



BORROWERS AND LENDERS BILL, 2016

ARRANGEMENT OF SECTIONS

Section

Application, and credit agreement

1. Application

2. Credit agreement

Effectiveness of a security interest between the lender and borrower and collateral description

3. Execution of a credit agreement

4. Security interest between the borrower and lender

5. Sufficient description of collateral

6. Automatic extension of security interest

Effectiveness of a security interest against third parties

7. Achieving third-party effectiveness

8. Third party effectiveness in proceeds

9. Security interest with respect to proceeds

10. Concurrent registration not necessary for effectiveness of a security interest

Effectiveness of a security interest by registration

11. Collateral Registry

12. Functions of the Registry

13. Appointment and functions of the Registrar

14. Staff of the Registry

15. Authorisation to register

16. Particulars of registration

17. Registration of security interest in collateral
18. Refusal to register
19. Voluntary amendment of a registration
20. Request for registration of discharge of an obligation
21. Amendments to the register
22. Time and expiry of registration
23. Searches of the Registry

General priority rules

24. Priority between security interests
25. Priority of a security interest in proceeds
26. Subordination of priority
27. Priority of future advances
28. Priority of purchase money security interest
29. Priority of security interest in accessions and commingled goods
30. Priority with respect to transferred collateral

Priority of transferees of money, negotiable instruments, chattel paper, security certificates and deposited securities

31. Priority of transferee money
32. Priority of the creditor
33. Priority of a purchaser of a negotiable instrument, a document of title, a chattel paper or a security certificate
34. Priority of purchaser of a deposited security
35. Priority of buyer or lessee

Priority rules related to interests in immovable property and fixtures

36. Priority of mortgages

37. Priority of right to payment related to immovable property

38. Priority of security interest in fixtures

39. Possessory lien with respect to movable property

Special priority provisions for lien arising by operation of law

40. Lien with respect to immovable property

41. Judgment liens

Enforcement of obligations of the borrower

42. Application of Part VI

43. Default

44. Remedies of lender on default

45. Lender's right to possession

46. Judicial enforcement

47. Application of collateral in satisfaction of obligation

48. Disposing of collateral after default

49. Notice of sale of collateral

50. Discharging of security interest

51. Accounting for sale

52. Distribution of proceeds of sale

53. Retention of collateral after default

54. Effect of retention of collateral

55. Right to settle the debt and redeem collateral

56. Appointment of receiver or manager

57. Registration of appointment or removal of a receiver or manager

Supervisory and enforcement role of Bank of Ghana under this Act

- 58. Functions of the Bank under this Act
- 59. Rules by the Bank
- 60. Examination by Bank
- 61. Investigation
- 62. Order for search of premises
- 63. Power of court to make certain orders
- 64. Administrative and criminal fines

Borrower's rights

- 65. Right to apply for credit
- 66. Protection against discrimination in respect of credit
- 67. Delivery of documents
- 68. Borrower's credit rights
- 69. Confidentiality, personal information and borrower credit records

Miscellaneous

- 70. Pre-agreement disclosure
- 71. Regulations
- 72. Interpretation
- 73. Modification and repeals
- 74. Transitional provisions

Schedule

Pre-agreement disclosure

BORROWERS AND LENDERS BILL, 2016

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BILL

ENTITLED

BORROWERS AND LENDERS ACT, 2016

AN ACT to provide for a Collateral Registry, a unitary legal framework for the registration of security interests, to establish an order of priority of security interests, the effectiveness of security interest against third parties and generally to regulate transactions between borrowers and lenders and for related matters.

Passed by Parliament and assented to by the President

Application and credit agreement

Application

1. (1) This Act applies to

(a) any credit agreement that provides for a security interest in either movable property or immovable property;

(b) a credit agreement or a proposed credit agreement whether or not the lender or borrower

(i) resides or has its principal office within the Ghana;

(ii) is an institution that belongs to the Republic;

(iii) is an entity controlled by an institution that belongs to the Republic; or

(iv) is an entity created by an enactment;

(c) the creation of a security interest, the effectiveness of a security interest against third parties and priority of a security interest in tangible property that is located in Ghana, irrespective of whether the interest is present or future;

Comment [N1]: We deleted unitary since the various legislation on registration of security interest will continue to exist.

Isn't the intention for this Act to replace all other legislation dealing with registration of security interests in movables? For the immovables, it may be different as the Act contemplates the registration of mortgages in land registries.

(d) where the tangible asset is of a type ordinarily used in more than one country but the borrower is located in Ghana;

(e) the creation, effectiveness against third parties and priority of a security interest in intangible property, if the borrower is located in Ghana, irrespective of whether the interest is present or future;

(g) for the purposes of this section, the borrower is located in Ghana if :

(i) it has its place of business in Ghana;

(ii) it has a place of business in more than one country, but the principal office of the borrower is in Ghana; and

(iii) it does not have a place of business, the borrower is ordinarily resident in Ghana.

(h) issues relating to the enforcement of a security interest in intangible property if the borrower is located in Ghana;

(i) issues relating to the enforcement of a security interest in tangible property if the enforcement takes place in Ghana; j) the creation, effectiveness against third parties and priority of a security interest in a deposit account, if a bank or other financial institution that maintains the relevant deposit account has a place of business in Ghana;

(k) the creation, effectiveness against third parties and priority of a security interest in proceeds if this Act governs the security interest in the original collateral;

(l) the effectiveness against third parties, priority and enforcement of security interests in fixtures created under the Mortgages Act, 1972 (NRCD 96) or section 1(f) of the Home Mortgage Finance Act, 2008 (Act 770);

(m) the effectiveness against third parties, priority and enforcement of mortgages and other interests in immovable property, including a transfer of rental payments and a right to payment that arises in connection with an interest in immovable property created under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96); and

(n) every transaction, act or omission under a credit agreement, whether or not that transaction, act or omission occurs within or outside the country.

(2) This Act does not

(a) affect any right a consumer has under a consumer protection legislation; and

(b) apply to a security interest in

(i) a ship as defined under the Ghana Shipping Act, 2003, (Act 645); or an aircraft as defined under Ghana Civil Aviation Regulations L.I 2000 or in any other relevant laws;

(ii) payment rights arising under or from financial contracts governed by netting agreements as determined by the Bank of Ghana;

(iii) assignment of wages, pension, health and similar benefits as provided in the National Pensions Act, 2008 (Act 766) and other applicable legislation;

(iv) a contract of annuity or of life policy insurance;

(v) deposited securities as provided for under the Central Depository Act, 2007 (ACT 733); and

(vi) a transfer of a right to damages in tort not related to commercial activity.

(3) Nothing in this Act affects the right of a lender to exercise the right of set-off.

Credit agreement

2. (1) An agreement is a credit agreement if

the agreement provides for or is a combination of the following:

(i) a credit facility;

(ii) a credit transaction; or

(iii) a secured credit guarantee;

(b) the agreement relates to a transaction that creates a security interest in a movable or immovable property to secure an obligation present or future, determined or determinable.

Comment [MD2]: Do we know which agreements and receivables would be exempted? In other words, is this exclusion practical?

Comment [N3R2]: We want to temporarily hold on to revising this section and investigate further the reasoning behind it's inclusion

(2) For purposes of this section, an agreement provides for a credit facility if in that agreement,

- (a) the lender undertakes to lend a stipulated amount to
 - (i) the borrower,
 - (ii) another person on behalf of the borrower, or
 - (iii) another person at the direction of the borrower, within a specified period or at specified intervals agreed on by the lender and the borrower;
- (b) the lender undertakes to either
 - (i) defer the obligation of the borrower to repay a stipulated amount lent by the lender to the borrower; or
 - (ii) send a bill to the borrower periodically in respect of a stipulated amount, whether or not the amount is a loan or a fee and whether or not an interest is payable to the lender in respect of the arrangements.

