para 94.

<sup>145</sup> ST Registry Guide, para 151.

<sup>146</sup> ST Guide, Chapter IV, para 109.

and at the same time, it will be capable of impeding the grantor's ability to grant new security interests in, or to deal with, the property described in the notice.<sup>147</sup> Nonetheless, there should remain the possibility of retrieving expired or cancelled notice in the event of dispute settlement especially in priority disputes.<sup>148</sup>

#### 6.4.3.2 *An integrated and harmonised system accessible from any location*

One of the primary purpose of harmonisation of secured transactions law is the need to integrate its existing systems and registries under one single and accessible record.<sup>149</sup> All users of the registry require information as to the location of the collateral and grantor. Hence, it is vital that the registry includes all these important information for the entire country in one centrally accessible electronic register. Of course, there may be different points of access but they should at least all connect to the same central archive. The secured creditor should be allowed to file the security interest anytime and directly via the collateral systems internet portal.

Irrespective of the fact that the CBN has the responsibility of operating the NCR, access should be provided for search and registration through State and Local government parastatals and licensed private establishments. Any search or notice filed through any of these avenues should reflect in the register. An integrated and easily accessible computerised register without human intervention reduces cost of registration because three processes will be eliminated: acceptance of document, revision of document, and entry of the financing statement data by the registry staff.<sup>150</sup> Additionally, there will be no need for storage space of documents, thereby, making searches easier and faster.<sup>151</sup>

The NCR has been established for this purpose but it does not integrate interests in company charges, and there are question marks as to whether certain types of equipment lease – financial lease – should be recorded in the NCR or the Registration Authority.<sup>152</sup> Hence, before a secured creditor provides credit to a grantor, the type of transaction would first need to be ascertained thoroughly in order to determine in which register to investigate the collateral. Afterwards, the legal personality of the grantor will also need to be determined since if it is a company granting its inventory as security for instance, there is a very high possibility that it should be registered as an equitable charge and not as a CBNR security

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<sup>147</sup> ST Registry Guide, para 151.

<sup>148</sup> ST Registry Guide, Recommendation 20 – 21.

<sup>149</sup> Wohlers (n 140) 713.

<sup>150</sup> CEAL Registry Report, p 24.

<sup>151</sup> CEAL Registry Report, p 4.

<sup>152</sup> See Chapter 3, para 3.3.4.1, above; CBNR, Art. 3 (3) (b); Equipment Leasing Act 2015, s 9.

interest. These type of restrictions that sets limitations based on the type of borrower serves no useful public policy purpose and they may even undermine good public policy practices. A large share of the population of businesses in Nigeria are registered entities, and the greater the potential economic importance of companies are affected, the greater the economic impact of the limits on their access to finance.<sup>153</sup>

As reiterated already, the CBNR should take over the registration of company charges. To instil public confidence in the registration system, it is important that the present fragmented filing system should be unified and integrated, and where this is not possible, they should all be coordinated and connected for information sharing purposes. A single online registry can provide a unique time of filing from any location, both Nigeria and abroad, especially where foreign lenders provide loan on the security of personal property.<sup>154</sup> Ranking of priority will be easier to establish based on the day, hour, minute and second of filing. Again, all types of security interests in personal property acceptable as collateral under the CBNR, to the extent that they do not conflict with other primary laws such as international conventions, should ideally be acceptable for registration.

#### 6.4.3.3 *Accuracy and reliability of information in the register*

Data entered in the register which provides notice that a security interest exists may not always be adequate to inform a third party but that should not mean that it cannot be relied on.<sup>155</sup> Generally, the information in the register informs third parties whether a security interest exists or not, and the secured creditor can be notified through the address provided in the financing statement, and an administrator can remotely confirm from the register whether there is an existing security interest in the collateral during insolvency proceedings.<sup>156</sup>

A collateral registry that promotes notice registration should be utilised by only the registrants for financing statement registration, thereby eliminating the possibility of any error committed by registry staff.<sup>157</sup> This provides an easy and attractive way of entering data for registration without the need to gain authorisation from the registry staff since the registration will be carried out online. Hence, the government do not need to guarantee the

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<sup>153</sup> Heywood Fleisig, Mehnaz Safavian and Nuria de la Peña, 'Reforming Collateral Laws to Expand Access to Finance' (World Bank 2006) 25.

<sup>154</sup> CEAL Registry Report, 4.

<sup>155</sup> Publicity Principles, D.4.

<sup>156</sup> *ibid.*

<sup>157</sup> IFC Toolkit, 69.

validity of the data registered, although, the online register would at least require a verification step before a registrant publishes an online notice.<sup>158</sup> If the government were to guarantee the accuracy and reliability of the information filed in the register, then every information filed would need to be inspected by the staff of the registry.<sup>159</sup> This system of registration is currently adopted for land transactions in Nigeria where the particulars of the transaction is reviewed by the registry employee even though the creditor's legal counsel may have already been consulted and paid exorbitant fees to prepare the document.

One advantage of the transaction-filing system is that the particulars of registration will be reviewed by a lawyer and the registry employee, thus making it less susceptible to mistakes.<sup>160</sup> However, this process usually takes a longer time before filing can be completed and it is more expensive because the creditor will have to pay the lawyer's disbursements. Also, the government must hire staff to verify the legality and accuracy of every filing which requires cost and time.<sup>161</sup> Survey carried out in Nigeria showed that there was hardly any proof that staff review of the filed documents adds a great deal of comfort to creditors, and neither has there been complaints to show that creditors will be distressed if staff do not review the registration of financing statements and searches.<sup>162</sup>

Many developed markets have done away with the cumbersome transaction filing system and they have embraced a simpler method of registration without registry staff intervention.<sup>163</sup> Registration of company charges,<sup>164</sup> and bills of sale registration at the High Court, do not follow a similar approach except that the documentation, which can be submitted electronically, will still be reviewed by the registrar to verify that stamp duties and filing fees have been paid. With notice registration, the secured creditor or its agent bears the burden of entering the information as supplied in the security agreement.<sup>165</sup> The legality and authenticity of the financing statement will be placed on the secured creditor which simplifies the process of registration, minimises the administrative burden, and reduces cost and delays in registration and searches.<sup>166</sup> Since ranking of priority will be determined by the order of registration, creditors will have a greater incentive to publish information

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<sup>158</sup> *ibid.*

<sup>159</sup> CEAL Registry Report, 15.

<sup>160</sup> CEAL Registry Report, 16.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> ST Guide, Chapter IV, para 14; Recommendation 54.

<sup>164</sup> Companies Regulations 2012, s 11.

<sup>165</sup> CEAL Registry Report, 17.

<sup>166</sup> Spyridon V Bazinas, 'The Influence of the UNCITRAL Legislative Guide on Secured Transactions' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 41.

correctly as compared to the NCR staff.<sup>167</sup> Also, since there is flexibility with regards to the notice registration system without a government guaranteeing the validity of the registration, creditors can choose the most convenient method of achieving lawfulness and authenticity of the financing statement without incurring hidden filing costs. Instead of government guarantee, the online system could be designed to detect or avoid errors during data entry.<sup>168</sup> System edits may be implemented which will detect whether a compulsory field has been filled or, where a specific type of data is required in a field or, whether the data entered was the right type (numeric or alphabetical). The NCR has adopted this registration scheme that would not require registry officers to review the authenticity or lawfulness of the security agreement or financing statement before a security interest is registered. The CBN must be commended here for this great effort in simplifying the use of the NCR registration system.

