



ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
LLM PROGRAM IN BUSINESS LAW

Legal and institutional framework for movable collateral registration in Ethiopia

A Thesis Submitted to the School of Law of Addis Ababa University in Partial Fulfillment of the Requirement for the Master of Laws (LLM)

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Advisor: FekaduPetros (Prof.)

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Addis Ababa, Ethiopia

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Approval Sheet by the Board of Examiners

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Declaration

The thesis titled “Legal and institutional framework for movable collateral registration in Ethiopia” is my original work and has not been submitted for an award of any degree or examination at any other University or program and all materials used in the course of writing this research work have been duly acknowledged.

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List of Abbreviations

CRO- Collateral Registry Office

ECC- Ethiopian Civil Code

ECOMC- Ethiopian Commercial Code

ECPC- Ethiopian Civil Procedure Code

EMCR- Ethiopia Movable Collateral Registry

FSCCD- Federal Supreme Court Cassation Division

LEGISLATIVE GUIDE- UNICTRAL Legislative Guide on Secured Transaction Law

MCRO- Movable Collateral Registry Office

MODEL LAW- UNCITRAL Model Law on Secured Transactions

MPSRP- Movable Property Security Right Proclamation

NBE- National Bank of Ethiopia

OOMCRD- Operationalization of Movable Collateral Registry Directive

PMPBP- Proclamation on Property Mortgaged or Pledged with Banks

UCC- Uniform Commercial Code

UNICTRAL- United Nation Commission on International Trade

UNIDROIT- Institute for Unification of Private International Law

US- United States

Abstracts

Access to credit is crucial for economic growth and is the engine for private sector development. Establishing a legal and regulatory environment where movable assets can be used effectively as collateral and, at the same time provide effective credit protection, is a critical step towards responsible and inclusive access to finance. Modern secured transactions system enables individual and entities to use their movable assets as security for credit generating new productive capital, expands investments, creates more jobs opportunities, increases production and productivity, creates opportunities to expand and foster access to and usage of financial products and services. The Ethiopian Parliament thinking of this recently has enacted a modern law governing security rights in movable assets in 2019, the proclamation is supposed to be the single and unified source of the law governing the taking of security in movable assets in Ethiopia. The new legal framework also mandates the establishment of a Collateral Registry Office in charge of registering all security rights in movable assets, filed exclusively online. Undoubtedly, the new legal framework would give businesses and consumers a better opportunity to access credit at a low cost by granting security rights to creditors in a broad range of movable assets. But this law also has certain problem that may cause practical challenges and the incompatibility of the general legal frame work.

To do its own humble part, this research paper will attempt to bring the issue of the newly introduced comprehensive law of security right to the spotlight, show the shortcomings of its governing rules and to assess the prevailing collateral registry system. It try to depicts legal and institutional framework for movable collateral registration in Ethiopia, mainly on focusing the exclusion security rights in an immovable assets from the reform process and having different legal regime for treatment of security interests in immovable property, the effect of attachment before judgment in determining a priority security right of creditors in Ethiopian secured transaction law legal frame work and the effectiveness of collateral registry in operation.

In so doing, the research will try to show certain short coming of Ethiopian security right legal frame work. And it will try to argue the need for the reintegration of security right in immovable assets and the effect of attachment before judgment into the new comprehensive secured transaction legal frame work.

CHAPTER ONE

Introduction

1.1. Background of the study

The term secured transactions refers to credit transactions where a creditor holds an interest in a debtor's property (collateral) to secure a loan or a debt obligation.¹ The interest in the property is also referred to as security interest², pledge or charge. Collateral facilitates credit by reducing the potential loss that lenders face from non-payment. A certain and predictable secured financing legal system will increase the credit amount that may be lent, lessen the cost of borrowing and enable loans to be made with a longer maturity.³ If the borrower becomes unable to repay the debt for any reason, the lender has the right to sell the secured asset and apply the proceeds to the debt. As international organizations and states acknowledge that current security rights law is essential for economic development, there has been an increased focus on upgrading it globally during the past few decades.⁴ The law of security rights is recognized to play an essential role in boosting economic development through enhancing access to credit. The Ethiopian House of People Representative recognizing these premises has enacted a modern law governing security rights in movable assets in 2019. The law allows borrowers to use a variety of assets as collateral, including vehicles, agricultural goods like crops, equipment, and accounts receivable, as well as incorporeal assets like intellectual property rights and receivables.⁵ The new legal framework also mandates the establishment of a Collateral Registry Office (CRO) in charge of registering all security

¹International Trade Center, *Increasing Access to Credit: Reforming Secured Transaction Laws*, 2010, p 14

²Ownership is a direct right in a thing that may be asserted independently of a right to possession or even of material detention itself. Secured interest is a clearly different concept; security is a creditor's conditional right to extract the value of secured assets when the debtor is in default. It is clearly not an ownership right.

³International Trade Center, cited above at note 1, p.14

⁴AsressAdimiGikay 'Ethiopian Law of Security Right in Movable property' (2021) (Published by AsressAdimiGikay) p, 12

⁵AsressAdimiGikay, *THE WORLD BANK BACKED LAW OF SECURITY RIGHTS IN MOVABLE ASSETS IN ETHIOPIA HAS FLAWS THAT NEED TO BE ADDRESSED URGENTLY*, Addis standard (June 9, 2021 / 3k.) Available at, <https://adisstandard.com/articles/> last accessed on January 21 2022

rights in movable assets, filed exclusively online. By granting creditors security rights in a variety of movable assets, the new legal framework will undoubtedly provide businesses and consumers with a better opportunity to access credit at a low cost than the previous outdated legal system, which had ambiguous provisions regarding many types of security rights.⁶ It also creates a single collateral registry system and efficient enforcement rules. But this law also has certain shortcomings that may cause practical challenges.

In this research an attempt will be made to see the gaps of the newly introduced Movable Property Security Rights legal framework and the prevailing development of collateral registry system in practice.

1.2. Statement of the Problem and Research Questions

Consolidating Ethiopia's dispersed security laws with their updates is one of the reforms that the Movable Property Security Rights Proclamation (MPSRP)⁷ has brought about. It is first comprehensive law of security rights, enacted in response to the problems of Ethiopian businesses and the financial sectors to have comprehensive law governing collateralization of assets.⁸ The exclusion of a security interest in immovable property from the framework of the MPSRP's approach to personal property security is, nevertheless, its most significant result. From a policy standpoint, it is important to consider whether Ethiopia made the appropriate decision to exclude security interests in movable property from the reform process. The legal regime governing mortgage has been in place since the 1960s, has different drawbacks that need a reform in consequence of the change in the social-economic and political change of the country. What is a justification for different legal regime for treatment of security interests in immovable property? It creates different treatment for secured creditors with interests in movable assets compared to real property mortgage creditors, and creditors/dealers operating under real property law and creditors under MPSRP may encounter practical difficulties as a result. It also results in different methods of registering security rights.

A security interest in assets will be of little or no value to a creditor unless that creditor can determine, at the time of a transaction, the priority of its interest therein in

⁶Ibid

⁷FDRE, Federal Neg. Gazz. No. 76, Movable Property Security Right Proclamation No. 1147/2019 (Addis Ababa, 2019).

⁸Asress Adimi Gikay, cited above at note 4, p 77

relation to the interests of other creditors. Attachment before judgment is a common phenomenon in Ethiopian court proceedings and it has the effect of preventing the owner of the property to create encumbrance, sale or create charge thereon. In the case of *KokebBekele vs. SelamEskodavolk*⁹, the Federal Supreme Court Cassation Division (FSCCD) recently held that attachment before judgment does not create a security right or have the effect of a judicial mortgage or pledge, reversing¹⁰ its previous stand and decision, which recognized attachment before judgment as perfection of security interest that gives a priority right to the one who attached the property before judgment. So what can the importance of attachment before judgment be? And for whom is the attached property a security? What effect does it have on a third party? What can be the effect of attachment before judgment in determining the priority security right of creditors? Where can we put the right of a person who attached the debtor's property before judgment in the determination of the priority rights of creditors in Ethiopia's security right legal framework? It is not yet clear.

Though the legal and regulatory framework is essential to any secured transactions system, the efficacy of a secured transactions law also requires an effective registration mechanism for interests in movable property. With no parallel paper-based registration system in place, the MPSRPs provisions governing collateral registry and registration demand for an electronic registration and search system.¹¹ Since only a small percentage of the population in Ethiopia has access to the internet, the decision to create an entirely electronic filing system is out of touch with reality.¹² How can we evaluate the effectiveness of a registry system having this in hand?

This study, therefore, attempts to delve deeper into the following research questions; and provide some theoretical and empirical answers.

⁹See, *Sister KokebBekele vs SelamEskodavolk* the Decisions of the FSCCD, volume 05, Civil Cassation File No-173079, 2012 E.C, unpublished.

¹⁰See, FSCCD of Ethiopia file number 97206 *AmareMekamu vs KalifeHeluf* and file no 29269 *Commercial Bank of Ethiopia vs WalelegneAyalewe*.

¹¹ The Directive named operationalization of movable collateral registry no. MCR/001/2020 (OOCR) that is issued by the NBE that establishes the electronic collateral registry envisions no paper based registration system.

¹²*AsressAdimiGikay*, cited above at note 4, p 197

- ✓ Does the secured transaction legal frame work is an integrated or unified? Do all types of property can be used to secure any debts? Does the exclusion of security rights in immovable properties from the ambit of MPSRP is justifiable?
- ✓ Does the law have established clear and predictable priority rules? In particular, what it can it be the effect of attachment before judgment in determining a priority security right of creditors in Ethiopian secured transaction law? Where can we put the right of a person who attached the debtor's property before judgment in determination of priority right of creditors? What effect attachment before judgment does have to third parties?
- ✓ Is the proprietary right over the collateral conferred by the security to the secured creditor effective through a publicly searchable registration system that would allow any person dealing with the collateral to find out about the security? Is a collateral registry in operation that is unified geographically and by asset type? Does relying on electronic registration system without paper based system is practicable with the reality in Ethiopia?

1.3. Research Objectives

The general objective of this research is to examine the newly introduced comprehensive law of security right to the spotlight, show the shortcomings of its governing rules and to assess the prevailing collateral registry system.

Specifically The research tries to analyze:-

- Thecomprehensiveness of the Ethiopian secured transaction legal frame work, mainly on the type of property that can be used to secure debts and the reason for the exclusion of security rights in immovable properties from the ambit of MPSRP.
- The effect of court order for the attachment of asset before judgment in the determination of priority right of secured creditors in Ethiopia secured transaction legal frame work. The effect it may have on third party and the general secured transaction legal frame work.
- The effectiveness with which the proprietary right over the collateral is granted to the secured creditor through a publicly searchable registration system that would enable anyone dealing with the collateral to learn about the security, as well as the viability of relying on an electronic registration system only without a parallel paper-based system in addition to the electronic system.

1.4. Scope and Limitations of the Research

Although the concept of secured transaction legal regime involves a wide array of specific thematic areas, this research is only focused on to analysis comprehensiveness of Ethiopian secured transaction legal frame work as a distinct legal regime, the effect of attachment before judgment in general secured transaction legal frame work and the organization of registry of collaterals. This research leaves out several issues that are significant for the effective functioning of secured transactions law because of financial, time and mostly, space limitations. Issues such as the nexus between security rights and bankruptcy law, specific rules governing enforcement of security rights, consumer protection in enforcement of security rights, and others are not addressed in this article. Absence of related domestic research on the subject was also another noteworthy constraint.

1.5. Significance of the study

This research believed to complements the literature on legal and institutional frameworks for secured transactions law. In addition to it serving as one of very few reading materials written on issues of Ethiopian security law for anyone interested in the subject, its contribution to further research in such apparently overlooked area will also be paramount. But none of these are as important as the contribution it will make in informing officials of different stakeholders and law makers to enable them ponder about the problems existing in their respective areas of expertise and induce them to come up with relevant solutions.