(3) For purposes of this section a credit transaction includes an agreement that provides for

- (a) a pawn transaction;
- (b) an installment agreement;
- (c) a chattel mortgage or secured loan;
- (d) a finance lease; or
- (e) an agreement with respect to an outright assignment of accounts receivable.

(4) An agreement provides for

- (a) a credit guarantee if in that agreement a third party promises to satisfy on demand by the party to whom the guarantee is made under the agreement, an obligation of the borrower in a credit facility or credit transaction to which this Act applies; or
- (b) a secured credit guarantee if in that agreement a third party promises to satisfy on demand by the party to whom the guarantee is made under that agreement, an obligation of the borrower in a credit

Comment [MD4]: Wouldn't this be a credit facility? The distinction between credit facility and credit transaction is not quite clear; these seems to be some overlap.

Comment [N5R4]: Let's discuss

agreement to which this Act applies, and in addition, creates a security interest in some movable or immovable property to secure the performance of its promise.

(5) A court may invalidate a credit agreement as fraudulent, where the parties to the agreement, with intent to defraud a third party, are not dealing at arm's length.

(6) A security interest shall be taken as given by a borrower to a lender for the sole purpose of creating a security interest and shall not operate as a transfer of an interest in property from the borrower to the lender.

Comment [MD6]: I am not quite sure what the intention of this paragraph is. Creation of a security interest is by definition a transfer of an interest (encumbrance) in that property to the lender. Is the intention to say that a security interest does not result in a transfer of ownership to the lender?

Effectiveness of a security interest between the lender and borrower and collateral description

Execution of a credit agreement

3. (1) A credit agreement does not require notarization to authenticate the agreement.

(2) Notwithstanding provisions to the contrary in the Stamp Duty Act, 2005, Act 689; the non-payment of stamp duty or any other tax by a party to a credit agreement shall not invalidate that agreement.

(3) A credit agreement may be executed in writing or electronically, and it may consist of one or more tangible documents or electronic records which taken together, establish the intent of the parties to the agreement to create a security interest in some property.

(4) The credit agreement may relate to any obligations, whether existing or future.

Security interest between the borrower and lender

4. (1) Where a security interest is created in respect of a credit agreement, that security interest shall be deemed effective between the parties to the agreement without registration, but the right to enforce that interest may be subject to the rights of other lenders entitled to priority under this Act.

Comment [MD7]: Should we rather say "by" instead of "in respect of"?

Comment [MD8]: Is there a need to refer to "deem"?

(2) A credit agreement shall be in writing signed by the borrower and identify:

Comment [MD9]: Can we delete this? The form of an agreement is covered by section 3(3) above. Furthermore, this paragraph refers to 'writing' only, but not to 'electronically' which appears to be somewhat inconsistent with section 3(3).

(a) the lender;

(b) the borrower;

- (c) the collateral; and
- (d) the secured obligation.

(3) A security interest in property that the borrower acquires in the future shall become effective without a written consent of the borrower or any further act of the borrower

- (a) when the borrower acquires rights to the property; and
- (b) if it falls under the collateral description in the credit agreement.

(4) A borrower shall provide a written consent for the security interest to extend to consumer goods acquired in the future.

Sufficient description of collateral and secured obligations

5. (1) The credit agreement shall contain a description of the collateral that must reasonably identify the **asset** to be provided as collateral.

(2) For the purposes of this section, the description of the collateral may be generic or specific.

(3) For the purpose of this section, a description "all inventory", "all receivables" or "all movable property" of the borrower is sufficient.

(4) The credit agreement may describe secured obligations generically, including by a reference to a maximum for which the collateral is encumbered.

Comment [MD10]: It may be useful for the Bill to refer either to 'property', as in the preceding section, or to 'asset' as here. If we mean the same thing, we should use just a single term.

Automatic extension of security interest

6. (1) After the security interest is created and becomes effective between the lender and borrower, it shall automatically extend to any identifiable proceeds of the collateral whether or not the credit agreement contains a description of the proceeds.

(2) Where proceeds in the form of money or funds credited to a bank account are commingled with other assets of the same kind:

- (a) The security interest extends to the commingled assets, notwithstanding that the proceeds have ceased to be identifiable;
- (b) The security interest in the commingled assets is limited to the amount of the proceeds immediately before they were commingled; and

- (c) If at any time after the commingling, the amount of the commingled money or of the balance credited to the bank account is less than the amount of the proceeds immediately before they were commingled, the security interest in the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time when the security interest is claimed.

Contractual limitations on the creation of a security interest ineffective

7. (1) A security interest in an account receivable is effective as between the borrower and the lender and as against the debtor of the account receivable notwithstanding any agreement limiting in any way the borrower's right to create a security interest.

(2) Nothing in this section affects any obligation or liability of the borrower for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to the account receivable or the credit agreement on the sole ground of the breach of that agreement, or raise against the lender any claim it may have as a result of such a breach against the borrower.

(3) A security interest in a deposit account is effective notwithstanding an agreement between the borrower and the bank or other financial institution limiting in any way the borrower's right to create a security interest.

(4) A security interest in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security interest in the intellectual property does not extend to the tangible asset.

Effectiveness of a security interest against third parties

Achieving third-party effectiveness

8. (1) Except as otherwise provided in this Act, a security interest is effective against third parties when the security interest has been created and registered under this Act.

(2) A security interest shall continue to be effective against third parties for as long as the registration of the security interest has not been discharged or its duration lapsed.

Extension of a security interest to proceeds

Comment [Ta11]: Further discussion

Comment [MD12]: This is another useful explanation of the principles underlying the creation of security interests. Consider whether it would be appropriate and useful to include.

9. (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds shall

(a) continue in the collateral that has been dealt with, unless the lender authorised the disposition; and

(b) extend to the proceeds.

(2) If the lender enforces the security interest against both the collateral and the proceeds, the recovery of the security interest from the collateral and proceeds is limited to the value of the collateral at the date of the disposition that gave rise to the proceeds.

Security interest with respect to proceeds

10. (1) A security interest with respect to proceeds shall continue to be effective against third parties

(a) if the security interest in the original collateral has, by registration, been made effective against third parties; and

(b) if the proceeds are

(i) of a kind that is within the description of the collateral in the registration; or

(ii) cash proceeds as defined in section 74.

(2) A security interest in proceeds not covered by subsection 1(b) is temporarily effective against third parties until the expiration of ten working days after the proceeds arose.

(3) The security interest in proceeds referred to in subsection (2) shall cease to be effective against third parties if the lender does not amend the registration within ten working days after the proceeds arose.

Concurrent registration not necessary for effectiveness of a security interest

11. (1) A security interest that covers a right to movable or immovable property which is registered in another registry is effective against a third party when the lender satisfies the requirements of this Act.

(2) Concurrent registration of a security interest in collateral ~~if immovable~~ in another registry is not required for purposes of making the security interest effective against other lenders, or an insolvency administrator.

(3) Concurrent registration of a security interest in collateral immovable in another registry is necessary for the security interest to be effective against buyers of the property immovable.

Effectiveness of a security interest against third parties by registration

Collateral Registry

12. There is established by this Act a registry known as the Collateral Registry.

Functions of the Registry

13. The functions of the Registry are

- (a) to register security interests in movable and immovable property;
- (b) to provide for and maintain a register of security interests; and
- (c) to provide and maintain a platform for searches.