#### 6.4.3.4 *Confidentiality*

A modern collateral registry should basically serve only the legitimate purpose of registration of security interest in personal property. The purpose is usually to give notice that an encumbrance exists in the grantor's property, and also for the purpose of establishing priority of competing interests in the collateral.<sup>169</sup> Irrelevant information should not be recorded and the notice should include information necessary to alert third parties of the possible existence of the security interest.<sup>170</sup> It should not include unnecessary information such as the exact nature or amount of the obligation or the exact value of the collateral. Ordinarily, a security agreement might include confidential, personal, sensitive and business information which the parties may not want to include in the notice. To circumvent the possibility of disclosing important information such as the identity of the secured creditor, the ST Guide permits the secured creditor to use the address of its elected representative as an identifier.<sup>171</sup> The information registered will be limited, and confidentiality of the transaction, to an extent, will be maintained by ensuring that information beyond that required for the notice is not registered. The NCR follows this approach.

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<sup>167</sup> CEAL Registry Report, 17.

<sup>168</sup> IFC Toolkit, 69.

<sup>169</sup> IFC Toolkit, 67.

<sup>170</sup> *ibid.*

<sup>171</sup> Bazinas (n 166) 41.

#### 6.4.3.5 *Accessibility and openness*

What good is information if it cannot be readily accessed? Worryingly, Nigeria has no comprehensive registration system that allows for full and free public access to investigate all types of security interest over personal property.<sup>172</sup> As a result, searches and registration cannot easily be undertaken from one register. One major disadvantage of this impediment is that credit bureaus will be unable to garner information for their credit reports to build their debt history portfolio. Interested persons who wish to make business decisions should be able to access the necessary contents of the register. On the whole, the registry should be available to potential users without irrelevant restrictions.<sup>173</sup> All type of users of the registry, whether a local community lender or a multinational financial institution, have as much need of information in regards to personal property which they wish to take as security. The registry should be available for the process of searches and registration any time of the day via an online network where possible.

Section 197 (1) CAMA requires a charge to be filed within ninety days, but an inspection of the charge register will not usually disclose the existence of any charge registered against the company if the company happens to have created a charge during the ninety day window. The researcher strongly believes that notice registration can rectify this ninety day ‘invisibility period’ problem where registrants have full access to verify all types of security interest from a single register. Also, based on the fact that priority under the NCR is determined by the exact date and hour of filing, the need to investigate further to establish whether there is an invisible security interest will therefore be irrelevant since the NCR determines priority of security interest on a ‘first to file’ basis.

The register should be accessible quickly with little risk of error. There are certain features currently present in the process of searching such as the compulsory physical presence of searcher. Often, searchers will only have access to records in the registries only if they appear in the filing office.<sup>174</sup> Usually, they cannot enquire by fax, mail, telephone or the internet.<sup>175</sup> This is totally unnecessary, and almost impossible to effect where the searcher is abroad. Requiring physical appearance increases the cost to search the register which invariably restricts public access. Information in the registry should be deemed public information without any unjustifiable restriction. There should be no requirement to state the

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<sup>172</sup> CEAL Registry Report, summary vii.

<sup>173</sup> Wohlers (n 140) 715.

<sup>174</sup> CEAL Registry Report, 30.

<sup>175</sup> *ibid.*

purpose of the search.<sup>176</sup> This is because the financing statement would not usually include sensitive business information which could harm the grantor (or the grantee).

Institutions that deal with information sharing will benefit immensely if the registry is online and openly accessible. The economic implication is that these institutions can extract information for sale, thus making the information market competitive.<sup>177</sup> Allowing public access means that any type of person can access information and as a result, businesses should be able to legally resell the information which they extract from the registry archive.<sup>178</sup> These businesses are sometimes referred to as ‘value added networks’ or ‘value added services’ and they are well established in developed economies in much of Europe and North America.<sup>179</sup> There may be limited government supervision of their services but it need not be special supervision. This will no doubt promote business activities for entrepreneurs who may want to venture into this sector, thereby, creating additional employment opportunities.

The importance of open access to search for registry information will improve transparency and ease of access to the security interest information. The CBNR stipulates a fee of 500 naira for searches,<sup>180</sup> but the researcher argues that it should be significantly less than this sum, perhaps no more than 250 naira, or even free of charge, and public access to the collateral registry should be available at all times unless during system maintenance.<sup>181</sup>

## 6.5 Conclusion

So far, it has been considered that the NCR informs third parties of the existence of a security interests in personal property. The NCR operates nationally and it is centrally accessible online through the NCR website.<sup>182</sup> One of the primary objectives of harmonising secured transactions law is the need to integrate existing records and personal property security registries in one archive.<sup>183</sup> An integrated computerised registration system can deliver speed, accuracy and low cost of registration.<sup>184</sup> To promote public confidence in the registration

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<sup>176</sup> In New Zealand for example, the searcher is required to state the purpose of the search and where the search contravenes the outlined statutory reasons deemed legal, the searcher will be liable for an action under s 66 Privacy Act 1993 – see NZPPSA s 173 – 174.

<sup>177</sup> CEAL Registry Report, 9.

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> CBNR Art. 22 (1) (c).

<sup>181</sup> ST Registry Guide, para 276.

<sup>182</sup> <<https://www.ncr.gov.ng/Home>> last accessed 22 December 2016.

<sup>183</sup> Wohlers (n 140) 713.

<sup>184</sup> CEAL Registry Report, summary vi.

system, it is important that the NCR should be a unified and integrated, and where this is not possible, then it should be coordinated and interconnected for information sharing purposes with other personal property collateral registries such as the CAC register and the Regulation Authority in charge of registering financial leases. The Nigerian secured transactions system is non-unitary, but it does operate functionally to capture interests that perform security-like functions. At the very least, it is important that the NCR encompass notices of all non-possessory security interests that currently exists in Nigeria but it has failed to achieve this seemingly simple task.

Be that as it may, the CBN will need to raise public awareness and organise training programmes on secured transactions law to educate targeted groups such as companies, financial institutions, trade financiers, lawyers, credit bureaus, etc., about the technicalities of the NCR system. The next chapter in this thesis will be entirely focused on capacity building as there will need to be a concerted effort to sensitise the stakeholders on the new secured transactions regime which may include: understanding the market value of personal property, an introduction to secured transactions law which would familiarise stakeholders with new concepts and principles, the scope of the CBNR and the types of transactions which it would affect, how security interests are created, determination of priority, and in particular, the use of the registry.<sup>185</sup> Commercial lawyers who often represent banks and businesses will need to be familiar with the provisions of the new law.<sup>186</sup> Public lawyers also need to be conversant with the system for the purpose of advising their employees regarding the effects of the law on government institutions and to address any need for amendments to the CBNR.<sup>187</sup>

Businesses such as car dealerships who sell vehicles on credit or factoring companies that purchase book debts which may become subject to the priority rules under the CBNR would need to be acquainted with how it applies to them. Consequently, it is vital that they understand the importance of registering their security interest in the NCR. In most cases, such enterprises would have lawyers advising them, but a public awareness programme would have to be designed for all businesses that use, or are otherwise, affected by the new secured transaction system.<sup>188</sup> The training of businesses could be effected by methodological approaches, which will be detailed in the next chapter, involving

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<sup>185</sup> IFC Toolkit, p 92 - 94.

