Overview of the Regulatory Framework for Secured Transaction in Movable Assets

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Introduction

Medium, small and micro enterprises (MSMEs) play a significant role in the building and sustenance of a nation's economy. Small and medium scale enterprises constitute about 80% of Nigerian businesses and therefore are very crucial to the Nigerian economy. [1] However, MSMEs mostly depend on credit facilities to build and sustain their companies but have little of immovable assets to offer as security. Another challenge of MSMEs is poor management and governance, which also is a credit risk.[2]

However, information asymmetry and inadequate collateral are two significant constraints that limit the flow of credit from banks to SMEs.[3] Ghimire and Abo argue from their finding that this phenomenon is more recurrent in the micro-enterprises compared to small or medium enterprises.[4] A 2001 World Bank

survey on Nigeria showed that although 85% of the firms had a relationship with banks, most of them had no access to credit.[5] Yet they are the engine for growth in developing economies.[6]

To tackle the problem of access to credit for MSMEs and achieve financial inclusion for them, the Federal Government enacted the Secured Transactions in Moveable Assets Act (STMAA) in 2017. The law was innovative, and a radical attempt to leapfrog MSMEs into the financial system using the best available legal framework and technology. This overview describes the structure and legal technologies deployed by the STMAA and assesses the implementation of the law in the light of other reform policies. It concludes that while the enactment of the STMAA is a commendable achievement, the realisation of the regulatory objective is hampered by other factors which if not addressed may render it moribund.

STMAA 2017 Regulatory Objective and Application

The STMAA set its regulatory objectives as financial inclusion, lending to MSMEs, secured credit on moveable assets, the perfection of a security interest in moveable assets and realisation of the collateral.[7] The law established the National Collateral Registry (NCR) as the institution to receive, maintain and give access to the record of security created over movable assets and implement its objectives.[8]

The Act[9] applies to all security interests in movable assets created by an agreement that secures payment or the performance of an obligation between a person who is a creditor, borrower or guarantor. It also applies to all financing and operating leases entered after the commencement of the Act.

The law is inapplicable to set-off rights and interest in land except for account receivables. Also, not applicable to a security interest in a movable property like ships or aircraft for which separate registries exist.

Comparative Analysis and Evaluation

The STMAA seems transplanted from the Personal Property Security Act (PPSA) applicable in Canada and Australia, given the substantial similarities among

them.[10] However, we cannot judge the effectiveness of the STMAA by the success of the PPSA in Canada or Australia. In assessing the NCR, significantly, they started from ground zero in 2017 though they inherited the internal CBN registry.[11] As of March 1 2020, the total number of filings was 87,674, and the value of registered Financing Statement with the NCR was =N=1,604 Billio, $ 1.2 Billion and €6.3 Million.[12] Of these only 31,707 filings were by women for the total value of =N=110 Billion and USD 444,000.[13]

NCR has registered about 23 classes of collaterals totalling 157,752 collaterals against 237153 debtors as of March 1, 2020.[14] The collaterals range from boats, planes, deposit accounts, title document, negotiable instruments, intellectual property, jewelery to minerals, money, motor vehicles, motorcycle, accounts receivables, farm products and timber. Out of the 157752 collaterals, motor vehicles remain the most popular with 28,3030, followed by consumer/household goods with 19920 and inventory with 19823. The data is consistent with those from other countries which indicate that motor vehicles are the most popular or available collateral for secure transaction in movable assets.[15]

Despite the success, the broader legislative framework of the STMAA suggests policy conflict in the reform agenda. First is the problem of many regulations. The Equipment and Leasing Act 2015 (ELA) established a similar legislative framework as the STMAA.[16] There are areas of potential conflict as the ELA anticipates a separate registry for equipment leases. Also, the Companies and Allied Matters Act (CAMA) requires registration at the Corporate Affairs Commission (CAC), where companies create a security interest. STMAA is applicable to finance and operating leases.[17]

Second is the incomplete ecosystem for the development of credit and credit culture. The passage of laws such as the Credit Reporting Act 2017 and Federal Competition and Consumer Protection Act 2019 indicate substantial progress in reform. However, other significant pieces of the ecosystem, such as the CAMA Amendment Bill and Insolvency Bill, are yet to be enacted.

Challenges of Implementation and Solutions

The STMAA provided a framework for the resolution of the problem of multiple regulations. S.2(1)c of the STMAA gave the NCR the primacy to ensure that every public Registry established by an Act of the National Assembly operate in a manner that creates an automated interface between such a registry and the NCR. CAC has commenced interfacing with the NCR with its new requirements which raised its filing requirements to meet those of the NCR.[18] Ultimately it is whether the credit infrastructure is user friendly that would determine the success of the reform.

Understanding the regulatory objectives, particularly for change drivers, has been a challenge. The speed of the law driving behavioural change has been slow. Training for the finance industry and advocacy and creation of awareness among MSMEs of the existence of this option for access to credit would change behaviour over time.

Existing jurisprudence on the exercise of security rights poses a challenge for the achievement of the object of the law. The law anticipated the clog in the court driven exercise of security rights by providing an alternative where the parties could agree on a non-judicial process of recovery of collateral upfront. But as they say, old habits die hard. It is not clear how the STMAA will fare in the development of the credit jurisprudence.

