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ACT

No. 8 of 2013

I assent

DR. JOYCE BANDA

PRESIDENT

15th July, 2013

ARRANGEMENT OF SECTIONS

SECTION

PART I—PRELIMINARY

1. Citation and commencement
2. Interpretation
3. Scope of the Act

PART II—CREATION OF SECURITY INTERESTS

4. Effectiveness of security agreement
5. Standards of good faith and commercial reasonableness
6. Description of collateral in security agreement
7. Inadequate description of collateral as consumer goods
8. Description of proceeds not required for enforceability against third parties

PART III—PERFECTION OF SECURITY INTERESTS

9. Perfection of security interest
10. Continuity of perfection where perfected security interest subsequently perfected in another way

PART IV—CREATION AND PERFECTION OF SECURITY INTERESTS IN PARTICULAR KINDS OF PERSONAL PROPERTY

11. Security interests in after-acquired property
12. Creation of security interests in after-acquired property
13. Continuation of security interests in proceeds
14. Continuous perfection of security interest in proceeds

SECTION

15. Temporary perfection of security interests in proceeds in other cases
16. Perfection where goods in hands of bailee
17. Security interests in crops
18. Temporary perfection of security interest in negotiable instrument or investment security returned to debtor
19. Temporary perfection of security interest in negotiable document of title or goods returned to debtor

PART V—PRIORITY BETWEEN SECURITY INTERESTS

20. Priority of security interests in same collateral when Act provides no other way of determining priority
21. Original method of perfection applies to continuously perfected security interest
22. Priority in original collateral to continue in proceeds
23. Transfer of security interests does not affect priority
24. Voluntary subordination of security interests
25. Priority of security interest applies to all advances
26. Priority of purchase money security interest in collateral or its proceeds, other than inventory or intangibles
27. Priority of purchase money security interest in inventory or its proceeds
28. Priority of purchase money security interest in intangibles or its proceeds
29. Non-proceeds security interest in accounts receivable
30. Priority between purchase money security interests in goods or their proceeds taken by seller
31. Priority between purchase money security interests in same goods or their proceeds not taken by seller
32. Security interests in accessions
33. Priority of security interest in goods before they become accessions
34. Continuation of security interests in goods that become part of processed or commingled goods
35. Limit on value of priority of goods that become part of processed or commingled goods
36. Priority where more than one security interest continues in processed or commingled goods
37. Priority of purchase money security interest in goods that continues in processed or commingled goods

SECTION

38. Rights of debtor may be transferred
39. General priority of security interest in transferred collateral over security interests granted by transferee
40. Transfer of debtor's interest in collateral with prior consent of secured party

PART VI—SPECIAL PRIORITY RULES

41. Lien has priority over security interest relating to same goods
42. When holder of money takes money free of perfected security interest in money
43. Priority of creditor who receives payment of debt
44. Priority of purchaser of negotiable instrument, document of title, chattel paper and security certificate
45. Priority of interests on assignment of account receivable or chattel paper
46. Execution creditor has priority over unperfected security interest
47. Buyer or lessee of collateral takes collateral free of unperfected security interests
48. Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests

PART VII—PERSONAL PROPERTY SECURITIES REGISTRY

49. Establishment of a Personal Property Security Registry
50. Appointment of Registrar
51. Registrar may refuse to provide certain services relating to Registry
52. Person may register financing statement
53. Data required to register financing statement
54. Identification of debtor in financing statement
55. Identification of secured party in financing statement
56. When financing statement not to be registered
57. When financing statement to be registered
58. Registration of financing statement not to constitute notice or knowledge
59. Verification statement to be forwarded to person who registered financing statement
60. When financing statement may be registered
61. Authorization to register financing statement

SECTION

62. Financing statement may relate to one or more security agreements
63. When secured party to notify debtor about registration of financing statement
64. Registration of financing statement invalid only if seriously misleading
65. When financing statement seriously misleading
66. Proof that person actually misled not necessary
67. Validity of registration when description of part of collateral is incorrect
68. Duration of registration of financing statement
69. Renewal of registration
70. Registration of financing change statement in respect of transfer of security interest perfected by registration
71. Registration of financing change statement in respect of subordinated security interest
72. Voluntary amendment to, or discharges of, registration of financing statements
73. Discharge of registration relating only to consumer goods
74. When debtor may demand registration of financing change statement
75. Matters that may be required by demand
76. Procedure where no-compliance with demand
77. Compulsory amendment or discharge by Court order
78. No fee for compliance with demand
79. Search of Registry
80. Search criteria
81. Search purposes
82. When registration and search constitutes interference with privacy of individual
83. Printed search result receivable as evidence

PART VIII—ENFORCEMENT OF SECURITY INTERESTS

84. Application of this Part
85. Part not to remedies under the Insolvency Act
86. When contracting out of certain provisions in this Part permitted
87. Secured party may take possession of and sell collateral
88. Secured party may render collateral unusable

SECTION

89. Secured party may apply certain collateral in satisfaction of secured obligation
90. Secured party may take possession of and sell collateral
91. Duty of secured party selling collateral to obtain best price reasonable obtainable
92. Power of sale applies to document of title and related goods
93. Methods of sale of collateral
94. Notice of sale of collateral
95. Extinguishment of subordinate security interests on sale
96. Secured party to give statement of account to debtor
97. Secured party selling collateral must pay prior ranking secured parties
98. Distribution of surplus
99. Surplus may be paid into Court
100. Proposal of secured party to retain collateral
101. Persons entitled to notice may object to proposal
102. Person making objection may be requested by secured party to prove interest
103. Position where persons entitled to notice do not object to retention of collateral by secured party
104. Secured party shall not damage goods when removing accession
105. Entitled persons may redeem collateral
106. Debtor may reinstate security agreement
107. Limit on reinstatement of security agreement

PART IX—MISCELLANEOUS PROVISIONS

108. Entitlement to damages for breach of obligations
109. Security party to provide certain information relating to security interest
110. Time for complying with request
111. Exemption from complying with request
112. Secured party may recover costs arising from request
113. Application to Court for compliance with request
114. Consequences of not complying with Court order
115. Obligation to disclose successor in security interest when request made
116. Method of service of notices
117. Court may make order concerning service of notice

SECTION

- 118. How to effect services of notice by post
- 119. How to effect service of notice by facsimile
- 120. How to effect service of notice by electronic mail
- 121. Notices served in court proceedings
- 122. Regulations
- 123. Repeals and savings

PART X—APPLICABLE LAWS

- 124. When Malawi law applies to tangible property
- 125. When Malawi law apply to intangible property
- 126. When Malawi law applies to deposit and investment accounts
- 127. When Malawi law applies to proceeds
- 128. When Malawi law applies to enforcement
- 129. When Malawi law applies to some other matters

PART XI—TRANSITIONAL PROVISIONS

- 130. Interpretation
- 131. Prior security interests continue to be enforceable against third parties during transitional period
- 132. Prior registered security interests deemed to be perfected by registration during transitional period
- 133. Other prior security interests deemed to be perfected during transitional period
- 134. Prior security interests to be perfected during transitional period
- 135. Consequences of not perfecting certain security interests
- 136. Time of registration of certain prior security interests
- 1376. Priority of prior security interests during transitional period
- 138. Priority of third party interests during transitional period

An Act to reform the law relating to security interests in personal property and, in particular, to provide for the creation of security interests in personal property; the perfection of security interests; the determination of priority between security and other interests in the same personal property; the establishment of a registry of security interests in personal property; the enforcement of security interests in personal property; and for matters connected therewith and incidental thereto

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Personal Property Security Act, 2013, and shall come into operation on such date as may be appointed by the Minister by notice published in the *Gazette*. Citation and
commence-
ment