<sup>186</sup> Cuming Report, para 6.2.2.

<sup>187</sup> Both private and public lawyers should be conversant with the operation of the NCR including the process of registration and searching the NCR archive.

<sup>188</sup> Cuming Report, para 6.2.5.



dissemination of information through capacity building schemes using regional and nationally recognised associations, for example, Abuja Chamber of Commerce and Industry (ACCI), Nigerian Institute of Advanced Legal Studies (NIALS), Manufacturers Association of Nigeria (MAN), and Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN).

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## VII. CHAPTER SEVEN: BUILDING CAPACITY IN SECURED TRANSACTIONS LAW - PUBLIC AWARENESS AND EDUCATION IN NIGERIA

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‘Capacity building is one of the least understood yet most important aspects of development work.’<sup>1</sup>

### 7.1 Importance of Capacity Building

The foundation to establish an enabling business environment for secured lending is not always as clearly defined as reforming its laws to meet international best standards. Preparing a security agreement may seem uncomplicated, but there are other elements which must be embarked on to protect all parties involved in the transaction. For instance, contracting parties must be aware of the inherent dangers lurking behind the mirage of the notice registration procedure which must be carried out with care to avoid a situation whereby their rights are not vulnerable to third party claimants. Again, the idea of perfection and priority as discussed in Chapter 6 might not be as clear-cut as it would seem especially for those who are not experienced in secured transactions. For it to be used in practice, it must be properly understood and interpreted by business people, arbitrators and lawyers, financiers, judges, etc.<sup>2</sup> The challenges borne by new technology especially with the online registration system requires that stakeholders should be equipped with new skills and competencies through training or retraining schemes to be able to understand, and most especially, operate effectively in the lending market. For the accomplishment of this nascent law in Nigeria, training and public awareness programs organised chiefly for stakeholders will go a long way to build capacity in the business sector.

Capacity building places a lot of emphasis on teaching and educating a community towards enlightenment of a particular subject matter, and one way it can be achieved may be through technical assistance which often requires a continuing and intimate relationship

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<sup>1</sup> International Finance Corporation, ‘Strategic Community Investment: A Good Practice Handbook for Companies Doing Business in Emerging Markets’ (IFC June 2010) 49  
[http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/learning+and+adapting/knowledge+products/publications/handbook\\_communityinvestment\\_wci\\_1319576907570](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/learning+and+adapting/knowledge+products/publications/handbook_communityinvestment_wci_1319576907570) last accessed 8 January 2017.

<sup>2</sup> ST Guide, Introduction, para 75.

between the source of assistance and the recipient institution or community.<sup>3</sup> This is a gradual process which focuses on sequences of interaction between the appointed technical advisor and representative(s) of the institution and the community.<sup>4</sup> Generally, capacity building can be seen as a process or activity that improves the ability of a person or institution to carry out its stated objectives.<sup>5</sup> A capacity building approach geared towards economic development involves identification of constraints that people experience in realising their full potential and basic rights, and finding appropriate vehicles through which to strengthen their ability to overcome the causes of their suffering or exclusion.<sup>6</sup> Access to necessary information, for example, market opportunities, is crucial for businesses to compete and grow in a global financial market environment.<sup>7</sup> The opportunity to gain access to finance can be elevated where information is readily available, thus allowing businesses to gain a foothold in the credit market. Experience has shown that many MSMEs in Nigeria lack awareness of finance opportunities and programs available to them from financial institutions, and worse still, they face difficulties in articulating their financial needs to the institutional lender. In this context, capacity building schemes within the Nigerian context will need be explored below.

Capacity building in Nigeria could entail the development of a national workforce through a methodical acquisition of technical skills and efficiency to stimulate a positive performance of an organisation. It can be seen as the internationalisation of the skills, knowledge and processes that enable the formation, implementation, monitoring and evaluation of set and achievable goals in an efficient manner.<sup>8</sup> Concurrently, it can be seen as a set of activities which an organisation or country needs to carry out to provide for itself, on a sustainable basis, and with a regular supply of skilled manpower to meet its present and future needs.<sup>9</sup> Capacity building enhances the ability of human resources and institutions to perform or produce results up to their capacity.

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<sup>3</sup> Anthony Brown, 'Technical Assistance to Rural Communities: Stopgap or Capacity Building?' (1980) 40 *Pub Admin Rev* 18, 21 - 22.

<sup>4</sup> *ibid*, 22.

<sup>5</sup> Lisanne Brown, Anne LaFond and Kate Macintyre, *Measuring Capacity Building* (MEASURE Evaluation, Carolina Population Centre March 2001) 5.

<sup>6</sup> Capacity building can be seen as an approach to development, see Deborah Eade, *Capacity Building: An Approach to People-Centred Development* (Oxfam Development Guidelines, UK and Ireland 1997) 24.

<sup>7</sup> Charles Harvey, 'East Asian SME Capacity Building, Competitiveness and Market Opportunities in a Global Economy' (2004) Working Paper 04-16, Department of Economics, University of Wollongong, 16.

<sup>8</sup> Keynote Address delivered by Chief (Dr.) JO Sanusi, Governor, Central Bank of Nigeria, presented at the PGDPA and CPS Graduation Ceremony of the Administrative Staff College of Nigeria, 13 December 2002, 2 – 3 < <https://www.cbn.gov.ng/OUT/SPEECHES/2002/GOVADD-13DEC.PDF>> last accessed 3 December 2016.

<sup>9</sup> *ibid*, 3.

With regards to MSME's in Nigeria, strategic management skills are often neglected owing to the inability of the business proprietor to organise and coordinate resources in their organisation to achieve favourable results.<sup>10</sup> This is because MSME's by their nature are generally under the control of their proprietor, and decisions taken by the proprietor will affect the entire organisation, which in turn may lead to lack of development because of inadequate training of staff to update their skills and knowledge of business strategies such as financial skills which are often acquired through training and experience.<sup>11</sup> Thus, it is important that sustained and high level of investment in human capital should be adopted in Nigeria which would result in a highly skilled and knowledgeable labour force, thereby positively impacting on growth and economic development. The trickle-down effect of embracing this culture is that it will instigate long term sustainable economic growth and accelerate development if it is properly executed.

## **7.2 The Theoretical Importance of Building Capacity in Secured Transactions Law: The Case of New Zealand**

Experience gained from other jurisdictions has shown that successful implementation of secured transactions law is more likely to occur when a well-designed training and sensitisation program involving the operation of a secured transaction system is carried out.<sup>12</sup> For example in China, training and capacity building were fundamental elements for the successful establishment of the Property Rights Law 2007 which was a huge step in reforming secured lending.<sup>13</sup> The training project targeted clients and public sector stakeholders to create public awareness about the new collateral system for private sector stakeholders such as financial institutions, firms, lawyers, non-bank financial institutions, with the aim of creating awareness and building expertise on personal property security and title-based financing opportunities.<sup>14</sup> As of 2012, at least 62 training events have been delivered successfully by this capacity building project.<sup>15</sup>

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<sup>10</sup> Ebitu E Tom, Basil Glory and Ufot A. Alfred, 'An Appraisal of Nigeria's Micro, Small and Medium Enterprises (MSMEs): Growth, Challenges and Prospects' (2016) 4 Int'l J Small and Entrepreneurship Research 1.

<sup>11</sup> *ibid.*, 4.

<sup>12</sup> Cuming Report, para 6.1.

