

UNIFORM ACT ORGANIZING SECURITIES (GUARANTEES)

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**THE ORGANISATION FOR THE HARMONISATION
OF BUSINESS LAW IN AFRICA
UNIFORM ACT ORGANIZING SECURITIES (GUARANTEES)**

**The Council of Ministers of the Organization for the
Harmonization of Business Law in Africa (OHADA).**

- Mindful of the Treaty on the Harmonization of Business Law in Africa, in particular Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 thereof;
- Mindful of the report of the OHADA Permanent Secretariat and the observations of the Contracting States;
- Mindful of the opinion of the Common Court of Justice and Arbitration dated 8 April 1997 ;

The Contracting States present have deliberated upon and unanimously adopted the Uniform Act set out below:

In all the countries of the French zone, the law on securities was inherited from French Law which is basically the Civil Code (articles 2011 to 2203), the Commercial Code and other special decrees. In Cameroon the laws regulating securities were inherited from the two colonial masters: France and Britain by virtue of article 9 of the League of Nations Mandate of 20th July 1922.

*In 1924 all laws so far applicable in French Equatorial Africa were rendered applicable to the mandated territory of East Cameroon by Decree of 22nd May 1924 thus rendering French law applicable in the French-speaking provinces of Cameroon. The effect of this was to introduce the French Civil Code (**Code Civil or Code Napoléon**) and the French Commercial Code (**Code du Commerce**) which continue to serve as the primary source of civil law and Commercial Law in the French-speaking provinces of Cameroon.*

By virtue of Ordinance No. 5 of 1924, all Ordinances enacted in Nigeria after February 1924 were applicable to Southern Cameroons under British Mandate. This Ordinance is thus the enabling legislation which makes the application of Nigerian and English law possible in Cameroon. Further, section II of the Southern Cameroons High Court Law 1955 rendered applicable in the English speaking provinces of Cameroon, the Common Law, doctrines of equity and statutes of general application which were in force in England on the first day of January 1900. Consequently, the laws relating to securities are derived from case law, equity and legislations enacted before 1900 in England and also Nigerian law.

The Uniform Act organising Securities came into effect on 1st January 1998. The scope of this Act covers surety-bonds, letters of guaranty, possessory liens, pledges, mortgages, distribution

and classification of securities and lastly, final provisions. There are substantial similarities between the Uniform Act and the Common Law. The innovations brought by the Uniform Act have been highlighted and commented upon.

Article 1:

Securities shall be the means offered a creditor by the law of each Contracting State or agreement between the parties to guarantee the execution of obligations, whatever their legal nature may be.

Securities in the domain of fluvial, maritime and airspace law shall be regulated by specific legislation.

» The definition of securities under the Uniform Act is similar to that under Common Law. This article provides a classic definition of all securities whatever their nature. This Uniform Act constitutes the law on securities. As under the Uniform Act, in common law jurisdictions, security is defined as “a collateral given or pledged to guarantee the fulfilling of an obligation; especially the assurance that a creditor would be paid (usually in interest) any money or credit extended to a debtor” (See Black’s Law Dictionary, 7th ed. U.S.A. West Group St. Paul Minn 1999 pp. 1358, 1711; See also, Schmitthoff, M.C. and Sarre, D. Charlesworth’s Mercantile Law, 14th ed. London: Stevens & Sons, 1984, p.481, Iwan D. Textbook on Commercial Law, London: Blackstone Press Ltd, 1992, p. 376.

» According to article 1(2) in the area of fluvial, maritime and airspace law, the law on securities are regulated by specific codes, decrees and regulations and international conventions. (For example, see the CEMAC Maritime Code, Règlement no 03/01-UEAC-088-CM-56 portant adoption du Code, Communautaire révisé de la Marine Marchande adopted on August 3 2001 at Bangui –Central African Republic). In Cameroon, see Order No. 00726/MINT of 18 June 2005 establishing the conditions for the use of civilian aircrafts in general aviation and aerial works. Also, Order No. 00732/MINT of 18 June 2005 relating to the logbook for the registration of civilian aircrafts.

Article 2:

A collateral security shall consist in the undertaking by one person to be answerable for the obligation of the principal debtor in case of the latter's default or at the first call of the beneficiary of the guarantee.

A secured debt shall consist in the right of the creditor to ask for payment, preferentially, from the proceeds of the sale of personality or realty used to guaranty the debtor's obligation.

» Collateral security is defined as “a security, subordinate to and given in addition to a primary security that is intended to guarantee the validity or convertibility of the primary security.” (Black’s Law Dictionary, *op.cit.*, p. 1358).

In other words, it is a security upon a security. The definition of collateral security under the Uniform Act is similar to that under Common Law.

» In the case of a secured debt, the creditor has a preferential right to the proceeds of sale.

PART I

COLLATERAL SECURITIES

CHAPTER I

SURETY-BONDS

In the French-speaking provinces of Cameroon, the law relating to surety-bonds had not been revised since 1804 and the abundant case law on this type of security over the last two centuries demonstrated the prevalence of many thorny issues. However, the English-speaking part of Cameroon benefited from the development of the law in England and Nigeria which have not been very problematic. These laws protected the consent of the guarantor and illiterate parties to a contract. (see the Illiterate Protection Ordinance Cap 83 in Nigeria which is applicable in Anglophone Cameroon).

The Uniform Act on Securities has brought in innovations which have further reinforced the protection offered to the guarantor and illiterate parties.

1. **The guarantor’s consent.** *The guarantor stands surety for the debtor’s obligation and undertakes to perform that obligation if the debtor fails to perform it himself. In order to protect the guarantor’s consent, the agreement must be made expressly between the creditor and the guarantor, failing which it will be null and void. It must be made in writing and must indicate in both words and figures the maximum amount guaranteed. (Article 8). The debt to which the surety-bond relates must be attached to the agreement. It is worth noting that the surety-bond may be revoked by the guarantor before the maximum amount has been reached, or renewed. (Article 9).*
2. **Illiterate guarantor.** *A special clause has been formulated to protect an illiterate guarantor (article 4). Two witnesses chosen by the guarantor are required to assist him.*
3. **Liability of the guarantor.** *The guarantor is deemed to be jointly and severally liable with the debtor for the guaranteed debt, unless otherwise provided under the contract (Article 10).*
4. **Information requirements.** *In order to enable the guarantor to take the necessary measures to protect his interests, the creditor must inform the guarantor of the following:*

- *Any failure of the debtor to pay, any debt which has become immediately payable or whose term has been extended (Article 14).*
- *The statement of the principal debtor's liabilities where the surety-bond is general (Article 14).*

Article 3:

A surety-bond shall be a contract in which the guarantor undertakes, and the creditor accepts, to perform the debtor's obligation if the latter fails to perform it himself.

Such undertaking may be contracted without the creditor's authority and even without his knowledge.

» The definition of a surety bond under the Uniform Act is very similar to that under the Common law. Under the Common Law a bond is an obligation. A bond is also an instrument of indebtedness issued by Companies and Governments to secure the repayment of money borrowed by them. A surety-bond is “the legal relation that arises when one party (guarantor) assumes liability for a debt, default or other failing of a second party (debtor)” (See, Words and Phrases legally Defined, p.180; Osborne’s Concise Law Dictionary, 6th ed., by John Burke, p. 56). It is a contract between a guarantor who stands surety for the debtor’s obligation that, the guarantor undertakes to perform that obligation if the debtor fails to perform it himself and the creditor of that obligation, who accepts the guarantor’s undertaking. It is thus a bilateral contract between the guarantor and the creditor. The liabilities of both parties begin simultaneously. In other words, under a contract of suretyship, a surety (guarantor) becomes a party to the principal obligation. On maturity of the principal debt, the creditor may at once take proceedings against the guarantor.

» In order for the contract to be made, there is no need for the consent of the principal debtor, and the surety-bond may even be given without his knowledge. However, since article 19 requires the guarantor to notify the principal debtor before settling the debt with the creditor, it is desirable that the debtor is aware of the existence of any such guarantee and the conditions before hand.

Section I. Formation of the surety-bond

Article 4:

Whatever the nature of the obligation guaranteed, the surety-bond shall not be presumed. Under penalty of being declared void, it shall be expressly agreed upon between the guarantor and the creditor.

A surety-bond shall be recorded in a deed bearing the signature of the two parties and an indication in the guarantor's handwriting of the maximum amount guaranteed in words and in figures. Where the two differ, the surety-bond shall be good for the amount in words.

A guarantor who does not or is unable to write shall be assisted by two witnesses who shall vouch for his identity and presence in the bond instrument and, furthermore, attest to the fact that the nature and effects of the deed have been explained to him. The presence of attesting witnesses shall dispense the guarantor from fulfilling the formalities referred to in the preceding paragraph.

The provisions of this article shall also apply to surety-bonds required by the law of each Contracting State or by a court decision.

» Because a surety-bond is a very serious undertaking and in order to avoid disputes on the existence and terms of a contract of suretyship, certain formalities must be complied with in order to ensure that the guarantor is properly aware of his obligations. This is especially necessary in a country where a good majority of the persons are illiterates. The agreement must be made expressly between the creditor and the guarantor, failing which it will be null and void. The surety-bond must be in writing and signed by both parties. Similarly, in Common Law jurisdictions, guarantees are executed under seal, that is by deed. A contract of guarantee is not enforceable unless it is evidenced by a note or memorandum in writing signed by the guarantor or by some other person authorized to sign it on his behalf. (See section 4 of the Statute of Frauds 1677). The note or memorandum must identify the parties and set out all the material terms.

» Further, the guarantor must indicate in handwriting, in both words and figures the maximum amount guaranteed. If there is a difference in the two amounts, the amount in words will prevail.

» A special clause has been formulated to protect an illiterate guarantor. Two witnesses chosen by the guarantor are there to assist him.

In the case where the guarantor cannot read or write, this provision requires that:

- a) two witnesses must attest to the presence, identity and participation of the guarantor in concluding the contract and
- b) They must attest that the nature, contents and effects of the agreement were read and explained to the guarantor.

The presence and participation of these witnesses will dispense with the formalities stated in article 4(2)

In order to protect illiterate parties, a special procedure is employed. There must be a jurat if one of the parties is an illiterate. This is synonymous to what obtains in other common law jurisdictions such as Anglophone Cameroon (See the Illiterate Protection Ordinance in Nigeria Cap 83 which is also applicable in Cameroon; see also, Aguda, *The Law of Evidence*, 3rd edition, para. 81, p. 158).

Article 5:

Where the debtor is required by agreement, the laws of each Contracting State or court decision to provide a guarantor, such guarantor must be resident in or elect domicile within the territorial jurisdiction where he is needed, unless this is waived by the creditor or a competent court.

The guarantor shall present guarantees of solvency which shall be evaluated taking into account all the components of his estate.

A debtor who does not find a guarantor may replace the guarantor with any security giving the same guarantees to the creditor.

» If the debtor is required by the agreement or by law to provide a guarantor, the guarantor must be resident or elect domicile within the jurisdiction where the contract was signed except this has been waived by the creditor or a competent court.

» The guarantor must be solvent. His properties must be evaluated to ensure that he can meet his liabilities.

» Article 5(3) gives the debtor the option to provide any other valuable security such as a real property to guarantee the payment of his debt if he cannot get

a guarantor to guarantee his loan. This is also possible under Common Law for it is a question of agreement.

Article 6:

Where the guarantor accepted by the creditor subsequently becomes insolvent either voluntarily or by court decision, the debtor shall provide another guarantor or a security giving the same guarantees to the creditor.

The only exception to this rule shall be the case where the guarantee was given by virtue of an agreement in which the creditor wanted a specific person as guarantor.

» If the debtor is obliged by contract, or by a court order to provide his creditor with a surety-bond, and if the guarantor under that surety-bond subsequently becomes insolvent, the debtor must find another guarantor to provide a surety-bond or must furnish real security providing the creditor with the same guarantees. The question that may arise is: what happens if the debtor is unable to provide the same guarantees or any guarantee at all? It is suggested that the debt becomes payable. However, it is doubtful whether the creditor will get his money back immediately. It may be desirable that situations of this nature be covered by insurance taken out by the debtor and/or the guarantor.

» The above rule will not apply if the creditor requested a specific person to be the guarantor.

Article 7:

A surety-bond may not exist unless the principal recognizance guaranteed is validly constituted. However, it shall be possible to guarantee the commitments of an incapable person with full knowledge of the facts. Confirmation by the debtor of a voidable recognizance shall not bind the guarantor unless the guarantor expressly waives the nullity.

Lack of authority of the representative to commit the principal debtor that is a corporate body may be relied upon by the latter's guarantor under the conditions provided for in the preceding paragraph.

The commitment of the guarantor may neither be contracted under more onerous conditions than the principal recognizance, under penalty

of reducing the said recognizance proportionately, nor exceed the debt owed by the principal debtor at the time of the proceedings.

The principal debtor may not increase the guarantor's commitment through an agreement subsequent to the surety-bond.

» The provisions of article 7(1), (2) are similar to the Common Law. Since the contract of guarantee is an accessory contract to the main obligation, where this is vitiated on the basis of common mistake, the guarantee agreement would be avoided as well. (See *Associated Japanese Bank International Ltd v. Credit du Nord SA* [1989] 1 W.L.R 255; *Mckae v. Commercial Disposals Commission* (1951) 84 CLR 377 in Iwan, D. *Textbook on Commercial Law, op. cit.*, pp.374 – 375). Similarly at Common Law, if the transaction is void, for example, in the case of a minor or lack of corporate authority as between the principal debtor and creditor, the guarantor is not bound. (See *Coutis and co. v. Browne – Lecky* [1947] K.B. 104). However, the Uniform Act has brought in an innovation by way of an exception to the effect that if the guarantor has full knowledge of such incapacity or lack of authority and waives his right to nullify the contract, the contract would still be binding. (See also recent developments in England under Section 2 of the *Minors' Contract Act 1987* in Cheschire and Furmston's *Law of Contract*, 12th ed. London: Butterworths, 1991, p.439. See also the *Statute of Frauds Amendment Act 1828*).

» As under the Common Law, article 7(3) and (4) provide that liability of the guarantor would be discharged where there is an unauthorized variation on the principal contract and the guarantee. (See *Bolton v. Salmon* [1891] 2CH. 48 at p.54; *National Bank of Nigeria Ltd. v Awelesi* [1964] 1W.L.R. 1311 in Schmitthoff, M. C. and Sarre, D. *Charlesworth's Mercantile Law, op. cit.*, p. 487).

» The suretyship contract is predicated upon the principle of substitution, that is, the guarantor undertakes to meet stipulated liabilities in the event of the principal debtor's failure to do so. It is worth noting that the guarantor is a favoured debtor and can insist on a strict adherence to the terms of his obligations. He cannot be made liable for more than he has undertaken on the default of the principal debtor. In the event of breach of this term, the guarantor's liability will be reduced to the extent of the principal debt agreed initially by the creditor and guarantor. The guarantor's liability is limited to the amount which he has undertaken to pay. (See *Burnes v. Trade Credit Ltd* [1981] 1W.L.R. 805 in Iwan, D. *Textbook on Commercial Law, op. cit.*, p.380).

Article 8:

A surety-bond to secure a recognizance may be extended, beyond the principal and within the limit of the maximum amount guaranteed, to debt accessories and debt recovery costs, including costs incurred after notification made to the guarantor, on condition that the commitment results from a hand-written statement by the guarantor, in accordance with the provisions of Article 4 above.

The act constituting the principal recognizance shall be annexed to the surety-bond agreement.

The surety-bond may also be contracted for part only of the debt and under softer conditions.

» By virtue of article 8(1) the contract of guarantee may be extended to include cost of defending an action plus the principal debt and interest if the guarantor consents through a hand-written statement. In any case, the agreement cannot exceed the maximum amount recoverable from the principal debtor. This is in consonance with article 4(2) mentioned above. The guarantor's liability cannot be unduly extended. Similarly, in Common Law Jurisdictions, any variation of the terms of the agreement between the creditor and the principal debtor can only be valid if they obtain the written consent of the guarantor as provided by article 4 (See, *Samuel v Howarth* (1817) 3 Mer. 272 at p.278 in Ezejiofor, Okonkwo and Ilegbune, *Nigeria Business Law*, London: Sweet and Maxwell, 1982, p.141).

» Article 8(2) provides that the incorporation of the principal obligation is necessary if the surety bond is a separate document. If the surety bond is incorporated or mentioned in the principal contract, for example a contract of loan, then it will not be necessary to annex the principal contract to the surety bond.