1.6. Methodology

This research has both doctrinal and non-doctrinal features. Doctrinally, a descriptive inference is made regarding Legal and institutional framework for movable collateral registration in Ethiopia with a comparative analysis of global best practices, more specifically with The UNCITRAL Legislative Guide on Secured Transactions (LEGISLATIVE GUIDE)¹³, the UNCITRAL Model Law on Secured

¹³Legislative Guide on Secured Transactions, UNITED NATIONS (2007), available at <https://uncitral.un.org/en/texts/securityinterests>

Transactions Law (MODEL LAW)¹⁴ and Article 9 Uniform Commercial Code(UCC)¹⁵. In the non-doctrinal path, an empirical endeavor is made to see the operating registrar mechanisms for security interests in movable property and their effectiveness in achieving the goal of providing public notice of interests in movable assets and to establish priority in the assets described in the notice for secured creditors, which is then weighed for conformity against the Ethiopian laws and global best practices.

Since the paper also emphasizes assessing the practices and features of the operating registrar, interviews will be conducted with the registrar of MCRO and one randomly selected vehicle registry officer from the Addis Ababa City Administration's Drivers and Vehicles Licensing and Control Authority. Furthermore, data will be gathered on registry regulations and features (such as the existence of website registration and the functionality of online registration). The researcher believes that this approach will allow for better understanding of the strengths and weaknesses of registries.

¹⁴ UNCITRAL Model Law on Secured Transactions, UNITED NATIONS, (2016), available at https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions

¹⁵ The UCC was published in 1952, as a uniform code to harmonize the commercial law of the states in the US through adoption.

CHAPTER-TWO

Features of Advanced secured transactions legal framework

2.1. Access to finance and its economic rational

It is well accepted that access to credit is crucial for economic growth and is the engine for private sector development.¹⁶ Credit enables the effective use of entrepreneurial skills, the continuation of productive business operations, the diversification and expansion of investment in new technologies, and ultimately the acceleration of economic growth.¹⁷ According to money empirical studies, access to credit has a significant impact on firm profitability, job creation, and overall social welfare.¹⁸ The purpose of this research is not to explain the economic importance of credit, there enormous works were done to this in economics and other related field.¹⁹

2.2. Purpose of Security and the role of law of security rights in enhancing access to credits

The motive of security is to reduce the risk of giving credit by increasing the chances of the lender recovering the amounts that become due to him.²⁰ By doing so, security increases the availability of credit and improves the terms on which credit is available: the offer of security influences the lender's decision whether or not to lend, it also simplifies the terms on which he is prepared to lend (typically by increasing the amount of the loan, by extending the period for which the loan is granted and by lowering the interest rate).²¹ The economic value of security can be formulated in a simple rule which links the economic value to the risk reduction achieved by security: the more the risk of giving credit is reduced, the greater the value of the security to the lender and the greater

¹⁶World Bank Group, Secured Transaction Systems and Collateral Registries, (2010), p.6 available at: www.worldbank.org

¹⁷AsressAdimiGikay , cited above at note 4, p.20

¹⁸Ibid

¹⁹On positive relation between access to credit and economic growth, See for instance, Jermy Greenwood and Boyan Jovanovich, "Financial Development, Growth and Distribution of Income," *Journal of Political Economy* 98, no 5(1990): 1076-11074

²⁰John Armour, "The Law and Economics Debate About Secured Lending: Lessons For European Lawmaking, Centre for Businesses Research", University of Oxford, Working paper 122(20019) p, 3 available at: <https://ssrn.com/abstract=1118030>

²¹John L. Simpson et al., General Principles of a Modern Secured Transactions Law, 3*Law & Bus. Rev. Am.* 73 (1997) <https://scholar.smu.edu/lbra/vol3/iss2/4>, p 73

the security's economic effect.²² A reduction of the risk of the lender is of most immediate value to the lender but benefits flow at the same time to the borrower and to the economy generally.²³

To ensure this, the law should permit the creation of effective security which is capable of achieving its purpose of reducing the risk attached to the credit; and the law must possess the required qualities to permit it firms to use diverse range of assets as collateral, by encouraging the use of security in the widest possible range of circumstances.²⁴ The legal framework that have these qualities are called advanced secured transactions legal framework in today's secured transaction law study. These Advanced secured transaction legislation will provide predictable and clear rules so that parties can establish certainty about the consequences of their transactions. Because of this certainty and predictability, more people can lend and borrow, boosting the credit market's competition and lowering credit costs.²⁵ The question is what qualities, should policy makers, businesses, and other stakeholders look for in the law governing secured lending? What are those principles for advanced secured transaction legislation?

2.3. Development of Advanced secured transactions legal framework

The foundation of any modern secured transactions system is the legal basis upon which it is designed, constructed and operated.²⁶ International organizations and states acknowledge the importance of modern secured transaction law for economic growth. Many jurisdictions have started modernizing their secured transactions laws since the 1990s.²⁷ Some of these modernization activities have evolved from within domestic legal systems—due to the law's self-replicating evolution—intended either to increase a country's credit rating, or to emulate the successful implementation of secured transactions reform by a neighboring country.²⁸ Some modernization initiatives, such as

²²Ibid

²³International Trade Center, cited above at note 1, p.2

²⁴John L., cited above at note 20, p.2

²⁵Ibid

²⁶World Bank Group, cited above at note 16, p.43

²⁷Orkun Akseli, What Role for the UNICITRAL Model Law on Secured Transactions, *Law and Contemporary Problems* [Vol. 84: No 1, 2021 p, 181. available at available online at <http://lcp.law.duke.edu/>. (last accessed on January 21 2022)

²⁸Ibid

those where a national government requests assistance to modernize its operations or a country implements austerity measures to meet the financing requirements set forth by international financial institutions, have instead been recommended by those institutions.²⁹

In recent decades, the law governing security interests has undergone significant modifications that have revealed key characteristics that the law needs to have in order to accommodate contemporary and intricate secured finance arrangements.³⁰ These features emerged from continuous updating of the law in response to localized financial innovation and businesses practices.³¹ The notable national legislation is Article 9 the UCC, which was adopted in the US in the 1950's. This code has been used as model for secured transaction legislation to other legal systems.³² Having inspired reforms in different countries, UCC could be cited as good example of modern law of security right.³³

The main proponents of modern secured transactions law at the international level are the UNCITRAL and the Institute for Unification of Private International Law (UNIDROIT).³⁴ The central concepts of modern secured transactions systems have been incorporated into a number of international principles and guidelines which are enacted by this organization. The following four global instruments and guidelines, in particular, have influenced several reform initiatives:³⁵ The World Bank Principles for Effective Insolvency and Creditor Rights Systems revised 2015³⁶, The MODEL LAW (2016)³⁷ The LEGISLATIVE GUIDE (2007)³⁸ and the Convention on International Interests in

²⁹ Ibid

³⁰ AsressAdimiGikay , cited above at note 4, p.20

³¹ Ibid

³² OrkunAkseli, cited above at note 27, p.187

³³ AsressAdimiGikay, rethinking Ethiopian secured transaction law through comparative perspective: lessons from uniform commercial code of the US, volume 11 MIZAN LAW REVIEW, (September 2017) p, 165

³⁴ Ibid

³⁵ World Bank Group, cited above at note 16, p.50

³⁶ World Bank Group , Principles for Effective Insolvency and Creditor/Debtor Regimes (2016), <http://pubdocs.worldbank.org/en/919511468425523509/ICR-PrinciplesInsolvency-Creditor-Debtor-Regimes-2016.pdf>, (last accessed January 2, 2022).

³⁷ MODEL LAW, Cited above at note 13. The main objective is creating models for countries to reform their domestic credit and security laws.

Mobile Equipment (2001) (Cape Town Convention) with its Protocols.³⁹ Many jurisdictions that had reformed their secured transaction regime had used the principles and recommendations provided in these documents.⁴⁰

Since it requires making subjective assessments about how the law functions in the relevant field across jurisdictions in order to extract core principles, establishing the key principles of modern security interest law is difficult and likely to draw criticism.⁴¹ Moreover, the functioning of law is tied to the existence of other political, economic, and legal institutions such as strong law enforcement institutions and independent judiciary.⁴² Having in mind of this, in the above secured transaction law development we can extract the fundamental components of modern secured transactions law as a minimum standard.

2.4. Major components of a modern secured transactions legal frame work

2.4.1. Scope of the Law, A functional and unitary approach to secured transactions

The first building block that Modern secured transactions law addresses is the scope of the legislation. A secured transaction law should address several dimensions in its scope: First the types of parties, particularly grantors, to which the law applies should include natural persons and legal entities, second the types of movable assets to which the law applies must include tangibles and intangibles, present and future, including their products and proceeds, third the types of obligations that may be secured must include pre-existing, present and future obligations, whether monetary or other and fourth the types of transactions must include all of those in which the performance of an obligation is secured by a right in movable assets, including the functional equivalents such as outright transfers of receivables.⁴³ These are the general scope that secured transaction legislation should cover.

³⁸See, LEGISLATIVE GUIDE, *supra* note 14. It directs the states through the implementation process, explaining how to effectively incorporate the relevant provisions and the choices for enacting states.

³⁹See Convention on International Interests in Mobile Equipment, UNIDROIT, available at <https://www.unidroit.org/instruments/security-interests/cape-town-convention>

⁴⁰World Bank Group, Secured Transactions, Collateral Registries and Movable Asset-Based Financing knowledge guide, (November 2019), p.4 available at: www.worldbank.org (last accessed April 24, 2022)

⁴¹AsressAdimiGikay, cited above at note 4, p.20

⁴²Ibid

⁴³World Bank Group, cited above at note 40, p.58

Advanced secured transaction legal framework entails the existence of a unitary concept of security interest. It is the notion that, regardless of their formal name, all transactions that guarantee the performance of a duty should be governed by a single statute.⁴⁴ The main feature of the unitary model is that all security devices created on personal property are united under the single concept of security interest and are subject to a single set of rules, including rule of creation, registration, and enforcement.⁴⁵ An important aspect of the unitary theory is the functional approach to security interest. The fundamental element underlying a modern secured transactions law is the functional approach under which the law applies to any transaction that in substance secures an obligation with a right in movable property, irrespective of its form, the nature of the parties, or which party owns the collateral.⁴⁶ Thus, the economic function, or the substance, of these devices should be the basis in determining whether the secured transaction legislation applies.

The unitary notion of security interest was first introduced in UCC, and it has since been incorporated into other state laws and international legal instruments. The underlying idea of having a unitary, functional, and comprehensive approach is to do away with the inherent problem of fragmentation in national laws.⁴⁷ A pledge of assets is governed by the pledge law, a mortgage by the mortgage law, a sale with reserved ownership by the sales law, etc. Often, the same asset may be encumbered under more than one security device, but the relevant laws provide priority rules only for conflicts between two security rights created under the same law.⁴⁸ Adopting a secured transactions law with a broad scope eliminates such legal risks and unpredictability. The unitary concept eliminates the differential treatment of different transactions and parties.

2.4.2. Creation of Security Rights

The cost of credit will be reduced if security rights can be obtained in an efficient manner. The law should enable the quick, inexpensive, and simple creation of a private security interest without depriving the person giving security of the use of his

⁴⁴UCC, section 9-109(1) (a)

⁴⁵AsressAdimiGikay , cited above at note 4, p.47

⁴⁶World Bank Group, cited above at note 16, p.59

⁴⁷World Bank Group, cited above at note 40, p.58

⁴⁸Ibid

asset.⁴⁹ Since one of the objectives of contemporary secured transaction law is to encourage the use of collateral and reduce time and expense, it is necessary to make an effort to make the creation process relatively easy and informal. Modern laws allow for the issuance, conclusion, submission, and other activities pertaining to agreements to be undertaken either in tangible form or online.⁵⁰ Security agreements shouldn't include any formalities that may raise the cost of the transaction or delay its implementation. And also the law should specify that the contract contain the names and addresses of the parties, the assets that are to be secured, and the debt/monetary obligation the security right secures.⁵¹

2.4.3. Priority and Perfection of Security Rights

The question of priority is at the very heart of what secured transactions are about.⁵² The general priority rule is based on the time of registration of a notice or perfection through some other mechanism (e.g., taking possession). Subject to certain expressly stated exceptions, a creditor who publicizes the existence or potential existence of its security right has priority over other parties who subsequently acquire rights in the collateral or publicly announce the existence of their interests (so long as the requirements for the perfection of the security right are met).⁵³ The word 'perfection'⁵⁴ refers to making a creditor's rights in collateral effective against third parties, whether the other creditors are, purchasers or lien holders.⁵⁵ Accordingly, the law on secured transactions should establish rules governing competing rights of persons holding security and other persons claiming rights in the assets given as security.

