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Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Back Door

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Abstract

In response to the inability of micro, small and medium scale enterprises (MSMEs) to access credit to finance their business operations, the governor of the Central Bank of Nigeria passed the Central Bank of Nigeria (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) Regulations, No 1, 2015. The purport of this regulation is, among other things, to ensure that MSMEs can use items of personal property to create security. This article critically examines the regulation in the light of the building blocks of article 9 of the US Uniform Commercial Code, which is not only a paradigmatic piece of legislation but appears to be the model on which the Nigerian regulation is based. This critical examination leads the authors to conclude that, although the regulation represents the first steps to reform, much more remains to be done to ensure effectiveness.

Keywords

Secured transactions, bankruptcy, personal property, collateral registry, credit, security devices

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INTRODUCTION: THE CLOSE NEXUS BETWEEN A MODERN SECURED TRANSACTIONS LAW AND ECONOMIC DEVELOPMENT

Given the important role played by credit in any economy, a tidal wave of reforms has swept through the secured transactions laws of several countries in the developed and developing world.[1] While developed countries have presumably effected the reforms to promote further access to credit,[2] it has been argued for low and middle income countries that the reforms will catalyse access to finance by the private sector in need of it.[3] Whether the reforms were inspired by nudging from international institutions,[4] or from genuine efforts to attract improvement in credit accessibility, at least there is economic justification in asserting that countries with reformed secured transaction laws perform better than their counterparts who are yet to undertake this all-important step towards a functioning and robust credit market.[5] It has

1 The Secured Transactions Reform Project (a project dedicated to the reform of English secured transactions law) tracks countries that have undertaken such reform. For a list of these countries, see: <http://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/> (last accessed 14 December 2016).

2 For instance, Ron Cuming points out that, in Canada, the reform of personal property security law was not informed by demands for change by the finance industry or the commercial bar. Rather, it resulted from the conclusions of "a few practitioners, academics and government officials that *modernization of this area of Canadian commercial law would produce significant benefits for many Canadians*" (emphasis added). See R Cuming "Personal property security law in Canada: The revolution is nearly complete" (1998) 72 *Australian Law Journal* 918 at 918. In contrast is the case in the UK, where practitioners have been said to be more or less indifferent to proposed amendments to the extant secured transactions law regime, reinforcing the English law maxim "if it isn't broken, don't fix it". See G McCormack "Pressured by the paradigm: The Law Commission and the company security interests" in J Lacy *The Reform of UK Personal Property Security Law: Comparative Perspectives* (2010, Routledge Cavendish) 83 at 83.

3 See B Kozolchyk "Secured lending and its poverty reduction effect" (2007) 42 *Texas International Law Journal* 727 at 728, where, citing statistical data from Albania, Brazil, Mexico and Romania, the author argues that reform in secured transactions law reduced interest rates by a significant percentage. Similarly, in H Fleisig et al *Reforming Collateral Laws to Expand Access to Finance* (1st ed, 2006, World Bank / International Finance Corporation) at 6, the authors essentially argue that the lack of a reformed secured transactions law framework has made lenders in low and middle income countries unwilling to accept available assets (mainly personal property) as collateral. It is in response to this precarious challenge that the UN Commission for International Trade Law (UNCITRAL) seeks to "assist States in developing modern secured transactions laws … with a view to promoting the availability of secured credit". See "UNCITRAL legislative guide on secured transactions", available at: <https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf> (last accessed 14 December 2016).

4 See generally B Arruñada "Pitfalls to avoid when measuring institutions: Is *Doing Business* damaging business?" (2007) 35 *Journal of Comparative Economics* 729.

5 In their research involving 12 countries in Central and Eastern Europe, Haselmann and Pistor found that, following changes in their secured transactions laws, foreign banks entering the system tend to extend their credit volume. See R Haselmann, K Pistor and V Vig "How law affects lending" (2010) 23/2 *Review of Financial Studies* 549, available

been suggested that the certainty and predictability that reform brings catalyses capital inflows that benefit not only local businesses but also consumers.[6] In summary, it has been stated on the basis of empirical research that, "by increasing domestic and international capital flows, appropriate legal reforms can play a substantially more central role in the economic development process than previously thought".[7]

Nigeria, Africa's largest economy,[8] certainly has much to benefit from the reform of her personal property security laws (PPSL). Estimates of the losses resulting from the non-acceptance by Nigerian lenders of a whole range of items of personal property are particularly troubling.[9] This has contributed to the paucity of credit available to micro, small and medium enterprises (MSMEs) and a manufacturing sector in dire need of these funds as many MSMEs often do not meet the lending criteria set by commercial banks.[10] It

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at: <http://rfs.oxfordjournals.org/content/23/2/549.full.pdf+html> (last accessed 14 December 2016).

6 See T Tajti "The law-finance-technology nexus in the 21st century: Is there a need to rethink the limits of law?" (2015) 37 *Journal of the Corvinus University of Budapest* 427 at 471, available at: <https://www.researchgate.net/publication/291361402_The_law-finance-Technology_nexus_in_the_21st_Century_Is_there_a_need_to_rethink_the_limits_of_law> (last accessed 14 December 2016). The author argues that justice in commerce should be about predictability of the market, enabling market participants to plan their economic activities. In his view this is a vital ingredient for any economy's development.

7 A Saunders et al "The economic implications of international secured transactions law reform: A case study" (1999) 20 *University of Pennsylvania Journal of International Economic Law* 309 at 311.

8 Before 2014, South Africa's economy was the largest in Africa. According to World Bank data, its Gross Domestic Product (GDP) as at 2014 stood at USD 350.1 billion; see: <http://data.worldbank.org/country/south-africa> (last accessed 14 December 2016). However, Nigeria's economy overtook South Africa's following the rebasing of the former's economy in the same year to account for sectors such as telecommunications, airlines and movie production. According to World Bank data, Nigeria's GDP currently stands at USD 481 billion; see: <http://data.worldbank.org/country/nigeria> (last accessed 14 December 2016). See also "Nigeria becomes Africa's biggest economy" (6 April 2014) *BBC News*, available at <http://www.bbc.com/news/business-26913497> (last accessed 14 December 2016).

9 As pointed out by H Fleisig et al, before 2006, an estimated 99% of items of movable property accepted in the USA as security would be unacceptable to creditors in Nigeria. See H Fleisig et al *Reforming Collateral Laws to Expand Access to Finance* (1st ed, 2006, World Bank / International Finance Corporation) at 7.

10 As suggested in a report by the Consultative Group to Assist the Poor and the World Bank, decisions by commercial banks to lend to SMEs in Nigeria are driven by the Central Bank of Nigeria regulatory requirement for collateral from the SMEs, the expected transaction costs to be incurred by the banks in establishing and enforcing property rights, ease in the resolution of insolvency (liquidation) and the standing of the bank as against other creditors in an insolvency. The report titled "Access to finance in Nigeria: Microfinance, branchless banking, and SME finance" is available at: <https://www.cgap.org/sites/default/files/CGAP-Access-to-Finance-in-Nigeria-Microfinance-Branchless-Banking-and-SME-Finance-Jan-2009.pdf> (last accessed 14 December 2016).

would be unfair to begrudge lenders who demand security, as there are indeed sound economic as well as legal reasons for requiring security from borrowers.[11] Despite efforts made in 2010 by the Central Bank of Nigeria (CBN) to unlock credit through the provision of liquidity for the benefit of these enterprises,[12] two years later, for inexplicable reasons, businesses were unable to access the facilities.[13] Indeed experiences of government policy interventions only reinforce the need for reform. A reformed PPSL will indubitably unlock a plethora of assets over which MSMEs may create security interests and galvanize lenders to leverage on the certainty and predictability that will be occasioned by the new regime.