» By virtue of article 8(3), the contract of guarantee may involve only part of the debt and may also be taken under less onerous conditions.

Article 9:

The general surety-bond to secure the principal debtor's debts, in the form of an all embracing surety-bond, of the current account debit balance or in any other form, unless otherwise expressly provided, shall

include only the guarantee of direct contractual debts. It shall be concluded, under penalty of being declared void, for a maximum amount freely determined by the parties, including the principal and all accessories.

A general surety-bond may be renewed where the maximum amount is reached. Such renewal shall be express. Any clause to the contrary shall be deemed to be unwritten.

It may be revoked at any time by the guarantor before the maximum amount guaranteed is reached. All the commitments of the secured debtor arising before the revocation shall remain secured by the guarantor.

Unless otherwise provided, a general surety-bond shall not secure the debts of the principal debtor prior to the date of the surety-bond.

» Article 9(1) is similar to the Common Law position. The surety-bond is an accessory contract in the sense that the guarantor's obligation springs out from that of the principal debtor. The liability of the guarantor is therefore coterminous with that of the principal debtor. The surety-bond is a mechanism, which provides (a) second pocket to pay if the first pocket is empty. It follows that other liabilities of the principal debtor towards other debtors for the same creditor cannot be included under the contract of guarantee.

» The provisions of article 9(2) and (3) are similar to the Common Law position. The normal rules under Common Law concerning renewal and to revocation of the offer prior to acceptance will apply to suretyship contracts. A guarantee may expressly provide that it shall be revocable or determinable either by the surety or the creditor by notice. When such a notice is given it has the effect of preventing future liability accruing under the guarantee but does not relieve the surety from liability already incurred. (See *Offord v. Davies* (1862) 12 CB (NS) 748 in Iwan, D. Textbook on Commercial Law, *op cit.*, p. 376; See also *Solvency Mutual Guarantee Co. v. Froane* (1861) 7H & N.5 in Ezejiofor et al, *op.cit.*, p.143).

» Similarly under article 9(4) a contract of guarantee cannot cover the past debts of the principal debtor which were taken prior to the surety-bond or any future debts of the principal debtor.

Section II. Terms of a surety-bond

Article 10:

The surety-bond shall be deemed joint and several.

It shall be simple when so decided expressly by the law of each Contracting State or by agreement between the parties.

» Under a surety-bond, the guarantor is deemed to be jointly and severally liable with the debtor for the guaranteed debts, unless otherwise provided under the contract or by the national law of the Member State concerned. This means that the guarantor can be sued directly in the place of the debtor or the debtor could be sued together with the guarantor. This is in consonance with the Common Law position. However, it is worth noting that article 15 (2) states that the creditor may only pursue the simple or joint and several guarantors through the principal debtor.

Article 11:

A guarantor may himself be secured by a surety designated as such in the contract.

Unless otherwise provided, one or more sureties shall be simple guarantors of the guaranteed surety.

» The guarantor may have his obligations under the surety-bond underwritten by a further guarantor, who must be designated as such in the contract. Unless otherwise, specified in the contract, the underwriting guarantor is not jointly and severally liable with the principal guarantor.

Article 12:

The guarantor may secure his undertaking by offering a security of one or more of his assets.

The guarantor may also limit his undertaking to the value of the proceeds from one or more of his assets on which he has granted such security.

» The guarantor may provide security, for the performance of his own obligations under the surety-bond by giving real security over one or more of his assets.

» In such an event, and if the creditor agrees, he may limit his liability under the surety-bond to the value of such assets if they are realized. These provisions are in consonance with the Common Law position.

III. Effects of a surety-bond

Article 13:

The guarantor shall be required to settle the debt only where the principal debtor has defaulted.

The creditor shall notify the guarantor of any default by the principal debtor and may not undertake any action against the guarantor unless formal notice to pay has been served on the debtor and has remained unheeded.

An extension of term granted the principal debtor by the creditor shall be notified by the creditor to the guarantor, who shall be entitled to refuse such extension and to force the debtor to pay, obtain a guarantee or take any preventive measure.

Notwithstanding any clause to the contrary, shortening of the period of payment granted the principal debtor shall not automatically extend to the guarantor, who shall be required to pay only on the due date fixed at the time when the guarantee was made. However, the guarantor shall incur shortening of the period of payment where, after formal notice, he does not fulfil his own obligations on the agreed date.

» As under the common Law, a guarantor is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt and until the debtor has defaulted the guarantor is not liable. See *Rouse v. Bradford Banking Co.* supra). Further, in Common Law jurisdictions, the liability of the surety or guarantor is only secondary in that, it does not arise until the principal debtor, whose liability is primary, has made default. Consequently, a creditor cannot, before any default has been committed bring an action against a surety. (See *Antrobus v. Davidson* (1817) 3 Mer.569 in Ezejiolor, Okonkwo and Ilegbune, *Nigerian Business Law*, London: Sweet and Maxwell, 1982, p. 211).

» At Common Law, before payment has been made by the guarantor, the latter has the right to compel the debtor to relieve him from liability by paying off the debt. Also, under the Uniform Act, article 13(2) provides that a formal notice to pay must be served on the debtor and unless he defaults, the creditor cannot commence legal proceedings. If the principal debtor fails to pay the debt, the surety may obtain an order to compel him to do so. (See *Ascherson v. Tredegar Dry Dock co.* [1909] 2 CH.401 in Schmitthoff, M.C.& Sarre, D. Charlesworth's *Mercantile Law*, *op. cit.*, p.488).

» With regard to article 13(3), unless the extension of time is granted with the consent of the guarantor, the guarantor would be discharged. (See Ezejiofor et al, *op.cit.*, p.493). Under Common Law, if however when agreeing to an extension of time, the creditor and debtor agree to an increase in the rate of interest, without the agreement of the guarantor and in the absence of clear words in the guarantee permitting such variation, the guarantor will be discharged (See Burnes v. Trade Credits Ltd [1981] 1W.L.R.805).

» If the period for payment of the debt is reduced or shortened, the guarantor shall nevertheless be required to pay on the due date fixed in the original contract. However, if the period of payment is shortened with consent of the guarantor who has been formally notified, the guarantor would be liable on such an agreed shortened date. This is similar to the Common Law position. (See Ezejiofor et al., *op.cit.*, p.141).

Article 14:

The creditor shall notify the guarantor of any default by the debtor, shortening or extension of the term, indicating the remaining amount still owed in terms of principal, interest and charges on the date of default, shortening or extension of the term.

Where the surety-bond is general, the creditor shall, in the month following the end of each civil quarter, be bound to inform the guarantor of the state of the principal debtor's debts, stating the origin thereof, their due dates and amounts in terms of principal, interest, commissions, costs and other accessories still owed at the end of the just-ended quarter, and reminding him of his option to revoke by repeating the provisions of this article as well as those of Article 9 above.

Where the creditor fails to comply with the formalities provided for in this article, he shall forfeit any interest owed by the guarantor from the date of the last statement to the date on which the new statement is notified, without prejudice to the provisions of Article 18 below.

Any clause repugnant to the provisions of this article shall be deemed to be unwritten.

» Article 14(1) and (2) is an important innovation brought by the Uniform Act, which has changed the relationship between the creditor and the guarantor. In addition to informing him of any failure of the debtor to pay, or any debt which has become immediately payable or whose term has been extended, he must deliver to the guarantor within one month of the end of each calendar quarter, a statement of all the debts of the debtor, with an indication of their due dates and their amounts as of the end of the quarter together with a reminder that the guarantor remains free to revoke the suretybond. (See Boris Martor et al, *Business Law in Africa: OHADA and the Harmonization process*, London: Eversheds, 2002 p.218). The requirement puts a heavy responsibility on the creditor. The precaution is desirable given the importance of the guarantor's obligation under a suretyship contract.

» Article 14(3) provides that in the event of non-compliance to these requirements, the creditor is not entitled to claim interest from the guarantor for the period between the date for which such information was last communicated until the date further information is communicated.

Article 15:

The guarantor shall be liable in the same way as the principal debtor. The joint and several guarantors shall be bound to execute the principal obligation under the same conditions as a joint and several debtors, subject to the special provisions in this Uniform Act.

However, the creditor may only pursue the simple or joint and several guarantors through the principal debtor.

» This article reinforces and completes the innovation in articles 13 and 14. Taking into consideration the provisions of article 13, the creditor cannot commence proceedings against the guarantor alone, but must also involve the debtor in any such proceedings. In practice it is normal to sue the guarantor and join the debtor in the proceedings. However, as stated in the comments under article 10 it may be expressly stipulated in the agreement that either the debtor or the guarantor may be pursued by the creditor.

Article 16:

A guarantor by court order and joint and several guarantor shall not have the right to act in priority.

Where a simple guarantor does not expressly give up this right, he may, as soon as proceedings are started against him, request an enquiry into the assets of the principal debtor, indicating the latter's

assets liable to immediate seizure on the national territory and that sufficient funds be produced for full settlement of the debt. The guarantor shall also advance money to cover the costs of the enquiry or deposit the necessary sum fixed by the competent court for that purpose.

Where the guarantor has indicated the assets and supplied sufficient funds for the enquiry, the creditor shall be responsible to the guarantor, in proportion to the assets so indicated, for the insolvency of the principal debtor occurring because of a default in the proceedings.

» In suing a debtor to recover the money, none of them, that is, neither the debtor nor the guarantor, has priority over the other. In other words, they are given equal opportunities since the debtor and guarantor are held jointly and severally liable. In practice, where proceedings have been brought against the guarantor, he can bring an application to court requesting the debtor to disclose his assets or requesting the court to make an order of seizure of the debtor's known assets to satisfy the debt.

» This is a situation where there is a recalcitrant debtor and the guarantor has taken time to indicate the assets of the debtor and the creditor does not take action against the debtor then the creditor shall be liable to the guarantor to the extent of the assets thereby indicated in the event of the insolvency of the debtor because of the creditor's inaction.

Article 17:

Where there are many guarantors for the same debtor and debt, unless they have joint and several liabilities or have given up this right, each guarantor may, upon the first proceedings instituted by the creditor; request that the debt be shared among the solvent guarantors on the date the exception is invoked.

A guarantor shall not be responsible for the insolvency of the other guarantors after the sharing has taken place.

A creditor who voluntarily splits action may not go back on his decision but shall bear the insolvency of the guarantors pursued with no possibility of carrying over the insolvency to the other guarantors.

» Under both the Uniform Act and at Common Law, guarantors must contribute in proportion to their respective shares of the debt for which they have agreed to make themselves responsible. See, *Steel v. Dixon* (1881) 17 Ch. D 825; See also Iwan, D. Commercial Law, *op.cit.*, p.384 See also, *Ellesmere Brewery Co. v. Cooper* in Ezejiofor et al, *op.cit.*, p.139). Where there are several guarantors who have provided surety-bonds to cover the same debtor for the same debt, the guarantor who is first approached by the creditor for payment may require the creditor to divide the burden of the debt among all the guarantors who are solvent as of that date, unless the guarantors have waived the benefit of this provision or unless joint and several liability has been stipulated among the guarantors. At Common Law, in reckoning the number of guarantors for the purpose of contribution, those who are not able to pay, that is, those who are insolvent are excluded (See *Ex parte Snowdon* (1881) 17 Ch. D. 44).

Article 18:

Any guarantor or guarantor's surety may invoke against the creditor all the exceptions inherent in the debt belonging to the principal debtor which tend to reduce, extinguish or defer the debt, subject to the provisions of Articles 7 and 13, paragraphs 3 and 4 and the discounts made from the debt as part of the collective proceedings in settlement of the accounts payable.

A simple or joint guarantor shall be discharged when subrogation to the rights and guarantees of the creditor no longer operates in his interest through the creditor's fault. Any clause to the contrary shall be deemed to be unwritten.

Where the fault attributed to the creditor only limits to the subrogation, the guarantor shall be discharged in proportion to the deficit of the guarantee remaining.

» The guarantor has a right to invoke exceptions inherent in the contract of debt which has the effect of reducing, extinguishing or deferring the debt, for example, any clauses giving right to a period of grace, force majeure, or reduction of interest.

- » Further, if a guarantor's interest is compromised through the creditor's fault, the guarantor is discharged from the contract

Article 19:

The guarantor shall notify the principal debtor or take third party proceedings against him before settling the debt with the plaintiff creditor.

Where the guarantor settles without warning or taking third party proceedings against the principal debtor, he shall forfeit his right to take any action against him where, at the time he paid or after such payment, the debtor had the means to declare the debt extinguished or he had paid without knowing about the guarantor's payment. However, the guarantor shall maintain his right to action for recovery against the creditor.

- » This article avoids double portions. The guarantor must inform the principal debtor before making any payment under the surety-bond in order to avoid double payments, set-off and other defences that may be available to the principal debtor.
- » If he fails to do so, he will lose his right to claim against the debtor, if subsequent to payment, the debtor would have been in a position to obtain a decision that the debt no longer existed, or if the debtor pays the debt without being aware that the guarantor had already made payment.
- » Nevertheless, in such circumstances, the guarantor remains entitled to claim reimbursement from the creditor of all moneys that have been unduly paid.

Article 20:

The guarantor shall be subrogated to all the rights and guarantees of the plaintiff creditor in respect of all that he has paid to the creditor.

Where there are many principal debtors jointly and severally liable for the same debt, the guarantor shall be subrogated to each one of them in respect of what he has paid, even where he guaranteed only one of them. Where the debtors are a couple, he shall split the action.

- » This article protects the right of the guarantor who has paid against the debtor and the creditor. Where the guarantor has properly informed the debtor and

has made payment to the creditor, he is subrogated to all the rights and guarantees possessed by the creditor against the debtor for the money paid. This is similar to the Common Law and Civil Law position (See Articles 1251 and 1252 of the Civil Code). For example, under Common Law, the guarantor has a right to the benefit of all the securities which the creditor has received from the principal debtor (see *Forbes v. Jackson* (1882) 19 Ch.D 615). If the guaranteed debt is secured by a mortgage executed by the principal debtor, the surety is, on payment of the debt, entitled to a transfer of the mortgage. (See *Copis v. Middleton* (1823) Turn & R. 224 at p.229).

» If there are many debtors who are jointly and severally liable for the same debt, the guarantor is subrogated in all the rights and guarantees of the creditor against each one of the debtor in respect of the money he has paid even though he guaranteed only one of the debtors. If the debtors are a couple, he can separate the action.

Article 21:

A guarantor who has settled may also take action against the principal debtor for payment made as principal, interest on the amount and costs incurred from the time he disclosed the proceedings taken against the principal debtor. He may also claim damages for any detriment suffered through the creditor's action.

Where there is a leftover from a partial surety-bond, the creditor may not be preferred to the guarantor who has settled and taken action on his own behalf. Any clause to the contrary shall be deemed to be unwritten.

» This article further protects the right of the guarantor. The guarantor may claim against the debtor any damage that he might have suffered as a result of his pursuit by the creditor. He can also claim interest, cost and expenses incurred in bringing the action. Similarly under Common Law, a guarantor may recover from the principal debtor the cost of defending an action brought against him by the creditor if he undertook the defence with the consent of the debtor.

Article 22:

Any action by the guarantor's surety against the guarantor shall comply with the provisions of Articles 19, 20 and 21 above.

Section 23:

Where there are many simple or joint and several guarantors for the same debt and one of them has settled the debt in due time, he may take action against the other guarantors for their own share of the debt.

» If several guarantors have provided surety-bonds for the same debt, the guarantor who pays the debt may seek reimbursement from the other guarantors, in proportion to their respective undertakings. Similarly, under Common Law, a guarantor who has paid more than his share of the common liability is entitled to compel contribution from his co-guarantors (see *Cowell v. Edwards* (1800) 2 Bos. & P. 268). This is so whether they are bound jointly and severally or only severally (see *Underhill v. Horwood* (1804) 10 Ves. 209; *Ward v. National Bank of New Zealand* (1883) & App. Cos. 755).

Article 24:

The guarantor may take action for payment against the principal debtor or request that his rights be maintained in the latter's estate even before paying the creditor:

- as soon as proceedings are taken against him;
- where the debtor has defaulted or is unable to meet his liabilities;
- where the debtor did not discharge him within the agreed time limit;
- Where the debt has fallen due to shortening of the period under which it was contracted.

