

A REVIEW OF THE NIGERIAN LAW AND PRACTICE ON *PERFECTION* OF CHARGES

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ABSTRACT

Generally, stamping and registration of a charge created over a company's assets are relevant for the enforcement and the preservation of priority of any security interests created under Nigerian law. This process is called "perfection". The goal of this article is to (i) provide at a glance what the perfection process entails, (ii) identify issues that are thrown up by the laws applicable to the perfection process, (iii) discuss and/or resolve some of the aforementioned issues. The article also examines how affected parties have been able to balance commercial concerns around the high cost of perfection and legal risks of failure to comply. The discourse would be incomplete without an examination of the impact of some recently enacted statutes on the perfection procedure.

Keywords: *Charges, Perfection, Stamping, Registration.*

INTRODUCTION

It is not unusual for a borrower to create security over its¹ assets to secure its repayment obligations to a finance party (a lender or group of lenders). Security can be created over a company's assets or individual by way of charge, pledge, lien or mortgage. Under Nigerian law, in addition to the creation of such security interest by the execution of the relevant documents, the law prescribes steps that must be taken by the borrower and/or the secured lender(s) to "perfect" the security. Failure to "perfect" these security interests may have severe repercussions for the lender, especially in the event of the borrower's insolvency. Such "unperfected" security for corporate entities will generally be void against the liquidator and other creditors.

The requirements for the perfection of any security largely depends on the nature of the assets over which it is created (moveable or immoveable asset), location and, in some cases, the identity of the chargor. However, our focus is on the general perfection requirements a company creating security over its assets would be statutorily required to meet - stamping and registration over movable and immovable assets.² Due to the cost and other commercial implications of "perfection", borrowers and lenders continue to find creative ways to strike a balance between commercial realities and compliance with applicable laws. We discuss a couple of these balance-striking mechanisms. The administration of the laws applicable to the perfection of charges by the relevant regulators also forms part of the discourse in this article.

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1. A company may secure its obligations as a borrower through security created over a third party's assets. Where, for instance, a company is a subsidiary-member of the group, a parent-member of the group may advance security over its assets to secure the obligations of that subsidiary-member of the group.
2. The discussion in this article will not extend to ship and aircraft.



A CHARGE AS A SECURITY INTEREST

Security interests may be created over a company's assets by way of a pledge, a charge, a mortgage or an assignment by way of security. The type of security interests created usually depends on the nature of the underlying asset. For instance, a pledge would typically be created over assets that possession can be taken of. Where a company decides to create a security interest over its insurance policies, it would typically be by way of an assignment of the proceeds of the insurance to the finance party. The nature of the security interest created is also determined by the objective the lender seeks to achieve. For instance, where the lender intends for the borrower to be able to sell or otherwise dispose of the assets in the ordinary course of business, the lender would create a floating charge rather than a fixed charge over the said assets. Other quasi-security interests secure the obligations of a borrower company in financings like the guarantee and the lien. Security may also vary depending on the interest passed to the finance party, which could be (A) only possession, *e.g.* lien and pledge; (B) title to the asset (with or without possession), *e.g.* legal mortgages; or (C) mere charge without possession or title, *e.g.* equitable mortgage. A discourse on security interests under Nigerian law will be incomplete without a reference to the distinction between equitable interests and legal interests.³ For instance, the extent of the rights and power of a mortgagee varies depending on whether the mortgage is equitable or legal. Furthermore, a charge is an interest⁴ over the asset in question by way of security which subsists until the underlying debt is discharged.

THE PERFECTION REQUIREMENTS

"Perfection" of security typically involve (a) stamping the documents creating the security (the "Charge Documents")⁵ and (b), where required, registering the stamped Charge Documents at the relevant registries.⁶ Registration of security interests would vary depending on (a) the nature of the asset over which the security is created and (b) the identity of the chargor. Security over land will, in addition, require (a) the consent of the governor in accordance with the Land Use Act, 1978 and (b) the registration of the deed at the relevant lands registry.⁷ For security over an oil and gas interest (*e.g.*, an oil mining lease, oil prospecting licence or marginal filed interest) or electric power licence, the consent of the relevant regulator will be required, in addition to the other general perfection requirements.⁸ Otherwise, the security interest would be void in law. CAMA also

