

No.

2017



THE REPUBLIC OF KENYA

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HIS EXCELLENCY THE PRESIDENT

UHURU KENYATTA

I assent

President

, 2017

**AN ACT of Parliament to facilitate the use of movable property as collateral for credit facilities, to establish the office of the Registrar of security rights and to provide for the registration of security rights in movable property and for related purposes.**

**THE MOVABLE PROPERTY SECURITY RIGHTS ACT, 2017**

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**THE MOVABLE PROPERTY SECURITY RIGHTS  
ACT, 2017**

**AN ACT of Parliament to facilitate the use of movable property as collateral for credit facilities, to establish the office of the Registrar of security rights and to provide for the registration of security rights in movable property and for related purposes**

**ENACTED** by the Parliament of Kenya, as follows—

**PART I—PRELIMINARY**

**1.** (1) This Act may be cited as the Movable Property Security Rights Act, 2017.

Short title and Commencement.

(2) This Act shall come into force on such date as the Cabinet Secretary may, by notice in the Gazette, appoint.

**2.** In this Act, unless the context otherwise requires—

Interpretation.

“acquisition security right” means a security right in a tangible asset or intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended to enable the grantor to acquire it to the extent the credit is used for that purpose;

“attachment to immovable property” means a tangible asset that, despite the fact that it is physically affixed to immovable property, it is treated as movable property;

“Board” means the Board of Directors established under section 5 of the Business Registration Service Act, 2015;

No. 15 of 2015.

“Cabinet Secretary” means the Cabinet Secretary responsible for the registration of security rights;

“collateral” means—

- (a) a movable asset that is subject to a security right; or
- (b) a receivable that is the subject of an outright transfer;

“commingled assets” means funds credited to a deposit account or money mixed with other money so that they ceased to be identifiable;

“commingled goods” means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass;

“competing claimant” means a creditor of a grantor or other person with rights in the collateral that may be in competition with the rights of a secured creditor in the same collateral, including —

- (a) another secured creditor of the grantor that has a security right in the same collateral;
- (b) another creditor of the grantor that has a right in the same collateral;
- (c) the insolvency representative in insolvency proceedings under the Insolvency Act, 2015; in respect of the grantor; or
- (d) a buyer or other transferee, lessee or licensee of the collateral;

No. 18 of 2015.

“consumer goods” means goods primarily used or intended to be used by the grantor for personal, family or household purposes;

“credit purchase transaction” means a hire-purchase agreement, a conditional sale agreement, a chattel leasing agreement or a retention of title agreement;

“credit sale agreement” means an agreement for the sale of goods under which payment of the whole or a part of the purchase price is deferred and a security interest in the goods is created or provided for in order to secure the payment of the whole or a part of the purchase price;

“debtor” means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;

“debtor of the receivable” means a person that owes payment of a receivable, including a guarantor or other person secondarily liable for payment of the receivable;

“deposit account” means an account maintained by an institution licensed under the Banking Act or other written law;

Cap. 488.

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“electronic securities” means securities not represented by a certificate;

“equipment” means a tangible asset other than inventory or consumer goods that is primarily used or intended to be used by the grantor in the operation of its business;

“financial lease” means a lease under which at the end—

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

“future asset” means a movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

“grantor” means —

- (a) a person that creates a security right to secure either its own obligation or that of another person;
- (b) a buyer or other transferee, lessee, or licensee of the collateral that acquires its rights subject to a security right; and
- (c) a transferor in an outright transfer of a receivable;

“intangible asset” includes receivables, choses in action, deposit accounts, electronic securities and intellectual property rights;

“intellectual property” means—

- (a) copyright as defined in section 2(1) of the Copyright Act, 2001;
- (b) industrial property rights as defined in section 2(1) of the Industrial Property Act, 2001;
- (c) trade mark as defined in section 2(1) of the Trade Marks Act; and

No. 12 of 2001.

No. 3 of 2001.

Cap. 506.

(d) any other related right;

“inventory” means tangible assets held by the grantor for sale or lease in the ordinary course of the grantor’s business, including raw and semi-processed materials;

“money” means bank notes and coins issued by the Central Bank of Kenya or notes and coins authorized as legal tender by another country;

“movable asset” means any tangible or intangible asset;

“negotiable document” means a document, such as a warehouse receipt or bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirements for negotiability;

“negotiable instrument” means a bill of exchange, cheque and promissory note as defined in the Bills of Exchange Act;

Cap. 27.

“non-consensual creditor” means a creditor that has obtained a right in the collateral by operation of any law, including under an execution process or as a result of owed taxes and similar fees;

“notice” means communication in the prescribed manner to the Registrar of information in an initial notice, an amendment notice or a cancellation notice;

“notification of a security right in a receivable” means a communication by the grantor or the secured creditor under section 60 informing the debtor of the receivable that a security right has been created in the receivable;

“outright transfer of a receivable” means the transfer by agreement from one person to another person of ownership to transferor’s contractual right to payment of a monetary sum from a third person;

“possession” means the actual possession of a tangible asset by a person or its representative, or by an independent person that acknowledges holding it for that person;

“proceeds” means whatever is received in respect of the collateral, including what is received as a result of sale or other disposition or collection, lease or licence of the

collateral, insurance proceeds, claims arising from defects in, damage to or loss of the collateral, and proceeds of proceeds;

“receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a deposit account and a right to payment under security;

“registrant” means the person who submits the prescribed registry notice form to the Registrar;

“registration number” means a unique number assigned to a registered initial notice by the Registrar;

“Registrar” means the person appointed under section 19 to supervise and administer the operations of the Registry;

“Registry” means the registry established under section 19;

“registry records” means the information in all registered notices stored by the Registrar, consisting of the records that are publicly accessible and the records that have been archived;

“securities” has the meaning assigned to it under section 2 of the Capital Markets Act;

Cap. 485A.

“security certificate” means a certificate —

- (a) representing that the person entitled to the security is the person in possession of the certificate; or
- (b) identifying the person entitled to the security;

“secured creditor” means —

- (a) a person that has a security right; and
- (b) a transferee in an outright transfer of a receivable;

“secured obligation” means an obligation secured by a security right, excluding an outright transfer of a receivable;

“security agreement” means —

- (a) an agreement, regardless of whether the parties have denominated it as a security agreement,

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between a grantor and a secured creditor that provides for the creation of a security right; and

- (b) an agreement that provides for the outright transfer of a receivable;

“security right” means —

- (a) a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; and
- (b) the right of the transferee in an outright transfer of a receivable;

“serial number” means the serial number located on the chassis or body frame of a motor vehicle or trailer;

“serial-numbered collateral” means a motor vehicle or a trailer as defined in section 2 of the Traffic Act; Cap. 403.

“tangible asset” means all types of goods and includes motor vehicles, crops, machineries, livestock;

“trust indenture” means any deed or document, however designated, by the terms of which a person issues or guarantees, or provides for the issue or guarantee of debt obligations secured by a security right and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for under it;

“trust receipt “ includes an acknowledgment of the grantor in writing to deal with the collateral for the benefit of the secured creditor; and

“working day” means any day from Monday to Friday, but does not include a public holiday.

