

**THE SCOPE OF BANKS' POWER IN THE ENFORCEMENT OF  
SECURITY INTERESTS UNDER ETHIOPIAN LAW: LESSONS FROM  
THE US AND THE OHADA LAWS**

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### **Abbreviations and Acronyms**

Article 9	Article 9, Secured Transactions, the Uniform Commercial Code (2010)
NBE	National Bank of Ethiopia
OHADA	Organization for the Harmonization of Business Law in Africa
PMPBP	Property Mortgaged or Pledged with Banks (as amended) Proclamation No. 97/1998
Security Act/Act	OHADA Uniform Act Organizing Securities of 15 December, 2010
UCC	Uniform Commercial Code

## **Abstract**

An examination of the Ethiopian PMPBP, as expounded by the pertinent decisions of the Federal Supreme Court Cassation Division, reveals that it confers enormous power on banks, since it allows banks, upon their debtors' default, to extra-judicially enforce their claims over collateral. However, it is not clear from the PMPBP whether the other methods of enforcement contained in the Civil Code, private disposition of collateral, and taking of collateral based on prior judicial authorization, can also be used by banks, even though it does not expressly repeal them. On the other hand, the PMPBP permits a debtor to bring an action against a bank that causes it damage due to its non-compliance with enforcement procedures. Yet, it does not provide detailed provisions regarding the nature and extent of liability of a bank. With the goal of attaining legal clarity and certainty and further protecting the interests of banks and debtors, therefore, the thesis, based on the lessons taken from Article 9 and the OHADA Security Act, provides some recommendations regarding the PMPBP, as part of Ethiopia's reform of its collateral law. Accordingly, it is suggested that the PMPBP be amended to address the uncertainty and lack of clarity on the relation between the Civil Code and the PMPBP on whether banks can, in addition to the enforcement methods contained in the PMPBP, utilize the methods available under the Civil Code. Furthermore, it is recommended that the PMPBP's provision on a bank's liability towards a debtor be detailed.

## INTRODUCTION

### I. Background of the Research

The importance of security has long been recognized in virtually all economies. As a result, “[the first] question any private lender asks is, ‘How do I get my money back?’”.<sup>1</sup> In order to answer this query, it is common for financial institutions, particularly banks, to demand a certain security, often the property of their borrowers, for the finances they provide to borrowers. Security, thus, mainly serves as a tool for, fully or partially, protecting banks from the risk of losing the money they supply to their clients in the event of their clients’ inability or unwillingness to repay. In other words, it serves as a means of protection of banks against the risks of insolvency<sup>2</sup> and failure to repay owing to other reasons of their borrowers.

This protective purpose of security is principally achieved by the enforcement of the security interests of banks over the property they hold as security. Enforcement and other issues relating to security interests, mainly the creation and perfection of the interests, are regulated by an area of law generally referred to as “collateral law”. The specific nomenclature of this area of law, however, varies from jurisdiction to jurisdiction, depending on such factors as differences in legal systems and traditions.<sup>3</sup>

Ethiopia, as is the case in other jurisdictions, has put in place the legal framework for using property as collateral. The Civil Code is the main law that regulates security interests on both

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<sup>1</sup> Heywood Fleisig, *Secured Transactions: The Power of Collateral*, FINANCE & DEVELOPMENT, (1996), at 44.

<sup>2</sup> 2 Philip R Wood, COMPARATIVE LAW OF SECURITY INTERESTS AND TITLE FINANCE - The Law and Practice of International Finance Series, (Sweet & Maxwell), (2<sup>nd</sup> ed., 2007), at 4.

<sup>3</sup> For instance, the field of law that governs security interests in personal property is known as “secured transactions law” in the US. § 9-101, Article 9. At this juncture, it must be noted that this thesis is written based on the 2010 version of Article 9 of the Uniform Commercial Code - Secured Transactions that is available at the Website of the Legal Information Institute of Cornell Law School (<https://www.law.cornell.edu/ucc/9>).

On the other hand, the term “secured transactions law” is unknown in Ethiopia. Rather, “pledge law”, as part of the Civil Code, is used to refer to the area of law that regulates security interests over movable property. Chapter 6 of Title XVII of Book V, “Contracts of Pledge”, Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, Gazette Extraordinary, 19<sup>th</sup> Year, No. 2, 5 May, 1960.

movable and immovable property. On top of the Civil Code, Ethiopia has laws that govern some aspects of collateral contracts, the notable ones being the PMPBP and the Business Mortgage Proclamation No. 98/1998, which apply when banks provide loans by holding collateral.

According to these bank collateral laws, banks have the power to enforce their security interests over property they hold as security without resorting to courts. Such power has a significant impact on both banks and defaulting borrowers. While it equips banks with the authority to easily and efficiently enforce and collect their claims,<sup>4</sup> it may substantially affect the property rights and interests of their borrowers. Therefore, it is essential to properly understand, appraise and delimit the scope of banks' power in the enforcement of security interests without judicial oversight in Ethiopia.

## **II. Research Question**

The fundamental question that this thesis addresses is, therefore, what the scope of banks' power in the enforcement of security interests under Ethiopian law is. In particular, it deals with the rights of banks in the course of enforcement, as laid down in the pertinent laws and interpreted in court decisions. More specifically, the methods of and procedures for enforcement, which principally involve the sale of borrowers' property by auction or their transfer to banks, and the liability of banks in relation to enforcement are examined. The research question is chosen because the area has not been properly researched and it is deemed vital, by the writer of the thesis, to fill this gap by producing a comparative research work. Moreover, the thesis evaluates Ethiopian security enforcement laws, as applied to banks, based on Article 9 and the OHADA Security Act. Accordingly, it provides some recommendations for reforming and better implementing the Ethiopian collateral law.

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<sup>4</sup> United States Agency for International Development (USAID), ETHIOPIA COMMERCIAL LAW & INSTITUTIONAL REFORM AND TRADE DIAGNOSTIC, (Jan. 2007), at 42.



At this juncture, it is desirable to justify why the OHADA and US laws are selected for the research. The US has one of the most developed, internationally influential<sup>5</sup> and up-to-date collateral law. Hence, Ethiopia can draw many lessons from the US system. Yet, the US system, as a sophisticated one, may not fully fit into the Ethiopian context because of the different socio-economic situations of the two systems. Partly with the hope of addressing this challenge, the OHADA law is also chosen in order to look for lessons for Ethiopia from its African counterparts. Additionally, the OHADA law, as is the US law, represents a collateral law that has been recently revised.<sup>6</sup> Thus, the OHADA and US laws are relevant and important for appraising and reforming Ethiopian collateral enforcement laws.

### **III. Objectives of the Research**

The thesis has three core objectives. It aims at exploring and filling the research gap in this area of Ethiopian law. It also aims at identifying important lessons for Ethiopia based on the US and OHADA laws. Finally, the thesis, it is hoped, will serve as an additional input for further research and development of the Ethiopian collateral law, particularly as applied by banks.

### **IV. Research Methodology**

The thesis is written based on the analysis of both primary and secondary sources of legal research. Accordingly, the relevant Ethiopian laws and the binding decisions of the Federal Supreme Court Cassation Division are primarily utilized. The laws of the US (Article 9 along with cases) and the OHADA (the Security Act) are also used. Besides, secondary sources on the laws, mostly books, articles and foreign cases, have served as vital input for the thesis.

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<sup>5</sup> Tibor Tajti, *COMPARATIVE SECURED TRANSACTIONS LAW*, (Akademiai Kiado), (2002), at 214.

<sup>6</sup> The Security Act was originally adopted in 1997. However, the 1997 version has been revised and supplanted by the existing Security Act in 2010. Article 227, the Security Act.

With respect to the section on OHADA law, the lack of many sources on the area written in English has been a serious challenge in the course of writing this thesis. This is mainly attributable to the fact that, although English and French are among the working languages of the OHADA,<sup>7</sup> many OHADA publications (books, articles and cases) are still typically made in French. Thus, the thesis does not discuss cases on OHADA law. The part of the thesis on OHADA law is written based only on the text of the OHADA law and the available secondary sources prepared in English. Hence, the thesis is admittedly limited in this regard.

## **V. Structure of the Thesis**

In terms of structure, the thesis is divided into three chapters. The first chapter provides a general overview of security and enforcement of security interests. It also deals with the major purposes and types of security as well as the methods of enforcement of security interests.

The second chapter specifically provides an introduction to the Ethiopian legal and banking system, and the collateral laws of Ethiopia and the US. Furthermore, it familiarizes the OHADA and its collateral law.

The last chapter is the principal part of the thesis. It deals with the scope of banks' power in the enforcement of security interests on movable property (pledges) under the Ethiopian, US and OHADA laws. It is mainly concerned with the rights, obligations and liabilities of banks while enforcing their security interests on movable property of their borrowers, by focusing on Ethiopian law in light of the US and OHADA laws.

Finally, some concluding remarks are provided. Additionally, some recommendations for Ethiopian bank collateral law are made on the basis of the lessons drawn from the US and OHADA laws.

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<sup>7</sup> Article 42, Treaty for the Harmonization of Business Law in Africa (as amended), (signed on 17 October 1993), (Port-Louis, Mauritius), (hereinafter referred to as "OHADA Treaty").

## **CHAPTER ONE**

### **OVERVIEW OF SECURITY AND ENFORCEMENT OF SECURITY INTERESTS**

This chapter deals with the three important concepts that underlie the thesis, i.e., security, security interests and enforcement of security interests. Thus, it provides a general overview of security, security interests and enforcement and the main justifications for their use. With its overview on the meanings and reasons for security, security interests and enforcement, the chapter is intended and expected to serve as a stepping stone into the subsequent chapters that deal with security and enforcement under the Ethiopian and the US legal systems as well as the OHADA system. In view of that, the chapter is divided into two major sections. While the first part explains the meanings, purposes and types of security and security interests, the next one is dedicated to expounding the meaning, purpose and methods of enforcement.

#### **1.1. Security and Security Interests**

##### **1.1.1 The Concepts of Security and Security Interests**

Though it is obvious that the word “security” has different meanings depending on which area of law or other field of study it is utilized, for the purpose of this thesis, it has the meaning ascribed to it in collateral laws. Accordingly, security refers to a “[c]ollateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor.”<sup>8</sup> It is, hence, the property over which a bank or another type of creditor has rights for the fulfillment of some obligations of its debtor, such as a repayment obligation under a loan contract.

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<sup>8</sup> BLACK’S LAW DICTIONARY, (7<sup>th</sup> ed., 1999), at 1358.

Likewise, a “collateral” has been defined as “an asset pledged by a borrower to a lender until a loan is paid back.”<sup>9</sup> This definition shows that the word “security”, as explained above, can be interchangeably used with “collateral”. It has to be borne in mind that this approach of interchangeably using “security” and “collateral” is also adopted in this thesis.

Another important notion with regard to collateral law, particularly in the US, is the “lien”. A lien is a “legal right or interest that a creditor has in another’s property, lasting usu. until a debt or duty that it secures is satisfied.”<sup>10</sup> Hence, it is a legally-enforceable interest that a person has over the property of another. A lien may be created by a law, judgment or contract.<sup>11</sup>

The other related crucial concept is a “security interest”, which refers to the rights of a creditor over a collateral (movable or immovable property).<sup>12</sup> In other words, a security interest is the “legal claim on collateral that has been pledged, usually to obtain a loan.”<sup>13</sup> Thus, the rights that a creditor has over a property which it holds as security are regarded as security interests of the creditor. In this thesis also, the term “security interest” is used in this sense, as referring to the rights of a bank over a collateral.

