
The Next Frontier for Finance Leasing in sub-Saharan Africa: Revisiting Secured Transactions Law in Nigeria

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An introduction to equipment leasing and economic development

Can those who live in penury find liberation through a sustainable financial inclusive law such as a reformed secured lending and leasing regulation, or is this just a mirage born out of financial hopelessness? Poverty has been characterised as a “lack of access to essential goods, services, assets and opportunities to which every human being is entitled”,¹ and as well, “a condition where the poor have insufficient funds to maintain an acceptable standard of living.”² The overarching goal of a competitive environment suitable for secured lending should aim to facilitate timely access to low-cost credit for borrowers, and from an economic standpoint, alleviate poverty. In the low and middle-income countries such as Nigeria, small and medium enterprises (SMEs) are treated as catalyst for economic growth, and these SMEs need to access low-cost finance and acquire equipment and latest technological gadget for their establishments. In response to the development changes in Nigeria, one of the main goals of the National Economic Empowerment and Development Strategy (NEEDS) is to provide cheap and easy access to finance which is economically sustainable in order to reduce the financial costs many businesses face, with a view of providing direct low-cost credit to the productive sector as an incentive to jump-start the private sector.³ However, this initiative has had very little impact on secured lending.

In many small and middle-income emerging economies, the equipment leasing industry has not been fully explored as an alternative for financing business enterprises. There is a high demand for lease of equipment in these economies compared to other more advanced and industrialised countries such as the United States of America (USA) that have expanded their

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¹ Asian Development Bank, *Enhancing the Fight Against Poverty in Asia and the Pacific: The Poverty Reduction Strategy of the Asian Development Bank* (December 2004) 1.

² African Development Bank, *Bank Group Policy on Poverty Reduction* (February 2004) 4.

³ International Monetary Fund, *Nigeria: Poverty Reduction Strategy Paper – National Economic Empowerment and Development Strategy (NEEDS)* (December 2005) IMF Country Report No. 05/433, 53.

leasing industry.⁴ Leasing allows businesses to make use of equipment's which they have not purchased outrightly, while using the financial benefits arising from using the leased equipment as the means to pay the lease instalment payment.⁵ Additionally, equipment leasing helps businesses to manage their financial resources prudently since they can use the cash for other pressing needs such as employee remuneration, developing marketing strategies, procuring raw materials etc., with a higher return on investment, as against investing an immediate property acquisition which could stifle their business operations.⁶

Many developing countries face legal and infrastructural obstacles to successfully operate a leasing industry while the absence of a simple and predictable set of rules regulating equipment leasing could hamper businesses from gaining access to affordable finance. In many sub-Saharan African countries, leasing regulations do not exist, or does not take note of intrinsic characteristics of this type of transaction in its application and interpretation which causes confusion for contracting parties.⁷ Where SMEs have the possibility of expanding their activities with readily available equipment leased to them, the level of poverty will be reduced significantly in that businesses benefitting from such expansion will create additional employment for both the skilled and unskilled. In promoting SMEs in developing economies, equipment leasing has a huge role to play in reducing poverty by generating capital and labour, while maintaining a sustainable business environment for the economy. Therefore, it is imperative that developing economies in sub-Saharan Africa should strive to establish a robust leasing industry which can lead to the development of capital markets whereby SMEs can be introduced to formal financial markets, thereby stimulating capital market funding to leasing establishments.⁸

There remains a general view that legal and regulatory frameworks dealing with secured transactions law can directly impact on how SMEs can get access to finance.⁹ To unveil these conceptions, as a reference point, this article will seek to evaluate the legislative position of the recently enacted Equipment Leasing Act 2015 ("ELA 2015"), while determining the extent to which the establishment of the Central Bank of Nigeria (CBN) Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulation No.1, 2015)

⁴ International Finance Corporation, *Global Leasing Toolkit: An Introduction* (World Bank 2011) 5.

⁵ *ibid.*

⁶ *ibid.*

⁷ International Finance Corporation, *Leasing in Development: Guidelines for Emerging Economies* (World Bank 2009) 3.

⁸ Mosharref Hossain, 'Leasing: An Alternative Financing mechanism for SMEs' [2013] 2 *ABC Journal of Advanced Legal Research* 66, 67.

⁹ *Financing Innovative SMEs in a Global Economy, Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a more Responsible and Inclusive Globalisation* (OECD) 2nd OECD Conference of Ministers Responsible for SMEs, 3-5 June 2004, Istanbul, Turkey) <http://www.oecd.org/cfe/smes/31919231.pdf> accessed 30 November 2016.

