LEASE FINANCING: A COMPARATIVE ANALYSIS OF THE SECURED TRANSACTIONS LAW OF UGANDA AND THE UNITED STATES OF AMERICA

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EXECUTIVE SUMMARY

A lease is one of the important tools that may be used to access finance. A lease has been held as one of the important financial tools by which businesses especially small and medium-scale enterprises (SMEs) can access capital goods since it allows them access to goods without immediate payment of cash. The focus of this thesis is regulation of the finance lease under secured transactions law. It compares the legal framework on finance lease in Uganda and the United States of America with the view to drawing lessons for Uganda from the American experience. This is done by examining the legal rules found in the relevant legal framework on finance lease in both countries with a focus on two key aspects: creation of the lease interest and its enforcement. The view taken by this thesis is that the regulatory regime on financial leasing in Uganda is currently inadequate, while the American regime on lease financing set out under the Uniform Commercial Code (UCC) provides a more comparatively robust framework. This is because the regime in Uganda is still evolving. Consequently, there are many lessons that Uganda can draw from the United States' experience including the application of remedies such as strict foreclosure and self-help repossession with the concomitant non breach of peace principle among others.

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INTRODUCTION:

Lease is one of the important tools that businesses may use to access finance. This is because it enables businesses immediate access to much needed resources such as machinery and equipment, which is required for production. For small and medium-scale enterprises (SMEs), the importance of leases in their operations and success thereof cannot be overemphasized.[1] Leasing is generally considered more attractive as a form of borrowing compared to the usual forms of borrowing because of a number of non-fiscal advantages.[2] These advantages make leasing more so appealing to emerging economies such as Uganda.[3] The factors include availability, flexibility, affordability, coverage and security to mention but a few.[4] Availability of leasing in emerging economies, where capital markets are undeveloped, is connected to the fact that leasing may be the only source of medium or long term borrowing available for obtaining capital equipment.[5] Further still, with leasing unlike other forms of credit, there nay be no requirement of having a good financial record.[6] In terms of flexibility, leasing allows terms of payment to be tailored to the interests of each lessee.[7] The focus of this thesis is

[1] See International Finance Corporation (IFC), Leasing in Development: Guidelines for Emerging Economies, p 7, available at https://www.ifc.org/wps/wcm/connect/1341b08049586162a62ab719583b6d16/IFCLeasingGuide2009.pdf?MOD=AJPERES, wherein it is stated as follows: '…lease financing has proven to be an important tool to provide access to investment finance for Small and Medium Enterprises (SMEs), especially in emerging economies where SMEs provide strong growth and employment opportunities, but lack access to financing due to a limited development of capital markets and banking sector.'

[2] Martin J. Standford, International Financial Leasing: The Status of the UNIDROIT Convention and the Analysis of its provisions.

[3] ibid.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

regulation of lease finance. It compares the legal framework on lease finance in Uganda and the United States of America with the view to drawing lessons for Uganda from the American experience.

Rationale for leasing in Uganda

The rationale for lease financing in emerging economies or developing countries is of paramount importance and it is not difficult to find.[8] As widely acknowledged, SMEs are major players in these emerging economies and consequently they contribute substantially to their gross domestic products (GDP). Yet in spite of their obvious importance to their local economies, these businesses often are incapacitated by the lack of or limited access to finance. This lack of access to finance may be explained by different factors including an immature capital markets and banking sector.[9] This is where leasing comes in. Leasing ultimately enters the SME access to finance discourse by essentially bridging the financial gap thereby provides a critical source of finance to these enterprises.[10]

In the context of Uganda, where SMEs comprise more than sixty percent (60%) of the business sector,[11] SMEs are not surprisingly plagued with the same access to finance challenges.[12] This

[8] See IFC (n1).

[9] ibid.

[10] Ibid.

[11] Joseph S Lutwama, Small & Medium Enterprises (SMEs) Financing in Uganda: Are Capital Markets a Viable Option? Available at https://www.researchgate.net/publication/256010004_Small_Medium_Enterprises_Smes_Financing_in_Uganda_Are_Capital_Markets_a_Viable_Option.

[12] See Potential for Leasing Products: Assets Financing for Micro & Small Businesses in Tanzania and Uganda 2001 available at https://afraca.org/?wpfb_dl=18 and Making Finance Work for Uganda, 2009 available at http://documents.worldbank.org/curated/en/378491468308684447/pdf/690460ESW0P1070ance0Work0for0Uganda.pdf.

subject of leasing is important for Uganda because of the recognised importance of the role it plays in the SME sector, of which this sector as previously stated is crucial for the economy. Accordingly, this study is important because it will shed light on the regulatory framework on the finance lease, highlighting the weaknesses and strengths if any. Ultimately, it will make recommendations for reforms based on the American UCC experience where the law is arguably more advanced.

With the exception of leasing as applied in real property there is no specific legislation on leasing in Uganda as applied in financing. Leasing has hitherto been regulation by taxation law, common law and principles of contract.[13] In the absence of specific laws on lease financing, it is not unusual for financial institutions to enter into lease financing arrangements with businesses seeking to acquire equipment and seeking collateral in the form of real property under the mortgage law. Such agreements are prone to confusion especially during enforcement proceedings.[14] With the evolution of the law on secured transactions in Uganda, there is a great opportunity for the rules on security interests created therein to be exploited. Yet in light of the currently inadequate secured transactions legal regime,[15] the fate of leasing remains unclear and ought to be examined hence the need to conduct this study on finance leases under secured transactions law. Accordingly, the following laws will be examined: The Chattels Transfer Act,[16] the Chattels Securities Act[17]and the Security Interest in Movable Property Bill No. 1 of

[13] Juma Kisaame, 'Case Study of DFCU Leasing Company, Uganda' 17.

[14] See *Access Reprographics Limited & 2 Others Vs. DFCU Leasing & 2 Others,* Civil Suits Nos 106, 150 And 788 of 2007.

[15] ibid.

[16] Chattels Transfer Act, Cap 70 of 1978.

[17] Chattels Securities Act, No. 7 of 2014.

2018(hereinafter 2018 Bill).[18] The position of this thesis is that the American regime on finance lease found under the Uniform Commercial Code (UCC) prescribes a more robust framework compared to the Uganda regime which is still evolving. Consequently, there are many lessons that Uganda can draw from the United States' experience.

Research questions and sub questions:

The overall goal of this research is to address the major question, whether the laws of Uganda address finance lease and if so how? More specifically, this research will in the first place answer the question, whether the finance lease is regulated under the Secured Transactions Laws of Uganda? Secondly, it will address how the secured transactions laws of Uganda deal with creation and enforcement matters of finance leases. Finally, having reviewed Article 9 of the UCC, this will conclude with what lessons Uganda can learn from finance lease regime in the United States.

Literature review:

James Brook's *Secured Transactions: Examples and Explanations*[19] provides a detailed description of leases especially from the vantage point of Article 9 of the UCC. Dahan and Simpson in their book *Secured Transactions Reform and Access to Credit* provide various scholarly articles on key topics relating to secured transaction law reform, which is pertinent to the intended research.[20] Reference will also be made to Tajti Tibor's, *Comparative Secured*

[18] The said Bill was tabled by the Minister of Justice and Constitutional Affairs. See 'what the passing of the Security Interest in Movable Property Bill, 2018 means for all Ugandans' available at <https://ursb.go.ug/wp-content/uploads/2018/08/URSB-Newsletter-June-2018.pdf> accessed 13th October 2018

[19] James Brook, Secured Transactions: Examples and Explanations (Aspen Publishers 2005).

[20] Dahan F and Simpson J (eds), Secured Transactions Reform and Access to Credit (Edward Elgar 2008**).**

Transactions Law,[21] which provides detailed account on the concept of security interest. The United States is part of North America, a region that is under review in this book. Gullifer L and Akseli O in *Secured Transactions Law Reform Principles, Policies and Practice*[22] provide a wide range of articles which address issues pertinent to secured transactions reforms. These articles are expected to be instructive for purposes of this research. Chima, Williams Iheme's thesis '*Towards Reforming the Legal Framework for Secured Transactions in Nigeria,*[23] will be of relevance to this research. Being African countries and both former British colonies, Uganda and Nigeria are expected to have similar circumstances. It is expected that this thesis will facilitate easy comprehension of secured transactions reforms.

Jurisdiction:

Uganda and the United States of America will be reviewed. Besides being the author's home country, and that the author is more familiar with Ugandan legislation, Uganda was selected because as stated above, the government is currently engaged in reforming its law on secured transaction. It is not clear whether the efforts will result into a robust regulatory regime, which the country desperately needs. Moreover, this regime optimistically speaking has the potential to champion development of the leasing sector which is currently dogged by absence of regulation. Yet in the absence of any specific regime on leasing, this already preconceived

[21] Tibor Tajti, Comparative Secured Transactions Law (Akadémiai Kiadó 2002).

[22] Gullifer L and Akseli O(eds), Secured Transactions Law Reform Principles, Policies and Practice (Hart Publishing 2016).

[23] Chima, Williams Iheme's 'Towards Reforming the Legal Framework for Secured Transactions in Nigeria' (PhD, Central European University 2016)

secured transactions might favourably fill the gap. Optimistically when the leasing sector is boosted with regulation, spill over effects can be expected in the SME sector, which would benefit through increased access to credit. In the final analysis, with increased access to finance by SMEs, we can expect growth and increased GDP for the country.

Whereas critics of the UCC have condemned for uncertainty and failure to bring about predictability in jurisprudence,[24] its Article 9 on secured transactions is widely celebrated. Not only has it influenced the secured transactions regimes of many developed countries, the said regime is acknowledged for having been the motivation behind the European Bank of Reconstruction and Development (EBRD) Secured Transactions Model Law.[25] For this reason, it is presumed that regime prescribed therein may be useful in offering some solutions for Uganda with respect to leasing.

Methodology:

This research will be conducted using both primary and secondary sources. The secondary sources to be relied on will include text books, journal articles, national legislation, international instruments both hard law and soft law nature, case law and other electronic sources. A legal analysis of these legal frameworks will be conducted in order to determine their adequacy. Similarly, a comparative analysis will be conducted between the legislation of the two countries as previously cited.