2.—(1) In this Act, unless the context otherwise requires— Interpretation

“accessions” means goods that are installed in, or affixed to, other goods without losing their identity;

“account receivable” means a right to payment of a monetary obligation that is not evidenced by chattel paper, an investment security or by a negotiable instrument, whether or not that obligation has been earned by performance;

“advance” means the payment of money, the provision of credit or the giving of value;

“after-acquired property” means personal property that is acquired by a debtor after the security agreement is made;

“cash proceeds” means proceeds in the form of money, cheques, drafts or deposit accounts in banks or similar institutions;

“chattel paper” means one or more writings that evidence both a monetary obligation and a security interest in, or lease of, specific goods or specific goods and accessories;

“collateral” means personal property that is subject to a security interest;

“commercial consignment” means a consignment where—

(a) a consignor has reserved an interest in goods that the consignor has delivered to the consignee for the purpose of sale, lease or other disposition; and

(b) both the consignor and the consignee deal in the ordinary course of business in goods of that description but does not include an agreement under which goods are delivered to an auctioneer for the purpose of sale;

“consumer goods” means goods that are used or acquired for use primarily for personal, domestic or household purpose;

“control” with respect to deposit and securities accounts exists—

(a) automatically upon the creation of a security interest if a bank or other financial institution that maintains the deposit or securities accounts is the secured creditor; or

(b) if the bank or other financial institution has concluded a control agreement with a debtor and secured party;

“Court” means the High Court;

“crops” means crops and plants, whether grown, growing or yet to be planted, attached to land by roots or forming part of trees, but does not include trees, unless the trees are grown for commercial purposes and sale;

“debtor” means a person that has an interest in a collateral, and includes—

(a) a consignee who receives goods from another person under a commercial consignment;

(b) a financial lessee or a lessee under an operating lease for a term of more than one (1) year;

(c) a transferor of an intangible; and

(d) a buyer that acquires goods subject to a retention of title clause;

“default” means the occurrence of an event that, under a security agreement, gives a secured party the right to enforce a security interest;

“document of title” means a writing issued by or addressed to a bailee—

(a) that covers goods in the possession of the bailee and are identified or are fungible portions of an identified mass; and

(b) in which it is stated that the goods identified in it will be delivered to a named person, or to a transferee of that person, or to a bearer or to the order of a named person;

“equipment” means goods that are held by a debtor other than as inventory or consumer goods, and used in the operation of the debtor's business;

“farm products” include crops, fish, livestock and their unborn offspring and products, whether or not grown or raised naturally or artificially;

“financial lease” means a lease, including a hire-purchase agreement, at the end of which—

(a) a lessee automatically becomes the owner of the good that is the object of the lease;

(b) the lessee may acquire ownership of the good by paying no more than a nominal price; or

(c) the good has no more than a nominal residual value;

“financing statement” means forms in writing or their electronic equivalent as provided in the Registry Regulations on which information is provided in order to effect, amend, terminate or continue a registration;

“fungible goods” means goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement;

“future advance” means the payment of money, the provision of credit, or the giving of value secured by a security interest, occurring after the security agreement has been concluded, whether or not provided or given under an obligation to do so;

“goods” means tangible personal property and include farm products, inventory, equipment, consumer goods, trees that have been severed, and petroleum or minerals that have been extracted but does not include chattel paper, a document of title, a negotiable instrument, an investment security or money;

“intangible” means personal property, other than goods, chattel paper, a document of title, an investment security, money or a negotiable instrument;

“inventory” means goods that are—

(a) held by a person for sale or lease, or that have been leased by the person as lessor;

(b) to be provided under a contract for services;

(c) raw materials or work in progress; or

(d) materials used or consumed in a business;

“investment security” means a writing, whether or not it is in the form of a security certificate, that is recognized in a place in which it is issued or dealt with as a warrant, option, share, right to participate, or other interest in property or an enterprise, or that evidences an obligation of the issuer, and that, in the ordinary course of business, is transferred by—

(a) delivery with any necessary endorsement, assignment, or registration in the records of the issuer or agent of the issuer;

(b) an entry in the records of a clearing house or central securities depository;

(c) an entry in the records maintained for that purpose by or on behalf of the issuer; or

(d) an entry in the records maintained for that purpose by or on behalf of the nominee,

but does not include a writing that evidences a monetary obligation that is secured by an interest in land;

“land” includes all estates and interests, whether freehold or leasehold, in real property;

“negotiable instrument” means—

Cap. 48:02

(a) a bill of exchange or promissory note within the meaning of the Bills of Exchange Act; or

(b) any other writing that evidences a right to payment of money and is of a kind that, in the ordinary course of business, is transferred by delivery with any necessary endorsement; but does not include chattel paper, a document of title or an investment security;

“new value” means value other than antecedent debt or liability;

“operating lease” means a lease, other than a financial lease, for a term of more than one year;

“organization” means any body, whether incorporated or unincorporated;

“perfected security interest” means the security interest that has been created and becomes effective against third parties by control, possession, registration or temporarily, as the case may be;

“personal property” includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments;

“possession” in relation to a secured party, means possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent;

“proceeds” means identifiable or traceable personal property received as a result of sale, other disposition, collection, lease or license of the collateral, including proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of collateral;

“purchase” means taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction that creates an interest in personal property;

“purchase money security interest” means—

(a) a security interest in collateral retained by a seller that secures the obligation to pay any unpaid portion of the purchase price of the collateral;

(b) a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;

(c) the interest of a financial lessor or a lessor of goods under a lease for a term of more than 1 year; or

(d) the interest of a consignor who delivers goods to a consignee under a commercial consignment, but does not include a transaction of sale and lease back to the seller;

“receiver” has the same meaning as in the Insolvency Act;

Act No. . . . of
2013

“obligation secured” means an obligation secured by a security interest;

“secured party” means—

(a) a person in whose favor a security interest is created;

(b) a consignor;

(c) a financial lessor and a lessor who acquired goods under an operating lease for a term of more than one year;

(d) a transferee of an intangible;

(e) a seller who reserved title to the sold goods; or

(f) a trustee or agent of the person mentioned in paragraphs (a) to (e);

“security agreement” means an agreement between the debtor and secured party that creates or provides for a security interest;

“security interest” means a property right in personal property that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest, but does not include a personal right against a guarantor or other person liable for the payment of the secured obligation;

“value” means consideration that is sufficient to support a simple contract and includes an antecedent debt or liability and a binding commitment to provide future value;

“writing” includes an electronic message if the information contained therein is accessible so as to be usable for subsequent reference.

(2) For the purposes of this Act, the determination of whether goods are consumer goods, equipment, farm products or inventory shall be made at the time when the security agreement is concluded.

Scope of the
Act

3.—(1) This Act shall bind the Government.

(2) Any person, whether an individual or entity, domestic or foreign, may—

(a) create a security interest; and

(b) be a debtor or secured party under this Act.

(3) The provisions of this Act on perfection, registration, priority shall also apply to liens created by judgments or operation of the law.

(4) The provisions of this Act on perfection, registration, priority and enforcement shall supersede laws applicable to interests created by conditional sale agreements (including agreements to sell subject to retention of title), hire purchase agreements, consignments, operating and financial leases, and outright assignments of intangibles.

(5) This Act shall not apply to—

(a) a lien, charge, or other interest in personal property created by any other Act or by operation of any written law;

(b) any right of set-off whether or not arising under or from financial contracts governed by netting agreements; or

(c) an interest created or provided for by any of the following transactions—

(i) the creation or transfer of an interest in land;

(ii) a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land, unless the right to payment is evidenced by an investment security;

(iii) a transfer of present or future claim to wages, salary, pay, commission or any other compensation for labour or personal services of an employee;

(iv) an assignment for the general benefit of creditors of the person making the assignment;

(v) a transfer of an interest or claim in or under a contract of annuity or life policy of insurance under the Pension Act or other applicable law;

Act No. 6 of 2011

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

(vii) the registration of a transfer, assignment, mortgage or assignment of a mortgage of a ship subject to the Inland Waters Shipping Act; and

Cap. 71:01

(viii) a transfer or mortgage in a license, concession or other personal privilege issued or granted under the relevant laws.