### 1.1.2 Major Purposes of Security

Various rationales are usually presented to justify the existence and use of different types of security. The most important of the justifications states that security is required to ensure that the person providing money or another property on credit (the creditor, such as a bank) will recoup its money, particularly during the bankruptcy of the borrower.<sup>14</sup> This, in the event of a borrower’s

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<sup>9</sup> B. Balkenhol & H. Schütte, Collateral, Collateral Law and Collateral Substitutes, Employment Sector, International Labour Office Geneva, (Social Finance Programme Working paper No. 26), (2<sup>nd</sup> ed.), at 11.

<sup>10</sup> Black’s, *supra* note 8, at 933.

<sup>11</sup> Tibor Tajti, *supra* note 5, at 41.

<sup>12</sup> *Id.*, at 34.

<sup>13</sup> Investopedia, “Security Interest”, available at <https://www.investopedia.com/terms/s/security-interest.asp> (last accessed on December 8, 2017)

<sup>14</sup> Gerard McCormack, SECURED CREDIT UNDER ENGLISH AND AMERICAN LAW, (Cambridge University Press), (2004), at 5.

default to perform its obligation towards a creditor, is achieved by a creditor directly taking the security or selling it to another person and satisfying its claims against the borrower from the proceeds. It has, therefore, been held that collateral has the purpose of protecting the collateral taker from the risk of insolvency of its counterparty (the collateral provider).<sup>15</sup> In other words, security “ensures that in the event of default of the debtor, the secured party will have a preferred claim on the collateral over the claims of other creditors or the debtor’s trustee in bankruptcy.”<sup>16</sup> It “operates as broad insurance against uninsurable risk or intentional default leading to nonpayment of the loan”.<sup>17</sup> Thus, a collateral protects a creditor from losing its money.

Aside from protecting a creditor from the risk of inability to recover its claims, a collateral incentivizes a creditor to take more risk and provide more finance. It makes a lender to be confident that it will recover its money whatever happens to the other assets of the debtor.<sup>18</sup> It also encourages a creditor to do more business, even with borrowers that have poor credit risks.<sup>19</sup>

Furthermore, security is important for borrowers, since it enables them to obtain credits,<sup>20</sup> which otherwise they could not have (easily) accessed. They could then use the money they acquire through the credits for the development of their businesses and their personal lives.

Security can result in better terms of loan as well, thereby benefiting a borrower.<sup>21</sup> A debt secured by an asset is more likely to result in a longer repayment period and lower rate of interest.<sup>22</sup> In other words, as the risk of non-payment becomes minimal for a creditor due to collateral, a debtor

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<sup>15</sup> Joanna Benjamin, *INTERESTS IN SECURITIES: A PROPRIETARY LAW ANALYSIS OF THE INTERNATIONAL SECURITIES MARKETS*, (Oxford University Press), (2000), at 79.

<sup>16</sup> Tajti, *supra* note 5, at 68.

<sup>17</sup> Heywood Fleisig *et al.*, *REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE*, the World Bank, (2006), at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> Benjamin, *supra* note 15, at 80.

<sup>20</sup> Fleisig, *supra* note 1.

<sup>21</sup> Heywood, *supra* note 17, at 4.

<sup>22</sup> *Id.*

gets credit based on better terms of loan, which mainly reduce the costs of borrowing and grant it longer repayment period.

Finally, it is often held that security is “the oil of the economy and the engine of economic growth.”<sup>23</sup> This explanation for the use of security is based mainly on the idea that security encourages lenders to provide more credits with lower costs of credit.<sup>24</sup> Borrowers will then use credits for their multifaceted goals, such as for establishing or expanding their businesses, which enables them to create job opportunities and generate tax revenues for their states, to mention but a few of their contributions to economic growth.

### 1.1.3 Types of Security

There are different ways of classifying security. The most common one of these ways is the categorization based on the nature and types of property utilized as security. Accordingly, when a real property<sup>25</sup> (immovable property) is used as security, the word “mortgage” is used, while the words “secured transaction” (in the US) and “pledge” (mainly in civil law legal systems) generally refer to a security interest created on a personal property<sup>26</sup> (movable property). But, in addition to these tangible property, security interests may be created on intangible property, such as intellectual property rights and account receivables.

The classification of security usually has implications on which law regulates security interests on which property, as distinct areas of law often govern the two categories. For instance, the Ethiopian

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<sup>23</sup> McCormack, *supra* note 14, at 15.

<sup>24</sup> *Id.*, at 15-16.

<sup>25</sup> The term “real property”, which is usually used in the common law world, refers to “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land”. Black’s, *supra* note 8, at 1234. Thus, it is equivalent to “immovable property” in civil law systems.

<sup>26</sup> On the other hand, the term “personal property”, as utilized in the common law, means “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” Black’s, *supra* note 8, at 1233. It is, therefore, the equivalent of “movable property” in continental legal systems.

Civil Code contains two separate sections for mortgages and pledges.<sup>27</sup> Similarly, in the US, while Article 9 and the corresponding laws of the states apply to security on personal property,<sup>28</sup> mortgages are subject to different laws of the states.<sup>29</sup>

## **1.2 Enforcement of Security Interests**

### **1.2.1 The Meaning of Enforcement**

As has been alluded to above, obtaining a security interest over a debtor's property is not an end in itself.<sup>30</sup> It is intended to enable a creditor to recover its claims against its debtor in the event of the failure of the borrower to fully or partly discharge its repayment obligation towards its creditor.<sup>31</sup> If a debtor discharges its contractual payment obligations to its creditor in accordance with the terms of their contract, the creditor's claims are said to be voluntarily satisfied.

Yet, it usually happens that debtors, due to different reasons such as bankruptcy, fail to perform their duties towards their creditors. In such cases, creditors take legal measures in order to collect their claims from their defaulting debtors. In other words, they enforce their rights (legal, contractual or judicial) against the property on which they had obtained security interests. This process of collection is generally referred to as "enforcement".

The concept of enforcement of a security interest has been defined as the act of taking the value of the collateral by a creditor with the aim of applying the value to all or part of the obligation owed

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<sup>27</sup> Chapter 4 of Title XVIII of Book V for mortgages and Chapter 6 of Title XVII of Book V for pledges, the Civil Code.

<sup>28</sup> Louis F. Del Duca *et al.*, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE AND INTERNATIONAL COMMERCE, (Matthew Bender & Company, Inc.), (2<sup>nd</sup> ed., 2011), at 19-20.

<sup>29</sup> Robert M. Plehn, *The United States*, in Winnibald E. Moojen and Matthieu Ph. van Sint Truiden (eds.), BANK SECURITY AND OTHER CREDIT ENHANCEMENT METHODS: A PRACTICAL GUIDE ON SECURITY DEVICES AVAILABLE TO BANKS IN THIRTY COUNTRIES THROUGHOUT THE WORLD, (Kluwer Law International), (1995), at 442.

<sup>30</sup> Linda J. Rusch & Stephen L. Sepinuck, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS, (Thomson Reuters), (2<sup>nd</sup> ed., 2010), at 134.

<sup>31</sup> Del Duca, *supra* note 28, at 7.

by its debtor.<sup>32</sup> Hence, enforcement is a tool for satisfying the claims of a creditor over its security in accordance with laws and contractual terms. However, it has to be noted that in order for creditors to enforce their security interests, they must comply with some legal requirements and procedures, such as the registration of their security interests and perfection, as prescribed in the laws of their jurisdictions.

### 1.2.2 Purpose and Methods of Enforcement

The purpose of enforcement is to enable creditors to collect their claims against their borrowers with the help of tools incorporated in collateral laws. Enforcement is a means of realizing the security value of collateral by a creditor. This is the reason why it has been held, by R Wood, that a “security interest is pointless if it cannot be enforced.”<sup>33</sup> Thus, enforcement is the key for achieving the chief purpose of security as a shield for a creditor from losing its money owing to the default of its debtor.

There are various methods of enforcement that are recognized in different legal systems. The most common of these is enforcement through a court order and supervision. In this method, the collateral is sold usually in a public auction, which “is intended to protect the debtor.”<sup>34</sup> The process of sale is also often subject to judicial oversight. This method of enforcement is particularly common in civil law legal systems.<sup>35</sup> In this regard, it has been remarked that:

“in most civil code jurisdictions, the original rule was that the secured creditor was generally limited to public auction, usually only after a court order. These jurisdictions historically gave priority to the protection of the debtor by insisting on judicial monitoring of enforcement and by a public sale designed to prevent an

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<sup>32</sup> Rusch & Sepinuck, *supra* note 30.

<sup>33</sup> Wood, *supra* note 2, at 363.

<sup>34</sup> *Id.*, at 373.

<sup>35</sup> *Id.*, at 365-366.



abusive sale by the mortgagee. Hence, judicial protectionism. The starting-point was different, so that, despite advancing liberalism in most of the senior jurisdictions, the picture is still different.”<sup>36</sup>

Enforcement can also take the form of direct taking of the collateral by a creditor for the satisfaction of full or partial obligations of its debtor.<sup>37</sup> Private sale, which involves the sale of the collateral by a secured creditor without judicial oversight, is the other method of enforcement.<sup>38</sup> In some systems, such as the US, collateral may be repossessed by a creditor without any judicial order, hence, the name “self-help repossession”.<sup>39</sup> However, the repossession is done to facilitate the private sale or strict foreclosure of the collateral. Though sale under the private method is conducted without a prior judicial supervision, a creditor has some obligations, such as the “commercially reasonable” test of Article 9.<sup>40</sup>

Moreover, in English law-based systems, possessory management is used for the purpose of enforcing a creditor’s rights.<sup>41</sup> According to this method, a mortgagee takes possession of the collateral and satisfies its claims against its debtor by collecting income from the collateral.<sup>42</sup> Once the creditor’s claims are fully satisfied, the collateral will be surrendered to the debtor.<sup>43</sup>

It is worth noting that not all methods of enforcement of security interests are necessarily recognized in collateral laws of all jurisdictions,<sup>44</sup> since countries make different policy choices

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<sup>36</sup> *Id.*

<sup>37</sup> Donald J. Rapson, *Default and Enforcement of Security Interests under Revised Article 9*, 74 CHICAGO-KENT LAW REV., (1999), at 923.

<sup>38</sup> Wood, *supra* note 2, at 374.

<sup>39</sup> William D. Warren & Steven D. Walt, SECURED TRANSACTIONS IN PERSONAL PROPERTY, (Foundation Press), (7<sup>th</sup> ed., 2007), at 269.

<sup>40</sup> Wood, *supra* note 2, at 374.

<sup>41</sup> *Id.* at 368.

<sup>42</sup> *Id.* at 368.