<sup>13</sup> IFC Secured Transactions Advisory Project in China (International Finance Corporation, April 2012) 2; Valerie Marechal, Pelin Tekin and Humay Guliyeva, 'China's new Property Rights Law – An Important Step Towards Improving Access to Credit for Small and Medium Enterprises' (World Bank Doing Business) <<http://www.doingbusiness.org/~media/FPKM/Doing%20Business/Documents/Reforms/Case-Studies/2009/DB09-CS-China.pdf>> accessed 5 December 2016.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

Common law countries such as New Zealand have undergone substantial changes of their secured transactions law as a result of lack of transparency and incoherent principles.<sup>16</sup> 1 May 2002 marked the commencement of the NZPPSA which regulated the use of personal property as security to secure loan repayments. This law reform has been regarded as the most significant commercial law reform to take place in New Zealand.<sup>17</sup> The NZPPSA replaced the Chattels Transfer Act 1924, the Companies (Registration of Charges) Act 1993 and the Motor Vehicle Securities Act 1989, and for the first time, captured ROT devices.<sup>18</sup> INSOL International, an International Association of Restructuring, Insolvency & Bankruptcy Professionals have stated that the NZPPSA has a general effect on the following group of people and companies:<sup>19</sup>

1. Banks and financial institutions: This could involve accuracy of registered security interests, termly renewal of registration (five years), the position of purchase money creditors, realisation of security, legal resources to address security registration and education and training of personnel;
2. Suppliers of goods and services: The need to protect their ROT claims as super priority interests, priority issues, termly renewal of registration. Discharge of registrations, realisation of security, legal representation and training of personnel;
3. Debtors including companies and individuals: Likelihood of reassessment of credit facilities and availability by secured creditors, validity of registered security interests, renewal and discharge of registrations, priority issues and powers of purchase money creditors.
4. Consumers: Knowledge that a purchaser of goods in the normal course of business will take free valid title in the goods regardless of the goods being subject to a security interest.
5. Professionals: Various implications for professionals including accountants, lawyers, official receivers and liquidators.

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<sup>16</sup> New Zealand Law Commission, Reform of Personal Property Security Law (Preliminary Paper No 6 1988) 50.

<sup>17</sup> Mike Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence (2011) 34 UNSW LJ 696.

<sup>18</sup> Reservation of title devices were not consistently governed by the prior laws except for s 18A of the Chattels Transfer Act 1924 which recognised reservation of title devices as secured transactions.

<sup>19</sup> Richard Agnew and Christine Hayter, Far East and Pacific Rim: Priority Debts in the Distribution of Insolvency Estates (INSOL International), <http://www.insol.org/newinsolworld/OLDISSUES/dec99/fareast.html> last accessed 20 February 2017.

To gain sufficient understanding of the NZPPSA, it would be necessary to have a good appreciation of the economic underpinnings and intention of the law, and the drafting techniques implemented in the design of its commercial objectives.<sup>20</sup> Lawyers understand the ordinary purpose of the law and the manner in which it emphasises economic function over legal form but the law contains various provisions which achieves specific commercially acceptable outcomes.<sup>21</sup> To apply these provisions, lawyers need to appreciate the desired outcomes and their practical implications. In interpreting the provisions, users of the law need to appreciate the general structure and how different sections that are often dispersed into separate parts can interact and guide each other's interpretation. The NZPPSA has been inspired by the UCC Article 9 model, so the necessary theoretical understanding of this law can be gained by looking back at seminal works pertaining to Article 9 and its relationship with the NZPPSA.<sup>22</sup>

In order for the courts to appreciate the economic and commercial background of the new legislation and to interpret the provisions of the law on personal property security under the NZPPSA regime, interpretative aids such as Law Commission reports and the judicial publications have been used extensively to this effect.<sup>23</sup> Also, the courts have resorted to international academic commentaries and sometimes foreign precedents. The courts have made use of this interpretative aids because if they are ignored, there is a risk that the economic objectives of the NZPPSA may not be fully realised.<sup>24</sup> Thus, continuous training of essential stakeholders will ensure that they have the necessary appreciation of the intrinsic provisions of the Act.<sup>25</sup> Seminars and workshops organised at the onset would need to be followed by continuous education and training in modern secured transactions law practices, while adopting a compulsorily periodic review approach on a consistent basis.<sup>26</sup>

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<sup>20</sup> Gedye (n 17) 704.

<sup>21</sup> Gedye (n 17) 705.

<sup>22</sup> *ibid.*

<sup>23</sup> New Zealand Law Commission (n 16).

<sup>24</sup> Gedye (n 17) 708. See also Steve Edwards, Craig Wappett and Bruce Whittaker, *Personal Property Securities in Australia* (LexisNexis Butterworths 2010) which illustrates a table setting out the provisions of New Zealand, Australia and Saskatchewan personal property security laws and their relationship with one another.

<sup>25</sup> Gedye (n 17) 732.

<sup>26</sup> Gedye (n 17) 733.

### **7.3 Identification of Topics and Target Groups for Capacity Building in Nigeria**

The CBN will need to conduct and manage public awareness and training activities associated with operating the NCR. The CBN has the requisite technical assistance to offer this training service in that they have previously extended assistance to other government agencies in the past such as the National Assembly, Investment and Securities Tribunal, Nigeria Economic Society, Nigerian Bar Association, etc.<sup>27</sup> There are other national bodies equipped with the knowledge expertise to undertake training at a regional and/or national scale. The Abuja Chamber of Commerce and Industry (ACCI), Nigerian Bar Association Section on Business Law (NBA-SBL), Manufacturers Association of Nigeria (MAN), and Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN), Nigerian Institute of Advanced Legal Studies (NIALS), etc., are examples of competent organisations capable of running the capacity building programmes in Nigeria. The focus of the capacity building programme should include an introduction to the law of secured transactions, fundamentals of secured transactions law in relation to property and commercial law, meaning of security interests and how it is created, priorities between competing claimants, use of NCR and an overview of its User Manual, realisation of security interests. Most importantly, lending practices applicable in the financial sector should be discussed as part of the training.

It is of utmost importance for stakeholders to have familiarity with the secured transactions law and NCR system. First, public knowledge about new credit opportunities will lead to an increase in demand for credit, especially with the new financing opportunity being offered by the recently set up Development Bank of Nigeria (DBN).<sup>28</sup> Secondly, putative debtors need to be informed about the implications of granting their business and consumer property as security and the safety nets provided by the new legal regime to protect their ownership interests in their collateral. Most importantly, third party purchasers should be educated as to the effects of purchasing an encumbered personal property. It is important that the public are appropriately sensitised and aware of the need to investigate and check the NCR. The people who need to be informed about the secured transaction law extends

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<sup>27</sup> CBN and the Community: Capacity Building for Governmental and Professional Institutions (Central Bank of Nigeria) <<https://www.cbn.gov.ng/CBNCommunity/GovProff.asp>> accessed 5 December 2016.

<sup>28</sup> Franklin Alli, 'Dev Bank of Nigeria Takes Off July' (Vanguard Newspaper Report, 7 June 2016) <<http://www.vanguardngr.com/2016/06/devt-bank-nigeria-takes-off-july/>> accessed 6 December 2016.

beyond creditors, debtors and purchasers. Requisite training should at least be provided to the following targeted groups:

- 1) The judiciary and commercial arbitrators;
- 2) Registry staff;
- 3) Private and public legal counsel;
- 4) Postgraduate business law students;
- 5) Members of the business sector and credit personnel of financial institutions;
- 6) Enforcement officers; etc.