“CBNR”, conflicts with the provisions of ELA 2015 with regards to ‘double perfection’ of financial lease.

First and foremost, and rather controversially, the CBNR does not recognise the equitable charge as a security interest.¹⁰ Notwithstanding, this law requires the registration of financial lease transactions in the National Collateral Registry (“NCR”).¹¹ Concurrently, ELA 2015 stipulates that equipment lease agreements, which includes financial lease, must be recorded in a register administered by a Registration Authority.¹² As seen above, the laws governing equipment leasing in Nigeria are conflicting, and complex, thus, financiers may become wary and unwilling to get involved in these type of transactions which could prove detrimental to the economy. Purportedly, this leaves the Nigerian secured transaction system in a neck-deep quagmire since two conflicting legal regimes on financial leasing are in operation simultaneously.

As this may lead to confusion during registration, a solution to this problem could be found under the United Nations Commission on International Trade Law (“UNCITRAL”) Legislative Guide on Secured Transactions 2007, henceforth: the “Guide”;¹³ the UNCITRAL Guide on the Implementation of a Security Rights Registry 2014, henceforth: the “Registry Guide”;¹⁴ and the UNCITRAL Model Law on Secured Transactions 2016, henceforth: the “Model Law”.¹⁵ These UNCITRAL laws follow a functional approach and an integrated system to assist States in harmonising their secured transactions law involving all types of recognisable security interests including quasi-securities such as financial lease,¹⁶ which happens to be the focus this article. The extent to which their recommendations can be exported to Nigeria will be the substantial discussion in this article. Their recommendations could act as a guidance and catalyst

¹⁰ Iyare Otabor-Olubor, ‘Reforming the Law of Secured Transactions: Bridging the Gap between the Company Charge and CBN Regulations Security Interests’ [2016] *Journal of Corporate Law Studies* 1-34.

¹¹ In a recent CBN Circular addressed to all banks and financial institutions in Nigeria, it states - “All banks and other financial institutions are hereby required to register their security interest in movable assets with the NCR with effect from Monday, 4 July, 2016”, see Kevin N Amugo, ‘Circular to Banks and other Financial Institutions: Secured Transactions and National Collateral Registry for MSME Financing in Nigeria’ (Central Bank of Nigeria, 29 June 2016).

¹² ELA 2015, s 7 establishes the Equipment Leasing Association of Nigeria “Registration Authority”, and as the sole body responsible for recording equipment lease transactions – see s 9 (2) (e).

¹³ http://www.uncitral.org/uncitral/en/uncitral_texts/security/Guide_securedtrans.html accessed 2 December 2016.

¹⁴ http://www.uncitral.org/uncitral/en/uncitral_texts/security/2013Security_rights_registry.html accessed 2 December 2016.

¹⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html accessed 10 December 2016.

¹⁶ For further discussion on works pertaining to UNCITRAL’s reform on security interest laws, see for example – Spiros V. Bazinas ‘Acquisition Financing under the UNCITRAL Legislative Guide on Secured Transactions’ [2011] 16 *Unif. L. Rev.* 483; Louise Gullifer and Orkun Akseli, *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Bloomsbury Publishing 2016); Spiros V. Bazinas, ‘The UNCITRAL Legislative Guide on Secured Transactions: Key Objectives and Fundamental Policies’ [2010] 42 *UCC Law Journal* 123; Marek Dubovec and Cyprian Kambili, ‘Using the UNCITRAL Legislative Guide as a Tool for a Secured Transactions Reform in Sub-Saharan Africa: The Case of Malawi’ [2013] 30 *Arizona J. of Int’l & Com. L.* 163.

for other unreformed countries in sub-Saharan Africa having a similar incoherent secured transactions law.

Brief history of equipment leasing in Nigeria

Leasing of equipment has been in practice since the ancient times in the Sumerian City of Ur, about 2010 B.C. which was then a major commercial centre, and it involved the rental of farm tools leased to farmers by priests who then stood as government authorities.¹⁷ Also, in 1750 B.C., Hammurabi in his famous code of laws acknowledged the existence of lease of movable property.¹⁸ However, modern leasing is believed to have started in the USA in the 1950's, from where it later spread to Europe and then the Far East in Japan in the 1960's, and thereafter the rest of the world in the 1970's.¹⁹ The leasing industry in Nigeria represents a viable opportunity for businesses to access cheap and affordable credit to support long-term sustainability. The leasing of equipment is relatively young but it has nevertheless contributed to the socio-economic development of the country especially where the purchase of industrial goods has become relatively expensive for SMEs.