[24] John L. Gedid, U.C.C. Methodology: Taking a Realistic Look at the Code, (1988) 29 Wm. & Mary L. Rev. 341), http://scholarship.law.wm.edu/wmlr/vol29/iss2/4

[25] Tajti (n21).

Limitations of the research.

In writing this research there were various limiting factors. Resources on secured transactions law and leasing in Uganda was either limited or not available at all. The researcher mainly relied on the texts of relevant laws. Further still, where some materials were found especially with regards to leasing, these were not strictly speaking legal publications. It should also be noted that this research was principally a desk research and no fresh data was obtained from the field.

Road map to the thesis:

This thesis contains four chapters. The first part of this thesis is introductory. It sets out the importance of leases generally and demonstrates the rationale for conducting a study on lease financing in context of Uganda. Additionally, it briefly outlines the research questions, the objectives, literature review on lease financing and the methodology applied in the study. Chapter one provides an overview on leases and related concepts. Chapter two focuses of creation of the lease security interest. It highlights successive secured transactions laws adopted in Uganda and examines the relevant provisions therein with respect to creation of lease interest in order to determine what modes of creation of the lease security interest are provided for. The focus of Chapter three is on enforcement of the lease interest. It reviews the different security transactions laws in Uganda and Article 9 of the UCC in order to ascertain the enforcement mechanisms prescribed under the laws. The final part contains the conclusions based on the reviews of the laws of the two countries, finally providing recommendations on how the Ugandan law can be improved

CHAPTER ONE: OVERVIEW ON LEASES

1.0. Introduction

In this section the thesis defines leases and provides a general overview of important conceptual issues that arise in the latter parts of the thesis. The true lease and security lease are distinguished in order to enable the reader appreciate how the lease security interest operates. Similarly, types of transactions related to the lease, specifically title finance transactions are also explained.

1.1 Leases

Leasing has been defined as 'the leasing of capital assets for substantial periods to commercial users who do not require or obtain title to the assets'.[26] The above definition although only functional does capture the essence of a lease: the elements of 'use by a party who is not an owner,' 'for a defined period' are clear and certainly a consideration would be payable. The UCC clearly defines a lease in the ordinary terms of a *right of possession* and *use* for which *consideration* is payable. The relevant section[27] states: **'…** a transfer of the right to possession and use of goods for a term in return for consideration, …'[28]

1.2 True leases and security leases distinguished

Distinction between the true lease and the security lease has been a subject of controversy for a long time and has led to numerous litigations in the United States. Part of the problem has

[26] Derek R. Soper, Robert M. Munro and Ewen Cameron, (eds), The Leasing Handbook,

[27] UCC S 2A-103.1. a (2002).

[28] Ibid.

been the great similarity between the two terms if compared for instance to the sales transactions. Parties have often disguised security transactions to appear as leases in order to obtain certain benefits in tax, accounting and bankruptcy. Further still, the UCC provisions defining security interests was originally narrow and therefore inadequate. Promulgation of Article 2A was therefore done with the view of providing a comprehensive body of law to address leasing, which had significantly grown both in size and importance in the American economy.[29]

Article 2A introduced a new test to distinguish between a true lease and a disguised security interest. The security leases are also termed a loan, "leases intended as security", "financing leases" or "disguised security interests"[30] and these must comply with additional requirements under secured transactions law for them to be enforceable.[31] In the new Article 2A two part test, it is not the intention of the parties that is relied upon, rather, it is an approach that looks at the economics of the transaction.[32] Essentially in conducting the analysis the focus is to determine whether the parties to the leases envisaged that at the end of the lease term, there would be any meaningful residual interest left for return to the lessor.[33] The two part test which has its origins in the pre-revised statute when satisfied should lead to a rebuttable presumption

[29] William H. Lawrence, and William H. Henning Chapter 1, The Uniform Commercial Code, is reproduced from *Understanding Sales and Leases of Goods* by 1996 Matthew Bender & Company.

[30] Ken Weinberg, Lease Vs. Loan Analysis Under the Uniform Commercial Code Dispatches from the Trenches July 7, 2003 https://www.bakerdonelson.com/Lease-Vs-Loan-Analysis-Under-the-Uniform-Commercial-Code-07-01-2003.

[31] The requirements of filing a financing statement under Article 9 of the UCC would apply.

[32] Lawrence (n29); see also Robert Downey, Edward K. Gross and Stephen T. Whelan, 'Leases' *the Business Lawyer*, (2013), Vol. 68, No. 4 pp. 1191-1201.

[33] E. Carolyn Hochstadter Dicker and John P. Campo, FF&(and)E and the True Lease Question: Article 2A and Accompanying Amendments to UCC Section 1-201(37), 7(1999). Am. Bankr. Inst. L. Rev. 517

of the existence of a secured transaction.[34] The first part of the tests seeks to establish whether the lease is terminable or not.[35] A transaction is a secured transaction if the consideration of the lessee to pay the lessor for the rights to possess and use the goods is an obligation that forms part of the terms of the lease and the is not terminable by the lessee.[36] In other words, part one of the test is all about discovering whether the lease contains a so-called "hell or high water clause.[37] While in the second part, the goal is to ascertain what residual value, if any, parties envisaged would remain at the end of the lease term.[38] A lease which provides options for purchase or renewal requires a further consideration of whether the price for purchase is nominal, in which case this would further substantiate the view that the parties intended to enter into a disguised financing.[39] Where the two-part test fails to answer the question, courts will look to all of the facts surrounding the transaction.[40]

In *RE O.P.M Leasing Services case,*[41] the lease contained a 'hell of high-water clause' which made the lease absolute and not terminable. The lessee sought to cease making payments on a lease for an alleged breach of warranty. The brief facts were that, OPM leased a number of computers to West Virginia pursuant to a master lease agreement. OPM later assigned its lease payments or receivables from West Virginia to La Salle Bank. West Virginia argued that

[34] Ibid.

[35] Ibid; see also Lawrence (n32).

[36] Ibid Lawrence.

[37] Ibid; The hell or high waters clauses essentially requires the lessee to make rental payments to the lessor "come hell or high water. See Dicker(n33).

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] *U.S. Bank. C. SDNY 21 B.R. 993 (1982).*

because OPM failed to make monthly maintenance payments to IBM, another party, it terminates the rights of La Salle as assignee to receive payments. The master lease agreement had provided that West Virginia's obligation to make payments to assignees directly due under the lease was 'absolutely unconditional' and that the payments were to remain due and payable whether the equipment schedule was terminated by the operation of law or not. Court took the view that the lessee could not stop making payment merely on the basis of the breach of warranties and further that, the hell and high-water clause was enforceable since it demonstrated the intention of the parties as stipulated in the contractual terms. In this case, although it was decided before the revision of the UCC that introduced the two-part test, it is easy to note that West Virginia was dealing with a security lease and not a true lease, since it clearly contained a hell or high waters clause, which made it impossible for the lessee to terminate it.

The *Re Wells case*, a more recent case demonstrates how application of the two-part test led to the conclusion that the lease was in fact a true lease and not a disguised security interest.[42] The lessee sought to include a vehicle lease agreement as part of the debtor's estate under a Chapter 13 bankruptcy plan.[43] Under the said lease, the lessee had acquired a motor vehicle from the lessor, American Car Centre, LLC under the following key lease terms: $1,200 down payment, bi-weekly payments of $198.08 *for* ninety-one months, and an option to purchase the leased vehicle at lease expiration.[44] However, the lease agreement also provided for circumstances when the lessee's performance would be excused including, when the lessee has exhausted all

[42] No. 15-80056-CRJ-13 2015 WL 3862969 (Bankr. **N.D.** Ala. June *22,* 2015) accessed in Edward K. Gross; Dominic A. Liberatore; Stephen T. Whelan, Leases, (2016) 71 *Bus. Law*. 1263.

[43] Ibid.

[44] Ibid.

funds available for payment owed to the lessor, and when no other legal procedure was available to the lessee to make payment to the lessor.[45] Under the relevant Tennessee Law, amongst the requirements for a lease to be considered a security interest were that: the lessee must not have the option to terminate the lease and (i) the original term of the lease must be equal to or greater than the remaining economic life of the goods, amongst others.[46] Since the lease contained an early termination, the lessor argued that it was a true lease and lessee was not bound to become owner of the vehicle.[47] On the other hand the lessee's contention was that the early termination clause was ineffective due to unpaid weekly payments.[48] Court agreed with the lessor that the lease comprised a true lease and not a security interest. It noted among other things that the remaining economic value of the vehicle was more than the original term of the lease agreement.[49]And further that although there was an option to purchase at the end of the lease, the lessee was neither bound to renew the lease nor purchase the vehicle.[50] Moreover, court also found that the vehicle would continue to have value at the expiry of the lease. Evidently in this case, two important features easily led to the conclusion that the lease was a true lease: First, the lease was terminable by the lessee and secondly, the economic value of the vehicle was greater the original term lease. However, it should be noted that if reference had been made to the single fact that the lease contained an option to purchase, perhaps the conclusion would have been that the lease was a security interest as the lessee attempted to

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Ibid.

argue. In making the distinction between a security lease and a true lease therefore, it is important to pay attention to the substance of the transaction and specifically examine the individual terms of the agreement. The two-part test is helpful in determining the distinction. However, there may still be cases not fall within the scope of the test and courts will have to engage in a more detailed analysis to determine whether a transaction is a lease or a disguised secured transaction.

1.3 Finance lease

In a finance lease there are three parties including a supplier, a lessor and a lessee.[51] It should be noted that the seemingly related terms finance lease, financial leasing and financial lease have been used in different instruments have the potential to cause confusion.[52] To avoid any potential misunderstanding therefore, throughout this thesis the term finance lease will be used and will be implied whenever reference is made to leasing and finance. Under the U.C.C. the finance lease has these key characteristics: the lessor is neither the producer nor supplier of the goods and does not make this choice with regards to the goods; the lessor obtains the goods by either outright purchasing or somehow obtaining the right to their possession and use; and finally, either ***one*** of the following additional attributes should apply: a) before execution of the lease agreement, the lessor furnishes the lessee with a copy of the agreement on which the goods were obtained; b) the lessee approves the supply contracts in order to make the lease contract effective; c) before signing the lease, the lessee receives from the lessor a statement

[51] Peter W. Schroth,' Financial Leasing of Equipment in the Law of the United States' (2010) 58 Am. J. Comp. L. 323.

