



AMAN ASSEFA & ASSOCIATES

LEGAL UPDATE

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ETHIOPIA'S REFORMED
SECURED TRANSACTIONS LAW
IN MOVABLE ASSETS

Ethiopia has started implementing its reformed secured transactions law in movable assets

INTRODUCTION

In Ethiopia, the taking of security in movable assets has fundamentally changed since the 27th of February 2020, the day the Movable Property Security Rights Proclamation No.1147/2019 came into full force. The day also marked the commencement of the operation of Collateral Registry under the auspices of the National Bank of Ethiopia (NBE). Proclamation No. 1147/2019 has affected not only the sources of the law on security right in movable assets in Ethiopia but also the major strands in a secured transactions system.

Ethiopia's secured transactions system was based on the civil law tradition of continental Europe, mainly that of France. Thus, the Civil Code (1960) and the Commercial Code (1960) have been the principal sources of the law governing security rights. There have also been other secondary sources (proclamations) that complemented the Codes on different aspects of secured transactions. The new law, however, heralds a shift away from this French-based civilian system to the Anglo-American model in many important respects. It is also informed by UNCITRAL instruments and UNCITRAL Model Law on Secured Transactions. This has significant implications for secured creditors and debtors as well as for transactional lawyers advising clients.

The new law is a very detailed instrument incorporating 96 articles and divided into seven major parts. It has covered, among other things, and in greater detail, issues of creation, perfection (third-party effectiveness), priority, and enforcement of security right. It has also introduced an electronic collateral registry system for the first time which is put in operation through the National Bank of Ethiopia's Directives.

The following presents brief summary of the major reforms introduced by Proclamation No.1147/2019:

1.Scope of application: The Proclamation applies to security rights in movable property arising from security agreement. Having adopted a functional approach to security right [Article 2(44 cum 43)], the scope of application of the Proclamation is so wide in terms of assets covered, personal scope (secured creditor), nature of the secured obligation, and transactions that are assimilated to security right.

While the Proclamation expressly recognizes security right as property right that guarantees any obligation (payment of money or performance of some obligation), movable property is defined so broadly as to even include use right over land. A future asset can also be the subject of a security agreement. The personal scope of the Proclamation is so broad that the traditional distinction between banks and non-bank creditors introduced to Ethiopian legal system through Proclamations No.97/1998 and No.98/1998 is totally abolished.

Because the new law has adopted a functional approach to security right, the tradition concepts of security devices such as pledge, pledgee, pledger are also abandoned and replaced by collateral, secured creditor and grantor, respectively. Security rights arising from agreements involving exchange-traded securities, mortgage of a ship, interest in an aircraft fall outside the scope of the new proclamation.

Creation of security right: The Proclamation has introduced the concept of non-possessory security right for tangible movable properties. This is one of the fundamental departure from its predecessors that required the secured creditor to be in possession (directly or constructively) of the property to create a valid security agreement/arrangement. As regards mortgage over businesses, the Commercial Code required registration of the mortgage agreement with the relevant public body for validity. Under the new Proclamation, the creation of a security right over a going concern does not need registration of any type to make it valid as between the secured creditor and the grantor of the security.

2.Perfection mechanics (Third-party effectiveness): Proclamation No.1147/2019 under Article 13 has recognized three modes of effecting a security right against third parties: registration, possession and control.