<sup>43</sup> *Id.*

<sup>44</sup> Ulrich Drobnig, *A Comparative Introduction to Security over Movables and Intangibles*, in Joseph J. Norton and Mads Andenas (eds.), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, International Economic Development Law Series, (Kluwer Law International), (1998), at 12.

that result in distinct laws on enforcement. For instance, as expounded in the third chapter of the thesis, secured banks in Ethiopia are granted the special power to extra-judicially enforce their claims, while non-bank creditors do not have such privilege.

## **Conclusion**

Security, which is commonly demanded by banks for providing finance, serves as a means of protection of banks from their borrowers' failure to repay, albeit it also has other purposes. The rights of banks over collateral take the form of security interests. These rights are given effect mainly by their enforcement. In other words, the enforcement of security interests primarily aims at satisfying the claims of banks, such as by the disposition or taking of collateral by banks.

## CHAPTER TWO

### INTRODUCTION TO THE ETHIOPIAN, US AND OHADA COLLATERAL LAWS AND SYSTEMS

This chapter builds on the previous chapter. Since the next chapter is about the enforcement of security interests in the Ethiopian, US and OHADA laws, it is helpful to first comprehend the legal systems and collateral laws of these jurisdictions. Accordingly, this chapter briefly introduces the Ethiopian legal and banking system as well as its collateral laws. Then, it provides the US collateral legal framework. Lastly, the chapter introduces the OHADA and its collateral law.

#### 2.1 The Ethiopian Legal and Banking Systems

##### 2.1.1 Legal System

Currently, Ethiopia has a federal system based on its 1995 Constitution.<sup>45</sup> As a result, the legislative, judicial and executive powers are apportioned between the federal government and the regional states.<sup>46</sup> According to the Constitution, the federal government has the powers, among others, to administer the National Bank, print and borrow money, mint coins, regulate foreign exchange and money in circulation.<sup>47</sup> The House of Peoples' Representatives, the national Parliament, is mandated to pass laws on all matters assigned by the Constitution to the federal government.<sup>48</sup> More specifically, the Parliament is granted the power to enact a commercial code<sup>49</sup> and civil laws that the House of the Federation deems necessary to establish and sustain one economic community.<sup>50</sup>

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<sup>45</sup> Article 1, Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazette*, Extraordinary Issue, 1<sup>st</sup> Year, No. 1, 21 Aug., 1995.

<sup>46</sup> *Id.*, Articles 50 and 79.

<sup>47</sup> *Id.*, Article 51 (7).

<sup>48</sup> *Id.*, Article 55 (1). A primary law enacted by the Parliament is officially known as "proclamation".

<sup>49</sup> *Id.*, Article 55 (4).

<sup>50</sup> *Id.*, Article 55 (6).

As far as the characterization of the Ethiopian legal system is concerned, there have been differences. While some hold that the legal system of Ethiopia is a civil law,<sup>51</sup> others claim that it is a mixed one.<sup>52</sup>

Both of these positions have some merits. Ethiopia's major substantive laws, the 1960 Civil Code, the 1960 Commercial Code, the 1957 Penal Code and the 1960 Maritime Code, were drafted principally based on the codes of countries that belong to the continental legal family, which mainly include France, Switzerland, Greece and Italy. Additionally, most of the drafters of these codes were from civil law legal systems.<sup>53</sup> In contrast, the 1965 Civil Procedure Code and the 1961 Criminal Procedure Code of Ethiopia were chiefly prepared based on the Indian Civil Procedure Code of 1908 and the 1956 Malayan Code of Criminal Procedure respectively, which were, in turn, based on English law.<sup>54</sup> Nonetheless, it is worth mentioning that laws from the common law were also used for drafting the substantive codes,<sup>55</sup> as the procedural codes were equally influenced by civil law systems.<sup>56</sup>

Perhaps, another important feature of the current legal system of Ethiopia is its precedent system. As of 2005, the Federal Supreme Court Cassation Division, which has the highest judicial authority except on constitutional interpretation issues,<sup>57</sup> has been entrusted with the power to render

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<sup>51</sup> Jembere, Aberra, AN INTRODUCTION TO THE LEGAL HISTORY OF ETHIOPIA: 1434-1974, (Münster: LIT, 2000), at 13.

<sup>52</sup> Ayalew, Mulugeta M., Ethiopia, in J. Herbots (ed.), INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONTRACTS, (Kluwer Law International), (2010), at 19.

<sup>53</sup> The drafters of all Ethiopian codes, except the Civil and Criminal Procedure Codes, were from civil law systems. René David drafted the Civil Code, while Jean Escarra and Alfred Jauffret drafted the Commercial Code. Jean Escarra also drafted the Maritime Code. These drafters were all French experts. On the other hand, the Penal Code, which has been revised and renamed in 2005 as "Criminal Code", was drafted by Jean Graven, a Swiss jurist. Jembere, *supra* note 51, at 11, 205 and 213.

<sup>54</sup> Simeneh Kiros Assefa, CRIMINAL PROCEDURE LAW: PRINCIPLES, RULES AND PRACTICES, (2009), at xxvi and 41.

<sup>55</sup> Jembere, *supra* note 51, at 11.

<sup>56</sup> Simeneh, *supra* note 54, at 40 and 41.

<sup>57</sup> Article 80(1) and (3), the Constitution. Pursuant to Article 62 (1) of the Constitution, the House of Federation, which is the second federal chamber, is empowered to interpret the Constitution and rule on constitutionality matters.

decisions that bind all lower federal and regional courts in Ethiopia.<sup>58</sup> Accordingly, it has been rendering decisions on various areas of law, including collateral law, which must be followed by all lower courts. Its decisions have been largely utilized by courts in the course of rendering judgments. In short, the decisions of the Cassation Division have precedential effect. This system, which is the salient feature of the common law, can, thus, be an additional justification for not categorizing the Ethiopian legal system as purely civil law.

It follows that the Ethiopian legal system is a product of the two major legal systems in the world, i.e., civil and common law. Hence, its categorization as a mixed system, rather than a purely civil law one, is well-founded.

Yet, at this juncture, it has to be noted that the main sources of law in Ethiopia are still codes and other legislations and it is common for Ethiopian judicial decisions to start analyses from the relevant laws. Hence, the decisions of the Federal Supreme Court Cassation Division are used by courts in conjunction with the pertinent laws.

### **2.1.2 Banking System**

Ethiopian investment law reserves the banking business, as an area of investment, only for Ethiopian nationals.<sup>59</sup> This means foreign nationals cannot own Ethiopian banks. Recently, the government even extended the prohibition of ownership of shares by foreign nationals to include foreign nationals of Ethiopian origin,<sup>60</sup> who otherwise are not regarded as foreigners for many

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<sup>58</sup> Article 2(1), Federal Courts Proclamation Reamendment Proclamation No. 454/2005, *Federal Negarit Gazeta*, 11<sup>th</sup>, No. 42, 14 Jun., 2005.

<sup>59</sup> Article 3 (1)(a), Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012, *Federal Negarit Gazeta*, 19<sup>th</sup> Year, No. 4, 29 Nov., 2012.

<sup>60</sup> Article 5(2), Manner of Relinquishing Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or an Insurer Guideline No. FIS/01/2016, National Bank of Ethiopia, 28 Oct., 2016.

legal purposes.<sup>61</sup> As a result, all banks were ordered by the NBE to purchase their shares owned by foreign nationals of Ethiopian origin and to resell them to Ethiopian nationals.<sup>62</sup>

The NBE is the licensor and regulator of banks.<sup>63</sup> Accordingly, it, among others, is empowered to regulate and determine the supply and availability of money and credit as well as the applicable interest rates and other charges.<sup>64</sup> The NBE regularly issues directives and circulars on banking activities.

Ethiopian banks<sup>65</sup> provide retail and commercial banking services, the provision of credit (mainly to businesses) being one of such vital services. However, the Development Bank of Ethiopia particularly also engages in financing investments that the government gives priority, such as manufacturing and commercial agriculture.<sup>66</sup> Ethiopian banks also provide international banking services, such as issuing letters of credit.

Banking activities are mainly regulated by the Commercial Code, proclamations, regulations and directives (particularly those issued by the NBE). The Commercial Code governs transactions in negotiable instruments and various banking dealings, such as bank deposits and credit transactions.<sup>67</sup> The Banking Business Proclamation provides the regulatory framework of banks, including the licensing and management of banks.<sup>68</sup> The other types of legal acts that govern banking are regulations and NBE's directives.

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<sup>61</sup> Providing Foreign Nationals of Ethiopian Origin with certain Rights to be Exercised in their Country of Origin Proclamation No. 270/2002, *Federal Negarit Gazette*, 8<sup>th</sup> Year, No. 17, 5 Feb., 2002.

<sup>62</sup> Article 5(8), Manner of Relinquishing Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or an Insurer Guideline.

<sup>63</sup> Article 14, the National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008, *Federal Negarit Gazette*, 14<sup>th</sup> Year No. 50, 11<sup>th</sup> Aug., 2008.

<sup>64</sup> *Id.*, Article 5(4).

<sup>65</sup> Currently, there are 18 banks in Ethiopia. Among these, the Commercial Bank of Ethiopia and the Development Bank of Ethiopia, are owned by the state.

<sup>66</sup> Development Bank of Ethiopia, *A Short Guide to Access DBE's Loans*, at 1.

<sup>67</sup> Book IV, Commercial Code of the Empire of Ethiopia, Proclamation No. 166/1960, *Negarit Gazeta*, Gazette Extraordinary, 19<sup>th</sup> Year, No. 3, 5 May, 1960.

<sup>68</sup> Banking Business Proclamation No. 592/2008, *Federal Negarit Gazette*, 14<sup>th</sup> Year, No. 57, 25<sup>th</sup> Aug., 2008.

### 2.1.3 Collateral Law

Collateral law in Ethiopia can be characterized as being scattered in various laws.<sup>69</sup> The collateral law of Ethiopia is mainly contained in the Civil Code. The Code provides the framework to use movable and immovable property as security. A contract of pledge, through which a movable property can be used as security for the performance of an obligation, is specifically governed by Chapter 6, Title XVII of Book V of the Civil Code.<sup>70</sup> The Code also deals with a contract of mortgage, by which a security interest is created over an immovable property. However, according to the Constitution, land is a public property that cannot be subject to sale or other means of exchange.<sup>71</sup> As a result, the Civil Code's provisions on mortgage are currently applied only for security interests over houses and buildings. A lease right of a person on land can, however, be used as collateral, according to the Urban Land Leasehold Proclamation.<sup>72</sup>

The Commercial Code also contains provisions that deal with security interests created over specific types of property. It regulates the use of a business as a going concern for security purposes.<sup>73</sup> Furthermore, the Commercial Code notably lays down rules on pledging of shares<sup>74</sup> and the rights of secured creditors during bankruptcy.<sup>75</sup>

Furthermore, the Civil Code has envisioned the enactment of special laws that regulate contracts of pledge, particularly relating to specific lending institutions.<sup>76</sup> Accordingly, aside from the Civil Code, Ethiopia has important legislations on the enforcement of security interests. These are the

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<sup>69</sup> Asress Adimi Gikay, *Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US*, 11 MIZAN LAW REV., (Sept. 2017), at 166.

<sup>70</sup> Articles 2825-2874, the Civil Code.

<sup>71</sup> Article 40(3), the Constitution.