3. This distinction is a consequence of the common law and equity systems Nigeria inherited during its colonisation by the British. See Akintunde Olusegun Obilade, *The Nigerian Legal System*. (1st edn, Sweet and Maxwell 1979) for a more extensive reading on the history of the Nigerian legal system and the adoption of the doctrines of common law and equity.
4. This interest has been described as an "equitable proprietary interest". Strictly speaking, title is not passed (as in mortgage – where there is an option to redeem). See Richard Calnan, *Taking Security: Law and Practice* (2nd edn, Jordan Publishing Limited 2011) 40, 52-54.
5. Where reference is made to a single document creating a charge, it would be a "Charge Document".
6. Charges created by a company over assets like ship and aircraft will be registered with both the CAC and the Nigerian Maritime Administration and Safety Agency (for a mortgage over a ship or vessel) or the Nigerian Civil Aviation Authority (for a mortgage over an aircraft).
7. Land in Nigeria is held and administered at the state level (Land Use Act, 1978, s 1). Perfection of any security interest in land will be carried out at the land registry of the state in which the land is situate.
8. Kenechukwu Kingsley Ugochukwu 'The Process of Vessel Mortgage Registration at the Nigerian Ship Registry' (*LinkedIn*, 1 August 2019) < <https://www.linkedin.com/pulse/process-vessel-mortgage-registration-nigerian-ship-ugochukwu-1c/> > accessed 5 May 2021. The exact statutory provision expressly providing for the requirement for the consent of the Director General of NIMASA has been elusive. On the other hand, it would appear that the consent of the Director General of the Nigerian Civil Aviation Authority is not required for the registration of a charge over an aircraft. Interestingly, the NCAA is empowered under the Civil Aviation Act, 2006 to approve or consent to the registration of aircraft and any related mortgage or the conferment of any benefit on a person further to the statute and any other related subsidiary legislation (s 30(4)(q)). See also Alex Izinyon II, 'Nigeria: Aviation Finance Comparative Guide' (*Mondaq*, 19 April 2021) < <https://www.mondaq.com/nigeria/transport/986862/aviation-finance-comparative-guide> > accessed May 5, 2021



requires a company to register⁹ the particulars of specific categories of security interests with the Corporate Affairs Commission ("CAC"), Nigeria's companies' registry. Thus, in addition to stamping the relevant Charge Documents and obtaining the relevant regulatory or governmental approvals and consents, where applicable, the borrower is required to register the security interest at the CAC.

STAMPING

The requirement to stamp a Charge Document is provided for under the Stamp Duties Act, 1939 (as amended) ("SDA").¹⁰ The modalities for stamping a Charge Document depend on whether it was executed in Nigeria or executed outside Nigeria and then later brought into Nigeria. A Charge Document¹¹ is stamped at an *ad valorem* rate in accordance with the Schedule to the SDA that provides for the categories of instruments susceptible to stamp duties, as well as the applicable charge of duty on them.

When Should a Charge Document be Stamped?

A Charge Document is required to be stamped "before the expiration of thirty days after it is first executed" if it has been executed in Nigeria.¹² Where the Charge Document is executed outside Nigeria, it is required to be stamped before the expiration of thirty days, "*after it has been first received in Nigeria*" after the applicable stamp duty has been paid.¹³ Where the Charge Document is not stamped as aforesaid, the chargee¹⁴ is guilty of an offence and liable on conviction to a fine of twenty naira (approx. \$0.0488).¹⁵ However, the chargee may escape penalty if the chargee is able to come up with a reasonable excuse (to the satisfaction of the commissioner of stamp duties) for the delay in the stamping or the omission to stamp the Charge Document. In the case of a Charge Document that would be void but for the obtention of the consent of a public officer,¹⁶ the 30-day period begins to count from the date such approval or sanction is obtained (and not the date it is executed).¹⁷

9. s 222.

10. The SDA has now been amended by the Finance Act, 2019 (ss 52 – 56) and the Finance Act, 2020 (ss 46-48). The majority of the sections that have been extensively amended are largely irrelevant for the purposes of this article. It is noteworthy, however, that the word "stamp" and any of its other variants would now include an electronic stamp or a notional stamp. Furthermore, a reference to a document for stamping under the SDA would also include a reference to electronic documents. The SDA is an ancient statute, enacted since 1939 even before Nigeria attained independence. It needs to be amended to address modern day realities.

11. s 80 of the SDA has an arguably extensive definition of a mortgage which includes, among others, 'conditional surrender by way of mortgage, further charge or disposition'. A Charge Document will be stamped, as a deed of mortgage would, at 0.375%.

12. SDA, s 22(3)(a).

13. SDA, ss 22(3)(a) and 23.

14. The SDA expressly provides that the mortgagee or the obligee will be liable to penalty if the instrument is not stamped as stipulated in the SDA (s 23(3)(c)).

15. The exchange rate according to the I&E FX Window is N410/USD1 as published by the FMDQ Group on May 5, 2021. See <<https://fmdqgroup.com/>>.

16. This would probably apply to a charge over land.

17. SDA, s 23(5).



It is interesting to note that the 30-day period can be extended or reduced by an order of the Minister¹⁸ if the Minister¹⁹ is of the opinion that the 30-day period is (a) being used to evade the payment of stamp duties or (b) too long or too short in view of the fact that it is either easy or difficult to access a commissioner to assess the duty payable or having the instruments stamped.²⁰

There are, perhaps, three major questions that the provisions we have examined in the previous paragraph provoke. The first is, when do we consider a Charge Document to be first executed? The second is, where a Charge Document has been executed outside Nigeria, when would it be considered by the tax authorities to have been first received in Nigeria? Finally, how do secured lenders deal with the Sword of Damocles hanging over their heads for non-payment of the applicable stamp duties?