PART II—CREATION OF SECURITY INTERESTS

4. Except as otherwise provided by this Act or any other Act or rule of law or equity, a security agreement shall be effective and create a security interest as between the parties according to its terms.

Effectiveness of security agreement

5.—(1) All rights, duties or obligations that arise under a security agreement or this Act shall be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.

Standards of good faith and commercial reasonableness

(2) A person shall not be regarded as having acted in bad faith merely because the person acted with knowledge of the interest of some other person, unless it is proved that the person knew that his actions would violate the rights of the other person.

6.—(1) A security agreement shall be enforceable and a security interest created in respect of collateral only if a security agreement contains an adequate description of the collateral that may be generic or specific.

Description of collateral in security agreement

(2) For the purposes of this Part, a description of collateral is adequate if the collateral is described by—

(a) item, kind, type or category;

(b) a statement that a security interest is taken in all of the debtor's present and after-acquired property; or

(c) a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

7. A description is inadequate for the purposes of section 6 if it describes the collateral as consumer goods without specific reference to the item or kind of collateral.

Inadequate description of collateral as consumer goods

Description of
proceeds not
required for
enforceability
against third
parties

8. Except as otherwise provided in this Act, a security interest in any collateral shall automatically continue in the proceeds thereof, whether or not the security agreement contains a description of the proceeds.

PART III—PERFECTION OF SECURITY INTERESTS

Perfection of
security
interest

9.—(1) Except as otherwise provided in this Act, a security interest is perfected when—

(a) the security interest has been created; and

(b) either—

(i) a financing statement has been registered in respect of the security interest;

(ii) the secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession); or

(iii) the secured party, or another person on the secured party's behalf has control of the collateral that is a deposit account or investment security.

(2) Subsection (1) shall apply regardless of the order in which creation and either of the steps referred to in paragraph (b) of that subsection occur.

Continuity of
perfection
where
perfected
security
interest
subsequently
perfected in
another way

10. A security interest shall be continuously perfected for the purposes of this Act if—

(a) the security interest is perfected under this Act;

(b) the security interest is subsequently perfected in another way under this Act; and

(c) there is no intervening period during which the security interest is unperfected.

PART IV—CREATION AND PERFECTION OF SECURITY INTERESTS IN PARTICULAR KINDS OF PERSONAL PROPERTY

Security
interests in
after-acquired
property

11. A security agreement may provide for security interests in after-acquired property.

Creation of
security
interests in
after-acquired
property

12.—(1) A security interest in after-acquired property shall be created without written consent or any further act of a debtor.

(2) Where the after-acquired property is consumer goods, the debtor shall provide written consent.

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

Continuation
of security
interests in
proceeds

(a) continue in the collateral that has been dealt, unless the secured party expressly or impliedly authorized the dealing; and

(b) extend to the proceeds.

(2) If the secured party enforces the security interest against both the collateral and the proceeds, its recovery from the collateral and its proceeds shall be limited to the value of the collateral at the date of the dealing that gave rise to the proceeds.

14. A security interest shall remain continuously perfected in proceeds if the security interest in the original collateral is perfected by registration of a financing statement that contains a description of the original collateral, if—

Continuous
perfection
of security
interest in
proceeds

(a) the proceeds are of a kind that is within description of the original collateral; or

(b) the proceeds are cash proceeds.

15. If the proceeds are not cash proceeds and not within description of the collateral in the financing statement as set forth in section 14, a security interest in proceeds shall be temporarily perfected until the expiration of 10 working days after the proceeds arose. If the secured party does not perfect within ten working days, its security interest in the proceeds will become unperfected.

Temporary
perfection
of security
interests in
proceeds in
other cases

16. A security interest in goods in the possession of a bailee may be perfected when—

Perfection
where goods
in hands of
bailee

(a) the security interest has been created and a financing statement relating to the goods is registered; or

(b) possession of a negotiable document of title to the goods has been delivered to the secured party, or the bailee has issued a document of title in the name of the secured party or holds the goods on behalf of the secured party.

17.—(1) Except as otherwise provided in this Act, a security interest can be created and perfected in crops and continues as such before they are planted, while growing and afterwards when cut or separated from the soil.

Security
interests
in crops

(2) A security interest in crops shall be created only with the consent of the mortgagee or lessor under a lease with the duration of no more than three years.

(3) A perfected security interest in crops shall not be extinguished or prejudicially affected by a subsequent sale, lease, mortgage or other encumbrance of or upon the land on which the crops are growing.

Temporary perfection of security interest in negotiable instrument or investment security returned to debtor

18. A security interest in negotiable instruments or certificated securities that has been perfected by possession shall remain perfected until the expiration of ten working days after the secured party made the negotiable instrument or investment security available to the debtor for sale, exchange, presentation, collection, renewal or registration of a transfer.

Temporary perfection of security interest in negotiable document of title or goods returned to debtor

19. A security interest in a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, shall be temporarily perfected until the expiration of ten working days after the secured party made the negotiable document of title or goods available to the debtor, if—

(a) the security interest was perfected by possession; and

(b) the secured party delivered the negotiable document of title or goods for the purposes of sale, exchange, loading, unloading, storing, shipping, manufacturing, processing, packaging or otherwise dealing with the goods in preparation for their sale or exchange.

PART V—PRIORITY BETWEEN SECURITY INTERESTS

Priority of security interests in same collateral when Act provides no other way of determining priority

20.—(1) Priority between security interests in the same collateral is determined as follows—

(a) a perfected security interest shall have priority over an unperfected security interest;

(b) priority between perfected security interests shall be determined by the order of whichever of the following first occurs in relation to a particular security interest—

(i) the registration of a financing statement;

(ii) the secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession); or

(iii) the secured party, or another person on the secured party's behalf acquiring control of the collateral; and

(c) priority between unperfected security interests in the same collateral shall be determined by the order of creation of the security interests.

(2) This Act does not affect the priority of wage and similar claims granted to workers under other laws of Malawi.

21. For the purposes of section 20, a continuously perfected security interest shall be treated at all times as perfected and retain its priority from the date of its original perfection.

Original method of perfection applies to continuously perfected security interest

22. The priority of a security interest in original collateral shall also be the priority with respect to its proceeds.

Priority in original collateral to continue in proceeds

23. A security interest that is transferred shall have the same priority as it had at the time of the transfer.

Transfer of security interests does not affect priority

24.—(1) A secured party may agree, in a security agreement or otherwise, to subordinate its security interest to any other interest.

Voluntary subordination of security interests

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

(3) An agreement to subordinate a security interest shall be effective according to its terms between the parties and may also be enforced by a third party if the third party is the person for whose benefit the agreement is intended.

25. A security interest shall have the same priority in respect of all advances, including future advances.

Priority of security interest applies to all advances

26. A purchase money security interest in collateral or its proceeds, other than inventory, shall have priority over a non-purchase money security interest in the same collateral created by the same debtor if the purchase money security interest in the collateral or its proceeds is perfected not later than ten working days after the day on which the debtor, or another person at the request of the debtor, obtained possession of the collateral.

Priority of purchase money security interest in collateral or its proceeds, other than inventory or intangibles

27. A purchase money security interest in inventory or its proceeds shall have priority over a non-purchase money security interest in the same collateral given by the same debtor if the purchase money security interest in the inventory or its proceeds is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral.