**3.** The objects of this Act are to—

Objects.

- (a) promote consistency and certainty in secured financing relating to movable assets;
- (b) enhance the ability of individuals and entities to access credit using movable assets; and

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(c) to establish the office of the Registrar and a Registry to facilitate the registration of security rights in movable assets.

4. (1) This Act applies to security rights in movable assets, including —

Scope of application.

- (a) every transaction that secures payment or performance of an obligation, without regard to its form and without regard to the person who owns the collateral;
- (b) without limiting the generality of paragraph (a), a chattel mortgage, credit purchase transaction, credit sale agreement, floating and fixed charge, pledge, trust indenture, trust receipt, financial lease and any other transaction that secures payment or performance of an obligation; and
- (c) with the exception of Part VII, an outright transfer of a receivable.

(2) Despite subsection (1), this Act does not apply to—

- (a) a security right in book-entry securities under the Central Depositories Act, 2000;
- (b) the creation, lease or transfer of an interest in land, excluding a right to payment that arises in connection with an interest in or a lease of land;
- (c) a security right in a vessel including a mortgage right subject to the Merchant Shipping Act, 2009;
- (d) a security right in an aircraft subject to the Civil Aviation Act, 2013; and
- (e) except as otherwise provided in this Act, a lien, charge or other interest created by law.

No. 4 of 2000.

No. 4 of 2009.

No. 21 of 2013.

(3) This Act does not apply to security rights in proceeds of collateral if the proceeds constitute a type of asset that is governed by another law.

(4) Nothing in this Act affects the rights and obligations of the grantor and the secured creditor under the Consumer Protection Act, 2012.

No. 46 of 2012.

(5) Nothing in this Act overrides a provision of any other law that limits the creation or enforcement of a

security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in, or the transferability of an asset on the sole ground that it is a future asset, or a part of, or undivided interest in, an asset.

5. (1) Except for sections 5(2), 6, 8, 56, 57 and 80 to 87, the provisions of this Act may be derogated from or varied by agreement, provided that the agreement does not affect the rights or obligations of any person that is not a party to the agreement.

Party autonomy and standard of conduct.

(2) A person shall exercise the rights and perform the obligations under this Act diligently and in good faith.

## **PART II—CREATION OF A SECURITY RIGHT**

6. (1) A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

Creation by execution of a security agreement.

(2) A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

(3) A security agreement shall—

- (a) be in writing and signed by the grantor;
- (b) identify the secured creditor and the grantor;
- (c) except in the case of an agreement that provides for the outright transfer of a receivable, describe the secured obligation; and
- (d) describe the collateral as provided in section 8.

(4) A security agreement entered into in accordance with this section is enforceable and creates a security right, irrespective of the satisfaction of the requirements that may be imposed by any other written law.

7. (1) A security right may secure one or more obligations of any type, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Obligations that may be secured and assets that may be encumbered.

(2) A security right may encumber—

- (a) any type of movable asset, whether tangible or intangible;

- (b) parts of assets and undivided rights in movable assets;
- (c) generic categories of movable assets; and
- (d) all of a grantor's movable assets.

**8.** (1) The assets encumbered or to be encumbered shall be described in the security agreement in a manner that reasonably allows their identification.

Description of collateral.

(2) A description that indicates that the collateral consists of all of the grantor's movable assets, or of all of the grantor's movable assets within a generic category, satisfies the standard of subsection (1).

(3) A description reasonably identifies the collateral if it identifies the collateral by—

- (a) specific listing;
- (b) category;
- (c) a type of collateral defined in this Act; or
- (d) quantity.

(4) The obligations secured or to be secured shall be described in the security agreement in a manner that reasonably allows their identification.

(5) A generic description of the secured obligations satisfies the standard of subsection (4).

**9.** (1) A security right in an asset extends to its identifiable proceeds.

Right to proceeds.

(2) Where proceeds in the form of funds credited to a deposit account or money become commingled assets—

- (a) the security right extends to the commingled assets;
- (b) the security right in the commingled assets is limited to the amount of the proceeds immediately before they became commingled assets; and
- (c) if at any time after the commingling, the balance credited to the deposit account or amount of money is less than the amount of the proceeds immediately before they became commingled assets, the obligation secured by the security

right that is enforceable against the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time the security right in the proceeds is claimed.

**10.** A security right in collateral extends to commingled goods.

Tangible assets commingled in a mass or product.  
Contractual limitations on the creation of a security right.

**11.** (1) A security right in a receivable is effective as between the grantor and the secured creditor and as against the debtor of the receivable despite an agreement limiting the grantor's right to create a security right entered into between the grantor and the debtor of the receivable or any subsequent secured creditor.

(2) Nothing in subsection (1) affects any obligation or liability of the grantor for breach of the agreement referred to in that subsection, but the other party to the agreement may not—

- (a) avoid the contract giving rise to the receivable or the security agreement on the sole ground of the breach of that agreement; or
- (b) raise against the secured creditor any claim the party may have against the grantor as a result of that breach.

(3) A person who is not a party to the agreement referred to in subsection (1) cannot be held liable for any damages resulting from the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

(4) This section applies only to receivables arising from—

- (a) a contract for the supply or lease of goods or services other than financial services under the Banking Act, the Building Societies Act, Microfinance Act, 2006 or the Sacco Societies Act, 2008;
- (b) a construction contract;
- (c) a contract for the sale or lease of immovable property; or
- (d) a contract for the sale, lease or licence of intellectual property or of proprietary information.

Cap. 488.  
Cap. 489.  
No. 19 of 2006.  
No. 14 of 2008.

(5) A security right in a right to payment of funds credited to a deposit account is effective despite an agreement between the grantor and the financial institution limiting the grantor's right to create a security right.

**12.** (1) A secured creditor with a security right in a receivable or other intangible asset, or in a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the collateral without a new act of transfer.

Personal or property rights securing or supporting payment or other performance.

(2) Where the right referred to in subsection (1) is transferable only with a new act of transfer, the grantor is obligated to transfer the benefit of that right to the secured creditor.

**13.** A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the document is in possession of the asset at the time the security right in the document is created.

Tangible assets covered by negotiable documents

**14.** A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Tangible assets with respect to which intellectual property is used.

### **PART III—THIRD-PARTY EFFECTIVENESS OF A SECURITY RIGHT**

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

Method for achieving third-party effectiveness.

**16.** (1) A security right in any proceeds is effective against third parties without any further action of the grantor and the secured creditor if—

Proceeds.

(a) the security right in the original collateral is effective against third parties; and

(b) the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a deposit account.

(2) If a security right in a collateral is effective against third parties, a security right in any type of proceeds of that collateral, other than the types of proceeds referred to in subsection (1)—

- (a) is effective against third parties for ten working days after the proceeds arise; and
- (b) continues to be effective after the expiration of the ten days, if the security right in the proceeds is made effective against third parties by registration of an amendment notice.