### **7.3.1 The Judiciary and Commercial Arbitrators**

High ranking legal officers such as judges and commercial arbitrators who are tasked with interpreting and applying the law of secured transactions should be familiar with the interpretation of the provisions of the CBNR and the operation of the NCR, and how it may affect commercial law in Nigeria. Workshops and seminars should be offered to judges and arbitrators to enable them increase their knowledge about the new system and to determine the extent of the power of financial institutions as lenders.<sup>29</sup> The EBRD has provided an international best practice guide on ten essential ‘Core Principles for Commercial Law Judicial Training in Transition Countries’.<sup>30</sup> These principles are designed to assist transition countries to establish and improve commercial law judicial training in their respective countries. This training helps to ensure that the law meets its intended goals.<sup>31</sup> These principles do not necessarily consider all the issues which must be taken into account when designing and delivering technical assistance. For the purpose of this thesis, it would be adapted into the context of secured transactions law which is a core aspect of commercial practice in Nigeria.

#### *7.3.1.1 First principle*

The objectives of undertaking judicial training in commercial law is generally to instil public confidence. The requisite training can assist judges and arbitrators to conduct efficacious

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<sup>29</sup> Cuming Report, para 6.2.3.

<sup>30</sup> Core Principles for Commercial Law Judicial Training in Transition Countries (EBRD) ‘EBRD Judicial Training’ <http://www.ebrd.com/what-we-do/sectors/legal-reform/dispute-resolution/international-standards.html> last accessed 12 January 2017.

<sup>31</sup> Special Study: Legal Transition Programme Review (EBRD November 2012) 28 <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/121109legal.pdf> last accessed 12 January 2017.



proceedings on commercial matters such as secured transactions law, while encouraging swift settlement of disputes.<sup>32</sup>

#### *7.3.1.2 Second principle*

Judges and arbitrators should be trained in substantive law.<sup>33</sup> Secured transactions in broad terms relates to various legal fields such as property law, commercial law, and insolvency law. Judges and arbitrators should receive comprehensive training in these substantive law areas. Training should be holistic, while identify the interrelationships between these different legal areas in order to appreciate the true nature of secured transactions and how they affect business, trade and economic development.

#### *7.3.1.3 Third principle*

Judges and arbitrators should be trained in commercial aptitude on secured transactions.<sup>34</sup> They should receive training in other aspects of secured transactions e.g. personal property assignments, discharge of security obligations, priority disputes among several creditors, debtor-creditor relationships, methods of attachment, creditor rights. Judges and arbitrators hearing secured transaction matters should have a sound understanding of how business and markets in Nigeria and outside Nigeria work in practice. Also, the training session should be based primarily on case study prepared in advance, and in each training session, learning materials should be accompanied by written materials.<sup>35</sup>

#### *7.3.1.4 Fourth principle*

Judges should be trained in alternative dispute resolution. Judges should receive comprehensive training on how they can facilitate the settlement of secured transaction disputes through mediation and through other alternative dispute resolution mechanisms, to the extent permitted under Nigerian law. Advocacy skills and training should address how judges can identify cases which may be settled outside the courtroom, and what judicial measures the courts can propose to disputing parties for swift resolution of disputes.<sup>36</sup>

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<sup>32</sup> EBRD Judicial Training, Principle 1.

<sup>33</sup> EBRD Judicial Training, Principle 2.

<sup>34</sup> EBRD Judicial Training, Principle 3.

<sup>35</sup> Cuming Report, para 6.2.3.

<sup>36</sup> EBRD Judicial Training, Principle 4.

#### 7.3.1.5 *Fifth principle*

Independent educational bodies such as the Nigerian Institute of Advanced Legal Studies (NIALS) should set the training curriculum.<sup>37</sup> The training curriculum for substantive law in secured transactions should be organised in accordance with international best standards as produced by the UNCITRAL and EBRD. In designing secured transactions aptitude training, the body responsible for the training of judges and arbitrators should consult with the business community on course content and training methodology.

#### 7.3.1.6 *Sixth principle*

Judges and arbitrators should receive initial and ongoing training on secured transactions law.<sup>38</sup> NIALS and BRIPAN could be involved in this training scheme. Newly appointed judges and arbitrators should receive comprehensive initial training in the secured transactions curriculum. Continuous training in the secured transactions curriculum should be encouraged. This could be used as a factor in judicial promotion especially with regards to commercial courts.

#### 7.3.1.7 *Seventh principle*

Training should be provided by legal and non-legal experts if possible, and it should be practical.<sup>39</sup> Licensed training providers for the secured transactions curriculum should be drawn from both the legal community and other business-related professions, in order to provide a breadth of perspective on business matters. In particular, non-legal experts e.g. the Manufacturers Association of Nigeria (MAN), and computer-based experts from the CBN could be involved in the aptitude training of arbitrators and judges.<sup>40</sup> Modes of training should be practically and vocationally oriented especially if the training involves use of the NCR. Interactive and collaborative learning should be encouraged. Training of judges and arbitrators to conduct further training (train the trainer scheme) on substantive law should also be encouraged.

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<sup>37</sup> EBRD Judicial Training, Principle 5.

<sup>38</sup> EBRD Judicial Training, Principle 6.

<sup>39</sup> EBRD Judicial Training, Principle 7.

<sup>40</sup> *ibid.*

#### *7.3.1.8 Eight principle*

There should be a review of the secured transactions law curriculum on an ongoing basis.<sup>41</sup> Building capacity in the judiciary and arbitration institutions will be unsustainable if the curriculum is not regularly updated. In view of the dynamic relationship between law and the economy, and the rapid changes which can occur in the credit market due to technological, financial and other innovation affecting property rights, the content of the secured transactions law curriculum should be reviewed periodically and updated as required. This can be achieved where case law archive on secured transactions law is created, and searchable online.

#### *7.3.1.9 Ninth principle*

There should be monitoring of judges and arbitrators training needs.<sup>42</sup> Training needs in the secured transactions law curriculum should be monitored periodically through consultation with judges, arbitrators and trainers, analysis of the efficacy of training methods and arrangements in line with educational practices, and feedback from the business community, and review of court performance in secured transaction matters. The judiciary and arbitration institutions should establish transparent procedures for monitoring their training needs at least annually.

#### *7.3.1.10 Tenth principle*

Responsible administrative authorities and bodies such as the Nigerian Bar Association Section on Business Law (NBA-SBL) should promote the commercial curriculum. These bodies should promote the secured transactions law curriculum within the court, and court of arbitration, by fostering a training culture, while encouraging judicial training attendance.<sup>43</sup> This will ensure the quality of training programmes.

### **7.3.2 Registry Staff**

The NCR being electronically operated would require no direct intervention by its staff. However, it is extremely important for the NCR to uphold the duty of care owed to registry users, and to equip their staff with the necessary administrative skills and knowledge to deal

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<sup>41</sup> EBRD Judicial Training, Principle 8.

<sup>42</sup> EBRD Judicial Training, Principle 9.