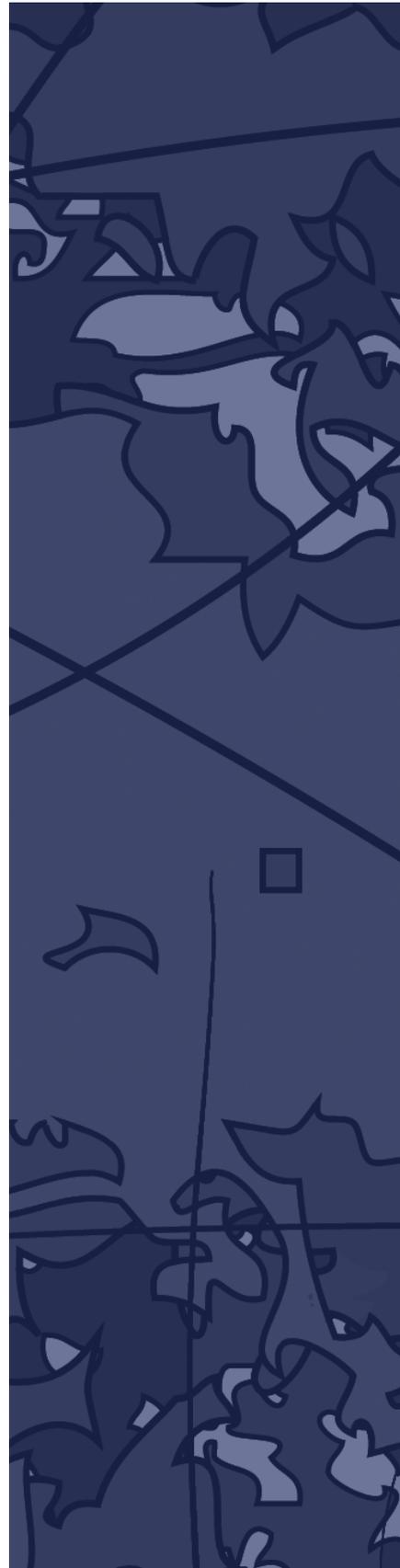
Possession applies to money, negotiable instruments, negotiable documents and certificated securities. Control applies to funds in a deposit account or electronic security. Registration is available to security right interests over any type of movable asset. However, this is fundamentally different from the type of registration prevailing before the adoption of the new Proclamation. The new Proclamation only requires registration of ‘notice’ of security right and not the contents of the security agreement. Also, single notice for security rights under multiple security agreements is sufficient; it is electronic, central and open to public access. Currently it is administered by the National Bank of Ethiopia that has also issued Directives to guide its operation.

3. Priority: Multiple and competing security rights can be created over a single movable asset. While a secured creditor (including non-consensual creditor) has priority over other creditors and this is also the case during bankruptcy, it is the order of registration (first-to-register rule) in the Collateral Registry that determines priority among secured creditors [Articles 46-47 of the Proclamation].

This has resolved the uncertainties of the rules of ranks under Article 2860 of the Civil Code; it has also abolished the concurrence ranking of claims registered on the same date under Article 192(2) of the Commercial Code. Note that knowledge of existence of other security right or change in the method of third-party effectiveness normally does not affect priority right. The Proclamation has recognized certain exceptions to the first-to-register rule, though.

4. Enforcement of security right: Ethiopia began reforming its secured transactions law in 1998 when it amended few provisions of the Civil Code and Commercial Code to allow lending banks to foreclose their collaterals using extra-judicial process. Its scope was limited to banks alone.

Proclamation No.1147/2019 not only has reinforced this extra-judicial process but also introduced additional means of enforcement. Secured creditor’s right to take possession of the collateral from the grantor under Article 81 is the case in point. However, this is possible only if such right is provided for in the security agreement and that the grantor does not object to dispossession. If the grantor resists dispossession, the secured creditor can have the Collateral Registry Office to order the police to execute it.



The secured creditor can alternatively render the collateral unusable or dispose it on the premise of the grantor without removing it. The manner of disposal is to be determined by the secured creditor itself and it should not always be through public auction. Only a ten working days' notice is required to initiate the process and in certain instances the secured creditor is exempted from giving any notice.

The new law has also recognized the right of the higher-ranking secured creditor to take over an enforcement process commenced by other secured creditor at any time before the enforcement process is completed (Article 80). The Proclamation has also introduced elaborate rules on enforcing of security rights in intangibles where taking possession does not apply.

5.Unified System of secured transactions regime: The Proclamation is supposed to be the single, unified source of the law governing the taking security in movable assets in Ethiopia, and repealed expressly Proclamations No.97 and No. 98 of 1998. It has also impliedly repealed other laws inconsistent with its provisions (Article 93).

But there are ample provisions in the Civil Code and the Commercial Code which are not inconsistent with the new law and these laws will continue to complement the new Proclamation.

While it is still early days to assess and determine the impact of this new Proclamation, it is expected to play a crucial role in unleashing the financial potential in movable assets all across the Country.



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