Priority of purchase money security interest in inventory or its proceeds

Priority of
purchase
money
security
interest in
intangibles or
its proceeds

28. A purchase money security interest in an intangible or its proceeds shall have priority over a non-purchase money security interest in the same collateral given by the same debtor if the purchase security interest in the intangible or its proceeds is perfected not later than ten working days after the day on which the security interest in the intangible was created.

Non-proceeds
security
interest in
accounts
receivable

29. A security interest in accounts receivable that is given for new value shall have priority over a purchase money security interest in the accounts receivable as proceeds of inventory if the security interest in the accounts receivable is registered before the purchase money security interest.

Priority
between
purchase
money
security
interests in
goods or their
proceeds
taken by
seller

30. A purchase money security interest in goods or their proceeds taken by a seller, lessor or consignor of a collateral, shall have priority over any other purchase money security interest in the same collateral given by the same debtor to a secured party that is not a seller, lessor or consignor of that collateral if the purchase money security interest in goods or their proceeds is perfected—

(a) in the case of inventory, at the time the debtor, or another person at the request of the debtor, obtained possession of the collateral; or

(b) in the case of collateral, other than inventory, not later than ten working days after the day on which the debtor, or another person at the request of the debtor, obtained possession of the collateral.

Priority
between
purchase
money security
interests in
same goods or
their proceeds
not taken by
seller

31. Priority between purchase money security interests in the same goods or their proceeds that have not been taken by a seller, lessor or consignor, and those that have been given by the same debtor, shall be determined in accordance with section 20.

Security
interests in
accessions

32. A security interest in goods that becomes an accession shall continue in the accession.

Priority of
security
interest in
goods before
they become
accessions

33. Except as otherwise provided in this Act, a security interest in goods that is created and perfected before the time when the goods become an accession shall have priority over a claim to the goods as an accession made by a person with an interest in the whole.

Continuation of
security
interests in
goods that
become part of
processed or
commingled
goods

34. A perfected security interest in goods that subsequently becomes part of a product or mass shall continue as a perfected security interest in the product or mass if the goods are manufactured, processed, assembled or commingled in such a way that their identity is lost in the product or mass.

35. If more than one security interest is perfected in the goods before they become part of a product or mass, the security interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.

Limit on value of priority of goods that become part of processed or commingled goods

36.—(1) A perfected security interest continuing in the product or mass shall have priority over an unperfected security interest continuing in the same product or mass.

Priority where more than one security interest continues in processed or commingled goods

(2) If more than one unperfected security interest continues in the same product or mass, each unperfected security interest shall be entitled to share in the product or mass according to the ratio that the obligation secured by the unperfected security interest bears to the sum of the obligations secured by all unperfected security interests in the same product or mass.

37. Notwithstanding section 36, a perfected purchase money security interest in goods that continues in a product or mass shall have priority over—

Priority of purchase money security interest in goods that continues in processed or commingled goods

(a) a non-purchase money security interest in the goods that continues in the product or mass; and

(b) a non-purchase money security interest in the product or mass given by the same debtor.

38.—(1) The rights of a debtor in collateral may be transferred despite a provision in the security agreement prohibiting transfer or declaring a transfer to be a default.

Rights of debtor may be transferred

(2) A transfer by the debtor shall not prejudice the rights of the secured party under the security agreement, including the right to treat a prohibited transfer as an act of default.

(3) In this section, "transfer" includes a sale, the creation of a security interest or a transfer under judicial enforcement proceedings.

39. If a debtor transfers an interest in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest shall have priority over any other security interest granted by the transferee

General priority of security interest in transferred collateral over security interests granted by transferee

Transfer of
debtor's
interest in
collateral with
prior consent
of secured
party

40.—(1) If a security interest is perfected by registration and the debtor transfers all or part of its interest in the collateral, the security interest in the transferred collateral shall remain perfected against such collateral and, if the security interest extends to after-acquired property, the security interest in the transferred collateral shall remain perfected against any collateral that the transferee acquires within fifteen days.

(2) The security interest shall not be perfected with respect to collateral acquired by the transferee after the expiration of a fifteen day period unless the secured party registers a financing statement naming the transferee as the debtor.

PART VI—SPECIAL PRIORITY RULES

Lien has
priority over
security
interest
relating to
same goods

41. A possessory lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods shall have priority over that security interest if—

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

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

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

When holder
of money takes
money free of
perfected
security
interest in
money

42. A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of a secured party.

Priority of
creditor who
receives
payment
of debt

43. A creditor who receives payment of a debt owing by a debtor through any payment system shall receive the payment free of a security interest whether or not the creditor had knowledge of the security interest at the time of the payment.

Priority of
purchaser of
negotiable
instrument,
document of
title, chattel
paper and
security
certificate

44. A purchaser of a negotiable instrument, document of title, chattel paper or security certificate shall have priority over a perfected security interest in the negotiable instrument, the document of title, the chattel paper or the security certificate if the purchaser—

(a) gave value;

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

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

45.—(1) The rights of an assignee of an account receivable or non-negotiable chattel paper shall be subject to—

Priority of interests on assignment of account receivable or non-negotiable chattel paper

(a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract or a closely connected contract; and

(b) any other defence or claim of the account debtor against the assignor (including a defence by way of a right of set-off) that accrues before the account debtor receives notification of the assignment.

(2) Subsection (1) shall not apply if the account debtor has made an enforceable agreement not to assert defences to claims arising out of the contract.

(3) In this section—

(a) “account debtor” means a person who is obligated under an account receivable or chattel paper; and

(b) “assignee” includes a transferee or other secured party.

46.—(1) The interest of a judgment creditor in any collateral shall have priority over any security interest in the same collateral if the security interest is not perfected at the time of execution.

Execution creditor has priority over unperfected security interest

(2) In this section, “time of execution” means—

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

(b) in any other case, the time when a charging order or a garnishee order is served on the person holding some property for or on behalf of the debtor.

47. A buyer or lessee of collateral who acquires the collateral for value shall take the collateral free of an unperfected security interest in the collateral.

Buyer or lessee of collateral takes collateral free of unperfected security interests

Buyer or
lessee of
goods sold or
leased in
ordinary
course of
business takes
goods free
of certain
security
interests

Establishment
of a Personal
Property
Security
Registry

Appointment
of Registrar

Registrar may
refuse to
provide
certain
services
relating to
Registry

Person may
register
financing
statement

Data required
to register
financing
statement

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

PART VII—PERSONAL PROPERTY SECURITIES REGISTRY

49. There shall be established a Personal Property Security Registry which shall be—

- (a) electronic;
- (b) maintained for the purposes of effecting, amending or terminating registrations under this Act; and
- (c) operated at all times, except if precluded by maintenance, technical or security problems.

50. The Minister shall appoint a Registrar of the Personal Property Security Registry.

51. The Registrar may refuse access to the Registry or otherwise suspend the operation of the registry, in whole or in part, for purposes of maintenance or due to technical or security problems.

52.—(1) A person may register a financing statement in accordance with this Act and the Registry Regulations.

(2) The Registrar and any Registry employee shall not verify whether authorization for registration has been properly granted pursuant to this Act or conduct any scrutiny of the information provided in the financing statement.

53. A financing statement shall provide—

- (a) the identifier of the debtor;
- (b) the identifier of the secured party or a representative of the secured party;
- (c) a description of the collateral, including a serial number as provided in this Act and the Registry Regulations;
- (d) the date of prior registration, if prior registration law (as defined in section 130) applies in respect of the security interest;
- (e) the maximum amount of the secured obligation; and
- (f) any other data required by this Act or the Registry Regulations to be contained in the financing statement.