Equipment leasing in Nigeria can be traced far back to the early 1960's when subsidiaries of British companies operated in Nigeria and benefitted from offshore leasing provided by foreign leasing companies.²⁰ This arrangement was feasible due to the fact that there were no restrictions on exchange control. Since the transaction was cross-border in nature, it allowed the lessee to claim capital allowance in Nigerian, while the lessor could claim UK capital allowances. This was possible because both the lessee and lessor will be treated as owners of the equipment for tax purposes in their respective countries and thus entitled to tax depreciation.²¹ Depending on how the agreement was structured, it allowed parties to exploit the different leasing rules in both jurisdictions. This arrangement became popularly known as "double dipping".²² Notwithstanding these generous opportunities, the outbreak of the Nigerian civil war temporarily halted the development of the leasing industry. The federal government imposed exchange restrictions geared towards conserving scarce foreign exchange which affected the offshore subsidiary leasing companies doing business in Nigeria.²³ A sudden upturn in oil revenues gave the government

¹⁷ Alexandra Bolea and Roxana Cosma, 'Leasing as a Modern Form of Business Financing' in *Progress in Economic Sciences* (Jan Polcyn edn Nr 2, PWSZ Poland 2015) 295, 296.

¹⁸ *ibid.*

¹⁹ Equipment Leasing Association of Nigeria, *Lease Financing in Nigeria* (2nd ed ELAN Publication, Lagos 2015) 2.

²⁰ Bob Osaze, *Lease Financing in Nigeria* (ELAN Publication, Pacific Printers Nig. Ltd. Lagos 1993).

²¹ Bank of England, 'Recent Developments in Equipment Leasing' [1982] 22 (3) Bank of England Quarterly Bulletin 382, 384 <http://www.bankofengland.co.uk/archive/Documents/historicpubs/qb/1982/qb82q3382389.pdf> accessed 2 December 2016.

²² *ibid.*, 384.

²³ E.N. Egbuna, 'Equipment Leasing in Nigeria: Trends and Prospects' [1995] 19 (3) CBN Bullion 33, 34.

incentives such as the 1972 – 77 Indigenisation Policy to indigenise foreign entities in Nigeria which challenged foreign dominance of commerce and industry in Nigeria, thus, hampering further development of the leasing industry in Nigeria.²⁴ As a matter of fact during this period, laws affecting financial leasing in England were under critical reforms. These reforms were facilitated by the Crowther Report in order to revise the consumer credit regime, designed to recognise the extension of credit in quasi-security transactions e.g. hire-purchase, financial lease and conditional sale agreements which in the grand scheme of things were perceived to be in reality a chattel mortgage.²⁵ Specifically, the basis of this reform was to unify the different set of rules applicable to the recognised security devices. These recommendations were never implemented.²⁶

ELA 2015 represents the first legislation in Nigeria dealing with equipment leasing transactions. The adoption a leasing law in Nigeria before the enactment of the ELA 2015 was actually considered but never implemented. The Okigbo Report 1976 on the Nigerian Financial System advised the federal government to promote equipment leasing activities in the merchant banking sector.²⁷ The government White Paper provisionally accepted the recommendations, but unfortunately, it never materialised partly as a result of the CBN restrictions places on merchant banks from investing more than 15% of their total asset on equipment leasing.²⁸ Not to mention, the Orojo Report which led to the establishment of the Corporate Affairs Commission (“CAC”), received a memorandum from the Equipment Leasing Association of Nigeria (“ELAN”) to enable the registration of equipment leases with the CAC, a government body responsible for administering the public register of company charges. After careful consideration, this idea was dismissed because first, the equipment lease was not seen as peculiar to companies because a lessor or lessee could also be a natural person, and secondly, it was asserted that the nature of an equipment lease transaction does not transfer ownership to the lessee, but merely possession, and besides, a lessee could always follow his rights even though the property is the hands of a third party.²⁹ For future purposes, it was accepted that the responsibility of registering financial

²⁴ Chibuike U. Uche, ‘Equipment Leasing in Nigeria: Problems and Prospects’ [2001] 3 (4) JIBR 381 383 – 384.

