

## Security Interests in Movable Properties in Uganda

### Opportunities and Challenges



## 1. Introduction

It is little over a year since the Security Interest in Movable Property Act 2019 (SIMPA or the Act) was enacted and entered into force. This law regulates the use of movable property as collateral to secure credit and debt obligations. Prior to the Act, and indeed presently, the formal credit market was and still is dominated by real estate collateral in form of mortgages and other secured and unsecured security interests in land. The SIMPA is meant to unlock access to credit facilities by Small and Medium Enterprises (SMEs) and individuals, the majority of whom are not real estate owners, and expand the reach of the financial services sector. It covers both traditional assets like chattels and intangible assets like accounts receivables, deposit accounts, electronic securities and intellectual property rights. This publication highlights some of the key opportunities and challenges posed by the regime under the SIMPA.

## 2. Establishment of the Register of Security Interests Movable Property

Establishment and maintenance of a separate register for security interests in movable properties is a key pillar of the SIMPA. The mandate to establish and maintain such a register was bestowed on the Uganda Registration Services Bureau (URSB). The register is required to be established and maintained as an electronic records system with records of the details of the security interest and the particulars of the property which is the subject of the security. The security interest may be registered by way of notice after its creation but with the written consent of the property owner. Particulars of a registered interest may be amended by way of an amendment notice. Needless to add, there are registration fees payable ranging between UGX10,000 and UGX20,000. As mandated under the law, URSB has already established the registry as fully-fledged online platform which can be accessed at <https://simpo.ursb.go.ug/>. The platform provides a public record of all the registered interests and it is available to anyone who may wish to conduct a search to ascertain if there are any registered interests in a movable property they intend to deal in. Certified copies of the search are also provided by URSB upon request.

Registration of an interest on the platform is for public notice purposes and it is different from traditional encumbrances on title to immovable property such as caveats which prohibit transactions except where notice is given to the caveat.

Moreover, multiple security interests may be registered in respect of the same movable property but in such cases the security interests rank in priority according to the date of registration. Additionally, registered interests take priority over unregistered interests.

Registration of the interest is not the only method of perfecting security in movable properties. Other methods recognised under the Act include taking possession of the collateral and taking control of a deposit bank account where such an account is the collateral.

## 3. Taking possession

Taking possession of the collateral by the holder of the security interest is recognised as one of the means of perfecting the interest. Prior to enacting the SIMPA, the practice of taking possession of chattels as collateral was predominantly in use by money lenders and other informal players in the credit market but it was not backed by any particular legislation. Legal recognition of the practise opens the door to regulated players in the financial services sector to explore possession as a means of perfecting collateral.

## 4. Control of a deposit account

Taking control of a deposit account in a financial institution is another method of security perfection which is recognised and protected by the Act. For financial institutions such as banks and other institutions which are authorised to take deposits from the public, having control of the deposit account is rather straightforward. All that which is required is for the deposit account to be maintained with that bank or financial institution at the time the security in the account is created. This gives the financial institution authority to access the funds on the deposit account in the event of default. On the other hand, for secured creditors who are not deposit taking financial institutions, the Act requires a tripartite agreement between the secured creditor, the borrower and the financial institution where the deposit account is maintained. The particular and details of the envisaged agreement are not prescribed by the Act. It is incumbent upon the banking and other financial institutions and their advisors to carefully work out the details to facilitate the operationalisation of this component of the law.

## 5. Perfection of proceeds from the collateral

Where there are transactions or dealings in respect of a collateral of a movable property which give rise to proceeds in form of money, accounts receivable, negotiable instruments or a right to payment of funds to a bank account, such proceeds are deemed by the Act to be perfected with no requirement for further actions on the part of the secured creditor. Effectively, in such instances the law does not impose any further obligations on the secured lender.