Appointment and functions of the Registrar

14. (1) The Bank shall appoint a Registrar for the Registry and shall specify in the letter of appointment, the terms and conditions of the appointment.

(2) The Registrar shall not be required to

- (a) verify whether authorisation for registration has been properly granted under this Act; or
- (b) conduct a scrutiny of the information provided on the registration form.

Staff of the Registry

15. The Bank shall appoint other officers and employees as the Board considers necessary for the effective implementation of the functions of the Registry under this Act.

Registration of security interests

16. (1) A lender in whose favour a security interest is created shall register that security interest before the disbursement of credit or in any event, no later than twenty-eight days after the date of creation of the security interest.

Comment [MD13]: I am thinking whether this should not be limited only to protect the buyers of immovable property. A registration in the Collateral Registry that relates to a car should be fully effective even against buyers who should be searching the Collateral Registry. This would make the Collateral Registry more comprehensive, and the legal framework less complicated.

Comment [N14R13]: Disagree. We are view that it should apply to collateral in general. For instance it could movable collateral registered with the Companys registry. The principle should apply in such an event.

We need to discuss, as I am not sure what the intent is. The Company's Registry does not record ownership rights to assets, but rather charges over those assets. This provision is about a relationship of the Collateral Registry with those registry that record ownership rights, including the car and land registries.

(2) A lender that is subject to the supervision of the Bank, who fails to register a security interest within the specified period commits an offence and is liable to pay an administrative penalty of 10 penalty units for each day that the offence subsists.

(3) The Registrar may where he deems just and expedient waive in part the administrative penalties payable.

Authorisation to register

17. (1) The lender or a representative of the lender may register a registration form only with the consent of the borrower in **writing**.

(2) A borrower who enters into a credit agreement authorises the lender to register the security interest in the collateral described in that credit agreement.

Comment [MD15]: Section 3(3) refers to in writing or electronically, but here we are referring only to writing. Is the intention to limit authorization only to actual writing without the possibility of issuing one electronically? I think that anything that requires writing could be done electronically. We can simply define writing to include electronic records and refer to writing only throughout the Bill.

Public access to the Registry

18.(1) Any person may submit a form to the Registry, if that person

- (a) has established a user account with the Collateral Registry; and
- (b) has paid the prescribed fee.

(2) Any person may submit a search request to the Collateral Registry, if that person uses the prescribed search request form.

(3) If the registration or search request is refused, the Collateral Registry shall communicate the reason to the registrant or searcher within a reasonable time.

Particulars of registration

19. (1) The lender shall specify the following on the registration form:

- (a) the identifier of the borrower in the manner prescribed in the Registry Rules;
- (b) the identifier of the lender in the manner prescribed in the Registry Rules;
- (c) the maximum amount secured by the security interest;
- (d) a description of the collateral in the manner prescribed in the Registry Rules;
- (e) the period of time for which the registration shall be effective; and
- (f) any other information required by the Registry Rules.

(2) In furtherance of this section, the Registrar shall, with respect to each borrower, keep an index of registered security interests.

(3) The Registrar shall, in addition, index the registrations that identify the collateral by a serial number for which a description is required under the Registry Rules by that serial number unless those assets are held as inventory.

(4) The Registrar shall issue and deliver a certificate of the registration to the lender ~~or a registrant of a security interest.~~

(5) The lender ~~or a registrant~~ shall submit a copy of the certificate under subsection (4) to the borrower within fifteen days of receipt.

(6) The production of a certificate issued under subsection (4) in proceedings before a court is evidence of registration with respect to a security interest in the collateral specified in that certificate.

Registration of security interest in collateral

20. (1) A registration with respect to a security interest in collateral is effective when a registration number, date and time of registration is entered by the Registrar in the register.

(2) A registration with respect to a security interest in collateral is effective against third parties when it becomes publicly searchable.

(3) A single registration may relate to security interest created over one or more collateral of a borrower.

(4) The effectiveness of a registration shall not be affected by any defect, irregularity, omission or error, unless the defect, irregularity, omission or error is misleading to a searcher.

(5) The registration is ineffective if there is a misleading defect, irregularity, omission or error in the identifier of a borrower as a result of which the registration would not be disclosed when a search is conducted against the correct identifier of the borrower.

(6) The registration with respect to collateral required to be identified by a serial number is ineffective only as against a buyer if there is a misleading defect, irregularity, omission or error in the serial number as a result of which the registration would not be disclosed when a search is conducted against the correct serial number.

(7) An error of the kind covered by this section shall not render a registration ineffective with respect to other borrower or collateral that is sufficiently identified or described.

Comment [MD16]: Since we added 'or a registrant of a security interest' should it be added to subsection (5) below as well? If the registrant is different than the lender, the registrant should provide a copy to the borrower.

Do we need to refer to registrant of a security interest? I thought that a reference to 'registrant' would suffice. We can define the term 'registrant' too.

The sole grounds for the refusal to register

21. (1) A person may submit a registration form to the Collateral Registry, but the Registrar shall refuse to register it if

(a) it is not submitted in the prescribed form or in a manner that enables the information to be entered into the register; or

(b) the prescribed fee has not been paid by the person submitting the registration form, unless arrangements for its payment have been made in accordance with the Registry Rules.

Voluntary amendment of a registration

22. (1) An amendment to a registration may be effected only by a lender or an agent of the lender, by registering the amendment at the Registry at any time.

(2) The registration of amendment shall be before the expiration of the registration.

(3) An amendment to a registration that adds collateral other than proceeds, a new borrower or that modifies the maximum amount secured by the security interest is effective and has priority as to the added collateral, the added borrower and the new maximum amount only from the date when the amendment was registered.

Request for registration of discharge

2223. (1) A borrower may give a written demand to a lender to amend or discharge a registration if

(a) the obligations under the credit agreement to which the registration relates have been performed and there is not a commitment to make a future advance;

(b) the lender has agreed to release part of the collateral described in the registration;

(c) if the lender has agreed to reduce the maximum amount secured by the security interest;

(d) if the lender has agreed to the transfer of the borrowers obligations to a third party;

(e) the collateral described in the registration includes an item or kind of property that is not collateral under a credit agreement between the lender and borrower; or

Comment [A17]: The paragraphs below may need to be expanded to the duty to amend a registration to reduce the maximum amount secured by the security interest, required under section 18(1)(c), if that particular will be shown publicly.

Comment [N18R17]: This may not be practical. Will amendment have to be done everytime the borrower meets its periodic payment obligations. Or we looking at scenario where the lender agrees to give a certain amount but later disburse a lesser amount.

We are looking at the latter scenario. You and I enter into a credit agreement which stipulates the maximum amount as 1 million. Six months later we revise the agreement to reduce the maximum amount to 750,000.

The first scenario would be highly impractical, and, in any case, would come into play only if the Law required an indication of the actual amount owed.

Comment [MD19]: This is not a feature of any system – legal and registry – that I know. Let's discuss the purpose of this provision. Since I have never come across it, I would like to better understand the intent.

(f) the security interest has been extinguished in accordance with this Act.

(2) A lender shall, within fifteen working days after receipt of a demand from the borrower that complies with subsection (1), amend or discharge the registration, unless the registration lapses before the expiration of that period.

(3) If the lender fails to comply with the demand within fifteen working days after its receipt, the borrower making the demand under subsection (1) may apply to court for an order to compel the lender to register an amendment or discharge of the registration as appropriate.

Time and expiry of registration

24. (1) The registration is effective for the period stated in the registration form.