The following are special priority rules that should be included in a priority scheme of any reformed secured transactions law, Acquisition security right; Preferential claims; and Buyers, lessees, or licensees:

⁴⁹International Trade Center, cited above at note 1, p 46

⁵⁰World Bank Group, cited above at note 40, p.60

⁵¹See, MODEL LAW, cited above at note 13. Article 3

⁵²International Trade Center, cited above at note 1, p 59.

⁵³World Bank Group, cited above at note 40, p.61

⁵⁴The MPSRP, LEGISLATIVE GUIDE and MODEL LAW use the term 'third-party effectiveness'.

⁵⁵ World Bank Group, cited above at note 31, p.61

2.4.3.1.Acquisition of security right

As we have discussed above secured transaction law should allow for the creation of a security right in future assets which also called floating security right, which floats over its present and future assets. However, because both the debtor's current and future assets are subject to floating security rights, this can give the floating secured creditor a monopoly over those assets. Subsequent creditors could be discouraged from providing loans to the debtor with floating security rights in its assets. The solution provided by advanced secured transaction law for this problem is called acquisition security right, as one of the exception to the general priority rule. An acquisition security right is a security right in goods, intellectual property rights or intellectual property licenses that are acquired with the credit advanced by the creditor, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit priority over floating security right.⁵⁶ The creditor may be the seller or a financier.

2.4.3.2.Preferential claims

Priority ranking is to a large extent policy driven and it may be tempting to carve out exception to the chronological rule to favor certain groups of interest.⁵⁷ These temptations should be resisted as much as possible because exceptions could alter how definite and reliable a security appears, which could discourage secured credit altogether.⁵⁸ Those claims include judgments, liens and tax and claims. It is recommended that such rights should be subject to registration in the security right register, and should only acquire priority from the time of registration.

2.4.3.3.Buyers, lessees, or licensees

The rights of those who buy, lease, or license collateral may be in a priority conflict with the security rights, which is a significant priority issue.⁵⁹ The situation where the security right is extinguished or subordinated to a right of a buyer, lessee or licensee presents a significant risk for the secured creditor. If, on the other hand, the law does not extinguish a security right, the buyer, lessee or licensee may hesitate to acquire rights in the collateral. Therefore, the interests of these two parties must be fairly balanced by the

⁵⁶Ibid.

⁵⁷International Trade Center, cited above at note 1, p 61.

⁵⁸Ibid

⁵⁹World Bank Group, cited above at note 40, p.60

law. The general principles of advanced secured transactions laws is that a buyer, lessee or licensee of movable property takes subject to a security right if it has been perfected.⁶⁰ A sale, lease, or license of the collateral in the regular course of a seller's, lessors, or licensor's business constitutes another exception to the general rule. Credit secured by a borrower's inventory is common. When this inventory is sold, leased, or licensed as part of routine business operations, it is important to make sure the purchasers, lessees, or licensees are not worried about the possibility of a security interest existing in the asset they acquire.⁶¹ In order not to disturb such commercial transactions, a special priority (taking free) rule should be included in a secured transactions law; that is, a buyer, lessee or licensee who acquires its right in movable property in the ordinary course of the seller's, lessor's or licensor's business takes the right free of or unaffected by a security right.⁶²

2.4.4. Registration of Notices with Respect to Security Rights

Secured transactions law should have to provide the fundamental legal authority for the collateral registry. The purpose of provisions on the registry system is to establish a general security rights registry and to regulate its operation. An effective point of reference for priority rules based on the date of registration of a notice with respect to a security right, as well as an impartial source of information for third parties dealing with a grantor's assets (such as prospective secured creditors and buyers, judgment creditors, etc.), are all objectives of the registry system. To achieve this objective, the registry system should be designed to ensure that the registration and searching processes are simple, time- and cost-efficient, user-friendly and publicly accessible.⁶³

2.4.5. Enforcement of security rights

A security right will have little or no value to a secured creditor unless the creditor is able to enforce the security right in a predictable and time- and cost-efficient manner. The value that the secured creditor will ascribe to the security will increase with his level of confidence that this will be the case, making loans more affordable and readily

⁶⁰Ibid

⁶¹World Bank Group, cited above at note 40, p.60

⁶² See, MODEL LAW, cited above at note 14. Article 34.

⁶³ Ibid

available ⁶⁴Modern secured transactions systems must offer effective extra-judicial remedies for both tangible (repossession and disposal of equipment) and intangible (collection of accounts receivable) collateral.⁶⁵ In addition to the array of extra-judicial remedies, a state should consider providing alternative expeditious judicial/administrative mechanisms.⁶⁶The law should also allow the party the discretion to specify desirable remedies in the security agreement that must be enforced in a way that is commercially reasonable to the secured creditor and grantor.⁶⁷

These building blocks of modern secured transactions legal frame work will serve as a good guide for a methodological study of modern secured financing law. In this paper these building block will be used for the study of Ethiopia secured transaction legal frame work with comparative analysis of theLEGISLATIVE GUIDEL, MODEL LAW and UCC.

⁶⁴ Ibid

⁶⁵ MODEL LAW, cited above at note 14, at chapter. 6, article 73(1).

⁶⁶ See MODEL LAW, cited above at note 14, Article 73(2).

⁶⁷ World Bank Group, cited above at note 40, p.67

CHAPTER-THREE

Ethiopian secured transactions law, legal Assessment

3.1.The Ethiopian secured transactions law before the enactment of MPSRP

Before the enactment of MPSRP, secured transactions-related laws are scattered across different codes and statutes. The core of secured transactions law in Ethiopia is embodied in the 1960 Civil Code, which governs real estate mortgage, antichresis possessory pledge⁶⁸, and the pledge of incorporeal assets⁶⁹. The COMOC governs business mortgage⁷⁰ and the pledge of transferrable securities⁷¹. Other statutes governing security interests proclaimed in different time are the Warehouse Receipts Law governing security rights in warehoused goods⁷², the Proclamation on Property Mortgaged or Pledged with Banks(PMPBP)⁷³, the Proclamation on Business Mortgages⁷⁴, and the financial leasing law⁷⁵, which removes hire purchase from the realm of secured transactions and other amendments to the ECC and ECOMOC⁷⁶.The proclamations that amend some of the provision of the ECC and ECOMC have taken as a piecemeal reform of secured transactions law, i.e., the one that responds to the needs of specific sectors or the failure to reform the law entirely while there is the apparent need.⁷⁷

This approach has created fragmented approach to security interests. The law lacked a coherent and logical structure and organization. The laws also recognized a few types of security interests in different types of assets. For example,theydon't have created a legal

⁶⁸The Civil Code Article 2287(1) and Title XVIII Chapter 4 Articles 3041 -3130 for Mortgages and Antichresis and Title XVII Articles 2825 – 2874 for pledges.

⁶⁹The Civil Code Arts.1128 and 2829.

⁷⁰The Commercial Code, Book I, Title V, articles 171- 193. The provision of the commercial code governing business mortgage were updated by a new law cited as Ethiopian Business Mortgage Proclamation No. 98/1998.This proclamation repelled and replaced by the MPSRP

⁷¹Pledging securities were governed by Arts. 950 -958 of the Commercial Code.

⁷²The Proclamation to Provide for a Warehouse Receipt System, Proclamation No. 372/2003

⁷³PMPBP, Proclamation No. 97 of 1998, Federal NegaritGazeta, No.16, 19th, February 1998.

⁷⁴The Proclamation to Provide for Business Mortgages Proclamation, Proclamation No. 98 of 1998, Federal NegaritGazeta, No. 17, 19th, February 1998

⁷⁵The Capital Goods Leasing Proclamation No. 103/1998.

⁷⁶A Proclamation to Provide for Business Mortgages, Civil Code as Amended Proclamation, Gazeta, No. 46, 30th, June, 2009.

⁷⁷AsressAdimiGikay , cited above at note 33, p.176

frame work for non-possessory pledge for movable property, except for vehicle and big machineries which have relatively reliable registration system. The major security devices which are pledge and mortgage are organized in different chapters and title of the ECC although both legal devices secure payment or performance of an obligation. In response to reform the outdated domestic secured transactions law, the Ethiopian Parliament enacted advanced law governing security rights in movable assets in 2019. This law has ended a fragmented approach to security interests by introducing a single concept of security rights, except relating to security interests in immovable property, which will be discussed later.

3.2. The MPSRP

Ethiopia has enacted its first comprehensive law of security rights named the MPSRP in 2019⁷⁸. It aimed at to modernize the countries secured transaction legal regime to enables individuals and entities to use their movable assets as a security for credit generating new productive capital, expands investments, creates more job opportunity, increases production and productivity, fosters accesses to and usage of financial products and services, creates opportunity to expand banking service to rural areas.⁷⁹

The Proclamation is supposed to be the single, unified source of the law governing the taking security in movable assets in Ethiopia, it combined the previous scattered Ethiopian security law and there updates.⁸⁰ Ethiopia's reform initiative is to be commended because the country did away with an antiquated law that was incompatible with modern secured financing schemes. The proclamation tries to determines all elements of the modern day secured transactions regime, including the types of assets that may be used as collateral, the creation of security rights, the registration and search processes, the determination of the relative priorities among conflicting claims to collateral, the enforcement of security rights and the extent to which parties may enforce such rights out of court.

⁷⁸MPSRP No. 1147/2019

⁷⁹See, preamble of MPSRP

⁸⁰Article 93 of MPSRP has repealed the previous PMPBP no. 97/1998 provisions relating to movable property security rights and Business Mortgages Proclamation, Proclamation No. 98 of 1998. It also provided any laws, regulations; directives or practices that are inconsistent with matters covered under the proclamation are inapplicable.

3.2.1.The scope of MPSRP

3.2.1.1.The incorporation of unitary theory of security right under MPSRP

The MPSRP has adopted a unitary theory of security right as opposed to the fragmented concept of security interest that was in use prior to 2019.⁸¹The MPSRP under article 3(1) provide that the proclamation should apply to rights in movable property created by agreement that secure payment of credit or other performance of an obligation.⁸² This provision is similar to UCC, which states the article applies to a transaction regardless of its form that creates a security interest in personal property or fixture by contract.⁸³The LEGISLATIVE GUIEDE also recommends jurisdiction to adopt unitary concept of security interest⁸⁴, to eliminate the inherent problem of fragmentation in national laws.

Adopting the unitary theory of security interest, art 3 of the MPSRP ensures that no other law governs security right in movable assets, for all security rights are united under the umbrella of one law. Whenever a transaction secures the performance or payment of an obligation, such as when a car is sold but the title is held by the seller until the whole amount is paid, that transaction creates a security right and is governed by the MPSRP.⁸⁵ It is subject to the some rule of registration and enforcement unless the MPSRP provides a specific exception.

3.2.1.2.The incorporation of functional approach to security under the MPSRP

The other component of modern secured transaction law that the MPSRP has adopted is the functional approach to security. This approach is taken as part of unitary theory. This can be clearly inferred from art 2(43) of the MPSRP which define "security rights" means a property right in movable property that is created by an agreement to secure payment or other performance of an obligation, regardless of the type of property, the status of the grantor or secured creditor, or the nature of the secured obligation.⁸⁶The functional approach to security interests assures that transactions whose economic purpose is to secure payment of credit or performance of an obligation are considered as

⁸¹ AsressAdimiGikay , cited above at note 4, p.45

⁸² The MPSRP article 3(1)

⁸³ UCC section 9-109(1)(a)

⁸⁴ LEGISLATIVE GUIDE, cited above at note 13, rec. 15(a).

⁸⁵ AsressAdimiGikay , cited above at note 4, p.47

⁸⁶ MPSRP article 2(43)

secured transactions and are governed by the law of security rights.⁸⁷By applying essential similar rules to all security interests, the approach eliminates the differential treatment of different transactions and parties.

A practical challenge maybe, courts or different stake holder may fail to appreciate the fundamental change introduced by the functional approach and also they may classify transactions according to the categories prevailing under the prior law. Therefore, it is critical for the judges/ stakeholders to understand how the reformed law applies to transactions that previously did not create security rights.