²⁵ Report of the Committee on Consumer Credit (1971) Vol. 1 Cmnd 4596, henceforth “Crowther Report”, para. 5.2.8. The Crowther Report further noted that: “*The assimilation of the various security devices does not, of course, mean that all forms of security will be treated in the same way, but simply that distinctions will be drawn on a functional basis, according to the nature and purpose of the security itself rather than according to the form of the security instrument*”, para. 5.5.9.

²⁶ *ibid* at para. 5.2.8.

²⁷ Report of the Committee on the Nigerian Financial System (1976) Federal Republic of Nigeria “Okigbo Report”, Department of Customs and Excise, Lagos, 38.

²⁸ Central Bank of Nigeria, *Monetary and Credit Policy Guidelines* (CBN 1991) 8. This requirement was however later removed in 1991 as of the liberation movement subject to the adoption of the Structural Adjustment Programme.

²⁹ Nigerian Law Reform Commission, Working Papers on the Reform of Nigerian Company Law (Vol. 1 Review and Recommendations, Lagos 1987) “Orojo Report”, 8.

lease may be undertaken by the CAC sometime in the near future in order to streamline the registration process.³⁰

Types of equipment lease

A lease agreement usually involves two parties, the lessor (financier) and the lessee (debtor). The lessor reserves title in the property and is often regarded as the legal owner of the property, while the lessee is given the right to use the property in return for instalment fees consensually agreed between both parties. The lessee has the right to use the property for a set period of time while being able to control the use of the property exclusively.³¹ In most cases, the funds used to purchase the property is financed by the lessor of the equipment, or the lessor might be an independent third party, or an affiliate of the seller (a finance entity created by the lessor to facilitate lease transactions).³² The lessor is then granted a security interest in the acquired equipment in order to secure the repayment of the loan.³³ Equipment which can be leased includes construction equipment, agriculture equipment, rolling stock and aircrafts, trucks and vehicles, IT and office equipment, etc.

There are basically two types of equipment lease recognised under Nigerian law – the finance lease and operating lease. Section 2 ELA states:

- 2.—(1) An equipment lease agreement shall be in writing containing—
- (a) A statement to the effect that the lessor and lessee have agreed to enter into—
 - (i) A finance equipment lease, or
 - (ii) An operating lease, or
 - (iii) Any other specified variant of either (i) or (ii) above;

Their differences lie on the rights and obligations of both parties, the risks and benefits, differences in accounting treatment, and in tax treatment.³⁴ What this means is that they can be distinguishable looking at different perspectives from the industry, legal, accounting and tax basis.³⁵ In financial leasing which is the focus of this paper, the lease agreement provides that the lessor retains title to the equipment for the duration of the lease term but title is transferable to the lessee at the end of the lease term automatically, or if the lessee exercises the purchase option usually provided in the

³⁰ Orojo Report, 8 – 9.

³¹ International Financial Reporting Standards, *Leases: Definition of a Lease* (IFRS, February 2015) 3 – 4, <http://www.ifrs.org/Current-Projects/IASB-Projects/Leases/Documents/Leases-Project-Update-February-2015.pdf> accessed 14 November 2016.

³² The Guide, Introduction, no. 22.

³³ *ibid.*

³⁴ See above note 19, *Lease Financing in Nigeria*, 9–10.

³⁵ *ibid.*

agreement.³⁶ It could take various forms which could involve two parties – the lessor and lessee, or three parties - a third party financier, the lessor and lessee. Whereas, an operating lease or “true lease” is designed to temporarily transfer possession and right of use of the asset from the lessor to the lessee without amortising the full cost of the asset or outrightly assigning proprietary interest in the *res*.³⁷ The lessee leases the equipment for short-term use of the equipment which the lessor has on hand, and the lessor recovers capital outlay on the equipment from multiple rentals for the entire life of the equipment with the maintenance cost and risk of obsolescence borne by the lessor.³⁸

Financial lease can be riddled with several transactional puzzles which contracting parties would have to navigate carefully. As a matter of fact, leasing could be designed in such a way as to function as a security agreement. For instance, a conditional seller may decide to disguise his interest in the goods without complying with the registration requirements of the secured transactions legislation, or the grantor may wish to benefit from tax advantages by utilising the benefits of ownership of the goods through instalment sale such as a finance lease arrangement. A financial lease can serve a security purpose, and thus would qualify as a security device in a legal system with a functional approach of taking security, but an operating lease will not qualify as such. Their difference is not always so clear-cut. For instance, a two-week lease of a wheelchair to a medical practitioner for use in his private medical establishment does not create a security interest for the lessor, but a lease for the economic life of a wheelchair could practically qualify as a finance lease.