(2) The Registrar shall charge a fee for a registration as set out in the Registry Rules.

(3) A person may on notice to the borrower extend the effective date of a registration before its expiration.

Searches of the Registry

25. (1) A person may conduct a search at the registry and obtain a result of the search in accordance with this Act and the Registry Rules.

(2) A person conducting a search under subsection (1) may do so by reference to the following:

(a) the identifier of a borrower in accordance with the Registry Rules;

(b) if collateral is required to be described by a serial number or collateral identification under this Act and the Registry Rules, the serial number of the collateral or the collateral identification; or

(c) the registration number assigned to the registration.

(3) A person may carry out a search of the Registry without the need to justify the reasons for the search.

(4) The Registrar may, upon request and payment of a fee as prescribed in the Registry Rules, issue a result of the search in the form of a certificate.

Comment [N20]: Is there a need to discharge once the registration has expired.

No, that would not be even possible. The system should be designed that after a registration has expired, no amendments or discharges with respect to that registration could be made.

Comment [MD21]: I am not sure what this addition means. Is the intention to simply notify the borrower or actually procure some authorization? If it is the former, then it should be fine. Authorization for the registration and any extension of the duration is given in an agreement, and no further authorization from the borrower should be necessary.

Comment [MD22]: I am unclear as to why searches by collateral description that have some legal effect should be allowed. No modern registry provides for such types of searches. If the intention is to provide for this search as a service to users, it might not need to be governed by a law. Let's discuss.

Comment [A23]: We can discuss the practical use of this type of search. It is not very useful in the new kinds of registry systems where the user account holder has access to its registration history.

Comment [A24]: Let's discuss whether searches should be subject to a fee. We can also reserve this issue for the Registry Rules.

Comment [N25R24]: Searches ought to be subject to a fee unless we would want to refine it and make searches free for our registered users and require non registered users to pay a fee.

Yes, let's explore further.

(5) The result of the search issued under subsection (4) is irrebuttable evidence of the existence of the information in the Registry on the date and time the result is issued.

General Priority Rules

Priority between security interests

26. Priority between security interests in the same collateral is determined by the order of their registration.

Priority of a security interest in proceeds

27. Subject to sections 10, priority of a security interest in an original collateral is also the priority with respect to proceeds from that collateral.

Subordination of priority

28. (1) A lender may at any time in writing, subordinate its priority under this Act in favour of any existing or future lender or other creditor without the need for the beneficiary to be a party to the subordination.

(2) The agreement to subordinate the priority of a security interest shall not adversely affect the rights of a person who is not a party to the agreement.

Priority of future advances

29. The priority of a security interest extends to all secured obligations, including obligations incurred after the security interest became effective against third parties limited to the maximum amount stated in the registration.

Priority of purchase money security interest

30. (1) A purchase money security interest in collateral or its proceeds, other than inventory, has priority over a non-purchase money security interest in the same collateral created by the same borrower, if the purchase money security interest in the collateral or its proceeds is made effective against third parties by registration not later than **ten working days** after the day on which the borrower obtained possession of the collateral.

(2) A purchase money security interest in inventory or proceeds has priority over a non-purchase money security interest that was made effective against third parties by registration in the same collateral given by the same borrower, if

Comment [A26]: Let's discuss whether this time period is appropriate, and what the consequences of shorter/longer periods are.

(a) the purchase money security interest in the inventory or its proceeds is made effective against third parties by registration; and

(b) the lender receives a notification at the time the borrower obtains possession of the collateral.

Priority of security interest in accessions and commingled goods

31. (1) A security interest in goods that is made effective against third parties before the time when the goods become an accession has priority over a claim to the goods as an accession made by a person with an interest in the goods.

(2) Where the security interest in goods that is effective against third parties subsequently becomes part of a product or mass, and its identity is lost, that security interest shall continue in the product or mass.

(3) If more than one security interest in the goods is effective against third parties before the goods become part of a product or mass, the security interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.

Priority with respect to transferred collateral

32. (1) The rights of a borrower in collateral may be transferred despite a provision in a credit agreement prohibiting transfer or declaring a transfer to be a default.

(2) If a borrower transfers an interest in collateral that at the time of the transfer is subject to a security interest effective against third parties, that security interest has priority over any other security interest created by the transferee.

Priority of transferees of money, negotiable instruments, security certificates and deposited securities

Priority of transferee of money

33. A transferee of money takes the money free of a security interest, unless the transferee acts in collusion with a borrower in violation of the rights of a lender.

Priority of transferee of funds

34. A creditor who receives through any payments system, the payment of a debt owed to that creditor by a borrower shall receive the payment free of a security interest, unless the transferee acts in collusion with a borrower in violation of the rights of a lender.

Priority of a purchaser of a negotiable instrument, a document of title, or a security certificate

35. A purchaser of a negotiable instrument, document of title, or security certificate has priority over a security interest in that negotiable instrument, document of title, or security certificate effective against third parties, if the purchaser

(a) gave value;

(b) acquired the negotiable instrument, the document of title, or the security certificate without knowledge that the transaction is a breach of a credit agreement to which the security interest relates; and

(c) took possession of the negotiable instrument, the document of title, or the security certificate.

Priority of buyers

Priority of buyer or lessee

37. (1) A buyer or lessee of movable property collateral acquires that movable property free of a security interest that has not been made effective against third parties if the movable property was acquired for value.

(2) A buyer of goods sold in the ordinary course of business of a seller, and a lessee of goods leased in the ordinary course of business of a lessor, shall take the goods free of any security interest, unless the buyer or the lessee knows that the sale or the lease constitutes a breach of a credit agreement under which the security interest was created.

(3) A buyer of immovable property for value shall, where the mortgage of the lender has not been recorded under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96), take that immovable property free of a security interest that has been made effective only under this Act.

Comment [Ta27]: Open for discussion

Comment [A28]: We can discuss the difference between taking free of the security interest created by the seller and any security interest that might have been created by the seller's predecessor in title.

Priority rules related to interests in immovable property and fixtures

Priority of mortgages

38. A security interest in an immovable property in the form of a mortgage that is made effective against a third party under this Act has priority over any other mortgage subsequently registered under this Act, the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

Priority of right to payment related to immovable property

39. (1) Security interest in a rental payment or a right to payment that arises in connection with an immovable property that is made effective against third parties under this Act has priority over any other security interest or mortgage subsequently registered under this Act, Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

(2) A buyer of an immovable property in respect of which a security interest in a rental payment or a right to that payment has been made effective against a third party under this Act and not recorded under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96), takes that immovable property free of that security interest.

Priority of security interests in fixtures

40. (1) A security interest in a fixture made effective against third parties under this Act has priority over any other security interest or mortgage subsequently registered under this Act, the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

(2) The buyer of an immovable property that includes a fixture that is subject to a security interest made effective against a third party under this Act and not recorded under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96) takes that fixture free of the security interest.

Special priority provisions for a lien arising by operation of law

Possessory lien with respect to movable property

41. A possessory lien in a movable property created by operation of law and held by a person who provided materials or services in respect of that movable property that is the subject of a security interest made effective against third parties under this Act, has priority over that security interest if

(a) the materials or services relating to the lien were provided in the ordinary course of business;

(b) the lien has not arisen under an Act that provides that the lien does not have the priority; and

(c) the person who provided the materials or services did not, at the time the person provided those materials or services, know that a credit agreement relating to the materials or services contained a provision prohibiting the creation of a lien by the borrower.