When is a Charge Document First Executed?

The SDA does not explain what it considers a first execution to be. In practice, however, a commissioner of stamp duties would usually look to the date of the Charge Document to answer this question. The relevance of this question is more pronounced where a Charge Document is executed in counterparts. Would the Charge Document be first executed when the first party executes it or would it be first executed when the last counterparty executes it? It is not unusual for a Charge Document to be executed in cross-border secured lendings over a couple of days. It could be due to the differences in the time zone or the unavailability of the relevant authorised signatory. The relevant time of first execution would ultimately be a question of fact. Some Charge Documents define the date of execution as the date the last counterparty signs the contract, and in that case, the date of first execution is likely to be such a date, except there are reasons to conclude otherwise. In practice, the parties would usually hold off on dating the contract until all the relevant parties to the Charge Document have signed and the date of the Charge Document has been agreed. The assumption is that from this date, the 30-day period would begin to count - the parties would usually arrange their affairs such that it takes a couple of days after the designated date to present the documents for assessment before the commissioner of stamp duties.

When is a Charge Document First Received in Nigeria?

The SDA does not explain when a document is first received in Nigeria. However, following the amendments to the SDA in 2020, the FIRS issued an information circular providing clarifications on the term (the "FIRS Stamp Duties Circular").²¹ Prior to 2020, parties usually presented executed hard copies of documents with wet-ink signatures for stamping.²² Where a Charge Document is

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18. The administration of stamp duties is done both at the federal and state level (the SDA, s.4). Where one of the counterparties to the agreement in question is (or the document will be executed by) a company, the appropriate tax authority is the Federal Internal Revenue Service. Where the agreement or instrument is to be executed by individuals, the appropriate tax authority is the internal revenue service of the relevant state. Consequently, the power to extend the 30-day period may also be exercised by the Governor of the relevant state (where applicable).
19. Interestingly, the SDA does not specify whom the Minister is. There is, however, an isolated reference to the Minister of Finance in s 2 of the SDA. It is noteworthy that the Minister that has historically been responsible for tax-related orders has been the Minister of Finance. The reasonable inference here is that the relevant Minister is the Minister of Finance.
20. s 23(8)-(9).
21. The Information Circular dated 29 April 2020 can be accessed on the FIRS' website at <https://pwcnigeria.typepad.com/files/firs-information-circular-2019-fa_stamp-duties.pdf> accessed 4 May 2021.
22. There were occasions that a copy of an executed document could be printed out for stamping. By virtue of s 52 of the Finance Act 2019 instruments that may be stamped now include "electronic documents".



executed in counterparts, particularly in cross-border secured lending, the execution pages would typically be collated at a point outside Nigeria before the executed originals of the Charge Document are sent to Nigeria. The Charge Document would be dated as discussed above²³ with a minor qualification - after the wet ink pages have been physically delivered and received in Nigeria. Again, the assumption is that the 30-day period begins to count from the date on the Charge Document. The electronic versions of the executed (but undated) Charge Document would typically have circulated shortly before Nigeria's originals arrived. As it would be seen below, since 2020, circulating an electronic version prior to sending the originals would mean that the Charge Document would be first received in Nigeria as at the time a person in Nigeria had access to the shared electronic version.

Since 2020 however, an electronic Charge Document executed outside Nigeria will be first received in Nigeria if it: (a) is retrieved or accessed in or from Nigeria; (b) (or an electronic copy of it) is stored on a device (including a computer, magnetic storage, etc.) and brought into Nigeria; or (c) (or an electronic copy of it) is stored on a device or computer in Nigeria. To ensure that the date of the Charge Document coincides with the date it is first received in Nigeria, parties to the Charge Document (and their professional advisers) in Nigeria are only granted access to the Charge Document²⁴ when the parties to the Charge Document have agreed on a date (which would, as discussed above, be as close as possible to when the originals are physically delivered to Nigeria). As earlier explained, the ultimate goal is to manage the process such that the Charge Document is stamped shortly after it is dated.

Secured Lenders and the Sword of Damocles

There is no report²⁵ documenting the imposition of the penalty imposed further to s. 22(3) of the SDA. In practice, however, the costs of the facility (including perfection costs) would be offset as soon as the facility is disbursed. To protect their interest, secured lenders would always make the stamping of a Charge Document (and other security document(s)) a condition precedent (or subsequent) to the effectiveness of the facility agreement. It is not unusual that the Charge Document would have been presented for assessment by the commissioner of stamp duties before any loan is disbursed under the facility. Upon disbursement, the amount assessed would be further disbursed to the secured lender's counsel for payment to the FIRS. The mechanics of each transaction depends on its circumstances. The solicitors to the secured lenders typically manage the stamping process.