» The guarantor may seek payment from the debtor or may secure his right to payment, even before he has himself made payment to the creditor in the following circumstances

- When the creditor seeks payment under the surety-bond;
- When the debtor becomes insolvent or otherwise cannot meet his obligations;
- When the debtor has not released him from the surety-bond within the agreed time period; or
- When the debt has become payable upon expiry of its contractual term.

Section IV. Extinction of a surety-bond

Article 25:

Partial or total extinction of the principal debt shall, in the same measure, entail the extinction of the guarantor's commitment.

Payment in a different form shall totally liberate the guarantor, even if the creditor is subsequently dispossessed of the thing accepted by him. Any clause to the contrary shall be deemed to be unwritten.

Renewal of the principal recognizance by change of object or cause, modification of the conditions or guarantees attached thereto shall liberate the guarantor unless he accepts to carry forward his guarantee to the new debt. Any stipulation to the contrary before the renewal shall be deemed to be unwritten.

Any commitments made by a simple or joint and several guarantor shall be handed down to his next-of-kin strictly in respect of debts existing prior to the death of the guarantor.

» The surety-bond comes to an end under the following circumstances:

If the main obligation is wholly or partially extinguished, the surety-bond will be extinguished to the same extent.

» If there is a novation of the main obligation by means of a change in the object of the obligation or the consideration, the guarantor is freed from his surety-bond unless he agrees to transfer his guarantee to the new debt. Under Common Law, the surety-bond comes to an end under the following circumstances:

1. When all the debt is paid
2. When the debt is partially paid to the satisfaction of the creditor
3. If there is a renewal of the principal debt and the guarantor is not in agreement.
4. Where the creditor has agreed to a debt cancellation to the guarantor.
5. Where the guarantor has a personal claim against the creditor to the tune of the sum guaranteed or debt due and owing

Article 26:

The guarantor's liability shall be extinguished independently of the principal recognizance:

- where, upon action being taken against him, the guarantor pleads compensation for personal claim;

- where the creditor has agreed to a debt cancellation for the guarantor alone;
- Where there is confusion between the person of the creditor and the guarantor.

» The surety-bond may be extinguished independently from the main debt in the following circumstances

- When, in the context of proceedings brought by the creditor for payment under the surety-bond, the guarantor can rely upon a set-off between his debt under the surety-bond and a debt owed to him by the creditor;
- When the creditor waives the guarantor's debt under the surety-bond; or
- When the guarantor also becomes the creditor, for example, if the guaranteed debt is assigned to him.

Article 27:

However, any confusion in the person of the principal debtor and his guarantor, where one becomes next-of-kin of the other, shall not extinguish the creditor's action against the guarantor's surety.

CHAPTER II LETTER OF GUARANTY

In the revision of the law on securities, the Uniform Act introduced one of the most widespread guarantees in international business transaction: the guarantee on first demand. The regulations were made very easy and are derived from the rules of the International Chamber of Commerce for such guarantees.

1. *Very strict conditions, both in form and content, have been set out to prevent natural persons or individuals from contracting such guarantee (article 29) and to allow only legal persons to undertake such guarantees. These legal persons must be adequately informed on the nature and contents of their undertaking (article 30).*
2. *The effects of guarantee at first call are those recognized in business practice and by case law, with the exception of a few additional measures concerning the procedure for the demand for payment, the expiry of the contractual term, the defences available to the aggrieved guarantor or the principal against abusive or fraudulent call for payment on the part of the beneficiary.*

Article 28:

A letter of guaranty shall be an agreement by which, at the request or on the instructions of the principal, the guarantor undertakes to pay a fixed amount to the beneficiary, upon the latter's first call.

A counter-guaranty letter shall be an agreement by which, at the request or on the instructions of the principal or the guarantor, the counter-guarantor undertakes to pay a fixed amount to the guarantor, upon the latter's first call.

» Article 28 defines a letter of guarantee and counter guarantee. The letter of guarantee is an agreement whereby, at the request or on the instructions of a principal, a guarantor (usually, a financial institution) undertakes to pay a defined amount to a beneficiary, upon the beneficiary's first call. It is not necessary that the beneficiary is part of the agreement.

» The counter-guarantee is an agreement whereby, at the request or on the instructions of a principal or a guarantor, a counter-guarantor undertakes to pay a defined amount to the guarantor, upon the guarantor's first call. The system of a back-to-back guarantee and counter-guarantee is used in international contracts where a performance bond is requested from a foreign contractor. In this situation, the party for whom the work is being performed will usually require the contractor to furnish a performance bond given by a local bank. This bank will in turn require a counter-guarantee to be provided by a bank in the contractor's own country, under which it can seek payment if a call is made on the guarantee that it has itself issued. In practice, the contractor will first approach its own bank to act as counter-guarantor, and that bank will then arrange for the guarantee from the local bank.

Letters of guarantee can also be used to guarantee an overdraft on a bank account or for the payment of custom duties. Letters of guarantee and counter guarantee are similar to documentary credit or letters of credit which is used in financing international trade. Documentary credit is in essence a bank's assurance of payment against presentation of specified documents. It is defined by the Uniform Customs and Practice for Documentary Credits as (UCP) "any arrangement, however named or described, whereby a bank (the issuing bank) acting at the request and in accordance with the instructions of a customer (the applicant for the credit), (i) is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or (ii) authorizes such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents,

provided that the terms and conditions of the credit are complied with” In the case of a documentary credit opened pursuant to a contract of sale, the buyer will be the applicant for the credit and the seller will be the beneficiary. (See. R.M. Goode, *Commercial Law, op. cit.*, pp. 643-689).

Section I. Formation of a letter of guaranty

Article 29:

Letters of guaranty and counter-guaranty may not, under penalty of being declared void, be subscribed by natural persons.

They shall give rise to separate liabilities distinct from the agreements, deeds and acts likely to be at their origin.

» Letters of guarantee and counter-guarantee cannot be issued by individuals. It provides that any letter of guarantee that is given in contravention of this prohibition will be null and void. The letter of guarantee is an agreement between the guarantor and the principal.

It is given upon the instructions or at the request of a principal, and it is therefore advisable for the principal also to be a party to the letter of guarantee to ensure that it corresponds properly to his instructions. Only banks and financial institutions can issue letters of guarantee and counter-guarantee.

» An essential characteristic of the letter of guarantee or counter-guarantee is that it creates obligations that are independent from the main contract in relation to which it has been given. This is referred to as the autonomy of the letter of guarantee. This means that a guarantor under a letter of guarantee, unlike a guarantor under a surety-bond, is not entitled to raise defences inherent to the debt that might be available to the principal under the main contract. A guarantor under a letter of guarantee must pay immediately, without argument, upon the first call.

» Since the letter of guarantee is a guarantee upon first demand which is independent from the principal's obligations, it is a very powerful and efficient instrument for the beneficiary, especially when it guarantees the obligations of contractors undertaking major projects such as infrastructure constructions where no specific assets are available as real security during the construction period. This approach reflects the need of the business community for a high degree of certainty in relation to payment obligations contained in commercial instruments.

Article 30:

Guarantee and counter-guarantee agreements shall not be presumed. They shall be recorded in writing and shall indicate, under penalty of being declared void:

- the designation of the letter of guaranty, or counter-guaranty at first call;
- the name of the principal;
- the name of the beneficiary;
- the name of the guarantor or counter-guarantor;
- the initial agreement, the action or event giving rise to the issue of the guarantee;
- the maximum amount of the sum guaranteed;
- the date of expiry or the event bringing about the expiry of the guarantee;
- the conditions for the call for payment;
- the impossibility for the guarantor or counter-guarantor to benefit from the exceptions of the guarantee.

» The letter of guarantee must be made in writing and must contain the following required information, failing which it will be null and void:

- An indication that the agreement is a guarantee or counter-guarantee at first call;
- The names of principal, beneficiary, guarantor and counter-guarantor;
- Identification of the main agreement in relation to which the guarantee is given;
- The maximum amount guaranteed;
- The expiry date or any event which will cause the guarantee to expire
- The conditions which must be fulfilled for payment to be made under the guarantee; and
- A statement that the guarantor may not rely on any defences that would be available to a guarantor under a surety-bond. This is commendable since it shows transparency and it makes tracing easy. It also ensures that financial institutions are aware of the nature of their undertaking.

Section II. Effects of a letter of guaranty

Article 31:

Unless otherwise provided for, the beneficiary's guarantee right shall not be transferable. However, the inalienability of the guarantee right shall not affect the beneficiary's right to transfer any amount he is entitled to by virtue of the basic yield.

- » A letter of guarantee is personal to the beneficiary and therefore, cannot be assigned, unless otherwise provided in the contract of guarantee. However, this does not prevent the beneficiary from assigning the benefit of the corresponding obligations under the main contract.

Article 32:

A guarantee and counter-guarantee shall take effect on the date of issue unless a later effective date is stipulated.

Unless otherwise provided for, the principal's instructions, the guarantee and counter-guarantee shall be irrevocable.

- » Letters of guarantee are effective as of the date of their issue unless otherwise provided in the contract of guarantee or counter-guarantee.
- » They are irrevocable unless the principal has instructed otherwise.

Article 33:

The guarantor and counter-guarantor shall be liable only to the extent of the amount stipulated in the letters of guaranty or counter-guaranty, subject to deduction of previous payments made by the guarantor or the principal unchallenged by the beneficiary.

The letter of guaranty may provide that the amount secured shall be reduced by an amount determined or to be determined on specific dates or against presentation to the guarantor or counter-guarantor of the documents required for that purpose.

- » A letter of guarantee is valid only for the amount stated in the agreement. This amount may be reduced from time to time by payments made by the guarantor or the principal which are not disputed by the beneficiary.
- » It may also be stipulated that the amount will be reduced by a determined or determinable amount on particular dates or upon presentation to the guarantor of certain documents.

Article 34:

A call for payment shall be subsequent to a written document from the beneficiary accompanied by the documents provided for in the letter

of guaranty. Such call shall specify whether the principal has defaulted in his obligations towards the beneficiary and, if so, in what way.

Any call for a counter-guarantee shall be accompanied by a written declaration from the guarantor stating that the latter has received a call for payment from the beneficiary complying with the provisions of the letters of guaranty and counter-guaranty.

Any call for payment in respect of the letters of guaranty or counter-guaranty shall be made no later than the date of expiry of the guarantee and shall be accompanied by the required documents, at the place of issue of the guarantee or counter-guarantee.

» Since there are many variations, special attention should be paid to the definitions of the conditions of payment when drafting a letter of guarantee and when demanding payment under the contract of guarantee. A call for payment must specifically stipulate whether the principal has defaulted in his obligations and the nature of any default by the principal towards the beneficiary. In practice, a distinction must be made between several types of guarantee.

In particular, the guarantee may require that reasons be given when the beneficiary demands payment or it may require the presentation of specific documents or it may be absolutely unconditional, with no more than the statutory requirement that a call upon the guarantee must be made in writing and state that the principal is in default of his obligations or when a call is made upon a counter-guarantee, that the guarantor must state in writing that he has received a demand for payment from the beneficiary.

» Any request for payment under the letter of guarantee must be made in writing by the beneficiary who must comply with any conditions stipulated in the guarantee for making a call under it. A call for payment in respect of a guarantee of counter guarantee must be made before the expiry date of the guarantee.

Article 35:

The guarantor or counter-guarantor shall have a reasonable time to examine whether the documents produced comply with the provisions of a guarantee or counter-guarantee.

Prior to any payment, the guarantor shall, without delay, forward the beneficiary's request and all the documents attached thereto to the principal for information, or, where necessary, to the counter-guarantor for transmission to the principal for the same purposes.

Where the guarantor decides to reject the call for payment, he shall inform the principal and beneficiary thereof as soon as possible and make available to the latter all the documents presented.

Similarly, the guarantor shall, without delay, notify the principal or, where necessary, the counter-guarantor who shall notify the principal under the same conditions, of any reduction in the amount of the guarantee and of any act or event terminating the guarantee.

» If the beneficiary calls the guarantee, the guarantor must be allowed a reasonable time period within which to verify that it conforms with any documents supplied by the beneficiary as against the requirements of the letter of guarantee. This provision does not specify what is a reasonable time period. It is hoped that the Common Court of Justice and Arbitration would determine what is a reasonable time. It may vary from case to case depending on the given circumstances.

» Before any payment is made under the letter of guarantee, the guarantor must also inform the principal of the call and transmit to him a copy of the demand and all accompanying documents.

» The guarantor has an inherent right to examine the document in order to determine whether he should pay or reject payment. He is bound to inform the beneficiary and the principal of any decision he takes in writing if the guarantor decides to refuse the demand for payment, he must inform the principal and the beneficiary as soon as possible. He must also inform the principal of any reduction in the amount of the guarantee and of any event causing the guarantee to terminate.

Article 36:

The principal may not prevent the guarantor or counter-guarantor from paying unless the beneficiary's call for payment is manifestly excessive or fraudulent. The guarantor and counter-guarantor shall have the same options under the same conditions.

» The principal cannot order the guarantor not to make payment under the contract of guarantee, unless the call for payment is excessive or fraudulent. In practice, a principal will often try to block payment under a letter of guarantee because of a contractual dispute even though the guarantee is independent of the main contract. This may result to a lot of litigation.

Article 37:

A guarantor or counter-guarantor who has made valid payment to the beneficiary shall have right to the same action as the security against the principal.

» After payment to the beneficiary by the guarantor, he has a right of action against the principal. This means that if payment has been properly made under the letter of guarantee, the guarantor may seek reimbursement from the principal.

» Although, it is not expressly stated in the Uniform Act, it would seem that the principal or the beneficiary can claim from each other or against the guarantor. For example, the principal may claim against the beneficiary where payment was made on a request that was excessive and fraudulent or against the guarantor where payment was made in contravention of a court order. Further, the beneficiary may claim against the guarantor in the event of a refusal to pay or a delay in payment when the call upon the guarantee has been properly made.

Article 38:

The guarantee and counter-guarantee shall cease:

- either on the specified calendar date or at the expiry of the time limit agreed on;
- on presentation to the guarantor or counter-guarantor of the discharge documents specified in the letters of guaranty or counter-guaranty; or
- On a written declaration of the beneficiary discharging the guarantor and counter guarantor from their recognizance.

» A contract of guaranty comes to an end: first, on a specified date; second, on an agreed time limit; third, on the presentation of discharged documents specified in the letters of guaranty; fourth, on a written declaration of the beneficiary discharging the guarantor from their obligation. The provisions of the Uniform Act are laudable. However, it is recommended that specimen forms of a contract of guarantee and discharge should be provided for guidance. This is a common practice in Common Law jurisdictions.

PART II TRANSFERABLE GUARANTEES

Article 39:

Transferable guarantees shall include the possessory lien, pledge, pledging without dispossession and preferential rights.

Transferable guarantees subject to notification shall be registered in the Trade and Personal Property Credit Register provided for in the regulations governing the organization and functioning of the said Register.

» This provision stipulates that securities over movable property comprises of possessory lien, pledges with or without dispossession and preferential rights.

» These securities over movable property must be registered in the Trade and Personal Property Credit Register as provided by article 19 et seq: of the Uniform Act on General Commercial Law. These provisions are an innovation which is commendable since it encourages transparency. The Commercial Registry is a repository of business transactions and therefore can serve as an index of the economy of the country. The commercial Registry acts like a spotcheck of business transactions. However, in practice, there have been lapses in its operation since the registry lacks the machinery for an efficient operation.

Article 40:

The Registrar shall issue to anyone who so requests:

- either a general statement of existing entries together with any endorsements in the margin;
- one or more statements related to each category of entries; or
- a certificate showing that no entries have been made.

Any entry, modification or striking off which does not conform to the provisions of the law or any issue of incomplete or erroneous extracts shall commit the Registrar.

CHAPTER I POSSESSORY LIEN

Articles 41 to 43 deal with the right of retention which is a perfect and complete security of general application. Henceforth, it can guaranty all debts owed to the creditor which must be certain, liquidated and due. It may be exercised when there is a link or connection between the cause of the debt and the asset itself. It places the creditor in a situation of pledge and gives him an enforceable right. These provisions are derived from Senegalese Law on securities. (see, Joseph Issa-Sayegh, Le droit de retention en droit sénégalais, Mélanges Charles Freyria, p.69 et seq ; Penant, no. 810, octobre-décembre 1992, p. 261 et seq.).