Secured transactions and finance lease

Nigeria published its first secured transactions law under the Central Bank of Nigeria (CBN) Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria 2015,³⁹ hereinafter “CBNR”. This regulation seeks to strengthen access to credit in Nigeria by creating a centralised online collateral registry – National Collateral Registry

³⁶ The Guide, Introduction, no. 26; See also Herbert Kronke, ‘Financial Leasing and its Unification by UNIDROIT – General Report’ [2011] Unif. L. Rev. 27; See above note 19, *Lease Financing in Nigeria*, 10.

³⁷ The Guide, Introduction, no. 26. The distinction between finance lease and operating lease was further enumerated in *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc* [2000] 4 All ER 734, 737, CA, as “An operating lease involves the lessee paying a rental for the hire of an asset for a period of time which is normally substantially less than its useful economic life. The lessor retains most of the risks and rewards of ownership of an asset in the case of an operating lease. A finance lease usually involves payment by a lessee to a lessor of the full cost of the asset together with a return on the finance provided by the lessor. The lessee has substantially all the risks and rewards associated with the ownership of the asset, other than the legal title. In practice all leases transfer some of the risks and rewards of ownership to the lessee, and the distinction between a finance lease and an operating lease is essentially one of degree.”

³⁸ Olatunji E. Sule and Sarat I. Amuni, ‘Equipment Leasing as a Source of Finance for Small and Medium Scale Entrepreneurs in Nigeria’ [2014] 2 (3) Int’l J. of Management Excellence 247, 250.

³⁹ Regulations, No. 1, 2015 - Federal Republic of Nigeria Official Gazette (Vol. 102, Lagos 3 February 2015). Note that

(NCR) – which will allow small businesses including consumers to secure loans using the NCR to record all types of security interests taken over their movable property such as livestock, inventory and equipment.⁴⁰ Just like the Guide which adopts a functional, integrated and comprehensive approach to the concept of “security right”,⁴¹ the CBNR tries to follow a similar approach with the aim that substance should prevail over form. This was borne out of the idea that different types of non-possessory asset security and several variations of title-transfer and reservation-of-title devices were based upon a few identical guiding principles aimed towards reaching the same economic outcomes.⁴² This system permit title devices such as financial lease to be integrated into the system in a way that protects the seller from third party encumbrances whether taken before or after the creation of the security interest. In the law of secured transactions, this type of interest may sometimes be re-characterised as a security device.⁴³

Para. 3 (2) CBNR provides that “all financing leases entered into by any secured creditor after these Regulations have become effective are subject to registration in the Collateral Registry and the priority provisions of these Regulations”. What this means is that a lessor’s right in its asset can only be perfected upon registration in the NCR. Similar to the Guide’s recommended notice registration system for movable property,⁴⁴ the CBNR supports this system of filing of security interest in its NCR electronic database to alert unwary third parties about the potential existence of a security interest in the property.⁴⁵ The CBNR treats the financial lease, which ordinarily is a title-based device, as a security device for the purpose of the secured transactions law. It states: purchase money security interest (PMSI) means “(a) a right taken by a financial institution who provides credit to enable the debtor to acquire the collateral if such credit is in fact used; and (b) a right of a finance lessor”.⁴⁶ This very bare definition does not explain what the right of a financial lessor may contain but what can be understood from this meaning is that the CBNR does not try to re-characterise title-based devices such as the financial lease as a secured transaction under the law. Interpreting the rights (and priority) of a purchase money creditor as provided shows that that a PMSI in collateral and its proceeds shall have a certain type of super-priority over a non-PMSI

⁴⁰ *Nigeria's New Collateral Registry Aims to Increase Access to Finance for Small Business* (The World Bank, 3 August 2016) <http://www.worldbank.org/en/news/feature/2016/08/03/nigerias-new-collateral-registry-aims-to-increase-access-to-finance-for-small-business> accessed 11 December 2016.

⁴¹ The Guide 2007, Introduction, para. 20; Registry Guide 2014, para. 13; Model Law 2016, Art. 2 (z) (kk) defines a “security right” as “a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation, and the right of the transferee under an outright transfer of a receivable by agreement”. However, this terminology is not used in Nigeria but instead, the CBNR 2015 states the equivalent as “security interest”. For this purpose, “security interest” will be used for the most part in this article.