Fairly recently, stakeholders in the Nigerian credit market woke up to the "glad tidings" of reform that promises to expand access to credit through the acceptance of a broad range of items of personal property as collateral.[14] The legal instrument that has ushered in this possibility is the CBN (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No 1, 2015) (the Regulation) made by the governor of the CBN.[15] The Regulation essentially seeks to "… improve access to finance for … MSMEs while maintaining a strong prudent lending policy to promote [sic] Sound Financial System in Nigeria".[16] This courageous step should interest researchers tracking development in secured transactions law reform in Nigeria for two reasons.

First, the approach taken by this reform bears the trappings of the functional approach to PPSL for which article 9 of the US Uniform Commercial

11 As economists have shown, credit rationing is caused by the problems of adverse selection, moral hazards as well as uninsurable risks; essentially, the availability of collateral / security solves this problem as it mitigates the problem of information asymmetry with which lenders are faced. See generally J Stiglitz "Credit rationing in markets with imperfect information" (1981) 71 *American Economic Review* 393; and T Steijvers and W Voordeckers "Collateral and credit rationing: A review of recent empirical studies as a guide for future research" (2009) 23/5 *Journal of Economic Surveys* 924 at 926. For a brilliant summary of the legal arguments for security / collateral as against mere contractual claims, see G McCormack "UNCITRAL, security rights and the globalisation of the US article 9" (2011) 62 *Northern Ireland Legal Quarterly* 485 at 488.

12 See CBN "₦200 billion intervention fund for re-financing and restructuring of banks' loans to the manufacturing sector: Central Bank of Nigeria guidelines", available at: <http://www.cenbank.org/Out/2010/publications/guidelines/dfd/GUIDELINES%20ON%20N200%20BILLION%20REFINANCING%20MANUFACTCTURING.pdf> (last accessed 14 December 2016).

13 "We can't access government loans: SME operators" (14 February 2015) *Business News*, available at: <http://businessnews.com.ng/2015/02/14/cant-access-govenment-loans-sme-operators/> (last accessed 14 December 2016).

14 "Small firms may secure loans with vehicles, bikes" (28 September 2015) *Business News*, available at: <http://businessnews.com.ng/2015/09/28/small-firms-may-secure-loans-with-vehicles-bikes/> (last accessed 6 January 2016). The title of the report may be misleading as it only tells part of the story, as further analysis shows below.

15 Federal Republic of Nigeria *Official Gazette* no 12, vol 102 (on file with the authors).

16 See the commencement section of the Regulation.

Code (UCC article 9) is the paradigm. As global regulatory competition continues to inspire gravitation towards the functional approach / unitary system of UCC article 9,[17] this step by the CBN means that the gravitation has not been lost on Nigeria. In fact, it may be considered as delayed, compared to the reforms which have been undertaken in other common law countries.[18] However, lying at the heart of any sustainable PPSL reform in Nigeria is the important fact of the present state of Nigeria's collateral law framework, which to all intents and purposes draws from the English compartmentalized system.[19] The implication of this realization is that there is much more to the reform of Nigeria's PPSL than that which has been done through the Regulation, no matter how laudable it appears.

The second reason is that the interaction between behavioural science and policy making has led to the enactment of legal instruments that meet the requirements of practicability and legitimacy.[20] The trend in many jurisdictions that have reformed their PPSL (at least outside Africa) reflects consensus building among stakeholders, which necessarily includes academia.[21] While

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17 See T Tajti "Testing the equivalence of the new comprehensive Australian Personal Property Securities Act, its segmented European equivalents and the draft common frame of reference" (2012) 24 *Bond Law Review* 85, in which (at 85) the author ascribes the Australian reform to the global move towards rethinking the "unsystematized" and thus "less predictable and uncompetitive" laws in the area of secured transactions.

18 The various common law provinces of Canada from 1967 to 1996, New Zealand in 1999, Ghana in 2008, Australia in 2009, Liberia in 2010, Malawi in 2013 and Sierra Leone in 2014. Similarly, other countries in continental Europe and in South America have reformed or are in the process of reforming their secured transactions law through the lens of UCC, art 9, aided by the World Bank Group – Center for the Economic Analysis of Law. See the list of countries at: <http://www.ceal.org/draftlaw.asp> (last accessed 14 December 2016).

19 For an in-depth analysis of security interest creation under English law (England and Wales), see R Moonen and S Truiden (eds) *Bank Securities and Other Credit Enhancement Methods* (1st ed, 1995, Kluwer Law International) at 131. On English personal property law, on which Nigeria's law is substantially based, see further: R Goode *Commercial Law* (4th ed, 2010, Penguin Books), part IV; P Wood *Comparative Law of Security Interests and Title Finance* (2nd ed, 2007, Sweet & Maxwell), part 3; and T Tajti *Comparative Secured Transactions Law* (2002, Akademiai Kiado) at 233–56. Given the opinion of the peer reviewers of this article on the age of sources, even though these books were published in the first decade of the 21st century, English law has barely changed on the issues under discussion since their publication. The distinguishing feature is that security devices and retention of title devices remain distinct in the English compartmentalized system, as does the distinct notification-based receivables financing, enshrined in *Dearle v Hull* [1823] 3 Russ 1, as a method of perfection. See generally F Oditah *Legal Aspects of Receivable Financing* (1998, Sweet & Maxwell) at 32.

20 For an inimitable analysis of the impact of behavioural science in policy making (although with a bias for EU law), see generally A Alemanno and A Sibony (eds) *Nudge and the Law: A European Perspective* (2015, Hart Publishing). The authors thank Prof Tibor Tajti for bringing their attention to this recent book.

21 In the UK for instance, where secured transactions law reforms are being seriously considered, consultations have been ongoing with the purpose of determining, among other things, the scope of the reforms, and implications for other areas of law and for

this is obviously not the case in Nigeria, it may well be the reason why subsidiary legislation was used to achieve a quick fix. As this article will also argue, this approach is in itself problematic.

The authors believe that this article is the first academic effort at dissecting the 48 section Regulation on personal property security. The aim is to undertake a critical analysis of the provisions of the Regulation as a flagship legal instrument that embodies what may pass for Nigeria's PPSL. The analytical approach is two-fold. First, the article examines the Regulation against the backdrop of what are now known as the building blocks of UCC article 9.[22] Secondly the analysis examines the intrinsic values for which a bespoke PPSL for Nigeria should strive, against the backdrop of existing legislation and the workings of the institutions that to all intents and purposes reflect the compartmentalization for which English secured transactions law is known.

After this introduction, the article examines the pre-Regulation regime pertaining to secured transactions law in Nigeria and the bedraggled circumstances that called for reforms. It then sets out a diagnosis of perceived problems that are inherent in the Regulation, as well as other incompatibilities of the pre-Regulation regime that may impair the workings of the Regulation and further complicate existing problems.

THE SECURED TRANSACTIONS LAW REGIME IN NIGERIA AND THE YEARNING FOR REFORM

The features of a reformed secured transactions law: Nigeria in perspective

A reform of secured transactions law in Nigeria should be broad enough to insure against the existence of small sets of conflicting laws and rules governing various title financing and security devices.[23] Thus, a modern secured

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stakeholders. See for instance City of London Law Society "Discussion paper: Secured transactions reform" (November 2012), available at: <http://www.citysolicitors.org.uk/attachments/article/121/20121120-Secured-Transactions-Reform – discussion-paper.pdf> (last accessed 14 December 2016). See also the Secured Transactions Law Reform Project at: <http://securedtransactionslawreformproject.org/> (last accessed 14 December 2016).