Articles 41 to 43 which deal with possessory liens are not an innovation under the Common Law. Under the Common Law possessory liens may be sub-classified under general liens

and particular liens. A general lien entitles the lienee to retain possession of any of the debtor's chattels to secure payment of all sums due on a general balance of account between them. Thus, a general lien is exercisable in respect of a debt or account which has no relation to the chattel subject to the lien. In practice, general liens are created by agreement and is confined to certain trades and professions, such as, solicitors' lien, bankers' liens and agents' liens. Particular liens entitle the lienee to retain possession only of those of his debtors' chattels in respect of which the debt arose, that is, it entitles the lienee to hold the debtor's goods pending payment of charges incurred in relation to the goods detained, there being no right to retain the goods for the purpose of security payment of some other debt due from the owner unconnected with the goods in question.

Examples of particular liens include the innkeeper's lien, common carrier's lien, artificer's lien and the salvor's lien. (See, Iwan Davies, Textbook on Commercial Law, op. cit., pp.320-323).

However, this right of retention is new to the French-speaking provinces of Cameroon. The possessory lien under the Uniform Act is very similar to the particular lien under the Common Law since it is applicable in securing payment of a debt which has a causal link or is connected with the goods detained. Under both the Uniform Act and the Common law jurisdictions, the debt must be certain, liquid and due. It is reiterated that under civil law and OHADA, the right of retention is an independent and complete security.

Article 41:

Any creditor legitimately holding a debtor's asset may hold same pending full payment of his due, regardless of any other security.

» Under both the Uniform Act and at Common Law, a lien is a right normally given by operation of law to one person over the goods of another person to secure payment of a sum of money owed by that other person to the lienee.

Article 42:

The possessory lien may be exercised only:

- prior to any distraint;
- where the debt is unquestionable, liquid and due;
- where there is a link between origin of the debt and the asset held.

The link shall be deemed to be established where the holding of the asset and the debt result from business dealings between the creditor and debtor.

The creditor shall give up the possessory lien where the debtor furnishes an equivalent security.

» This lien can be exercised only if the asset concerned is not already subject to a seizure under the Uniform Act on Simplified Recovery Procedures and Measures of Execution (See article 130 et seq.). Further, the debt owed to the creditor must be certain, liquidated and due. See the case of Société Maregel (Conseil: SCP DIOUF et FALL, Avocats à la Cour) c/ Sérigne Mustapha MBACKE (Conseil: Maître Chiekh Amadou DIOP, Avocat à le cour), Arrêt No. 016/2002 of 27 June 2002 in the Common Court of Justice and Arbitration, Abidjan in Recueil de Jurisprudence, Numéro Spécial Janvier 2003, pp.31-32. There must be a causal link or connection between the debt and the asset itself. A link is deemed to exist where both the possession of the asset and the debt are the consequence of a business relationship between the creditor and the debtor. For example, in the case of an innkeeper's lien, that is the lien of a hotel proprietor over the goods and belongings of the guests. A common carrier has a lien when his charges become due, normally, when the goods arrive at their destination.

» A creditor must waive his right of retention if the debtor gives him another equivalent real security (or either movable or immovable assets) of a sufficient value to cover the amount of the debt in exchange.

» The debtor may also propose a personal security if the creditor agrees to waive his right of retention in exchange.

The provisions of this article are similar to the position at Common Law as mentioned in the introduction of chapter one.

Article 43:

Where the creditor receives neither payment nor security, he may, after notification to the debtor and proprietor of the asset, exercise his right of pursuit and preferential rights as in a pledge.

» If the debtor neither makes payment nor provides any guarantee, and if the creditor has an enforceable right as defined in article 130 et seq. of the Uniform Act on Simplified Recovery Procedures and Measures of Execution, the creditor may then have a formal demand for payment served on the debtor by a bailiff. Failing payment within an eight-day period, the creditor may enforce his rights, either by

organizing a sale by auction of the retained assets or by seeking a court order attributing the asset to himself up to the value of the debt.

» In the event of competing claims, a creditor with a possessory lien has the same rank as a creditor with an ordinary pledge, which is higher than that of certain other categories of creditors including those who are secured by pledges without dispossession.

CHAPTER II PLEDGES

The rules applicable to pledges (articles 44 to 62) have been updated by facilitating the creation and realization of this type of security without causing prejudice either to the debtor or the creditor. Most of the rules for particular transactions are governed by rules and regulations of international trade. In order to realise a pledge, it is necessary to have an enforceable right. This means, all pledges need a court decision in case of a forced sale.

A pledge is the delivery of personal property usually goods by a borrower (called pledgor) to a lender (called pledgee) to be held by him as security for a loan made to the borrower. The property pledged is to be retained by the pledgee until the debt is paid according to the contract between the parties. It is essential to the creation of a pledge that the property pledged must be delivered to the pledgee. A pledge involves the transfer of possession of the security, actual or constructive, to the creditor. Delivery was the essence of pledge. It is a loan upon security and the pledgee has the right to retain the property until payment on the due date; to sell the property if the borrowed money is not paid on the due date and to transfer the property subject to the pledgor's right to its return upon payment of the money due.

A lien is the right of a person in possession of goods to retain possession of them until some claim against the owner of the goods is satisfied. At Common Law the lienor had no power of sale, he had merely a personal right of retention until payment of the claim. A lien could not be transferred or assigned to a third party. A lien may arise by implication of law or by contract between the parties but usually it arises by law as a consequence of some other transaction between the parties. It is also known as possessory lien because it lasts so long as the possession lasts. An equitable lien differs from a Common Law lien in that possession by the creditor of the property to which the equitable lien is attached is not necessary to the existence or continuance of the lien. Equitable lien is therefore non-possessory. It is satisfied only by a judicial sale of the property charged. (See, Ezejiolor, Okonkwo and Ilegbune, op. cit., p. 116).

Article 44:

A pledge shall be a contract in which personal property is offered to the creditor or a third party agreed upon by the parties as security for a debt.

» The definition of a pledge as stated in article 44 is similar to a pledge under Common Law. The classic type of pledge is a contract whereby a movable asset is handed over to the creditor or to an agreed third party as security for a debt. It can be oral or in writing. (See Iwan Davies, *Textbook on Commercial Law, op.cit.*, pp 318-39; Osborne's *Concise Law Dictionary*, 6th ed, by John Burke, 1976, p.255).

Section I. Constitution of a pledge

Article 45:

A pledge may be constituted for past, future or possible debts provided they are not voidable. Cancellation of a secured loan shall entail cancellation of the pledge.

» A pledge may be given for any debt, whether existing or future or even only potential. The pledge, however, becomes null and void if the debt it guarantees is itself null and void.

Article 46:

Any personal property, tangible or intangible, may be pledged.

The parties may, in the course of executing the contract, agree on subrogation of the pledged asset by another.

The pledge may also extend to sums or assets deposited as collateral security by civil servants, legal officials or any other person to guarantee breaches for which they may be liable and loans obtained for constituting the said collateral security.

» Any movable assets, be it tangible or intangible may be pledged. Another asset may be substituted for the asset originally pledged if the parties so agree during the course of the pledge agreement.

Article 47:

The pledgor shall be owner of the asset pledged. Where he is not the owner, a bona fide pledgee may oppose any action for recovery by the owner under the conditions relating to the possessor in good faith.

The pledgor may be the debtor or a third party. In the latter case, the third party shall be considered as a security.

» The asset may be pledged either by the debtor or by a third party who in either case must be the owner of the asset. There is need for a clear document of ownership of the assets before any transaction is carried out. At Common Law, you cannot pledge what you do not own. For example, 'A', the father owns property 'X', 'B' the son pledges property 'X' to 'C' and takes a loan in good faith. 'A' does not want the transaction and wants his property back. 'C', who entered the transaction in good faith will oppose the action of 'A'. 'A', the father who is the third party will be treated as the person who secured the loan.

This is commendable because it protects the creditor from losing his money. If on the other hand, the transaction was entered in bad faith, that is 'C' knew that 'B' had no authority to pledge property 'X', then 'C' cannot invoke article 47.

Article 48:

The pledge contract shall not have the desired effect unless the pledged asset is effectively handed over to the creditor or to a third party agreed upon by the contracting parties.

A promise of a pledge, especially of future assets, shall commit the promisor to hand over the asset under the agreed conditions.

» The pledge agreement is effective as between the parties once the asset has been handed over to the creditor or the agreed third party.

» Any type of corporeal movable property may be pledged, the commonest type of pledges are of goods, but documents including insurance policies and share certificates may be pledged.

Under African customary Land Law, which was applicable in Anglophone Cameroon before OHADA land can be pledged. The Uniform Act has brought an innovation here by repealing this aspect of customary Land Law. Consequently, land can no longer be pledged but mortgaged.

Article 49:

Whatever be the nature of the debt guaranteed, the pledge contract may not be binding on third parties unless it is recorded in writing, is duly registered and contains a statement of the amount owed and the kind, nature and quantity of personal property pledged.

However, the written document shall not be necessary in the case where the national law of each Contracting State allows for freedom of proof depending on the amount of the recognizance.

» In order to be valid as against third parties, the pledge agreement must be made in writing and registered, unless the amount of the debtor's obligation is below a certain threshold and if the National law of the relevant Member State permits the pledge agreement to be made orally. This means that a contract of pledge can be oral and as far as the parties are concerned it is valid and binding. However, it will not be binding on third parties unless it is recorded in writing.

Section II. Special clauses of a pledge

Article 50:

(1) A debtor who pledges his claims against a named third party shall surrender to the secured creditor his proof of claim and notify his immediate debtor about the transfer of his claim with option of redemption, failing which the secured creditor may carry out such notification.

At the request of the secured creditor, the transferred debtor may undertake to pay the pledgee directly. Under penalty of being declared void, the said commitment shall be recorded in writing. In such case, the transferred debtor may not invoke against the secured creditor the exceptions founded on his personal relationship with his immediate creditor.

Where the transferred debtor has not undertaken to pay the secured creditor directly, he shall however be required to do so where, on the due date; he cannot rely on any exception against his immediate creditor or the secured creditor.

The creditor of the transferred debtor shall remain jointly and severally bound with the latter to pay the pledged debt.

A secured creditor who has obtained payment of the transferred debt with option of redemption shall be accountable to his immediate debtor.

2. Notification of transfer of a debt with the option of redemption shall not be necessary for pledging bearer bonds, which shall be done by simple delivery, apart from the drafting of a document to record the pledge.
3. The transfer of debts shall be done for bills to order by endorsement with the option of redemption or, for registered certificates, by entry of the pledge on the registers of the issuing establishment.
4. A pledge may be constituted on a receipt showing deposit of transferable securities. Such receipt shall be handed over to the secured creditor and the constitution of the pledge shall be notified to the depositing establishment which may not reconstitute the encumbered securities to the owner of the receipt unless he presents this document or a final court ruling in lieu thereof or one ordering restitution.

»» If the debtor pledges his claims against a named third party, he must provide the creditor with any document entitling him to payment of the debt, and must serve upon the third-party debtor notice of the transfer of the debt. If he fails to do so, the creditor himself may serve such a notice.

»» The creditor may also request an undertaking from the transferred debtor to make payment directly to him. This undertaking must be made in writing otherwise it will be void. Once the undertaking has been made, the transferred debtor cannot make any objection to payment for any reason arising out of his relations with the transferring debtor.

»» If the transferred debtor has not undertaken to pay the creditor upon the due date, he must nevertheless do so if on that date, he has no valid reason not to pay either the transferring debtor or the beneficiary of the pledge. The transferring debtor remains jointly and severally liable with the transferred debtor for the payment of the debt.

»» If transferable securities are to be pledged, the debtor may do so by providing the creditor with a receipt for their deposit with the third party who holds them on his behalf. The creation of the pledge must also be notified to the

depository of the securities, who must not return them to their owners unless on presentation of the receipt or of an enforceable judgment ordering their return.

Article 51:

Apart from loan on stock subject to the rules on pledges, banks may, where so authorized, grant three-month loans on quoted securities which the secured creditor may liquidate on the stock exchange without formality on the day following the due date, where repayment has not been made.

» . A person may buy shares or stocks from a stock exchange market for five million FCFA and pledge those stocks for a loan from a bank. The bank may grant a loan for three months based on quoted securities which can be sold at the stock exchange market. This is a welcome innovation. This would be possible when the Douala Stock Exchange Market becomes operational.

Regrettably, it cannot work in Cameroon because we do not have quoted security on stock exchange. The trading facilities are not available. There is total lack of networking which obtains in developed countries such as the Paris Bourse (Cac 40), London Stock Exchange (FTSE), Nasdaq in New York, Nikkei Average in Tokyo.

Article 52:

The pledging of merchandise which the debtor may dispose of by a pledge document, bill of lading, transport or customs receipt shall be constituted according to the provisions proper to each of these securities or documents.

» In certain circumstances specific formalities will have to be complied with, depending upon the nature of the assets that are pledged.

The pledging of goods which may be at the debtor's disposal by virtue of a pledge certificate, a bill of lading or other transport or customs document is subject to the particular rules laid down for such matters.

Article 53:

Intangible property shall be pledged under the conditions provided for by specific instruments for each type. Unless otherwise provided by law or other stipulations, the handing over to the creditor of the deed recording the existence of the right shall dispossess the settlor.

» Intangible assets are pledged in accordance with any specific rules that may be applicable. For example, pledges of patents and trademarks registered with the African Intellectual Property Organisation (OAPI) are also required to be registered with OAPI if they are to be valid as against third parties. Where there are no specific rules, intangible assets are pledged by handing over to the creditor the document that evidences title to them.

Section III. Effects of the pledge

Article 54:

The secured creditor shall keep or cause the agreed third party to keep the pledged asset until full payment is made of the principal, interest and costs of the debt which encumbered the pledge.

Where one or more additional debts arise between the same debtor and creditor after the pledge but become due before the payment of the first debt, the creditor may retain the pledged asset or cause it to be retained until full payment of all the debts, even where there are no contractual provisions to this effect.

» A pledge is an efficient form of security as it enables a creditor to retain possession of the pledged asset or have it held by a third party until full payment of the debt including interest and related costs. The interest of the creditor is well protected under OHADA. The pledge has the effect of removing from the debtor's possession the asset or document of the title to that asset which it provided as security to the creditor.

» Furthermore, even in the absence of any contractual stipulation to this effect, if the debtor incurs any new debts viz-a-vis the creditor after the pledge has been created, and if such new debts are payable before payment of the original debt, the creditor may retain the pledged asset until all the debts have been paid in full. Pledges are often used in project financing operations especially pledges over third party-debts, bank accounts or specific contractual rights. For example, a pledge over third-party debts will enable a bank to obtain a guarantee in the form of

specific identified third party debts that will be payable to it in the event of default by the project company.

Article 55:

Where the creditor has been dispossessed against his wish, he may claim the pledged asset as a bona fide possessor.

» If the goods are taken out of the creditor's possession without his consent, he can make a claim over the pledged asset as a bona fide possessor. This is commendable because the interest of the creditor is well protected by the law.

Article 56:

1. Where payment is not made by the due date, the secured creditor armed with the writ of execution may proceed with the liquidation sale of the pledged asset eight days after notice to the debtor and, where necessary, to the third party settlor of the pledge under the conditions provided for by the rules of measures of execution.

The competent court may authorize the assignment of the pledge to the secured creditor up to the amount of the debt and following an estimate at quoted prices or as determined by an expert.

Any clause in the contract which authorizes the sale or assignment of the pledge without complying with the foregoing formalities shall be deemed to be unwritten.

2. Where the asset pledged is a claim:

- where the pledged claim matures before the secured debt, the secured creditor may claim the amount of the principal and interest, unless otherwise provided;
- where the secured debt matures before the pledged claim, the secured creditor shall wait for the pledged claim to mature before he can claim the amount.

Furthermore, unless otherwise agreed upon, he shall obtain interest by deducting it from what is owed him in interest and principal.

In either case, the secured creditor shall receive the amount of the pledged claim subject to being answerable, as proxy, for any surplus received on behalf of the pledge settlor.

» In the event of default, a creditor who has an enforceable right to payment may arrange for the forced sale at public auction of the pledged asset eight days after notice has been served on the debtor and if need be on the third party who has guaranteed the pledge. The sale is organized in accordance with articles 120 *et seq* of the Uniform Act on Simplified Recovery Procedures and Measures of Execution.