Future Advances

Where the amount of the value of a loan being secured by the charge is "unlimited", the Charge Document can be stamped for "such an amount only as the ad valorem duty impressed thereon extends to cover".²⁶ Where "any advance or loan is made in excess of the amount covered by that duty, the security, shall for the purposes of stamp duty, be deemed to be a new and separate instrument, bearing the date on the day which the loan or advance is made." For instance, if the total commitment that can be drawn under a facility agreement is USD1bn and the borrower draws on



23. See the heading "When is a Charge Document First Executed?"
24. This could be by way of a passworded cloud storage application.
25. To the best of the author's knowledge as at 12 May 2021.
26. SDA, s 82(2).

only USD750mm, the Charge Documents will be stamped for USD750mm. Where the borrower eventually draws on an additional loan under the facility, say USD200mm, the borrower will be required to "upstamp" the Charge Documents to reflect such new advances from time to time.

In practice, lenders would typically stamp the Charge Documents for a portion of the commitment advanced to the borrower under the facility to manage the costs of perfecting security interests. The consequence is that in the event of enforcement, the security created would only be effective in law for the portion of the commitment stamped. Depending on the peculiarities of the transaction, secured lenders and their advisers have found ways to ensure that the Charge Documents will be "upstamped" to cover the balance of the loans drawn by the borrower. Some lenders could require a portion of the loan (or repayments) be deposited into an account, which could either be encumbered (or opened in the name of the security trustee or secured lender as applicable) for the purpose of "upstamping" the balance of the loan amount. The transaction documentation would usually stipulate the conditions when the monies from this reserve account would be disbursed to complete the perfection process. There is also the concern that if such "upstamping" is ill-timed, it could fall within the hardening period and be subject to challenge by the liquidator (or administrator, as the case may be).

It can be argued that where the loan amount is certain, and a secured lender stamps only a portion of the loan, the Charge Documents have been insufficiently stamped in contravention of the provisions of the SDA. The provisions of section 82 of the SDA clearly envisages a situation where the total commitment is uncertain or where the amount the loan to be advanced is not fixed, not a situation where the secured lender(s) commitments is certain or fixed and have been (or will be) totally disbursed. Second, the words of section 23 of the SDA are unambiguous. A Charge Document is required to "*...be duly stamped with the proper ad valorem duty...*".²⁷ The penalty discussed under the heading "When Should a Charge Document be Stamped?" above applies where a document "*has not been or is not duly stamped in conformity with the foregoing provisions of this subsection*".²⁸ Two points need to be made in response to this argument. The first is that the secured lender is well aware of the risks²⁹ of not stamping the entire loan amount; the unstamped amount is "unperfected" and may remain so, if the attempts to perfect the security in future is ill-timed. The secured lender will only be able to enforce the security in respect of the stamped amount. The second is there is no precedent (administrative or judicial) to support that argument. There has been no circular or publication by the federal or any state authority stating that a Charge Document should be assessed in reference to the actual loan advanced and not the amount the party presenting the Charge Document for assessment is indicating. Similarly, there is no case law interpreting the above-quoted sections of the SDA in relation to stamping a portion of the actual amounts advanced in a lending.

Penalties

In addition to the penalties discussed under the heading "When Should a Charge Document be Stamped?" above, section 22(4) of the SDA provides that

27. SDA, s 23(3)(a).

28. SDA, ss 23(3)(a)-(b).

29. The risks of not fully stamping the Charge Documents would have been discussed by the secured lenders and their advisers.



"an instrument executed in Nigeria, or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Nigeria, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force in Nigeria at the time when it was first executed." (Emphasis supplied.)

It would appear that a Charge Document may not be admissible in evidence until it is "duly stamped" as envisaged by the SDA.

There have been cases where litigants have, relying on the aforementioned section, challenged the admissibility of a document as evidence in a suit on the basis that it was not stamped. Ordinarily, the use of "duly" indicates that it is not enough that a document has stamped, but that the correct amount of duty has been paid on it. Can the admissibility of a Charge Document be challenged in reliance on s. 22(4) of the SDA where stamp duty is paid in respect of a portion of the loan advanced?³⁰ There is no reason it should not.

The other side of the coin is how have the courts treated such challenges. The Supreme Court in *Okuwobi v Ishola*³¹ held that (a) holding a document inadmissible merely on the ground of non-stamping is wrong since stamp duties are mainly a source of revenue to the government and (b) the proper approach is for the court to direct that the document in question to be duly stamped before receiving it in evidence. The Supreme Court's decision in *Okuwobi* has been followed by the Court of Appeal in *MS O. Ilemobola Co. Ltd. v Gov., Kaduna State*.³² It is perhaps a bit worrying that the Court of Appeal held that "failure to have a document duly stamped is not a ground or basis for rendering the document inadmissible", even though the provisions of the SDA on the point are unambiguous. It is only in respect of criminal proceedings that stamping can be discarded as a prerequisite for admissibility. The Supreme Court in *Okuwobi* made no such pronouncement. Instead, it shifted the onus to the court to direct that the document in question be stamped before it will be admitted as evidence.