22 See T Tajti *Comparative Secured Transactions Law* (1st ed, 2002, Akademiai Kiado) at 400. The author identified the building blocks of secured transactions law under UCC art 9 as: the unitary concept of security interest; the public notice filing and perfection system; the concept of floating lien with its inseparable companion the concept of purchase money security (acquisition finance); a complex system of priorities (instead of the single first to register, first in rights); the cumulative enforcement system; and the complementarity role with other fields of law (in particular, insolvency and consumer protection).

23 The leading models are UCC art 9 in the United States, the Australian Personal Property Security Act (PPSA), the various Canadian PPSAs and New Zealand's PPSA. The "UNCITRAL legislative guide" (above at note 3), although a soft law, has been inspiring secured

transactions law elevates substance over form, adopts a functional approach to secured transactions, and has a unified set of rules with which to deal with the creation, perfection, prioritisation and enforcement of rights stemming from every transaction that creates a security interest on a debtor's personal property or fixtures.[24]

In Nigeria, due to some inhibitive features that are tightly connected to the legal enforcement of secured transactions rights,[25] plurality of security devices[26] and the dearth of comprehensive insolvency legislation,[27] real property assets indeed form better collateral than items of personal property, at least from a lender's perspective. Thus, underlying challenges vis-à-vis an unreformed secured transactions law,[28] the outdated personal bankruptcy law,[29] the absence of bespoke corporate insolvency legislation,

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transactions law reform in many countries across the globe as stated by Spiros Bazinas, one of the principal drafters of this model law. See O Michele "Spiros V Bazinas: Moving international secured transactions law forward" (2010) 66 *Secured Lender* 64 at 67, available at: <https://www.highbeam.com/doc/1P3-2108923791.html> (last accessed 14 December 2016).

24 By its art 9-109(a)(1) and its official comment 2, the US UCC takes a substance-over-form approach, deeming a security interest to exist when it appears in function, regardless of the form it takes. The Regulation adopted a similar "functional approach"; see sec 2 on the definitions of "security interest" and "security agreement". In this article, "functional approach" is used to describe a kind of secured transactions law under which the name given to an agreement does not matter; instead, what is important is whether a security interest was created in the debtor's personal property collateral in exchange for credit.

25 Many commercial transactions that take place in Nigeria follow imported concepts from countries where these concepts are well governed by detailed secured transactions law. For instance, apart from the floating charge, no security device exists in Nigeria for natural persons to create security interests in a debtor's after-acquired property. Similarly, due to the lack of a national electronic registry to publicize security interests in personal property, there is a substantial problem of ostensible ownership.

26 Hire purchase, conditional sale, equipment leasing, consignment, and so on, are the title financing devices that exist in Nigeria; each has its own set of governing rules with respect to creation, perfection and enforcement. This makes the commercial arena highly unpredictable for secured creditors, especially in the context of a debtor's bankruptcy.

27 There is no insolvency legislation for corporate debtors in Nigeria. The closest provisions are the anaemic winding up procedures in the Companies and Allied Matters Act (CAMA), which are insufficient to tackle current commercial realities. See CAMA, part XV, available at: <http://www.nigeria-law.org/CompaniesAndAlliedMattersActPartXV-XVII.htm#Winding%20up%20of%20Companies> (last accessed 14 December 2016).

28 The key challenges are the "unsuitable" nature of personal property collateral due to a lack of defined rules for its creation, perfection, priority and enforcement. The lack of a personal property registry where security interests in personal property collateral are registered has contributed in lenders' apathy towards accepting them as collateral.

29 There is a Bankruptcy Act of 1990 for individual debtors, modelled after its English counterpart, although it is now in need of reform.

as well as a dawdling judicial system,[30] render otherwise good personal property assets less valuable or attractive for lending. For instance, when evaluating the degree to which his loan is indeed asset based and truly deserving of risk analysis, an astute lender would ask a basic and crucial question: "can the lender - upon a borrower's default - rapidly enforce his security interest against the assets given by the debtor as collateral, and simultaneously transmute such collateral into proceeds to satisfy the owed debts?"[31] The key principles underlying asset based financing may well be derived from this basic question. Additionally, the lender would certainly want to know whether his security interest in the debtor's personal property is superior or subordinate to other competing security interests in the same collateral and how this panoply of security interests would be prioritized in the context of the debtor's bankruptcy or insolvency.[32]

Whether a law reform initiative truly encompasses secured lending principles and is economically viable is also contingent upon the quality and efficiency of the collateral registry, and the speed with which a security interest can be enforced on the debtor's collateral after his default or bankruptcy. It is self evident that the modern principles of secured transactions are currently lacking in Nigeria, such that creditors' ability to enforce security interests against debtors' assets is severely weak due to a slow and overburdened judicial system. This difficulty is reinforced by the lack of a developed private enforcement mechanism vis-à-vis security interests on personal property collateral; thus, the concept of repossessing collateral via self help after a debtor's default is still hotly contested.[33] Furthermore, there is no collateral registry

30 For case law proof of the slow judicial system in Nigeria, see *Bokini v John Holt & Co Ltd* [1937] 13 NLR 109; this case concerned a real mortgage transaction and lasted seven years. In *Bank of the North v Muri* [1998] 2 NWLR (pt 536) 153, a case on a real mortgage transaction took ten years to move from the High Court to the Court of Appeals. In *Ojikutu v Agbonmagbe Bank Ltd* (now known as Wema Bank Plc) [1996] 2 Afr LR (comm) 433, another matter concerning a real mortgage transaction lasted 11 years.

31 See UCC, art 9-609 and the Regulation, sec 35. For a good understanding of enforcement after a debtor's default, see C Harris and W Burgess "Perfection and enforcement of security interests under article 9" (1991) 70 *Michigan Bar Journal* 306 at 308.

32 J White and S Robert *Uniform Commercial Code* (6th ed, 2010, West), chap 25 entitled "Priority conflicts". See also H Kanda and S Levmore "Symposium on the revision of article 9 of the Uniform Commercial Code: Explaining creditor priorities" (1994) 80 *Virginia Law Review* 2103 at 2108–51.

33 Self-help repossession was vehemently condemned in *Ellochim Nigeria Ltd and Others v Mbadiwe* [1986] NWLR (pt 14) 47 at 165, where the court said: "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids." See *Ojukwu v Military Governor of Lagos Sate* [1985] 2 NWLR (pt 110) 806, which condemned repossession via self-help. See also the Supreme Court decision in *Civil Design Construction Nigeria Ltd v SCOA Nigeria Ltd* [2007] 6 NWLR (pt 1030) at 300, where Justice Onnoghen, delivering the

where security interests on personal property collateral are registered, where all existing or potential creditors can go to search for encumbrances against the personal property assets of a debtor being offered by him as collateral; this no doubt precipitates and intensifies the problem of ostensible ownership in Nigeria.[34]

Consequences for lack of reform: CBN Regulation ("reform") to the rescue?

It is to be expected that the overall consequence of this array of weaknesses arising essentially from the unreformed nature of Nigeria's secured transaction law is that only a small subset of assets, most notably real property assets, is considered ideal for lending. By this logic, the bulk of wealth locked up in corporations' personal property (such as inventories, equipment, accounts receivable and intellectual as well as investment property) is usually cut off, and unfortunately deemed incapable of securing lending.[35] Similarly, MSMEs, which do not always have a robust collection of real property to offer as collateral, but may instead be able to offer equipment, inventories

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lead judgment, expressed his strong disapproval of the use of self-help to recover possession, when he decried: "even under the common law, if it were to apply to the facts of this case, which I do not concede, *the respondent cannot seize or repossess the rig without recourse to the court*" (emphasis added). However, in *Umeobi v Otukoya* [1978] All NLR 140 and *Awojugbagbe Light Industry Ltd v Chinukwe* [1995] 5 NWLR (pt 390) 409, the courts exalted the use of self-help in the repossession of collateral. In the authors' opinion, the ratio decidendi in *Umeobi* and *Awojugbagbe* with respect to repossession of collateral should be the way forward, considering the new secured transactions law, although with some statutory regulations to stymie the possible overreaches of secured creditors against debtors.