## 6. Cross border movement of movable properties

Where a movable property which subject to a security interest perfected outside Uganda is transferred to Uganda, the law grants protection to the security interest in the property. However, this is on condition that there are reciprocal arrangements between Uganda and the country of origin on recognition and continuation of perfection of security interests. While this provision presents a great opportunity for cross border recognition of perfected security interests and avoids duplication of perfection efforts across jurisdictions, it is still a broad aspiration. At the time of writing this publication, it has been a year since the SIMPA came into force but Uganda is yet to enter into any such reciprocal arrangement with any country as envisaged under the Act. It is reported though that the government is trying to explore the provisions on free movement of goods and services contained in the Protocol of the East African Community Common Market. As we wait for such arrangements to be negotiated and concluded, it is important for those affected to take steps to perfect their securities in Uganda in accordance with the SIMPA.

The Act also imports extra-territorial application where a collateral perfected in Uganda is moved outside Uganda. In such instances it is stated that the property remains subject to the Act but it is not clear how it can be enforced. However, the secured creditor has the option of perfecting an additional security.

## 7. Enforcement and realisation of the security

Upon default by the debtor to perform their obligations, enforcement and realisation of the security may be done according to the provisions of the Act, other applicable laws in force or in the manner provided for in the agreement between the parties. Prior to taking any enforcement measures, the secured creditor must serve a notice in writing on the borrower providing the particulars of the default, the consequences in the event of failure to remedy the default and the time period within which the default must be remedied.

Where the period in the notice expires without the debtor remedying the default, the secured creditor of an interest which is perfected by registration is entitled to register a default and enforcement notice with URSB.

## 8. Enforcement without recourse to Courts of Law

The Act lists categories of security interests perfected under the Act which may be enforced without judicial proceedings. Firstly, where the secured interest is in respect of accounts receivable, the secured creditor has a right to instruct the account debtor to make payments directly to the secured creditor for the satisfaction of the debt obligations and collection expenses. Secondly, if the security is a document of title perfected by possession, the secured creditor has a right to proceed in respect of the property under the document of title. Thirdly, where the collateral is a deposit account perfected by taking control, the secured creditor may instruct the financial institution to pay the balance on the deposit account to the account of the secured creditor. In each of these instances the Act makes it clear that there is no need to seek or obtain a court order.

Subject to certain safeguards, the secured creditor may exercise the sale of the collateral where the debtor defaults. The sale must be by auction and after satisfying notice requirements stipulated under the Act.

## 9. Expedited possession

Expedited possession enables the secured creditor to take possession of the collateral with or without a court order. However, the right to exercise expedited possession is subject to the meeting specific safeguards prescribed in the law and these are; the debtor must consent to the secured creditor taking possession of the asset without a court order, and the taking of possession

must be effected without breach of public peace. Breach of public peace is elaborated to include entering the debtor's premises without permission and the use of violence and intimidation.

## 10. Securities perfected under other laws

The Act faces criticism for introducing a dual system of perfection of securities, specifically with regard to corporate securities such as liens and charges under the Companies Act, 2012. Only interests which were registered and perfected under other laws before the commencement of the Act are recognised. Interests which were not registered under other laws were accorded 150 days to be registered under the SIMPA. The Act thus introduces an obligation for new interests to be perfected both under the SIMPA in addition to the other laws like the Companies Act. Also, questions have been raised over the priority ranking of interests which are registered under other laws like the Companies Act and the SIMPA. Particularly, the impact of registration under the SIMPA on security interests which are created under Part IV of the Companies Act 2012 which regulates registration of charges. Even the URSB is still grappling with these questions though it appears their expectation is that the solution lies in repealing the corresponding provisions of the Companies Act 2012.

## 11. Conclusion

The SIMPA introduces novel and innovative approaches to the use of both chattels and intangible assets to secure debt obligations. It is expected that this should unlock access to credit facilities by SMEs and individuals and enhance financial inclusiveness. Implementation of the law is still work in progress but the URSB has already put in place the requisite infrastructure. The onus is on the financial services sector players to embrace the law and harness the opportunities presented.

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Denis is the Managing Partner at Cristal Advocates where he also leads the energy and tax practice. He is qualified both as a Lawyer and Chartered Accountant with vast experience serving various industries in Sub Saharan Africa. Before joining Cristal Advocates, he had worked for close to 10 years with Deloitte and Touche where he started his career and rose to senior managerial positions.

At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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