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Business Brief

Legislative reform and development for forms of credit support

During the last year, various African countries have taken steps towards legislative reform with a view to creating new forms of security specific to the economic climate of borrowers in Africa.

We share some insight into the developments in the laws of Kenya to promote greater access to credit facilities in these countries.

Kenya

The laws relating to the creating of security interests in Kenya included the Companies Act 17 of 2015 for security over assets of a company, the Chattels Transfer Act (Cap 28 of the Laws of Kenya) for security over chattels created by natural persons, the Pawnbrokers Act (Cap 529 of the Laws of Kenya) and the Hire Purchase Act (Cap 507 of the Laws of Kenya) for hire purchase transactions. Registries such as the Companies Registry and the Chattels Transfer Registry have been established, but many of these registries are scattered meaning there was no one-stop registry to undertake a limited search on the registered security interests of particular company. Further, the records were not entirely reliable and accurate and because they were performed manually, the search process was challenging.

On cross-border transactions specifically, an all-inclusive security document known as the all assets debenture is the most common form of security taken by lenders. Unlike a special notarial bond under South African law, there is no need to identify each of the movable assets by means of an inventory list to be appended to the all assets debenture. The description of the secured assets under the all assets debenture is also usually very broadly defined to include all assets of the company granting the security. This has caused difficulties on enforcement as there is much uncertainty over which assets are secured under an all assets debenture. Further, intangible assets such as intellectual property are not recognised as items capable of forming security, which left companies such as small to medium enterprises with no tangible assets at a loss as they could not acquire external financing.

In order to address these issues and improve access to credit, the Kenyan legislators were

prompted to develop new legislation and the Movable Security Rights Bill was published in November 2016. On 10 May 2017, Kenyan President Uhuru Kenyatta signed into law the Movable Security Rights Bill 2017, now called the Movable Property Security Rights Act, 2017 (the Movable Property Act). The Movable Property Act establishes the Office of the Registrar of Security Rights and sets out to establish an online one stop registry known as the Collateral Registry to ease the process of registration of security rights over movable assets and eliminate the requirement to pay stamp duty on security agreements creating security rights. The Movable Property Act repeals the Chattels Transfer Act and the Pawnbrokers Act and institutionalises and formalises security rights over movable assets.

The Movable Property Act now requires a clearer description of collateral and section 8(1) provides that the assets encumbered or to be encumbered shall be described in the security agreement in a manner that reasonably allows their identification. Section 8(3) further provides that a description reasonably identifies the encumbered assets, if it makes reference to a specific listing, category, type of collateral (as defined by the Movable Property Act) or quantity. The term "intangible asset" is defined in section 2 and includes receivables, deposit accounts, electronic securities and intellectual property rights, whereas "tangible asset" means all types of goods and includes motor vehicles, crops, machinery and livestock.

Similar to the Zambian "financial statement", part IV of the Movable Property Act deals with registration of notices relating to security rights. Section 19(2) provides that 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. 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. An initial notice must include the identity and address of the grantor of the security and the secured party or its representative, a description of the collateral in a manner that makes it possible to identify it, the effective dates of the registration and any other information relevant for statistical purposes.

Although the Movable Property Act applies retrospectively to existing security agreements creating security rights over movable assets, companies still need to register a charge (such as an all assets debenture) over its assets at the Companies Registry in addition to the Collateral Registry.

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