THE SECURED TRANSACTIONS IN MOVABLE ASSETS ACT, 2017 (THE "SETIMA")

The SETIMA regulates the creation and perfection of movable assets' security assets (*i.e.*, tangible and intangible property other than real estate). Examples of movable assets include equipment, farm products, raw material, account receivables (including book debts and excluding negotiable instruments), consumer goods, trees that have been severed and mineral resources that have been extracted.³³

30. See para 3.1.2 above. Again, it is important to maintain the distinction here between the two contemplated scenarios. The first is that the total amount to be advanced as loan is uncertain. In this case, stamp duty will be paid in respect of each amount advanced from time to time. The second is that a loan has been advanced, but stamp duty has been, or would be, paid in respect of only a portion of the loan advanced. It is in the latter case that we have a situation, arguably, where a Charge Document has not been "duly stamped".

31. [1973] 3 SC (Reprint) 31.

32. [2000] 7 NWLR (Pt. 666) 633.

33. SETIMA, s 63. See also National Collateral Registry, 'Collateral Registry FAQ' <<https://www.ncr.gov.ng/Home/Faq>> accessed 12 May 12, 2021.



The SETIMA exempts the provisions of the SDA from applying to transactions under the SETIMA³⁴ (s. 54). It would thus be the case that where a Charge Document is in respect of a movable asset and required to be perfected in accordance with the SETIMA, then documents should not be stamped.

CHARGE DOCUMENT REGISTRABLE UNDER SETIMA AND CAMA

Section 2(3) of the SETIMA provides that, "[n]othing in this Act shall prevent the creation of security interest in the form of charges by companies registered under the Companies and Allied Matters Act". It is thus possible that a Charge Document could be registrable under both the CAMA and the SETIMA (for instance, book debts). In that case, the question is whether stamp duties should be paid or not. It would be prudent to pay stamp duties in respect of such a Charge Document until there is a clarification from the relevant regulatory authorities (*i.e.*, the Central Bank of Nigeria and the CAC) on the point. In practice, only stamped Charge Documents can be presented for registration at the CAC.³⁵ In some cases, the CAC requests for the original stamp duties receipt. It is also possible to engage the CAC relying on section 54 of the SETIMA to make a case for why stamp duties are not applicable to that relevant Charge Document. However, where time is of the essence in a transaction, this may not be the best option for the parties involved.

THE NATIONAL COLLATERAL REGISTRY ("NCR") AND THE REGISTERED CLIENTS

The NCR is the registry established under the SETIMA for the registration of security interests created over movable assets. It appears that at present, only Registered Clients (financial institutions regulated by the CBN) can file security interests in movable assets at the NCR.³⁶ Unregistered clients can, however, perform searches at a registry. Thus, it would appear that details of encumbrances over a company's movable assets would only be registrable at the NCR where the secured lender is a Registered Client. Consequently, a search by any public user at the NCR will only turn up encumbrances created in favour of a Registered Client.

This seemingly narrow application of the provisions of the SETIMA may be due to the fact that the NCR is at the CBN and is being operated by the members of staff appointed by the CBN.³⁷ Furthermore, the CBN's supervisory power is largely over financial institutions.

Is it the case that only a Charge Document executed in favour of a Regulated Client would be exempted under s. 54 of the SETIMA? As far as we know, only a Regulated Client can register encumbrances at the NCR. There is, however, no provision in the SETIMA limiting its applicability to financial institutions alone. If that is the case, it may be difficult to make a case before the CAC as envisaged two paragraphs above. Furthermore, it raises a question that begs to be answered which is; where a company creates a charge over a movable asset in favour of a secured lender that is not a Regulated Client, and such charge is not required to be registered at the CAC, what steps should it take to "perfect" such a charge?

34. SETIMA, s 54.

35. Registration at the CAC is discussed below. See text to n 38.

36. See National Collateral Registry, 'About the Registry' <<https://www.ncr.gov.ng/Home/About>> accessed 12 May 2021.

37. SETIMA, ss 10 and 11.



REGISTRATION AT THE CAC³⁸

A company is, in some cases, required to file its Charge Documents at the CAC. However, not all kinds of charges are statutorily required to be filed at the CAC.³⁹ Some charges would be required to be registered at the NCR. Some charges would be required to be registered at the CAC and some other registries.⁴⁰ Where a Charge Document required to be registered under CAMA is not registered within 90 days after the date of its creation, the charge is void against the liquidator and any creditor of the company. Any monies secured thereby becomes immediately payable. Additionally, registration of the Charge Document is constructive notice of the matters in the particulars of charge.⁴¹

Registrable and Non-registrable Charges

Section 222 of CAMA identifies nine types of charges⁴² that would be void against a liquidator and other creditors if not delivered to the CAC for registration. They are: (a) charge for the purpose of securing any issue of debentures; (b) charge on uncalled share capital of the company; (c) charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale; (d) charge on land, wherever situate, or any interest therein, but not including a charge for rent or other periodical sum issuing out of land; (e) charge on book debts of the company; (f) floating charge on the undertaking or property of the company; (g) charge on calls made but not paid; (h) charge on a ship or aircraft or any share in a ship; and (i) charge on goodwill, or on any intellectual property.