<sup>43</sup> EBRD Judicial Training, Principle 10.

with recorded financing statements. Training programmes can be outlined for the NCR staff especially for those who are not proficient in computer usage. Often, staff will be required to address electronic problems with the NCR.<sup>44</sup> Some important factors would need to be considered such as the training of private staff if the NCR decides to outsource all or part of the registry function to private establishments. If this is indeed feasible and private establishments are outsourced for this purpose, it has to be determined whether they would have the technological capacity, IT assets and supports to meet the needs for a modern secured transactions registry which would operate 24/7.<sup>45</sup>

The level of knowledge and understanding will be key for such an arrangement to operate smoothly. The NCR should have an accounting section to deal with fees for searches and registrations generated through its services, and with expenses and liabilities incurred by the registry.<sup>46</sup> A registry manager could be appointed and trained on the policies and procedure of managing an electronic registry which may include registration provisions of the CBNR, implementation of the CBNR, and its access policy derived from the NCR User Manual. It may be important for NCR staff to attend at least two or three study tours to jurisdictions operating a successful and similar registration system. These tours could be arranged during the first two years of the NCR operation and should involve hands-on training for the three different components of the registry: IT, accounting department and registry.<sup>47</sup> Additionally, staff should also undergo continuous nationwide training. This can involve experimenting with non-real online registration forms and search forms both in and outside Nigeria.

Staff training should as well include customer service provision or help-desk functions to NCR users. Since the NCR will be operated only electronically, request for assistance may be received via telephone or online. The knowledge required to fulfil this function will be achieved in training on the NCR system. Legal advice should not be provided through this means and registry staff must be instructed about it during their training. Registry staff should familiarise themselves in the management of Frequently Asked Questions (FAQ) which should be frequently updated by registry staff to include new questions that might occur, such as how to open a user account, loss and retrieval of passwords, how to make payments, etc.<sup>48</sup>

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<sup>44</sup> Cuming Report, para 6.2.1.

<sup>45</sup> IFC Toolkit, 95.

<sup>46</sup> Cuming Report, para 6.2.1.

<sup>47</sup> *ibid.*

<sup>48</sup> IFC Toolkit, 96.

### **7.3.3 Private and Public Counsel**

Many private lawyers in Nigeria represent corporate clients such as financial institutions and business ventures. In light of this new regime, private lawyers representing such clients in the preparation of security agreements, they will need to be conversant with the CBNR provisions, and what needs to be included in security contracts between their clients and third parties. This would ensure that their clients are adequately protected. Also, state counsel representing the public and government institutions including local government parastatals should understand the rights of their institutions in the personal property of a debtor and rights against third party claimants e.g. insolvency administrators.<sup>49</sup> Public lawyers may also need to render advice to their employees as to the effect the CBNR would have if they happen to suffer redundancy. Well-trained public and private lawyers who are familiar with the NCR and processes of registration and searcher can offer significant contribution and recommendations in future reform process in order to address any need for amendments to the CBNR. The training could be performed through regional workshops and seminars where participants can gain continuous professional development points as part of their continuous legal training. The training arrangements could very well be carried out online because of logistic problems in finding a suitable training centre to accommodate regional and/or State lawyers depending on how the capacity building programme is framed.

### **7.3.4 Postgraduate Business Law Students**

Postgraduate business law students undertaking degree and vocational training in higher education should be exposed to the intricacies of secured transactions law. An instructor could be employed to engage students as part of their legal and business studies training. This type of training should be initiated after the new law has been implemented. These courses do not have to be mandatory. In many jurisdictions where the use of personal property in secured transactions is prevalent, they do offer modules as part of their higher education courses particularly in the Master of Laws (LL.M.) program.<sup>50</sup> In Nigeria, The University of Lagos has designed and offered postgraduate taught course (Secured Credit Transactions), and with this experience, other higher education institutions should now consider adopting a similar module in light of the new secured transactions law. Vocational

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<sup>49</sup> Cuming Report, para 6.2.2.

<sup>50</sup> Examples of universities currently running substantive aspects of secured transactions as part of their law curricula includes the London School of Economics and Political Science, American University College of Law, University of North Carolina School of Law, University of Southampton.

legal training at the various training centres of the Nigerian Law School should offer candidates the opportunity of learning secured transactions law. This may not necessarily be a standalone module, but it could be incorporated into the Corporate Law and Practice module.

The module could run for one semester and should be available to postgraduate business law students only. The reason for making it unavailable to undergraduate students is because secured transactions is formed from interdisciplinary legal fields such as contract law, property law, commercial law and corporate law. It is important for students taking this module to have an opportunity to first appreciate these various legal fields. Where a module is adopted to this effect, it is advisable for it to be included as part of a curriculum of specific courses dealing with business law issues.<sup>51</sup> A hard and/or soft copy textbook should be prepared and used for teaching purposes.

### **7.3.5 Members of the Business Sector and Credit Personnel of Financial Institutions**

Ideally, these target groups should be the first and most important sector for the training. They are most likely to include micro-credit organisations, leasing companies, banks, factoring houses, businesses that sell on credit, etc. Generally, building capacity in this group should be implemented before or shortly after implementation of the new law. The financial market in Nigeria is dominated by these organisations. This group may as well include public establishments that will use the CBNR and NCR to enforce statutory obligations. It is very important to ensure that both creditors and debtors in whatever capacity in which they operate, whether unregistered businesses, bureaux-de-change, or individuals, etc., are familiar with the provisions of the CBNR. For instance, they should be adequately sensitised about the priority provisions of the CBNR, the importance of timely registration of security interests, methods of realisation, effects of insolvency on secured properties, and powers of third party claimants e.g. trustees in bankruptcy and good faith purchasers. For the most part, the training of this target group should begin with a general overview of the CBNR and the operation of a NCR. Credit personnel should particularly be trained in providing practical solutions for control and monitoring of debtor assets such as inventory and receivables. Internal training can be provided if the financial institution is well equipped to undertake

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<sup>51</sup> Cuming Report, para 6.2.7.

internal training. Where this is not possible, an external instructor experienced in the credit market should be appointed to fulfil this purpose.

### **7.3.6 Enforcement Officers**

The use of self-help in the realisation of security interest can be found under Art. 34 CBNR. Where this has not been agreed in the security agreement, the secured creditor may resort to any available judicial procedure to realise the security interest.<sup>52</sup> Where parties opt to use court enforcement procedures, unnecessary delay in the enforcement of claims against the grantor's personal property may render security interest in collateral unattractive. Enforcement officers appointed by the court should be sensitised on the various enforcement mechanisms under Part V of the CBNR using different hypothetical case study examples. The nature of personal property makes it possible for it to be removed to another jurisdiction. Thus, it is therefore important for enforcement officers to understand the process of tracing, seizure, and sale for enforcement to be carried out speedily and efficiently.

## **7.4 Mode of Delivery and Delivery Responsibilities**

The responsibility of carrying out public awareness programs nationally should be the Chief Registrar of the NCR, or a senior member of an established government parastatal set up for this purpose. Where possible, an international collateral registry expert may be consulted, and invited to participate in preparation of an Operators' Guide, News Releases, Public Service Announcement, and White Papers.<sup>53</sup> Also, the international expert could engage in speaking events with professional associations e.g. the Nigerian Bar Association, and could also serve as a guest instructor or visiting facilitator for business or law schools nationwide.<sup>54</sup>

Written materials in the form of an Operators' Guide should be prepared, either by or in collaboration with a registry staff experienced in collateral registry operation. The NCR has already produced a 'User Manual' to achieve this purpose, but a simplified documentation with explanations should be strongly considered. Such written materials should adequately explain the economic importance of the NCR and CBNR, address the mode of operation of the NCR, refer to international best practices as provided by multilateral institutions, provide directions to additional information on the NCR website such as a Frequently Asked Question (FAQ) section, and information regarding training

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<sup>52</sup> CBNR, Art. 34 (2).