3.2.1.3. The security rights to which the MPSRP applies

Regarding the security rights to which the MPSRP applies it is clear. Art 3(1) puts “this proclamation shall apply to all rights in movable property created by an agreement that secures payment or other performance of an obligation.”⁸⁸ It defines security right as property right in movable property. The subject matter of security right is movable property. The classification of goods⁸⁹ into movables and immovables is the main classification of goods under ECC.⁹⁰ The reading of the Amharic versions of Article 1126 of the ECC shows that what is divided into movable and immovable under this provision is not just goods but corporeal goods.⁹¹ A corporeal thing is any product a human person can perceive whereas an incorporeal thing is any product that humans cannot perceive, but which has economic value.⁹² So we can say that incorporeal things are not the subject classification to be movable or immovable property under the ECC. The MPSRP, however, provides movable property a broader definition. Movable property is defined under article 2(27) of MPSRP as " includes inventories, agricultural products, incorporeal assets, corporeal assets, the right to use land unless prohibited by

⁸⁷AsressAdimiGikay , cited above at note 4, p.49

⁸⁸ MPSRP article (3)(1)

⁸⁹ The term “goods” is mostly used interchangeably with the terms “things” and “property” to mean the resources, tangible or intangible, over which property rights may be established. In this paper this terms were also used to show the subject matter of security rights may be established.

⁹⁰ From the cumulative reading of Articles 1126, 1127 and 1130 of the Civil Code one can understand that the basis for such classification is the physical nature of goods. The physical nature which is used in our law is the fact of mobility.

⁹¹MuraduAbdo, "a subsidiary classification of goods under the Ethiopian property law. A commentary ," Mizan Law review 2, no 1(2008) p 52

⁹² Id, p 53

pertinent laws, properties excluding land house, and building, a security right under a higher purchase agreement, security trust deed, trust receipt, commercial consignment, mortgage of a businesses, sale with ownership reserved, sale with right of redemption, security right in certificated securities, and security rights in ware house receipts."⁹³Movable property includes anything from a corporeal chattel to an incorporeal asset and the right to use land. Instruments and documents representing claims also have taken as movable property.The approach taken by the MPSRP is similar to UCC ⁹⁴ and MODEL LAW⁹⁵, they applies to financing secured by personal property (i.e. movables, whether tangible or intangible, as distinct from "real property", i.e.. land buildings)."

3.2.1.4. Security rights to which MPSRP is in applicable

3.2.1.4.1.Security rights in securities traded on exchanges

Security right in exchange traded securities also called as intermediated securities, they relate to shares, bonds, and other securities that are traded on exchange. MODEL LAW and LEGISLATIVE GUIDE completely exclude security rights in securities, particularly those held with intermediaries (intermediated securities) from the scope of secured transaction law.⁹⁶ The reason provided for this is the nature of securities and their importance for the functioning of financial markets raise a broad range of issues that merit special legislative treatment and they have been covered by other multinational legal instrument.⁹⁷ We have to note that the MPSRP doesn't apply to security rights in any type of securities (securities that are traded on exchanges only), however the international instrument excludes security rights in all types of security, whether or not traded on exchanges.

Ethiopia is in the process of establishing a capital market in line with the recent enactment of the Capital Markets Proclamation no. 1248/2021.⁹⁸ The proclamation will enable to establish a market where securities such as shares or equities, bonds, and derivatives are bought and sold. However the institution that is intended to facilitate this

⁹³ AsressAdimiGikay , cited above at note 4, p.50

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ See, The LEGISLATIVE GUIDE and The MODEL LAW (Model scope Provisions Article 3)

⁹⁷ These are typically governed by specialized regimes, such as those adopted by the UNIDROIT.

⁹⁸ The Capital Markets Proclamation no. 1248/2021

transaction that may be named Ethiopian Securities Exchange⁹⁹ market still doesn't start to operate. Therefore Security rights that are traded on exchanges are going to be regulated by the capital market proclamation and the rest that is security rights not traded on exchanges will be governed by the MPSRP. Even though a separate legal regime for security rights in intermediated securities would fragment the legal framework governing security rights, implementing a legal framework on such a fairly complex issue in Ethiopia without targeted study and evaluation would undoubtedly result in less than ideal results.¹⁰⁰

3.2.1.4.2. Security rights in ships and Aircraft

The maritime code principally governs security rights in ship.¹⁰¹ Since Ethiopia is a signatory to the Cape Town convention and the aircraft protocols, these legal documents govern security rights in aircraft, aircraft engines, aircraft objects, and helicopters. Ethiopia probably took this action to make sure Ethiopian Airlines Enterprise Share Company, a state-owned airline, had solid international financing. The Convention and Protocol instead establish an independent international interest that may attach to equipment, rather than overriding any inconsistencies in domestic law.

3.2.1.4.3. Liens and privileges created by other laws

Rights in property created by the operation of the law (liens or privileges) and not on the basis of an agreement between parties (non-consensual security rights) are other types of security right to which the MPSRP is inapplicable unless provided otherwise.¹⁰² According to the ECC's provisions for contracts for work and labor, the contractor shall have the right of retention over any movable property belonging to the client that he has made or repaid and that is in his possession as a guarantee of the obligations that the client owes him under the contract.¹⁰³ The Federal Tax Administration Proclamation No. 983/2016 under article 41 entitles the tax Authority to issue a seizure order on the taxpayer and any person having possession of the taxpayer's property if the taxpayer has failed to pay the tax due within the in 30 days after receiving a notice to pay tax or immediately after the Authority makes a finding that the

⁹⁹ See article 31 of The Capital Markets Proclamation no. 1248/2021

¹⁰⁰ Asress Adimi Gikay, cited above at note 4, p.69

¹⁰¹ The Ethiopian Maritime Code article 30-53

¹⁰² MPSRP article 3(2)(d)

¹⁰³ ECC article 2628(1)

collection of the tax owing by a taxpayer is in jeopardy.¹⁰⁴ The MPSRP also excludes other privileges such as warehouse recipient lien, and other agent's liens.

But this liens and privileges may be in conflict with consensual security rights (which the MPSRP regulate), especially in determination of priority of security right. To rectify this problem the MPSRP have certain provisions dedicated to liens and privileges, which addresses issue of priority between consensual and non-consensual security interests. Article 55(1) of the MPSRP provides the right of non-consensual creditors has priority over a security right if, before the security right is made effective against third parties, the non-consensual creditor has registered a notice in the CRO.¹⁰⁵ Therefore, the lien holders, especially the government with regard to tax claims, should register notices of their liens in the collateral registry and their priority should date from the time of registration. This registration requirement for liens holders is in compatible with the federal tax administration proclamation which requires a seizure order to be executed against any property of the taxpayer at the time of execution of the order the property shouldn't be subject to a prior secured claim of creditors or subject to attachment or execution under any judicial process.¹⁰⁶ Similarly MODEL LAW recommends the lien holder should register notices of their liens in the collateral registry and their priority should date from the time of registration.¹⁰⁷

Regarding a non-consensual secured creditor who has a possessory lien, MPSRP under art 55(3) like UCC¹⁰⁸ have provided that a possessory liens on goods which secures payment or performance of an obligation for services or materials furnished with respect to goods by persons in ordinary course of person's businesses has priority over a security right in the good as long as the holder of the possessory lien remain in possession of the goods. This secures service providers, including maintainers who repair cars or provide replacement parts alone or in conjunction with maintenance services, warehouse operators who render free storage services, agents who are not paid by the principal for their services, and other suppliers of goods and services.

¹⁰⁴ The Federal Tax Administration Proclamation No. 983/2016 article 41(1) and (2)

¹⁰⁵ MPSRP article 55(1)

¹⁰⁶ See, The Federal Tax Administration Proclamation No. 983/2016 article 41(1) and (2)

¹⁰⁷ See, MODEL LAW cited above at note 14, article 34

¹⁰⁸ UCC section 9-102(a)(52)

3.2.1.4.4. Security rights in immovable property

One of the oldest distinctions in the law of secured transactions is the separation between secured transactions in immovable property (real property) and secured transactions in personal property movables (personal property).¹⁰⁹ The MPSRP has taken this distinction and exclude of security right in immovable property from its ambit. The MPSRP starting from its name it is named as movable property security right proclamation and it's come to effect with the aim of to enable individuals and entities to use their movable assets as a security for credit generating.¹¹⁰ In most legal systems as well, the rules governing immovable property secured transactions are distinct from those governing personal property secured transactions.¹¹¹ This separation is reflected by the existence of separate laws for each regime. The UCC is only applies to security interest in personal property and fixtures, it doesn't applies to security interests in real property¹¹². The MODEL LAW¹¹³ and other modern statutes expressly exclude rights in immovable assets from their scope. From a substantial perspective, immovable property and movable property secured transactions are substantially similar. What can it be a justification for different legal regime for treatment of security interests in immovable property?

3.2.1.4.4.1. Is there a justification for the exclusion of immovable property security rights from the ambit of MPSRP?

A. The impact of the way the modern-day secured transaction legal regime has developed

Historically, movable property has been considered less desirable collateral than immovable property.¹¹⁴ Financial institutions have been hesitant to offer loans secured by moveable property for a variety of reasons, including the deteriorating value of movables, the difficulty in determining their value, the risk posed by the collateral's ease of movement beyond the reach of the creditor, etc.¹¹⁵ Immovable property is the dominant type of collateral; in others, movable assets such as vehicles and equipment may be used, often to supplement interests in immovable assets. In consequence, Legal regime

¹⁰⁹YoramKeinan, "The Evolution of Secured Transactions, 79 Kentucky Law Journal 59, in p. 593.

¹¹⁰ See article 1 and preamble of the MPSRP

¹¹¹YoramKeinan, cited above at note 109, p.15

¹¹² UCC section 9-109(d)(11)

¹¹³ See Model Law on Secured Transactions: Guide to Enactment (2017), Article 6

¹¹⁴YoramKeinan, cited above at note 109, p.16

¹¹⁵ World Bank Group, cited above at note 16, p.100

governing security rights in immovable property were well devolved, starting from state formation. As a result, states and international organizations are interested in creating a legal and regulatory environment where movable assets can be used effectively as collateral and MSMEs and individuals can use their assets as collateral to access capital. They leaved out security right in immovable assets which is already well developed with in its distinct regime.

In case of Ethiopia even if Immovable property mortgage plays a key role in financing in the last decades, the legal regime governing mortgage has been in place since 1960s and it is as obsolete as the rest of the pre-2019 secured transaction relating to movables. The change to be mentioned is the PMPBP, which provides a bank can transfer the ownership of the collateral, to a third party by auction upon giving 30 days' notice to the defaulting debtor in accordance with the CPC.¹¹⁶ It is described as piecemeal reform, which is unfair because it favors specific creditor groups. Therefore, it is unjustifiable to exclude the obsolete legal regime governing security rights in immovable property, which is unfit for modern secured financing schemes, from comprehensive secured transaction regime reform in the country.

B. Immovable Property as a Secured Property

There are several differences in the ways each type of property is used as collateral. Generally, immovable property is used primarily in non-possessory secured transactions. Movable property can be used either for possessory secured transactions, or for non-possessory ones. However, the mechanism of a non-possessory personal property-secured transaction is not yet significant in most developing countries or transitional economies.¹¹⁷ We can argue that since secured transactions involving real estate are non-possessory, there is a need for legal regulations, particularly with regard to registration and priority requirements.¹¹⁸ However, one of the major reforms brought by the MPSRP is the introduction of non-possessory pledges, security rights in movable property are effective against third party through registration or control without possession. So in Ethiopian context we cannot justify the exclusion of immovable property in the way it is used as collateral. How movable and immovable properties used as a security are substantially similar.

¹¹⁶See, PMPBP no. 97/1998,

¹¹⁷YoramKeinan, cited above at note 109, p.16

¹¹⁸ Ibid

C. Immovable Property Secured Transaction as an immovable Property Transaction

In most jurisdictions, immovable property transactions (sales, leases, and secured transactions) are governed by a single, distinct legal framework that usually includes a single registration system for all types of transactions.¹¹⁹ Moreover, immovable property transactions' rules include priority rules between purchasers, lessors, and secured creditors. It is important to note that most countries have long-established processes for registering immovable property ownership and transactions.¹²⁰ For this reason, even in legal systems in which new "secured transactions" legislation was introduced, these new rules were specifically aimed at movable property and excluded immovable property secured transactions.¹²¹ In the US, the states' legislation with respect to immovable property transaction is still in force alongside with the UCC, which specifically excludes immovable secured transactions from its scope. We may justify the exclusion of security rights in immovable property from the ambit of the MPSRP on this ground.