Significant tension exists under Nigerian legal law between the sanctity of contract principle and social justice or distribution ideology. The STMAA carefully balances the two values by providing for a system of ascertainable priority and realisation of collateral on the one hand and access to information and transparency on the other side that could develop a secondary credit market and enable competitive forces to put the debtor in the driver's seat. These laudable objectives could be lost if the implementation and enforcement institutions are not in sync.

The STMAA provides the opportunity for a new paradigm of restorative justice and responsive regulation as postulated by Braithwaite.[19] Some of the pillars of this paradigm include consent for a non-judicial collateral realisation process which must be provided explicitly for in security document, responsive regulation through NCR as the nucleus for interfacing all registries, and public

awareness campaign and industry education and training. Other pillars of responsive regulation would include the designation of change champions, incentives and network of partners, court training, consultation, feedback and listening. In other words, as Braithwaite argues the NCR should provide a pyramid of support, not enforcement.[20]

Conclusion

The enactment of the STMAA is a commendable achievement, but the realization of the regulatory objective is hampered by other factors which if not addressed would render it ineffective.

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[1] Charles N O Mordi, Cajetan M Anyanwu & Banji S Adebusuyi, *Credit Delivery to Small and Medium Enterprises: Post Bank Consolidation in Nigeria Occasional Paper No. 53* (Real Sector Division, Research Department, Central Bank of Nigeria, 2014) They explain that the national policy on SMEs in Nigeria classifies SMEs into micro, small and medium. Any business enterprise employing less than 10 workers and having an asset base of less than N5 million is regarded as a micro enterprise. The employment base for small scale enterprises, is set between 10 and 49 employees with an asset base of over N5 million but less than N50 million. Medium scale enterprises are those that employ between 50 and 199 workers, with asset base of over N50 million but less than N500 million.

[2] K K Ogujiuba, F K Ohuche & A O Adenuga, *Credit Availability to Small and Medium Scale Enterprises in Nigeria: Importance of New Capital Base for Banks – Background and Issues* (2004).

[3] Binam Ghimire & Rodrigue Ado, “An Empirical Investigation of Ivorian SMEs Access to Bank Finance: Constraining Factors at Demand-Level” (2013) 2:4 J Finance Invest Anal 29–55.

[4] *Ibid*.

[5] Azende Terungwa, “An empirical evaluation of small and medium enterprises equity investment scheme in Nigeria” (2011) 3:5 J Account Tax 79–90.

[6] *Financing for SMEs in Sustainable Global Value Chains. (World Bank Group report for the G20 Global Partnership for Financial Inclusion.)*, by World Bank Group (Washington, D.C.: World Bank, 2017); Eniola Anthony Ektebang, “SME firms performance in Nigeria: Competitive advantage and its impact” (2014) 3:2 Int J Res Stud Manag 75–86.

[7] *S. 2. STMAA 2017*

[8] *S. 11 STMAA 2017*

[9] *S. 2 STMAA 2017*

[10] *See also US Uniform Commercial Code UCC Article 9.*

[11] *Survey of 2010 did not include Nigeria because as of thne public registration of security interest in movable assets was non-consistent Making Security Interests Public: Registration Mechanisms in 35 Jurisdictions ALEJANDRO ALVAREZ DE LA CAMPA, SANTIAGO CROCI DOWNES, AND BETINA TIRELLI HENNIG*, by Alvarez De La Campa Alejandro, Santiago Croci Downes & Betina Tirelli Hennig (Washington, D.C.: World Bank and IFC).

[12] National Collateral Registry, *NATIONAL COLLATERAL REGISTRY (NCR) STATISTICS AS AT 1ST MARCH, 2020* (National Collateral Registry)

[13] *Ibid.*

[14] *Ibid.*

[15] The most common PMSI (Purchase Money Security Interest) transaction in the United States is automobile financing: John Ukegbu, *Uniform Commercial Code: The Anatomy of an Automobile FinancingTransaction* (La Cours Hotel Lagos, 2019) at 10.

[16] The ELA 2015 has not become operative as the government has been unable to fund the infrastructure to get it going whereas the STMAA has CBN support and funding.

[17] S.2 STMAA 2017

[18] Corporate Affairs Commission made new requirements for registering charges with the Commission on moveable assets. This took effect on 3rd April, 2018. In the process of registering their charges pursuant to Section 197 of the Companies and Allied matters Act (CAMA) companies are now required to accompany the **FORM CAC8** with the following additional information, viz: a. Serial number or Chassis number of the collateral (Motor Vehicle, Plane, Boats, Plants and machinery etc.) b. BVN of the Business Owners/Board of Directors. c. Moveable assets Used. d. High level description of the moveable assets used.

[19]John Braithwaite, "The Essence of Responsive Regulation" (2011) 44 UBC Law Rev 475.

[20] The STMAA creates many offences and provides criminal penalty for infringement but our thesis is that support and responsive regulation is the preferred way to achieve behaviour change. Two critical offences created in s.58 of the STMAA are providing false or misleading information to the NCR and disposing of the collateral.

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