Lien with respect to immovable property

42. A possessory lien in an immovable property created by operation of law and held by a person who provided materials or services in respect of that immovable property that is the subject of a security interest made effective against third parties under this Act has priority over that security interest, if the person providing the materials or services registered the lien under this Act before the security interest was registered.

Comment [Ta29]: Open to discussion

Comment [A30]: Let's discuss this because I am not sure this rule provides a fair result. It is also contrary to the preceding rule under which a lien over movable would have priority.

Judgment liens

43. (1) The interest of a judgment creditor in collateral shall have priority over any security interest in the same collateral if the security interest is not made effective against third parties at the time of execution.

(2) In this section, "time of execution" means

(a) the time of seizure, if movable property is seized by or on behalf of an execution creditor;

(b) the time when a judicial order is served on a person who is holding movable property for or on behalf of a borrower; or

(c) the time when notice of a judgment or order with respect to movable or immovable property is registered in the Collateral Registry.

Comment [Ta31]: Legally, under our laws there's no such thing as a notice of judgment.

True, but the Collateral Registry is not designed to register a judgment. Rather, it is designed to register forms in which information is entered. So, my addition was meant to say that a judgment creditor will register an electronic form in which she will enter some information from the judgment. In any case, we can discuss the mechanics and then settle on the appropriate statutory text.

Comment [A32]: I added this assuming that the actual judgment or order will not be registered.

Enforcement of obligations of the borrower

Applicability

44. (1) This chapter applies to a security interest other than an outright assignment of an account receivable.

(2) If the security interest extends to both movable and immovable property, the lender may proceed under

(a) this chapter with respect to movable property and the Home Mortgage Finance Act, 2008 (Act 770) with respect to immovable property, or

(b) this chapter with respect to both movable and immovable property.

(3) The lender may exercise any other right provided in the credit agreement, except to the extent it is inconsistent with the provisions of this Act.

(4) Where there is a conflict between this Act and other enactments applicable to the enforcement of the rights of a lender, this Act shall prevail.

Default

45. (1) Where a borrower

(a) fails to make payment on the specified date for payment, or

(b) breaches a term of the credit agreement,

the lender shall give notice of default to the borrower in writing and request the borrower to pay the amount due within thirty days.

(2) The lender may deliver the notice by

(a) hand personally;

(b) courier service;

(c) registered mail; or

(d) other means agreed upon by the lender and the borrower in the credit agreement.

(3) A notice delivered

(a) by hand, is effective on the date it is received by or on behalf of the borrower;

(b) by courier service or registered mail, is effective on the date it is officially recorded as delivered by return receipt or its equivalent; or

(c) by other means, is effective on the date it is made available to the borrower.

(4) If a borrower fails to

Comment [N33]: I am of the view we need to specify the time period as it in the case in the current act.

I do not quite agree because the length of the cure period may depend on the circumstances. Thirty days may be too long if the default is significant and there is a risk that the collateral may deteriorate. The period of time should rather be "reasonable" under the circumstances.

This 30-day cure period is also inconsistent with section 46 below which allows the lender to enforce its rights on delivery of a notice, rather than 30 days thereafter.

Comment [MD34]: Let's discuss the problems with delivering notices of default. CAL Bank indicated that in their practice it is challenging for them to deliver such notices to borrowers who intentionally avoid receiving such notices.

- (a) pay the amount outstanding;
- (b) make satisfactory arrangements to pay the amount outstanding to the lender; or
- (c) cure a default other than failure to make payment;

within the time period stipulated in the notice, the lender may enforce the rights ~~set out in section 44 provided for under this Act or in the credit agreement.~~

Comment [A35]: In light of section 43(3), I think we need to add this language.

If we need that language, we should also be referring to the remedies under some other enactments that this Act does not preclude – see s. 44(2)(a).

Remedies of lender on default

46. Where a borrower defaults and the lender delivers a notice of default under section 45, the lender may

- (a) sue the borrower on any covenant to perform under the credit agreement; or
- (b) realise the security interest in the collateral without initiating proceedings in court.

Lender's right to possession

47. (1) The lender may take possession of the collateral or render the collateral unusable without removal.

(2) Where a lender has a right to take possession of the collateral, the lender may enforce that right without initiating proceedings in court for that purpose.

(3) Where a lender is unable to enforce a right of possession in a peaceable manner, the lender may, in accordance with a warrant issued by a court under section 48, use the services of the police to

- (a) remove the collateral; or
- (b) evict the borrower or other person in possession of the collateral, where the collateral is immovable property.

Comment [MD36]: Let's discuss the effect of this rule on third parties. I am thinking about this scenario. I own a building that I lease to Ben who registers the lease in the land registry. Subsequently, I give a mortgage to Nana who registers it in the Collateral Registry. Eventually, I default. Should Nana have the power to evict Ben even though his lease was registered before the mortgage? Or, should that power exist only if the lease was registered or entered into subsequently to the security interest?

(4) A person who

- (a) fails without reasonable excuse, to vacate premises being foreclosed by a lender under subsection (1) when duly requested to do so, or
- (b) obstructs a lender in the lawful exercise of a right conferred on the lender by this section commits an offence and is liable on summary conviction to a fine of not more than five hundred penalty units or to a

term of imprisonment of not more than three years or to both; and in the case of a continuing offence, to a further fine of not more than fifty penalty units for each day the offence continues.

(5) A lender is not required to give prior notice to the borrower before repossessing or rendering collateral unusable under this section.

(6) A lender shall upon taking possession of a collateral, register a notice of that fact in the Registry.

Comment [MD37]: What is the purpose of this registration?

If it is to indicate that an enforcement process has commenced, it is too narrow because it does not apply to intangibles and immovables. Why would there be a need for this registration when the collateral is tangible but not when it is intangible or immovable?

Judicial enforcement

48. (1) Where a borrower receives from the lender notice of a request made by the lender to a court for a warrant to be issued for the purpose of removing a collateral, evicting the borrower or other person in possession, that borrower may within three days after receipt of the notice, object to the request by giving evidence to the court that:

- (a) full payment of the amount owed has been made by the borrower;
- (b) ~~some other~~ default has been cured; or
- (c) default has not occurred.

(2) The court shall issue a warrant, if five days after service of the notice of the request for a warrant on the borrower, the borrower does not file an objection to the request for a warrant.

(3) Where the court does not issue a warrant in accordance with subsection (2), the lender is deemed to be authorised to use the services of the police to

- (a) remove the collateral; or
- (b) evict the borrower or other person in possession of the collateral, where the collateral is immovable property.

(4) If after the lender has commenced enforcement in accordance with subsection (3), the court subsequently determines that the lender did not have sufficient grounds for enforcement, the court shall order the lender to suspend the enforcement process and the lender is liable to pay actual and punitive damages to the borrower.

(5) An appeal against the decision of the court under this section shall not operate to suspend the enforcement process.

Application of collateral in satisfaction of obligation

49. (1) A lender may collect and apply an account receivable, security, money or a negotiable instrument taken as collateral to the satisfaction of the obligation secured by the collateral if the borrower is in default.

(2) Unless otherwise agreed between the lender and the borrower, the lender may notify the account debtor and collect payment even prior to default by the borrower.

Disposing off collateral after default

50.(1) A lender may in accordance with the provisions of a credit agreement sell the collateral either by auction, public tender, private sale or any other method provided for in the credit agreement.

(2) For the purposes of this Act, where a lender is realizing its security interest in collateral by way of auction in accordance the Auction Sales Act, (PNDCL 230), the process of realization by the lender shall be deemed as an execution of a judgment debt.