⁴² The Guide 2007, Chap. I, para. 102.

⁴³ The Guide 2007, Chap. I, para. 108.

⁴⁴ Registry Guide 2014, para. 55 – 60.

⁴⁵ CBNR 2015, Part III, para. 9.

⁴⁶ CBNR 2015, Part I, para. 2 (1).

in the same collateral created by the same borrower if the PMSI is perfected when the borrower receives the collateral.⁴⁷

Accordingly, the financial lease maintains its irreducible core as a traditional financing device, but yet, relies on the same rules applicable to security interests so long as it involves the creation, perfection and priority rules of the CBNR. This is indistinguishable from the Guide's categorisation as a "non-unitary approach" of recognising secured transactions, as against a "unitary approach" recommended by the Guide which re-characterises and denominates acquisition security rights (including retention-of-title right and financial lease right) as security rights.⁴⁸ In this context, the financiers of acquisition security rights will be considered as "acquisition secured creditors".⁴⁹ The CBNR does not adopt the unitary approach, but nevertheless, recognises financial lease as a functional equivalent to a real security in that it performs a similar economic function of reserving title, as a title-device, for the lessor on equipment and machinery. In principle, the "non-unitary system", which is arguably the least favourable approach based international best practice guidelines, is applicable under Nigerian secured transactions law.

Finance lease under ELA 2015 and CBNR 2015

First and foremost, for a financial lease to be valid under ELA 2015, it must be in writing and it must evidence the estimated price of the equipment. Also, it must state that the equipment is being acquired by the prospective lessor on behalf of the lessee in connection with the lease agreement, a statement that the prospective lessee selected the equipment, or selected the supplier or manufacturer with or without relying on the skill and judgment of the prospective lessor.⁵⁰ In furtherance of validating a lease, a body known as the Equipment Leasing Registration Authority, ("Registration Authority") is established to register equipment lease agreements.⁵¹ In this register, the equipment lease agreement containing the particulars of the lessor, the lessee and equipment

⁴⁷ CBNR 2015, Part IV, para. 27.

⁴⁸ The Guide 2007, Chap. I, para. 111; See Alejandro Garro, 'Creation of a Security Right, Pre-default and Obligations of the Parties, Acquisition Financing: Summary of the Guide's Recommendations' (UNCITRAL – 3rd International Colloquium on Secured Transactions, 1 March 2010) < https://www.uncitral.org/pdf/english/colloquia/3rdSecTrans/Alejandro_Garro_Edited-sum.pdf > accessed 12 December 2016, para. 13 "*...some legal systems may be reluctant, for various reasons, to recharacterize acquisition financing devices as secured transactions. Thus, the Guide leaves it free to States to either adopt a so-called "unitary approach", subsuming all transactions serving security functions, irrespective of how they are denominated (retention of title, financial leases, etc.), into a unitary and generic notion of "security right" (thus mirroring Article 9 of the UCC and the PPSA of Canada, New Zealand and other common-law jurisdictions). Alternatively, States may opt for a so-called "non-unitary approach", maintaining the traditional characterization of retention of title and other acquisition financing devices, yet applying to those transactions the same rules that apply to security rights insofar as the creation, effectiveness against third parties, priority, and other financing aspects of the transaction.*"

⁴⁹ The Guide 2007, Chap. IX, para. 75.

⁵⁰ ELA 2015, s 2 (2).

⁵¹ ELA 2015, s 9 (1) (b).

will be recorded, and this register will be open to the public for inspection upon payment of a prescribed fee.⁵²

There is an express requirement for the lease to be registered with the Registration Authority in its prescribed form, irrespective of the value of the equipment, not later than 14 days after the commencement of the lease agreement.⁵³ The effect of a registered lease is to constitute sufficient notice to third parties of the fact and terms of the lease, and failure to register it will render the lease invalid between the parties to the agreement, but shall be void against any third party acting in good faith, for value without notice of the lease agreement.⁵⁴ There is a statutory requirement for the lessor to conspicuously inscribe or affix his name on the leased equipment,⁵⁵ but whether this requirement is mandatory with failure to do so capable of invalidating the agreement is unclear.