» Alternatively, the creditor may request the court to attribute the asset to him, within the limits of the value of his claim. These formalities are mandatory and the pledge agreement may not provide for the sale or attribution of the asset in any other way.

According to article 56(2) when the pledged asset is a claim, payment to the creditor is made as follows:

- If the due date of the claim is earlier than the due date of the transferring debtor's own debt, the creditor may receive payment of the amount in principal and interest;
- If the due date of the transferring debtor's own debt is earlier than the due date of the claim, the creditor must wait until the later date before receiving payment.

In either case, the creditor receives the whole amount of the claim and acts as his own debtor's agent with regard to any amount received in excess of his own claim.

Article 57:

The secured creditor shall be preferred, in respect of the price of the asset sold or compensation under insurance against loss or destruction, for the amount of the principal, interest and costs of the secured debt.

He shall exercise his pre-emptive right in conformity with Article 149 below. Where there are several secured creditors, they shall be paid off by order of entry of successive pledges or, if no entry was made, by order of constitution of the pledges.

» If the pledge asset is sold or lost or destroyed, the creditor has a preferential right over the proceeds of the sale or over any insurance payment. This preferential right covers the principal of the secured debt plus interest and costs. It is expected that the Trade and Personal Property Credit Registry will have an accurate record of the registration and the time the pledge was registered to avoid any confusion.

Article 58:

1. Unless otherwise provided, the secured creditor may neither use the asset pledged nor take the earnings from it. Where he is authorized to take the earnings, he shall deduct them, unless otherwise provided, from the interest and capital owed him. Where the pledged asset is a claim, the provisions of Article 56 (2) above shall apply.
2. The creditor or an agreed third party shall watch over the asset and preserve it as if he were a paid depositary. Where the asset is in danger of perishing, the creditor or agreed third party may, on the authorization of a competent court, ruling in emergency session, sell it. Effects of the pledge shall then be carried forward to the proceeds of the sale.
3. An agreed third party and, where necessary, a purchaser in bad faith of the pledged asset shall be jointly and severally liable with the secured creditor for the non-fulfilment of these obligations.

» Unless otherwise agreed between the parties, the creditor may not use the pledged asset, and he should not take the revenues from it. If he is allowed to take such revenue, he must set these off against the amount of his claim unless otherwise stipulated in the agreement.

» If there is a risk that the pledge asset will be lost or damaged, the creditor or third party in whose possession it is, may seek urgent authorization from the court to sell it. In such an event, the proceeds of the sale are pledged to the creditor. In this regard the interests of both the creditor and debtor are protected. Loss is minimized. It should be recalled that the competent court is the Court of First Instance.

A purchaser in bad faith will be held jointly and severally liable with the secured creditor.

Article 59:

Where the secured creditor has been fully paid his principal, interest and costs, he shall restitute the asset together with all its accessories. The settlor shall then take into account the appropriate and necessary expenses the secured creditor incurred to preserve the asset.

The pledge of a consumer asset shall allow the creditor to reconstitute an equivalent asset.

- » The creditor must return the asset to the debtor, who must reimburse the creditor for any expenses that have been necessarily incurred for its safekeeping following complete satisfaction of the debt. Thus the creditor cannot unnecessarily hold on to the assets when the debt has been fully recovered.

Section 60:

The pledge shall be indivisible notwithstanding the divisibility of the debt towards his heirs or that of the creditor.

The debtor's heir who has paid his part of the debt may not claim restitution of his portion of the pledge, even where it is divisible by nature, as long as the debt is not fully paid.

The creditor's heir who has received his own share of the claim may not reconstitute the pledge, even if it is divisible, to the detriment of joint heirs who have not been paid.

- » A pledge is indivisible even if the debt itself is divisible. Therefore in the event of the death of the debtor, if one of the heirs pays his portion of the secured debt, that heir is not entitled to request the return of a portion of the pledge asset, even if division is physically possible.

- » Similarly, in the event of the death of the creditor, if one of his heirs has received payment of his portion of the secured debt that heir cannot return any portion of the pledge asset to the debtor. The sanctity of the pledge is maintained in spite of the demise of one or all the parties. The Common Law notion of 'once a pledge always a pledge' is recognized. However, it comes to an end once the debt is fully repaid.

Section IV. Extinction of the pledge

Article 61:

The pledge shall terminate when the obligation it secures is fully extinguished.

- » The pledge terminates when the debt for which it has been granted has been paid in full.

Article 62:

The pledge shall terminate independently of the recognizance secured where the asset is voluntarily returned to the debtor or third party settlor, or where a competent court orders restitution as a result of the fault of the secured creditor, unless a receiver is designated to assume the duties of an agreed third party.

» Further, the pledge terminates if the creditor voluntarily returns the pledged asset or is ordered to do so by the court.

CHAPTER III PLEDGING WITHOUT DISPOSSESSION

In addition to the classic pledge without dispossession over a business, professional equipment or motor vehicles to which no significant modifications have been made (articles 69 to 90 and 91 and 99) two other types of pledges over transferable securities and shareholdings (articles 64 to 68) based on the Uniform Act on Commercial Companies and Economic Interest Groups and the pledges over stocks, goods and raw materials (articles 100 to 105) have been introduced.

Under Common Law and in Civil Law, any type of corporal movable, such as equipment, motor vehicles, raw materials, stocks and goods may be pledged (see Cozens-Hardy J. in Harrold V. Plenty (1901) 2 Ch. 314 at p.316. Iwan Davies, Textbook on Commercial Law, op. cit., 320). However, the pledging of shareholdings is an innovation.

Article 63:

The following may be pledged without dispossessing the debtor:

- partnership rights and transferable securities;
- a business;
- professional equipment;
- motor vehicles;
- stocks of raw materials and merchandise.

» In addition to the classic type of pledge where the asset is removed from the debtor's physical possession, there is a category of pledges where the debtor is not dispossessed. This type of pledge is very convenient in practice, since the creditor

may obtain security over assets which may have a very high value, while the debtor is not deprived from using these assets which are essential for his business.

The pledging of a business may extend to all the assets comprised in the business. This may also involve professional equipment, stocks of raw materials and merchandise. It is similar to the Common Law concept of a floating charge. In the much-quoted judgment of Romer L. J in *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284 at p. 295, it was stated that a floating charge has three characteristics, namely, "(1) if it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as it concerns the particular class of assets I am dealing with". Consequently, the underlying concept is that of a class of revolving assets which the company is free to manage and deal with in the ordinary course of business until an event occurs which entitles the creditor to intervene and assert his security rights over the assets then held or subsequently acquired by the company. The occurrence of such an event is said to cause the charge to 'crystallize'. Until crystallization, the security interest does not attach and the chargee has no right *in specie*, merely an interest in a fluid fund of assets. A floating charge creates an immediate security interest but until crystallization no specific asset is appropriated to the security and the debtor company is therefore free to deal with the asset in the ordinary course of its business. (See also Lord Macnaghten in *Illingworth v. Houldsworth* [1904] A.C. 355 at p. 358; Buckley, L. J in *Evans v. Rival Granite Quarries Ltd* [1910] 2 K.B. 979 at p.999; in R.M.Goode, *Text book on Commercial Law, op. cit.*, pp. 786-803. . See *Official Assignee of Madras v. Mercantile Bank of India Ltd* [1935] AC 53, Lord Wright; Iwan Davies, *op.cit.*, p. 323. Also see, Charlesworth's *Mercantile Law*, 14th ed. by Clive M. Schmitthoff and David A.G. Sarre, London, Stevens & Sons, 1984, P. 475; Steven's *Elements of Mercantile Law*, 12 ed. (1955) by John Montgomerie, B.A., London, Butterworth &Co (publishers) Ltd. 1955 p. 490 – 491).

These pledges may be made contractually or by court order. This provision recognizes five different types of assets which can be pledged without transferring the assets:

- transferable securities and other partnership rights or shareholdings;
- a business or any of its components excluding real property rights;
- professional equipment;
- motor vehicles;
- stock of raw materials and goods.

This is an innovation. At Common law, a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive.

Section I. Pledging of partnership rights and transferable securities

Articles 64 to 68 of the Uniform Act on securities must be read with article 747 of the Uniform Act on Commercial Companies and Economic Interest Groups and also with regard to registration in the commercial registry provided by the Uniform Act on General Commercial Law (articles 44 and 45) and finally with articles 88 et seq. and articles 237 et seq of the Uniform Act on Simplified Recovery Procedures and Measures of Execution relating to seizure of transferable securities or other partnership rights or shareholdings. A pledge must be made in writing, either by a notorized deed or private contract. Under penalty of being declared null and void, it must contain all the information provided in article 65.

The pledge is effective once it has been registered with the Commercial Registry. It secures the rights of the creditor for a five year period which is renewable. Both court-ordered and contractual pledges must be notified to the company or establishment concerned.

Article 64:

Partnership rights and transferable securities of commercial companies as well as the transferable rights of corporate bodies subject to registration in the Trade and Personal Property Credit Register may be pledged by agreement or by court order.

» Transferable securities are shares, bonds negotiable or non-negotiable in a company and also in a partnership. This provision allows a creditor to obtain security over any type of shares in any type of company or any bonds held by his debtor, and is likely to be used more and more frequently over financial instruments with the development of financial markets such as the *Bourse Régionale des Valeurs Mobilière* (Regional Stock Exchange) BRVM in West Africa and *Bourse Camerounaise des Valeurs Mobilières* (Cameroon Stock Exchange) (BCVM) and *Bourse des Valeurs Mobilière d'Afrique Centrale* (Central African Stock Exchange) BVCAM in Central Africa. In particular, in the context of project finance initiatives, the shares of any special purpose vehicle created for the project are often pledged in favour of financial institutions.

This is an innovation. Under the Common Law, the pledge was by its very nature confined to physical assets, including documents. The pure intangible could not be reached by this device and could be accommodated only by a valid non-possessory security interest. (See, Cozens-Hardy J in *Harrold v Plenty* (1901) ch. 314 at p.316; Iwan Davies op. cit, p 320; R. M. Goode, *Commercial Law*, Penguin Books, Middlesex; 1985, p. 713.

» These pledges must be registered in the Trade and Personal Property Credit Registry following article 27 of the Uniform Act on General Commercial Law. This registration requirement is a welcomed innovation in the sense that there is transparency, certainty, predictability and easy reference.

Article 65:

The pledge shall be constituted by a duly registered notarial or private deed. It shall, under penalty of being declared void, contain the following details:

1. the full name and domicile of the creditor, debtor and pledge settlor, where he is a third party;
2. the registered office and the registration number in the Trade and Personal Property Credit Register of the corporate body issuing the partnership rights and transferable securities;
3. the number and, where necessary, the registration numbers of the pledged securities;
4. the amount of the debt secured;
5. the conditions for claiming the principal and interest;
6. the election of domicile by the creditor in the jurisdiction where the Trade and Personal Property Credit Register is kept at the place where the company was registered.

» If the pledge is made by agreement, this must be done either by notarized deed or by a private contract which must be registered. The pledge agreement must include certain information, such as the identities of the debtor and creditor, the registration number of the company whose securities are pledged in the Trade and Personal Property Credit register, its registered office and the amount of the secured debt. The problem is that the society is not aware of this registration requirement and even when they do, they are very reluctant or timid to conform because of the expenses involved, the cumbersome procedure and the plethora of documents required. These are some of the reasons why the bulk of pledging transactions have not yet conformed to the OHADA system. The practical solution may be to make registration cheaper and easier than it is at present.

Article 66:

In the same cases and under the same conditions as those laid down in Articles 136 to 144 below, the competent court may authorize

the creditor to register the partnership rights and transferable securities.

The court decision shall contain the details referred to in Article 65 above.

» If a creditor wishes to obtain a court-ordered pledge, the conditions laid down for court-ordered mortgages in articles 136 to 144 are applicable. The creditor seeks temporary registration of the pledge on the property. These conditions seem unnecessarily cumbersome. It may seem preferable for the creditor to proceed in accordance with articles 85-90 and 236-245 of the Uniform Act on Simplified Recovery Procedures and Measures of Execution regarding the seizure of shareholdings.

» If the pledge is given not by agreement but pursuant to a court order, the court order must contain the same information required under article 65 mentioned above.

Article 67:

(1) Subject to the special provisions governing the commercial companies and corporate bodies concerned, pledging by agreement or by court order shall be effective only where it is registered in the Trade and Personal Property Credit Register.

Provisional registration and final registration shall take place respectively after the decision authorizing the pledge and the final validation decision.

Registration shall preserve the rights of the secured creditor for five years from the date of registration. It shall cease to have effect where it is not renewed before the expiry of the period.

(2) Apart from the registration referred to above, pledging by agreement or by court order shall be notified to the commercial company or corporate body which issued the partnership rights and transferable securities or the documents recording the partnership rights.

(3) The provisions of Articles 80 and 82 below shall apply to the pledging of company shares.

» The pledge is only effective once it has been registered with the Trade and Personal Property Credit Register. This registration is valid for five years and is renewable.

» The pledge must also be notified to the issuing company of the shares or other interests which have been pledged. In accordance with article 747 of the Uniform Act on Commercial Companies and Economic Interest Groups, if the pledge covers shares which are registered shares of a joint stock company (Société Anonyme S.A), it should be registered in the company's corporate books and in particular in the share transfer ledger. The pledge shares themselves must be transferred in a special account in the name of the holder. Furthermore, it would be desirable for the pledging creditor to obtain a transfer form and share certificates for the pledged shares, as guarantee in the event of enforcement of the pledge.

» Any modifications, partial or total striking off must be entered on the margin of the original entry. (See articles 80 and 82).

Article 68:

Pledging shall confer on the creditor:

- a right of pursuit and a right of sale which he shall exercise in conformity with the provisions of Section 56 (1) above;
- a preferential right which he shall exercise in conformity with the provisions of Article 149 below.

» If the creditor has an enforceable right, the pledge over shares or other interests entitles him to organise their sale at auction in the event the debtor does not pay his debt on the due date and after a notice period of eight days has elapsed following a formal demand for payment, or he may seek a court order attributing the shares to himself, up to the value of the debt. (See article 56).

» The pledge also gives the creditor a preferential right over certain other creditors in the event of competing claims (See article 149).

Section II. Pledging of a business and preferential right of the vendor of a business

Sub-section I. Pledging of a business

Article 69:

- (1) Pledging of a business shall extend to the customers, the sign, business name, right to business lease and business licences.

- (2) It may also extend to other intangible components of the business such as patents, trade and business marks, designs, models and other intellectual property rights, and the equipment.
Such extension of the pledge shall be the subject of a special clause designating the items intended and shall be specifically recorded in the Trade and Personal Property Credit Register. Such clause shall only take effect where notification as provided for in Article 77 below, is satisfied.

- (3) Pledging may not be extended to rights in real estate property conferred or recorded by leases or agreements subject to registration in the land register.

- (4) Where the pledge concerns a business and its branches, the latter shall be designated by a precise indication of their registered office.

» A pledge over a business must cover certain components of the business, such as, the clientele, the commercial name and logo, the commercial lease and any operating licence.

» It may also cover all the remaining components of the business such as in particular the equipment or intangible rights such as patents and trademarks.

» However, it cannot include real rights over property which requires registration with the land registry such as mortgage rights or leases with term that is so long that they are considered as conferring real rights. This provided effectively for security over trading stock, receivables, machinery and other equipment excluding land and building. It is not necessary to pledge all the component parts of the business.

This type of pledge is very useful since it gives the creditor security over assets which generally have a high value and which may extend to all the assets comprised in the business. In this respect, the pledging of a business may be similar

to the common law concept of the floating charge. (See, Boris Martor et al., *Business Law in Africa; OHADA and the Harmonization Process*. Kogan page, London, 2002, p. 203. See also R. M. Goode, *Commercial law, op.cit.* pp. 786-795).

Article 70:

The pledge shall be constituted by a duly registered notarial or private deed. It shall, under penalty of being declared void, comprise the following details:

- (1) The full name and domicile of the creditor, the debtor and pledge settlor, where the settlor is a third party;
- (2) The registration number of the parties in the Trade and Personal Property Credit Register, where they are subject to this formality;
- (3) The precise description and registered office of the business and, where necessary, its branches;
- (4) The components of the business pledged;
- (5) The amount of the debt secured;
- (6) The conditions for claiming the principal debt and interest;
- (7) The election of domicile by the creditor in the jurisdiction where the Trade and Personal Property Credit Register is kept.