[52] Terms are applied in the American U.C.C, the UNIDROIT Ottawa Convention on Financial Leasing and the UNIDROIT Model Law on Leasing.

containing key terms such as pledges and warranties, disclaimers of warranties, limitation or modifications of remedies, and liquidated damages, which were furnished to the lessor by the supplier as part of the supply contract; d) and there are specific requirements when the lease in question is not a consumer lease.[53] In Uganda, the Security Interest in Movable Property Bill (hereinafter the Bill) contains a more precise definition compared to what is provided by the UCC.[54] The finance lease is defined as a lease on a tangible asset where any of the following exist: the lessee automatically becomes the owner of the tangible asset; the lessee may become the owner of the tangible asset upon payment of a nominal price at the end of the lease or the tangible asset has not more than a nominal residual value.[55]

1.4 Title finance transactions

Title finance is a broad term also described as asset-based finance or vendor/lessor security.[56] The use of the term derives from the fact that in each of the specific transactions, the financier has the title or ownership of the asset.[57] This is to be contrasted with a mortgage wherein the financier does not get title or ownership but obtains a mortgage interest in the asset. Yet these transactions might as well be mortgages because they exist to secure repayment of credit

[53] UCC S 2A-103.1.g additional attributes include : d)if not a consumer lease, before the lessee signs the lease, the lessor informs the lessee in writing the following:- i) details identifying the supplier; ii) that the lessee has the right to promises and warranties under the contract by which the lessor obtained the lease products and iii) that the lessee is free to communicate directly with the supplier in order to obtain with respect to the supply contract further and more accurate particulars with respect to promises and warranties, their disclaimers and limitations of them and remedies.

[54] See Section 2 of the Security Interest in Movable Property Bill No.1 of 2018.

[55] Ibid.

[56] Phillip R. Wood Law, Title Finance, Derivatives, Securitisations, Set-off and Netting, (Sweet & Maxwell, 1995). p. 4.

[57] Ibid.

granted by the supplier to the acquirer of assets.[58] Conditional sales, finance lease and hire purchase are all forms of title finance.

1.4.1 Conditional sale

The ultimate objective of a conditional sale is actual purchase and ownership of goods by the buyer.[59] The conditional sale differs from the hire purchase by virtue of the fact that in the former, the conditional sales agreement binds the buyer.[60] The seller in a conditional sale only transfers possession to the buyer but retains the title (hence the reference to retention of title) until the buyer has completed the payment obligations and any other additional obligations agreed upon.[61] The seller retains title only as a form of security,[62] however for all intents and purposes, the conditional sale is a purchase of goods by the buyer. This transaction has a number of similarities with the lease especially with the security lease. In the security lease, the lessee grants the lessor a security interest in the goods as a form of security considering that the ultimate goal is for the lessee to own the property free of any security interests.

1.4.2 Hire Purchase

A contract of hire has been described *as a bailment of goods coupled with an option to purchase them which may or may not be exercised*.[63] The common understanding here is that the seller gives the goods to the buyer, who makes an initial payment and then completes the rest of

[58] ibid (n3).

[59] Tatji (n21) p 95.

[60] Ibid.

[61] Mehdi Motallebi; Hassan Khosravi, 'Comparative Study of Hire-Purchase in Iran and English Common Law' (2017)10 J. Pol. & L. 1. (2017)

[62] Ibid.

[63] P.S Attiya, The Sale of Goods.

payment with interest by instalment. A hire purchase agreement is essentially a lease of goods with an option to purchase, which the hirer is obligated to exercise.[64] A hire purchase agreement has a number of similarities with a finance lease. In the first place, the hire purchase transaction strictly speaking has three parties and two contracts:[65] the first contract is a sale contract wherein the parties are the seller/supplier and the finance company and then the second contract, the hire purchase contracts under which the finance company then lets the goods to the buyer under terms of a hire purchase.[66] It should be noted that whereas the hire purchase has its origin in common law, the term is not known in the United States, however its equivalent seems to be the finance lease.

1.5 Security interests

The concept of security interest is used widely throughout this thesis. It therefore deserves a definition in order to avoid any misconceptions. A security interest has been defined under the UCC to mean '*interest in personal property or fixtures which secures payment or performance of an obligation.*'[67] However it should be noted that security interests is a wide term and includes rights a creditor has on all assets that are used as security whether personal property or real property.[68] Furthermore, it should be noted that although Article 2A leases do not create security interests, an Article 2A lessor may acquire security interests by complying with Article 9 of the UCC.[69] Equally important terms applicable with respect to security interests are

[64] Tajti (n21) 94,95.

[65] Ibid.

[66] Ibid.

[67] UCC S. 1-201. b.35.(2001).

[68] Tatji (n21).

[69] UCC S. 1-201. b.35.(2001).

attachment and perfection. They determine enforceability of the security interest against the debtor and third parties. A brief explanation of this ensues.

1.5.1 Attachment and perfection

The time difference between creation of a security interest and making it known to the public partly explains the difference between the two terms, attachment of a security interest and perfection.[70] Whereas attachment occurs at the time of creation of the interest when the security agreement is executed, perfection takes place when the various methods are applied to make the existence of the said interest known to the public.[71] At the moment of the creation of the security interest, it attaches and essentially this makes it valid and enforceable against the contracting party under the agreement, that is the debtor, borrower or lessee who is granting the security interest.[72] Following attachment, once the existence of the security interest has been brought to the attention of the whole world through any of the various methods, then it can be said that the security interest has been perfected.[73] This makes the interest enforceable against third parties.

Once a security interest has been perfected, the secured party is protected against other creditors and potentially gets a priority position before later secured creditors as far as that collateral is concerned.[74] However, a security interest that has attached, but has not been perfected will not

[70] Tatji (n21) p37.

[71] Ibid.

[72] Ken Weinberg, Attachment: Your Security Interest isn't "Perfect" Without it, Dispatches from the Trenches May 1, 2011, https://www.bakerdonelson.com/Attachment--Your-Security-Interest-isnt-Perfect-Without-it-05-01-2011

[73] Tatji (n21) 38.

[74] Ibid.

take priority over one that is created later but perfected before.[75] Perfection may be in various forms: filing or recording the relevant prescribed documents at the designated public office; taking possession of the collateral by the secured party; or automatically in the case of certain security interests.[76]

1.6 Conclusion

As noted, the lease has similar transactions, which adopt different names in other jurisdictions than the United States, although their substance remains the same. The distinction between a true lease and security lease is important because as noted in the cases discussed in this section, different consequences follow in case of disputes. For purposes of this thesis, the focus is on the finance lease in which a security interest is created following compliance with Article 9 requirements.

[75] Ibid.

[76] Ibid.

CHAPTER TWO: CREATION OF THE LEASE SECURITY INTEREST

2.0 Introduction

In this chapter, the thesis explores the creation of a lease security interest under various pieces of legislation including the Chattels Transfer Act, the Chattels Security Act, as well as the Security Interest in Movable Property Bill of Uganda and the USA's Article 2A and Article 9 of the U.C.C. The question under examination is: how is a lease security interest created? This The objective here is to establish whether the law prescribes clear rules on mode of creation of security leases interests.

2.1 The Chattels Transfer Act 1978

2.1.0 Overview

Application of the Chattel Transfer Act 1978 Cap 70[77] commenced on the 12th of January 1978. As the name presupposes, the objective for which this post-colonial piece of legislation was enacted was to facilitate transfer of chattels and to make provision for relevant matters regarding chattel securities.[78] Weak and largely irrelevant as it is,[79] this Act has been Uganda's main piece of legislation with respect to personal property security for close to four decades. Although this piece of legislation was meant to have been repealed by the 2014 Chattels

[77] Available at http://www.fao.org/faolex/results/details/en/c/LEX-FAOC096018

[78] See preamble to the Act.

[79] This piece of legislation has largely existed for historical purposes since its provisions have hardly be used by the industry. See the Uganda Law Reform Commission Report.

Security Act 2014, following the noted inadequacies in the latter law which rendered it impossible for immediate commencement, the Chattels Transfer law remains in force.[80]

2.1.1. Creation of the lease security interest

Before an analysis of leases under the Act, it is important to establish whether how the law defines a security interest. This forms the basis for understanding how a lease or any other security device would function under this law. The Chattels Transfer Act does integrate the concept of security interest. An examination of the introductory provisions of this law reveals that a security interest in not defined.[81] On a quick appraisal of the analogous Chattels Transfer Act of Tanzania[82] it is revealed that the term security interest is glaringly absent. It is submitted that the failure of these laws to define security interest may be predicated on the principle that, under English law, interest in the collateral was transferred to the creditors by the obligors and the same re-transferred to the borrowers upon payment of the debts.[83] Hence the overarching ideology of 'chattels transfer'. Tanzania and Uganda both having been British colonies inevitably could not escape the legacy of common law and English principles. Consequently, the concept of a security interest which is consensual, seems a little divorced from the chattels transfer in which the borrower completely divests ownership from themselves to the lender.

[80] See memorandum to the Security Interest in Movable Property Bill.

[81] Section 1 – the interpretation section.

[82] The Chattels Transfer Act of 1942, Cap 210.

[83] Robert R. Pennington,' The Genesis of the Floating Charge' (1960) 23 Mod. L. Rev. 630.

Whereas the Act does not define security interest, it defines an important terminology: which may be of relevance to the discourse on the lease interest, 'instruments. It has been defined as follows:

"… any instrument ***given to secure the payment of money or the performance of some obligation*** and includes any bill of sale, mortgage, lien, or any document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or ***lease…"***[84] (emphasis added). Accordingly, it is submitted that whereas the Chattels Transfer Act does not define a security interest expressly, this is implied within the meaning of an instrument. This position is further substantiated by the fact that one of the instruments referred to is a chattels mortgage, one of the more popular English security interests in personal property.[85]

Additionally, with respect to leases, it may be stated that whereas the Act does not specifically define a lease, it describes a lease as an instrument that may be used to secure payment of money or satisfy performance of an obligation.[86] The failure to define a lease is submitted to be a weakness of this law since modern secured transactions laws ordinarily define this term.[87] Additionally, prescribing a clear definition is important to give the term context within this sector or field. A lack of certainty arises from the failure to define the term because it becomes unclear to interested parties whether the type of transaction is available for their use or not.