The following charges need not be registered at the CAC to be perfected: (a) a charge for rent or other periodical sum issuing out of land;⁴³ (b) a charge on a negotiable instrument or on a marketable security;⁴⁴ (c) a debenture entitling the holder to a charge on land;⁴⁵ (d) a security

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38. The discussion on registration of charges created by a company of its assets will be limited to the CAC.
39. We discuss the categories of charges required to be filed at the CAC in para 3.2.1 below.
40. See the introductory remarks at para 3 above.
41. This is the exact wording of the statute (CAMA, s 222(1)). Constructive notice would be given in respect of the particulars of the charge as contained in the Charge Document.
42. These categories of charges have been discussed somewhat extensively by Richard Calnan. See n 2 176 - 186. The provisions of the English companies' statute which provide for the kinds of charges to be registered have similar provisions to CAMA, s 222(2).
43. According to CAMA, s 222(2)(d) excludes "a charge for rent or other periodical sum arising out of land".
44. According to CAMA, s 222(13) book debts do not include marketable security or negotiable instruments. Additionally, CAMA, s 222(7) states that the deposit of a negotiable instrument for securing the payment of any book debts of a company will not be treated as a charge on the book debts. A charge on a marketable security or negotiable instrument is not a charge on book debt. Such a charge cannot also be classified under any of the categories listed in CAMA, s 222(2). CAMA does not define marketable security. In ordinary usage, a reference to marketable security is usually understood to mean shares, exchange traded funds and derivatives. See Nick Lioudis, 'Common Examples of Marketable Securities' (Investopedia, 22 January 2020) <<https://www.investopedia.com/ask/answers/033015/what-are-some-common-examples-marketable-securities.asp>> accessed 14 May 2009.
45. CAMA, s 222(8) provides that the holder of a debenture, entitling the holder to a charge, is not an interest in land.



financial collateral arrangement⁴⁶ or any charge created or otherwise arising under a security financial collateral arrangement.

A lender usually seeks to register a Charge Document for three reasons: (a) create a security interest enforceable in the borrower-company's insolvency, (b) maintain priority against other creditors and (c) give constructive notice⁴⁷ to third parties. In instances where the Charge Document is not required to be registered, lenders prefer to do what is known as a "miscellaneous filing" to give constructive notice to third parties. Upon a miscellaneous filing, the Charge Document will be included in the company's file at the CAC. Any prudent lender who wishes to extend a secured facility to a company will ordinarily carry out a search on the company to see if, among others, there are any existing encumbrances and would most likely discover such a Charge Document. In recent times, the CAC has extended the provisions of s. 222 to any document that creates a security interest over a company's assets. The result is that the relevant Charge Document will be rejected for "miscellaneous filing". The company would be required to pay the filing fees as if it were a charge requiring registration.⁴⁸

On Whom Lies the Duty to Register the Charge Documents

Section 224 of CAMA provides that:

it is the duty of a company to send to the Commission for registration, the particulars of every charge created by the company and the issues of debentures of a series requiring registration under section 222, but registration of any such charge may be effected on the application of any person interested therein.

46. CAMA does not define a "financial collateral". It, however, defines a security financial collateral arrangement in s 222(13) as an agreement or arrangement, evidenced in writing, where: (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker; (b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations; (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and (d) the collateral-provider and the collateral-taker are both non-natural persons. Reg 3 of the Financial Collateral Arrangements (No.2) Regulations 2003 of England and Wales ("FCA Regulations") defines financial collateral as cash or financial instruments. The FCA further defines cash as "money in any currency, credited to an account, or a similar claim for repayment of money and includes money market deposits and sums due or payable to, or received between the parties in connection with the operation of a financial collateral arrangement or a close-out netting provision. Financial instrument means (a) shares in companies and other securities equivalent to shares in companies; (b) bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradeable on the capital market; and (c) any other securities which are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment); and includes units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000, eligible debt securities within the meaning of the Uncertificated Securities Regulations 2001, money market instruments, claims relating to or rights in or in respect of any of the financial instruments included in this definition and any rights, privileges or benefits attached to or arising from any such financial instruments. Interestingly, the definition of security financial collateral arrangement under CAMA is similar to the definition of security financial collateral arrangement under the FCA Regulations.