However, a secured transactions law is of maximal use when it deals with all types of assets. Security can be created in either movable or immovable things or in rights. Although security over immovable assets is frequently provided for separately under immovable property laws, the principles for a secured transaction law are essentially the same regardless of the nature of the secured asset.¹²² Security in rights plays an ever increasing role in security and must therefore be properly addressed in a secured transactions law.

3.2.1.4.4.2. The effect of the exclusion of security rights in immovable property

A. Effect on Accessory

Modern secured transactions legislation applies to security rights in movable assets, including when they have become accessory¹²³, i.e., attached to immovable property. Such an attachment may result in a complete loss of a security right in the movable asset that was created and perfected prior to its affixation. It is essential that

¹¹⁹ Ibid

¹²⁰ Orkun Akseli, cited above at note 27, p.189

¹²¹ Yoram Keinan, cited above at note 109, p.16

¹²² Id, p 15

¹²³ The word accessory is used interchangeable with the word fixture both having the same meaning indicating anything attached to immovable or destined for the use of the immovable. Civil law legal system uses the word accessory and the common law legal system use the word fixture.

laws address this and establish clear priority rules not only with regard to the competing security interest in the movable asset but also with regard to any competing interest that is extended to the movable asset under a law regulating rights in immovable property (e.g., that of the mortgagee).¹²⁴

The MPSRP to rectify this challenge provided an accessory to an immovable is considered as movable property¹²⁵, therefore security rights in accessory to immovable is governed by the MPSRP. However no security right can be created "in an ordinary building materials incorporated in to an immovable".¹²⁶ A security right in an accessory to immovable, which is made effective against third parties, has priorities over competing claims arising out of other laws. But this may cause a challenge on practice especially on the definition given to accessory under MPSRP and ECC. The ECC defines an accessory as anything, which the owner or the possessor of the thing has permanently destined for the use of the other thing.¹²⁷ The meaning of accessory under the MPSRP presupposes physical attachment while under the ECC material attachment is not required. This could result in a potential conflict between a security right established under the MPSRP on the same property and an immovable property interest under the ECC that extends to accessories.¹²⁸

Due to the MPSRP approach, it is challenging for immovable property dealers to determine whether accessories are encumbered without first checking with the CRO, and secured creditors must check the immovable property registry to determine an accessory's status. This approach increases the burden on parties dealing with immovable property mortgages and accessories. The solution may be to reform ECC governing accessory consistent with the meaning of accessory provided under the MPSRP or enactment of a secured transactions law applicable to both movable and immovable collateral.

¹²⁴ Id, 48

¹²⁵ See, MPSRP article 4(4) and 53(1)

¹²⁶ MPSRP article 53(1)

¹²⁷ ECC article 1136

¹²⁸ AsressAdimiGikay , cited above at note 4, p.69

B. The effect on a floating security rights agreement when it includes immovable property

Today, more debtors (particularly businesses) provide creditors both real property and personal property as secured collateral.¹²⁹In particular, many project finance transactions consist of credits secured by the debtors' entire assets, which include immovable property.¹³⁰Under a single security device, such as a floating (subject to the special regulations regulating floating charges) or enterprise charge, creditors may get security over both moveable and immovable assets.¹³¹However, under current secured transaction regulations, taking a security on both types of assets would require creditors to acquire a security under two different regimes and meet the requirements of two registration systems.¹³²

The MPSRP permits the creation of security rights in debtor's present and future assets. For this purpose it defines future assets as "a movable property, which doesn't exist or which the grantor doesn't have right in or the power to encumber at the time the security agreement is concluded."¹³³Recognizing floating security right is among the major development of the modern secured transaction regime and also the MPSRP. However, The Ethiopian mortgage law doesn't recognize floating security right agreement on immovable property that is not yet acquired. This can be inferred from article 3048 of the ECC which provides the act creating the mortgage shall clearly specify the immovable mortgaged and such act shall specify in particular the commune in which the immovable is situate, the nature of the immovable and, where appropriate, the number of the immovable in the cadastral survey plan.¹³⁴ The immovable has to be in existence and identifiable in the time of creation of security right in immovable to have effect under Ethiopian mortgage law. So it is clear that floating security right agreement on immovable doesn't have legal ground. The exclusion of immovable property security rights from the scope floating security is unjustified and it restricts debtors borrowing base. To rectify this problem the solution would be the enactment of a secured transactions law applicable to both movable and immovable collateral.

¹²⁹YoramKeinan, cited above at note 109, p.16

¹³⁰ Ibid

¹³¹ World Bank Group, cited above at note 40, p.47

¹³² Id, 48

¹³³ MPSRP article 2(18)

¹³⁴ ECC article 3048

C. It established two registries and various methods for registering security.

It is evident that the exclusion of security interests in immovable property from the scope of the MPSRP results in the creation of two registries: one for security interests in immovable property registered in the notary office and another for security interests in movable property registered in the CRO. For example transaction related to security rights in accessory, before making all asset security right agreement that includes the debtor's movable and immovable property the creditors should have to check both registries to protect their security right.

The other is it creates different method of registering/perfecting security rights, the one is simple perfection of security right the other is more cumbersome. The MPSRP provides registration of security right should contain the identifier of the grantor of the security right, the identifier of the secured creditor or its representative, an address of the grantor and the secured creditors, a description of the collateral, and the period of effectiveness of the registration.¹³⁵ Registering a real property mortgage or business mortgage, the registration system requires depositing the security agreement at the relevant register which is the basis for the request of registration.¹³⁶ Given the fact that registering a real property mortgage or business mortgage has serious implications, every registry might require authentication of legal acts before they can register it.¹³⁷ The authentication involves submitting original contracts and copies thereof for verification by the Documents and Act Authentication and Registration Office. The process includes verifying if the document is signed by an authorized person and authority (if any).¹³⁸ The parties are also required to visit at least two offices, Documents and Act Authentication and Registration Office for authentication of the security agreement and the notary office to deposit the authenticated security agreement to give effect of the security agreement to third parties.

¹³⁵ MPSRP 27(1)-(2).

¹³⁶ See Article 3052 and 1573 of ECC which provided the mortgage agreement to have effect against third party it should be entered in the register of immovable property at the place where the immovable mortgaged is situated. Similarly the new commercial code

¹³⁷ See, The Proclamation to Provide for Authentication and Registration of Acts and Documents, Proclamation No. 922/2015, Article 9(1)(a), which provides "documents that shall be authenticated and registered in accordance with the appropriate law should be authenticated as per the requirements of the proclamation".

¹³⁸ The Proclamation to Provide for Authentication and Registration of Acts and Documents, Proclamation No. 922/2015 , Article 8.

The major benefit of the authentication and registration system is its paternalistic nature, which allows a state authority or a notary to verify the validity of the security agreement while allowing parties more opportunity to do so during the registration phase.¹³⁹ It is also disadvantageous with its inflexibility and higher transaction cost that will be incurred in two offices. The traditional system of authentication and registration cannot be used if electronic filing is to be adopted.¹⁴⁰ The details required in registering security right in immovable most of them are not necessary to perfect the security right or for the purpose of rendering the contract effective against third parties.

Despite a meaningful reform with the enactment of the MPSRP, real property mortgage creditors still use the old system of authenticated registration while secured creditors with movable collaterals will benefit from an efficient and flexible notice filing system. It is not well grounded to leave out of the new secured transaction legal framework if the purpose of the reform is, in fact, to adopt a comprehensive legal regime that decreases transaction costs associated with secured lending.¹⁴¹

As pointed above, we can enact a secured transactions law applicable to both movable and immovable collateral. Recognizing the advantage of modern collateral registries, several countries (e.g., Ghana and Sierra Leone) contemplate a reform that would result in the enactment of a secured transactions law applicable to both movable and immovable collateral.¹⁴² If we didn't dare to do this with the lack of enough experience in other legal system (especially in country where which have developed legal system) to serve as a model to be guide for, at least we can unify a registration system for both real and personal property. A single notice of a security right could be registered in the collateral registry for perfection. It only needs to provide a debtor-indexed based registration system, it would combine registration of real property and personal property secured transactions (the law may need to provide for special indexing/searching rules for immovable collateral). In that case, the collateral registry would operate similar to a motor vehicle registry that records ownership rights, i.e., the collateral registry would record only encumbrances over immovable assets. Even if experience shows that such unification has not been implemented in most legal systems, the efficiency of a unified

¹³⁹ AsressAdimiGikay , cited above at note 4, p.190

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² World Bank Group, cited above at note 40, p.48

registration is obvious, especially when the registration is based on the debtor's identification rather than the type of assets. Nevertheless, it is still not clear whether a total unification of the two systems is possible. But a partial unification of registration is possible.

3.2.2. Priority and Perfection of Security Rights under MPSRP

Most scholars agree that one of the major goals of secured transactions' laws is to establish clear priority rules with respect to the underlying secured assets.¹⁴³ Obtaining priority is an expectation for the secured creditor. Secured credit is a bargain. In exchange for a priority position in the event of the grantor's or debtor's insolvency, the secured creditor extends credit at low interest rates and accepts collateral as security.¹⁴⁴ It has been well established under money legal systems that the priority between secured creditors is determined according to the principle of perfection, or third-party effectiveness.¹⁴⁵

Perfection or third party effectiveness is the process by which security right is notified to third parties and thereby becomes effective against them.¹⁴⁶ MPSRP uses the term 'third-party effectiveness'. Subject to some clearly-defined exceptions, a creditor who publicizes the existence or potential existence of its security right has priority over other persons who thereafter acquire rights in the collateral or who thereafter publicize the existence of their interests.¹⁴⁷ Security rights can be perfected or made effective against third parties by the method of control, possession, and notice filing and automatically.

3.2.2.1. Perfection by Notice Filing

The notice filing system mainly provides general information regarding the existence of security rights in the debtor's property to subsequent creditors (or third parties).¹⁴⁸ The MPSRP has adopted the notice filing system as one of the method of perfection of security right.¹⁴⁹ The creditors who registered a notice of their security rights in the collateral registry have properly perfected their security rights and it will be effective

¹⁴³YoramKeinan, cited above at note 109, p.18

¹⁴⁴OrkunAkseli, cited above at note 27, p.193

¹⁴⁵YoramKeinan, cited above at note 109, p.19

¹⁴⁶The term 'perfection' is used in most common law legal system to describe the same concept. However, The LEGISLATIVE GUIDE and MODEL LAW use the term 'third-party effectiveness'.

¹⁴⁷ World Bank Group, cited above at note 16, p.61

¹⁴⁸Id,p 192

¹⁴⁹MPSRP Article 13(1)

against third parties.¹⁵⁰ Under Article 46(1) of the MPSRP, in principle, provides priority among competing security rights created by the same grantor in the same collateral is determined according to the order of registration, without regard to the order of creation, of the security right.¹⁵¹ Therefore, the time of registration of a notice at the CRO is the principal way of determining the priority of competing security rights that are perfected through registering notice.¹⁵² The first in time principle is one of the major reforms introduced by the MPSRP, which is similar to article 9 of UCC¹⁵³, priority rank is determined by the order in which perfection was accomplished.

3.2.2.2. Perfection by Possession

The other method of effecting security rights against third parties is possession, where the collateral is given to the lender. The fact that the lender is in possession of the assets gives them notice that he has rights in them.¹⁵⁴ The MPSRP under article 13(2) provides a security right in movable property shall be effective against third parties if the secured creditor has possession of the corporeal asset that is money, negotiable instruments, negotiable documents, and certificated securities or subject to Article 56.¹⁵⁵

The type of assets in which security rights can be granted and be made effective against third parties by possession are -money, negotiable instruments and documents, and certificated securities. A creditor who has security right in this kind of property his security will be perfected against third party by possession without a need of registration. In cases of conflicts between Securities rights perfected through possession and any other method of perfection (including the filing of a notice), the security right perfected through possession gets priority.¹⁵⁶

In Ethiopia, the scope of perfection by possession is excessively limited. In effect it abolishes possessory pledges in money instances. Asreseadimi argued that

"the fact that the MPSRP has significantly limited the use of possessory pledge by requiring registration of security rights in corporeal chattels (save in exceptional cases),

¹⁵⁰Ibid

¹⁵¹MPSRP Article 46(1).