34 Until the emergence of the collateral registry under the Regulation, there was no collateral registry where security interests in personal property were registered. Even now, the extant collateral registry does not fully solve the problem, given the fact that only banks and financial institutions can use it to publicize their security interests in personal property collateral. On the problem of ostensible ownership, see the seminal article by M Charles Jr "The mystery and myth of 'ostensible ownership' and art 9 filing: A critique of proposals to extend filing requirements to leases" (1988) 39 *Alabama Law Review* 683 at 725–63.

35 See S Stacy "Follow the leader? The utility of UNCITRAL's legislative guide on secured transactions for developing countries (and its call for harmonization)" (2014) 49 *Texas International Law Journal* 35 at 47–52. The author remarks that, "a common trend among firms in the developing world is that credit applications are rejected due to insufficient collateral. Often, business owners refrain from applying for loans because they are confident that they cannot meet the collateral requirements requested by banks. According to the World Bank and IFC, unavailability of collateral is not always the problem; rather, the problem may be the inability of debtors to utilize valuable assets as collateral. For example, laws may exclude goods not yet acquired by a debtor (eg the future crops of a farmer), a debtor's rights to payment (eg a business's accounts receivable), other intangible property rights (eg copyright), and sometimes even immovable goods (eg large equipment or machinery)".

and accounts receivable, are usually not in a good position to acquire sufficient credit to start or expand businesses; sadly they play a major economic role in Nigeria's fledgling economy.[36]

It was in view of these challenges, posed essentially by an unreformed secured transactions law, that the CBN recently passed the Regulation pursuant to its powers in the CBN Act[37] and the Banks and Other Financial Institutions Act.[38] The Regulation draws essentially from the tenets of UCC article 9, a paradigm law on secured transactions.[39] However, while a secured transactions law that mirrors the building blocks of UCC article 9 is a starting point, much more work lies in ensuring that the version being implemented in Nigeria is thoroughly in line with its idiosyncratic features, and generally compatible with the existing legal framework.

Looking at the Regulation, the authors argue that it will not satisfactorily solve the numerous challenges that bedevil secured transactions law in Nigeria because it lacks certain essentials and to that extent is defective. They base their arguments on these defects (discussed below) and are of the view that, absent the fixing of these missing links, the Regulation, which is improperly seated at the moment, will indeed deepen the confusion and misery that are currently panning out in the secured lending industry in Nigeria.

SOME DIAGNOSED DEFECTS OF THE REGULATION

The first defect: Creation of an enforceable security interest – no mention of "value" in the Regulation

Using UCC article 9 as a benchmark, and given that the Regulation largely draws from its principles, there are essentially four requirements that

36 Small and Medium Enterprises Development Agency of Nigeria "SMEDAN and National Bureau of Statistics collaborative survey: Selected findings (2013)" at 5–6. According to this detailed report, "a total number of 36,994,578 workers are engaged in the micro enterprises". It also found at the end of the survey period, ie 2013, that: "The MSMEs contributed 48.47 per cent to Nigeria's GDP in nominal terms." The report is available at: <http://nigerianstat.gov.ng/pdfuploads/SMEDAN%202013_Selected%20Tables.pdf> (last accessed 6 January 2016).

37 See CBN Act 2007, sec 51.

38 See Banks and Other Financial Institutions Act, sec 57, chap B3 Laws of the Federation of Nigeria, 2004 (as amended), which states that "the Governor may make regulations, published in the Federal Gazette, to give full effect to the objects and objectives of this Act. Without prejudice to the provisions of subsection (1) of this section, the Governor may make rules and regulations for the operation and control of all institutions under the supervision of the Bank."

39 The Regulation uses similar building blocks of UCC art 9 with respect to the creation, perfection, priority and enforcement of security interests on a debtor's personal property collateral. It also adopted the "functional approach" to secured transactions with respect to a debtor's personal property collateral, although it does not apply to non-bank creditors in Nigeria. See the Regulation, sec 2 on the definitions of "security interest", "security agreement" and "secured creditor".

parties to a security agreement must fulfil before the agreement becomes enforceable.[40] The Regulation captures all these requirements except one; it omitted the requirement that a secured party give "value" to a debtor in exchange for encumbering his assets under a security agreement.[41] This lack will certainly yield terrible consequences, ranging from the unenforceability of a security agreement to the exploitation of debtors whose assets would be encumbered with no loan given in return. It should not come as a surprise though that each of these essential requirements for the validity of a security agreement under UCC article 9 has been the subject of extensive litigation over several decades,[42] and it has been sufficiently settled in a plethora of cases in the USA and elsewhere that the absence of value proceeding from a

40 See the Regulation, sec 6. See also UCC, arts 9-203 and 1-204 for the meaning of "value". In general, the secured creditor must have to give value, the debtor must have rights in the collateral subject of the security interest, and there must be a security agreement which describes the collateral and is signed or authenticated by the debtor.

41 In contrast with UCC, art 9-203, the Regulation does not make mention of "value" as a precondition for a valid security agreement; see the Regulation, secs 4–8 dealing with "creation of security interest" in personal property. The giving of "value" has long been settled as a compulsory requirement for an enforceable security interest. See S Weise "UCC article 9: Personal property secured transactions" (2007) 62 *Business Lawyer* 1633 at 1636.

42 The following recent cases demonstrate how US courts have consistently interpreted UCC, art 9-203, which outlines the requirements for creating an enforceable security interest in a debtor's collateral (the debtor must sign or authenticate the security agreement). In *In re Burival* 72 UCC2d 742 [Bank D Neb 2010], the creditor's security agreement was deemed invalid because only the creditor (not the debtor as well) signed the agreement. This was also the court's position in *In re Jojo's 10 Restaurant LLC* 74 UCC Rep Serv 2d 441 [Bankr D Mass 2011], holding that the debtor must own or have rights in the collateral; *In re WL Homes LLC* 78 UCC Rep Serv 2d 417 [D Del 2012], in which the court found that the debtor did not have sufficient use, right and control in the collateral, holding that the debtor's grant of security interest in them was invalid. A similar decision was also reached in *Banner Bank v First Community Bank* 76 UCC Rep Serv 2d 919 (D Mont 2012), holding that the debtor's collateral has to be described in a security agreement. The description has to be generic and not a detailed description of each and every property under encumbrance, although this requirement could be excused where the secured party possesses the collateral; see *Caterpillar Financial Services Corp v Peoples National Bank NA* 80 UCC Rep Serv 2d 53 (7th cir 2013). Closely linked to this is the "composite document rule" that states that a court could read a series of documents and recognize them as one; see *In re Bucala* 76 UCC Rep Serv 2d 691 (Bankr SD NY 2012), holding that the secured party must give value for encumbering the debtor's collateral. Giving value could be in the form of lending money (*In re Martin* 23 UCC2d 605, Bankr D Or 1994), the debtor's pre-existing financial obligation to the secured party (*Ford Motor Credit Co v State Bank & Trust Co* 13 UCC2d 548 Miss 1990), the secured party's forbearance (*In re Recker* 27 UCC2d 1434 ED Mo1995) or debt forgiveness (*Magee v All Terrain Contractors, Inc* 31 UCC2d 581 1996). For a complete treatment, see J White and R Summers *Uniform Commercial Code* (6th ed, 2010, West Publishing Co, Practitioner Treatise Series, vol 4) at 141. The essence of outlining these cases is to provide adequate guidance to Nigerian judges who will soon face similar challenges regarding the interpretation of the requirements for creating a valid and enforceable security agreement from the perspective of the Regulation or a similar law in the future.