[84] Section 1.g of the Chattels Transfer Act.

[85] Section 1.g of the Chattels Transfer Act.

[86] Ibid.

[87] See UCC Article § 2A-103, sections e, g, and h.

Under the U.C.C a lease is not only defined, variants of leases such as consumer and finance leases are described.[88]

Since the law does not define a lease, it is not expected that it would provide for creation of a lease security under this Act. This is one of the weaknesses of the law as already noted. The above notwithstanding, creation of a lease interest may perhaps be inferred from the provisions relating to creation of an instrument. A quick survey of the Act shows that creation of instruments is not expressly addressed; however, it also reveals that instruments are expected to be attested, expected to be registered and expected to take a certain prescribed form.[89] It is safe to conclude that instruments are made in writing and a review of the instrument or form shows that it is executed by only the grantor and attested

2.1.2 Attachment and Perfection

A review of the provisions of the Chattels Transfer Act does shows that the terms attachment and perfection are not in it. However, the Act makes provision for registration of instruments which is to be deemed notice to the all persons.[90] The rationale for the absence of provisions on perfection might be found in the fact the underlying philosophy of the legislation is that the collateral or chattel is 'transferred' to the grantee for purposes securing payment. As such since the grantee would already have legal title by virtue of the transfer, such a party could easily take over possession of the chattel in the event of default.

[88] *Ibid.*

[89] See Sections 14,4 and 18 of the Chattels Transfer Act.

[90] See section 4 of the Chattels Transfer Act.

In the context of leasing, the absence of clear rules on perfection is likely to render challenges. A lessor who was leased goods to a lessee, which goods are in the possession of the lessee will want to have the confidence that its interests in the goods are not only attached but also perfected and therefore protected from third parties. This law does not offer this.

Based on the foregoing, it would be safe to state that the laws of Uganda as they stand currently do not clearly provide for leasing, not least the finance lease. The provisions on the instrument make it unrealistic for a lease to be created. In the following section this thesis proceeds to examine the Chattels Securities Act, the law which was intended to repeal the Chattels Transfer Act but did not. This should raise concern because in the absence of any other law, this Act remains effectively the law on secured transactions. It is no surprise that the has hardly been applied by credit industry.

2.2 The Chattels Security Act 2014

2.2.0 Overview

This piece of legislation was adopted with much anticipation at a time when the only law on personal property security was the foregoing Chattels Transfer Act. It was enacted in order to repeal the ancient Chattels Transfer Act and most importantly to regulate the making and enforcement of security interest in chattels.[91] Unlike its forerunner the Chattels Transfer Act, this Act incorporate various important definitions as will be seen.

A quick perusal of the Act reveals the important section addressed therein: creation of security interest and rights of secured parties, perfection and priorities, registration, financing

[91] See long title to the Chattels Security Act, 2014.

statements and rights and remedies.[92] These key features such as creation of security interests and perfection and priorities are submitted to be important aspects of secured transactions law since they ensure certainty and predictability. To this extent this law ought to be lauded.

2.2.1 Creation of lease security interest.

In this Act, a security interest has been defined in terms of a right, interest, the functions of the device and its examples. Accordingly, it states that, it is a, '…right which is enforceable against persons generally, arising out of an interest in a chattel paper, a document of title, goods, an intangible, money or a negotiable instrument.'[93] It also includes interests created or provided for by a lease.[94] It goes on further to enumerate examples of a security interest, which include the following: a floating charge, a conditional sale, a hire purchase agreement, a consignment and a lease. This definition is arguably more substantially detailed, and it may be argued that it is representative of fairly modern definition of security interest as prescribed in international instruments and the laws of other jurisdictions.

The Act defines a lease as follows:"… means a lease or bailment of goods for more than three years…"[95] In the parts that follow, the Act describes different kinds of leases, which are distinguishable on the basis of their duration and option to terminate or renew.[96] It is submitted that the Act does not lay down specific rules on creation on a lease interest. Instead it prescribes uniform rules which are applicable in creation of all security interests under the Act. Such an

[92] Chattels Securities Act.

[93] See Section 2 of the Chattels Securities Act.

[94] Ibid.

[95] See Section 2 of the Chattels Securities Act.

[96] Ibid a – c.

approach is important as it enhances certainty and predictability in enforcement of law. A review of the rules on creation of security interests ensues.

Under Part II of the Act, entitled 'creation of security interest and rights of the secured party', the Act lays down comprehensive rules on the creation of security interest. Accordingly,[97] a security interest is created by a transaction which in substance secures payment or performance of an obligation.' Additionally, a contract which creates a security interest shall have the following features and these are mandatory based on the use of the term 'shall', in this requirement. Suffice to state, the following are the features that such a security interest creating agreement should possess: (a)"should have been intended only as security; (b) be a right that is enforceable against any person; (c) be created by grant or declaration of trust and not by reservation; and (d) expressly specify a restriction on the control by the debtor over the assets".[98] These features are crucial in the creation of a security interest because as implied in (a) thereby transactions which are disguised as creating security interests and yet have the effect of transferring legal title. Such instruments would not be effective in creating a security interest.

The section adds that agreements creating security interest agreements are effective as between the parties and against a third party and further that good faith is assumed on the part of both the debtor and the secured debtor.[99] The reference to an agreement creating a security interest in the terms in which it is stated here suggests that security interests are created by agreement. In addition to the provisions on creation of security agreements, the Act also makes provisions

[97] Section 9.1 of the Chattels Securities Act.

[98] Section 9.2 of the Chattels Securities Act.

[99] Section 10. 1 and 2 Chattels Securities Act.

for instances of attachment of security interest. With respect to leases, section 11.6. a – b is relevant.

2.2.2 Attachment and Perfection

Perfection under the Chattels Securities Act takes places when a security interest has attached and the all the required steps with respect to perfection under the act have been undertaken.[100] Perfection is to be done by way of registration of a financing statement[101] and through possession of the collateral by the secured creditor or by a third party on his behalf.[102] The latter method applies when collateral involved includes chattel paper, goods or negotiable instruments among others.[103] In the context of lease finance, if this law had the chance of being implemented, perfection would have to take place by registration of a security agreement.

From the foregoing provisions as above stated, a lease interest just as any other security interest under the Act created by agreement and is required to be in writing. Importantly also as deduced from the definition of a lease, the duration of this agreement should be below three years.[104]

[100] See section 17 a & b of the Chattels Securities Act.

[101] See section 18 of the Chattels Securities Act.

[102] See section 19 of the Chattels Securities Act.

[103] Ibid.

[104] See (n40).

2.3 The Security Interest in Movable Property Bill 2018

2.3.0 Overview

The Security interest in Movable Property Bill was introduced to Parliament in the year 2018. The Bill seeks to provide for the use of personal property as collateral.[105] This would appear to be the main objective of the Bill once it is assented into law. Other objectives of the Bill include provision of rules of priority, the creation of security interests, registration and enforcement of security interests, as well as matters related to the registry.

What is interesting about this intended piece of legislation is the background that led to its enactment. Besides the fact Uganda has been on a decades long journey to reform its personal property securities law, this law in the making process was tabled soon after the 2014 Chattels Securities Law, which failed to become operational due to inherent weaknesses therein. The major sections of the Bill address important aspects of secured transactions law including, creation of security interests, perfection, registration, priorities and enforcement. On the face of it therefore, it is apparent that Bill constitutes a comprehensive piece of legislation.

2.3.1 Creation of lease interest.

The security interest is a proprietary right created in moveable property by agreement and for purposes of securing an obligation.[106] Specifically, the Act adds that rights include rights under financial and operating lease.[107]

[105] Memorandum to the Bill the clause 1 on its objectives.

[106] Section 2 of the 2018 Bill.

[107] Ibid.

Although the Bill does not define a lease, it elaborately defines a financial lease. Accordingly, a financial lease is defined along the following terms: One where the lessee automatically becomes the owner of the tangible asset; where the tangible asset has not more than a nominal residual value; and where the lessee may become the owner of the tangible asset by payment of a nominal price at the end of the lease.[108] As will be noted in the discussion that follows on under the U.C.C Article 9, the security lease has been defined in somewhat similar terms. This might suggest that the drafters of this Bill referred to the U.C.C, which is commendable since the latter is celebrated piece of legislation.

The Bill contains various provisions on the creation of security interests. From the onset, the law articulates that a security interest may be created partially or wholly in a movable property.[109] Additionally, it also sets out that there is no limitation on the types or categories of movable properties in which security interests may be created.[110] Most importantly, with regards to the creation of a security interest, it states that the basis is an agreement between the secured creditor and the grantor.[111] It should be noted that under section 2 of the Bill, the interpretation section, a secured creditor includes a financial lessor and a grantor includes a financial lessee. Accordingly, this confirms the position that the lease interest, just as any other security interest under the Bill is formed under by virtue of the security agreement.

[108] See Section 2 of the 2018 Bill.

[109] See section 4.1 of the 2018 Bill.

[110] Section 4.1.a & d. 2018 Bill.

[111] Section 4.2 of the 2018 Bill.

2.3.2 Attachment and Perfection

The Bill does not appear to embrace the concept of attachment of security interest. This is a problematic. Under the Bill a security interest is perfected when: notice of the security interest is filed and registered with the register of security interest in movable property; the secured creditor or a third party on its behalf has possession of the collateral; or in the case of deposit accounts, the secured party or another person acting on its behalf has control of the deposit account.[112]

2.4 The Uniform Commercial Code

2.4.1 Article 2A

Initially the UCC did not include provisions on leases of goods.[113] During the 1940s and 1950s, leases were relatively insignificant compared to the 1980s, when there was substantial business investment in equipment and growth in leasing of personal property.[114] Before Article 2A was promulgated the law on leasing was scattered, fragmented and ancient.[115] Therefore, in recognition of the need for leasing legislation, Article 2A was enacted in 1987 and went through various revisions till 1990.[116] It contains important definitions of a lease and the finance lease.

[112] See section 8.1.a-c of the 2018 Bill.

[113] Dicker (n33).

[114] ibid.

[115] Ibid.

[116] Ibid.

2.4.2. Article 9

2.4.2.0 0verview

Article 9 of the UCC deals with secured transactions generally, hence the short title, Uniform Commercial Code-Secured Transactions.[117] It contains rules on creation, attachment and enforcement among others. The focus of this section is creation of lease security interest.