**17.** (1) If the secured creditor transfers a security right or a part of it, the secured creditor may register an amendment notice to reflect the transfer.

Transfer of a security right.

(2) A transfer of a security right is effective whether or not an amendment notice has been registered.

**18.** If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document is also effective against third parties.

Negotiable documents and tangible assets covered by negotiable documents.

#### **PART IV—REGISTRATION OF NOTICES RELATING TO SECURITY RIGHTS**

**19.** (1) There is established the Office of Registrar who shall oversee the general running of the Registry.

Establishment of the Office of the Registrar and the Registry.

(2) The function of the Registry shall be to receive, store and make accessible to the public information on registered notices with respect to security rights and rights of non-consensual creditors.

(3) The Board may appoint—

- (a) a suitable person as the Registrar;
- (b) other staff of the Registry.

**20.** (1) The Registrar shall not, on the Registrar's own motion, amend or delete information contained in the registry records.

Integrity of information in the Registry.

(2) The Registrar shall preserve information contained in the registry records and reconstruct the information in the event of loss or damage.

**21.** (1) The Registrar shall remove information in a registered notice from its public records only upon the expiry of the period of effectiveness of the registration of a notice.

Removal of information from the Registry and archival.

(2) The Registrar shall archive information removed from its public records—

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- (a) for five years; and
  - (b) in a manner that enables the information to be retrieved by the Registrar in accordance with section 34.
- 22.** The Registrar or an officer acting under the authority of the Registrar cannot be held liable for anything done under the authority of this Act if that action or matter is done in good faith. Limitation of liability of the Registrar.
- 23.** The Registrar may charge the prescribed fees. Registry fees.
- 24.** (1) Registration of an initial notice or an amendment notice that either adds collateral not included in the security agreement or adds a grantor is ineffective unless authorized by the grantor in writing. Grantor's authorization for registration.
- (2) A notice may be registered before the creation of a security right or the conclusion of a security agreement to which the notice relates as long as there is evidence of the authorization in writing.
- (3) A written security agreement is sufficient to constitute authorization by the grantor for the registration of a notice.
- 25.** The registration of a single notice may relate to security rights created by the grantor under one or more security agreements with the same secured creditor. One notice sufficient for security rights under multiple security agreements.
- 26.** The procedure for registration of notice, access to information by the public, conduct of search and assigning of unique identifiers to grantors and secured creditors shall be as prescribed in the Regulations. Procedure for registration of notice etc.
- 27.** (1) An initial notice shall contain the following information in the relevant designated fields, as further prescribed in the Regulations— Information required in an initial notice.
- (a) the identifier and address of the grantor;
  - (b) the identifier and address of the secured creditor or its representative;
  - (c) a description of the collateral in accordance with section 8 or by a serial number for the serial-numbered collateral only that is not held as inventory;
  - (d) the period of effectiveness of the registration; and

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(e) any other information for statistical purposes only.

(2) If there is more than one grantor or secured creditor, the required information shall be entered separately for each grantor or secured creditor.

**28.** With the exception of the names and addresses of the grantor and the secured creditor or their representatives, the information contained in a notice shall be expressed in English.

Language of information in a notice.

**29.** (1) The Registrar shall assign a unique registration number to a registered initial notice and associate all registered amendment and cancellation notices that contain that number with the registered initial notice.

Time of effectiveness of the registration of a notice.

(2) The registration of an initial, amendment and cancellation notice is effective from the date and time when the information in the notice is entered into the records in the Registry.

(3) The Registrar shall enter information in a notice into the records in the Registry without delay after the notice is submitted and in the order in which each notice was submitted.

(4) The Registrar shall record the date and time when the information in a notice is entered into the records in the Registry.

**30.** (1) The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field of the notice, but shall not in any event, exceed ten years.

Period of effectiveness of the registration of a notice.

(2) The period of effectiveness of the registration of an initial notice may be extended only within six months before its expiry by the registration of an amendment notice that indicates in the designated field a new period, in any event not exceeding ten years.

(3) The registration of an amendment notice extends the period of effectiveness for the period indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

**31.** (1) Immediately after the registration of a notice,

Obligation to

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the Registrar shall, in the prescribed form, provide to the registrant, a copy of the information contained in the notice, indicating—

send a copy of a registered notice.

- (a) the date and time when the registration became effective; and
- (b) the registration number.

(2) Within ten working days after receipt by registrant of a copy of the information in accordance with subsection (1), the registrant shall send it to the person identified in the registered notice as the grantor.

(3) A registrant who fails to comply with subsection (2) commits an offence and is liable, on conviction, to a fine not exceeding five thousand shillings.

**32.** (1) The person identified in a registered initial notice as the secured creditor may, in the prescribed manner, register an amendment or cancellation notice relating to that registered notice.

Right to register an amendment or cancellation notice.

(2) The registration of an amendment or cancellation notice is ineffective unless authorized by the person identified in the registered initial or amendment notice as the secured creditor.

**33.** (1) The secured creditor shall register an amendment notice if—

Compulsory registration of an amendment or cancellation notice.

- (a) the registered notice to which it relates contains information that exceeds the scope of the grantor's authorization; or
- (b) the security agreement to which the registered notice relates has been revised to delete some collateral.

(2) The secured creditor shall register a cancellation notice if—

- (a) the registration of an initial notice was not authorized by the grantor;
- (b) the registration of an initial notice was authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded; or
- (c) the security right to which the notice relates has been extinguished and the secured creditor has no further commitment to provide value to the grantor.

(3) In cases described in subsections (1) (a) and (2) (a), the secured creditor shall not charge or accept any fee or expense for complying with its obligation.

(4) If any of the conditions set out in subsections (1) and (2) is met, the grantor may, in writing request the secured creditor to register an amendment or cancellation notice and the secured creditor shall not charge for complying with the grantor's request.

(5) If the secured creditor fails to comply with the grantor's request within ten working days after its receipt, the grantor may seek the registration of an amendment or cancellation notice by the Registrar.

(6) Before giving effect to the requested registration, the Registrar shall give notice to the secured creditor.

(7) Appeals from the decision of the Registrar shall lie with a court of competent jurisdiction.

**34.** (1) A search of the registry records may be conducted according to—

- (a) the identifier of the grantor; or
- (b) the serial number of the collateral.

(2) On receipt of a search request in the prescribed form, the Registrar shall conduct the search and issue a search certificate containing the following—

- (a) the date and time when the search was performed;
- (b) all information matching the search requirements criterion exactly; or
- (c) an indication that no registered notice contains information matching the search criterion exactly.

(3) A search certificate issued by the Registrar is proof of its contents.

**35.**(1) An error in the grantor identifier entered by the registrant in a notice renders the registration of the notice ineffective.

(2) An error in the grantor identifier does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.

Search criteria and results.

Errors in required information by the registrant entered in a notice.

(3) An error in required information other than the grantor's identifier does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

(4) Any error in the statistical information prescribed by the Regulations does not affect the effectiveness of the registration.