» The pledge is required to be made in writing, either by notarized deed or registered private contract. It must include similar information as in the case of pledges over shares, together with description of the components of the business which are being pledged. Which ever form is used, it must indicate certain information including details of the parties, the amount of the debt guaranteed, the component of the business covered by the pledge, and the due debts for payment of principal and interest. The pledge agreement or court order is submitted to the registry of the court for filing with the Trade and Personal Property Credit Register, so that third parties can obtain information on the pledge.

In contrast, under Common Law, a floating charge is usually created by an instrument expressed to cover the debtor company's undertaking or its present and future property, no particular form of words is necessary. It suffices that the agreement manifests an intention to charge the company's present and future assets

or designated class of assets with freedom to deal with them in the ordinary course of business so long as the company is a going concern and creditors do not exercise any contractual right to intervene. (See R. M. Goode, *Commercial law, op.cit*, p. 790).

Article 71:

In the same cases and under the same conditions as those laid down in Articles 136 to 144 below and the last paragraph of Article 70 above, the competent court may authorize the creditor to register the pledge on the business of his debtor.

The court decision shall contain all the details referred to under Article 70 above.

» This article provides for the conditions laid down for court ordered mortgages to be applicable. (See articles 66 and 136-144). Here again, this seems unnecessarily cumbersome.

Article 72:

Pledging by agreement or by court order shall take effect only after registration in the Trade and Personal Property Credit Register.

Provisional and final registration shall be carried out respectively after the decision authorizing the pledge and the final validation decision.

» The pledge is effective once it has been registered. This is commendable as it provides for transparency and certainty.

Sub-section II - Preferential right of the vendor of a business

Article 73:

In order for the sale to produce the effect of transfer and to be binding on third parties, it shall be registered in the Trade and Personal Property Credit Register at the instance of the registered purchaser.

» Under both the Uniform Act and the Common Law, the pledgee can sell the whole interest in the property after the due date for repayment. However, under this provision, such a sale must be registered in the Trade and Personal Property Credit Register in order that property and risk passes to the buyer of the goods and also that such a sale is binding on bona fide third parties.

Article 74:

Subject to the provisions of Article 73 above, in order for the vendor of the business to enjoy his preferential right and the action for rescission contained in the provisions relating to the sale of a business, he shall cause the sale to be entered in the Trade and Personal Property Credit Register.

» The seller of the business must register the deed of sale with the Trade and Personal Property Credit Register in order to obtain a preferential right and the action for rescission. This preferential right is valid for a renewable five-year period. Its registration has the same effect as registration of a pledge over the business and the seller enjoys the same rank as the beneficiary of a pledge in the event of competing claims.

Article 75:

Any application for the cancellation of the sale of a business out of court, by court decision or as of right, shall be subject to prior entry in the Trade and Personal Property Credit Register on the initiative of the vendor.

Such prior entry shall be authorized by the President of the court of the area where the sale was registered, by decision on application, on condition that the matter be eventually referred back to him.

Upon prior entry, the validity of subsequent entries shall be subordinated to any decision on the cancellation of the sale.

» If the owner of the business sells his business he may, on certain conditions, seek cancellation of the sale if the purchaser does not pay the purchase price.

However he needs the information after his request must have been entered in that Trade and Personal Property Credit Register.

Article 76:

Where the sale has been cancelled out of court, by court decision or by virtue of a rescission clause as of right, the cancellation shall be published in the Trade and Personal Property Credit Register.

» Decisions of court cancelling the sale must be registered with the Trade and Personal Property Credit Registry.

Sub- section III - Rules of publication common to pledging of a business and the vendor's preferential right

Article 77:

Where pledging by agreement or by court order, or the preferential right of the vendor of a business extends to patents, service and trade marks, designs and models and other intellectual property rights, as well as to equipment, it shall, in addition to registration of the creditor's security, fulfil the publication conditions laid down by the provisions on intellectual property and the rules of this Uniform Act on the pledging of equipment appurtenant to a business.

» When the pledge covers intellectual property rights, it must also comply with any specific intellectual property law requirements that may be applicable relating to registration of filing. For example, if patents and trademarks that are registered with the African Intellectual Property Organisation (OAPI) are pledged to a creditor, the pledge itself must also be registered with (OAPI) so that it can be relied upon against third parties.

Article 78:

Where the business pledged or encumbered by a preferential right has branches, the entries referred to in Articles 71, 72, 73 and 74 above shall be made at the place of main registration and secondary registration of the debtor.

Article 79:

The registrar responsible for entries, modifications and striking off shall be responsible for cross-checking in accordance with the provisions organizing the Trade and Personal Property Credit Register.

Article 80:

- (1) Any modification by subrogation and transfer of priority shall take effect only where it is entered on the margin of the initial entry.
- (2) Modifications by agreement, legal subrogation in the benefit of the security or endorsement of the deed constituting the pledge, where drafted to order, shall be subject to the conditions of form and duration provided for constituting a pledge by agreement or the preferential right.

» Any modification of the contract of pledge must be initialed on the original contract.

» All agreed modifications must conform to the conditions necessary for the formation of a pledge (See article 65 of the Uniform Act on Securities).

Article 81:

Once the registration formalities have been complied with, the registered creditor shall notify the registration form or the form modifying the initial registration to the lessor of the building housing the business. Failing this, the secured creditor may not avail himself of the provisions of Article 87 below.

» After having complied with registration formalities, the registered creditor is duty bound to inform the lessor of the registration of his interest and any modification thereon. Failure to notify the lessor would allow him to proceed to carry out his claim against the business without taking cognizance of the interest of the creditor (See Article 81).

Article 82:

Partial or total striking off shall have no effect unless it is entered on the margin of the initial entry. Striking off by agreement may not be carried out unless a notarial or private deed is filed showing the consent of the creditor or of his duly subrogated assignee to the striking off.

Striking off by court order shall be done by the competent court of the place of registration.

Where striking off concerns entries from different jurisdictions concerning a business and its branches, it shall be ordered, for the

entire group, by the competent court in the jurisdiction of its principal place of business.

» Partial or total striking off will not be regarded as valid unless it is entered on the margin of the original entry.

» Secondly, any agreement by the parties that has not been notarized with the consent of the creditor is invalid. The competent court to make the order of striking off is that of the place of registration. However if there are multiple striking off involving various branches and jurisdictions then the competent court is that which operates in its principal place of business presumably the headquarters.

Article 83:

Registration shall preserve the rights of the creditor for five years from the date of registration. It shall cease to have effect where it has not been renewed before the expiry of the said period.

» The creditor's rights are preserved within a period of five years. This can be renewed before the expiration of five years. If this is not done then the creditor's right of action has lapsed. The period of five years duration is commendable. It provides certainty in business. However the creditor must be vigilant to ensure that the period is renewed.

Article 84:

No sale of a business out of court or by court order may take place unless the vendor or auxiliary justice in charge of the sale produces a statement of entries made on the business.

» All sales whether private or by court order can only be carried out only after an entry has been made in the Trade and Personal Property Credit Register. It is expected that the commercial registry will issue the statement of entry in writing which warrants the auctioneer or the auxiliary of justice, for example, the 'hussier' or bailiff to carry out the sale.

Sub section IV - Effects of Entries

Article 85:

Unsecured creditors may obtain shortening of the period of payment from the court in the case where a pledge is entered subsequently to their claim, because of the operation of the business or where the components of the business assigned to the secured creditor's guarantee are sold.

» An unsecured creditor has a right to reduce the term of his credit by court order. This is possible if there is a pledge subsequent to his claim or where part of the business over which there is a secured credit has been sold.

Article 86:

- (1) In case the business is transferred, the proprietor shall, no less than fifteen days in advance, notify the registered creditors, by extra-judicial act, of his intention to move the business, indicating where the new one on which he intends to establish the business. Any transfer without the proper notification shall entail shortening of the period of payment for the debtor.

- (2) A registered creditor who does not consent to the transfer of the business may, within a period of fifteen days following notification, apply for shortening of the period of payment where his security has been reduced.
- (3) A registered creditor who consents to the transfer shall maintain his security if he enters his consent, within the same time limit, on the margin of the initial entry.
- (4) Where the business is transferred to another jurisdiction, the initial entry shall, at the request of the registered creditor, be carried over to the register of the new jurisdiction.

» A business may be transferred provided fifteen days notice has been given in advance by an extra-judicial act indicating the new venue. A transfer without notification may reduce the term of payment. However, a registered creditor who is against the transfer may within the period of fifteen days notice indicate his refusal and apply that the term for his credit be reduced. If the creditor consents, he must do so within fifteen days limit by entry on the margin of the initial entry.

Transfer also entails transfer of the original entry to the new jurisdiction. This must be on demand by the registered creditor.

Article 87:

A lessor who intends to take action to terminate the lease on the building in which the business encumbered with securities is operated shall notify his application to the registered creditors through an extra-judicial act.

Neither shall the court decision terminating the lease be pronounced, nor shall termination out of court or by resolutive clause take effect as of right until after the expiry of a period of two months following notification.

» A lessor has a right to terminate the lease encumbered with securities provided he has given the registered creditors notification by extra judicial act. This may be by notice in the newspaper or written letters to the registered creditors concerned.

A court decision can only take effect only after two months after notification of termination. Also see article 81 of the Uniform Act on Securities.

Article 88:

Registered creditors shall be entitled to a higher bid which they shall exercise in accordance with the provisions governing the sale of businesses.

» A registered creditor has a right to a higher bid in the event of sale of the business. However, this must be in conformity with Article 131 of the Uniform Act Relating to General Commercial Law. He may make a higher bid of 1/10 of the price of the business.

Article 89:

Registered creditors shall exercise their right of pursuit and right of sale in conformity with the provisions of Article 56 (1) above.

» A registered creditor has a right of pursuit but this must be in conformity with Articles 56(1).

Article 90:

Registration shall secure, to the same degree as for the principal, two years of interest. The secured creditor and preferred vendor shall

have on the business right of preference which they shall exercise in accordance with the provisions of Article 149 below.

- » A secured creditor must have his interest registered. This will enable him to have a right of preference in accordance with article 149 of the Uniform Act on Simplified Recovery Procedures and Enforcement Measures.

Section III - Pledging of professional equipment and motor vehicles

Professional equipment and motor vehicles can be pledged following rules and regulations in force. What it means is that local rules and regulations concerning the equipment must be respected. It is therefore not possible to pledge a vehicle that is not roadworthy or licensed in conformity with transport rules and regulations.

Article 91:

Material used as equipment by the purchaser to exercise his profession, whether it is new or used, may be the object of security for the benefit of the vendor. The same security may be given to a third

party who has guaranteed the undertakings of the purchaser towards the vendor through a security-bond, endorsement or any other commitment with the same objective, as well as to any person who has lent the necessary funds for the purchase.

The material which is part of the business may be pledged at the same time as the other components of the business or separately, apart from any sale.

- » Professional equipment and motor vehicles may be pledged. If they form part of a business, all or part of them may be pledged, either separately or with other components of the business.
- » The value of this type of pledge will depend to a large extent on its duration and the nature of the equipment, which may be such as to depreciate rapidly and thus to diminish the value of the pledge over time.

Article 92:

Where the secured debt is represented by one or more negotiable instruments, endorsement of the instruments shall entail transfer of the pledge without notification, on condition that the creation of the said instruments was provided for by the deed constituting the pledge and entered in the Trade and Personal Property Credit Register.

Article 93:

The provisions applicable to the pledging of professional equipment shall also apply to motor vehicles subject to a declaration of placement on the road and of administrative registration, whatever the ultimate use of the article purchased may be.

» In order to pledge motor vehicles, the pledged agreement must comply with the rules and regulations relating to licensing, insurance, road worthiness in the national territory of the Member State.

Article 94:

The pledge shall be constituted by a duly registered notarial or private deed. It shall, under penalty of being declared void, contain the following details:

- (1) the full name, domiciles and professions of the parties and, where necessary, of the third party applying for registration;
- (2) a description of the equipment in question which permits its identification, an indication of the location and the indication, where necessary, that the equipment is likely to be transferred;
- (3) the amount of the secured debt;
- (4) the conditions for claiming the principal debt and interest;
- (5) for the transfer of the vendor's preferential rights in case of issue of negotiable instruments, a provision on the method of payment;
- (6) the election of domicile by the parties in the jurisdiction where the Trade and Personal Property Credit Register is kept.

» The pledge is recorded either in a notarized deed or in a registered private contract which must include certain information including description of the equipment which is pledged.

Article 95:

Pledging of equipment and motor vehicles shall take effect only upon registration in the Trade and Personal Property Credit Register. Such registration shall preserve the rights of creditor for five years from the date of registration. It shall cease to have effect if it is not renewed after expiry of the period in question.

» The security is effective once it has been registered with the Trade and Personal Property Credit Register. The rights of the creditor is preserved for five years from the date of registration. The security interest is valid for a renewable five year period from the date of registration.

The pledge over a vehicle must also be recorded on the vehicle's registration document. This is an innovation which is commendable because it makes tracing easy and change of ownership cannot be effective if the debt or pledge has not been discharged. This protection avoids fraudulent dealings.

Article 96:

The provisions of Articles 79, 80, 82 and 84 above shall apply to the pledging of professional equipment and motor vehicles. For motor vehicles subject to a declaration of placement on the road and administrative registration, the pledge shall be entered on the administrative document authorizing placement on the road and registration.

» A pledge over a vehicle must also be recorded on the vehicle's registration document. This provision is desirable as it protects the interest of the creditor.

Article 97:

The debtor may not sell all or part of the equipment encumbered by the pledge without the prior approval of the secured creditor or, failing this, without court authorization.

In the absence of the approval or court authorization, the debt shall become immediately payable if the pledged equipment is sold.

If it is not paid, the debtor shall be subject to a judicial settlement or liquidation of assets where such a procedure is applicable to him.

The incapacities and forfeitures attendant on personal bankruptcy and the penalties provided for the offence of breach of confidence shall apply to the debtor or any person who, by fraudulent manoeuvres, deprives the secured creditor of his rights or reduces them.

- » If the owner of the equipment wishes to sell it, this may be done only with the prior consent of the secured creditor or, failing such consent, with the authorization of the court.
- » If the debtor nevertheless proceeds with the sale in the absence of authorization the debt becomes payable immediately upon the sale.
- » In the event that the debtor fails to make payment in such circumstances, administration or liquidation proceedings under the Uniform Act on Collective Proceedings for the Clearing of Debts may be commenced against him to the extent that such proceedings may be applicable to him. Such proceedings are not applicable to individuals without commercial status.
- » Further, the debtor may be declared in personal bankruptcy and he may be subject to criminal penalties if he is found to have fraudulently reduced his secured creditor's rights.

Article 98:

In the case of failure to pay on the due date, the secured creditor shall exercise his right of pursuit and proceed to sell the equipment and motor vehicles in accordance with the provisions of Article 56 (1) above.

Where the pledged equipment has been committed at the same time as the other components of the business, the provisions of Article 56 (1) above shall equally apply.

- » If the debtor fails to make payment of the secured debt on the due date, and after a notice period of eight days following a formal demand for payment, the creditor may arrange for the forced sale at public auction of the pledged equipment.

- » Alternatively, he may seek a court order attributing the pledge equipment to himself up to the amount of his debt.

Article 99:

Registration of the pledge shall guarantee, to the same degree as the principal, two years of interest. A secured creditor of the professional equipment shall have a preferential right which he shall exercise as specified by the provisions of Article 149 below.

- » The creditor is entitled to receive the amount of his debt together with up to two years of interest.
- » The pledge also gives the creditor a preferential rank in relation to certain other categories of creditors.

Section IV - Pledging of stocks

Article 100:

Raw materials, produce from an agricultural or industrial concerns and goods meant for sale may be pledged without dispossession through the issue of a pledge document, on condition that a precise package of interchangeable goods is constituted before the issue of the stock.

- » Stocks of raw materials, agricultural or industrial products or other goods which are required to be sold may be pledged without dispossession from their owner, on condition that they form defined collection of tangible goods. This is commendable in the sense that it provides security on assets of a high value which could include, for example, minerals, crude oil or petroleum products. This provision is similar to the concept of floating charge under Common Law which we have already discussed above. (See Article 63).