2.4.2.1 Creation of the lease security interest.

Although it does not define a secured transaction, reference is made to both a security interest and security agreement, which are defined within the provisions of the U.C.C. The security interest has been defined as interest which secures payment or performance of an obligation.[118] As opposed to immovable or real property, this interest is in personal property, which would include leased goods.[119] This security interest is created by means of a security agreement.[120] Creation of a security interest as such is a two-party affair between a debtor and a secured party.[121] Ideally the debtor being an owner of property – the collateral and therefore having rights to or in it, gives an interest to the secured party, thereby creating a security interest in favour of the secured party over the said goods.[122] The definition of the security agreement is

[117] https://www.law.cornell.edu/ucc/9/9-101

[118] UCC S. 1-201 (b) (35). U.C.C Article 9.

[119] Ibid.

[120] UCC S. 9-102 (a) (74).

[121] Brook (n19) p 49.

[122] Ibid.

very expressive in that it reveals the manner in which a security interest is created. it states that: '… means an agreement that creates or provides for a security interest.'[123]

2.4.2.2 Attachment and Perfection

Once a security interest has been created between a debtor and a secured party with respect to a specific property or goods, it may be stated that the security interest has attached to the property.[124] It should be noted that attachment occurs with respect to a specific, identifiable properties and not something abstract.[125] The importance of this requirement may be seen in enforcement where security interest which has not attached is not enforceable.[126] According to Section 9-201 (a), a security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral.

Perfection under the Article 9 depends on the local law of the jurisdiction where the debtor is situated.[127] However, the different methods of perfection available are possession and delivery, control, filing of finance statement and automatic perfection.[128] In the context of leasing, the appropriate method would be by filing a finance statement.

In the context of a security lease therefore, in order to create a security interest, the lessor would have to lease goods to the lessee under the relevant lease agreement, say the finance lease provisions under section 2A. The lessor and lessee would then have to execute a security

[123] UCC S. 9-102 (a) (74).

[124] Brook (n19) 50.

[125] ibid.

[126] Ibid.

[127] See UCC. S.9-301.

[128] See UCC S.9-313; S.9-314; S.9-309

agreement in which the lessee now a debtor gives security interest to the lessor, who now be the secured party. However, for this lessor/secured party to acquire enforceable security interest, would have to fully comply with Article 9.[129] It is also evident from the foregoing that such agreement creating a security interest would have to be in writing, given the authentication requirement.[130]

2.5 Conclusion

The objective of this section was to examine the rules on creation of the lease interest under the relevant pieces of legislation. Since the laws under review are secured transactions laws, they did not contain rules on creation of security interest specific to leases alone. Rather general mandatory rules are laid down for parties to comply with. With regards to the specific laws reviewed, it was noted that the Chattel Transfer Act, Uganda's current law on secured transaction has the weakest provisions. Its inadequacy is noted in both the absence of key provisions and the lack of clarity where some rules are provided. The Bill is quite progressive and is likely to provide a more developed legislation than the Chattels Transfer Act. Conceivably, the UCC Article 9 has more articulate provisions on creation of security interests with comprehensive definition of terms and express rules on creation of security interest.

[129] UCC S. 1-201 (b) (35).

[130] UCC S. 9-203 (3) A.

CHAPTER THREE: ENFORCEMENT OF THE LEASE SECURITY INTEREST

3.0 Introduction

This chapter provides a discussion on the various enforcement mechanisms available to a lessor upon default by a lessee. The approach applied in the previous chapter will be adopted in this chapter as well; that is review of specific provisions with respect to enforcement of lease security interest under the various pieces of legislation: The Chattels Transfer Act, the Chattels Security Act, and the Security Interest in Movable Property Bill of Uganda and the USA's Article 9 of the UCC. Once a secured party has extended a facility to a debtor, the question of enforcement automatically applies: what remedies are available to the lessor/secured party upon the lessee/debtor's default?

3.1 The Chattels Transfer Act 1978

The Act contains rather scanty and vague rules on enforcement. It refers to the grantee's power of sale and the right to take possession of the chattels as explained herein below:

3.1.1 Default

Default is not expressly defined under the Act. However, the same may be implied from a number of provisions to mean default in the payment obligation, observance or performance of a covenant, condition or agreement.[131]That notwithstanding, this is a weakness in the law. The matter of default has to be defined since this is where debtor protections commences.[132] When

[131] See sections 5, 7 & 12 of the Chattels Transfer Act.

[132] Tajti (n21) p185.

the default terms are clear and unambiguous, the debtors appreciates their obligation better and are can remedy any default before secured party take any remedial action.

3.1.2 Remedies of the secured party

3.1.2.1 The Power of sale[133]

The grantee has the right to execute a sale of the grantor's chattel in the event of default by the grantor. The power of sale may be exercised by order of court or without one depending on the terms of the instrument. If the instrument reserves the right to sell without an order of court, then the sale shall be by public auction. However, the sale may be undertaken by private treaty where the grantor and other interested parties consent to it. Whereas the law provides the remedy of sale, it does not prescribe additional rules for the conduct of the sale. For instance, under Article 9 of the UCC[134] the remedy is prescribed along with detailed rules on notice as well as commercial reasonableness. The latter being safeguards to ensure that sale is conducted in a just manner that takes into account the interests of the debtor. In the absence of such specific rules, there is likely to be uncertainty as secured parties will seek to conduct the sale process in a manner that favours only their interests. It would therefore be safe to exercise this remedy under the direction of court since a debtor who is unhappy will almost always challenge sale of their collateral. In ***THE MATTER OF PRIVATE MAILO BUGERERE BLOCK 79 PLOT 31 LAND AT NAMATONGONYA,***[135] a case involving a mortgage under the Mortgage Act,[136] the Plaintiff sought to obtain a court order of sale of mortgaged property by way of a

[133] Section 41 of the Chattels Transfer Act.

[134] See part 4.4.2.2

[135] Civil Suit (OS) 11 OF 2014.

[136] No. 8 of 2009.

summary procedure. The Court stated among others that, if a party seeks to obtain a court order for sale of mortgaged property, the party must have complied with all the procedures under the mortgage law with regards to notice. The alternative is for the party to proceed to court under the ordinary suit. In light of the provisions of this law, in the absence of specific rules regarding the conduct of the sale, it would appear the way to proceed is by ordinary suit, which may potentially take years to be completed, thus slowing down the enforcement process.

3.1.2.2 Right to take possession[137]

Where the grantor's chattels which are charged to an instrument become liable for execution under a judgement debt, the interest of the judgement debtor in the chattels can be sold to a third party, whereupon the said purchaser is obligated to serve a notice of the said purchase on the grantee. Upon receipt of such notice, then the grantee may exercise the power of taking possession. It is not clear why the grantee's right to take possession is attached to the said chattel becoming a subject of a judgement debt. It is submitted that in the absence of a judgement debt issued against the grantor, when the grantor is in default, the grantee should be in position to take possession of the chattel in satisfaction of the debt. Otherwise the remedy is not effective.

As noted from the foregoing the enforcement mechanisms stipulated in this Act cannot encourage secured parties to extend credit. This is because there is uncertainty and a lack of clarity within the rules. For instance, the Act does not set out the requirement for notice of sale when grantee decides to sale the chattels. Additionally, with respect to the right of taking possession, it is rather ambiguous why the grantee's power to take possession is only

[137] Section 42 of the Chattels Transfer Act.

exercisable under the sequence and circumstances provided. If a grantee has given value to the grantor, there should be a remedy which is effective and not dependant on certain extraneous circumstances. If this law was to be implemented with respect to financial leasing, it would be ineffective.

3.2 The Chattels Security Act 2014

This part will contain a discussion on the enforcement mechanisms provided under this law. What is immediately clear is that there are more remedies available to the secured party, and similarly there is protection mechanisms in-built within the provisions intended for protection of the debtor. It should be noted that this law has since been abandoned due to its weaknesses which would have made the implementation process difficult.

3.2.1 Default

The Law does not define the term for purposes of its application under this law. And whereas it is not defined, a literal reading of section 71 suggest that default is to be determined by the terms of the agreement.[138] Accordingly, upon default the secured party can either sue on a claim or realise the security.[139] There are various ways of realising of security including taking possession, sale, foreclosure and collection.[140]

[138] It refers to default occurring under the agreement. See Section 71.1 of the Chattels Securities Act.

[139] See section 71.1 (a) and (b). Chattels Securities Act.

[140] See section 73.1. Chattels Securities Act.

3.2.2 Remedies of the secured party

3.2.2.1 Taking Possession

A secured party has the right to take possession upon default of the debtor.[141] The secured party is entitled to exercising this remedy without seeking judicial endorsement.[142] Whereas taking possession may be done without a court order, however the law makes it clear that this remedy is exercisable on the condition is it does not cause *breach of the peace*.[143] Taking possession may also entail rendering an equipment unusable while on the debtor's premises.[144] The concept of breach of the peace is enshrined in Article 9 of the UCC, where the remedy of self-help repossession is made subject to non-breach of the peace [145]. Unfortunately, it was not defined, and this has caused great inconsistencies in the manner in which the courts have interpreted it.[146] As such this would have rendered some challenges in implementation leaving the courts with the laborious task of determining its denotation.

3.2.2.2 Sale by secured party

Secured party has a right to sell any or all the collateral in its condition or with some commercially reasonable preparation.[147] The proceeds of the sale are to be used for settling costs involved in the sale and satisfaction of the debt, beginning with the settlement of costs

[141] See section 75.1. Chattels Securities Act.

[142] Ibid.

[143] Ibid.

[144] Section 75.2. Chattels Securities Act.

[145] See section 4.4.2.3 of the thesis for a further discussion on breach of the peace.