(5) An error in the description of the collateral does not render the registration of the notice ineffective with respect to other collateral sufficiently described.

(6) An error in the serial number of the serial-numbered collateral renders the registration ineffective as against a buyer or lessee of that asset.

**36.** (1) If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice indicating the new identifier of the grantor within sixty days after the change but before the expiry of the period of effectiveness of the registered notice, the security right to which the notice relates remains effective against third parties and retains the priority it had over the rights of competing claimants before the change.

Post-registration  
change of  
grantor  
identifier.

(2) If the secured creditor registers an amendment notice after the expiration of the time period indicated in subsection (1)—

- (a) a security right with respect to which a notice is registered after the change in the grantor's identifier but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and
- (b) a person that buys, leases or licenses the collateral after the change in the grantor's identifier but before the registration of the amendment notice acquires the collateral rights free of the security right to which the amendment notice relates.

**37.** (1) If a security right has been made effective against third parties and the collateral is transferred to a transferee that acquires the collateral rights subject to the security right, the security right remains effective against

Post-registration  
transfer of the  
collateral.

third parties and retains the priority it had over the rights of competing claimants before the transfer, provided that the secured creditor registers an amendment notice adding the transferee as a new grantor within ten working days after the secured creditor acquires knowledge of the transfer and the transferee's identifier.

(2) If the secured creditor registers an amendment notice after the expiration of the time period indicated in subsection (1)—

- (a) a security right created by the transferee with respect to which a notice is registered after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and
- (b) a person who buys, leases or licenses the collateral after its transfer but before the registration of the amendment notice acquires the collateral rights free of the security right to which the amendment notice relates.

(3) In the case of successive transfers of the collateral, subsections (1) and (2) apply to the last transfer.

#### **PART V—PRIORITIES**

**38.** Subject to the other provisions of this Part, priority among competing security rights created by the same grantor in the same collateral is determined according to the time of registration.

Competing security rights created by the same grantor.

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

Competing security rights created by different grantors.

**40.** Knowledge of the existence of a security right in favour of another person on the part of a secured creditor does not affect its priority under this Act.

Irrelevance of knowledge of the existence of a security right.

**41.** (1) Subject to the rights of a non-consensual creditor under section 46, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

Future advances and future collateral.

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(2) The priority of a security right covers all collateral described in a notice registered by the Registrar, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

**42.** If a security right in proceeds of the collateral is effective against third parties as provided in section 16, the priority of the security right in the proceeds is determined using the same date used to determine the priority of the security right in the collateral.

Priority of a security right in proceeds.

**43.** (1) If more than one security right extends to commingled goods, a security right that is effective against third parties before the goods become commingled has priority over a security right that is not effective against third parties at the time the collateral becomes commingled goods.

Priority of security rights in tangible assets commingled in a mass or product.

(2) If more than one security right in commingled goods is effective against third parties, the security rights rank equally in proportion to the value of the collateral at the time it became commingled goods.

**44.** (1) A security right may be created in tangible assets that are attachments to immovable property or may continue in tangible assets that become attachments to immovable property.

Priority of security rights in attachments to immovable property.

(2) A security right made effective against third parties in an attachment to immovable property under this Act has priority over a competing interest created and made effective against third parties under immovable property law.

**45.** (1) If the collateral is sold or otherwise transferred, leased or licensed and a security right in that collateral is effective against third parties at the time of the sale or transfer, lease or license, the buyer, transferee, lessee or licensee acquires its rights subject to the security right except as provided in this section.

Rights of buyers or other transferees, lessees or licensees of collateral.

(2) A buyer or other transferee of the collateral acquires its rights free of the security right if the secured creditor authorizes the sale or other transfer of the asset free of the security right.

(3) The rights of a lessee or licensee are not affected by the security right if the secured creditor authorizes the

grantor to lease or license the asset not affected by the security right.

(4) A buyer of tangible collateral sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.

(5) The rights of a lessee of tangible collateral leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

(6) The rights of a non-exclusive licensee of intangible collateral licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the license agreement, the licensee does not have knowledge that the license violates the rights of the secured creditor under the security agreement.

(7) If a buyer or other transferee of tangible collateral acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

(8) If the rights of a lessee of a tangible collateral or licensee of intangible collateral are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

**46.** (1) The right of a non-consensual creditor has priority over a security right if, before the security right is made effective against third parties, the non-consensual creditor has registered a notice with the Registrar.

Rights of non-consensual creditors.

(2) If a security right is made effective against third parties before the non-consensual creditor registers a notice, the security right has priority, but that priority is limited to credit extended by the secured creditor—

- (a) within thirty working days from the time the secured creditor received a notification from the non-consensual creditor that the non-consensual

creditor had registered a notice with the Registrar; or

- (b) pursuant to an irrevocable commitment in a fixed amount agreed between the grantor and the secured creditor, if the commitment was made before the secured creditor received a notification from the non-consensual creditor that the non-consensual creditor had registered a notice.

(3) A possessory lien on goods which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business has priority over a security right in the goods as long as the holder of the possessory lien remains in possession of the goods.

**47.** An acquisition security right in consumer goods, equipment, inventory, or intellectual property has priority as against a competing non-acquisition security right created by the grantor, provided that a notice with respect to the acquisition security right is registered with the Registrar before the grantor obtains possession of the asset or acquires a right in intellectual property.

Non-acquisition security rights competing with acquisition security rights.

**48.** An acquisition security right of a seller or lessor has priority over a competing acquisition security right of a secured creditor other than a seller or lessor.

Competing acquisition security rights.

**49.** (1) In the case of an acquisition security right in equipment, a security right in proceeds has the same priority as the acquisition security right.

Acquisition security rights in proceeds.

(2) In the case of an acquisition security right in inventory or intellectual property, a security right in proceeds has the same priority as the acquisition security right, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a deposit account.

(3) The priority of a security right in proceeds referred to in subsection (2) is conditional on the acquisition secured creditor notifying non-acquisition secured creditors with a security right in the same kind of asset as the proceeds that, before the proceeds were generated, the acquisition secured creditor registered a notice with the Registrar.

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**50.** An acquisition security right in a tangible asset that extends to commingled goods and is effective against third parties has priority over a non-acquisition security right granted by the same grantor in the commingled goods.

Acquisition security rights in tangible assets commingled in a mass or product.

**51.** (1) A person may at any time subordinate the priority of its rights under this Act in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

Subordination.

(2) Subordination does not affect the rights of competing claimants other than the rights of the person subordinating its priority and those of the beneficiary of the subordination.

**52.** A consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice if the consensual transferee—

Negotiable instruments.

- (a) qualifies as a holder in due course under the Bills of Exchange Act; or
- (b) takes possession of the negotiable instrument and gives value without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

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**53.** A transferee of funds from a deposit account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the deposit account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

Rights to payment of funds credited to a deposit account.

**54.** A transferee that obtains possession of money that is subject to a security right acquires its rights free of the security right, unless that transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

Money.