¹⁵²AsressAdimiGikay, cited above at note 4, p.208

¹⁵³Ibid

¹⁵⁴YoramKeinan, cited above at note 109, p.19

¹⁵⁵MPSRP Article 13(2).

¹⁵⁶See MPSRP Article 61 62 64 and 65.

*is incompatible with the longstanding legal tradition of Ethiopia which recognizes possessory pledge as one of the most important security devices. In other jurisdictions including in the US, possessory security right is still a strong security right because of the possibility to take possession of a broad range of assets as a method of rendering the security right effective against third parties. In Ethiopia, due to the hostile approach to possessory security right that seems to have been adopted by the MPSRP, the effectiveness of possessory pledge against third parties is limited to specific instances. In the exceptional cases recognized, delivery of possession of the collateral renders the security agreement effective against third parties. If a security agreement envisions delivery of possession to a secured creditor with regards to corporeal chattels in general, there is a risk that it may not be binding on third parties if it is not the asset with respect to which perfection by possession is not permissible, effectively nullifying the security agreement and discouraging the parties from using possessory pledge."*¹⁵⁷

3.2.2.3.Perfection by Control

The MPSRP under article 13(3) recognizes control as one method of rendering security rights effective against third parties¹⁵⁸, the creditor has control of the collateral, that are the right to payment of funds credited to deposit account or an electronic security. Electronic securities —shares and bonds registered and transferable electronically but not represented by a certificate.¹⁵⁹By exercising the security right in payment of funds credited to a deposit account, the secured creditors can exercise control by creating a security right in favor of the financial institution, by concluding a control agreement, and by making the secured creditor the deposit account holder.¹⁶⁰With this method of control, the secured creditor must be granted access to the deposit account by the debtor, either by becoming an exclusive customer or joint account holder with regard to the deposit account.¹⁶¹When the creditor has control of the collateral, that is the right to payment of funds credited to deposit account or an electronic security, he will have priority right on the property.¹⁶²

¹⁵⁷AsressAdimiGikay , cited above at note 4, p.112. For further reading , you see chapter four of the book.

¹⁵⁸MPSRP Article 13(3).

¹⁵⁹MPSRP Article 2(15).

¹⁶⁰AsressAdimiGikay , cited above at note 4, p.182

¹⁶¹Ibid

¹⁶²MPSRP Article 13(3).

It has been discussed that a modern secured transaction law should include the following special priority rules (also called super-priority).The MPSRP has also included these special priority rules, which are acquisition security rights¹⁶³, preferential claims¹⁶⁴, and buyers, lessees, or licensees¹⁶⁵.In Ethiopia's legal system regarding this special priority rule, there has been a practice of taking orders of attachment before judgment as judgment liens (preferential claims). This has created uncertainty about the effect of attachment before judgment in the determination of priority in the general secured transaction legal framework.So what is the effect of attachment before judgment in determining the priority rights of creditors?

3.2.2.4.Attachment before judgment

Attachment is the legal process of seizing another's property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered.¹⁶⁶ Attachment of property before judgment is done for the primary objective of preventing the defendant's attempt to defeat the decree's realization which is passed in favor of the plaintiff.Attachment before judgment is a common phenomenon in Ethiopian court civil proceedings in accordance with article 150 to 153 of the ECPC.¹⁶⁷ Under this procedure the action is taken entirely against the property, and it is applicable to all suits, including those involving immovable property.¹⁶⁸ Such action is to be taken where the court is satisfied that the defendant, with the intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove such property from the local limits of the court's jurisdiction.¹⁶⁹ The court must be satisfied that the defendant has the intent to obstruct or delay the execution of the decree.¹⁷⁰

¹⁶³See, article 56 of the MPSRP.

¹⁶⁴See, 3.2.1.4.3 of this paper for more.

¹⁶⁵Ibid.

¹⁶⁶BLACKS LAWS DICTIONARY, cited above at note 18, p.t 78

¹⁶⁷ In practice this provision are not differentiated with article 154 to 158 which are designed for an injunction order. An injunction is an order restraining a party from doing from a particular act or requiring him to do such an act and the plaintiff may ask for injective relief as part of the final decree.

¹⁶⁸Robert Allen Sedller, "Ethiopian Civil Procedure" (published by the faculty of law Haile Selasie first University Addis Ababa in association with Oxford University Press) 1968, p 362

¹⁶⁹ECPC, article 151(1)

¹⁷⁰Robert Allen Sedller, cited above at note 171, p.362

Where the court is satisfied that the property might be disposed of or removed, it may either direct the defendant to furnish security of a specified amount, or to produce the property or its value or a portion as may be sufficient to satisfy the decree, or it may order that he appear and show cause why he should not furnish security.¹⁷¹ If the defendant fails to show cause why he should not furnish security, or fails to furnish the security when required, the court is to order that the property specified in the application, or such portion of it as appears necessary to satisfy any decree, be attached.¹⁷²

The attachment is ordinarily made in the manner provided for the attachment of property in execution.¹⁷³ Where and a decree is subsequently passed in favor of the plaintiff, the plaintiff has to make an application for execution and the ordinary rules governing execution will apply.¹⁷⁴ Objection to the attachment of the property may be preferred by a third party on the ground that the property belongs to him or by the judgment-debtor on the ground that the property is exempt from attachment. So too, where property has been attached prior to judgment, the third party may prefer his claim, and it will be investigated in the same manner as a claim made to property attached in execution of a decree for the payment of money.¹⁷⁵

The attachment before the judgment is an encumbrance preventing the owner of the property from creating an encumbrance, selling, or creating a charge thereon. It has an effect on any property that can be used as collateral. What impact can attachment before judgment have on the general secured transaction legal framework?

i. The effect of attachment before judgment between the parties (the plaintiff and the defendant)

An order of attachment before Judgment affects the right of the owner of the property to deal with the same even before any verdict is available against him as regards the claim of the plaintiff.¹⁷⁶ The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. If a

¹⁷¹ECPC article 151(1)

¹⁷²ECPC article 152(1)

¹⁷³ECPC article 153(1)

¹⁷⁴ECPC article 153(5)

¹⁷⁵ECPC article 153(3)

¹⁷⁶SrinivaRao, "article on attachment before judgment", (2020), p ,5 available at <https://districts.ecourts.gov.in>files>>

decree is given in favor of the plaintiff he/she can apply for the sale of the property under attachment in execution of such decree without reattachment.

However, the plaintiff or the judgment creditor can fully collect the fruit of his decree only when there are no other creditors of the judgment debtor who wants to satisfy their claims against the attached property. If there are other creditors and the property of the judgment debtor is not enough to satisfy the debt, the plaintiff who attached the property only entitled to rateable distribution.¹⁷⁷The FSCCD in case between sister Kokeb Bekelevs Selam Eskodavolk held that attachment before judgment doesn't create a security right or a priority right on the property or doesn't have the effect of judicial mortgage/pledge.¹⁷⁸Therefore, the effect of attachment before judgment regarding the parties is mainly to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favor of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. It doesn't give the plaintiff or the judgment creditor priority rights in relation to other creditors in the attached property, including the one who doesn't attach the property.

In this scenario, the judgment debtor may be able to conduct certain transactions and bring other creditors to reduce the share of the judgment creditor who first attached the contested property in the asset distribution. This can make the attachment of the property pointless to the plaintiff, and it defeats the purpose of attachment. We can argue that the creditor can contest and avoid this transaction in the process of execution of his decree¹⁷⁹, but still the law is not clear in this regard. In bankruptcy proceeding there is a procedure for contesting and invalidation this kind of fraudulent transaction, they can be subject to challenge by the bankruptcy trustee.¹⁸⁰

ii. The effect of attachment before judgment to third parties

Until recently, in Ethiopian courts, the court order of attachment before judgment was taken to mean judicial mortgage, which gives priority rights to the one who attached the property in civil proceedings when the attached property is immovable property. This practice was acknowledged by the FSCCD in case between sister Commercial Bank of

¹⁷⁷See, article 403 of ECPC

¹⁷⁸Sister Kokeb Bekelevs Selam Eskodavolk, cited above at note 21

¹⁷⁹Article 418- 421 of the ECPC has provided the procedure for investigating a claim to attached property.

¹⁸⁰See Commercial Code of Ethiopia Proclamation No. 1243/2021, article 671-677

Ethiopia vsWalelegneAyalewe¹⁸¹, the division held that attachment before judgment creates judicial mortgage security right by interpreting article 3041, 3044, 3059(1) of the ECC and article 154,403 of the ECPC . The one who first attached the immovable property in court proceeding will have priority right on the property. When attachment is related to movable property, the stand was it doesn't have the effect of judicial lien or judicial pledge. This stand is also backed by the decision of FSCCD of in case between AmaremelkamuvskalebHeluf¹⁸² which held that attaching movable property before judgment doesn't create judicial pledge security right, by interpreting article 2825, 3043, 3045, 3044 of the ECC and article 403 of the ECPC.

However, this inconsistent interpretation has been resolved by the FSCCDin case betweenSisterKokebBekelevsSelamEskodavolk¹⁸³.The court held that an attachment before judgment doesn't create a security right or a priority right on the property and doesn't have the effect of a judicial mortgage or pledge, thus reversing its previous stand.This way of interpretation is also has been provided by Robert Allen Sedlerand he putted:-

*"Most significantly, attachment before judgment doesn't affect the rights existing before the attachment of persons not parties to the suit, nor does it bar any person holdings a decree against the defendant from applying for the sale of the property under attachment in execution of his decree against the defendant."*¹⁸⁴

Beyond that, the order of attachment is restricting the defendant's ability to deal with the attached property, and it is the same for a third party relating to the attached property. Creditors cannot create a security on the property once it is attached. The order of attachment, if it relates to movable property, is effected by registering in the office that registers the movables. For example, the most common movable property that is used as collateral is a motor vehicle. If the attachment order is related to the motor vehicle, it is registered in the vehicle registry.¹⁸⁵ These have the effect of notifying a third party of the prohibition to deal with the property.

¹⁸¹Commercial Bank of Ethiopia vs. WalelegneAyalewe ,FSCCD, File No. 29269, vol. 7, pp. 42-45, in Amharic

¹⁸²Amaremelkamu vs.kalebHeluf, FSCCD, File No. 97206, vol. 16, pp. 292-295, in Amharic

¹⁸³Sister KokebBekelevsSelamEskodavolk , cited above at note 9

¹⁸⁴Robert Allen Sedller, cited above at note 171, p.363

¹⁸⁵Interview with w/r HebseteReta, vehicle registry officer in Addis Ababa City Adminsitration Drivers and vehicles licencing and control authority KolfeQeraniobranchNBE (Addis Ababa, April 18, 2022)

Therefore, anyone who wants to create a security right in movable property also has to check and verify the status of the specific property in the movable registry and whether there is an attachment order relating to the property. Checking the status of the property in EMCR is not enough to assure you that the property was not encumbered before. An interview with AtoFiqremarkos¹⁸⁶ also indicated that banks who registered security rights in vehicles in the EMCR also registered their security rights in the vehicles registry first. He also further indicated that the EMCR doesn't register the court order of attachment before judgment, since there is no clearly created security and the relationship between the creditor and the grantor is not clear and also the EMCR doesn't have a form to register this kind of court order. These have resulted in the registration of security interests at two separate registrars. The fact that attachment orders and security rights are registered at different registrars imposes on buyers or secured creditors the duty to check different registry. This definitely increases the transaction costs involved in secured lending.

We can argue that since attachment before judgment doesn't create priority rights, there is no need to check the attachment of the movable in the movable registry. However, according to article 1567 to 1574 of the ECC, the purpose of the register is to provide public information about the debtor's indebtedness and to provide subsequent creditors and purchasers with information on previous rights. If the attachment order is registered at the registrar, it is presumed that everyone knows the status of the property and will act accordingly. So creating a security right on the property without checking its status in the movable registry may result in invalidation of the security agreement. So checking the status of the movable property in the movable registry before entering a security agreement relating to the movable to avoid any risk of losing your collateral subsequently is mandatory for prudent creditors. This fragmentation will complicate due diligence and increase the risk of disputes. The legal framework of a reform has to centralize all secured transactions' legal rules and information in one place. The EMCR has to create a system that registers court orders of attachment before judgment to convey notice to potential creditors of the attachment of the property.