secured party in a security agreement renders the agreement unenforceable against a debtor's collateral.[43]

Many reasons account for why "value" is indispensably important and why its absence in the Regulation will be colossal, especially to debtors. The first reason is premised on the common law principle of "consideration", a trite principle of contract law in Nigeria. By this principle, an agreement is unenforceable against the person making a promise until some value has come from the promisee in exchange for the performance of the promise.[44] Being that a security agreement within the purview of UCC article 9 and the Regulation is a contract, the authors argue that the absence of the requirement for a secured party to give value to a debtor in exchange for encumbering his assets is fundamentally incongruous with the basic principle of the validity of contracts in Nigeria and, to that extent, the Regulation is problematic and promises to be a seedbed for litigation.[45]

Secondly, in all the countries[46] that reformed their secured transactions law following UCC article 9 of which the authors are aware, only the Regulation has

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43 See *KAOP Company v Midway National Bank* 372 NW2d 774 [Minn Ct App 1985], where the court rendered invalid a security agreement that was devoid of value. A similar holding was also reached in *Queen of the North, Inc v LeGrue* 582 P 2d 144 at 148 [Alaska 1978]. Also see the relevant cases on "value" in note 42 above. From the Australian perspective, which also makes the giving of "value" a precondition for the enforcement of a security agreement, see N Moore and J Black "Australian secured creditor and insolvency law: Sweeping changes under new personal property securities regime" (2011) 30 *American Bankruptcy Institute Journal* 54 at 55.

44 To be enforceable, a contract must either be supported by "deed" or "consideration"; see *Moschi v Lep Air Services Ltd* [1973] AC 331 at 346. Also, Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 855 stated that consideration is "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable". Similarly, see the New Zealand Court of Appeal in *Melmerley Investments Ltd v McGarry* [2001] CA141/01 at 21, where the court stated that "a Court is concerned only with the presence of consideration and does not make an assessment of the comparative value of the acts or promises of the parties towards one another". For a similar holding on the key role of "consideration" in determining an enforceable contract, see *Akrnzua II Oba of Benin v Benin Divisional Council* [1957] WRNLR 1.

45 Considering that a security agreement stemming from the Regulation is a contract, such security agreements would have to be tested by the time honoured rule of "consideration" and, where they do not fit the long line of landmark cases establishing the doctrine of consideration (*Bank of West Africa v Fagboyegun* [1961] WNLR 227; *Barclays Bank of Nigeria Ltd v Okotie-Eboh* and *Others* [1972] NCLR 174; *Ikomi v Bank of West Africa* [1965] ALR comm 25; and *Gbadamosi v Mbadiwe* [1964] 2 All NLR 19), the Nigerian courts would not hesitate to render such agreements unenforceable, against the secured party who has not provided "consideration".

46 See the definition of a "secured creditor" in UCC, art 9, Canadian PPSAs, Australian PPSA, New Zealand PPSA, the "UNCITRAL legislative guide", book IX of the Draft Common Frame of Reference, the European Bank for Reconstruction and Development principles of secured transactions, and so on. In all of these legal frameworks, the definition of a "secured creditor" includes both natural and legal persons.

restricted natural persons from being a secured party under a security agreement; under the Regulation, only banks and financial institutions can become a secured party.[47] Apart from the curious fact that this restriction prevents Nigerians in equally good positions to advance sales or loan credits from exploiting the Regulation and its collateral registry, there is also the possibility of debtors being grossly exploited by banks whose bargaining position is far stronger than a natural debtor's, especially given the fact that the Regulation has made banks natural monopolists in this regard.[48] Indeed, a bank-natural debtor relationship in the context of the Regulation is unfortunately comparable to a horse and an ass yoked together. If "value" is not required from banks as a precondition for the validity of a security agreement, the chances are high that banks whose bargaining strength is higher could successfully encumber debtors' assets without granting them credit to start or expand their businesses, and could validly enforce such agreements. In the authors' view, if this happens, then the essence of the Regulation, which is to make sufficient and affordable credit available to debtors, becomes grossly defeated.

It must be borne in mind that there is as yet no law in Nigeria that adequately protects consumer debtors from abuses stemming from financial contracts; hence, abuses against consumer debtors by banks and other financial institutions are often neglected for lack of a good legal framework, given that the common law doctrine of "unconscionable terms" appears to be the only defence available to exploited debtors in contractual relations.[49] Yet,

47 See the Regulation, sec 2, which defines a "secured creditor" as "a financial institution in whose favour a security interest is created and includes a chargee under any type of charge, chattel mortgagee or holder of any type of consensual lien".

48 As the Regulation only applies to banks and financial institution creditors and because non-bank secured creditors cannot use the Regulation or its collateral registry to publicize their security interests in a debtor's personal property collateral, banks are almost the only ones in a favourable position to lend to debtors with personal property collateral. This would no doubt lead banks to overreach and it is very possible that they would offer high lending rates, given their situational monopoly, especially considering the dearth of regulations regarding financial contracts in Nigeria. In truth, there are many natural persons in Nigeria, especially in rural areas, who give funds to MSMEs to start businesses, engage in retained title financing contracts with debtors and need to register their security interests to avoid ostensible ownership problems. Sadly, the Regulation cuts them off, thereby shrinking access to credit.

49 See *Earl of Chesterfield v Janssen* 2 Ver Sr 125, 28 Eng Rep 82 at 100 [Ch 1750] where the court described an "unconscionable term" as "[t]hat which no man in his senses and not under delusion would make on one hand, and that which no honest and fair man would accept on the other hand". This doctrine also fully applies in Nigeria; in *Okoli v Morecab Finance (Nigeria) Ltd* [2007] 14 NWLR (pt 1053) 37, the Nigerian Supreme Court equated unconscionability with fraud when it opined that: "… fraud may be presumed from the nature of the bargain … the circumstances and condition of the parties contracting, weakness, one sided, extortion and advantage taken of that weakness on the other. Fraud in such cases does not mean deceit or circumvention; it means unconscionable use of the power arising out of the circumstances and condition of the parties".

where unconscionable terms are successfully pleaded by a repressed debtor, judges do not often go beyond striking out the problematic term; the Nigerian legal system seems not ready to allow for the award of punitive damages in contracts, as are obtainable in the United States.[50] Needless to say that the doctrine of freedom of contract has often been used as a counter-defence by banks against the plea of unconscionable terms.[51]

Thirdly, it is argued that, by omitting the giving of value as a precondition for the validity of a security agreement in the Regulation, a secured party could, upon concluding a security agreement with a debtor, validly file a financing statement in the collateral registry to give notice of his security interest in the debtor's collateral without any monetary advance to the debtor. The negative implication of this is that a debtor stranded of cash in this situation is almost practically prevented from seeking alternative funds elsewhere using the same collateral that has already been encumbered. This is unfortunately due to the fact that the approached prospective lenders would probably search the collateral registry to discover the existing security interest of the first creditor and on this basis could refuse to grant credit to the debtor if they desire not to be second ranking with respect to the presented collateral.[52] In the context of this analysis, it cannot be overemphasized that the Regulation took sides with the stronger party whose enormous strength could cause a situational monopoly, as well as a stranglehold on the debtor; that is, he advances little or no credit at all, and his encumbering security interest wards off other potentially good creditors.

The second defect: Co-existence of floating charge with floating lien – a dilemma in receiver appointment?