**55.** A transferee of securities who takes possession of the certificated security or acquires rights in an electronic security and gives value without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement acquires its rights free of a security right.

Securities.

**PART VI—RIGHTS AND OBLIGATIONS OF THE PARTIES AND THIRD-PARTY OBLIGORS**

**56.** A grantor or secured creditor in possession of the collateral shall exercise reasonable care to preserve the asset.

Obligation of a person in possession to exercise reasonable care.

**57.** On termination of a security right in the collateral the secured creditor shall register an amendment or cancellation notice as provided in sections 33.

Obligation of a secured creditor to return the collateral to register an amendment or cancellation notice.

**58.** A secured creditor has the right to inspect the collateral in the possession of the grantor or another person.

Right to inspect the collateral.

**59.** Except as otherwise provided in section 11, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the contract giving rise to the receivable, without the debtor's consent.

Protection of the debtor of the receivable.

**60.** (1) Notification of a security right in a receivable is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor.

Notification of a security right and payment of a receivable.

(2) Notification of a security right in a receivable may relate to receivables arising after notification.

(3) Unless the debtor of the receivable receives notification of a security right in a receivable, the debt may be discharged by paying in accordance with the original contract.

(4) After the debtor of the receivable receives notification of a security right in a receivable, the debt may be discharged only by paying the secured creditor or by paying as otherwise instructed in the notification or subsequently by the secured creditor in writing received by the debtor of the receivable.

(5) If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.

(6) The debtor of the receivable is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right in a receivable has been created.

(7) Until the secured creditor complies with subsection (6), the debtor of the receivable may discharge its obligation by paying the grantor, even if the debtor of the receivable has received a notification of a security right.

**61.** (1) In a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor—

Defences and rights of set-off of the debtor of the receivable.

- (a) all defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and
- (b) any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

(2) Despite subsection (1), the debtor of the receivable may not raise as a defence or right of set-off against the secured creditor breach of an agreement referred to in section 11 limiting the grantor's right to create the security right.

(3) The debtor of the receivable may agree with the grantor in writing not to raise against the secured creditor the defences and rights of set-off referred to in subsection (1), but the debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

**62.** An agreement concluded before notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

Modification of the original contract.

**63.** The failure of the grantor to perform obligations under the contract giving rise to a receivable does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

Recovery of payments made by the debtor of the receivable.

**64.** (1) The creation of a security right in a right to payment of funds credited to a deposit account does not affect the rights and obligations of the institution with which that deposit account is maintained without the consent of the institution, nor does it obligate the institution to provide any information about that deposit account to third parties.

Rights as against the institution.

(2) Any rights of set-off that the institution may have are not affected by any security right that the institution may have in a right to payment of funds credited to a deposit account that it maintains.

#### **PART VII—ENFORCEMENT OF A SECURITY RIGHT**

**65.** (1) After the failure of the debtor to pay or otherwise perform a secured obligation, the grantor and the secured creditor may exercise any right—

Post-default rights.

- (a) under this Part;
- (b) provided in the security agreement; or
- (c) provided under any other written law.

(2) The exercise of a post-default right with respect to the collateral does not prevent the exercise of a post-default right with respect to the secured obligation, and the exercise of a post-default right with respect to the secured obligation does not prevent the exercise of a post-default right with respect to the collateral.

(3) The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under this Part before default.

(4) If the security right has been created under a hire-purchase agreement, the secured creditor may enforce its rights only in accordance with the Hire Purchase Act.

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**66.** A secured creditor may exercise its post-default rights by application to a court or in accordance with this Part, without applying to a court.

Methods of exercising post-default rights.

**67.** (1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.

Relief for non-compliance.

(2) The notification required under subsection (1) shall adequately inform the recipient of the following matters—

- (a) the nature and extent of default;
- (b) if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed;
- (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified;
- (d) the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and
- (e) the right of the grantor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may—

- (a) sue the grantor for any payment due and owing under the agreement;
- (b) appoint a receiver of the movable asset;
- (c) lease the movable asset;
- (d) take possession of the movable asset;
- (e) sell the movable asset; or
- (f) pursue any of the remedies under section 65.

(4) The Cabinet Secretary may prescribe the form

and content of a notification to be served under this section.

**68.** (1) The secured creditor may sue for the performance of the secured obligation only if—

Secured creditor's right to sue.

- (a) the grantor is personally bound to satisfy the secured obligation;
- (b) by any cause other than the wrongful act of the secured creditor or grantor, the collateral is rendered insufficient to fully satisfy the secured obligation and the secured creditor has given the grantor a reasonable opportunity to provide additional sufficient security and the grantor has failed to provide that additional security; or
- (c) the secured creditor is deprived of the whole or part of the security right through or in consequence of, a wrongful act or default of the grantor or the debtor.

(2) The court may order the postponement of any proceedings brought under this section until the secured creditor has exhausted all other remedies relating to the collateral under this Part or a security agreement.

(3) Despite subsection (2), a court may order the parties to resort to alternative forms of dispute resolution including reconciliation, mediation, arbitration and other dispute resolution mechanisms.

**69.** (1) Any person whose rights are affected by the enforcement process in accordance with this Part is entitled to redeem the collateral by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement.

Right of redemption.

(2) The right of redemption may be exercised until the asset is sold or otherwise disposed of, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

**70.** (1) Despite the fact that another secured creditor or a non-consensual creditor has commenced enforcement, a secured creditor whose security right has priority over that of the enforcing secured creditor or non-consensual creditor is entitled to take over the enforcement process.

Right of the higher-ranking secured creditor to take over enforcement.

(2) The right referred to in subsection (1) may be invoked at any time before the asset is sold or otherwise disposed of, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

(3) The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce the rights by any method available to a secured creditor under section 65.

**71.** (1) A secured creditor is entitled to obtain possession of the collateral in the following cases—

Right of the secured creditor to possession of the collateral.

- (a) the grantor has consented in the security agreement to the secured creditor obtaining possession, in which case no court application is required; or
- (b) the grantor has not consented in the security agreement to the secured creditor obtaining possession, but at the time the secured creditor attempts to obtain possession of the collateral, the grantor or any other person in possession of the collateral does not object.

(2) A secured creditor may, without removal, render the collateral unusable and dispose of it on the grantor's premises.

**72.** (1) After default, the secured creditor is entitled to sell or otherwise dispose of, lease, or license the collateral in its present condition or following any commercially reasonable preparation or processing.

Right of the secured creditor to dispose of the collateral.

(2) The secured creditor may select the method, manner, time, place and other aspects of the sale or other disposition, lease or license, including whether to sell or otherwise dispose of, lease or license collaterals individually, in groups or as a whole.

(3) The secured creditor may buy collateral—

- (a) at a public auction; or
- (b) at a private auction but only if the collateral is of a kind that is customarily sold on a recognized market.

**73.** (1) A secured creditor shall send a notification of its intention to dispose of the collateral to—

Notice of disposition.