¹⁸⁶Interview with AtoFiqremarqosAbebe, project manager for the operationalization movable collateral registry at NBE (NBE, April 16, 2022).

iii. The effect of attachment before judgment to the general secured transaction legal framework

The major goal of secured transactions' laws is to establish clear priority rules with respect to the underlying secured assets. Since attachment before judgment doesn't create a security right or a priority right on the attached property, the order of attachment before judgment doesn't have any effect in the determination of priority between competing creditors. However, since the order before judgment is registered in the Movable Registry, it conveys notice to potential creditors of the attachment of the property. The defendant or owner of the property is also prevented from creating an encumbrance, sale, or charge thereon after attachment. The registration of the attachment order provides public information about the defendant's indebtedness. This warns potential creditors, and it generally decreases access to credit. The defendant is prevented from getting a credit by attaching that property. There are a number of properties that are encumbered by court orders of attachment.¹⁸⁷ The order lasts for a longer period until the end of all court proceedings. All these properties are excluded from being used as collateral for getting credit.

To minimize the negative effect of attachment on access to credit, courts should have to give attachment order in limited circumstances in accordance with ECPC. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the law. The purpose of attachment before judgment under the ECPC is not to convert an unsecured debt into a secured one. Any attempt by a plaintiff to utilize the provisions of ECPC as leverage for coercing the defendant to settle the instituted claim should be discouraged. There are many instances of overstated and shaky claims being settled out of court under threat of attachment by dishonest plaintiffs who got attachment orders prior to judgment.¹⁸⁸

A defendant is not barred from dealing with his property merely because a suit has been or is about to be filed against him. A plaintiff should show, *prima facie*, that his claim is credible and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before a court gives an

¹⁸⁷In her interview with w/r HebseteReta, cited above at note 185, she stated that over 5000 vehicles have been attached by court order in relation to vehicles registered with the Addis Ababa City administration.

¹⁸⁸ There is, where the defendants is confident that the case is frivolous, they don't go for out of court settlement.

attachment order. Therefore, if courts grant attachment orders in these limited circumstances, the property that is subjected to an attachment order will be limited, and in effect, it will enhance access to credit by increasing the amount of property that can serve as collateral.

CHAPTER FOUR

Institutional assessment of Ethiopian Collateral Registries

Although a legal and regulatory framework is required for any secured transactions system, the effectiveness of a secured transactions law also necessitates an effective registration mechanism for movable property interests.¹⁸⁹The System is a public database that facilitates and records the registrations of securities over moveable property or collaterals created by borrowers to secure credit facilities¹⁹⁰ provided by lenders. The registry system is a source of publicly-accessible information for third parties dealing with a grantor's assets to assess whether such assets may be encumbered by a security right. It provides a basis for priority rules that depend on when third party effectiveness of a given security right is achieved through registration.

The MPSRP also provides for the establishment of CRO by regulation for the purposes of receiving, storing, and making information accessible to the public in registered notices with respect to security right and rights of non-consensual creditors.¹⁹¹ The MPSRP after authorizing creation of the CRO, but otherwise delegates all matters concerning the operation of the Registry to the NBE until such time of the establishment of an autonomous CRO by regulation.¹⁹²

Accordingly, the NBE has issued OOMCRD for implementation of the registration system and has also established the EMCR that is housed in the NBE.¹⁹³ Even if it appears temporary, empowering the NBE to provide the registry service allows the NBE to more efficiently evaluate the impact of the reform on credit access, consider changes to prudential regulation, lead the financial inclusion agenda in general, and aid in ensuring the registry's overall sustainability. The challenge can be that the NBE may be confined to its traditional service, which is the provision of services to banks, microfinance institutions, and capital goods finance companies. This was clearly indicated in an interview with Fiqremarkos Abebe¹⁹⁴, the project manager of the

¹⁸⁹World Bank Group, Secured Transaction Systems and Collateral Registries, (2010), p.6 available at: www.worldbank.org

¹⁹⁰Any other type of obligation secured by moveable property may also be registered.

¹⁹¹MPSRP Article 2(5) and 21

¹⁹²MPSRP Article 20 and 95

¹⁹³See EMCR website, available at <https://emcr.nbe.gov.et> and NBE OOCRd No. MRC/01/2020

¹⁹⁴Interview with Ato Fiqremarqos Abebe, cited above at note 186.

operationalization of the movable collateral registry. He said that the EMCR is under implementation as a project and is designed to register security rights for banks, microfinance institutions, and capital goods finance companies. He further added that OOMCRD is mainly regulated to register the security rights of banks, microfinance institutions, and capital goods finance companies. He clearly indicated that until now there was no system designed to register the security rights of other individuals or institutions. The EMCR is registering movable property security rights created by banks, microfinance institutions, and capital goods finance companies only.

Even while banks, microfinance institutions, and capital goods finance companies are the primary sources of credit in the economy, there are still other individuals and entities that offer credit and desire the perfected moveable property collateral security right. The MPSRP is promulgated to apply to all rights in movable property created by an agreement that secures payment or other performance of an obligation.¹⁹⁵ The NBE should have to regulate and design a system for the registration of the security rights of other individuals and institutions that want to secure payment or other performance of an obligation with movable property. Otherwise, it will not fully attain its objective, which is to assist in energizing the credit delivery system through the provision of efficient and cost-effective services and to play a key role in creating an enabling environment to ensure easy access to credit.

4.1. The EMCR

According to Fiqremarkos,¹⁹⁶ even though the EMCR is still being implemented as a project, the project team has already launched the security right electronic registry system. So far, more than 40,000 (forty thousand) security rights have been registered in the system.¹⁹⁷ Even if it is not fully implemented, we can say that there is an EMCR under operation that registers security notices that have a legal effect against third parties in accordance with the MPSRP.

The legal and institutional frameworks of the registry should permit simple registration of notices and searching for information. Considering the experience with notice registries over the past 50 years, a set of generally accepted principles has been

¹⁹⁵ See article 3 and preamble of the MPSRP

¹⁹⁶ Interview with Ato Fiqremarkos Abebe, cited above at note 186.

¹⁹⁷ Ibid

developed.¹⁹⁸These principles are incorporated in the UCC, LEGISLATIVE GUIDE and MODEL LAW. Based on these principles in this paper an effort was made to analyze the general legal framework in which the registry operates, the institution under operation, the practices and features available.

4.1.1. The Registration process

Registration should fulfill the dual objectives of perfecting a security interest against third parties and making it known to the public.¹⁹⁹There are two types of registration: notice registration and document registration. Delivery and recording of the agreement and possibly other documents are necessary for document registration. On the other hand, a notice registration only needs basic information to inform a potential creditor or buyer of a claim of a security interest in the assets indicated in the notice, not any documents. The MPSRP's provisions for collateral registry and registration call for an entirely computerized system for registration and search, with no parallel paper-based registration system.²⁰⁰

The notice filing system in Ethiopia is mainly governed by Articles 20-45 of the MPSRP and the OOMCRD. A notice can be filed by the secured party only by creating a user account at the EMCR.²⁰¹ Similarly, an amendment can be made to a notice filing by using the same user account and by an authorized person.²⁰² The original security agreement and the grantor's written permission are sufficient evidence of the grantor's authorization to register the security right.²⁰³ The EMCR does not conduct authentication of the contract, only receives, registers, stores, and makes accessible to the public information regarding security rights.

There has to be a clear regulation what constitutes the correct identifier of the grantor so as to ensure that a registrant can be confident that its registration will be effective and that searchers can confidently rely on a search result. In Ethiopia, With respect to determining the identifier of the grantor depends on whether the grantor is a natural or a

¹⁹⁸World Bank Group, cited above at note 189, p.4

¹⁹⁹Ibid

²⁰⁰Asress Adimi Gikay, cited above at note 4, p.198

²⁰¹ MPSRP Article 24(1)

²⁰²MPSRP Article 24(2).

²⁰³MPSRP Article 22(2) and 5

legal person.²⁰⁴Where the grantor is a natural person, the grantor identifier number is the Tax Identification Number (TIN) for Ethiopian natural persons and the Passport Number for non-Ethiopians, as well as the grantor's name as it appears in a recent official document and the name as it appears in a passport for those who are not citizens of Ethiopia.²⁰⁵Regarding a legal person, similarly, the grantor identifier is the TIN and the name that appears in the most recent document or law constituting the legal person.²⁰⁶In both cases, the law clearly requires the grantor's name as it appears on the official document, as well as the TIN number (passport number for non-Ethiopians) for grantor identification.

The challenge regarding this is in case where the grantor is a legal person constituted under the law of a foreign State who doesn't have TIN number will not be able to register as grantor. According to an interviewee with Feqremarkos²⁰⁷, a legal person formed abroad must also provide a TIN number for registration in the EMCR. This foreign legal person may not always have a TIN number, and they will be discouraged from providing their movable property as collateral. This will have its own effect on the overall supply of credit in the credit market. UCC does not require a grantor identifier number as grantors are identified by their names.²⁰⁸The LEGISLATIVE GUIDE also recommends that states that require additional information (the TIN requirement) in addition to the grantor's name should provide regulation for cases in which the grantor is a legal person constituted under the law of a foreign state, since the commercial or corporate register of the foreign state may not have an equivalent registration number system.²⁰⁹However, the OOMCRD doesn't clearly regulate this scenario, and it treats them similarly as legal persons that are constituted in the country. To address this gap, the NBE could have to take the name that appears in the document constituting the legal person as a sufficient requirement for a grantor identifier without requiring a TIN. This could be compatible with the LEGISLATIVE GUIDE, which recommends that the correct identifier for the

²⁰⁴ Secured creditor identifier is the same as the grantor identifier. See, OOMCRD No. MRC/01/2020 Article 11.

²⁰⁵ See article 28(1) of MPSRP and National Bank of Ethiopia, OOMCRD No. MRC/01/2020 Article 11.

²⁰⁶ Ibid

²⁰⁷ Interview with Ato Feqremarkos Abebe, cited above at note 186

²⁰⁸ UCC Section 9-502(a)(1).

²⁰⁹ See, UNCITRAL Guide on the Implementation of a Security Rights Registry

purposes of effective registration is the name that appears in the document constituting the legal person.²¹⁰

The notice filing also needs to identify the collateral using serial numbers where available and the collateral falls in the category of assets that can be identified by a serial number, by listing name and by known categories of collateral.²¹¹ The initial notice should also contain addresses of the parties, the period of effectiveness of registration (maximum of ten years subject to renewal more than once) as well as other information that may be required by the directive.²¹²

The EMCR uses an exclusively computerized, online system, and does not accept paper registration forms. It functions only with electronic registration system that requires internet connectivity. Under international best practices, electronic systems are preferred over paper systems mainly because registrants and searchers have immediate access to the registry record.²¹³ Such processes also reduce the possibility of human error and the input of inaccurate or irrelevant information.²¹⁴ The decision to use an electronic system is therefore well-founded. When we consider this in the context of internet accessibility, digital 2022 Ethiopia²¹⁵ revealed that just 29.83 million people out of Ethiopia's estimated total population of 119.3 million in January 2022 were internet users. At the beginning of 2022, 25.0 percent of Ethiopia's population was using the Internet. For context, these user statistics show that 89.50 million Ethiopians did not access the internet in the beginning of 2022, which translates to 75.0% of the population being offline at that time.²¹⁶ Nonetheless, in a country where less than 25% of the population has access to the internet, implementing an exclusive electronic filing system is not a viable solution.

To minimize the gap we can think of Paper-based notice registration systems as an additional system. To ensure access for the broader stakeholder to the collateral registry, certain countries adopted hybrid system—electronic and paper-based registration systems. In the US where electronic filing is utilized efficiently, paper-based filing is still

²¹⁰See Secured Transactions Guide, chap. IV, paragraph. 31-36, and rec. 54.subpara. (h).

²¹¹MPSRP Article 30(1)-(6).

²¹²MPSRP Article 27(1)(c), (e) & (f).

²¹³See recommendation 54 (j) of the LEGISLATIVE GUIDE

²¹⁴World Bank Group, cited above at note 189, p.4

²¹⁵digital 2022 Ethiopia, available at <https://datareportal.com/reports/digital-2022-ethiopia>

²¹⁶Ibid

allowed in the majority of the states,²¹⁷ the registry in Guatemala is also online and paper registrations are accepted as a hybrid system.²¹⁸ Paper-based notice registration systems usually require information submission in a notice or form by a registrant, entry of the notice's information into the registry record, assignment of a date and time to the notice, and entry of the relevant information from the notice into the registry index — when the information becomes available to searchers.²¹⁹ In an online registry, these steps occur when registrants complete registration. Implementing an exclusive electronic filing system is not in accordance with Ethiopia's realities, we have to implement also Paper-based notice registration systems as a hybrid system, to make collateral registry accessible to broader society.