The floating charge exists in the Nigerian Companies and Allied Matters Act (CAMA) as a security device that can encumber all of a debtor's present and future acquired property, while simultaneously allowing the debtor to deal with the encumbered assets in the ordinary course of business, until the occurrence of a certain event that causes the floating charge to crystallize.[53] Admittedly, doing business today, where the bulk of a company's assets is

50 There are no punitive damages in Nigeria for breach of contract; see *Agbanelo v Union Bank of Nigeria Plc* [2000] 7 NWLR (pt 666) 534 at 551. Punitive damages only exist in torts in Nigeria; see *Maritime Management Associates Inc and Another v National Maritime Authority* [2012] 18 NWLR (pt 1333) 506 SC at 544. This is not the same in the USA, where punitive damages can be awarded for breach of contract, as in the following cases: *Roddy v Lexington Insurance Co* 2009 WL 3335363 [ED Tenn 2009]; *Wilson v GMAC Financial Services Corp* 2009 WL 467583 [ED Tenn 2009]; and *Woodruff v National Life Insurance Co* 2008 WL 1734194 [ED Tenn 2008].

51 See generally the seminal article of A Angelo and E Ellinger "Unconscionable contracts: A comparative study of the approaches in England, France, Germany, and the United States" (1992) 14 *Loyola Los Angeles International & Comparative Law Review* 455 at 468–70.

52 See the Regulation, sec 23(2) on ranking the priority of security interests in order of perfection.

53 See CAMA, sec 197.

usually locked up in its inventories and other kinds of personal property assets, economic growth would be difficult to realize in the absence of a floating security device, although, in the case of Nigeria, a floating charge can only be created and enforced by corporate persons.[54] A cursory look at comparative secured transactions law reform shows that virtually all common law countries that inherited the floating charge from England, have transformed it into a floating lien in their reformed secured transactions law.[55] The reason for this general trajectory is traceable to certain diagnosed weaknesses inherent in the floating charge device.[56]

For instance, attachment of a security interest in the debtor's collateral is postponed until crystallization when the floating chargee's interest becomes fixed and queues behind previously existing fixed secured creditors. Additionally, the fact that the floating charge eventually crystallizes on all of the debtor's property has the possibility of clashing with retained title financing, such as hire purchase and conditional sale transactions into which the floating chargor has entered with a third party.[57] This no doubt raises the issue of the priority of security interests in the debtor's assets in the event of conflict between the holder of a floating charge and a retained title financer. Regrettably, Nigerian law has not adequately provided mechanisms by which this kind of conflict can be settled.[58]

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54 Ibid.

55 For a discussion of how the floating charge was transformed into a floating lien in the Australian PPSA, see P Quirk "Whether Australian secured transactions laws will transition from the English system to the Personal Property Securities Act?" [2009] 31 *Thomas Jefferson Law Review* 219 at 252–56.

56 A floating charge has priority disadvantages over fixed charges because of its postponed attachment, which only occurs upon crystallization. Also, to register a floating charge, a copy of the charge is deposited in the registry (document filing), whereas in the case of a floating lien in the US, only a financing statement is filed (notice filing). For a full examination of the weaknesses of a floating charge, see J Blake "the creation and enforcement of floating security interests in the US and Singapore" [2009] 18/5 *Norton Journal of Bankruptcy Law and Practice* 577 at 577.

57 See G McCormack *Reservation of Title* (2nd ed, 1995, Sweet & Maxwell) at 4.

58 A floating charge encumbers all present and future assets of a debtor, no matter where they are located. This also includes assets in which the debtor may only have an equitable ownership interest. Thus, in hire purchase or conditional sale transactions, for instance, where the company is the secured party, but a debtor to the holder of a floating charge, and where legal title of assets subject to conditional sale or hire purchase remains with the company until the hire purchaser or conditional buyer has paid the seller (the company in this case) in full, the dilemma of priority as to a crystallized interest of a floating chargee who eventually steps into the "shoes" of the company (the floating chargor) becomes heightened; this is particularly so, given also that the floating chargee / receiver could frustrate the contracts the company has with a third party, or even defeat the third party whose interest in the matter is only equitable since legal title was yet to pass from the company; see ibid. There is no formula with which to avert this kind of confusion in Nigeria, neither has it been a subject of discussion before any court, given the non-existence of any judicial decision on the dilemma.

Notwithstanding the existence of the floating charge in Nigeria, the Regulation introduces the floating lien,[59] which is basically a fixed charge that permits the debtor to use and dispose of encumbered assets in the ordinary course of business.[60] In the case of a floating lien, the security interest attaches to the debtor's collateral immediately after the preconditions are met. This means that the scope of assets being encumbered by the floating lien device is known from the beginning. It also means that there will be no interference with title financing devices. This is because all countries that have reformed their secured transactions law following UCC article 9 have adopted the functional approach to secured transaction, which eliminates the possibility of allowing the parties to develop their own agreement to govern their relationship; instead, if a security agreement creates a security interest in the debtor's personal property or fixtures, in exchange for credit, a uniform set of rules, similar to those contained in the Regulation, will apply.

Implications for the coexistence

The authors argue that the coexistence of a floating charge and floating lien in one legal system is a misnomer that yields rather unpleasant consequences.[61] The fact that the floating charge is contained in CAMA, an act of the National Assembly, means that it supersedes the floating lien that is contained in the Regulation, based on the usual hierarchy of laws.[62] The improperness of

59 See the Regulation, sec 7(2)(b) and UCC, art 9-204(1). Both sections include the concept of a "floating lien".

60 The security interest in each new asset brought into the asset pool is automatically perfected, owing to the initially perfected floating lien security interest. For a penetrating treatment of after-acquired property clauses (floating lien) in a security agreement, see A Kronman "The treatment of security interests in after-acquired property under the proposed Bankruptcy Act" (1975) 124 *University of Pennsylvania Law Review* 110 at 119.

61 This is because on one hand, there is competition between two security interests, one of them (the floating lien of the Regulation) attaching to the collateral from the beginning of the creation of an enforceable security agreement. On the other hand, another security interest on collateral (from the CAMA floating charge) attaches to the collateral later in time after crystallization. The dilemma is how will priority be resolved given the fact that the two security interests emerged from two unequal hierarchical sources of law (the Regulation versus a statute, CAMA) and also the fact that priority is based on the first to perfect, first in right principle. There is no formula in place to resolve this current dilemma in Nigerian jurisprudence and this is indeed one of the defects of the Regulation.

62 See Y Dina, J Akintayo and F Ekundayo "Guide to Nigerian legal information" (February 2005) *Globalex*, available at: <http://www.nyulawglobal.org/globalex/Nigeria.html> (last accessed 14 December 2016). The Nigerian Court of Appeal has held that validly made subsidiary legislation has the effect and force of the principal or enabling act; see *Trade Bank Plc v LILGC* [2003] 3 NWLR (pt 806) 11. However, the authors have found no authority that addresses the consequences of a conflict between a statute (like CAMA) and a Regulation (such as the CBN Regulation). It is therefore common sense that a statute enacted by the highest lawmaking body (which represents the citizenry) will take precedence over a mere regulation that derives life from an act or law respectively made by the National Assembly or a state's house of assembly.

their coexistence could further be appreciated if it is considered that only banks and financial institutions can be secured creditors in the context of the Regulation.[63] This means that, since a floating charge can be created by any incorporated entity, the possibility of a conflict of priority rights between a bank relying on a security interest arising from a floating lien in the Regulation, and another incorporated entity whose security interest arising from a floating charge has crystallized on all the debtor's property, would usually arise. Considering that a floating charge entitles the holder to appoint a receiver to oust the debtor from managing the asset, and to manage the asset basically in the interests of the appointor, banks and other financial institutions are also the underdogs of the Regulation's defects.[64]

Furthermore, the existence of two, unlinked collateral registries for incorporated entities will not only increase registration and transaction costs,[65] but also engender ostensible ownership problems in respect of dubious debtors, who may give unsuspecting lenders the impression that the assets that the debtor puts forward as security are unencumbered.[66] Similarly, a debtor who is in possession of assets following a conditional sale or hire purchase transaction with a natural creditor could possibly use those assets as collateral to obtain loans from a bank. In this case, the bank would have no way of verifying if the collateral already has encumbrances, since the collateral registry is not available for non-bank creditors to register their security interests in a debtor's personal property collateral. This scenario could also apply in the case of non-bank but incorporated creditors who use the Corporate Affairs Commission registries to register charges created on a company's asset(s). In view of this impending disaster in the Nigerian lending industry, the authors argue that a collateral registry whose use is restricted to a class of creditors can

63 See the Regulation, sec 2 for the definition of "secured creditor", which limits it to banks and other financial institutions.