(3) For the purposes of this Act where a lender as provided for under subsection 1 sells the collateral either by auction, public tender, private sale or any other method provided for in a credit agreement to purchaser, a transfer of legal title in collateral shall be effected by a court of competent jurisdiction.

Notice of sale of collateral

51. (1) A lender who intends to sell collateral under this Part shall, at least ten working days before the sale, give notice to the following persons:

- (a) the borrower and the debtor;
- (b) a person who has registered a security interest with respect to the same collateral before the lender took possession of the collateral; and
- (c) any other person that has given the lender notice that that person claims an interest in the collateral before the lender took possession of the collateral.

(2) Subsection (1) does not apply if

- (a) the collateral may perish within ten working days of taking possession;

Comment [A38]: The only form of disposal will be sale? If the collateral is IP, the lender can't instead license it? Let's discuss what is more practical. If the collateral is immovable, the lender may also want to lease it, instead of selling.

Comment [Ta39]: Disagree with comment. This section only contemplates a complete disposal or divestment of interest in the property.

My question remains - why does this section contemplates a complete disposal? All modern laws contemplate other forms of disposal that could be more practicable under the circumstances. My question is what is so different in Ghana that we should limit it to sales? Let's discuss.

Comment [MD40]: I do not understand the purpose of this portion of the sentence. If the sale is conducted extrajudicially, why should the court get involved in effecting the transfer of title? If I sell Ben's three cows at a public auction to the highest bidder, why should the court get involved? Maybe, I am just misunderstanding the purpose of this paragraph.

(b) the lender believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately;

(c) the cost of care and storage of the collateral is disproportionately large in relation to its value;

(d) after the lender takes possession of the collateral, and every person entitled to receive notice under subsection (1) consents in writing to the immediate sale of the collateral; or

(e) a court grants leave to the lender to sell the collateral without complying with subsection (1).

Discharge of security interests

52. Where collateral has been sold under section 50, any security interest in that collateral and its proceeds that are subordinate to the security interest of the lender who sold the collateral is extinguished.

Accounting for sale

53. Where collateral is sold, the lender shall, within fifteen (15) working days after the sale of the collateral, give the persons referred to in section 51 (1) a statement of account in writing, showing

(a) the amount of the gross proceeds from the sale;

(b) the amount of the costs and expenses of the sale; and

(c) the balance owing by the lender to the borrower, or by the borrower to the lender, as the case may be.

Distribution of proceeds of sale

54. (1) A lender who has sold collateral under section 49 shall apply the proceeds of the sale towards

(a) the costs and expenses of the sale incurred by the lender, and

(b) legal expenses

before applying the net proceeds of the sale towards the satisfaction of the debt or other obligation secured by the security interest of the lender.

(2) After applying the proceeds in accordance with subsection (1), any surplus from the proceeds of sale of collateral shall be paid into an account designated by the Bank.

(3) The surplus from the proceeds of sale of collateral under subsection (2) shall be paid to a person who has a subordinate security interest or any other person that claims an interest in the collateral upon the order of the court in respect of the proceeds.

(4) Any remaining proceeds of sale after the required payments have been made shall be paid to the borrower.

Retention of collateral after default

55. (1) A lender who has priority over all other lenders may, after default of the borrower, propose to retain the collateral in full or partial satisfaction of the obligation secured by the collateral.

(2) The lender shall give notice of the proposal to the persons listed in section 50(1).

(3) The lender shall sell the collateral under section 49 if a person who is entitled to a notice under section 50 (1) and whose interest in the collateral would be adversely affected by the proposal of the lender to retain the collateral gives to the lender a notice of objection to the proposal to retain the collateral within ten working days after receiving the notice referred to in subsection (2).

(4) Where the retention of collateral is by a bank or a specialised deposit-taking institution, the retention period shall be in accordance with the provisions of the Banks and Specialised Deposit-taking Institutions Act.

Effect of retention of collateral

56. (1) Where a notice of objection is not received by the lender at the expiration of the ten working days period referred to in section 55 (3), the lender is deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured by it.

(2) An election by a lender to retain collateral under subsection (1) extinguishes other security interests in that collateral subordinate to the security interest of that lender.

Right to settle the debt and redeem collateral

57. (1) A person who is entitled to receive a notice under section 51 (1) may, at any time before a lender sells the collateral in accordance with sections 49 or is deemed to have retained the collateral in accordance with section 55, settle the debt and redeem the collateral by tendering to the lender,

- (a) the principal amount owed to the lender,
- (b) the accrued interest on the principal amount,
- (c) any fee for the prepayment of an obligation, if agreed between the borrower and the lender,
- (d) other fees payable by the borrower to the lender up to the date for settlement, and
- (e) a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for sale, if those expenses have actually been incurred by the lender, and any other reasonable expenses incurred by the lender,

unless the person otherwise agrees in writing after the borrower has defaulted.

(2) The right of the borrower to redeem the collateral has priority over the right of any other person to redeem that collateral.

Appointment of receiver or manager

58. A lender in whose favour a security interest is created may upon default of the borrower

- (a) appoint a receiver or manager; or
- (b) apply to court for the appointment of a receiver or manager to
 - (i) take possession of and protect the property;
 - (ii) collect the rents and profits derived from the property; and
 - (iii) enforce the security interest on behalf of the lender.

Registration of appointment or removal of a receiver or manager

59. (1) A person who

- (a) appoints a receiver or manager;
- (b) obtains an order for the appointment of a receiver or manager; or
- (c) enters into possession of the property under the powers contained in a credit agreement shall, within ten days after the date of the appointment, order or entry into possession, submit notice in the prescribed form of that fact to the Registry.

Comment [MD41]: Please, compare with s. 47(6) – they appear to cover the same subject-matter. Paragraphs (3) of this section relates to this paragraph, so it would be difficult to delete this paragraph without addressing its relationship with paragraph (3) of this section.

Furthermore, the title of this section relates to receivers and managers, but this paragraph is about the lender taking possession of the collateral directly. Should the title be modified?

(2) The Registry shall enter and relate the notice of appointment of a receiver or manager with the relevant registration relating to the borrower.

(3) Where a

(a) person appointed receiver or manager of the property ceases to act as receiver or manager, or

(b) person who has entered into possession relinquishes possession,

the lender shall, within ten days of the occurrence of the events in subsection (a) or (b), submit a notice to that effect in the prescribed form to the Registry who shall make an entry in respect of the relevant registration in the register.

Comment [A42]: We can either delete this or use these words in subsection (2) as well. The forms that indicate the appointment and a removal shall be "prescribed."

(4) A person who fails to submit a notice under this section commits an offence and is liable on summary conviction to

(a) a fine of not more than one thousand penalty units, in the case of an entity; or

(b) two hundred and fifty penalty units or to a term of imprisonment of not more than two years or to both, in the case of an individual.

Supervisory and enforcement role of Bank of Ghana under this Act

Functions of the Bank under this Act

60. (1) In furtherance of this Act, the Bank shall

(a) *promote the effective functioning of* the Collateral Registry

(b) promote and support the development of a fair, transparent, competitive, and accessible credit market;

(c) receive complaints, in writing, from the public about alleged contraventions of this Act;

(d) monitor the credit market to detect and prevent conduct that is prohibited by this Act; (e) conduct investigations to ensure compliance with this Act;

(f) issue and enforce compliance orders;

(g) promote public awareness of credit matters, through

(h) public education, the design and dissemination of information to the public; or

(ii) the provision of guidance to the credit market and industry;

(iii) adoption of other measures to develop public awareness of the provisions of this Act;

(j) advise the Minister on matters of national policy related to credit and on the determination of standards as regards protection of the rights of borrowers and lenders in terms of this Act; and

(k) report on the volume and cost of different types of credit products, market practices relating to those products, and their implications for the choice for the borrower and competition in the credit market to the Minister annually.