- (a) the grantor and the debtor; and
- (b) any other secured creditor that registered a notice with respect to the collateral, at least five working days before the notification is sent to the grantor.

(2) The notification shall be sent at least five working days before the sale or other disposition, lease or license takes place and shall—

- (a) identify the grantor and the secured creditor;
- (b) contain a description of the collateral;
- (c) provide a statement of the amount required to satisfy the secured obligation including interest and a reasonable estimate of the cost of enforcement;
- (d) identify the manner of the intended disposition; and
- (e) provide a statement of the date after which the collateral will be sold or otherwise disposed of, leased or licensed, or the time and place of a public disposition.

(3) The notification shall be in the language of the security agreement or such other language that is reasonably expected to inform its recipients about its contents.

(4) The contents of a notification providing substantially the information specified in subsection (2) are sufficient, even if the notification includes information not specified in that subsection or minor errors that are not seriously misleading.

(5) The notification need not be given if the collateral may perish before the end of ten working days after the secured creditor obtains its possession and may decline in value quickly.

**74.** (1) A secured creditor shall apply or pay over for application the proceeds of disposition under section 72 in the following order—

- (a) the reasonable expense of repossessing, holding, preparing for disposition, processing, and disposing of the collateral;

Right of the secured creditor to distribute the proceeds of a disposition of a collateral.

- (b) the satisfaction of obligations secured by the security right under which the disposition is made; and
- (c) the satisfaction of obligations secured by any subordinate security right or other subordinate lien or right in the collateral if the secured creditor receives from the holder of the subordinate security right, lien or other right a demand for proceeds before distribution of the proceeds is completed.

(2) If requested by the secured creditor, a holder of a subordinate security right, lien or other right shall furnish reasonable proof of the right or lien within a reasonable time if the secured creditor is to comply with the holder's demand under subsection (1) (c).

(3) Whether or not there is any dispute as to the entitlement or priority of any competing claimant, the enforcing secured creditor may pay the surplus to a court for distribution in accordance with the provisions of this Act on priority.

(4) A debtor remains liable for any shortfall owing after application of the net proceeds under this section.

**75.** (1) A secured creditor may propose in writing to acquire one or more of the collaterals in total or partial satisfaction of the secured obligation.

Acquisition of collateral in total or partial satisfaction of the secured obligation.

- (2) The secured creditor shall send the proposal to—
  - (a) the grantor;
  - (b) the debtor, but only in the case of a proposal to accept the collateral in partial satisfaction of the secured obligation;
  - (c) any person with rights in the collateral that has notified in writing the secured creditor of those rights, at least five working days before the proposal is sent to the grantor or the grantor waived the right to receive the proposal;
  - (d) any other secured creditor that registers a notice with respect to the collateral, at least five working days before the proposal is sent to the grantor or the grantor waived the right to receive the proposal.

- (3) In the proposal referred to in subsection (2)—
- (a) the secured creditor shall identify the secured creditor and grantor;
  - (b) specify the amount owed as of the date the proposal is sent, including interest and the cost of enforcement;
  - (c) state the obligation that is proposed to be satisfied by acquiring the collateral;
  - (d) state whether the secured creditor proposes to acquire the collateral in total or partial satisfaction of the secured obligation;
  - (e) describe the collateral;
  - (f) refer to the right of the debtor or the grantor to redeem the collateral as provided in section 69; and
  - (g) state the date after which the collateral will be acquired by the secured creditor.
- (4) The secured creditor acquires the collateral—
- (a) in the case of a proposal for the acquisition of the collateral in full satisfaction of the secured obligation, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within fifteen working days after the proposal is sent to that person; and
  - (b) in the case of a proposal for the acquisition of the collateral in partial satisfaction of the secured obligation, only if the secured creditor receives the affirmative consent of each addressee of the proposal in writing within fifteen working days after the proposal is sent to that person.
- (5) The grantor may request the secured creditor to make a proposal in accordance with subsection (1) and if the secured creditor accepts it, the secured creditor shall proceed as provided in subsections (2), (3) and (4).

**76.** (1) If a secured creditor sells or otherwise disposes of the collateral, a buyer or other transferee

Rights acquired  
in collateral.

acquires the grantor's right in the asset free of the rights of the enforcing secured creditor and any competing claimant, except the rights that have priority over the security right of the enforcing secured creditor.

(2) If a secured creditor leases or licenses the collateral, a lessee or licensee is entitled to the benefit of the lease or license during its term, except as against creditors with rights that have priority over the right of the enforcing secured creditor.

(3) If a secured creditor sells or otherwise disposes of, leases or licenses the collateral and does so in violation of this Part, the buyer or other transferee, lessee, or licensee of the collateral acquires the rights or benefits mentioned in subsections (1) and (2), provided that the buyer or other transferee, lessee or licensee had no knowledge of a violation of this Part which materially prejudiced the rights of the grantor or another person.

**77.** (1) After default by the grantor, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a deposit account or security is entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary bank or issuer of the security.

Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a deposit account or security.

(2) The secured creditor may, with the consent of the grantor, exercise the right to collect under subsection (1) even before default.

(3) A secured creditor exercising the right to collect under subsection (1) or (2) is also entitled to enforce any personal or property right that secures or supports payment.

(4) The right of the secured creditor to collect under subsections (1) to (3) is subject to sections 59 to 63.

**78.** In the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable before or after default of the transferor.

Collection of payment under a receivable by an outright transferee.

#### **PART VIII—APPLICABLE LAW**

**79.** The law applicable to the mutual rights and obligations of a grantor and a secured creditor arising from their security agreement is the law chosen by them and, in

Law applicable to the mutual rights and obligations.

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the absence of a choice of law, the law governing the security agreement.

**80.** (1) Except as otherwise provided in this section, the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset is the law of the country in which the asset is located.

Law applicable to a security right in a tangible asset.

(2) The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one country is the law of that country in which the grantor is located.

**81.** (1) The law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the country in which the grantor is located.

Law applicable to a security right in an intangible asset.

(2) The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a deposit account, as well as to the rights and obligations between the financial institution and the secured creditor, is the law of the country in which that financial institution has its place of business. If the financial institution has places of business in more than one country, the law applicable is the law of the country in which the branch maintaining the deposit account is located.

(3) The law applicable to the creation, effectiveness against third parties and priority of a security right in an electronic security is the law of the country in which the issuer is located.

(4) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the country in which the intellectual property is protected.

**82.** The law applicable to issues relating to the enforcement of a security right—

Law applicable to the enforcement of a security right.

(a) in a tangible asset is the law of the country where the relevant act of enforcement takes place; and

(b) in an intangible asset is the law applicable to the priority of the security right.

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**83.** (1) The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original collateral from which the proceeds arose.

Law applicable to a security right in proceeds of the collateral.

(2) The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in the original collateral of the same kind as the proceeds.

**84.** For the purposes of the provisions of this Part, the grantor is located—

Meaning of location of the grantor.