54. A financing statement sufficiently identifies the debtor—Identification
of debtor in
financing
statement

(a) if the debtor is an individual, it provides the debtor's unique identification number as provided in the Registry Regulations, and the name, address and date of birth; or,

(b) if the debtor is an unregistered company—

(i) the identification number as provided in the Registry Regulations, the name and address of the company as provided in its formation documents, charter or other document creating the company; and

(ii) the name, job title and contact details of the person acting on its behalf in the transaction relating to this registration.

(c) if the debtor is a registered company, the company name indicated in the relevant companies registry where the company is registered, and a unique number assigned to it on its registration as provided in the Registry Regulations.

55. A financing statement sufficiently identifies the secured party—Identification
of secured
party in
financing
statement

(a) if the secured party is an individual, it provides the individual's unique identification number as provided in the Registry Regulations, and the name, address and date of birth;

(b) if the secured party is an unregistered company, it provides the identification number as provided in the Registry Regulations, the name and address of the company as provided in its formation documents, charter or other document creating the company; or

(c) if the secured party is a registered company, the company name indicated in the relevant companies registry where the company is registered, and a unique number assigned to it on its registration a unique number assigned to it on its registration as provided in the Registry Regulations.

56. A financing statement shall not be registered if—When
financing
statement
not to be
registered

(a) it is not submitted in the prescribed manner or in a form that enables the information to be entered directly by electronic means into the Registry; or

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

When
financing
statement to
be registered

57. A financing statement shall be registered at the time that a registration number, date and time are assigned to it by the Registry, and it shall not be effective against third parties until it becomes publicly searchable as provided in the Registry Regulations.

Registration
of financing
statement not
to constitute
notice or
knowledge

58. Registration of a financing statement shall not be constructive notice or knowledge of existence of a security interest or contents thereof to any person.

Verification
statement to
be forwarded
to person who
registered
financing
statement

59. A verification statement, in the form prescribed in the Registry Regulations, shall, as soon as reasonably practicable after a financing statement has been registered, be given to the person who submitted the financing statement for registration.

When
financing may
be registered

60. A financing statement may be registered before or after a security agreement is concluded.

Authorization
to register
financing
statement

61.—(1) A debtor who enters into a security agreement authorizes the registration of a financing statement and any amendments thereto.

(2) The debtor may also authorize registration of a financing statement prior to the conclusion of a security agreement and such authorization shall be signed by the debtor.

Financing
statement may
relate to one
or more
security
agreement

62. A financing statement may relate to one or more security agreements.

When secured
party to notify
debtor about
registration of
financing
statement

63. The secured party who registered a financing statement, or on whose behalf a financing statement has been registered, shall, not later than fifteen working days after the day on which the verification statement was received, give to the debtor a copy of the verification statement in accordance with the Registry Regulations, unless the debtor has waived in writing the right to receive it.

Registration
of financing
statement
invalid only
if seriously
misleading

64. The effectiveness of the registration shall not be affected by any defect, irregularity, omission, or error unless the defect, irregularity, omission or error is seriously misleading.

When
financing
statement
seriously
misleading

65.—(1) A registration shall be ineffective if there is a seriously misleading defect, irregularity, omission or error in—

(a) the identifier of a debtor; or

(b) the serial number of the collateral if the collateral is of a kind that is required by the Registry Regulations to be described by serial number.

(2) An error in the serial number of the collateral may render the registration ineffective only with respect to the collateral identified by such serial number.

(3) A registration of a financing change statement or termination is ineffective unless it has been properly authorized by the secured party.

66. In order to establish that a defect, irregularity, omission or error is seriously misleading, it is not necessary to prove that any person was actually misled by it. The registration shall be deemed to be seriously misleading if a search of the Registry under the correct debtor's identifier would not disclose the registration.

Proof that person actually misled not necessary

67. An incorrect description of certain collateral shall not render the registration ineffective with respect to other collateral sufficiently described.

Validity of registration when description of part of collateral is incorrect

68. Except as otherwise provided in this Act, a registration of a financing statement under this Act shall be effective until whichever is the earlier of—

Duration of registration of financing statement

(a) the expiration of the term specified in the financing statement;

(b) the expiration of five years commencing on the date on which and at the time at which the financing statement was registered; or

(c) when the financing statement has been discharged before the expiration of the relevant period referred to in this section.

69.—(1) A registration may be renewed by registering a financing statement as provided in the Registry Regulations before the effectiveness of the registration expires.

Renewal of registration

(2) Except as otherwise provided in this Act, the period of time for which a registration shall be effective is extended until whichever is the earlier of—

(a) the expiration of the new term specified in the financing change statement; or

(b) the expiration of five years commencing on the date on which and at the time at which the financing change statement was registered.

Registration of
financing
change
statement
in respect of
transfer of
security interest
perfected by
registration

70. If a secured party transfers a security interest perfected by registration, the transferred security interest will remain effective. The transferee need not amend the registration that names the transferor as the secured party or to register a new financing statement against the debtor.

Registration
of financing
change
statement in
respect of
subordinated
security
interest

71. If a security interest has been subordinated by the secured party to the interest of another person, a financing change statement may be registered to disclose the subordination before expiration of the effectiveness of the registration.

Voluntary
amendment to,
or discharges
of,
registrations
of financing
statement

72.—(1) An amendment or discharge of a registration may be effected by the secured party or its agent by registering a financing change statement at any time before expiration of the effectiveness of the registration.

(2) An amendment to a registration that adds collateral, that adds a new debtor or that modifies the maximum amount of the secured obligation is effective as to the added collateral, the added debtor and the new maximum amount only from the date when financing change statement was registered.

Discharge of
registration
relating only
to consumer
goods

73. If a registration covers consumer goods, the secured party shall discharge the registration within fifteen working days after all obligations under the security agreement creating the security interest are performed, unless the registration lapses before the expiration of that period.

When debtor
may demand
registration of
financing
change
statement

74. In cases not governed by section 73, the debtor may give a written demand to the secured party to amend or discharge the registration if—

(a) all of the obligations under the security agreement to which the registration relates have been performed and there is no commitment to make future advances;

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

(c) the collateral described in the registration includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor;

(d) no security agreement exists between the parties; and

(e) the security interest is extinguished in accordance with this Act.

75. Upon receipt of the demand submitted under section 74, the secured party must register, within fifteen working days, a financing change statement—

Matters that may be required by demand

(a) discharging the registration in a case within paragraph (a), (d) or (e) of section 74; or

(b) amending the registration to release some property that is no longer collateral in a case within paragraph (c) of section 74 or that was never collateral under a security agreement between the secured party and the debtor in a case within paragraph (c) of section 74.

76. If the secured party fails to comply with the demand within fifteen working days after its receipt, the person giving the demand under section 74 may ask the Court to issue an order discharging or amending the registration as appropriate.

Procedure for non-compliance with demand

77.—(1) The Court may, on application by the person, order that the registration be discharged or amended in accordance with the demand.

Compulsory amendment or discharge by court order

(2) The Court may make any other order it thinks proper for the purpose of giving effect to an order under subsection (1).

(3) The Registrar shall amend or discharge a registration in accordance with a Court order made under subsection (1) as soon as reasonably practicable after receiving the order.

78. A secured party shall not charge any fee for compliance with a demand received under section 74.

No fee for compliance with demand

79. A person may search the registry, and obtain a printed search result, in accordance with this Act and the Registry Regulations.

Search of Registry

80. The Registry may be searched only by reference to the following criteria—

Search criteria

(a) the unique identifier of the debtor as provided in the Registry Regulations;

(b) if collateral is required by this Act and the Registry Regulations to be described by serial number, the serial number of the collateral; and

(c) the registration number assigned to the registration.