Upon registration of the agreement, the lessor remains as the legal owner of the equipment regardless of whether the equipment has been fixed to land or building of another person, and this implied ownership shall take priority over any claim brought by the lessee, lessee's creditor or third party.⁵⁶ For the duration of the lease, the lessee is prohibited from using, sub-leasing, assigning by pledge, mortgage, charge, or creating any encumbrance which contravenes the legal ownership of the lessor with a third party, and any of such prohibited agreement shall be ineffective against the lessor.⁵⁷ However, the rights of the lessor will take priority against the lessee's creditor and all other third parties, except against a bona fide purchaser for value of the equipment under an unregistered lease.⁵⁸ Whether a holder of a judgment lien will be subject to a lessor's ownership right was not considered under this law. This high-ranking super-priority right given to the lessor is more or less akin to a PMSI as seen under the CBNR which can rank ahead of existing secured creditors only in the assets acquired. However, the difference lies on the basis that the lessor under this regime holds full ownership rights, while a purchase money creditor is purportedly a security interest holder.

These aforementioned provisions in ELA 2015 does not distinguish its applicability to the different types of equipment lease. There is no clear distinction as to which of the provisions will

⁵² ELA 2015, s 12 (1) – (2).

⁵³ ELA 2015, s 13 – 14. The prescribed form to register equipment lease shall by Form A of the First Schedule to the Act (ELA 2015) accompanied by evidence of conformity to s 6 of the Act.

⁵⁴ ELA 2015, s 16 - 17.

⁵⁵ ELA 2015, s 18. This requirement can be likened to the Russian Civil Code, Art. 228 (2) which provides for the labelling of pledged asset indicating that it is encumbered. This system of publicising a security interest is likely to be ineffective for choses in action for reason being that they are intangibles, see Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry (EBRD 2004) para. A3.

⁵⁶ ELA 2015, s 19.

⁵⁷ ELA 2015, s 20.

⁵⁸ ELA 2015, s 21.

apply to financial lease and which applies to operating lease. There is no provision to show whether an equipment seller can assign or subrogate his right to a lessor, other than the odd fact that every lessor must be a corporate entity.⁵⁹ The Guide recommends the possibility for a lender to acquire the benefit of a finance lease right through an assignment or subrogation.⁶⁰ Additionally, the Registration Authority is responsible for the registration of finance lease. The probable consequence of this is that a financial lessor/purchase money creditor will be required to register a finance lease both in the register of the Registration Authority,⁶¹ as well as in the NCR which requires financial lease to be registered as a PMSI.⁶² No transitional provision has been provided in any of these laws to explain how this “double-registration” problem can be resolved. Seemingly, there was no co-operation between the draftsmen of the legislation and the CBN as to how this will impact on secured transactions law in general.

All things considered, there is no reason why the NCR should not on its own, register financial lease following its interdependent relationship with other types of security interests. Moreover, the NCR registration system which has been established by the CBNR is operated electronically and notice registration based, thus adhering to international best practices as recommended, for example, by the Guide.⁶³ This modern notice registration system can record a financing statement showing all required information necessary to perfect the security interest.⁶⁴ Notice registration does not record the particulars of the transaction, and neither does it record all the title documents in the electronic register. It only provides a summarised record of potential encumbrances in whatever property rights the grantor may have in the asset.⁶⁵ It reduces the administrative burden on registry staff, it reduces risk of human error since information provided for registration is minimal, and it enhances privacy and confidentiality for contracting parties.⁶⁶ The lease register created by the Registry Authority records the particulars of lease agreements. It is title and transaction-based and it is centralised. In this transaction-based registration system, the registration process will be cumbersome due to the fact that pre-registration checks will need to be carried out by registry staff, and also, searches will be time-consuming. Unlike the NCR which

⁵⁹ ELA 2015, s 6 (1) (a) “No person shall carry on the business of equipment leasing unless it is a limited liability company and the Memorandum and Articles of Association of the company shall have express provision to carry on the business of equipment leasing”.

⁶⁰ The Guide, Recommendation 187 (d).

⁶¹ See above n 53.

⁶² CBNR 2015, para. 3 (2).

⁶³ The Guide, Chapter IV.

⁶⁴ CBNR, para. 12.

⁶⁵ Notice filing is a system whereby notice of the security agreement can be recorded in a single national registry via a financing statement, instead of recording the actual agreement which captures present and future encumbrance, see Spiros Bazinas, ‘Key Objectives and Fundamental Policies of UNCITRAL Legislative Guide’ in *The Reform of UK Personal Property Security Law: Comparative Perspectives* (John de Lacy edn, Routledge Cavendish 2010) 465–66; see also Registry Guide, para. 56.