64 See CAMA, secs 390 and 393 on the appointment of a receiver and its duties. Although sec 390 instructs the receiver to manage the company in the interest of the company and all interested parties, in reality, the receiver is only a "hand" of the floating chargee. To this extent, where a floating chargee has appointed a receiver to manage a company and its asset pool, in which a secured party bank has a floating lien interest, the authors submit that, in such circumstances, the secured bank creditor (floating lienee) will only benefit from assets (if any) left unencumbered by the floating chargee.

65 Usually, where a charge is created on an incorporated company's asset, the charge is registered in the Corporate Affairs Commission (CAC) registry. Under the Regulation, a security interest in an incorporated debtor's assets would have to be registered in both the CAC and the collateral registry. Similarly, a searcher would have to search in these two unlinked registries, increasing the transaction cost.

66 Nigeria has now reserved the collateral registry exclusively for the use of banks and other financial institution secured creditors. Since non-bank creditors cannot register their security interests in debtors' personal property collateral in this registry, a secured creditor bank would not be able to find out if the asset being presented to it by a debtor as collateral is already encumbered by a third party's security interest. Therefore, there will no doubt be priority fights soon, as a result of the ostensible ownership problem.

only intensify the problem of ostensible ownership, considering that Nigerians still use retention of title financing.

The third defect: The Regulation introduces a one-legged self-help repossession remedy

Why self-help repossession of collateral?

In all countries that have reformed their secured transaction law in line with UCC article 9, self-help repossession of collateral following a debtor's default has always been added to aid a secured party effortlessly to realize the debt owed to him fairly quickly.[67] There are many reasons why this is commercially sensible, First, certain collateral that is perishable can only be meaningfully utilized to offset debt if it is sold as fast as possible after default, as such collateral is insufficiently durable to last until the conclusion of litigation.[68] Similarly, as we now live in a world of competing technologies in which the speed with which electronic gadgets and personal property in general is outdated and easily replaced is more heightened than ever before, the lifespan and value of personal property have become more transient. Thus, the absence of a self-help repossessing right in respect of a debtor's collateral after default would probably result in the creditor being left with very outdated and low priced collateral after any protracted litigation, and the need would arise for the creditor to sue the debtor again for any deficient sum.[69] In fact, without a self-help remedy, credit lenders would be unlikely to accept personal property as collateral due to its ephemeral nature. It goes without saying that the absence of a developed self-help enforcement mechanism has resulted in the demand for real property collateral as a preferred form of security in Nigeria.

Indeed, a right to repossess by self-help grossly reduces the costs of litigation, especially in a slow judicial system like Nigeria's, given the fact that the amount lent or being sought from the debtor might often be less than the cost of litigating that sum. Modern commerce can hardly function well without a secured transactions law that allows the use of a well regulated

67 In the USA, UCC, art 9-609; Australia, PPSA, sec 123; New Zealand, PPSA, sec 109; Malawi, PPSA, sec 87; Romania, Law on the Legal Treatment of Security Interests in Personal Property (1999), art 36; Ghana, Borrowers and Lenders Act (2008), sec 34, etc. In the case of Nigeria, see the Regulation, secs 35–38.

68 For a masterful explanation as to why self-help repossession of a debtor's collateral is ideal, see the seminal article of JJ White "The abolition of self-help repossession: The poor pay even more" (1973) *Wisconsin Law Review* 503 at 511–30, available at: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1432&context=articles> (last accessed 14 December 2016).

69 Id at 524, in particular. footnotes 59 and 60, discussing the study conducted by Prof Johnson on how debtors are far better off with self-help repossession than with recovery through the courts. For a general overview of the study, see R Johnson "Creditors' remedies and rate ceilings some study results of the national commission on consumer finance" (1972) 26 *Personal Finance Law Quarterly Review* 65.

self-help remedy.[70] Thus, when recovery through litigation is made only an alternative avenue to recover debts, the chances are high that secured creditors, knowing the high possibility of recovering collateral immediately after default, would give sufficient and affordable credit to debtors, since there would be less need to factor in the costs of potential litigation. This would in turn impact positively on MSMEs, who would to some appreciable extent be relieved from high lending rates. Needless to say that, in aggregate, the reduced lending rates would somehow make their way into the macro strata and be felt in the economy by way of more affordable goods in the market.

Why the Regulation got it wrong with respect to the self-help repossession remedy

According to the Regulation, a secured creditor wanting to repossess a debtor's collateral after default must first give the debtor ten days' notice.[71] The authors argue that this is inappropriate because it destroys the element of surprise that is an essential ingredient in any successful repossession of personal property collateral. An examination of most of the countries that have reformed their secured transactions law following UCC article 9 reveals that none has provided a weak version of a self-help repossession right by withholding surprise, which would destroy the level of success in collateral repossessions. Even though the authors do not advocate for a direct transplant of any law or method without ensuring that it is first adapted to suit idiosyncratic factors in Nigeria, they do not see any good reason for the ten day notice and maintain that there are solid reasons why the ten day notice in the Regulation is a mistake and would discourage lenders from giving sufficient and affordable credit to debtors.

A debtor that has been notified about a pending repossession of collateral could easily transfer the collateral out of a court's jurisdiction within the ten day period. Alternatively, he could transfer the collateral to other states in Nigeria and sell it to unsuspecting buyers in market overt, since, according to the Sale of Goods Act, buyers purchasing in a market overt are not bound by any pre-existing security interest on the collateral.[72] If this happens, the secured party would be stranded and, even when he decides to utilize his

70 See the Regulation, sec 35(5) and UCC, art 9-609. The safeguard that checkmates the overreaches of secured creditors is the "without the breach of peace" standard, the breach of which could expose the secured party to liability for damages. In the USA, such damages could be punitive, as in *Sanchez v Mbank of El Paso* 792 SW2d 530, 12 UCC2d 1169 [Tex App 1990], aff'd 836 SW2d 151, 17 UCC2d 1358 [Tex 1992] and *General Finance Corporation v Smith* 505 So 2d 1045, 3 UCC2d 1278 [Ala 1987].

71 See the Regulation, sec 35 (1)–(3).

72 See sec 27 of the Sale of Goods Act, 1893, a statute of general application in Nigeria. To qualify as selling in "market overt", the seller must display the goods for sale and the market must be the type where such goods are normally sold. Where this is the case and a bona fide purchaser for value purchases from such a market, he acquires good title to the purchased goods. For a penetrating discussion on this, see J Pease "The change of the property in goods by sale in market overt" (1908) 8 *Columbia Law Review* 375 at 377.

equitable right of tracing to trace the collateral, he would incur additional costs, only to compete for title with a bona fide purchaser for value without notice, who has always been the law's "favourite child".[73]

It is not news that personal property is very difficult to trace in Nigeria; this is evident from the poor success rate of tracing and locating stolen vehicles or other personal property by trained law enforcement agents. If law enforcement agents still find it enormously difficult to trace stolen items in Nigeria due to many debilitating factors,[74] then the chances are high that secured creditors would suffer several losses in the hands of dubious debtors if the latter are notified in advance about a pending repossession.