81. A search of the Registry may be carried out without the need for the searcher to justify the reasons for the search.

Search purposes

When
registration
and search
constitutes
interference
with privacy
of individual

82. A person who submitted a registration or carried out search of the Registry with a frivolous, malicious or criminal purpose or intent shall be subject to civil and criminal penalties according to the relevant laws of Malawi.

Printed search
result
receivable
as evidence

83. The Registry may, upon request and payment of the fee to be prescribed in the Registry Regulations, issue a printed search result in the form of a certificate. A printed search result issued by the Registry shall be conclusive evidence of the existence of information in the Registry as of the date and time of its issuance.

PART VIII—ENFORCEMENT OF SECURITY INTERESTS

Application
of this Part

84. This Part shall apply to all security interests with the exception of those that are created or provided for by—

- (a) an outright transfer of an account receivable or chattel paper;
- (b) an operating lease for a term of more than one year that does not secure payment or performance of an obligation; or
- (c) a commercial consignment that does not secure payment or performance of an obligation.

Part not to
apply to
remedies
under the
Insolvency Act
Act No. . . . of
2013

85. This Part shall not apply to remedies and measures provided in the Insolvency Act, 2013.

When
contracting
out of certain
provisions
in this Part
permitted

86. Parties may in the security agreement contract out of sections 87, 88, 102, 106 and 107 of this Act.

Secured party
may take
possession
and sell
collateral

87.—(1) After default, a secured party may—

- (a) take possession of a collateral; or
- (b) without removal, render the collateral unusable under section 88.

(2) A secured party may proceed under this section—

- (a) pursuant to judicial process; or
- (b) without judicial process, if the debtor does not resist the removal of the collateral.

(3) Commencement of enforcement requires registration of the enforcement form. The enforcement form shall identify the debtor, the secured party and the collateral against which enforcement is sought.

(4) A prior notice to the debtor is not required for the secured party to repossess or render the collateral unusable under this section.

88.—(1) A secured party with priority over all other secured parties may render the collateral unusable under section 87 if the collateral is of a kind that cannot be readily moved from the debtor's premises or is of a kind for which adequate storage facilities are not readily available.

Secured party
may render
collateral
unusable

(2) If subsection (1) applies, the secured party may dispose of collateral on the debtor's premise provided that it shall not cause the person in possession of the premises, if other than the debtor, any greater inconvenience than is necessary.

89.—(1) A secured party with priority over all other secured parties may collect and apply an account receivable, investment security, money or a negotiable instrument taken as collateral to the satisfaction of the obligation secured by the security interest if the debtor is in default.

Secured party
may apply
certain
collateral in
satisfaction
of secured
obligation

(2) Unless otherwise agreed, the secured party may notify the account debtor and collect payment even prior to default.

90.—(1) With or without leave of the court, a secured party may take possession of the collateral pursuant to section 87 and dispose of it when—

Secured party
may take
possession of
and sell
collateral

(a) the debtor is in default under the security agreement; or

(b) the collateral is at risk.

(2) In subsection (1), collateral is at risk if the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or otherwise disposed of contrary to the provisions of the security agreement.

91. A secured party who exercises a power of sale of collateral under section 93 shall owe duty to obtain the best price reasonably obtainable as at the time of sale to the following persons—

Duty of
secured party
selling
collateral to
obtain best
price
reasonably
obtainable

(a) the debtor;

(b) any person who has registered a financing statement in the collateral that is effective at the time the secured party repossessed the collateral; and

(c) any person who has given the secured party notice that that person claims an interest in the collateral.

Power of sale
applies to
document of
title and
related goods

92. If the collateral is a document of title, the power of sale provided by section 93 shall apply to the document of title and to the goods to which it relates.

Method of
sale of
collateral

93. A secured party may effect a sale of collateral by auction, public tender, private sale or any other method provided for in the security agreement.

Notice of sale
of collateral

94.—(1) A secured party who intends to sell collateral under section 93 shall not less than ten working days before selling the collateral, give notice to the following persons—

(a) the debtor;

(b) any person who has registered a financing statement in respect of the collateral that became effective before the secured party repossessed the collateral; and

(c) any other person that has given the secured party notice that that person claims an interest in the collateral.

(2) Subsection (1) shall not apply if—

(a) the collateral may perish within ten working days of the repossession;

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

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

(d) the collateral consists of inventory;

(e) the security interest comprises all, or substantially all, of the assets of the debtor that is a company;

(f) after the secured party repossesses the collateral, every person entitled to receive notice under subsection (1) consents in writing to the immediate sale of the collateral; or

(g) a Court grants leave to the secured party to sell collateral under section 94 without complying with subsection (1).

(3) If a security interest extends to collateral and some, but not all, of the collateral is listed in subsection (2), the secured party may sell the collateral listed in subsection (2) under section 93 without complying with subsection (1).

95. If collateral has been sold under section 93, all security interests in the collateral and its proceeds that are subordinate to the security interest of the secured party who sold the collateral shall be extinguished on the sale of the collateral.

Extinguish-
ment of
subordinate
security
interests
on sale

96. If collateral is sold by a secured party under section 93, the secured party shall, within fifteen working days after the sale of the collateral, give the persons referred to in section 94 (1) a statement of account in writing, showing—

Secured party
to give
statement of
account
to debtor

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

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

(c) the balance owing by the secured party to the debtor, or by the debtor to the secured party, as the case may be.

97. A secured party who has sold collateral under section 93 shall, before applying the net proceeds of the sale towards the satisfaction of the debt or other obligation secured by the security interest of the secured party, apply the net proceeds of the sale towards the reasonable costs and expenses of the sale, and to the extent provided for in an agreement, reasonable legal expenses.

Secured party
selling
collateral
shall pay
prior ranking
secured
parties

98.—(1) For the purposes of this Act, there is surplus when the net proceeds recovered upon disposition of the collateral under this Part exceed the amount owed by the debtor to the secured party.

Distribution
of surplus

(2) In subsection (1), "net proceeds" means net proceeds of the sale after deducting the reasonable costs and expenses of the secured party of, and incidental to, taking possession of, holding, storing, repairing, maintaining, valuing, and preparing the sale of, and selling, the collateral.

(3) If a secured party has applied collateral under section 100 or sold collateral under section 93, as the case may be, the secured party shall pay the following persons the amount of any surplus in the following order—

(a) any persons who have a subordinate security interest perfected by registration, in the order of their priority;

(b) any other person who has given the secured party notice that that person claims an interest in the collateral; and

(c) the debtor.

99. The secured party may pay the surplus into Court if there is a question as to who is entitled to receive payment under section 98

Surplus may
be paid into
Court

Proposal of
secured party
to retain
collateral

100.—(1) A secured party with priority over all other secured parties may, after default, propose to retain the collateral in satisfaction of the obligation secured by it.

(2) The secured party shall give notice of the proposal to the persons listed in section 94.

Persons
entitled to
notice may
object to
proposal

101. The secured party shall sell the collateral under section 93 if a person who is entitled to a notice under section 94 and whose interest in the collateral would be adversely affected by the secured party's proposal to retain collateral gives to the secured party a notice of objection within ten working days after receiving the notice referred to in section 100.

Person making
objection may
be requested
by secured
party to prove
interest

102.—(1) The secured party may request a person, other than the debtor, who objects to provide proof of the person's interest.

(2) If the person to whom subsection (1) applies does not provide proof not later than ten working days after the secured party's request, the secured party may proceed as if no objection were received from the person.

Position where
persons
entitled to
notice do not
object to
retention of
collateral by
secured party

103.—(1) If no notice of objection is received, the secured party shall, at the expiration of the ten day period referred to in section 102, be deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and shall be entitled to hold or dispose of the collateral free from all rights and interests of the debtor and of any person entitled to receive notice under section 94 (1).