[146] See Ryan Mcrobert, Defining "Breach of The Peace" In Self-Help Repossessions Washington Law Review [Vol. 87:569

[147] See section 76.1. Chattels Securities Act.

associated with the sale and the secured party's associated legal costs, followed by settlement of the indebtedness secured by the security interest and subsequently, settlement of other debts secured by subordinate security interests in the collateral.[148]After the sale and application of the proceeds of the sale, the debtor is liable for any deficiencies.[149] The sales may be conducted by either public auction, private treaty or by contract.[150] The sale is expected to be conducted in a *commercially reasonable* manner in terms of time, place and terms of sale.[151] A sale will not be held to be commercially unreasonable by virtue only of the fact that a higher price would have been obtained using different means and at a different time.[152] The secured party is obligated to serve notice before executing a sale as long as the collateral involved is not perishable.[153] Twenty one (21) days' notice is required for any kind of sale, however the description of the notice will depend on whether it is a sale by public auction or sale by private treaty.[154] Notice for sale by public auction has to state the time and the place of the sale,[155] whereas the notice for a private sale has to state the time after which any such sale will take place.[156]

These provisions on sale by the secured party grant the secured party a right but also ensure that debtor's interests are protected through the inclusion of commercial reasonability. The

[148] See section 76.2. a, b, & c. Chattel Securities Act.

[149] See section 77.1.a. Chattel Securities Act.

[150] See section 78.1. Chattel Securities Act.

[151] See section 78.2. Chattel Securities Act.

[152] See section 78.3. Chattel Securities Act.

[153] See section 79.1. Chattel Securities Act.

[154] Ibid.

[155] See section 79.2.a Chattel Securities Act.

[156] See section 79.2.b. Chattel Securities Act.

challenge if the law was to be implemented would have been the interpretation of this term since the Act does not give it a broad definition.[157] That notwithstanding solutions would have been sought in American jurisprudence where the term is applied in its secured transactions law, under the secured party's remedy of disposition.[158]

3.2.2.3 Foreclosure

The Act provides for the secured party's right of foreclosure subject to a court order of foreclosure.[159] However the Act also protects the debtor's right of redemption of equity.[160] The debtor may at any time before secured party sells or contracts to sell redeem his equity by fulling the obligations secured by the collateral and paying the secured party's cost of preparation of the sale.[161]

Compared to the Chattels Transfer Act, this Act was more advanced. For instance, it contained provisions in terms of remedies available to a secured party, which would have been usable by a finance lessor upon default by the finance lessee. These provisions also were advanced in terms of relevant rules regarding implementation of the remedies. For example, in executing a sale, the different modes of sale that may be used, the nature of the notice required, and the persons entitled to this notice. Similarly, the law contained measures for protection of the debtor such the non-breach of peace and commercial reasonability standards. Such provisions

[157] It only makes mention with regards to a possible higher return if alternative time and sale mode was applied does not render the sale commercially unreasonable.

[158] See part 4.4.2.2 for a discussion on commercial reasonability.

[159] See section 82. Chattel Securities Act.

[160] See section 81. Chattel Securities Act.

[161] See section 81.a and b. Chattel Securities Act.

would have greatly facilitated the enforcement process for the finance lessor had this law been operationalised.

3.3 The Security Interest in Movable Property Bill 2018

In section, this thesis will explore the enforcement provisions contained in the Bill. Enforcement is provided for in Part IV of the Bill, wherein it provides for both judicial and non-judicial remedies available to the secured party upon default of the debtor. These same remedies would be available to the finance lessor.

3.3.1 Default

Enforcement of the security interest does not arise until default occurs. As such it is important to define what amounts to default. Under the interpretation section, default is defined as an incidence which constitutes a breach under the agreement between the secured creditor and the debtor.[162] Section 37 states that security interest under the Bill are enforceable when there is default of the obligation to pay or any other default event.[163] Cleary, besides breach of the obligation to pay, the parties may state in their agreement other events of default. This is important as this approach recognises the autonomy of the parties. It noted that compared to the previous Chattels laws on Transfer and Securities, the Bill has a precise and understandable definition of default, which is commendable as it shows the laws is advancing.

[162] See section 2 2018 Bill.

[163] See section 31.1. 2018 Bill

3.3.2 Remedies for secured creditor

The Bill provides for three major remedies for secured creditor, that is the right to take control or possession of the collateral, the right to sell or dispose[164] in any other manner and the acquisition of collateral by secured creditor.[165]

3.3.2.1 Right to take control or possession

This is a statutory right and it is available to the secured creditor regardless of whether the security agreement incorporates it or not.[166] The inclusion of this statutory right is of particular importance in the context of the lease security interest. This is because the lessor who has leased goods such as equipment can easily exercise this right to get possession of the goods. This secured creditors right to take possession of collateral is exercisable both with or without a court order.[167] This remedy is therefore available as a judicial and a non-judicial remedy. The secured party may exercise this remedy without a court order only under the following circumstances: where the grantor has consented in writing to the exercise of this remedy by the secured creditor in the absence of a court order; where the secured creditor has furnished both notice of default and a notice to take possession to the grantor or another person in case the collateral is in possession of that other person and where the taking of possession or control can take place without breach of the peace.[168] Where the grantor or lessee has defaulted under circumstances that are very clear, this remedy would save the lessor a lot time and money since

[164] Since the Bill does not provide a definition for disposition, it may be assumed that other forms of disposition such as leasing, and licensing would apply.

[165] See section 37. 2.a. and 2b. and section 45 of 2018 Bill.

[166] Section 37.2.a. 2018 Bill.

[167] See section 40.1. 2018 Bill.

[168] See section 40.2.a- c. 2018 Bill.

it does not involve matters of publication of notice or court orders. It is presumed that the consent by the grantor, would have been already obtained under a clause in the security agreement. However, what might render challenges is the issue of complying with the non-breach of peace provisions.

A breach of peace has been defined to include two circumstances only: that is where the there is an entering the grantor's premises without permission or physical violence or intimidation against the grantor.[169] There may be other scenarios not envisaged under these provisions which might also lead to a breach of peace. As such the courts would have to give this term broader meaning through their interpretation. Suffice it to say this requirement of not breaching the peace will greatly enhance protection of the lessee.

4.3.2.2 Right to sell or dispose

A secured creditor wishing to exercise their right of sale or disposition of security is obligated to provide ten (10) days' notice called a notice of disposition.[170] However there are exceptions. The secured creditor is not required to furnish this notice under certain circumstance: when the collateral involved is of a perishable nature; when the secured creditor reasonably believes there is a likelihood that the collateral will deteriorate in value if it's not disposed of immediately; when storage of the collateral involves unreasonably large costs; and when the type of collateral is one that is customarily sold on a recognised market.[171] Where none of the foregoing exceptions apply, the lessor is obligated to furnish notice on these persons including,

[169] See section 40.3.a and b. 2018 Bill.

[170] Section 41.1 2018 Bill.

[171] See section 41.3.a-d. 2018 Bill.

the grantor and debtor, any other person who files notice with respect to the collateral; and any other persons who gives the secured creditor notice of their interest in the collateral.[172]

Specific information must be contained in the notice of disposition of collateral: details of the grantor and secured creditor, a description of the collateral, a statement of the amount that is outstanding and required to fulfil the secured obligation, interest due and expenses, the intended method of disposition, statement of time and place of disposition in case of a public sale and statement of time after which sale is to be made, where disposition is by private sale.[173] It is submitted that when all interested parties are served with notice regarding intended disposition as opposed to the grantor or debtor alone, there may be higher chances of the payment obligation being performed. A sub-lessee who is aware of the lessee's default and an impending disposition may intervene by making advance payments to the lessee in order to ensure that the payment obligation is performed, and the sublease is not affected.

Following application of the proceeds of the disposition by the secured creditor,[174] the secured creditor has a duty to account to the grantor in case there is a surplus.[175] However in the event of a deficiency, the grantor is liable.[176] The provisions on accountability for surplus will ensure that secured creditors do not unfairly enrich themselves thereby protecting the interests of the debtors. Similarly, ten working days after the disposition of collateral, the secured party is obligated to furnish a statement of account to all the persons entitled to notice of disposition[177],

[172] See section 41.1.a-c 2018 Bill.

[173]See section 41.2 a-f. 2018 Bill.

[174] See section 43.12018 Bill.

[175] See section 43.32018 Bill.

[176] See section 43.4 2018 Bill.

[177] See section 44.1. 2018 Bill.

The statement should contain the gross amounts obtained from the disposition, the costs and expenses of enforcement ad disposition and any outstanding amounts owed to the secured creditor by debtor or to the debtor by the secured creditor following the sale.[178] These foregoing provisions regarding the secured creditor's duty to account also do protect the debtor.

4.3.2.3 Acquisition of collateral by the secured party.

The Bill also provide for this remedy, which is discretionary.[179] The secured creditor is not entitled to this remedy as a matter of right. Rather it is depends on whether the debtor and other interested parties' consent. A secured party who wishes to exercise this remedy is required to propose to acquire all or part of the collateral for total or partial satisfaction of the obligation and serve all the interested parties[180] with a notice in prescribed form.[181] The interested parties who would have received the notices have ten working days within which to serve a notice of objection of acquisition[182] following which the secured party is obligated to dispose the collateral in accordance with the provisions of the Bill.[183] It is submitted that such a remedy would be welcomed by lessors. It would allow them the time required to determine what course of actions with regards to the collateral would yield the highest proceeds to cover their debt.

Following from the foregoing discussion it is evident that the Bill has attempted to incorporate fairly adequate enforcement provisions, which also make provision for the protection of debtor

[178] See section 44.2. 2018 Bill.

[179] The provision states that the secured creditor 'may'.

[180] See section 45.2. 2018 Bill.

[181] See section 45.1. 2018 Bill.

[182] See section 46.1. 2018 Bill.

[183] See section 46.2 2018 Bill.

during enforcement, notable among them being the rights to redeem collateral and right to sue for damages based on non-compliance with the legal provisions. The assortment of remedies prescribed makes it easy for the secured creditor to select the most appropriate one. However, it is submitted that the existence of these measures alone will not make enforcement under the Bill effective. Ultimately, having an efficient court system and civil procedure rules which will complement successful implementation of these measures. Additionally, it is hoped that once the Bill is passed into law, it will create a balanced environment where clarity in the rules enhance confidence among borrowers and lenders including finance lessors and lessees.

3.4 Article 9 of the Uniform Commercial Code[184]

This is the relevant part that applies to matters of enforcement. It lays down the remedies that available to a secured party in the event that the debtor defaults. In order to protect the debtor, who is the perceived weaker party, there are mechanisms in-built in these provisions that are intended to protect the debtor including commercial reasonableness, the non-breach of peace requirement and provisions on non-compliance of the secured party. Similarly, it will be noted that while certain remedies are judicial, others such as repossession may be non-judicial or 'self-help', the term of art that's applicable. Expectedly, part 6 simply provides an arsenal remedies available to all secured parties which the parties are free to choose.