Article 101:

Pledging of stocks shall be constituted by a duly registered notarial or private deed. Under penalty of being declared void, the document constituting the pledge shall bear the following details:

- (1) The full name, domiciles and professions of the parties and, where necessary, the registration number in the Trade and Personal Property Credit Register of the debtor who constitutes the pledge;
- (2) a precise description of the asset pledged which permits its identification by its nature, quality, quantity, value and situation;
- (3) The name of the insurer who shall insure the secured stock and the building in which it is lodged against fire and destruction;
- (4) the amount of the debt secured;
- (5) the conditions for claiming the principal and interest on the debt;
- (6) the name of the banker in whose establishment the pledge document is domiciled.

» The pledge is recorded by a notarized deed or by registered private contract.

The deed or contract must contain certain information, including a precise description of the stock concerned. It will be identified with regards to its nature, quality, quantity, value and location and will also indicate the bank where the pledge will be payable.

Article 102:

Pledging of stocks shall take effect only when it is registered in the Trade and Personal Property Credit Register, under the conditions provided for by the rules governing the said Register.

Registration shall preserve the rights of the secured creditor for one year from the date of registration. It shall cease to have effect where it has not been renewed before the expiry of the period in question.

The provisions of Articles 79, 80, 82 and 84 above shall apply to pledging of stocks.

» The pledge becomes effective only upon registration with the Trade and Personal Property Credit Register. It is valid for a renewable one year period. This is unduly restrictive of the rights of the creditor. It is suggested that article 102 should be amended to extend the period to five years in order to reduce the expenses of registration every year.

Article 103:

The document handed over to the debtor after registration shall clearly show;

- the entry "*pledging of stocks*";
- the date of its insurance corresponding to the date of registration in the Register;
- the number of registration in the chronological Register;
- the signature of the debtor.

It shall be handed over by the debtor to the creditor by way of a signed and dated endorsement. The pledge documents thus issued may be endorsed and guaranteed under the same conditions as a promissory note, having the same effects. It shall be valid for three years only from its date of issue, unless it is renewed.

» Once it has been registered the Trade and Personal Property Credit Registry issues a pledge certificate which the debtor then endorses in favour of the creditor.

» This certificate has the same effect as a bill of exchange and may be endorsed in the same way and on the same conditions. It is valid for a renewable three year period from the date of issue. This is contrary to the one year period provided in article 102. There is a need for uniformity with a view to bringing it to five years in both articles.

Article 104:

A debtor who issues the pledge document shall be responsible for the stocks in his keeping and care.

He shall undertake not to diminish the value of the secured stocks and to insure them against risks and destruction. In case of reduction in the value of the security, the debt shall become due and, where it is not paid, the provisions of Article 105 below shall be applied.

He shall constantly make available to the creditor and domiciliary banker a statement of secured stocks as well as an account of all the transactions involving them. The creditor and domiciliary banker may,

at any moment and at the debtor's expense, cause a record to be made of the state of the pledged stocks.

The debtor shall maintain the right to sell the pledged stocks; he may not deliver the assets sold until the money has been deposited with the domiciliary banker. Failing such deposit, the provisions of Article 105 below shall apply.

» The debtor is the custodian of the pledged property. The debtor is responsible for the preservation of the pledged stocks thereby having the responsibility to maintain the *status quo ante*.

» The debtor is responsible for the safekeeping of the pledged stock. He undertakes not to reduce its value and to insure it against loss or destruction. In the event where the value of the stock falls below the value of the pledge; the debt becomes immediately payable.

» The debtor must also keep at the creditor's disposal a statement of the pledged stock and the accounts relating to any operations affecting the stock. The creditor may inspect the stocks at any time at the debtor's expense.

» The debtor retains the right to sell the pledged stock, but if he does so he may only make delivery to the purchaser after deposit of the proceeds with the bank where the pledge certificate is payable.

It is desirable that these clauses in article 104 are specifically incorporated into the pledged contract. It is recommended that the law should envisage a situation where, in case the sale is below the pledged amount the pledgor or his insurance company must make up the balance.

Article 105:

Failure to pay the debt on the due date, the creditor or bearer of the pledge document shall proceed to sell the pledged stock in accordance with the provisions of Article 56 (1) above.

The creditor or bearer of the pledge document shall have on the stocks committed a preferential right which he shall exercise as provided for by Article 149 below.

» If the debtor fails to pay, either on the due date or if the value of the stock has fallen below the value of the pledge, the creditor or the bearer of

the pledge certificate may realise the stock in the same way and on the same conditions as holders of the other types of pledges.

» Failure by the debtor to deposit the proceeds after a sale of the stock similarly allows the creditor or bearer of the pledge certificate to realise the pledge.

CHAPTER IV PREFERENTIAL RIGHTS

These rights are derived from the French Civil Code. However, the rights were considered as archaic, confusing and had to be modified to suit African conditions.

Preference is given to Treasury, Customs, Social Security authorities, etc. These rights worked hardship on creditors who were generally unaware of them because the assets may be completely distributed leaving nothing for them. However, since all transactions are registered with the Trade and Personal Property Credit Registry it gives an opportunity for any creditor to have access to information before taking any risk. The creditor may wish to oppose these preferential rights.

Section I - General liens

Article 106:

The general liens shall confer a preferential right on its holder according to the provisions of Articles 148 and 149 below.

The special instruments giving rise to a general lien shall specify their rank taking into consideration the provisions of Article 107 below. Failing that, the lien shall rank last on the list established by Article 107 below.

» Certain categories of creditors automatically enjoy preferential rights which are classified by the Uniform Act as real securities over movable assets. General preferential rights defined under articles 106 and 108, may be exercised by their beneficiaries with regard to any assets of the debtor, whereas special preferential rights defined under articles 109- 116, may be exercised only with regard to particular assets. Articles 148 and 149 then determine the rank of such preferential rights in the event where there are competing claims. In the event, subsequent legislation creates general preferential rights which are not specifically provided for under the Uniform

Act, that legislation must specify the rank of such rights in relation to the above rights.

» If it fails to do so, the new right will be ranked last after all the other rights already provided for by article 107.

Article 107:

Without publicity, the following shall have preferential rights, and in this order:

- 1) burial expenses, expenses related to the last illness of the debtor which occurred prior to the distraint of his property;
- 2) provisions made to the debtor for his subsistence during the last year preceding his death, the distraint of his property, or the court decision opening proceedings for a joinder of actions;
- 3) sums owed workers and apprentices for the execution or termination of their contract during the last year preceding the death of the debtor, the distraint of the property or the court decision opening proceedings of the joinder of actions;
- 4) sums owed the authors of intellectual, literary and artistic works for the last three years preceding the death of the debtor, the distraint of the property or the court decision opening proceedings for a joinder of actions;
- 5) Sums owed by the debtor in taxes and customs duties, and to security and social insurance agencies, within the limit of the amount legally fixed for the provisional enforcement of court decisions.

» This provision identifies a number of preferential rights which benefit the creditor without the need for any publications to be made in the Trade and Personal Property Credit Register or elsewhere. Most of these rights benefit creditors of a deceased debtor or a debtor whose assets have been seized or who has been put into administration or liquidation. In descending order of rank, the debts of which general preferential rights are attached are as follows:

- For humanitarian reasons, burial costs and medical costs incurred during the debtor's last illness before any seizure of assets has been given first priority.

- Equally in the second place, the means of subsistence provided to the debtor during the year preceding his death, the seizure of his assets or the opening of administration or liquidation proceedings.
- Thirdly, amounts owed to the debtor's employees under their employment contracts during the year preceding his death, the seizure of his assets or the opening of administration or liquidation proceedings;
- Fourthly, amounts owed by the debtor for the use of intellectual property rights during the three years before his death, the seizure of his assets or the opening of administration or liquidation proceedings;
- Fifthly, within the limits of the maximum amount laid down by the relevant national law for the provisional enforcement of court decisions, amounts owed by the debtor to the tax, customs and social security authorities

Article 108:

The sums owed in taxes and customs duties, and to security and social insurance agencies shall have preference over the amount stipulated in Article 107 (5) above.

These preferential rights shall be effective only where, within six months of their being due, they are entered in the Trade and Personal Property Credit Register.

However, where there has been violation of the tax, customs or social insurance laws, the period shall begin to run from the notification of restraint, the writ of collection or of any other bill of recovery.

Registration shall uphold the preferential right of the Public Treasury, the customs services and the security and social insurance agencies for three years with effect from the date of registration.

It shall cease to be effective unless renewal was requested before the expiry of this period.

» The tax, customs and social security authorities may also benefit from general preferential rights with regard to debts of a higher amount than the limit specified in article 107 but such rights are effective only if they are registered with the Trade and Personal Property Credit Register within six months of the debt falling due.

» In such an event the registration is valid for a renewable three year period from the date of registration.

Section II - Special liens

The list of special preferential rights are contained in Articles 109-116. Again they are derived from the French Civil Code. They have been modernized to suit present day business. For instance, a hotelier's lien over the property of his client have been abandoned. Now, a lessor is only guaranteed in twelve months before and twelve months after seizure of unpaid rents. In Common Law jurisdictions particular liens were recognized and this is not an innovation. These liens are similar to the special liens described under articles 109-116 of the Uniform Act. (See. Iwan Davies, Textbook on Commercial Law, Blackstone Press Ltd, London, pp. 320-323).

Another delicate point was the dispute regarding property preferences concerning the same items. The Uniform Act now recognizes a single rule for resolving such conflicts, that is, preference is granted to the first to claim it and then to subsequent claimants in application of Article 148-149.

Article 109:

Creditors with a special lien shall have, over the movable property allocated to them by the law as the basis of the mortgage, a preferential right which they shall exercise, after distraint, according to the provisions laid down in Article 149 below.

A preferential right shall also be exercised by subrogation over the insurance claims in respect of movable property that has perished or disappeared, as long as they are not paid.

» The holder of special liens may exercise their rights after first seizing the assets to which these rights are attached. With respect to special liens there must be a connection between the source of the debt and the asset concerned as provided in articles 110-116 of this Uniform Act. This provision is similar to the Common Law position as we have already observed in the introduction to chapter one relating to possessory liens.

Article 110:

A vendor shall have over the sold property a lien guaranteeing the payment of the unpaid price, where the property is still in possession of the debtor, or over the price still owed by the subsequent purchaser.

» The seller of a movable asset who has not paid the full sale price has a special or particular lien on that asset or in particular, he has a lien over the

proceeds of that subsequent sale if the price has not yet been paid. This is similar to the unpaid vendor's lien which arises under section 41 to 43 of the Sale of Goods Acts 1893 and 1979 in England and in Common Law jurisdictions.

Article 111:

A lessor of a building shall have a lien over the furniture of the rented premises. In addition to the damages which may be granted to the lessor, this lien shall guarantee the lessor's claims against the lessee for the twelve months preceding and the twelve months following the distraint.

A lessee or any person who, through fraudulent means, deprives the lessor of all or part of his lien shall be guilty of a criminal offence punishable by the national law of each Contracting State.

Where property is transferred without his consent, the lessor may still seize it and shall maintain his lien over such property where he declared the lien in the writ of distraint.

» The lessor of immovable property has a particular lien over the furniture of the lessee which is located in the rented premises as security for payment of the rent and any damage which might be awarded to him in relation to twelve months preceding and the twelve months following the seizure of the furniture. This type of lien also exists in Common Law jurisdictions.

Article 112:

A carrier by land shall have a lien over the transported property in respect of what is owed him, provided that there is a link between the transported property and the debt.

» A common carrier as distinct from a private carrier has a lien over the goods carried as security for any sum owed to him provided that there is a link between those goods and the debt. This type of lien also exist in Common Law jurisdictions. For example, a shipowner has a lien on goods carried by him for the freight due for their carriage. He also has a lien on the passenger's luggage for the passage money (See *Wolf v. Summers* (1811)2 Comp.631). Difficulties arise where there has been a fundamental breach of the carriage contract, for example, deviation. It is doubtful whether a lien

could be maintained in these circumstances as it would constitute the enforcement of a lien earned by unlawful means.

Article 113:

An employee of a person doing work at home shall have a lien over the sums owed by the person who gave the work to guarantee the debts arising from the work contract where such debts arise from the execution of the work.

» Under the Uniform Act and in Common Law jurisdictions, if goods are given for work to be done on it, the bailee has a lien on it for his charges for the labour and skill expended on it (See *Beran v. Waters*(1828) 3 Car & P. 520). The lien applies specifically to the goods on which the work is done and on no other and the work must be done at the instance of the rightful owner or with someone with whom he has contracted for work. Therefore a shoemaker has a lien upon the shoes he repairs for the cost of repairs; a mechanic has a lien on the car he repairs (See *Green v. All Motors Ltd.* (1917) K.B 625), a watch repairer on the watch he repairs, an accountant on his client's books of account for work done upon them. Normally a lien arises on completion of the work.

Article 114:

Employees and suppliers of works enterprises shall have a lien over the remaining sums owed the said enterprises for work done, as a guarantee for debts owed them in connection with the execution of the works.

The payment of workers' wages shall be given preference over the settlement of amounts owed suppliers.

» Employees and suppliers of a contractor have a particular lien over the amounts due to the contract for their work or supplies. Wages to employees will be ranked higher than money owed to suppliers. A similar lien exist in Common Law Jurisdiction.

Article 115:

A commission agent shall have over the merchandise which he holds on behalf of the principal a lien to guarantee his claims arising from the commission contract.

» An agent has a particular lien over goods held by him on behalf of his principal as security for the payment of his commission. This is also recognized in article 166 of the Uniform Act relating to General Commercial Law. In Common Law jurisdiction, this type of lien has been established by trade usage in the relationship between members of other trades such as solicitors, bankers and factors and their customers or principals.

Article 116:

Any person who incurs expenses or provides services to avoid the disappearance of movable property or to ensure that it continues to serve its desired purpose shall have a lien on such property.

» A person who has incurred costs or performed services to protect a particular movable asset has a particular lien over the asset. (See Article 149). For example, repairing a work of art under destruction; to salvage a ship by equipping it with the necessary items to permit it float on water.

This is similar to the artificer's lien under Common Law which arises where the lienee has by his labour and/or skill improved another's goods. The antithesis of the improver's lien is the salvor's lien for his services. The essence of the salvor's lien is that he helps to prevent injury to another person's goods. (See Iwan Davies, Textbook on Commercial Law, Blackstone Press Ltd, London, 1992, p. 323).

PART III MORTGAGES CHAPTER I

GENERAL PROVISIONS

The law on securities over immovable property in African countries of the franc zone was modernized during the colonial period by land decrees which dealt not only with real immovable property but also with the publication of land registration as follows:

- *The decree of 28 March 1899, amended by the decree of 12 December 1920, applicable in Congo, Gabon, Chad and Central African Republic.*
- *Decree of 24 July 1906 applicable in Togo*
- *Decree of 26 July 1932 applicable in Senegal, Mauritius, Mali, Guinea, Burkina-Faso, Niger, Benin and Ivory Coast.*
- *Decree of 21 July 1932 applicable in Cameroon.*

As far as the harmonization process is concerned, the law on securities over immovable property having been organized in the same way in all these countries did not pose any difficulty.

1. Types of mortgages.

With regards to mortgages there are three types of mortgages, namely contractual, statutory and court ordered mortgages.

The rules governing contractual mortgages (Articles 126-131) are different from those relating to statutory mortgages (Article 118). The text allows for every Member State to choose the standard form of mortgages approved by private contract or by the land registry (Article 128).

Statutory mortgages (this operates since the aforementioned colonial legislations on land) replace special preferential rights over immovable property in French Law. However, only statutory mortgages concerning business law were covered by the Uniform Act, namely, those dealing with sellers or other assignors of real property, architects and contractors. On the other hand, statutory mortgages dealing with family law or public accounting were left at the discretion of each state.

Court ordered mortgages (Articles 136-144) was maintained. The creditor must have an enforceable right of seizure over one of the immovable property.

2. Time of Expiration.

There was a need to abrogate the old provision which laid down the rule for the registration of mortgages because this made the debtor who had paid his debt to look for his creditor years after, to obtain the cancellation of the registration at his expense. Henceforth, it suffices just for the debtor to await the expiry period of registration. Although the registration could be renewed by the creditor (Article 123).

3. Publication of land registration.

The old colonial decrees equally covered publication of land registration which has not been amended. The rules of publicity, release of mortgages and or a reduction of its amount had to be harmonized for fear of derailing creditors from one country to another. It is worthy to note that this approach had led to the laying down of rules for the formality of registration of real property rights (for example, sale, usufruct or long term-lease). It would have been premature and delicate to go beyond this.