<sup>72</sup> Article 24(1), Urban Land Lease Holding Proclamation No. 721/2011, *Federal Negarit Gazette*, 18<sup>th</sup> Year, No. 4, 28<sup>th</sup> Nov., 2011.

<sup>73</sup> Articles 171-193, the Commercial Code.

<sup>74</sup> *Id.*, Article 329.

<sup>75</sup> *Id.*, Article 1058 *et seq.*

<sup>76</sup> Article 2833(1), the Civil Code.

PMPBP<sup>77</sup> and the Business Mortgage Proclamation.<sup>78</sup> These laws principally allow creditor banks to agree, before their borrowers' obligations are due, with their borrowers for the transfer of ownership of the property of the borrowers, which they hold as collateral, to others or to themselves in the event of default of the borrowers,<sup>79</sup> which is otherwise prohibited by the Civil Code and the Commercial Code.<sup>80</sup> In other words, the laws give banks the power to foreclose collateral without resorting to the ordinary method of enforcement involving a court (judicial foreclosure). Yet, it is worth noting that, apart from the few amendments made by the foreclosure legislations, the Civil Code is largely applicable to many other issues relating to contracts of pledge and mortgage entered into by banks.

There are also other statutes in Ethiopia that provide alternative financing arrangements. For instance, the Capital Goods Leasing Business Proclamation (as amended)<sup>81</sup> provides the framework for rendering capital goods finance and operating lease services and the rights and obligations of parties to these transactions.

Finally, as a side note, the Ethiopian government (specifically, the NBE) has recently prepared a draft proclamation that deals with the use of movable property as security.<sup>82</sup> The draft is expected to be submitted to the Parliament for adoption.<sup>83</sup> Thus, it is expected that Ethiopia will have an additional collateral law in the future.

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<sup>77</sup> The PMPBP has been amended by the Property Mortgaged or Pledged with Banks (Amendment) Proclamation No. 216/2000, *Federal Negarit Gazeta*, 6<sup>th</sup> Year, No.46, 6<sup>th</sup> Jul., 2000.

<sup>78</sup> Business Mortgage Proclamation No. 98/1998, *Federal Negarit Gazeta*, 4<sup>th</sup> Year, No. 17, 19<sup>th</sup> Feb., 1998.

<sup>79</sup> Article 3, the PMPBP; Article 13, Business Mortgage Proclamation.

<sup>80</sup> Articles 2851 and 3060, the Civil Code; Article 189, the Commercial Code.

<sup>81</sup> Capital Goods Leasing Business Proclamation (as amended) No. 103/1998, *Federal Negarit Gazeta*, 4<sup>th</sup> Year No. 27, 5<sup>th</sup> Mar., 1998.

<sup>82</sup> Fasika Tadesse, "Central Bank Appends Movable Assets as Collateral", *Addis Fortune*, (Vol. 18, No. 923), Jan 06, 2018,]. Available at <https://addisfortune.net/articles/central-bank-appends-movable-assets-as-collateral/> (last accessed on Feb. 7, 2018)

<sup>83</sup> *Id.* Please note that this thesis does not deal with the draft law. It only deals with the currently effective laws.



## 2.2 US Collateral Law

It can be observed that there are two distinct approaches in the US with regard to the regulation of the use of real and personal property as security. On the one hand, security interests on personal property and fixtures are governed by state laws framed based on Article 9.<sup>84</sup> This field of the US law is usually known as “secured transactions law”.<sup>85</sup> On the other hand, mortgage laws of the states regulate security interests on real property.<sup>86</sup> Mortgage laws significantly differ from state to state due to the lack of a uniform law, such as the UCC, on the field.<sup>87</sup>

Article 9, as were the other parts of the UCC, was drafted as a joint work of the American Law Institute and the National Conference of Commissioners on Uniform State Laws.<sup>88</sup> As part of the UCC, it was intended to serve as a model for the different US states in passing their own secured transactions laws. Consequently, following the adoption of Article 9, US states have adopted it as their laws, albeit with modifications.<sup>89</sup> However, the modifications made by the states are only minor.<sup>90</sup>

As alluded to above, Article 9 governs, among others, the creation, perfection and enforcement of security interests on personal property. It regulates how and under what conditions enforceable security interests may be created on personal property.<sup>91</sup> It also provides detailed rules on making

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<sup>84</sup> Del Duca, *supra* note 28, at 19.

<sup>85</sup> § 9-101, Article 9.

<sup>86</sup> Plehn, *supra* note 29.

<sup>87</sup> *Id.*

<sup>88</sup> Richard B. Hagedorn, SECURED TRANSACTIONS IN A NUTSHELL, (Thomson/West), (2007), at 3.

<sup>89</sup> James J. White & Robert S. Summers, PRINCIPLES OF SECURED TRANSACTIONS, (Thomson/West), (2007), at 2.

<sup>90</sup> Peter Winship, *An Historical Overview of UCC Article 9* in Louise Gullifer and Orkun Akseli (eds.), SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE, (Hart Publishing), (2016), at 21.

<sup>91</sup> Mainly, Part 2, Article 9.

creditors' security rights better than others (perfection).<sup>92</sup> Finally, Article 9 lays down the requirements, procedures and methods for the enforcement of security interests.<sup>93</sup>

Yet, Article 9 does not cover all types of personal property that can serve as security. In other words, there are a few security interests on personal property that are governed by other parts of the UCC and other laws for different policy considerations.<sup>94</sup> These include investment property (mainly governed by Article 8 UCC), intellectual property rights and aircrafts.

At this juncture, it is worth noting that Article 9 follows the unitary or functional approach.<sup>95</sup> According to this approach, all types of devices that serve as security are subject to similar rules, irrespective of the different forms they take.<sup>96</sup> Thus, various kinds of security devices are incorporated in and governed by Article 9.

Article 9 has been undergoing changes in its lifetime. It has been notably revised in 1962, 1972, and 1999.<sup>97</sup> The revisions made from time to time also affected the rules regarding enforcement. For example, the requirement of submitting a proposal for a secured creditor to undertake a strict foreclosure, which was stipulated in former § 9-505, does not exist as a mandatory precondition under the current version of Article 9.<sup>98</sup>

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<sup>92</sup> Mainly, Part 3, Article 9.

<sup>93</sup> Part 6, Article 9.

<sup>94</sup> § 9-109, Article 9.

<sup>95</sup> See Grant Gilmore, *Security Law, Formalism, and Article 9*, 47 NEBRASKA LAW REV., (1968), at 672; See also Michael G. Bridge *et al.*, *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL LAW JOURNAL, (1999), at 572; and Tibor Tajti, *Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE LAW REV., (2014), at 150.

<sup>96</sup> Michael, *supra* note 95. See also Tajti, *supra* note 95.

<sup>97</sup> White & Summers, *supra* note 89.

<sup>98</sup> The American Law Institute and National Conference of Commissioners on Uniform State Laws, *UNIFORM COMMERCIAL CODE: OFFICIAL TEXT AND COMMENTS*, 2009-2010 Edition, (Thomson Reuters), (2009), at 1074.

## 2.3 The OHADA System

### 2.3.1 The OHADA

The OHADA is an intergovernmental organization established in order to execute the tasks laid down in the Treaty for the Harmonization of Business Law in Africa (hereinafter referred to as “OHADA Treaty”).<sup>99</sup> The establishment of the OHADA was justified by the political need for strengthening African legal systems with the help of secure legal frameworks, thereby achieving the development of the continent.<sup>100</sup> Specifically, the objective of the OHADA Treaty is to “harmoni[z]e business law in the States Parties by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and promoting arbitration as a means of settling contractual disputes.”<sup>101</sup>

The OHADA currently has 17 State Parties,<sup>102</sup> which are mainly West African countries. Many of them are French-speaking and have civil law legal systems.<sup>103</sup> However, the membership of the OHADA is open to all Member States of the African Union and, upon the mutual agreement of all the State Parties, to a non-Member State of the African Union.<sup>104</sup> The headquarters of the OHADA is in Yaoundè, Cameroon.<sup>105</sup>

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<sup>99</sup> Article 3, the OHADA Treaty.

<sup>100</sup> Boris Martor *et al.*, BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS, (GMB Publishers Ltd.), (2<sup>nd</sup> ed., 2007), at 1.

<sup>101</sup> Article 1, the OHADA Treaty.

<sup>102</sup> “History of OHADA”, Organization for the Harmonization of Business Law in Africa, <http://www.ohada.org/index.php/en/ohada-in-a-nutshell/history>, (last accessed on April 5, 2018).

<sup>103</sup> Boris, *supra* note 100, at 2.

<sup>104</sup> Article 53, the OHADA Treaty.

<sup>105</sup> Article 3, the OHADA Treaty.

The acts enacted for the adoption of the common rules of the OHADA are known as “Uniform Acts”.<sup>106</sup> OHADA uniform acts are directly applicable to and binding on the States Parties.<sup>107</sup> Moreover, they prevail over any previous or subsequent conflicting national laws.<sup>108</sup> So far, the OHADA has passed some uniform acts that deal with various aspects of business law. These include uniform acts on securities, general commercial law and insolvency law.

### 2.3.2 Collateral Law

One of the areas on which the OHADA has adopted a uniform law is collateral law. Accordingly, the OHADA has the Security Act, which was adopted on 15 December, 2010 in Lomé, Togo. The Security Act repealed and supplanted the OHADA Uniform Act of 17 April, 1997.

The Security Act defines “security” as “the allocation of an asset or property in favor of a creditor to guarantee the discharge of an obligation or obligations, whatever their legal nature, provided that such obligation or obligations is existing, prospective, ascertained or ascertainable, conditional or unconditional and of a fixed or changing amount.”<sup>109</sup> The securities governed by the Act give either the right of the creditor to insist on his preferential right of payment from the proceeds of sale of the secured property, or the right to freely dispose of same acquired by virtue of the security agreement.<sup>110</sup>

The Act provides the legal rules for the creation, perfection and enforcement of security interests over various types of movable and immovable property. It covers all types of security. Therefore, it contains provisions that deal with personal security, such as surety-bonds, and real security, which are pledges and mortgages.

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<sup>106</sup> *Id.*, Article 5.

<sup>107</sup> *Id.*, Article 10.

<sup>108</sup> *Id.*

<sup>109</sup> Article 1, the Security Act.

<sup>110</sup> *Id.*, Article 4.

## **Conclusion**

All the three jurisdictions covered by this chapter have their own legal frameworks on collateral law. Ethiopian collateral law consists of the Civil Code, the Commercial Code and other statutes, although the Civil Code regulates secured transactions in more detail. On the other hand, its US counterpart is, in line with the unitary approach it follows, principally contained in Article 9. The OHADA collateral law is also unified in that it is incorporated in the Security Act.

## **CHAPTER THREE**

### **THE SCOPE OF BANKS' POWER IN THE ENFORCEMENT OF SECURITY**

#### **INTERESTS UNDER THE ETHIOPIAN, US AND OHADA LAWS**

This chapter is the main part of the thesis, as it deals with the scope of banks' power in the enforcement of security interests on movable property under Ethiopian, US and OHADA collateral laws. In the first part of the chapter, the methods of and procedures for the enforcement of security interests under Article 9 are dealt with. The next section is concerned with the methods of and procedures for the enforcement of security interests under the OHADA Security Act. Based on these jurisdictions, the last part of the chapter analyzes the Ethiopian law on the enforcement of pledges by banks.