(2) In furtherance of subsection (1), the Bank may

(a) *have* regard to international developments in the field of credit and financing; or

(b) consult a person, organisation or institution about a matter.

Rules by the Bank

61. The Bank may, by Notice, make rules for the effective implementation of this Act.

Investigation

62. Where the Bank has reason to suspect that a person has

(a) committed an offence under this Act, or

(b) committed the offence of fraud or dishonesty in relation to a credit agreement,

the Bank may conduct investigations as it considers necessary in pursuance of this Act.

Examination by Bank

63. (1) The Bank may, in the performance of its supervisory function, examine the books, accounts, documents and transactions of a lender subject to the supervision of the bank and may make copies or take possession of the records of that lender.

(2) The Bank may appoint a person to perform the function specified in subsection (1) on terms and conditions determined by the Bank.

(3) A lender who is subject to supervision by the Bank shall give the Bank access to and shall produce books, accounts, documents and information required to conduct the inspection.

(4) A person who, without reasonable excuse, fails to furnish the Bank with information required by the Bank commits an offence and is liable on summary conviction to a fine of not less than one thousand penalty units and not more than two thousand penalty units or to a term of imprisonment of not less than two years and not more than four years or to both.

(5) A person shall not, without the previous consent in writing of a lender, disclose information obtained under this section from the books produced by the lender who has custody or control of the books.

(6) Subsection (5) does not apply to

(a) publication or disclosure of the information to the Bank, its officers and employees; or

(b) where the publication or disclosure is required for the purposes of criminal proceedings or other action under this Act.

Order for search of premises

64. (1) Where the Bank has reasonable grounds to suspect that

(a) an action prohibited by this Act has taken place, is taking place, or is likely to take place on or in the premises;

(b) an article connected with an investigation into the prohibited conduct is in the possession of, or under the control of a person who is on or in the premises; or

(c) a book, the production of which has been requested by the Bank but which has not been produced in compliance with the direction is in the possession of a person who is in the premises or has control of that premises,

the Bank may apply to a court for the issue of a warrant authorising the Bank or a person named in the warrant to enter and search the premises.

(2) A person authorised to enter and search premises may

(a) search any person on the premises if there are reasonable grounds to believe that the person has personal possession of an article or document that has a bearing on an investigation being undertaken by the Bank;

(b) examine an article or document that is on the premises and that has a bearing on an investigation being undertaken by the Bank;

(c) request information from

(i) the owner of an article or document,

(ii) a person in control of the premises where the article or document is kept;

(iv) a person who has control of the article or document; or

(v) any other person who may have information about that article or document;

(d) take extracts from, or make copies of, any book or document that is in the premises and has a bearing on an investigation being undertaken by the Bank;

(e) use any computer system on the premises, or require assistance of a person on the premises to use that computer system, to

(i) access data contained in or available to that computer system;

(ii) reproduce a record from that data;

(iii) seize an output from that computer for examination and copying; and

(iv) attach, and if necessary, remove from the premises for examination and safekeeping, any item that has a bearing on an investigation being undertaken by the Bank.

(3) In this section "premises" includes structure, building, place, aircraft, vehicle and vessel.

Power of court to make certain orders

65. (1) Where on the application by a person alleging infringement under this Act, it appears to a court that another person

(a) has committed an offence under this Act;

(b) has contravened the conditions or restrictions of a licence or a code of conduct issued by or with the permission of the Bank; or

(c) is about to do an act that, if done, would be an offence or contravention of this Act;

the Court may, without limitation to other orders it may make, make an order to secure compliance with any other order under this section, and direct that other person to do or refrain from doing a specified act.

(2) A person who, without reasonable excuse contravenes or fails to comply with an order under subsection (1) commits an offence and is liable on summary conviction to a fine of not less than three thousand penalty units and not more than five thousand penalty units or to a term of imprisonment of not less than five years and not more than ten years or to both.

Administrative and criminal sanctions

66. (1) The Bank may impose an administrative penalty of not more than the monetary equivalent of five thousand penalty units and in the case of a continued breach, to an additional penalty of the monetary equivalent of not more than fifty penalty units for each day the breach continues.

Borrower's rights

Right to apply for credit

67. (1) A person who has a legal capacity to enter into a contract may apply to a lender for credit.

(2) A lender may refuse to enter into a credit agreement with a prospective borrower on reasonable commercial grounds consistent with the customary risk management and underwriting practices of the lender.

(3) This Act does not establish a right of a person to require a lender to enter into a credit agreement with that person.

Protection against discrimination in respect of credit

68. (1) A lender shall not discriminate against a person on the grounds of race, gender, ethnicity, political affiliation, the country of residence, or religion to

(a) assess the ability of the person to meet the obligations of a proposed credit agreement;

(b) decide whether to refuse an application to enter into a credit agreement, or to offer or enter into a credit agreement;

(c) determine an aspect of the cost of a credit agreement to the borrower;

(d) propose or agree on the terms and conditions of a credit agreement;

(e) assess or require compliance by the person with the terms of a credit agreement;

(f) exercise any right of the lender under a credit agreement, this Act or any legislation relating to credit; or

(g) determine whether to continue, enforce, seek judgment as regards a credit agreement or terminate a credit agreement.

(2) A person aggrieved by a decision of a lender may make a complaint to the Bank for redress.

Delivery of documents

69. A lender may deliver a document to a borrower

(a) in person;

(b) by ordinary mail;

(c) by facsimile;

(d) by electronic-mail;

(e) by printable web-page; or

(f) any other means agreed between the lender and the borrower.

Borrower's credit rights

70. (1) A lender shall not in response to a right exercised by a borrower under this Act

(a) penalise the borrower;

(b) alter, or propose to alter the terms or conditions of a credit agreement with the borrower to the detriment of the borrower; or

(c) take an action to accelerate, enforce, suspend or terminate a credit agreement with the borrower.

(2) Where a credit agreement or the provision of a credit agreement is

(a) declared by a court to be unlawful, and

(b) severed from the agreement,

the lender in that agreement shall not, in response to that decision,

(c) alter the terms or conditions of any other credit agreement with a party to the impugned agreement, except to the extent necessary to correct the unlawful provision, or

(d) take an action to accelerate, enforce, suspend or terminate another credit agreement with another party to the impugned agreement.

Confidentiality, personal information and borrower credit records

71.(1) A lender or a person who acts on behalf of a lender shall not disclose information obtained from a borrower unless the information is required under

(a) the Credit Reporting Act, 2007 (Act 726);

(b) any other law; or

(c) by a court of competent jurisdiction

(2) Despite subsection (1), a lender subject to the consent of the borrower may disclose information obtained from the borrower to another

lender, person.

Pre-agreement disclosure

72. A lender regulated by the Bank shall not conclude a credit agreement with a prospective borrower unless the lender provides the prospective borrower with a pre-agreement statement and quotation in the form specified in the Schedule.

Comment [MD43]: I would substitute this word with "person." This is because a third party inquiring about the collateral may also be a potential buyer. For instance, I want to buy Ben's machine but a search of the CR reveals a registration. Ben is telling me that he owes only very little money on that loan. I would need to know how much he actually owes to be able to price the equipment accordingly.