<sup>53</sup> IFC Toolkit, 89.

<sup>54</sup> IFC Toolkit, 89.

events or resources available to users.<sup>55</sup> Delivery of information vital to economic sustainability could also be effective through media coverage, but that will depend on the type of media utilised by the government. Media delivery via electronic means alone e.g. television and radio programmes will not be effective in rural areas having little or no electricity supply. As a result, the national public awareness plan should be tailored to specific circumstances depending on the availability of resources, types of target groups, and mode of delivery. In a nutshell, the Operators' Guide should be prepared in connection with the NCR User Manual, and it should explain the economic importance of the NCR and a secured transactions law for Nigeria.

### **7.5 Conclusion**

Acceptance of this new law will be heavily based on how the public understands it. The government must rally private and public constituencies to support this new law, and this can be achieved where the relevant stakeholders have been identified during the assessment stage.<sup>56</sup> Politically powerful individuals who may have accumulated bad debts may hinder the smooth operation of this law in situations where they might refuse to implement laws in their respective political capacity, which may thereby hinder public awareness programs in the long run. With the current financial crisis in Nigeria, there could be strong oppositions by insolvent parties to accept a strong debt management system which the CBNR would bring about. Insolvent debtors in financial hardship may be reluctant to see a strengthened debt management and collection regime.<sup>57</sup> A viable solution could be for the government to exempt outstanding debts, and the debt collection system would then apply to only new debts after the CBNR has been implemented into law. To summarise, an effective capacity building program will require the support of all stakeholders, and most importantly, government funding which could be needed to fund training projects conducted by Nigerian and international experts and organisations.

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<sup>55</sup> IFC Toolkit, 90.

<sup>56</sup> Increasing Access to Credit: Reforming Secured Transaction Law (International Trade Centre (ITC), Doc. No. BE-10-180.E Geneva) 27-28.

<sup>57</sup> *ibid*, 28.



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## VIII. CHAPTER EIGHT: CONCLUSION AND FINAL RECOMMENDATIONS

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Setting up an enabling business environment is one thing, but identifying those factors that will galvanise and facilitate access to finance will take a more precise effort. There are several dominant factors in Nigeria which could stymie the successful implementation of a workable secured transactions regime such as lack of key infrastructures for sustainable economic development e.g. electricity, internet and education. These infrastructures would need to be rehabilitated if the CBNR is to be a success. The environment for running a business in Nigeria is somewhat underdeveloped partly due to lack of access to affordable credit. The unpredictable nature of the Nigerian market economy has exacerbated financial exclusion with a trickle-down effect of widening the social economic gap of citizens. Financial institutions now prefer to grant loans to elite business proprietors in order to safeguard their investment based on the belief that the collateral given by these borrowers are more valuable. The lack of strong legal structures to assist the poor in search of credit to fund their micro or small business will only continue to widen the social gap in Nigeria unless the government attempts to reform the enabling environment to accommodate all business sizes whether small or large enterprises.

The political climate has been hostile towards reforming secured transaction laws. There remains the lack of political will to implement fundamental laws in this respect.<sup>1</sup> The overarching duty of lawmakers should be to ensure that adequate laws are in place for the economy to thrive, while at the same time, revising or abolishing the obsolete laws, such as the state bills of sale laws, which are now outdated. In Nigeria, the lawmakers do not perform this function with success even though they are among the highest paid lawmakers in the world.<sup>2</sup> One wonders then how lawmakers who fail to routinely perform their primary duties will be able to identify loopholes in enacted laws, while ensuring that the business environment is suitable for investment and long-term sustainable development.

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<sup>1</sup> The National Assembly are working towards the implementation of a Bill for an Act to provide for secured transactions, registration and regulation of security interest in movable assets, to consolidate the work of the CBNR on this matter. The Bill could be passed into law in the near future.

<sup>2</sup> The Economist, Rewarding Work (July 2013)

<http://www.economist.com/blogs/graphicdetail/2013/07/daily-chart-12> last accessed 3 December 2016.

Another fundamental issue which the government would need to address is the apparent lack of a credit reporting system for individuals. A robust credit system where the credit history of borrowers can be archived and retrieved when the need arises will go a very long way in support of the enabling environment for businesses to thrive. Financial institutions will be comfortable in taking security if they can determine the identity of their borrowers, and in particular, their creditworthiness. Also, such a system will assist lenders in tracing the whereabouts of a borrower if the borrower absconds without paying the secured loan. Where this happens, the borrower will be unable to get credit from any other lending institution who would be able to easily investigate the credibility of the borrower through the credit reporting system. Nigeria has attempted to execute such a system through the Bank Verification Number (BVN) process. Basically, the BVN is a unique number issued to every bank customer, especially those who carry out electronic or cashless transactions. This system was launched by the CBN, amongst other reasons, to enhance the transparency of bank financial advancement to customers in order to reduce the number of reported cases of account impersonation, scam, and internet fraud, perpetuated by borrowers with multiple bank accounts bearing different names and home addresses. The BVN system uses biometric technology to register customers, and these registers can be used to identify customers afterwards. This system will go a very long way in limiting the activities of fraudulent borrowers who move from one bank to another in the hope that the other lending institutions will extend finance to them without knowing of their history of default.

### **8.1 Final Recommendations**

The golden thread running across this thesis contemplates the need for Nigerian policy makers to undertake a reform of the secured transactions law to meet international best standards. Previously, lawmakers have attempted to undertake a similar exercise in the past through the Draft Law but it was unsuccessful. The Draft Law represented a wholesale reform of the system which would have involved the harmonisation of the Nigerian secured transaction system into one statutory regime. The CBNR has attempted to plug the gaping hole left by this unsuccessful attempt through a piecemeal fashion by harmonising some of the existing secured transaction practices. So far, there still remains several problems and inconsistencies which have been highlighted and discussed at great length in this thesis. Suggestions put forward thesis have been directed towards a wholesale reform of the CBNR because a piecemeal reform is effective.

### 8.1.1 One Type of Security Interest over Personal Property and Land?

The Nigerian secured transaction system has a very long history as seen in Chapter 2 which encompasses both interests in personal property and land. This thesis focuses on security interests in personal property, but it remains to be seen whether the law of secured transactions in Nigeria can actually encompass all types of property. Future research may be required to identify the ingredients necessary to undertake such a large scale reform for a security interest to cover all types of property including land. The UK is currently contemplating such an ambitious system.<sup>3</sup> It will take the form of a single type of security interest called a ‘charge’ to cover all types of property including land, and it will abolish the traditional types of security interests such as mortgage, security assignments, pledges and contractual liens.<sup>4</sup> The main reason is because the basic rules of secured lending are very similar whatever the type of asset that is granted.<sup>5</sup>

Nigerian lawmakers may need to consider this system in future. An audacious option could be to expand the range of the company debenture to individuals, or a special type of security interest may be developed for all types of persons inclusive of incorporated and unincorporated entities. Where this happens as it is in the case with the debenture deed, there will be no distinction between security interests over personal property and land. Security interests can then be taken over all types of property and the borrower will be able to encumber all of its present and future assets. Nonetheless, there will be a few challenges to this system. Interests in land cannot be enforced through foreclosure and sale against the borrower without the express consent of the Governor of the state where the land is situated. The implication of this is that the use of self-help, which should ordinarily be encouraged in enforcement proceedings in secured transactions will be completely ruled out. For it to work, the efficiency of enforcement of security interests over land will need to be reformed.<sup>6</sup> There are of course differences in the nature of the security interest with regards to the type of asset in that registration will play a fundamental role in such a scheme. Land registry in Nigeria represents a title registry. Without a registered interest free from defects, the lender cannot claim an equitable interest in the leasehold interest in the borrower’s property. However, the

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<sup>3</sup> Financial Law, City of London Law Society

[http://www.citysolicitors.org.uk/index.php?option=com\\_content&view=category&id=129&Itemid=469](http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=129&Itemid=469) last accessed 9 January 2017.