4.1.2. Centralized registry information

It is essential that this information be accessed from a single source because the primary function of a registry is to provide searchers with sufficient information to enable them to decide whether to deal with movable property.²²⁰ As a result, information should only be stored in one database, either distributed or centralized, from which it can be retrieved.²²¹ The LEGISLATIVE GUIDE recommends the record of the registry should be centralized and contains all registrations with respect to security interests registered.²²² The MPSRP provides the establishment of single registry that is CRO.²²³ The EMCR also that is under stage of implementation is centralized and housed in the NBE.²²⁴ Regardless of where a grantor's movable property is located, whether the registry is established under the law that governs the perfection of security interests, or whether the grantor is a natural person or a legal entity, a unified database provides comprehensive information relating to any registration created against that property.²²⁵

²¹⁷ Asress Adimi Gikay, cited above at note 4, p.200

²¹⁸ World Bank Group, cited above at note 189, p.7

²¹⁹ Ibid

²²⁰ World Bank Group, cited above at note 16, p.84

²²¹ Ibid

²²² See recommendation 54 (e) of the LEGISLATIVE GUIDE

²²³ MPSRP Article 24(2).

²²⁴ NBE, OOCR No.MRC/01/2020 Article 4(1).

²²⁵ World Bank Group, cited above at note 16, p.84

4.1.3. The search process

Information in the registry is public and should be available to any user without restriction.²²⁶ Any person who has internet access without demonstrating a reason for conducting the search can submit a search request to the registrar by using prescribed search request form and can get all information that has been entered in the register.²²⁷ You can search EMCR Registrations by the grantor's name as it appears on the TIN document or TIN number, the debtor's name as it appears on the TIN document or TIN number, the serial number of serial-numbered collateral, or the notice registration number.²²⁸ This approach would give secured creditors an alternative search criterion to quickly and efficiently retrieve a registration for any purposes. The search result is presented on the web page, and you can also download the result as a pdf.

Accessing the registrant for those without Internet access will be the main challenge, as already discussed. It is important to keep in mind that many system users will only need to access the search function and won't need to register with the system (like banks, where the majority of customers have internet access). They include those who purchase farm goods or other movables when the sale is not conducted in the ordinary course of the seller's business, such as when buying used machinery. Because of this, it is necessary to take potential searchers' accessibility into account when deciding what access methods must be offered. It is not sufficient to evaluate whether all potential creditors who will register notices have access to the Internet. As discussed above, we should have to consider paper-based notice registration systems as an additional system. At this time, if a search request is submitted on paper, the registry will issue a reply form. And also where internet searching is not available, convenient search points should be provided so that any person, wherever situated in the jurisdiction, can have easy access.

²²⁶ See, MODEL LAW, scitedabove note 7, at ch. 4, art. 35

²²⁷ MPSRP article 24(3) and the OOCRd No. MRC/01/2020 Article 5.

²²⁸ See, EMCR website available at <https://emcr.nbe.gov.et>. When you search, the required amount will be deducted from your virtual account or you will pay as specified on the EMCR website.

CHAPTER-FIVE

Conclusion and Recommendations

5.1. Conclusion

There is causality between access to credit and the way modern and efficient secured transactions law principles facilitate these concepts for the benefit of business. Predictable and effective secured transactions law principles can improve inclusive access to credit by reducing the cost of credit and assisting economic and business growth. This research studied the newly introduced Legal and institutional framework for movable collateral registration in Ethiopia as distinctive comprehensive legal regime, in promoting responsible and inclusive access to credit. In so doing, it showed the gaps existing in the Ethiopian general secured transaction legal frame work and the practice as seen from modern secured transaction legal frame work and practical points of view. Among these, significant are:

- The enactment of the MPSRP in 2019 has ended fragmented approach to security interests by introducing single concept of security rights. The MPSRP is supposed to be the single, unified sources of the law governing the taking security in movable assets in Ethiopia, it combined the previous scattered Ethiopian security law and there updates. However, the most important consequence of the approach taken by the MPSRP is the exclusion of security right in immovable property from its ambit. Under international best practices legal regimes governing security right in immovable property were well developed starting from state formation. They left out security rights in immovable assets, which are already well developed in their distinct regime, and focused on establishing a legal and regulatory environment where movable assets can be used effectively as collateral. We may justify on this basis under international best practice. However, in the case of Ethiopia, even though immovable property mortgage has played a key role in financing in the last decades, the legal regime governing mortgage has been in place since 1960, and it is as obsolete as the rest of the pre-2019 secured transactions on movables. Furthermore, because the use of immovable and movable property as a security is so similar, the principles of secured transaction law are essentially the same regardless of the nature of the secured asset. So it is unjustifiable to exclude the obsolete legal regime governing security rights in immovable property, which is

unfit for modern secured financing schemes, from comprehensive secured transaction regime reform in the country.

- The exclusion of security rights in immovable property and the different definitions given by MPSRP and ECC have created a gap in dealing with security rights in accessory, movable property that are attached to immovable property. The meaning of accessory under the MPSRP presupposes physical attachment while under the ECC material attachment is not required. This might lead to a potential conflict between the right in an immovable property extending to accessory under the ECC and security right under the MPSRP created on the same property. The MPSRP approach makes it difficult for immovable property dealers to know if the accessories are encumbered without checking at the CRO; at the same time, secured creditors need to consult the immovable property registry to check the status of an accessory. This approach adds burden on parties dealing with immovable property mortgage as well as accessories.
- More debtors (especially corporations) today provide creditors with both types of secured property: real property and personal property. Creditors may also take security over both movable and immovable assets through a single security device, such as a floating security right created on the debtor's present and future assets. The exclusion of immovable property security rights from the scope of MPSRP has forced creditors to take a security under two different regimes and to satisfy the requirements of two registration systems.
- It is clear that the exclusion of security rights in immovable property from the ambit of MPSRP creates two registries: the one that registers security rights in immovable property in the notary office and those of CRO, which register security rights in movable property in a different office. It imposes a buyer or a secured creditor the duty to check different registers to prevent their claims from being subordinated. It also made immovable property mortgage creditors still to use the old system of authenticated registration while secured creditors with movable collaterals will benefit from an efficient and flexible notice filing system.
- Attachment before judgment is a common phenomenon in Ethiopian court proceedings. There are a number of movable properties, especially motor vehicles that are attached by court orders. The defendant or the owner of the property is prevented to create encumbrance, sale or create charge thereon. This

has made a lot of properties ineligible to be used as collateral and decreased the availability of credit. The general secured transaction legal framework was disabled to facilitate those assets being used as collateral.

- Even if attachment of properties before judgment doesn't have the effect of creating security right and it will not have any effect in determination of priority rights of creditors, the registration of the attachment order in movable registry office has increased the burden on potential creditors to check and verify the status of the specific property in the movable registry before they create a security right on it. Checking the status of the property in EMCR is not enough to assure you that the property was not encumbered before. This defiantly increases transaction costs involved in secured Lending. This has created an effect on the efficiency and predictability of the general secured transaction legal framework.
- Ideally Ethiopia's choosing electronic systems are preferred under modern day secured transaction regime over paper systems because it allows registrants and searchers to have immediate access to the registry record. However, the choice to implement an exclusive electronic filing system is out of touch with the reality in Ethiopia. It has relatively low Internet connectivity with less than 25% of its population having access to the Internet. Since electronic system requires internet connection, implementing an exclusive electronic filing system is not a viable solution in Ethiopian reality. It left out money portion of the population from accessing the collateral registry service.
- The EMCR in operation is only registering movable property security rights created by banks, microfinance institutions, and capital goods finance companies. There was no system designed to register the security rights of other individuals or institutions. Even if MPSRP is promulgated to regulate all rights in movable property created by an agreement that secures payment or other performance of an obligation, institutions and individuals other than banks, microfinance institutions, and capital goods finance companies are not getting the service of registration of their security rights that are created on movable property.
- In the registration process regarding identification of grantor, a legal person constituted under the law of a foreign state who doesn't have a TIN number will not be able to register as a grantor under EMCR. This foreign legal person may not always have a TIN number, and they will be discouraged from providing their

movable property as collateral, which has its own effect on the overall supply of credit.

5.2.Recommendations

In order to have an efficient, fair, predictable and comprehensive secured transaction legal framework in Ethiopia, that improve inclusive access to credit by reducing the cost of credit and assisting economic and business growth, the most important recommendations that the researcher forwards after conducting this study are:

- ✓ To rectify the problem that has been created by the exclusion of the security right in immovable property from the comprehensive secured transaction framework regime, the researcher recommends the enactment of a secured transactions law applicable to both movable and immovable collateral. A secured transactions law is of maximal use when it deals with all types of assets. Security can be created in either movable or immovable things or in rights. Security over immovable assets is frequently provided for separately under land or building laws, but the principles for a secured transaction law are essentially the same regardless of the nature of the secured asset. Some economies (e.g., Ghana and Sierra Leone) contemplate a reform that would result in the enactment of a secured transactions law applicable to both movable and immovable collateral. If we didn't dare to do this because of the lack of experience in other legal systems (especially in countries that have developed legal systems), we could at least unify the registration system for both real and personal property. A single notice of a security right could be registered in the collateral registry for perfection. It only needs to use the provided debtor (grantor)-indexed-based registration system, which would combine registration of immovable and movable property secured transactions (the law may need to provide for special indexing and searching rules for immovable collateral). In that case, the collateral registry would operate similar to a motor vehicle registry that records ownership rights, i.e., the collateral registry would record only encumbrances over immovable assets. Even if experience shows that such unification has not been implemented in most legal systems, the efficiency of a unified registration is obvious, especially since the registration is based on the grantor's identification rather than the type of assets.
- ✓ The court's power to give an attachment order before judgment should not be exercised mechanically or merely for the asking. The purpose of attachment

before judgment is not to convert an unsecured debt into a secured debt. The court should have to give attachment order only when the plaintiff sufficiently proved that the defendant is about to dispose of whole or any part of his property and defendant is about to remove the property from local limits of Jurisdiction of the Court. This will have the effect of decreasing the property that is subjected to attachment and increasing the property that can be used as collateral. By doing so, security increases the availability of credit and improves the terms on which credit is available.

- ✓ One of the principal functions of a registry is to provide or make public sufficient information for searchers to decide whether to deal with movable property. The order of attachment before judgment is an encumbrance on the property that has an effect on a third party also. If any potential creditor creates a security right on the attached property, the security right may be in jeopardy. So the EMCR should have to create a system that registers court orders of attachment mainly for the purpose of informing potential creditors about the previous attachment orders.
- ✓ To ensure access for the broader stakeholder group to the collateral registry, paper-based notice registration systems have to be adopted in addition to the electronic system as a hybrid system. Paper-based notice registration systems will work by requiring information submission in a notice or form by a registrant, entry of the notice's information into the registry record, assignment of a date and time to the notice, and entry of the relevant information from the notice into the registry index—when the information becomes available to searchers. In an online registry, since these steps occur when registrants complete registration, both systems can work side by side. Regarding the search process, where internet searching is not available, convenient search points should have to be provided so that any person, wherever situated in the jurisdiction, can have easy access.
- ✓ Even while banks, microfinance institutions, and capital goods finance companies are the primary sources of credit in the economy, there are still other individuals and entities that offer credit and desire the perfected moveable property collateral security right. The MPSRP is promulgated to apply to all rights in movable property created by an agreement that secures payment or other performance of an obligation. The NBE should have to regulate and design a system for the registration of the security rights of other individuals and institutions that want to secure payment or other performance of an obligation with movable property.

- ✓ In the registration process, the TIN requirement in addition to the grantor's name for identification of a legal person constituted under the law of a foreign state is not always practicable; this foreign legal person may not always have a TIN number. This TIN requirement is excessive and it is discouraging foreign legal persons from providing their movable property as collateral. The EMCR could have to take the name that appears in the document constituting the legal person as a sufficient requirement for a grantor identifier.

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