It has to be noted that, in line with the theme of the thesis, the chapter deals only with the enforcement of security interests. This means the chapter is written based on the assumption that a valid and enforceable security interest has been created. Therefore, it does not deal with how a security interest is created and perfected (pre-enforcement stages).

Regarding the terminologies used in the chapter, due to some variations in the covered jurisdictions, the terms "secured creditor", "pledgee", "creditor", "pledgee-creditor" and "bank" are utilized to refer to a bank that holds collateral, while the words "debtor" and "pledger" refer to the party that is obliged to repay to the bank and whose obligation is secured by the collateral.

### **3.1 The Power of Secured Creditors in the Enforcement of Secured Transactions under**

#### **Article 9**

##### **3.1.1 Methods of and Procedures for Enforcement**

###### **i. Default: the Trigger**

A concept that is central to comprehending Part 6 of Article 9, which deals with enforcement, is “default”. In fact, this Part is titled “Default”. The importance of default can easily be understood from §9-601(a) of Article 9 that provides that “[a]fter default, a secured party has the rights provided in this part and...those provided by agreement of the parties...” Hence, default triggers the exercise of the rights of a secured creditor to enforce its claims on its debtor’s collateral.<sup>111</sup>

Surprisingly, however, Article 9 does not provide a definition of default. This led Gilmore to observe that default is “a matter of contract and can best be defined as being whatever the security agreement says it is.”<sup>112</sup> Similarly, the Supreme Court of South Dakota, in *First Nat. Bank v. Beug*,<sup>113</sup> confirmed that what constitutes default is determined by parties to a security agreement. It follows that the events for default are identified and shaped in accordance with the agreement of a secured party and its debtor. Thus, the occurrence or non-occurrence of something that is provided as an event of default in a security contract may not be so in another similar contract.

Be this as it may, some common grounds of default can be identified. The most obvious form of default, which has been regarded as the “principal, basic, classical event of default”<sup>114</sup>, is a debtor’s failure to make payment under a security agreement. This is corollary to the inherent obligation of a debtor in a security agreement, which is to repay what it borrowed from the secured party. The

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<sup>111</sup> 2 Grant Gilmore, SECURITY INTERESTS IN PERSONAL PROPERTY, (The Lawbook Exchange, Ltd., 1965), at 1191; White & Summers, *supra* note 89, at 207.

<sup>112</sup> Gilmore, *supra* note 111, at 1193.

<sup>113</sup> *First Nat. Bank of Black Hills v. Beug*, 400 N.W.2d 893 (S.D. 1987).

<sup>114</sup> Gilmore, *supra* note 111, at 1193.

other typical grounds of default are a debtor's death, dissolution, insolvency, or bankruptcy, and its breach of agreements, covenants, representations, or warranties contained in a security agreement.<sup>115</sup>

## **ii. Methods of Enforcement as Power of Secured Party**

Once default, whatever it means, materializes, Article 9 grants a secured party different rights to enforce its security interests that put the secured party in a powerful position. Such a broad power of a secured creditor can easily be comprehended from § 9-601(a) of Article 9 that stipulates that a secured creditor may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure and, if the collateral is documents, proceed either as to the documents or as to the goods they cover. In the following part of this section, the main methods of enforcement of a security interest over a personal property are separately explained.

### **a) Repossession**

In relation to enforcement, it is imperative to deal with an important power conferred on secured creditors that can be exercised before enforcement through extrajudicial disposition and strict foreclosure, i.e., repossession. Pursuant to § 9-609 (a), once its debtor defaults, a secured party can take possession of the collateral or, without removal, may render the collateral unusable and dispose of it under § 9-610. This right of a secured party may be exercised either according to judicial process or without judicial process if it can be done without breach of the peace.<sup>116</sup> With respect to this power of a secured creditor, it has been observed that self-help repossession has

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<sup>115</sup> Warren & Walt, *supra* note 39, at 248.

<sup>116</sup> § 9-609 (b), Article 9.



been a US traditional remedy, unlike in Europe, where the attitude can be described by the statement: “[y]ou mean that the creditor can just go out and steal the property back?”.<sup>117</sup>

Repossessing the collateral is normally essential for an enforcement to be carried out by disposition or strict foreclosure.<sup>118</sup> Yet, it is not an enforcement method in itself. It is merely intended to facilitate enforcement by either disposition or strict foreclosure. Therefore, it “in and of itself does not affect a transfer of the debtor’s rights in the collateral to the secured party or to anyone else”.<sup>119</sup>

### **b) Extrajudicial Disposition**

The first mode of enforcement of a security interest under Article 9 involves disposition of the security without the need for going to a court. Pursuant to §9-610 (a), after default, a secured party can sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing. This method is considered as the most common enforcement technique for secured creditors.<sup>120</sup> It is based on the policies of enabling the collection of claims without judicial proceedings and the attainment of higher yields using private and public sales.<sup>121</sup>

It is interesting to note, at this juncture, that Article 9 allows a secured party to purchase the collateral, which it holds as security, at a public disposition, or at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.<sup>122</sup> An example of a recognized market is the New York Stock Exchange.<sup>123</sup> Hence, a stock traded in the Exchange can be regarded as a good customarily traded in the sense of § 9-610(c).

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<sup>117</sup> Warren & Walt, *supra* note 39.

<sup>118</sup> White & Summers, *supra* note 89, at 218.

<sup>119</sup> Rusch & Sepinuck, *supra* note 30, at 155.

<sup>120</sup> *Id.*, at 156.

<sup>121</sup> White & Summers, *supra* note 89, at 212

<sup>122</sup> § 9-610 (c), Article 9.

<sup>123</sup> Official Comments, *supra* note 98, at 1057.

Article 9 does not, however, define what “public” and “private” disposition are. Be this as it may, it has been remarked, in the Official Comments to the UCC, that a public disposition is “one at which the price is determined after the public has had a meaningful opportunity for competitive bidding.”<sup>124</sup> On the other hand, a private disposition has been described as referring to any method other than an auction.<sup>125</sup>

The main procedural requirement to utilize this enforcement method is notification by the secured party to persons that have a stake in the collateral. A secured party that wishes to dispose of collateral, under § 9-610, is obliged to send a reasonable authenticated notification of disposition to its debtor, other secured creditors of the debtor and other persons listed under §9-611(c).<sup>126</sup> It is required that the notification be sent within a reasonable time, which is regarded as a question of fact.<sup>127</sup> Article 9, however, provides some guidance as to what a reasonable time is. It states that, in non-consumer transactions, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is regarded as sent within a reasonable time before the disposition.<sup>128</sup>

Once a disposition is undertaken, a secured party satisfies its claims from the proceeds of the sale.<sup>129</sup> The proceeds are applied first to the expenses of the disposition and then to the secured obligation.<sup>130</sup> If there is any surplus following the satisfaction of the claims of a secured creditor, in principle, it must be returned to the debtor.<sup>131</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> Rusch & Sepinuck, *supra* note 30, at 156.

<sup>126</sup> § 9-611 (b), Article 9.

<sup>127</sup> *Id.*, § 9-612 (a).

<sup>128</sup> *Id.*, § 9-612 (b).

<sup>129</sup> *Id.*, §9-615(a).

<sup>130</sup> *Id.*, §9-615(a).

<sup>131</sup> *Id.*, §9-615 (d)(1).

### c) Strict Foreclosure

The second method of enforcement is what is commonly known as “strict foreclosure”. In this regard, it is provided that, except some restrictions mainly with respect to consumer debts, a secured party can accept collateral in full or partial satisfaction of the obligation subject to some conditions, which mainly are the consent of the debtor and the non-objection of persons who have interests over the collateral.<sup>132</sup> Once a strict foreclosure occurs, it discharges the obligation to the extent consented to by the debtor and transfers to the secured party all of a debtor's rights in the collateral.<sup>133</sup>

This method has some advantages over the other methods. It can help a secured party avoid the requirements of notification and sale and the resultant costs.<sup>134</sup> Besides, it may enable a secured party to gain better price in the future and to avoid risking unreasonable disposition.<sup>135</sup> Strict foreclosure is also regarded as a method that is non-adversarial and that potentially forestalls litigation.<sup>136</sup>

### d) Judicial Foreclosure

Enforcement of a security interest can also be carried out with the help of a court decision and supervision. Article 9, under §9-601(a)(1), stipulates that a secured party may enforce its security interests by the available judicial procedure. Unlike the above methods of enforcement, however, Article 9 does not provide detailed rules on how to use this mode of enforcement, as it is left for the applicable state laws.<sup>137</sup> Though the details of the procedures required by this method may vary from state to state, it generally involves the institution of a suit and obtainment of a judgment by

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<sup>132</sup> *Id.*, §9-620(a).

<sup>133</sup> *Id.*, §9-622(a) and (b).

<sup>134</sup> White & Summers, *supra* note 89, at 222.

<sup>135</sup> *Id.*

<sup>136</sup> Donald, *supra* note 37.

<sup>137</sup> White & Summers, *supra* note 89, at 213.

a secured creditor followed by the issuance of a writ of execution (or another similar authority) that directs a sheriff (or another officer) to seize the debtor's property and sell it to satisfy the claims of the secured party.<sup>138</sup>

### **3.1.2 Major Limits to the Power and Liability of Secured Creditors in Enforcement**

#### **i. Major Limits to the Power of Secured Creditors**

Article 9, apart from granting secured creditors the power to enforce their security interests, also contains limitations to the exercise of their power that protect the interests of debtors. In other words, Article 9 has some provisions that limit the scope of power of secured creditors. Thus, the rights of secured creditors are restrained by the rights of debtors.<sup>139</sup> A discussion of the principal limitations to the enforcement power of secured creditors follows.

##### **a) Commercial Reasonableness**

The most important limitation imposed on the right of a secured party to dispose of collateral under §9-610 is the commercial reasonableness of the disposition. It requires that every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.<sup>140</sup> In as far as it is commercially reasonable, a secured party has the right to dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.<sup>141</sup> The question that follows, hence, is what is commercial reasonableness?

Article 9 provides some factors that may serve as the bases for determining whether a disposition is commercially reasonable. It stipulates that the fact that a greater amount could have been

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<sup>138</sup> *Id.*

<sup>139</sup> Alan M. Christenfeld & Barbara M. Goodstein, *Enforcing Security Interests under Article 9 of the UCC*, 242 NEW YORK LAW JOURNAL, (2009).

<sup>140</sup> § 9-610 (b), Article 9.

<sup>141</sup> *Id.*

obtained by a disposition at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the disposition was made in a commercially reasonable manner.<sup>142</sup> Furthermore, a disposition is considered as commercially reasonable if it is made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.<sup>143</sup> Since these criteria are not clear enough to lead to easy determination, it has been opined that the determination of commercial reasonableness is a factual matter.<sup>144</sup>

Although Article 9 does not say it expressly, the price at which the collateral was disposed is the main determining criterion.<sup>145</sup> In this respect, it has been commented that “[w]hile not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.”<sup>146</sup> In line with this, in *Coxall v. Clover Commercial Corp.*,<sup>147</sup> the court held that the disposition of a car did not comply with the requirement of commercial reasonableness mainly because the secured party did not prove that its disposition, by which the car was sold at a lower price, reflected the fair market value of the car and it did not prove its contact with other potential buyers.