<sup>4</sup> User Guide for Secured Transactions Code (CLLS Financial Law Committee July 2015) para 9 -10.

<sup>5</sup> Secured Transactions Code and Commentary (CLLS Financial Law Committee Discussion Draft July 2016) 42.

<sup>6</sup> See Chapter 2, para 2.4.1.

borrower's title in the property does not necessarily have to be ownership as it can be equitable or legal, thus allowing proprietary interest to be transferred using a security device. As ownership rights in land is legally vested in the Governor, a security interest can still be created in the residual rights of the borrower.

### **8.1.2 A CBNR Contractual Guide: a Distant Possibility**

A contractual guide for the CBNR to facilitate lending transactions may need to be considered as well. For instance, there has been very little discussion about how the CBNR will be interpreted by illiterate persons who may not be able to understand the intricacies surrounding this type of commercial transaction. The researcher has provided for capacity building strategies which could bridge this gap but it is without doubt that a contractual guide designed to facilitate secured transactions will be invaluable. It is important that borrowers are given an opportunity to enter into secured transaction without fear of exploitation. A useful contractual guide can serve this purpose, and on the other hand, it could assist the judiciary to understand and interpret agreements entered into by parties based on the secured transaction law.<sup>7</sup> The contractual guide will reflect the secured obligation with the maximum amount, and it should be capable of modification to suit the business arrangement of the parties, but it must identify some mandatory rules such as commercial reasonableness and good faith.<sup>8</sup> As of this moment, UNCITRAL is seriously considering the viability of a contractual guide for secured transactions law, and it was a major topic of discussion at the 4th International Colloquium on Secured Transactions Law.<sup>9</sup> The outcome of this colloquium with regards to the contractual guide may be worth considering for future implementation in Nigeria.

### **8.1.3 Wholesale or Piecemeal Reform?**

As discussed already in Chapter 4 and 5, compared to the CBNR, the Draft Law was a more robust law which reflected the recommendations of the Cuming Report. Change of government was a major factor that affected the enactment of this Draft Law. At the beginning of this research, the question which irked the researcher was not if reform was

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<sup>7</sup> Eric Franco, Maria Bonilla, Mudhukar R. Umarji and Steven Weise, 'UNCITRAL's Guide to Secured Transactions – a Contractual Guide' (2010) 15 Unif L Rev 367.

<sup>8</sup> *ibid*, 369.

<sup>9</sup> UNCITRAL [http://www.uncitral.org/uncitral/en/commission/colloquia\\_security.html](http://www.uncitral.org/uncitral/en/commission/colloquia_security.html) last accessed 9 January 2017.

needed, but whether Nigeria needed a wholesale reform of secured lending, or whether it would be feasible to implement reform in a piecemeal manner. From the analysis provided up to this point, essentially, the answer to this question is that the Nigerian government should undertake a wholesale reform majorly because the most recent piecemeal attempt undertaken by the CBN, unfortunately, does not meet international best standards.

Considering the level of interest in this area of law, and the wide-ranging effect it could have on the market economy, it is advisable for the government to ditch reforming secured transactions law through piecemeal methods. First and foremost, the CBNR has only tried to resolve the practical problems that have presented themselves without trying to actually deal with those inherent conceptual problems that are in the legal system, or those challenges faced by businesses which they have tried to work around. Additionally, the CBNR does not actually tackle the labyrinthine nature of quasi-security interests, and the complexities associated with them. A good law on secured transactions must provide for these type of securities and how the priority rules will affect them while sitting side by side with other traditional forms of security.

It is apparent that the NCR registration system discussed in this thesis has failed to meet the international best standards. There are a number of difficulties with the registration system which the CBN has been unable to tackle effectively through piecemeal measures. First, it does not mention whether the CBNR will be exclusively responsible for the registration of financial leases, and how it will affect registration of other types of title-based devices such as hire purchase. Also, the CBNR does not explain how priority should be determined if a secured creditor takes security over an asset also secured by an already existing floating charge, knowing that it does not recognise the equitable charges granted by companies. The significance of these inconsistencies further worsens the problem.

The CBNR did not seem to take note of policy matters underlying the need to have a robust secured transactions law. With respect to the CBN, the responsibility of drafting a national law of this magnitude, which cuts across the many pivotal facets of substantive private law, should have been undertaken by the legislature.<sup>10</sup> The piecemeal reform produced in the CBNR is clearly difficult to fit within the existing lending system which brings up more questions than it solves. At this point, a wholesale reform of secured transactions law is required because a piecemeal reform is problematic and could lead to a total breakdown of the system. Many reforms which were identified under the CBNR, as

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<sup>10</sup> See above (n 1).

against those which were already in existence as seen in Chapter 3, shows that the CBNR does not quite fit with other parts of the secured transactions system in Nigeria.

The CBNR has failed to identify which laws should be repealed or amended. Any repeal should cover the bill of sale but only to the extent that it does not affect absolute sales. The law should consider the nature of possessory securities such as the pledge, which ordinarily should not be registered but the CBNR has mandated every security interest to be registered, failing which it could lose priority to competing claims. Also, the CBNR does not provide for the likely impact it would have on immovable property, for example, fixtures. There needs to be detailed provisions to ascertain how the CBNR will interact with the land registry where goods are attached to buildings or land. Also, it fails to mention the position of security interests arising by operation of law, such as non-consensual liens, and whether they should be registrable, and what will be their priority status if challenged by a perfected security interest holder.

Secured transactions reform is cumbersome but time must be given to consider wholesale reform due to its critical importance to the economic and financial system. It is inherently complicated, but nevertheless, it is advisable to deal with all areas of difficulty together at once.<sup>11</sup> The Draft law could have certainly curbed this putative problem in that it accommodated all types of security devices, while having a single registration archive to record all security interests. In future, Nigerian lawmakers should pay close attention to the work of EBRD and UNITRAL on secured transactions, which if carefully considered would provide meaningful and practical advantages to the Nigerian market economy. In particular, the UNCITRAL Model Law could be the focal point if lawmakers in Nigeria seek to implement a wholesale reform for the reason that it follows a modern system for harmonisation of secured transactions through a unitary, functional and comprehensive approach,<sup>12</sup> thus eliminating the fragmentations and inconsistencies presently inherent in secured transactions law in Nigeria.

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<sup>11</sup> Louise Gullifer, 'Piecemeal Reform: Is it the Answer?' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 449.

<sup>12</sup> Spyridon V Bazinas, 'The UNCITRAL Legislative Guide on Secured Transactions and the Draft UNCITRAL Model Law on Secured Transactions Compared' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 484 – 485.

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