47. The relationship between notice and the preservation of priority has been discussed extensively by Richard Calnan. See (n. 2) 201 - 275.

48. It is apparent that s 222 of CAMA has become a major source of revenue for the CAC. If it were not the case, there is no explanation for the CAC's insistence on such "perfection". It is simply not required. The filing fees for registrable charges used to be 1% of the amount being secured and is now 0.35% of the amount secured.



Statutorily, the obligation, to ensure that the charged created by the Charge Documents are filed at the CAC, has been imposed on the borrower company. Nevertheless, CAMA recognises that a person interested in such a charge could also undertake registration in compliance with section 222. Where neither the company nor any interested person undertakes the registration as aforesaid, the company and each officer of the company commit an offence and are liable to such penalty as may be prescribed by the Commission.⁴⁹ The basis for the imposition of criminal liability is unclear – the effect of the non-registration is already damning as-is and criminal liability does not replace risk of non-registration. Where registration is undertaken by a person, other than the company, the company is required to reimburse such a person the amount of "*any fees properly paid to*" the CAC.

This question is really important where the Charge Document creates security in favour of a lender⁵⁰ who enjoys immunity from taxes (fees or levies) further to some diplomatic immunity statutes and executive orders. Where such lenders seek to rely on their exemptions, there has been some resistance from the CAC on the basis that these costs are statutorily required to be paid by the borrower company, and not the lender.

The 90-Day window

It does not suffice that the Charge Document is registered at CAC, it must be registered within the 90-day window in s. 222 of CAMA (the "Window"). There are two questions here – the first is, how is the Window computed, and the second is whether the Window can be enlarged. It is to these questions that we turn in paragraphs below.

The Computation of the Window

The Window begins to count from the date of the creation of the charge. The actual words of CAMA are "... within 90 days after the date of its creation...". One way to determine the date of creation of the charge is the date on the Charge Document. The effective date of the Charge Document, may be stated in the Charge Document to be different from the date on the face of the Charge Document. However, it may be problematic where the effective date is a later date than the date on the face of the Charge Document. It may be the case that further engagement would be required to convince the CAC to rely on the effective date. Where a company creates a charge outside Nigeria, after the acquisition of a property situate outside Nigeria, the Window begins to count "90 days after the date on which the copy of the instrument could in the course of post, and if despatched with due diligence, have been received in Nigeria".⁵¹ Where the charge is created over property situate in Nigeria, the Window begins to count from "*within 90 days after the date on which the acquisition is completed*".⁵² It is important to note that the property acquired should be one that "is subject to a charge of any such kind as would if the company had created it after the acquisition of the property, have been required to be registered ... " In respect of a charge created outside Nigeria and affecting or relating to property situate outside Nigeria, the Window is "90 days after the date on which the instrument or copy could, due course of post, and if despatched with diligence, have been received in Nigeria".⁵³

49. CAMA, s 224(3).

50. Example of such lenders are the African Export-Import Bank and the African Finance Corporation. These exemptions significantly reduce the costs of borrowing and make these lenders more attractive to Nigerian corporates than Nigerian banks.

51. CAMA, s 225.

52. *ibid.*

53. CAMA, s 222(5)



The Enlargement of the Window

The Window may be enlarged by an order of court following an application of the company or a person interested on such terms and conditions as seems to the court to be just and expedient.⁵⁴ According to CAMA, the court may make such an order where the omission to register the charge within the window is (a) accidental, or due to inadvertence or some other sufficient cause or (b) not of a nature to prejudice the position of creditors or the shareholders of the company.

Fluctuating Amounts

Section 227 of CAMA provides that where a charge secures "all sums due or to become due or some other uncertain or fluctuating amount", the particulars of the Charge Document to be filed at the CAC should include the "maximum sum covered by such charge (being the maximum sum covered by the stamp duty paid thereon). Thus, a Charge Document may be perfected by registration in respect of a portion of the facility advanced if the amount is uncertain, fluctuating or due to become due. However, the proper stamp duties must have been paid over that portion of that facility. In respect of the portion of the facility not stamped or registered, the charge is void so far as any security on the company's property is thereby conferred.

The unperfected portion of the facility may be perfected if: (a) additional stamp duty is subsequently paid on the Charge Documents, and (b) at any time prior to the winding-up of the borrower-company, amended particulars of the said charge stating the increased maximum amount (and the original Charge Document) are delivered to the CAC for registration. From the date of such delivery, the charge created by the Charge Document is "effective to the extent of such increased maximum sum except as regards any person who, prior to the date of such delivery has acquired any proprietary rights in, or a fixed or floating charge on the property subject to the charge".

