

Kaplan&Stratton Advocates | Movable Property Security Rights Act, 2017 (the "Act")



Global Expertise, with Regional Knowledge 01.06.2017



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Highlights

- The Act came into force on 16 May 2017.
- It is a complete and radical overhaul of the law relating to movable assets (including receivables) which will have a significant impact on the creation of security over assets in Kenya and other transactions, such as lease-hire and hire-purchase.
- The Act governs all security agreement over movable property with some very limited exceptions.
- Equipment leases, lease-hire, hire-purchase, conditional sale and retention of title
- Requires existing security agreements over movable property to be registered under the Act within 9 months of the Act coming into force to be effective against third parties.
- Sets up a registry for the registration of security agreements.
- Lenders and grantors will be assigned an ID number which will appear against any notice of a registered security they are party to.

Potential lessees, hirers of movable assets under lease-hire or hire-purchase agreements and sellers seeking to retain title will all be affected by the new Act.

Security Agreements

The Act requires that the parties enter into a written agreement for the security to be effective. The Act prescribes some minimum requirements that parties to an agreement cannot derogate from when drafting the contract. Other than this the Act permits parties to set their own terms

The Act permits security agreements to:

- (a) cover current and future assets. However, in relation to the creation of a security right over future assets this is only created once the grantor acquires rights to the asset;
- (b) contain different obligations and different terms; and
- (c) cover proceeds from the movable asset provided they are identifiable.

Even though real property is excluded from scope of the Act a security right can be created over an asset that is attached to immovable property.

Once the agreement is signed the creditor can register a notice of the security right to ensure it is effective against third parties. The notice cannot exceed 10 years. It can however be extended for a further 10 years provided the application is done within six months of its expiry.

Unique Registration Numbers and Identifiers

To help track security agreements, grantors obligations, and credit being given by individuals or institutions a registry will be set up where all security agreements will be recorded. This registry will be open to the public to conduct searches. In addition, the Registrar will assign a 'unique registration identifier' to the initial notice of the agreement and to each grantor and secured creditor.

It is important to note that an error in the grantor identifier number renders the notice ineffective. Therefore the security is not effective against third

In the case of comingled assets, the asset the creditor is claiming for is no longer identifiable then the creditor's right is limited to the lowest amount between when the proceeds were comingled and the time the right was claimed.

The Act treats intellectual property differently from other movable assets. In the sense that a security right over a tangible asset with which intellectual property is used does not extend to the intellectual property right. Conversely a right over intellectual property does not extend to a tangible asset.

Governing Law

Given that the collateral is movable and can in some instances cross borders the Act caters for different scenarios. As a general starting point the law applicable to the mutual rights and obligations of both parties is the law chosen by the parties. In the absence of a choice being made then it is the law governing the security agreement. However the nature of the right being sought to be enforced, the location of grantor, the location of the asset or its proceeds can all have a bearing on the governing law.

Effect on Existing Security Agreements

The Act specifically provides that it applies to 'all security agreements within its scope, including prior security rights' unless the prior security right is already subject to court, arbitral or tribunal proceedings.

If a security agreement was entered into before the Act, it is still valid between the parties. In relation to the effectiveness against third parties it will only be effective up till 9 months has lapsed from the Act coming into force i.e. 16 February 2018. To make the security effective against third parties it will be necessary for the holders of existing security to comply with the provisions of the Act.

To make the burden of complying easier on creditors who have pre-existing security agreements, the Act provides that it is implied that the grantor has already provided their consent to the agreement being registered.

What Next?

Lenders should review their security portfolios as a matter of urgency and determine which securities fall under the purview of this Act. They will then need to

Introduction

The Act came into force on 16 May 2017 and regulations under the Act have also been gazetted but are not yet available from the Government Printer.

The underlying intention of the Act is to help facilitate access to credit. It therefore governs (save for some exceptions) all agreements where movable assets act as the collateral.

The Act carves out certain types of movable property that are governed by other laws e.g.:

- (a) ships and aircrafts;
- (b) proceeds of collateral that are regulated under other Acts; or
- (c) any lien, charge or other interest created by law.

The new Act does not affect the application of other legislation that governs relationships between consumer and providers of goods or services like the Consumer Protection Act.

The Act covers all security over movable assets, including charges created by companies such as debentures. Dual registration will be necessary for most company charges.

parties. Other errors on a notice will not render it ineffective unless it would seriously mislead a reasonable researcher.

Priority in Registration & Amending Agreements

Where there are competing rights created by the same grantor over the same collateral then the rights are determined according to the time of registration. This priority is not affected even if the secured creditor registering the notice is aware another security right in favour of another person already exists.

The Act also legislates on the process to be followed in relation to discharges, partial discharges and subordination of debt that the parties will need to adhere to.

Enforcement

If the debtor fails to pay / perform his obligation a secured creditor can apply to court to exercise his default right. Alternatively, the creditor can follow the provisions of the Act without having to apply to court to exercise his post-default rights.

perfect their security by following the registration process set out in the Regulations as soon as the new Registry is operational.

Companies carrying on equipment leasing, lease-hire, hire-purchase and similar businesses should review their operational procedures to take account of the new Act. In most cases, searches of the new Registry should be undertaken before agreements become effective.

For further advice about any of the information contained here please feel free to contact:

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