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<sup>142</sup> *Id.*, § 9-627(a).

<sup>143</sup> *Id.*, § 9-627(b).

<sup>144</sup> Rusch & Sepinuck, *supra* note 30, at 161.

<sup>145</sup> White & Summers, *supra* note 89, at 227.

<sup>146</sup> Official Comments, *supra* note 98, at 1057.

<sup>147</sup> *Coxall v. Clover Commercial Corp.*, Civil Court of the City of New York, 781 N.Y.S.2d 567 (2004).

### b) Breach of the Peace

The restriction imposed on the extrajudicial repossession power of a secured creditor is that it should not breach the peace. Pursuant to § 9-609 (b), the possession of collateral without judicial process can only be conducted without breach of the peace. The drafters of Article 9, however, intentionally did not provide a definition of “breach of the peace”.<sup>148</sup>

It has been agreed by commentators that various factors must be taken into consideration in deciding on whether there was a breach of the peace.<sup>149</sup> It has been suggested in the Official Comments that “courts should hold the secured party responsible for the actions of others taken on the secured party’s behalf, including independent contractors engaged by the secured party to take possession of collateral.”<sup>150</sup> This has been confirmed in *Sanchez v. MBank of El Paso*.<sup>151</sup> Additionally, § 9-609 “does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer.”<sup>152</sup>

Courts have made various interpretations on the existence of breach of the peace. One of the leading cases is *Giles v. First Virginia Credit Services, Inc.*<sup>153</sup>, in which it was stated that “a breach of the peace analysis should be based upon the reasonableness of the time and manner of the repossession.” In particular, the court held that, in determining on breach of the peace, “courts have used a balancing test to determine if a repossession was undertaken at a reasonable time and in a reasonable manner, and to balance the interests of debtors and creditors.”<sup>154</sup> Accordingly, it identified “(1) where the repossession took place, (2) the debtor’s express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor’s use of

<sup>148</sup> White & Summers, *supra* note 89, at 219.

<sup>149</sup> *Id.*

<sup>150</sup> Official Comments, *supra* note 98, at 1054.

<sup>151</sup> *Sanchez v. MBank of El Paso*, 792 S.W.2d 530 (Tex. App. 1990).

<sup>152</sup> Official Comments, *supra* note 98, at 1054.

<sup>153</sup> *Giles v. First Virginia Credit Services, Inc.* 560 S.E.2d 557 (N.C. App. Ct. 2002)

<sup>154</sup> *Id.*

deception” as five relevant criteria for the balancing test.<sup>155</sup> Another case on breach of the peace is *Williams v. Ford Motor Credit Company*<sup>156</sup>, in which it was held that the mere absence of express consent of the debtor to the repossession does not result in breach of the peace.

### **c) Restrictions to Waiver of a Debtor’s Rights**

As a means of limiting the scope of power of secured creditors, thereby protecting debtors, Article 9 contains rules that prohibit the waiver of the rights of debtors. The most important, in this regard, is the proscription of waiver of the requirement of not breaching the peace in self-help repossession that is required by § 6-609.<sup>157</sup> Accordingly, an agreement that gives a secured party the right to extra-judicially repossess collateral by breaching the peace cannot be given effect.

Likewise, in relation to disposition of collateral, the waiver of the requirements of commercial reasonableness and notification is not allowed under Article 9.<sup>158</sup> The impermissibility of waiver also extends to the provisions that deal with strict foreclosure, to the extent the provisions impose obligations on secured creditors.<sup>159</sup>

### **ii. Liability of a Secured Party towards its Debtor**

With the intent of protecting debtors from overreaches and damage to their interests by their secured creditors, Article 9 provides legal remedies that debtors can claim against their creditors. The first type of remedy that debtors can request is an injunction. It is stipulated that, if it is established that a secured party is not proceeding in accordance with Article 9, a court, based on a debtor’s request, may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.<sup>160</sup> A debtor can also sue for damages, as per § 9-625 (b) that

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<sup>155</sup> *Id.*

<sup>156</sup> *Williams v. Ford Motor Credit Company*, 674 F.2d 717 (8<sup>th</sup> Cir. 1982).

<sup>157</sup> § 9-602 (6), Article 9.

<sup>158</sup> *Id.*, § 9-602 (7).

<sup>159</sup> *Id.*, § 9-602 (10).

<sup>160</sup> *Id.*, § 9-625 (a).

states that a person is liable for damages in the amount of any loss caused by a failure to comply with Article 9, including loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

It must be borne in mind that Article 9, in cases in which the amount of a deficiency or surplus is disputed, does not require a secured creditor to prove its compliance with the provisions of Part 6 relating to collection, enforcement, disposition, or acceptance, unless its compliance is in issue.<sup>161</sup>

A secured creditor, however, must prove that its collection, enforcement, disposition, or acceptance was conducted in accordance with Part 6 if its compliance is challenged.<sup>162</sup> In such cases, if a secured creditor fails to discharge its burden of proof, the remedy available for a debtor is the reduction or denial of deficiency against its secured creditor.<sup>163</sup>

### **3.2 The Power of Pledges in the Enforcement of Pledges in the OHADA Uniform Act**

Unlike Article 9's approach, in which enforcement is not significantly supervised by courts, the enforcement of a security interest over a pledge is fundamentally based on courts under the OHADA Security Act. The Act is generally based on the civil law system and is specifically influenced by the French law.<sup>164</sup> Consequently, the court-based enforcement methods under the Security Act are the reflections of the civil law tradition of the region. In the subsequent subsections, the methods of enforcement of security interests that are available under the OHADA Security Act are discussed.

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<sup>161</sup> *Id.*, § 9-626(a)(1).

<sup>162</sup> *Id.*, § 9-626(a)(2).

<sup>163</sup> *Id.*, § 9-626(a)(3).

<sup>164</sup> Boris, *supra* note 100, at 3. See also Martin Gdanski, *Modernisation of OHADA Uniform Law on Security Interests*, 26 JOURNAL OF INTERNATIONAL BANKING LAW AND REGULATION, (2011), at 476.



### **a) Judicial Foreclosure**

In the Security Act, the first mode of enforcement under a pledge contract is the sale of collateral by a public auction. The Act provides that, where payment has not been made on the due date, the pledgee-creditor in possession of a writ of execution may proceed to the forceful sale of the collateral eight days after notice has been duly served on the debtor.<sup>165</sup> This means a pledger does not have the right to sell the collateral without first resorting to a court and securing an order granting it the right to dispose of the collateral. The enforcement per this method must be conducted under the conditions laid down by the provisions organizing measures of execution from which no pledge may derogate.<sup>166</sup> Consequently, the rules of the OHADA Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures<sup>167</sup> must be complied with by a secured creditor in the course of enforcement.

Under this method of enforcement, a secured creditor must have a writ of execution.<sup>168</sup> Then, following the publication of the planned sale by auction,<sup>169</sup> the debtor will be notified of the place, date and time of the sale.<sup>170</sup> After the verification of the state and nature of the property by an officer,<sup>171</sup> the property will be sold to the highest bidder.<sup>172</sup> The proceeds of the sale will then be used for satisfying the claims of the pledger in accordance with Article 226 of the Security Act.

### **b) Taking of Collateral for Satisfaction of Claims**

Alternatively, a creditor can also enforce its claims against its debtor by requesting the competent court to allow it to take the collateral in payment of the balance of its debt and following the

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<sup>165</sup> Article 104, Paragraph 1, the Security Act.

<sup>166</sup> *Id.*

<sup>167</sup> Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures, (Apr. 10, 1998), (Libreville, Gabon).

<sup>168</sup> Article 104, Paragraph 1, the Security Act.

<sup>169</sup> Article 121, the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures.

<sup>170</sup> *Id.*, Article 123.

<sup>171</sup> *Id.*, Article 124.

<sup>172</sup> *Id.*, Article 125.

valuation at current market or as determined by an expert.<sup>173</sup> Thus, the taking of collateral for satisfying a pledgee's claims is not available without a judicial ruling to that effect, unlike what is in Article 9 in which a court order to undertake a strict foreclosure is not required.<sup>174</sup>

### c) Contractual Attribution of Collateral

Apart from the aforementioned default methods of enforcement of a security interest over a pledge, there is an additional mode of enforcement that may be contractually provided by parties to a pledge contract under the Security Act. Accordingly, parties may agree that the collateral be allotted to the pledgee-creditor where there is default in payment if the collateral is a sum of money or an asset whose value has been officially fixed or where the debtor of the secured debt is a professional debtor.<sup>175</sup> Hence, the direct taking of collateral by a pledgee can be provided as a form of enforcement with respect to specific types of assets or debtors, i.e, a sum of money or an asset whose value has been officially fixed, and professional debtors. Pursuant to Article 3 of the Act, a "professional debt" is circularly defined as one contracted in the course of any professional activity or where it has a direct link to any one of the professional activities of the debtor even if such activity is not the debtor's principal activity. It has been comprehended as referring to business debts.<sup>176</sup>

This position of the Security Act to allow extrajudicial enforcement has been regarded as a fundamental deviation from the typical civil law systems.<sup>177</sup> It has also been commended as a modernization,<sup>178</sup> as it simplifies enforcement. Unlike the above two methods, which may be

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<sup>173</sup> Article 104, Paragraph 2, the Security Act.

<sup>174</sup> § 9-620, Article 9.

<sup>175</sup> Article 104, Paragraph 3, the Security Act.

<sup>176</sup> Anthony Giustini, *The New OHADA Uniform Act on Security*, CLIFFORD CHANCE, (May 2011), at 4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

exercised in the absence of contractual clauses that authorize them, however, this method of enforcement is available only when it is specifically agreed in a pledge contract.

### **3.3 The Power of Banks in the Enforcement of Pledges under Ethiopian Law: A comparative analysis in light of the US and OHADA laws**

#### **i. Methods of and Procedures for Enforcement**

The PMPBP provides two methods of enforcement for banks that hold security interests over movable property. These are private (extrajudicial) disposition (foreclosure) and taking of collateral in satisfaction of the claims of banks. These modes of enforcement are expounded in the following parts.