[184] U.C.C Article 9 Secured Transactions (2010) Part 6, which is referred to throughout this part on enforcement.

3.4.1 Default

The secured parties' rights become enforceable only upon default by the debtor.[185] Default is not defined as the same has been left to the agreement of the parties.[186] As such the parties may agree whether default strictly entails non-performance of the payment obligation or any other default events. In the light of party autonomy such wide freedom is important.

3.4.2 Remedies of the secured party

3.4.2.1 Cumulative

The questions of whether the remedies are cumulative simply follow the fact that an array of remedies are provided. Accordingly, can a party proceed under these simultaneously? This is answered expressly wherein it is stated that the remedies are cumulative and may be exercised simultaneously.[187] The Simultaneous exercise of these remedies is premised on the condition that the secured party acts in good faith.[188] Clearly the simultaneous enforcement of the remedies is liable to abuse by a secured party and may lead to unnecessary harassment of the debtor hence the good faith requirement, which curbs down on the secured parties excesses.

4.4.2.2 Repossession

When threatened with repossession, a recalcitrant debtor may be motivated to comply with the obligations to pay.[189] This is what makes repossession such a powerful tool in the hands of the

[185] UCC S. 9-601 (a).

[186] Official Comment 3 to new S. 9-601.

[187] UCC S. 9-601 (c).

[188] Official Comment 5 to new 9-601.

[189] Kathy Cabral and Teresa Wilton Harmon , Remedies Outside the Box: Enforcing Security Interests Under Article 9 of the Uniform Commercial Code available at http://apps.americanbar.org/buslaw/blt/content/2012/08/article-03-cabral.shtml

secured creditor.[190] Self-help repossession is an attractive option because is usually faster and less expensive in comparison with judicial processes that involve making applications and the use of court bailiffs.[191] Repossession may be understood as the act of taking back something and in the case of a secured transaction, this involves the secured party taking the collateral from the debtor.[192] Under Article 9 of the U.C.C, the secured party is permitted to take possession of the collateral, and this involves rendering the collateral unusable while on the debtor's premises, in case it is an equipment.[193] This remedy is available as both a judicial and non-judicial remedy, meaning that the secured party has the option to decide whether they wish to exercise this remedy with the assistance of court or without.[194] The latter always seems like a more attractive option since the secured party does not have to undertake court processes and this may mean less time and less money spend on the recovery process. However, if repossession is to take place without a judicial process or on a self-help[195] basis, then it must proceed *without breach of the peace*.[196]

In order for a secured lender to successfully undertake self-help repossession, the non-breach of the peace requirement must be complied with. The purpose of the breach of peace provisions

[190] Ibid.

[191] Margit Livingstone, Breach of the Peace in Self-Help Repossession under U.C.C. Article 9, https://www.lexisnexis.com/LegalNewsRoom/corporate/b/business/posts/breach-of-the-peace-in-self_2d00_help-repossession-under-u.c.c.-article-9.

[192] Ryan McRobert, DEFINING "BREACH OF THE PEACE" IN SELF-HELP REPOSSESSIONS, WASHINGTON 2012 LAW REVIEW [Vol. 87:569.

[193] See UCC S. 9-609.1. (a) & (b).

[194] See UCC S. 9-609.2. (a) & (b).

[195] self-help is an attempt to redress a perceived wrong by one's own action rather than through the normal legal process. See McRobert (n146).

[196] See UCC S. 9-609.2. (b).

is ensure a balance of interests between creditors and debtors.[197] If the party fails to comply with it, the debtor may bring an action against the secured creditor for non-compliance with the provisions of Article 9 including payment of damages for any losses resulting from such non-compliance.[198] Importantly this remedy, which was originally limited to specific people, and situations was opened up by the UCC, and made available to all secured parties upon default.[199]

Breach of the peace is not defined under Article 9 and substantial case law has developed although largely inconsistent showing the difficulties courts encounter in defining what amounts to the breach of peace.[200] The failure of Article 9 to provide guidance on the meaning of breach of peace has also led to business uncertainty.[201] American courts have adopted two major approaches to defining breach of peace. On the one there are courts which apply a *five-factor balancing test* and on the other hand, the other courts apply a *facts specific inquiry* to determine whether a breach of the peace occurred. The general considerations under the balancing test are these five factors: i) the place where repossession took place; ii) the debtor's express or constructive consent, whether obtained; 3) the reactions of third parties; 4) the type of premises entered; and 5) the creditors' use of deception.[202] Among the courts which use the fact specific inquiry, these courts are divided on whether the use of enforcement officer leads

[197] Tajti (n21) p188.

[198] See UCC S. 9-625. b.

[199] McRoberts. (n146).

[200] Ibid.

[201] Ibid.

[202] Ibid.

to breach of peace.[203] This is in spite of Comment 3 to UCC section 9-609 having stated that the use of law enforcement to effect a self-help repossession constitutes a breach of the peace.[204] Likewise courts are divided on the question of disturbance to third parties. A 2008 case, *Chapa v Tracier*[205] in which the repossessed vehicle had two little children unknown to the law enforcement agents demonstrates a dilemma.[206] In determining this case, in spite of the possible extreme emotional distress the debtor must have experienced from the thought of her children being towed away, the court proceeded to hold that there was no breach of the peace.[207] Aside of leaving parties without remedies, the failure of the UCC to define breach of peace has left creditor unsure of what their rights entail.[208] In another case court seemed to apply the same reasoning used in *Chapa* to come to the conclusion that there was no breach of the peace, where third parties were involved.[209] In *Jordan v. Citizens & Southern National Bank of South*[210], a debtor whose truck has been repossessed pursued the creditor in a different vehicle for almost thirty minutes during which the creditor drove very recklessly and exceeded speed limits.[211] Whereas in this case the safety of the public at large was endangered by the reckless tow truck driver, court held that there was no breach of the peace.[212] The two cases show the danger with possible variations when case specific inquiries are undertaken by the court. Such variations

[203] Ibid.

[204] Ibid.

[205] *Chapa v. Tracier & Associates* 267 S.W.3d 386 (Tex. Ct. App. 2008), in McRoberts (n2).

[206] McRoberts (n146).

[207] Ibid.

[208] Ibid.

[209] ibid.

[210] 298 S.E.2d 213, 214 (S.C. 1982 in McRoberts (n146).

[211] ibid.

[212] ibid.

lead to not only ambiguity but also confusion.[213] The foregoing cases help to show that while repossession is a powerful tool for the UCC secured creditor, it remains flawed for failure to define the breach of peace.

4.4.2.3 Disposition

Upon default, a secured party is allowed to dispose the collateral by selling, licencing, leasing or any other means.[214] Although the definition of disposition is not provided therein, the enumeration of sale, lease and licence clearly indicates what is envisaged. Every form of disposition selected by the lessor must comply with the 'commercially reasonableness' requirement.[215] That standard of reasonableness is required in every aspect not limited to the method, manner, time, place, and other terms.[216] This is one of the mechanisms that ensures that the secured parties rights are not abused, thereby offering protection to the debtor. Consequently, the failure of a secured party to follow the principle of commercial reasonableness comes with negative consequences for that party. The fact that a higher amount would have been obtained from a different enforcement exercise does not per se render a disposition not commercially reasonable.[217] Rather a disposition complies with commercial reasonability when it adopts common means on a known market, when it is done at the

[213] ibid.

[214] UCC S 9-610 (a).

[215] UCC S. 9-610 (b).

[216] Ibid.

[217] UCC S. 9-627 (a).

prevailing market price on a market that is recognisable and when it complies with commercially reasonable methods typical to dealers in that specific kind of collateral.[218]

In giving interpretation to commercially reasonability, it has been held that it is a 'fact-intensive' exercise, similar to all other questions of reasonability.[219] In another case, which involved foreclosure and sale of an aircraft, the sale was held to be commercially unreasonable.[220] The court opined that publication of the notice of sale in the Phoenix newspaper was not appropriate because the advert did not reach the intended market and therefore failed to attract the bidders and a fair price for the plane. Consequently, the sale was commercially unreasonable.

As a form of protection available to the debtor, the debtor may bring an action for damages for loss occasioned by the secured party's failure to comply as well as restrain the secured party if the enforcement is not proceedings in accordance with Article.[221] Additionally, as a defence to a deficiency action, the debtor may challenge the secured party's compliance thereby shifting the burden to the secured party to prove among its compliance with conditions of commercial reasonability.[222]

[218] UCC S. 9-627 (b).

[219] *Re ExcelloPress, Inc.,* 890 F.2d 896 (7th Cir. 1989).

[220] *Ford & Vlahos v. ITT Com. Fin. Corp*., 8 Cal 4th 1220 (1994):

[221] UCC S.9-625 (a) and (b).

[222] UCC S.9- 626 (a) 2.

Prior to any disposition therefore, a secured party is obligated to furnish a reasonable notice[223] to the interested parties.[224] The essence of notice is to bring to the attention of the debtor and other secured creditors that certain impending actions may terminate their interests.[225] Whether a notice is reasonable is dependent on the merits of each case,[226] except in the case of non-consumer transactions where a notice sent after default, and at least ten (10) days or more before the earliest date of disposition is also deemed reasonable notice.[227]

A disposition may be *private or public.* A public disposition is to be understood as one where price determination follows meaningful opportunity for public competitive bidding, and meaningful participation entails either advertisement or issuance of public notice prior to the sale as well as public access to the disposition.[228] Whereas the form and content of the notification is prescribed,[229] the time and place must be stated for public disposition or the time after which any other disposition is to be made, for private disposition.[230] The secured party is permitted to participate in a public sale[231] and their participation in a private sale depends on the nature of collateral involved.[232]

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[223] UCC. S. 9-611 (b). See also Official Comment 6 to new 9-611, which confirms that the question of reasonability of time is left to the discretion of the courts to determine on the merits of each case.

[224] UCC S. 9-611 (c). These interested parties include the debtor and secondary obligor.

[225] Ibid.

[226] UCC S. 9-612 (a).

[227] UCC S. 9-612 (b).