- (a) in the country in which the grantor has place of business, if any;
- (b) if the grantor has a place of business in more than one country, in the country in which the central administration of the grantor is exercised; and
- (c) if the grantor does not have a place of business, in the country in which the grantor has his or her habitual residence.

**85.** (1) Except as provided in subsection (2), references to the location of the collateral or of the grantor in the provisions of this Part refer—

Relevant time for determining location.

- (a) for creation issues, to the location at the time of the creation of the security right; and
- (b) for third-party effectiveness and priority issues, to the location at the time the issue arises.

(2) If the rights of all secured creditors in the collateral are created and made effective against third parties and the rights of all claimants are established before a change in the location of the collateral or the grantor, references in the provisions of this Part to the location of the collateral or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

**86.** The law applicable to the relationship between the grantor of a security right in a receivable, negotiable instrument or negotiable document and the debtor of the receivable, the obligor under the negotiable instrument or

Law applicable to the relationship of third parties and secured creditors.

the issuer of the negotiable document is the law applicable to—

- (a) the relationship between the debtor of the receivable, the obligor under the instrument or the issuer of the document and the holder of a security right in the receivable, instrument or document;
- (b) the conditions under which a security right in the receivable, instrument or document may be invoked against the debtor of the receivable, the obligor under the instrument or the issuer of the document, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor of the receivable, the obligor under the instrument or the issuer of the document; and
- (c) whether the obligations of the debtor of the receivable, the obligor under the instrument or the issuer of the document have been discharged.

**87.** (1) If a security right is effective against third parties under the law of another country and this Act becomes applicable as a result of a change in the location of the collateral or the grantor, whichever determines the applicable law under the provisions of this Part, the security right remains effective against third parties under this Act until the earlier of—

- (a) the time when third-party effectiveness would have lapsed under the law of the other country; and
- (b) ten working days after the change and, thereafter, only if the third-party effectiveness requirements of this Act are satisfied before the expiry of that time period.

(2) If the security right remains effective against third parties under subsection (1), the time of third-party effectiveness is the time when it was achieved under the provisions of the relevant law.

#### **PART IX—GENERAL PROVISIONS**

**88.** (1) The Cabinet Secretary may make regulations with respect to any matter under this Act that is necessary

Continuity in third-party effectiveness upon a change of the applicable law to this Act.

Cabinet Secretary to make regulations

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or convenient to be prescribed by regulations for carrying out or giving effect to this Act.

for purposes of this Act.

(2) Without limiting subsection (1), the regulations may provide for any of the following matters—

- (a) the conduct of the business of the Registry;
- (b) the format of notices to be registered in the Registry;
- (c) the payment of fees in respect of any matter under Part IV;
- (d) the provision of copies of any notices registered in the Registry and the certification of the copies; or
- (e) any matter in relation to the Registry.

**89.** (1) For the purposes of this Part—

Transitional application of this Act.

“prior law” means the law governing security rights that was in force immediately before the coming into force of this Act;

“prior security right” means a right covered by a security agreement entered into before the coming into force of this Act that is a security right within the meaning of this Act and to which this Act would have applied if it had been in force at the time when the security right was created.

(2) Except as otherwise provided in this Part, this Act applies to all security rights within its scope, including prior security rights.

**90.** (1) The prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the coming into force of this Act.

Inapplicability of this Act to actions commenced before its coming into force.

(2) If the enforcement of a prior security right commenced before the coming into force of this Act, the enforcement may continue under the prior law.

**91.** (1) The prior law determines whether a prior security right was created before the coming into force of this Act.

Creation of a prior security right.

(2) A prior security right remains effective between the parties despite the fact that its creation did not comply with the creation requirements of this Act.

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**92.** (1) A prior security right that was effective against third parties under prior law continues to be effective against third parties under this Act until the earlier of—

Third-party effectiveness of a prior security right.

- (a) the time it would have ceased to be effective against third parties under the prior law; and
- (b) the expiration of nine months after the coming into force of this Act.

(2) A written agreement between the grantor and the secured creditor creating a prior security right and entered into before the coming into force of this Act is sufficient to constitute authorization by the grantor for the registration of a notice relating to that security right after the coming into force of this Act.

(3) If the third-party effectiveness requirements of this Act are satisfied before the third-party effectiveness of a prior security right ceases in accordance with subsection (1), the security right continues to be effective against third parties under this Act from the time when it was made effective against third parties under the prior law.

(4) If the third-party effectiveness requirements of this Act are not satisfied before the third-party effectiveness of a prior security right ceases in accordance with subsection (1), the prior security right is effective against third parties only from the time it is made effective against third parties under this Act.

**93.** (1) The time to be used for determining priority of a prior security right is the time it became effective against third parties.

Priority of a prior security right.

(2) The priority of a prior security right is determined by the prior law if—

- (a) the security right and the rights of all competing claimants arose before the coming into force of this Act; and
- (b) the priority status of none of these rights has changed since the coming into force of this Act.

(3) The priority status of a prior security right has changes only if—

- (a) it was effective against third parties at the time when this Act came into force and ceased to be

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effective against third parties as provided in section 92(1)(a); or

- (b) it was not effective against third parties under the prior law at the time when this Act came into force, and became effective against third parties under this Act.

**94.** The laws set out in the Schedule are amended as specified in that Schedule.

Consequential amendments and repeals.

**SCHEDULE (s.94)**

The several laws specified in the first column of the Schedule are amended, in the provisions specified in the second column thereof, in the manner respectively specified in the third column.

<i>Written law</i>	<i>Provision</i>	<i>Amendment</i>
The Chattels Transfer Act (Cap. 28).		Repeal.
The Agricultural Finance Corporation Act (Cap. 323)	s.2	In the definition of the expression “mortgage” insert the words “security right” after the word “lien”.
	s.20(3)	Delete and substitute therefor the following new sub section— (3) In addition to the action prescribed by subsection (2), the General Manager— (a) may register a notice under the Movable Property Security Rights Act to make a security right in movable property effective against third parties; and (b) shall, upon repayment of the loan and all interest due on it, register a cancellation notice in accordance with the Movable Property Security rights Act.
The Stamp Duty Act (Cap. 480).	s.31	Delete.
	s.38	Delete.

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	s.117	Insert the following new paragraph immediately after paragraph (k)— “(l) an instrument under the Movable Property Security Rights Act, 2017.”
The Hire Purchase Act (Cap. 507).	s.2	Delete the definition of the word “Registrar”.
	s.4	Delete subsection (1).
	s.5	Delete subsection (1).
	s.35(2)	Delete paragraph (d).
The Pawnbrokers Act (Cap. 529).		Repeal.
The Business Registration Service Act (No. 15 of 2015)	s.4(1)	Delete the words ‘chattels transfer’ and substitute therefor the words “security rights”.
The Companies Act, 2015 (No.17 of 2015).	s.3	(a) in the definition of the expression “credit sale agreement” delete the word “interest” appearing immediately after the word “security” and substitute therefor the word “right”.  (b) delete the definition of the expression “retention of tile agreement” and substitute therefor the following new definition— “retention of tile agreement” means an agreement for the sale of goods to a company, being an agreement—  (a) that does not constitute a charge on the goods; but  (b) under which, if the seller is not paid and the company is wound up, the seller will have priority over all other creditors of the company with respect to the goods or any property representing the goods as long as it has satisfied

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the applicable requirements for third-party effectiveness under the law relating to movable property security rights.