(2) If subsection (1) applies, all security interests in the collateral that are subordinate to the security interest of the secured party referred to in subsection (1) shall be extinguished.

Secured party
shall not
damage goods
when
removing
accession

104.—(1) A secured party who is entitled to repossess an accession under section 87 shall remove the accession from the whole in a manner that causes no greater damage to the other goods or that puts the person in possession of the whole to no greater inconvenience than is necessary for the removal of the accession.

(2) A person, other than a debtor, who has an interest in the other goods at the time the goods become an accession shall be entitled to reimbursement for any damage to that person's interest in the other goods caused by the removal of the accession.

(3) Any reimbursement payable under subsection (1) shall not include reimbursement for a reduction in the value of the property caused by the removal of the accession or by the necessity of the replacement of the accession.

(4) A person entitled to reimbursement under this section may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.

105.—(1) At any time before the secured party sells the collateral or is deemed to have taken the collateral in satisfaction of the obligation secured by it, a person who is entitled to receive a notice under section 94 may, unless the person otherwise agrees in writing after default, redeem the collateral by—

Entitled persons may redeem collateral

(a) tendering fulfillment of all the obligations secured by the collateral; and

(b) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for sale, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party.

(2) The debtor's rights to redeem the collateral shall have priority over any other person's right to redeem the collateral.

106.—(1) At any time before the secured party sells the collateral or is deemed to have taken the collateral in satisfaction of the obligation secured by it, the debtor may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by—

Debtor may reinstate security agreement

(a) paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement;

(b) remedying any other default by reason of which the secured party intends to sell the collateral; and

(c) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing, and preparing the collateral for sale, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party.

(2) Subsection (1) shall not apply to any security agreement made or entered into before the commencement of this Act.

107. Unless otherwise agreed, the debtor shall not be entitled to reinstate a security agreement more than twice in each year.

Limit on reinstatement of security agreement

PART IX—MISCELLANEOUS PROVISIONS

108.—(1) If a person fails to discharge any duty or obligation imposed by this Act, the person to whom the duty or obligation is owed and any other person who can reasonably be expected to rely on performance of the duty or obligation shall have a right to recover damages for any loss or damage that was reasonably foreseeable as likely to result from the failure.

Entitlement to damages for breach of obligation

(2) Nothing in subsection (1) shall limit or affect any liability that a person may incur under any law of Malawi other than this Act.

(3) In addition to the damages recoverable under paragraphs (1) and (2) of this section, the person that registered a financing statement without authorization of the debtor shall be responsible to pay to the debtor the statutory damages as may be prescribed.

Secured party
to provide
certain
information
relating to
security
interest

109.—(1) A debtor may request the secured party to send or make available to any specified person, at an address specified by the debtor making the request, any of the following—

(a) a summary of a security agreement that creates or provides for a security interest held by the secured party in the personal property of the debtor;

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness;

(c) a written approval or correction of an itemised list of personal property indicating which items are collateral, unless the security interest is over all of the personal property of the debtor;
or

(d) a statement of account indicating the pay off amount needed to fully satisfy the secured obligation.

(2) Subsection (1) shall not apply if the information requested under that subsection must be, or has already been, made available under any other Act or rule of law, to the person who made the request.

Time for
complying
with request

110. A secured party shall comply with the request made under section 109 (1) within ten (10) working days of its receipt, unless the secured party has been exempted under section 111.

Exemption
from
complying
with request

111. The Court may, on application by a secured party, make an order exempting the secured party from complying with a request made under section 109 in whole or in part or extending the time for compliance if the Court is satisfied that, in the circumstances, it would be unreasonable for the secured party to comply with the request.

Secured party
may recover
costs arising
from request

112.—(1) A secured party, who is required to respond to a request made under section 109, may charge the debtor only the reasonable costs for providing the information.

(2) A debtor who has requested information under section 109 shall be entitled to one response free of charge every three months.

113. The Court may, on application of the debtor who submitted a request under section 109, make an order requiring the secured party to comply with the request if, without reasonable excuse, the secured party failed to comply with the request.

Application
to Court for
compliance
with request

114. If the secured party fails to comply with a Court order made under section 113, the Court may, on the application of the debtor who made the request under section 109—

Consequences
of not
complying
with Court
Order

(a) issue an order—

(i) declaring that the security interest to which the request relates is to be treated as unperfected or extinguished; and

(ii) directing the Registrar to discharge and remove the registration relating to the security interest; and

(b) make such other orders as it thinks proper for the purpose of giving effect to an order under this section.

115. Where a debtor makes a request under section 109 and the secured party to whom the request was made no longer has an interest in the obligation secured or collateral covered by the registration, the secured party shall send or make available to the debtor the name and address of the immediate successor in interest or transferee and the latest successor in interest or transferee, if known.

Obligation to
disclose
successor in
security
interest when
request made

116.—(1) Any notice or any other document required or authorized by this Act to be served on or given to any person shall be in writing and is sufficiently served or given if—

Method of
service of
notices

(a) it is delivered to the person or the person's agent authorized to receive such notices as designated in the security agreement;

(b) it is left at that person's or that person's agent's usual or last known place of abode or business or at an address specified for that purpose in the security agreement;

(c) it is posted in a letter addressed to the person or the person's agent by name at that place of abode or business or address; or

(d) it is given by facsimile, electronic mail, or other similar means of communication.

(2) If the person is deceased, notice or other document may be served on or given to the person's personal representatives

117. Notwithstanding section 116, a Court may in any case make an order directing the manner in which any notice or other document is to be served or given, or dispensing with the service or giving of the notice or document.

Court may
make order
concerning
service of
notice

How to effect
service of
notice by post

118. If any notice or other document is sent to any person by post, it shall be deemed to have been delivered to that person at the time when the letter would in the ordinary course of post be delivered and, in proving the delivery, it is sufficient to prove that the letter was properly addressed and posted.

How to effect
service of
notice by
facsimile

119. A notice or document served or given by facsimile shall, in the absence of proof to the contrary, be regarded as having been served or given if the facsimile machine generated a record of the transmission of the notice or document to the facsimile machine of the recipient, and the date of the record is deemed to be the date of receipt of the notice or document.

How to effect
service of
notice by
electronic
mail

120. A notice or document served or given by electronic mail or other similar means of communication shall be, in the absence of proof to the contrary, regarded as having been served or given if—

(a) the computer system used to transmit the notice or document has received an acknowledgement or receipt to the electronic mail address of the person transmitting the notice or document; or

(b) the person who served the notice or document proves that the notice or document was transmitted by computer system to the electronic mail address provided by the person on whom the notice is served or given.

Notices served
in court
proceedings

121. Sections 116 to 120 shall not apply to—

(a) notices of other documents served or given in any proceedings in the Court or in any other court; and

(b) notices or other documents served or given in accordance with another procedure specified in the security agreement for serving or giving notices or other documents.