The implications of this are glaringly obvious. After one or two bad experiences with dubious debtors, lenders would probably abandon the Regulation and revert to demanding real property collateral that can be easily monitored, and cannot be hidden or transferred out of the jurisdiction even if the debtor is given advance notice of repossession. Thus, advance notice to debtors before repossession would certainly frustrate the entire ambition of the Regulation, which is to provide sufficient and affordable credit to debtors, especially MSMEs. It is on this basis therefore, that the authors argue that the ten day notice is unnecessary and should be removed immediately from the Regulation.

The intersection of secured transactions and insolvency law in Nigeria

The strength of any security interest in property is tested upon the debtor's insolvency[75] when various competing claims against the debtor's estate seek to be satisfied; some formula should be devised to determine priority. Thus, even though the subject matter of this article is personal property, suffice it to say that priority of security interests arising from a debtor's personal property are not all that would be determined upon its insolvency; security interests arising from real property and liens by operation of law would also be determined.[76] Determining the hierarchy of security interests arising from different property claims is not that simple, because, apart from liens arising by

73 It has been the judicial attitude in Nigeria to show over-protection to a bona fide purchaser for value without notice. This could easily be understood against the backdrop that, owing to the lack of a registry where security interests in personal property are registered, the possibility of disposing of an encumbered asset or using it to obtain financing from a third party is high. A more complete discussion was undertaken by Obaseki JSC in *Animashaun v Olojo* [1990] NWLR (pt 154) 111.

74 These factors include the lack of an identification database for citizens and residents in Nigeria, poor security apparatuses for the easy detection of crimes (such as closed circuit camera televisions on streets and highways), and the lack of a unified electronic database for registered vehicles and other personal property.

75 U Drobnig "Basic issues of European rules on security in movables" in J Lacy (ed) *The Reform of UK Personal Property Security Law: Comparative Perspectives* (2010, Routledge-Cavendish) 449.

76 See CAMA, sec 492.

operation of law, priority is usually determined by the order in which security interests in property were perfected.[77] Where perfection methods of security interests differ significantly between personal and real property, the bankruptcy trustee or receiver would find it difficult to resolve priorities, even more so where there is little or no guiding framework.

No insolvency statute in Nigeria to settle priority conflicts of security interests arising from various sources of law

With the coming into force of the Regulation, Nigeria faces a much more complicated situation in the event of the bankruptcy or winding up of a debtor. First, apart from the winding up procedures in CAMA,[78] there is no robust legal framework like the US Bankruptcy Code of 1978[79] or the English Insolvency Act of 1986[80] that exist to deal sufficiently with priority issues of secured claims arising from an insolvent debtor's estate. Secondly, it is interesting to point out that, in the realm of real property transactions in Nigeria, mortgage law is within the competence of both the state and federal governments.[81] Thus, the Conveyancing Act, 1881[82] and the various state mortgage laws[83] deal with mortgage transactions in Nigeria depending on where the real property is located. Security interests arising from real property mortgage transactions are perfected in the land registry of the state where the real property is located; the various land registries are unlinked, although that poses no problem of ostensible ownership due to the immovable nature of real property.

However, note that, under Nigerian law, a state law is subservient to a federal law in matters of concurrent jurisdictions.[84] In the absence of a regulating insolvency statute, this poses two problematic questions. First, should security interests arising from the Conveyancing Act trump those from state mortgage laws even if the security interests arising from the latter were perfected first in

77 See UCC, art 9-322 and 9-23. See also White and Robert *Uniform Commercial Code*, above at note 32 at 1277–92.

78 See CAMA, part XV.

79 Available at: <https://www.law.cornell.edu/uscode/text/11> (last accessed 14 December 2016).

80 Available at: <http://www.legislation.gov.uk/ukpga/1986/45/contents> (last accessed 14 December 2016).

81 See the second sched to the 1999 Constitution of Nigeria (as amended), which contains the concurrent legislative list.

82 This is a statute of general application in Nigeria. It governs mortgage transactions in the states located in the eastern and northern parts of the country, as well as some parts of Lagos.

83 The Property and Conveyancing Law 1959 applies to the western part of Nigeria (apart from Lagos) and the former mid-western region including Edo and Delta states. The Lagos state Mortgage Law, 2010 applies to mortgage transactions where the property is not located in the parts governed by the Conveyancing Act 1881. See generally, E Chianu *Law of Securities and Bank Advances (Mortgage of Land)* (2nd ed, 2004, Ambik Press) at 18–33.

84 See generally A Obilade *The Nigerian Legal System* (1979, Sweet & Maxwell) at 64–68.

time? Or should priority be determined among security interests solely on the first to perfect basis, regardless of the source of law from which the security interest arose? While in the US these dilemmas have to a large extent been solved by the *Butner* principle,[85] Nigerian law does not currently provide any equivalent or adequate answers. Similarly, the existence of the Regulation poses the same kind of question: where will a secured party whose security interest stems from the Regulation be placed in the hierarchy of security interests? Put more succinctly, how will the security interests arising from these different sources of law with unequal hierarchies be determined in the absence of an insolvency statute that provides a well defined structure of priorities? Certainly, following the hierarchy of laws in Nigeria, the Regulation is subservient to both federal and state laws, and the issue of priority should therefore worry banks and other financial institutions whose security interests would stem from it.

The authors further argue that reform of secured transactions law cannot be achieved in a piecemeal fashion as Nigeria has currently done. Instead, reform should be comprehensive; in other words, a certain harmony must be reached between secured transactions law and insolvency law, given that it is in the latter that priority for all security interests against a debtor's estate is determined.

CONCLUSION

This article has examined the importance of credit in any given economy and the role of secured transactions law in ensuring access to credit. These advantages are not limited to developing economies, as developed economies have undertaken or are at the threshold of undertaking reforms to their secured transaction laws. The article has also shown that the availability of credit to MSMEs in Nigeria has been hampered, not for want of items which may otherwise serve as collateral, but essentially because of the absence of badly needed reforms to her law relating to personal property. Hence the article has not only identified the problems which presently impair the decision to lend, but also highlighted the changes which reform of Nigeria's secured transactions law should embody.

Granted that reform is apropos, the article identifies key problems posed by the choice instrument of "reform" and how it has failed to deal with the existing problems and may even complicate them still further. For the purpose of creating a security interest, the Regulation ignores the requirement that value

85 See *Butner v US* 440 US 48 [1979] at 54: "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analysed differently simply because an interested party is involved in a bankruptcy proceeding." It is advised that this legal logic be applicable in the Nigerian bankruptcy regime to solve the legal uncertainty that exists with respect to a debtor's mortgaged property governed by different state laws and the resulting security interests in the context of the debtor's bankruptcy.

has to pass from the lender, which lays the borrower open to the danger of a creditor filing a statement when indeed the counterparty has received no credit from the creditor. This is even made worse as the Regulation countenances only banks and financial institutions as the creditors that enjoy its protection. The article also identifies the complications that will arise when the floating lien created by the Regulation is placed side by side with a system that still recognizes and in fact uses the floating charge device. The result of the analysis is that a floating lienee of the Regulation may well be at the mercy of a floating chargee. Furthermore, the article also points to the uncertain judicial attitude to self-help repossession and the notice requirement under the Regulation as combining to make an otherwise important enforcement device a "toothless bulldog". Finally, it is argued that an insolvency statute which settles priority questions will necessarily be relevant to enable creditors know their fate in insolvency from the outset.

To be clear, the foregoing does not in any way serve to discredit the rather noble intentions that gave rise to this regulatory intervention by the CBN. Rather, it is meant to show that more needs to be done. Going forward, it is hoped that a more robust and holistic reform will be undertaken to provide a PPSL that takes all the foregoing and more into account.