⁶⁶ Registry Guide, para. 59.

is operated electronically, users while using a single portal can register and search at the same time for a minimal fee. Further, the NCR is easily accessible any time of the day inclusive of public holidays. This is highly unlikely with the lease register.

On one hand, the CBNR 2015 recognises the financial lease as a PMSI, which in theory, should not prevent the lessee from granting a security interest in the same collateral to a third party. On the other hand, based on how equipment leases are generally described under ELA 2015, it is the exact opposite. Here, a lessee is prohibited from granting a security interest in the asset and where this happens, the third-party's right will be defeated by the lessor's deemed ownership right. The non-recognition of the lessee's right under this Act makes it very difficult for a lessee to use the full value of the equity which they may have already acquired in the equipment subject to financial lease rights.

Looking closely, the CBNR has tried to follow an integrated approach by permitting financial lease to be registered in the NCR. If this was to be applied at first instance, the result would have been that a lessee can use the equity in the asset being gradually acquired for further credit from other creditors.⁶⁷ The effect of this would be that the right of the lessor will not be seen as an ownership right, but rather, a security right in the leased asset.⁶⁸ Had there been a provision in the Act to show that the registration and priority of finance lease will be determined by the regulations under the CBNR, this confusion might not have arisen. The mess that is left is that two separate legal regimes governing financial lease, to the extent of registration and priority against parties, are operating together. ELA 2015 implements a title-based registration scheme, while CBNR is wholly operated electronically and notice registration based. ELA 2015 purportedly recognises a lessor's ownership title as indefeasible which can only be postponed to an innocent buyer for value who can take title in the asset free of the lessor's "security interest". This is not the case with the lessor under the CBNR in that where the lessor's right has been re-characterised as a PMSI for the purpose of effecting perfection and in determining priority, the lessor will be furnished with a super-priority right over the asset (not the lessee), and the lessee can legally assign equity by way of security in the asset to third parties.

A solution to this problem might be in data sharing, in the event that the Registration Authority does not surrender registration of financial lease to the NCR. However, because registration of finance lease under this Authority which is "transaction-filing" does not conform to the requirements of notice registration which is the internationally recommended system for registering security interests in movable assets, data sharing will prove to be difficult. The best line

⁶⁷ The Guide, Chapter IX, para. 100.

⁶⁸ *ibid.*

of action would be to transcribe all registered finance lease to electronic format which will be compatible with the online register of the NCR, while prohibiting the future registration of finance lease with the Registration Authority. This will bring about consistency and transparency in the search for encumbrances in that third parties dealing with a lessee do not have to search two registers thereby paying for two searches, and worst still, it could be time consuming. If this system is considered, the NCR may need to indicate on its financing statements whether a security interest is a real security or a purchase money security interest. This can take the form of a tick-box which will have to be indicated by the party registering the financing statement. In this way, third parties dealing with the grantor will know the extent of the grantor's liability in the asset which has been registered.

Conclusion

The current secured transactions law system in Nigeria functions in a non-unitary way. While this has the ability to provide flexibility to the law, it is capable of creating confusion where there are inconsistencies since it is not coherent to support innovative methods of taking security. The financial lease has been the main focus of this article, and unsurprisingly, it has proved to be the one of the most problematic transactional devices which has been under review for many years in Nigeria. The equipment leasing industry in developing economies have the capacity to transform their economic downturn into a long-term sustainable model. A model law on leasing has been prepared by UNIDROIT.⁶⁹ Notwithstanding, a more holistic and detailed guidance (or set of principles) is needed for emerging economies to align their incoherent equipment leasing and secured transactions system. UNCITRAL's Guide, the Registry Guide, and the Model Law provides an admirable platform for developing countries to undertake comprehensive secured transactions law reform. In order to improve the existing platform for secured lending, their leasing laws will as well need to meet international best standards. For this to happen, a set of basic principles could be published which will be useful for emerging markets during the course of shaping their domestic leasing laws. An economically-sound and reliable leasing law which reflects the functional and integrated system of a modern secured transactions regime in this respect can mitigate poverty in these countries, where the cost of advancing credit will be low. This will ensure that no one is left behind in our global quest for financial inclusion and economic sustainability.⁷⁰

⁶⁹ Model Law on Leasing (International Institute for the Unification of Private Law: UNIDROIT, 2008) <<http://www.unidroit.org/instruments/leasing/model-law> > accessed 12 December 2016.

⁷⁰ Poverty alleviation remains at the fore-front of the various sustainable development goals of the United Nations, see <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 12 December 2016.