##### **a) Extrajudicial Foreclosure**

Pursuant to the PMPBP, an agreement authorizing a creditor bank, with which a property has been pledged and whose claim is not paid within the time stipulated in the contract, to sell the said property by auction and to transfer the ownership of the property to the buyer is valid.<sup>179</sup> This provision is diametrically opposite to what the Civil Code, which governs security interests over property, provides with regard to enforcement. According to Article 2851 (1) of the Code, any agreement, even subsequent to the furnishing of the pledge, authorizing the creditor, in the event of non-payment on the due date, to take possession of the pledge or to sell it without complying with the formalities required by law is of no effect. Thus, an agreement that grants a secured creditor the right to take the collateral without the prescribed judicial procedure for the satisfaction of the claims of the secured party, which is known as *comissoria lex*, is not enforceable under the Civil Code. Nevertheless, the Civil Code does not prohibit an agreement providing that, after the debt has become due, the debtor must make over the pledge to the creditor in settlement of the

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<sup>179</sup> Article 3, the PMPBP.

debt.<sup>180</sup> In any case, the Code's prohibition of *comissoria lex* does not apply to bank creditors as a result of Article 3 of the PMPBP that allows banks to foreclose the collateral they hold without applying to courts.<sup>181</sup>

The power of secured banks to extra-judicially enforce their claims against their debtors has been affirmed in *United Bank S.C. v Ali Abdu*,<sup>182</sup> in which the Federal Supreme Court Cassation Division stated that a bank does not need a judicial decision or permission to sell collateral in a public auction in accordance with the PMPBP. In this regard, the power given to banks in Ethiopia is similar to that of Article 9, which provides an extrajudicial disposition of security. On the other hand, the PMPBP differs from the OHADA Security Act, since the latter does not allow extrajudicial sale.

At this juncture, it is worth inquiring why the government amended the Civil Code<sup>183</sup> through a statute and gave such a massive power to banks. As per the PMPBP, one of the reasons for this is the fact that it is time-consuming for banks to obtain court judgements for the sale of collateral and execute them.<sup>184</sup> The lengthy procedure had affected banking business.<sup>185</sup> Therefore, it was found essential to “create a conducive environment to economic development by enabling banks to collect their debts from debtors efficiently and thereby promoting a good business culture,” thereby necessitating the amendment of the pertinent provisions of the Civil Code.<sup>186</sup> Similarly, the Cassation Division reaffirmed that the purpose of the PMPBP is to ensure the timely collection of

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<sup>180</sup> Article 2851 (2), the Civil Code.

<sup>181</sup> A very analogous provision to Article 3 of the PMPBP is included in the Business Mortgage Proclamation that allows a similar contractual arrangement to be made when a business is held as collateral by a bank. Article 13

<sup>182</sup> *United Bank S.C. v Ali Abdu*, Cassation File No. 65632, 12 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2011).

<sup>183</sup> It must be noted that, prior to the PMPBP and the Business Mortgage Proclamation, the Civil Code (Amendment) Proclamation No. 65/1997 was enacted to give banks special enforcement power as that of the PMPBP and the Business Mortgage Proclamation. Yet, it was repealed and replaced by the PMPBP. Article 10, the PMPBP.

<sup>184</sup> Paragraph 1, Preamble, the PMPBP.

<sup>185</sup> Paragraph 2, Preamble, the PMPBP.

<sup>186</sup> Paragraph 3, Preamble, the PMPBP. *See also* USAID, *Supra* note 4.

the claims of banks and to enable them to use their money for investments in order to positively contribute to the economic growth of the country.<sup>187</sup>

Regarding the procedure for disposition, the PMPBP refers to the provisions of the Civil Procedure Code.<sup>188</sup> As a result, the sale of collateral by a bank must comply with the rules on the enforcement of judicial judgements by auction.<sup>189</sup> Before commencing this procedure, the first legal requirement following the default of a pledger is to give notice to the pledger at least 30 days earlier, by which it requires the debtor to discharge its obligation and notifies the debtor that the collateral will be disposed if the bank's claim is not satisfied by the debtor.<sup>190</sup> Then, if the default subsists even after the notice, according to the Civil Procedure Code, the bank has to proclaim an auction.<sup>191</sup> In practice, this is done in a newspaper that has a wide circulation.<sup>192</sup> The announcement must state the time and place of sale and other information required by Article 423(2) of the Civil Procedure Code.<sup>193</sup> Once the collateral is disposed, the proceeds must be used for satisfying the claims of the bank,<sup>194</sup> with the balance returned to the debtor afterwards.<sup>195</sup>

While the PMPBP allows disposition only through a public auction, the Civil Code provides that where the pledge is quoted on the market or has a current price, the pledgee may cause it to be sold by a private contract through the intermediary of a person authorized to make such sales.<sup>196</sup> The

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<sup>187</sup> *Commercial Bank of Ethiopia v Hassen Ibrahim*, Cassation File No. 44164, 10 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2009).

<sup>188</sup> Article 6, the PMPBP.

<sup>189</sup> Articles 394-449, Civil Procedure Code of the Empire of Ethiopia, Decree No. 52/1965, *Negarit Gazeta*, Gazette Extraordinary, 25<sup>th</sup> Year, No. 3, 8 Oct., 1965.

<sup>190</sup> Article 3, the PMPBP and Article 13, Business Mortgage Proclamation; Article 2853(1), the Civil Code.

<sup>191</sup> Article 425, the Civil Procedure Code.

<sup>192</sup> In this regard, the Reporter, a private newspaper that is published twice in Amharic and once in English every week, is commonly used by banks for the purpose of announcing auctions for the sale of collateral.

<sup>193</sup> The other information that are required to be included by this provision are the description of the property to be sold, its estimated value, any encumbrance to which the property is liable, amount of the sought recovery, terms and conditions of sale and the manner in which and the time within which the purchase price must be paid.

<sup>194</sup> Article 3, the PMPBP and Article 13, Business Mortgage Proclamation; Articles 2859(1) and 2857(1), the Civil Code.

<sup>195</sup> Article 2859(2), the Civil Code.

<sup>196</sup> Article 2854(2), the Civil Code.

practical use of this method is limited, since Ethiopia does not have specific recognized markets for goods, such as stock markets, and the collateral banks hold are special movables (mainly, vehicles) and immovable property, which can be easily disposed of in public auctions. Yet, though Article 2854(2) of the Civil Code is not explicitly repealed by the PMPBP, it is not clear whether the PMPBP, by allowing public sale, was indirectly meant to prohibit private disposition as provided in the Code.

Finally, it is important to note that the PMPBP states that the sale made by a bank is considered to have been executed on behalf of the debtor.<sup>197</sup> In other words, albeit there is no clear cross-reference to the Civil Code's rules governing agency, a bank that conducts an extrajudicial sale is deemed as an agent of its debtor. Consequently, although it is difficult to squarely apply the rules regarding an agent to a bank, some obligations of an agent, as laid down in the Civil Code, can, *mutatis mutandis*, be imposed on the bank. The first such obligation of a bank is acting in strict good faith.<sup>198</sup> This can serve as a tool for preventing the bank from deliberately harming the interests of its debtor. Another duty is to account to the debtor mainly on the amount of the proceeds of the sale, as required by Article 2210 of the Civil Code.

#### **b) Taking of Collateral for Satisfaction of Claims**

The other method available for a bank to enforce its security interests is to take the collateral and transfer ownership thereof to itself for satisfaction of its claims against its pledger.<sup>199</sup> This, however, is conditional on the non-appearance of a buyer at a second auction.<sup>200</sup> On the other hand, the Civil Code allows a pledgee to apply to the court to order that the pledge be given to it in payment, to the extent of the amount due to it, according to an expert valuation or the current price

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<sup>197</sup> Article 5, the PMPBP.

<sup>198</sup> Article 2208 (1), the Civil Code.

<sup>199</sup> Article 3, the PMPBP.

<sup>200</sup> Article 3, the PMPBP.

of the pledge, where it is quoted on the market.<sup>201</sup> Since this provision of the Code has not been expressly repealed by the PMPBP, it is reasonable to assume that a bank, if it wishes, can also apply to a court to authorize it to take collateral for satisfaction of its claims. However, it is the writer's opinion that there is a need for clarification of the position of the Parliament on whether, by providing the taking of collateral as a secondary mode of enforcement in the PMPBP, intended to repeal Article 2856 of the Civil Code.

It may be said that, as banks commonly resort to extrajudicial disposition to enforce their security interests, the practical utility of the taking of collateral based on judicial authorization may not be significant. Yet, since there may be circumstances under which banks choose to take collateral, instead of disposition, the issue must be plainly addressed in order to make clear their available options of enforcement methods.

This method of enforcing security interests is similar to the US mode of strict foreclosure, since it enables a bank to directly take the collateral for satisfying its claims. Nevertheless, it, as provided under the PMPBP, is different from the strict foreclosure of Article 9 because it is not available as a first alternative method of enforcement. Unlike the case of Article 9, it can be exercised only after a second auction for sale of collateral is conducted and if no buyer appears in the auction. The taking of collateral for satisfaction of bank's claims under Ethiopian law, which does not require a court authorization under the PMPBP, is also different from the OHADA Security Act, in which a prior court approval is a precondition for the taking of collateral for enforcement. However, the taking of collateral in satisfaction of claims, as laid down in Article 2856 of the Civil Code, is the same as the one available in the OHADA Security Act, as they both require prior judicial rulings.

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<sup>201</sup> Article 2856, the Civil Code.

### c) Judicial Enforcement

Albeit not based on the PMPBP, banks can also enforce their security interests against their debtors using the ordinary enforcement procedures as laid down in the Civil Procedure Code. This mode involves the institution of a suit against the debtor<sup>202</sup> and attaching its collateral. It is worth noting that, as further explained in the next part, this method of enforcement can be used at the same time as extrajudicial foreclosure, according to the decision in *Commercial Bank of Ethiopia v Hassen Ibrahim*.<sup>203</sup> This mode of enforcement is generally the same as the judicial enforcement available under §9-601 of Article 9.

#### ii. The Power and Liability of Banks in Enforcement

##### a) The Power of Banks in Enforcement as Expounded by Cases

The Federal Supreme Court Cassation Division has decided on some cases that help explicate the strong power banks have in Ethiopia in the enforcement of security interests. In this part, only the most relevant of these cases are discussed.

With respect to the possibility of contemporaneously using extrajudicial and judicial enforcement methods, the Cassation Division, in *Commercial Bank of Ethiopia v Hassen Ibrahim*,<sup>204</sup> ruled that the fact that the PMPBP allows banks to enforce their claims without resorting to courts does not prevent them from simultaneously initiating enforcement claims in courts, as the PMPBP does not prohibit judicial enforcement. In other words, a bank can, while it is in the process of extrajudicially foreclosing the collateral of its debtor, sue its debtor in a court for satisfying its claims using the ordinary enforcement method. This position of Ethiopian law, as defined by the Cassation Division, is analogous to the stance of Article 9, according to which the different

<sup>202</sup> Article 213(1), the Civil Procedure Code.

<sup>203</sup> *Commercial Bank of Ethiopia v Hassen Ibrahim*.

<sup>204</sup> *Id.*



enforcement methods it provides can be exercised simultaneously.<sup>205</sup> Such an approach puts banks in a powerful position. On the other hand, it may be difficult for their debtors, as they would be forced to litigate and follow up the foreclosure process at the same time.

Furthermore, a bank has the right to request the removal of an injunction on a property over which the bank has a security interest. This is pursuant to the decision in *Development Bank of Ethiopia v Woinshet Abera*.<sup>206</sup> In this case, the Cassation Division ruled that, if a bank holds a property as collateral, according to Article 158 of the Civil Procedure Code, it has the right to request a court to remove an injunction issued, in relation to a dispute between the bank's debtor and a third party, over the collateral before the bank enforces its claims. This, as per the ruling, is so in order to enable the bank to enforce the powers granted to it by the PMPBP. The ruling gives an additional protection to banks by granting them the right to challenge injunctions that can otherwise make enforcement impossible.