Miscellaneous

Regulations

73. The Minister may, in consultation with the Bank, by legislative instrument make Regulations for the effective implementation of this Act

Interpretation

74. In this Act, unless the context otherwise requires,

"accession" means goods that are physically united with other goods in a manner that the identity of each of the original goods is not lost;

"Bank" means the Bank of Ghana continued in existence under section 1(1) of the Bank of Ghana Act, 2002, (Act 612);

"bank" means any other than the Bank of Ghana;

"cash proceeds" means money, cheques, deposit accounts or other similar medium of exchange;

"collateral" means movable or immovable property that is subject to a security interest;

"creditor" means a person to whom money is owed;

"Collateral Identification Number" means

i) in the case of a vehicle, the vehicle identification or chassis number marked or attached to the body frame by the manufacturer;

ii) in the case of other movable property the serial number marked on or attached to property by the manufacturer;

iii) in the case of immovable property, the plot, land registration or indenture number of the land or building

Comment [MD44]: Let's discuss the legal requirement to identify assets, other than cars and immovables, by serial numbers. If such identification is simply optional, this should be fine.

"debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the borrower who granted the security interest, including a secondary obligor such as a guarantor of a secured obligation;

"equipment" means a tangible asset that is primarily used or intended to be used by the borrower in the operation of its business other than inventory or consumer goods;

"finance lease" means a lease agreement, including a hire-purchase agreement, even if not nominally referred to as a lease, under which, at the end of the lease—

- (a) the lessee automatically becomes the owner of the asset that is the object of the lease;
- (b) the lessee may acquire ownership of the asset by paying no more than a nominal price; or
- (c) the asset has no more than a nominal residual value;

"inventory" means goods that are

- (a) held by a person for sale or lease;
- (b) to be provided under a contract for services;
- (c) raw materials or work in progress; or
- (d) materials used or consumed in a business;

"lender" means a person who enters into a credit agreement with a borrower and includes

- (a) a person that sells goods on credit;
- (b) a person that provides services on credit;
- (c) a finance lessor; and
- (d) a buyer of accounts receivable;

"lien" includes an interest in property created by an order, a decree, a judgment, or any other statutory lien;

Comment [A45]: If this definition is exhaustive, we should say "means" instead of "includes."

Comment [Ta46]: Definition not intended to be exhaustive.

Does this include tax liens?

"mass or product" means tangible assets that are so physically associated or united with other tangible assets that they have lost their separate identity;

"proceeds" means an identifiable or traceable property received as a result of sale or other disposition, collection, lease or licence of collateral, civil or natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of collateral;

"purchase money security interest" means

- (a) a security interest in collateral retained by a seller that secures an obligation to pay an unpaid portion of the purchase price of the collateral;
- (b) a security interest taken by a person who gives value for the purpose of enabling a borrower to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or

(c) an interest of a finance lessor but does not include a transaction of sale and lease back to the borrower;

"security interest" means a property right in a movable or immovable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest, and regardless of the type of asset, the status of the borrower or lender, or the nature of the secured obligation; and includes fixed and floating charge, chattel mortgage, mortgage over an immovable property, contractual lien, pledge, outright or security assignment of receivables, reservation of title, finance lease, trust for the purposes of security, or other encumbrance of any nature created by an agreement other than a lien arising by operation of law;

"value" means consideration that is sufficient to support a simple contract, and includes an antecedent debt or liability, and a binding commitment to provide future value.

Modification and repeals

754. (1) Except as otherwise provided in this Act, the provisions of this Act on effectiveness of security interests against third parties, registration, priority and enforcement shall, on the commencement of this Act, supersede any provisions in existing enactments applicable to security interests in movable and immovable property.

(2) Registration of security interests only in the registries other than the Collateral Registry under this Act does not render security interest effective against third parties.

Transitional provisions

765. (1) A prior security interest that was effective against third parties under the prior law shall continue to be effective against third parties under this Act during the transitional period of three months ~~unless it would have ceased to be effective against third parties under the prior law earlier.~~

(2) ~~An existing~~ lender may, before the end of the transitional period, make its prior security interest effective against third parties under this Act.

(3) A security interest created before February 2010 is subject to the provisions in Part III and shall be enforced in accordance with the Act under which it was created.

(4) For a security interest created before February 2010 to retain the effectiveness of that security interest against a third party and priority from the date of its creation, the owner of that security interest shall register the

Comment [Ta47]: disagree. This should be maintained.

I did not suggest to delete this provision, rather add another paragraph/section that specifically details the laws to be abrogated/amended. This is how it is done in most countries, and it also has the benefit to avoid any doubts. You have also started doing it under section 77 below.

Comment [A48]: Should we be more specific and clearly identify the Acts, and their provisions, which will need to be amended or repealed?

Comment [Ta49]: Flagged for further discussions

Comment [A50]: This is neither a modification nor repeal. Do we even need this provision since the rules on third-party effectiveness clearly specify which registration and where is sufficient?

Comment [A51]: This is necessary for the situations where, for instance, the registration under a prior law lapses before the 3-month transitional period under this Act expires.

Comment [Ta52]: Disagree. Could you please explain the reason for your disagreement?

security interest under this Act within three months from the date of commencement of this Act.

(6) Subject to subsection (7), prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Act.

(7) If any step has been taken to enforce a security interest before the entry into force of this Act, enforcement may continue under prior law or may proceed under this Act.

(8) Prior law that applied to prior security interests immediately before the entry into force of this Act determines whether a prior security interest was created.

(8) A prior security interest remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Act.

(8) If the security interest is not registered before the expiration of the transitional period, the prior security interest is effective against third parties only from the time it is registered under this Act.

(9) The time to be used for determining the priority of a prior security interest is the time it became effective against third parties under prior law.

Comment [Ta53]: Flagged . Open for discussions

Comment [A54]: Let's discuss if we need these rules.

Comment [A55]: Consider adding these provisions to make the transitional section more comprehensive.

Comment [N56R55]: For further discussion

Repeals

77. The Chattel Transfer Act, 1952 is hereby repealed and revoked.

SCHEDULE

(Section 71)
Pre-agreement disclosure

PRE-AGREEMENT TRUTH IN LENDING DISCLOSURE STATEMENT:

(This is neither a Contract nor a commitment to Lend)

Lender's Name:
 Applicant

Prepared by:

Address:
 Application No:

Date prepared:

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS			
The cost of your credit at a yearly rate %	The amount the credit will cost you (specify currency and amount) US\$ or GH¢	The amount of credit provided to you or on your behalf US\$ or GH¢	The amount you will have paid after making all payments as scheduled US\$ or GH¢			
REQUIRED DEPOSIT PAYMENTS:						
Your payment schedule will be:						
<table border="0" style="width:100%"> <tr> <td style="width:33%">Number of Payments</td> <td style="width:33%">Amount of Payments</td> <td style="width:33%">When Payments Due</td> </tr> </table>				Number of Payments	Amount of Payments	When Payments Due
Number of Payments	Amount of Payments	When Payments Due				
<input type="checkbox"/> DEMAND FEATURE: This obligation has a demand feature <input type="checkbox"/> VARIABLE RATE FEATURE: This loan contains a variable rate feature. A variable rate disclosure has been provided earlier.						

You may obtain the insurance from anyone you want that is acceptable to creditor. If you purchase property or flood insurance from creditor, you will pay US\$ or GH¢ for a one year term.

SECURITY: You are giving a security interest in:

The goods or property being purchased Real property you already own

FILING FEES: US\$ or GH¢

LATE CHARGE: If a payment is more than [] days late, you will be charged %

PREPAYMENT: If you pay off early, you

will or will not have to pay penalty of []

may or may not be entitled to a refund of part of the finance charge.