- s.111(1) Insert the words “security right” immediately after the words “any charge”.
- s.832(3)(c) Delete the word “charges” and substitute therefor the words “security rights”.
- s.854(1) Delete paragraph (h).
- s.882(1) Delete the words “under section 884” appearing immediately after the words “registration of a charge” and substitute therefor the words “or a security right”.  
Insert the words “or security right” immediately before the words “so registered”.
- s.882(2) Insert the words “or security right” immediately after the words “the charge”.
- s.886(1)(b) Delete the words “of charges” appearing immediately after the words “relevant register”.
- s.886(2) Delete the words “of charges” appearing immediately after the words “relevant register”.
- s.889(1) Delete and substitute therefor the following new subsection—  
(1) If a company creates a charge or a security right, the charge (in so far as any security on the property or undertaking of the company is conferred by it) or a security right is void against—  
(a) a liquidator of the company;  
(b) an administrator of the company;  
and  
(c) a creditor of the company, unless the requirements of the applicable laws for the charge or security right

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- to become effective against third parties have been satisfied.
- s.889(2) Insert the words “or security right” immediately after the word “charge”.
- s.889(3) Insert the words “or security right” immediately before the words “becomes void”.
- s.890(1) Delete and substitute therefor the following new subsection—  
(1) A company shall keep a copy of every document creating—  
(a) a charge that is required to be registered under this Part; and  
(b) a security right created under the Movable Property Security Rights Act.
- s.891(1) Insert the words “and security agreements” immediately before the words “and record”.  
Insert the words “and security rights” immediately after the words “all charges” in paragraph (a);
- s.891(2) Insert the words “or the security right” immediately after the words “the charge” in paragraph (b).
- s. 927(5) Insert the words “and security rights” immediately after the word “charges”.
- s.975(3) Delete paragraph (e) and substitute therefor the following new paragraph—  
(e) in relation to each existing charge or security right on property of the foreign company that would be a security right subject to the Movable Property Security Rights Act if the foreign company were a company formed and registered under this Act, the documents that would be required to be lodged for registration in relation to a charge or a security right under the

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		Movable Property Security Rights Act; and
	s.1007(2)	Insert the words “and security rights” appearing immediately after the words “register of charges”.
The Insolvency Act, 2015 (No.18 of 2015).	s.2	Delete the word “interest” appearing immediately after the word "security" and substitute therefore the word "right" in the definition of the expression “conditional sale agreement”.  Delete the definition of the expression “retention of tile agreement” and substitute therefor the following new definition—  “retention of title agreement” means an agreement for the sale of goods to a company, being an agreement that does not constitute a charge on the goods; but under which, if the seller is not paid and the company is wound up, the seller will have priority over all other creditors of the company with respect to the goods or any property representing the goods as long as it has satisfied the applicable requirements for third-party effectiveness under the Movable Property Security Rights Act.
	s.205	Delete and substitute therefor the following new section—  <b>205.</b> A charge or a security right given by the bankrupt under an agreement to give the charge or create a security right that was made or made effective against third parties before the two years immediately before the bankruptcy is not liable to be cancelled under section 200.
	s.229(1)	Insert the words “or security right” immediately after the word “charge”.
	s.229(2)	Insert the words “or a copy of the registration with respect to a security right” in paragraph (c) immediately after the bracket and before the semicolon.  Insert the words “or security right”

- immediately after the word "charge" in paragraph (d).
- s.231(1) Insert the words "or security right" immediately after the word "charge".
- s.231(4) Insert the words "or collateral subject to a security right" immediately after the word "charge".
- s.294(2) Delete the word "pledges" and substitute therefor the words "creates a security right".
- s.325(2) Insert the words "or security right" immediately after the word "charge" appearing in sub-paragraph (e) (v).
- s.371(4) Insert the words "or security right" immediately after the word "charge".
- s.482(3) Delete and substitute therefor the following new subsection—
- (3) However, the costs of execution are a first charge or security right on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part of them for the purpose of satisfying the charge or security right.
- s.487(1) Delete the words "personal property" appearing in paragraph (a) and substitute therefor the words "movable property".
- s.498(2) Delete the word "pledged" appearing in paragraph (f) and substitute therefor the words "created a security right".
- s.498(3) Delete the word "pledged" and substitute therefor the words "creation of a security right".
- s.498(7) Delete and substitute therefor the following new subsection—
- (7) If property is pawned, encumbered by a security right or disposed of in circumstances that constitute an offence under subsection(2)(f), a person who takes in pawn or security right, or otherwise

receives, the property knowing it to have been pawned, encumbered by a security right or disposed of in such circumstances, commits an offence.

s.449(2) Delete the word “charge” appearing in paragraph (a) and substitute therefor the words “created a security right”.

s.507(3) Delete and substitute therefor the following new subsection—

(3) In particular, the Court may—

(a) provide for the liability of any person under the order to be a charge or security right—

(i) on any debt or obligation due from the company to the person; or

(ii) on any mortgage or charge or any interest in a mortgage or charge on assets of the company held by or vested in the person, or any other person on the person's behalf, or any other person who claims as an assignee from or through the person liable, or any person acting on that person's behalf; and

(b) from time to time make such further order as may be necessary for enforcing a charge or security right imposed under paragraph (a).

s.535(2) Delete and substitute therefor the following new subsection—

(2) For the purposes of subsection (1), the priority of a floating charge shall be determined in accordance with the Movable Property Security Rights Act.

s.612(4) Delete and substitute therefor the following new subsection—

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(4) The Movable Property Security Rights Act determines whether one floating charge is prior to another for the purposes of this section.

s.650 Delete.

s.675(4) Delete the words “pledging” appearing in paragraph (f) and substitute therefor the following words “creation of a security right”.

s.675(7) Delete and substitute therefor the following new subsection—

(7) If a person pawns, creates a security right or disposes of any property of a company in circumstances that would constitute an offence under subsection (2) or (3), each person who takes in pawn or security right, or otherwise receives, the property knowing it to be pawned, encumbered by a security right or disposed of in circumstances that—

- (a) would, if a moratorium were obtained for within the twelve months beginning with the day on which the pawning, creation of a security right or disposal took place, constitute an offence under subsection (2); or
- (b) constitute an offence under subsection (3), commits an offence.

s.676 Delete.

s.685(1) Insert the words “or secured” immediately after the word “charged” appearing in paragraph (f) (ii).

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I certify that this printed impression is a true copy of the Bill passed by the National Assembly on the 21<sup>st</sup> March, 2017.

*Clerk of the National Assembly*

Presented for assent in accordance with the provisions of the Constitution of Kenya on the ..... at the hour of.....

*Speaker of the National Assembly*