[228] Official Comment 7 to new 9-610.

[229] UCC S. 9-613 (1).

[230] UCC S. 9-613 (1) (E).

[231] UCC.S 9-610 (c) (1).

[232] '…if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations. See UCC S. 9-610 (c) (2).

4.4.2.4 Strict Foreclosure

Under Article 9, a secured party may accept collateral in satisfaction of a secured debt, under specified circumstances, notably upon consent of the debtor and upon certain interested parties not objecting to the said acceptance.[233] This remedy is what is termed as strict foreclosure. Essentially the idea of a strict foreclosure is the parties call it even once the secured party accepts the collateral and the debtor's obligation is extinguished.[234] A secured party wishing to exercise this remedy has to send a notification of proposal to accept proposal in full or partial satisfaction to the debtor and the other interested parties.[235] The debtor's response in case of an objection should be received within 20 days of the notification of the proposal and it must be in an authenticated record form.[236] In a consumer goods transactions, where the debtor has paid 60% of the outstanding obligation, a secured creditor who has accepted collateral is expected to the compulsorily dispose of this collateral.[237] This rule is clearly intended to protect the debtor since a 60% payment suggests they have acquired a substantial equity in the property, which ought to be protected through a compulsory disposition.[238] Any surplus is due to the debtor. Additionally, the proposal and objection, wherein the parties have to adhere to strict procedures ensures that any strict foreclosure that occurs is expressly undertaken and not constructive.[239] The debtor consents to the terms of the acceptance if it is in a record

[233] See UCC S. 9-620. a.

[234] Margit Livingstone, Breach of the Peace in Self-Help Repossession under U.C.C. Article 9, LexisNexis Corporate, Legal NewsRoom, Business Law Blog

[235] See UCC S. 9-621. a.

[236] See UCC S. 9-620. c.1 & 2.

[237] See. UCC S.9-620.e

[238] Tajti (n21) p190.

[239] Tajti (n21) p 190-191.

authenticated after default; and a debtor consents to an acceptance of collateral in full satisfaction if the terms of the acceptance are in a record authenticated after default or the secured party. This remedy would especially be attractive to secured parties who are engaged in leasing properties such as equipment. It would also make economic sense if the value of the collateral at default approximately near the fair market value of the collateral.[240]

With regards to the debtor's rights, it is submitted that, the secured parties' duties to not breach the peace in exercise of their repossession rights and the duty to ensure commercial reasonability in disposition are all part of the debtor's protection mechanisms and therefore, the debtor's rights.

3.5 Conclusion

As noted from the foregoing discussion, Uganda's current regime found within the Chattels Transfer is rather inadequate with respect to enforcement. The remedies provided do not have clear rules on how they are to be undertaken. On the other hand, the 2018 Bill shows that the position could potentially change once the Bill is passed into law. However, as demonstrated the Article 9 enforcement mechanism while robust, are not without challenges. This therefore presents an opportunity for Uganda to learn from the mistakes of Article 9 to improve the provisions of the Bill before it is passed into law.

[240] Margit Livingstone.

CONCLUSION

In this section of the thesis, conclusions will be drawn based on the findings and previous review of the legal framework on finance lease. The conclusions answer the major research questions this research sought to address. Based on the conclusions, recommendations will be made. By way of review the key questions this thesis set out to answer are the following: i) The major overarching question is whether the laws of Uganda address finance lease and if so how? ii) whether the finance lease is regulated under the Secured Transactions Laws of Uganda? ii) Secondly, how the secured transactions laws of Uganda deal with creation and enforcement matters of finance leases. iii) Finally, what lessons Uganda can learn from the finance lease regime in the United States.

Whether the finance lease is regulated under Ugandan law

The question whether the finance lease is regulated under Uganda secured transaction law is seemingly simple. However, it is not straight forward. It should be noted that currently Uganda's law on secured transactions is the 1978 Chattels Transfer Act as has been acknowledged previously. This is because the 2014 Act was not operationalised, and the 2018 Bill is yet to be passed into law. As such, that leaves Uganda in a dire situation where the 1978 Chattel Transfer law, an 'obsolete and ineffective' legislation is the applicable law on secured transactions. On the basis of the foregoing, clearly the answer to first sub-question would be in the negative, that the lease finance is not regulated under Ugandan secured transactions law. The foregoing conclusion notwithstanding, and as noted previously, the Security Interest in Movable Property Bill incorporates the finance lease. On that basis it may be stated the laws of Uganda do provide for the finance lease, albeit in non-legally binding or perhaps with persuasive and none authoritative value only.

How issues of creation and enforcement of the lease security interest is addressed.

The same approach used to answer question one will be applied here. Accordingly, in view of the fact that the 1978 Chattels legislation remains the current law on secured transactions, and in further consideration of the fact that this law does not make any reference to the finance lease, then the question, how the law deals with creation and enforcement of lease security interest would be in vain. However, taking a more optimistic view and anticipating that the Bill will be passed into law, assumptions can be made on how creation and enforcement issues will be addressed.

With regards to creation of the finance lease, as with other security interests stipulated within the Bill, creation is by way of a security agreement made between the secured creditor and the grantor. The Bill does provide a number of remedies for a secured party exercisable when the debtor is in breach. Firstly, the right to take control and possession of the collateral. It was noted that this remedy is available as a judicial and non-judicial remedy. Importantly also, it was noted that if the secured creditor wishes to exercise this remedy out of court, it must be undertaken without breach of the peace. Secondly, the secured creditor has the right to sell or dispose of the collateral. Thirdly, the secured creditor has the remedy of acquisition of collateral by secured party. As noted, this latter remedy is discretionary and is only exercisable with the debtor's consent and with a no objection from other interested parties.

what lessons can Uganda learn from the finance lease regime in the United States?

Strict foreclosure and the 60% Rule

Strict foreclosure is provided for under Article 9 of UCC as discussed previously. A similar remedy is prescribed in the 2018 Bill as discussed in part 4.3.2.3 of this thesis. The

recommendation therefore is not with respect to strict foreclosure per se. However, it is the introduction of the sixty percent (60%) rule, which is intended to protect the debtor. It is noted that given the nature of this remedy, which is obtainable through self-help measures and the fact that it does not involve the usual delays and expenses associated with litigation, it is likely to be very popular amongst secured creditors. Since many potential borrowers are SMEs, there is a likelihood of this remedy being abused by the secured creditors to the detriment of the borrowers. The form of the abuse would entail secured creditors insisting on acquiring and retaining collateral in spite of the debtor having paid a substantial part of their debt. It should be noted that in Uganda, many borrowers are ignorant and uninformed while the lenders who are experts in the financial field possess all the information regarding the markets. Accordingly, the inclusion of a rule on compulsory disposition would serve to protect the debtors.

Self-help repossession and the non-breach of peace requirement

It is the recommendation of this thesis that the non -breach of peace requirement of the UCC is adopted into the 2018 Bill by amending the current section 40.3.a and b. of the Bill. The amendment should entail expanding the scope of the meaning of breach of the peace to include the factors contained in the five-factor balancing test introduced under American jurisprudence. The factors are: i) the place where repossession took place; ii) the debtor's express or constructive consent, whether obtained; 3) the reactions of third parties; 4) the type of premises entered; and 5) the creditors' use of deception. The balancing approach is suggested because a court faced with circumstances of a potential breach of the peace has the discretion to examine those facts impartially and consistently, potentially leading to predictable results. In contrast the fact specific approach, which results in new rules each time a case is decided. The five

factors demonstrate some of the important issues which have consistently led to a breach of the peace. It is recommended therefore that these standards are used to amend or enrich the meaning of breach of the peace before the Bill is passed into law. This will save Uganda the same challenges the United States has faced in trying to give meaning to the term. It will also create certainty and predictability in the law.

Disposition and the commercially reasonable standard

Under section 43.4 of the 2018 Bill, upon disposition of the collateral and application of the proceeds, a secured creditor can pursue a grantor for any deficiency. The Rules on disposition, do not incorporate any safe guards with respect to 'commercial reasonableness'. Whereas under the UCC Article the debtor can challenge the secured party's claim for deficiency on the basis of compliance with commercial reasonableness, the same tool is not available for the debtor under the Ugandan regime. It is submitted that the incorporation of the commercial reasonableness standard in dispositions of collateral would provide an additional safeguard to debtors and a shield against deficiency claims. In terms of the actual rules, it is suggested that the provisions of the UCC are adopted.[241]

Concluding Remarks

Whereas Uganda does not yet have a solid piece of legislation on secured transactions, it wouldn't be overly optimistic to state that she is currently positioned on the right path. This is on the basis of the existence of the current Security Interest in Movable Property Bill of 2018, which has been variously referred to in this thesis. And whereas the purpose of this study was

[241] UCC S.9-627 a & b.

not focused on secured transactions broadly, any discussion on the finance lease, which forms the crux of the thesis couldn't escape the mention of the secured transactions regime. This is because currently that is where it is regulated. Also, as previously noted, Uganda does not have any other legislation on leasing of movable property. In light of the foregoing, it ought to be noted that the Bill adopts the functional approach similar to the UCC Article 9 approach wherein all security interests, no matter their form and substance are regulated by one uniform law.[242]

With respect to the finance lease therefore, aside from the definitional issues, and especially the distinction between the true lease and the security lease, issues creation of the lease security interest and the enforcement thereof comprised reference to general provisions of Article 9 on the creation of the security interests and enforcement mechanisms available to the secured party upon default of the debtor. Not surprisingly, the recommendations will be general but, in any case, applicable to finance lease. The Bill to a considerable extent contains rules similar to the those of U.C.C with regards to creation of security interest and enforcement. And while it is commendable that the Bill adopts a progressive approach, the provisions are not addressed with the level of detail contained in the U.C.C and therein lies the potential for challenges.

American courts have struggled to give interpretation to a number of issues which the UCC fails to address or addresses inadequately. The true lease and disguised security interest distinction issue and the non-breach of peace considerations are two areas which have come up in this study. Accordingly, it is recommended that, in order for Uganda to avoid going down the same road as the United States, an unnecessary and cost inefficient road of litigating on

[242] See Section 1-201(b) (35).

these issues in their courts, it would be prudent for Uganda to beforehand review the Bill and amend some of the provisions based on existing American Jurisprudence, which has litigated some issues.

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