Regulations

122.—(1) The Minister may make regulations for carrying out or giving effect to the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), such regulations may provide for all or any of the following—

(a) prescribing procedures, requirements, and other matters, not inconsistent with this Act, in respect of the Registry and its operation, including matters relating to—

(i) the form of access to the Registry; and

(ii) the location of and hours of access to the Registry;

(b) the prescribing amount of fees payable under this Act and for the services provided by the Registry;

(c) prescribing procedures for the payment of fees, including electronic payments;

(d) prescribing procedures, requirements, and other matters, not inconsistent with this Act, in respect of any registrations under this Act, including prescribing—

(i) the description of collateral in financing statements and financing change statements;

(ii) the kinds of goods that may or must be described by serial number;

(iii) what the serial number for various types of goods is;

(iv) the data fields, limits on the number of characters, abbreviations, or symbols that may be used in financing statements and financing change statements; and

(v) the manner of registering financing statements and financing change statements; and

(e) prescribing the necessary information to be entered in the Registry to effect, renew, discharge, or otherwise amend a registration;

(f) prescribing procedures, requirements, and other matters, not inconsistent with this Act, in respect of the form, use, and manner of obtaining printed or electronic verification statements to confirm a registration;

(g) prescribing procedures, requirements and other matters, not inconsistent with this Act, in respect of searching the Registry, including—

(i) criteria against which a search may be conducted;

(ii) the method of disclosure;

(iii) the form of search results; or

(iv) the abbreviations, expansions, or symbols that may be used when conducting searches;

(h) prescribing forms of financing statements for the purposes of this Act;

(i) prescribing procedures, requirements and other matters, not inconsistent with this Act, in respect of notices under this Act, including prescribing—

(i) the matters in respect of which notices are required under this Act; and

(ii) the form of notices under this Act; and

(j) providing for such other matters as are contemplated by or necessary for giving effect to this Act and for its due administration.

Repeals and
savings
Cap. 48:03
Cap. 48:05
Cap. 63:03
Cap. 48:06

123.—(1) The Bills of Sale Act, the Hire Purchase Act, the Farmers' Stop Order Act and the Commercial Credits Act are repealed.

(2) Any subsidiary legislation made under the Acts repealed by subsection (1), in force immediately before the commencement of this Act—

(a) shall remain in force, unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; and

(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

(3) Principles of the common law, equity and law merchant, unless in conflict with this Act, shall continue to apply.

PART X—APPLICABLE LAWS

When Malawi
law applies
to tangible
property

124.—(1) The law applicable to the creation, perfection and priority of a security interest in a tangible property when the tangible asset is located in Malawi is the law of Malawi.

(2) If the tangible asset is of a type ordinarily used in more than one country, the law of Malawi applies if the debtor is located in Malawi.

When Malawi
law applies
to intangible
property

125. The law applicable to the creation, perfection and priority of a security interest in an intangible property when the debtor is located in Malawi is the law of Malawi.

When Malawi
law applies
to deposit and
investment
accounts

126. The law applicable to the creation, perfection and priority of a security interest in a deposit or investment account is the law of Malawi if the bank or other financial institution that maintains the relevant deposit or investment account has a place of business in Malawi.

When Malawi
law applies
to proceeds

127. The law applicable to the creation, perfection and priority of a security interest in proceeds is the law applicable to the creation, perfection and priority of the security interest in the original collateral from which the proceeds arose.

When Malawi
law applies
to enforcement

128.—(1) The law applicable to issues relating to the enforcement of a security interest in tangible goods is the law of the country where enforcement takes place.

(2) The law applicable to issues relating to the enforcement of a security interest in intangible goods is the law of the country where the debtor is located.

129.—(1) The law applicable to the mutual rights and obligations of the debtor and the secured party arising from their security agreement is the law chosen by the parties and, in the absence of a choice of law, by the law governing the security agreement.

When Malawi law applies to some other matters

(2) A reference to the “the law” of another country as the law applicable to one or more of the issues governed by this Part does not include its conflict of laws provisions.

(3) The application of the law determined under this Part may be refused only if the effects of its application would be manifestly contrary to the public policy of the country.

(4) The commencement of insolvency proceedings under the Insolvency Act does not displace the conflict of laws provisions that determine the law applicable to the creation, perfection, priority and enforcement of a security interest.

Act No. . . . of 2013

(5) Avoidance of security interests, treatment of secured parties, ranking of claims and distribution of proceeds under the Insolvency Act if the insolvency proceeding commenced under the Insolvency Act shall not be displaced.

Act No. . . . of 2013
Act No. . . . of 2013

(6) For the avoidance of doubt, an unperfected security interest created by a debtor shall not be effective against an insolvency practitioner carrying out insolvency proceedings in relation to the estate of the debtor.

PART XI—TRANSITIONAL PROVISIONS

130. In this Part, unless the context otherwise requires—

Interpretation

“existing secured party” means a holder of a prior security interest;

“prior law” means any law whether statutory, equitable or common law that existed immediately before the commencement of this Act;

“prior interests” means an interest created or provided for by an agreement or other transaction that was made or entered into before the commencement of this Act and that had not been terminated before that commencement date but does not include a security interest that is renewed or extended by a security agreement or other transaction made or entered into on or after the commencement of this Act;

“prior registration law” means the Companies Act, the Bills of Sale Act, the Farmers’ Stop Order Act and the Commercial Credits Act, that existed immediately before the commencement of this Act;

Cap. 46:03
Cap. 48:03
Cap. 63:03
Cap. 48:06

“prior third party interest” means a third party interest that arose before the commencement of this Act;

“transitional period” means the period of six months commencing on the commencement of this Act.

Prior security interests continue to be enforceable against third parties during transitional period

131. A prior security interest that was enforceable against third parties under the prior law shall continue, during the transitional period, to be enforceable against third parties under this Act.

Prior registered security interests deemed to be perfected by registration during transitional period

132. A prior security interest that, immediately before the commencement of this Act, was registered under prior registration law shall, during the transitional period, be deemed to be perfected by registration under this Act.

Other prior security interests deemed to be perfected during transitional period

133. A prior security interest that, immediately before the commencement of this Act was not registered shall, during the transitional period, be deemed to be perfected by registration under this Act if the prior security interest had (under the prior law and without the collateral relating to that prior security interest being taken into possession by the secured party) priority over every other prior security interest (if any).

Prior security interests to be perfected during transitional period

134. An existing secured party may, before the end of the transitional period, perfect that secured party's prior security interest under this Act.

Consequences of not perfecting certain security interests

135.—(1) A prior security interest that is deemed to be a perfected security interest under section 132 or section 133 and that is not perfected under this Act within the transitional period shall be deemed to be an unperfected security interest on the close of the transitional period.

(2) If a prior security interest that is deemed to be an unperfected security interest under subsection (1) is perfected after the close of the transitional period, that perfection shall be only effective from the time of that perfection.

Time of registration of certain prior security interests

136.—(1) For the purposes of this Act, the time of registration of a prior security interest that is deemed to be perfected by registration under this Act shall be—

(a) the date that, under the relevant prior registration law, determined the priority of the security interest (where the prior security interest is deemed to be perfected by registration under section 132);

(b) the date that the security interest was created (where the prior security interest is deemed to be perfected by registration under section 132).

(2) When the security interest was perfected within the transitional period, it shall have priority from the date that the security interest was registered or created under the prior law.

(3) Subsection (2) does not affect the priority of a later registered fixed charge over an earlier registered floating charge. For the purposes of this Part, the fixed charge will be deemed to be a purchase money security interest.

137.—(1) During the transitional period—

(a) priority between prior security interests shall be determined by the prior law;

(b) priority between security interest that is deemed to be perfected by registration under section 132 or section 133 and a security interest perfected in accordance with this Act shall be determined by this Act; and

(c) priority between an unperfected prior security interest and another unperfected security interest shall be determined by the order in which they were created.

(2) During the transitional period, prior security interest deemed to be perfected under section 132 or section 133 and security interests perfected in accordance with this Act shall have priority over any unperfected interests.

Priority of
prior security
interests
during
transitional
period

138. During the transitional period—

(a) priority between a prior security interest and a prior third party interest shall be determined by the prior law;

(b) priority between a prior security interest and a third party interest that arose on or after the commencement of this Act shall be determined by this Act; and

(c) priority between a security interest that is not a prior security interest and a prior third party interest shall be determined by this Act.

Priority of
third party
interests
during
transitional
period

Passed in Parliament this thirteenth day of June, two thousand and thirteen.

H. H. NJOLOMOLE
for: Clerk of Parliament