Besides, a bank's enforcement right triumphs the enforcement power of a tax authority in relation to the commission of a crime by a debtor. According to the ruling in *Wegagen Bank v Ethiopian Revenues and Customs Authority*,<sup>207</sup> a bank has the right to enforce its claims against its debtor on collateral even though a court decides, following the signing of the security agreement, that the collateral be forfeited because it was used in the commission of the crime of contraband. In other words, a bank that has obtained collateral has priority over the subsequent claims of the Ethiopian Revenues and Customs Authority, which is the federal tax authority, over the collateral.

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<sup>205</sup> § 9-601(c), Article 9.

<sup>206</sup> *Development Bank of Ethiopia v Woinshet Abera*, Cassation File No. 21270, 6 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2007).

<sup>207</sup> *Wegagen Bank v Ethiopian Revenues and Customs Authority*, Cassation File No. 81215, 14 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2013).

The decision in *Tikur Abay Construction S.C. v Wegagen Bank S.C.*<sup>208</sup> also protects the power of banks with respect to their autonomy in the enforcement of their security interests. In this case, the Cassation Division held that an application made to a court to obtain an order against a bank to sell a specific collateral or to refrain from selling it in a public auction is not acceptable under the foreclosure laws, as the laws give banks the power to privately foreclose collateral, without prejudice to the liability of a bank to the debtor for any damage it may cause to its debtor as a result of its non-compliance with the legal procedure for foreclosure. This means courts are not allowed to intervene, with the effect of delaying, obstructing or prohibiting enforcement, in the process of extrajudicial foreclosure by banks. Debtors are also not permitted to challenge the conduct of banks in the foreclosure process.

A similar position has been taken, albeit in relation to an immovable property as collateral, in *Wegagen Bank S.C. v Bruck Chaka et al.*,<sup>209</sup> according to which, in the absence of a contractual clause to that effect, an application cannot be made to a court and an order granted to direct a secured bank to first sell a specific property from its more than one collateral. This decision ensures the liberty of a secured bank to pick and choose from its collateral and enforce its claims against them in the order or combination it wishes. In this regard, Article 9 also has a similar stand, as, pursuant to § 9-610, it allows a secured party to dispose of any or all of the collateral. If more than one movable property are used as collateral, however, the Civil Code mandates a court, on the application of the pledger, to limit the creditor's right to sell one of the pledges which is sufficient to pay off the creditor.<sup>210</sup>

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<sup>208</sup> *Tikur Abay Construction S.C. v Wegagen Bank S.C.*, Cassation File No. 84353, 14 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2013).

<sup>209</sup> *Wegagen Bank S.C. v Bruck Chaka et al.*, Cassation File No. 70824, 13 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2012).

<sup>210</sup> Article 2855, the Civil Code.

### b) Liability of Banks

Regarding the liability of a bank towards its debtor in relation to enforcement, the PMPBP provides that a bank must be liable for any damage it causes to its debtor in the process of selling by auction in violation of the relevant provisions of the Civil Procedure Code.<sup>211</sup> This has been reaffirmed in different decisions of the Cassation Division. In *Wife and Heirs of Nasir Aba Jabir Aba Jifar v Commercial Bank of Ethiopia*,<sup>212</sup> it was held that a claim can be brought for damages by a debtor if a bank has caused damage to the debtor in the course of the foreclosure by failing to comply with the legal foreclosure procedures. A similar position was taken in *Tikur Abay Construction S.C. v Wegagen Bank S.C.*

As we can apprehend from Article 7 of the PMPBP, a bank can only be liable for damage it caused to its debtor in the course of foreclosure. Consequently, a claim for damages by a debtor cannot be brought, under this provision, before a bank completes its foreclosure. This gives a bank the liberty to conduct its foreclosure without interruption by its debtor.

The PMPBP is similar to Article 9 in that it provides a framework for a debtor to claim for damage to its interests by a bank. Unlike Article 9, however, the PMPBP contains a single provision that applies to any damage caused to a debtor in the enforcement process. This entails that the Civil Code's rules on damages<sup>213</sup> can be utilized for determining the extent of damage, amount of damages and other related matters. Thus, any damage sustained by a debtor in relation to enforcement can be recovered under the PMPBP and the Civil Code.

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<sup>211</sup> Article 7, the PMPBP.

<sup>212</sup> *Wife and Heirs of Nasir Abajabir v Commercial Bank of Ethiopia*, Cassation File No. 68708, 13 DIGEST OF THE FEDERAL SUPREME COURT CASSATION DIVISION, (2011).

<sup>213</sup> The Civil Code's main provisions on damages relating to contracts are contained in Articles 1799-1805, while Articles 2090-2104 deal with damages for torts.

In contrast, as one can understand from the interpretation of the PMPBP in *Tikur Abay Construction S.C. v Wegagen Bank S.C.*, a request by a debtor for an injunction to be issued against a bank during a foreclosure process cannot be accepted. Accordingly, contrary to Article 9, an injunction is not a form of remedy for a debtor before the completion of the foreclosure process.

## **Conclusion**

There are differences and similarities in the enforcement methods and procedures of the US, OHADA and Ethiopian collateral laws. Aside from the conventional method of judicial foreclosure, Article 9 provides extrajudicial disposition and strict foreclosure of security as the modes of enforcement of security interests. It also allows a secured creditor to repossess, even without a court order, collateral for the purpose of facilitating enforcement by the available means. Article 9, moreover, contains rules that make secured creditors liable to debtors for their failure to comply with Article 9 in the course of enforcement. On the other hand, the OHADA Security Act, unlike its US and Ethiopian counterparts, has default methods of enforcement that are dependent on courts. In contrast, the Ethiopian PMPBP, similar to Article 9, allows a bank to agree with its borrower to sell the collateral by public auction without resorting to a court. Moreover, it conditionally permits enforcement in the form of taking of collateral for satisfaction of the claims of a bank. The PMPBP also allows a debtor to institute an action against a bank that caused it damage because of its non-compliance with the law during enforcement. Unlike the more specific provisions of Article 9, however, there is only one liability provision under the PMPBP.

## CONCLUSION AND RECOMMENDATIONS

The thesis examined the methods of and procedures for the enforcement of security interests over movable property by banks in the US, Ethiopian and OHADA collateral laws. The examination demonstrates that the different methods of enforcement of these jurisdictions reflect their respective policy objectives and legal systems.

Article 9 gives more flexibility to secured creditors to enforce their security interests, thereby putting them in a powerful position. Apart from the conventional means of enforcement through courts, it allows private and public disposition of collateral without resorting to courts. It also provides strict foreclosure, which enables a secured creditor to take collateral for satisfying the claims it demands from its debtor. In this regard, the power to repossess collateral without a judicial authorization for the purpose of facilitating enforcement by the available methods is an important aspect of enforcement under Article 9. Aside from protecting the interests of a secured creditor, Article 9 provides the framework for a debtor to bring action, for damages or injunction, against a secured creditor if the latter is violating or has violated Article 9 in the course of enforcement. On the contrary, the OHADA Security Act, as a reflection of its civil law foundation, contains default enforcement methods that are based on courts. In other words, it provides enforcement by a public sale based on a writ of execution and the taking of collateral for satisfaction of claims in accordance with a prior judicial authorization. However, it allows conditionally parties to a security agreement to agree for the attribution of collateral to the secured creditor.

The Ethiopian PMPBP provides enforcement methods that are radically different from the Civil Code. It permits a bank to agree freely with its debtor to the effect that it will extra-judicially sell the collateral by public auction in the event of default of its debtor, which otherwise is prohibited by the Civil Code. Besides, it conditionally empowers a bank to take collateral for the satisfaction

of its claims. The PMPBP also allows a debtor to bring an action against a bank that caused it damage because of its non-compliance with the legal procedures during enforcement. However, there is a single general liability provision under the PMPBP, unlike the more specific provisions of Article 9.

The thesis shows that the PMPBP makes banks enormously powerful by allowing them to enforce their security interests without the involvement of courts. This is further consolidated by the decisions of the Federal Supreme Court Cassation Division, which defend the autonomy of banks in enforcement.

From the perspective of banks and given the objective of the PMPBP to ensure timely collection of the claims of banks, the powerful position of banks is justified. Yet, on the other side, the economic interests of debtors, whose property are used by banks as security, cannot be disregarded in the enforcement of security interests.

With the aim of making the enforcement of security interests easier and clearer for banks and, at the same time, strengthening the legal protections afforded to debtors, therefore, it is recommended that some amendments be made to the PMPBP by the government, as part of reforming the Ethiopian collateral law. One of the issues that needs to be addressed is whether Article 2856 of the Civil Code, which permits a pledgee to request a court to take collateral for satisfying its claims in lieu of disposing it, is intended to be repealed by the PMPBP, under which this method of enforcement is available only if a buyer does not appear in a second public auction. Since it has not been expressly repealed by the PMPBP, it is reasonable to hold that Article 2856 is effective. This entails that a bank can use it as an alternative enforcement method without resorting to a public auction. The clarification on this issue will, thus, have the effect of broadening the options for enforcement by banks. It will also assist in making enforcement speedier and efficient, which

is one of the important considerations in reforming collateral laws.<sup>214</sup> This lesson is drawn from Article 9 that provides strict foreclosure as a form of enforcement that can be exercised independently. The OHADA Security Act is also similar to Article 9 in making taking of collateral, though with prior judicial authorization, an independent method of enforcement, thereby serving as a model for reforming the Ethiopia bank collateral law. On the contrary, if it was the intention of the Parliament to repeal Article 2856, it must be plainly provided to achieve clarity and certainty in the legal framework.

Besides, as the analysis of the decisions of the Cassation Division reveals, there cannot be any form of judicial intervention that can delay or prohibit the enforcement of security interests by banks under the PMPBP. If this is the intent of the Parliament, it is better to be clearly provided so that actions requesting judicial intervention will be prevented. If, on the contrary, the Parliament did not have such intent, the extent of permissible court intervention must be determined.

There is also uncertainty with regard to whether a bank can dispose of collateral by a private sale, pursuant to Article 2854(2) of the Civil Code, given that the PMPBP provides only sale by public auction. The PMPBP does not explicitly repeal this provision of the Code. As a result, it is reasonable to argue that a bank is not prohibited from using private disposition to enforce its security interests. In the interest of legal clarity and certainty, the PMPBP must be amended to address this issue unequivocally. Recognizing private disposition by banks as an option would give banks the flexibility to choose from private and public dispositions. This is in line with Article 9, in which extra-judicial disposition can take the form of either private or public disposition. Thus, the PMPBP should be amended to clearly reflect the position that private sale can also be used by banks for enforcing their security interests.

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<sup>214</sup> Heywood, *supra* note 17, at 58.

Finally, on the other side of the spectrum, it is recommended that the provision of the PMPBP on the liability of a bank for causing damage to a debtor due to its non-compliance with the legal procedure for enforcement be detailed. This, it is hoped, will assist in further understanding the extent and type of liability of banks in such cases. It will also have the effect of adequately protecting the rights and interests of debtors whose property are used for enforcement purposes. In this respect, Article 9, which contains specific provisions on the liability of a secured creditor to its debtor, can be a prototype for reforming the Ethiopian bank collateral law.



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