As much as secured lenders perfect a portion of the actual loan advanced for commercial reasons, there are two major risks that a secured lender must contend with. The first is that an ill-timed future perfection of the remaining portion of the facility may fall within the commencement of insolvency proceedings against the borrower-company and may be subject to challenge by the liquidator. It is the case that section 227 of CAMA contemplates a subsequent perfection that takes place "prior to the commencement of the winding-up of the company".⁵⁵ The second is that the secured lender loses priority to any subsequent charge created over the affected property prior to such future perfection.

The Window does not apply to any such future perfection. The future perfection is merely required to have been done prior to the commencement of the winding-up of the borrower company.

54. CAMA, s 230.

55. CAMA, s 578 provides that '(1) Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company is deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake, deems it fit to direct otherwise, all proceedings taken in the voluntary winding-up are deemed to have been validly taken. (2) In any other case, the winding-up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding-up.'



FLOATING AND FIXED CHARGES – AN ICING ON THE CAKE

A discourse on the perfection of charges under Nigerian law will be incomplete without a discussion on floating and fixed charges. The thrust of our discussion will be the difference between a fixed charge and a floating charge.⁵⁶

It would appear that there is a school of thought that the major difference between a floating charge and a fixed charge is that a floating charge is created over a group of assets or an asset that is not certain, fixed or ascertainable. This school of thought also holds the view that a fixed charge is created over a specific asset.⁵⁷ However, the provisions of CAMA seem to suggest that the major difference between a fixed charge and a floating charge is not necessarily the nature of the asset, but the effect of the charge on the ability of the chargor to deal with the asset(s) in question. Where the chargor is able to deal with the asset(s) in question, then the charge is a floating charge. The chargor who creates a floating charge over its assets in favour of (a) secured lender(s) (i) creates it over the whole or a specified part of the company's undertakings and assets, including the cash and uncalled capital of the company both present and future and (ii) will not be precluded from dealing with the asset(s) until (aa) the security becomes enforceable, (bb) the Court appoints a receiver or manager over the asset(s) or (cc) the chargor goes into liquidation.

In light of the aforementioned definition of a floating charge, it is clear that a floating charge can also be created over a specific asset.⁵⁸ What, therefore, should be the main distinguishing factor is whether the chargor in question is still able to "deal" with the assets. CAMA does not, however, define what "dealing" means.

It is important to understand the distinction between a fixed charge and a floating charge because a fixed charge has priority over a floating charge (even if it was created after the floating charge), except (a) the floating charge includes a prohibition restricting the chargor from creating any later charge ranking in priority to the floating charge and (b) the chargee of the subsequent fixed charge was aware of such restriction (CAMA, s. 204). However, a subsequent fixed chargee would be deemed to have constructive notice of such an existing floating charge if the particulars had been filed in accordance with CAMA. This is because a reference to a charge in s. 222 of CAMA⁵⁹ is also a reference to any "...provisions in a floating charge that prohibits or restricts the company from granting any further charge ranking in priority to or *pari passu* with the floating charge".

The distinction is also relevant because a floating charge will be required to be registered under s. 222 of CAMA regardless of the nature of the assets over which it is created. On the other hand, a fixed charge will only be required to be registered under section 222 of CAMA if it is over one of the asset classes recognised under section 222(2) of CAMA.⁶⁰

56. Detailed examination of various schools of thought (under English Law) on the distinction between a fixed and floating charge has been done by Richard Calnan. See (n 2) 133-144. Mr. Calnan's thoughts are very helpful especially in light of the fact that the development of Nigerian law has been greatly influenced by English Law.

57. *ibid.*

58. CAMA, s 203.

59. The registration of charges has been discussed in para. 3.2 above.

60. A discussion on registrable charge is at para 3.2.1 above.



CONCLUSION

The "perfection" process is not complicated. With expert professional advice, secured lenders will be able to address all of the issues discussed above in specific transactions. While the registration of a Charge Document at the CAC is useful, especially as it relates to notifying the whole world of encumbrances on a company's assets, the usefulness of the payment of stamp duties is not very clear. If Nigeria is indeed committed to increasing the ease of doing business, security documents' stamp duty rates should be revised.⁶¹ For instance, amounts below a certain threshold be subject to 0% stamp duties. The current rate of 0.375% may be further reduced for companies, bearing in mind that another 0.35% will be paid to the CAC and even more to other registries, where the asset in question include land, aircraft and ships.

61. Perhaps the bigger question is whether the SDA should not be repealed and the applicability of stamp taxes revised. In some countries, stamp duties have either been abolished (e.g. South Africa) or its applicability streamlined (e.g. Ghana and the United Kingdom). For instance, in the United Kingdom, stamp taxes apply to the transfer of real estate. In some countries where federalism is practised, stamp duties are charged only at the state level (e.g. India, Australia and United States). See DLA Piper, 'Guide to Going Global - Tax' (DLA Piper Intelligence, 6 June 2021) <<https://www.dlapiperintelligence.com/goingglobal/tax/index.html?t=18-capital-duty>> accessed 5 June, 2021.