Article 117:

A mortgage shall be a forcible or contractual real property security. It shall give its holder a right of pursuit and a preferential right. The right of pursuit shall be exercised according to the rules governing foreclosure.

The preferential right shall be exercised according to the provisions of Article 148 below for the purpose of securing the principal, expenses and three years' interest of the same rank, except special registration is made carrying a mortgage with effect from the mortgage date for interests other than those covered by the initial registration. The preferential right shall also be exercised by subrogation over insurance claims in respect of real estate loss.

» Under the Uniform Act, mortgage is the only form of security over real property. (See Anoukaha François et al, *Sûretés Collection Droit Uniform Africain*, éd. Bruylant, Bruxelles, 2002, p175 et seq). A mortgage may be agreed contractually or by court order or may result from operation of the law. If the debtor fails to pay the debt that is secured by the mortgage, the creditor is entitled to pursue payment against the mortgaged property in accordance with the rules laid down by the Uniform Act on Simplified Recovery Procedure and Measures of Enforcement.

Under Common law, there are two types of mortgages, namely, legal and equitable. A legal mortgage is a transfer of a legal estate or interest in land or other property for the purpose of securing the repayment of a debt. An equitable mortgage is one which passes only an equitable estate or interest, either

1. Because the form of transfer or conveyance used is an equitable one, that is operates only as between the parties to it, and those who have notice of it; e.g a deposit of title deeds, or
2. Because the mortgagor's estate or interest is equitable, that is, consists merely of the right to obtain a conveyance of the legal estate.

The Uniform Act recognizes only legal mortgages and not equitable mortgages.

» The creditor has a particular preferential right over the proceeds of the sale of the mortgaged property to guarantee payment of the principal amount of the debt, related costs and up to three years of interest. Similarly under Common Law, if the mortgagee has sold the mortgaged property during the currency of the mortgage, he must account to the mortgagor (debtor) for the proceeds of sale. (See *Langtan v. Waite* (1868) L.R. Eq. 165). In practice, banks require that the debtor takes a life insurance policy over the mortgage debt. This preferential right also attaches to any insurance payment made as a result of damage to the property or its destruction.

Article 118:

Unless otherwise provided, the rules applicable to contractual mortgages shall also apply to forcible mortgages.

Article 119:

Only registered property may be mortgaged, subject to special instruments authorizing the temporary registration of real property rights during the registration procedure, pending the final registration of

the said rights after the land certificate has been drawn up.

The following may be mortgaged:

- 1) built-on and non built-on property and the improvements or additional structures thereon, excluding movables constituting their furniture;
- 2) real property rights duly registered under the land tenure system.

» Only real property and other real rights which are registered with the land registry may be mortgaged, unless there are particular national laws which allow a mortgage to be provisionally registered pending registration of those rights, in which case a final registration of the mortgage must be made following the final registration of the rights to which it relates. This position is similar under the Common Law where only registered lands are mortgaged. It is desirable that before a mortgage is taken out on a property, it must be verified whether the property is registered with the land registry. In practice, in Anglophone Cameroon, it is possible to mortgage an unregistered land provided there is proof that there is an application for a land certificate. This type of mortgage can be recognized as an equitable mortgage. There is usually a proviso in the mortgage agreement that the land certificate when issued will be handed over to the mortgagee, that is, the creditor. For further security, the mortgagor may give a power of attorney to the mortgagee to claim the land certificates when issued.

» (1) Land, with or without constructions or buildings and any subsequent improvements or constructions on the land may be mortgaged.

(2) Real property rights, such as usufruct or a long term lease may also be mortgaged.

Article 120:

Only existing and well-defined property may be mortgaged. Mortgages shall be indivisible by nature and shall cover the entire property mortgaged until payment is complete, notwithstanding the occurrence of a succession.

» Under both the Uniform Act and in Common Law jurisdictions, mortgage may only be granted over property that exists and is identified.

Further, a mortgage is indivisible and covers the entire property until full payment of the debt. The scope of the mortgage cannot be reduced either when there is a partial payment of the debt that it secures or in the event of an inheritance affecting the property concerned. The Common Law position is that “once a mortgage, always a mortgage”. Even if there is a single franc due on the mortgage it is still a mortgage. Also, death does not terminate a mortgage.

Article 121:

Persons whose rights over property are subject to duly notified conditions, cancellation or rescission may only grant a mortgage on the property subject to the same conditions, cancellation or rescission.

However, mortgages granted by all the co-owners of joint property shall remain effective regardless of the outcome of any subsequent sale by auction or sharing of the property.

» Under both the Uniform Act and in Common Law jurisdictions, if the owner of the mortgaged property has only a conditional right to the property, the mortgage will also be conditional. A mortgagor can grant only the interest he possesses over the mortgaged property. This is commendable because it prevents unscrupulous transfers of property by persons who have limited interests such as joint owners and successors in title.

Article 122:

Any contractual or legal document to mortgage property shall be entered in the land register in accordance with the rules relating to the notification of landed property transactions.

Registration shall confer on the creditor a right whose scope shall be defined by the national law of each Contracting State and by the provisions set out in the land certificate.

A duly published mortgage shall be ranked on the day of registration, unless otherwise stipulated by the law, and shall maintain such rank until the publication of its extinction.

Where the real property rights which have been mortgaged consist in the breaking up of such real property rights as usufruct, land surface rights, long lease or building lease, the registration of the mortgage must also be notified, by extra-judicial act, to the owner, owner of the soil and subsoil or lessor.

» The Uniform Act on securities has not laid down a complete set of rules regulating mortgages. It leaves considerable scope for the application of national laws of Member States where the property is situated.

» Accordingly, mortgages must be established following national laws and must be duly registered with the land registry in accordance with any rules that may be laid down by the national law.

Land is a sensitive issue. It has been left to the various states to legislate on it following their national peculiarities. However, this defeats the essence of OHADA which is harmonization (See the introduction to mortgages).

» The rights resulting from registration are those defined by the national law and while the Uniform Act provides that in principle creditors with mortgages are ranked in accordance with the date of registration of the mortgage, this is subject to any exceptions that may exist under the national law. When the mortgage is given over a real property which is other than full title to the property, for example, usufruct, land surface right, long lease, the existence of the mortgage must be notified by bailiff to any other person having a real right to the property concerned.

Article 123:

Registration shall preserve the right of the creditor up to the date fixed by contract or court decision. Its effect shall cease if it is not

renewed for a specified duration before the expiry of the period in question.

» The registration of the mortgage is valid for a period of time which may be decided by the parties or by the court. It must also be renewed before expiry for a determined period. A mortgage cannot be in perpetuity.

This is an innovation under OHADA. Under the Common Law the mortgage is registered once and for all: "Once a mortgage, always a mortgage". It is not clear why the mortgage has to be renewed. Is it for an extension of time for the debtor/mortgagor to pay up his debts or for the mortgage to be valid? It is suggested that mortgages be registered once and the mortgagee has an option of foreclosure once the mortgage expires and the debt is unpaid or may wish to renew the mortgage.

Article 124:

Any deed pertaining to a mortgage, especially transfer, change of rank, subrogation, renunciation and extinction shall be established, according to the national law of the place of location of the property, by notarial or private deed following the model approved by the landed property mortgage registry and published as the deed by which the mortgage is granted or constituted.

The extinction of the contractual or forcible mortgage shall result from:

- the extinction of the principal obligation;
- the renunciation of the mortgage by the creditor;
- the lapse of registration certified, under the responsibility by the landed property registrar, with the attestation stating that no extension or new registration whatever shall affect the said lapse;
- the redemption of the mortgage resulting from an expropriation judgment shown in a report and from payment or deposit of the final compensation for expropriation for reasons of public purpose.

» The mortgage terminates by virtue of:

- termination or discharge of the main obligation in respect of which the mortgage has been given;
- release of the mortgage by the creditor;
- expiry and non-renewal of its registration with the land registry; or
- Release of the mortgage following an expropriation of the property for public use and the payment or deposit of the released compensation.

The various methods of termination of the mortgaged debt are in pari materia with that in Common Law jurisdictions except for the fact of renewal of its registration.

However in Cameroon, once the mortgaged debt has come to an end, there is need for a discharge certificate to be issued by the bank or creditor. The registrar of lands must endorse that the debt has been discharged and this must be published in the national gazette.

Article 125:

Striking off of a mortgage shall be governed by the rules pertaining to the publicity of landed property transactions.

In the event of refusal by the creditor to consent to, or by the registrar to proceed with the striking off of the mortgage, the debtor or his rightful claimants may obtain the legal release of this security. The release judgment handed down against the creditor or his rightful claimants and which has become absolute shall oblige the registrar to cancel the mortgage.

» The mortgage is discharged in accordance with the rules of the relevant Member State's land Registry.

If the conditions for discharge have been fulfilled and the creditor refuses to agree to the discharge or the land registrar fails to effect it, the debtor may obtain a court order for the release of the mortgage. The final court order will be obtained by the debtor who will hand it over to the registrar to effect the cancellation of the mortgage.

CHAPTER II CONTRACTUAL MORTGAGES

Article 126:

A contractual mortgage shall result from a contract subject to the conditions laid down in this chapter.

Article 127:

A contractual mortgage may be granted only by the person who has duly registered rights over the real property and is entitled to dispose of it.

It shall be granted to secure debts that are personalized by their the cause and origin thereof, representing a specific sum and brought to the knowledge of a third party through the registration of the deed. The debtor shall subsequently be allowed, if need be, to request that this sum be reduced, following the same rules of publicity of landed property transactions laid down to that effect.

» A contractual mortgage may be granted by the holder of real rights in order to guarantee certain identified debts for a definite amount of money. Only persons who have a land certificate can obtain a contractual mortgage. This is in conformity with the Common Law situation. (See Article 119).

» The amount of the debt must be indicated when the mortgage is registered and must be made known to third parties. This information may have a serious effect on the debtor's apparent credit worthiness. Consequently, if the debt is reduced after registration, the debtor may have the registration amended to reflect the reduction in accordance with the rules laid down by the national law.

Article 128:

A contractual mortgage shall be granted according to the national law of the place of location of the property:

- by duly authenticated deed made by the notary with jurisdiction or by the administrative or judicial authority empowered to draw up such deeds; or
- by private deed drawn up following a model approved by the landed property registry.

A proxy given to a third party for the purpose of constituting a mortgage in the notarial form shall be drawn up in the same duly authenticated form.

» A mortgage may be granted either by a notarized deed or by any administrative or judicial authority that is empowered to draw up such deeds, or by private contract drawn up in accordance with a standard form approved by the land registry depending on the place where the landed property is situated and the national law of the Member State concerned.

» In Cameroon, by virtue of article 8(1) of Ordinance No. 74-1 of 9th July 1974 to establish rules governing Land Tenure in Cameroon, deeds to establish the transfer or extinguish real property rights shall be drawn by a notary, under penalty of being declared null and void.

Article 129:

So long as the mortgage is not registered, the mortgage deed shall not be binding on third parties and shall constitute between the parties a reciprocal promise obliging them to publish the deed.

» The mortgage may be relied upon as against third parties only once it has been registered with the land registry. Similarly, under Common Law, in order for a mortgage to be effective, it must be registered.

It is recommended that this provision should be robust and make it compulsory that the debtor must stamp duty and register the mortgage and if he fails to do so within a stipulated period of time, the creditor should register the mortgage at the debtor's expense.

Article 130:

The publication of a contractual mortgage to secure a short-term loan may be deferred for a maximum period of ninety days without the creditor losing his rightful rank.

For that to happen, the creditor shall comply with the special provisions laid down for the purpose by the rules on publication of landed property transactions in respect of mortgages to secure short-

term loans, provided for by the national law of the place of location of the property.

Article 131:

A mortgage granted to secure a certain amount of credit to be provided shall be ranked on the date of its publication regardless of the successive dates of the execution of the commitment made by the providers of the credit.

» Here, publication is of the essence irrespective of when the credit is provided and also when the commitment to provide the credit is executed. Publication guarantees the ranking and not the commitment to provide the credit or the dates when the credit is provided.

CHAPTER III FORCIBLE MORTGAGES

Article 132:

A forcible mortgage shall be one granted without the consent of the debtor, by operation of the law or by a court decision.

A forcible mortgage, whether resulting from operation of the law or granted by court decision, may only concern specific property as well as debts personalized by their origin or cause, and for a specific sum.

Forcible mortgages other than those provided for by this Uniform Act shall be governed by special provisions of the national law of each Contracting State.

» Under both the Uniform Act and in Common Law jurisdictions, mortgages arising by operation of the law, whether by court decision or by statute, are granted without any need for the prior consent of the debtor. An example of statutory mortgage is provided for in article 74 of the Uniform Act on Collective Proceedings for the Clearing of Debts. It is given in favour of an insolvent debtor's creditors when administration or liquidation proceedings are opened against the debtor and must be registered within ten days of the opening of those proceedings at the request of the court registrar or the administrator or liquidator.

They are compulsory mortgages which can only be granted over identified real property as security for identified debts for a definite or determined amount of money.

» In addition to the statutory and court-ordered mortgages provided for under this Uniform Act, each Member State may permit other types of compulsory mortgages which will be governed by the national law.

Section I - Forcible mortgages

Article 133:

A forcible mortgage of a group of creditors shall be provided for by the Uniform Act on Collective Proceedings for the Clearing of debts to organize joinder of actions; it shall be registered within a period of ten days with effect from the court decision opening the proceedings for joinder of actions at the request of the registrar or receiver.

» The statutory or legal mortgage of creditors is provided by articles 73 and 74 of the Uniform Act on Collective Proceedings for the Clearing of Debts. Once a judgment has been issued, creditors can no longer publish any securities they have obtained from the debtor (Article 73). However, they are given a collective mortgage on all the real assets of the debtor, either present or future (Article 74).

The presumption is that all the debts of the company are registered. It is then that the liquidator or receiver must go to court to obtain an order of joinder to join all the parties. He is acting collectively. This is highly commendable because such a situation avoids multiplicity of suits and by some arrangements the receiver or liquidator can put the debtor in composition with the creditors. This is a welcome innovation.

Article 134:

A vendor, exchanger or joint heir may require from the other party to the deed a mortgage on the property sold, exchanged or shared to guarantee the total or partial payment of the price, balance in cash or debts resulting from the sharing.

In the absence of any contractual mortgage provisions, the vendor, exchanger or joint heir may, in pursuance of a decision by the competent court, obtain a forcible mortgage over the said property.

An action for cancellation of the deed of sale, exchange or sharing resulting from failure to pay the price or balance in cash shall lie with the vendor, exchanger or joint heir who holds a contractual or forcible mortgage duly published by the very fact of having obtained this guarantee at the same time as the action.

Any person who provides funds for the purchase of property being sold, exchanged or shared may obtain a contractual or forcible mortgage under the same conditions as the vendor, exchanger or joint heir once it is authentically established through the loan contract that the amount was intended for that purpose and through the receipt issued by the vendor, exchanger or joint heir that the payment was made from borrowed funds.

» A mortgage may arise in favour of sellers or other assignors of real property.

» This mortgage may be given by agreement to cover debts arising out of the sale, but failing such agreement, the seller is entitled to obtain a court-ordered mortgage on the property in question. Although these are technically court-ordered mortgages, they are categorized as statutory mortgages because the court order is a mere formality which cannot be refused

Article 135:

Architects, contractors and other persons employed to erect, repair or reconstruct buildings may, before the beginning of the work, obtain a contractual mortgage or, through a court decision, a forcible mortgage on the building on which the work is done. The mortgage shall be provisionally registered for the estimated amount due.

Such registration shall be assigned a rank on the date it occurs but for a period not exceeding one month following the completion of the work recorded by a bailiff. The mortgage shall maintain its date if, within the same period, by agreement of the parties or by court

decision, the registration becomes final for all or part only of the estimated amount due.

Any person providing funds to pay or refund expenditure by architects, contractors and other persons employed to erect, repair or reconstruct buildings may obtain a contractual or forcible mortgage under the same conditions as these creditors once it is duly recorded in the loan contract that the sum was intended for this purpose and, by the bills of the architects, contractors and other persons, that the payment was made from borrowed funds.

» A mortgage may arise in favour of architects and contractors employed for construction or repair of buildings.

» This mortgage may be given by agreement to cover debts arising out of the work performed but failing such agreement, the architects or contractors are entitled to obtain a court-ordered mortgage on the property in question.

If a contractual mortgage is obtained before the start of the work, it is registered provisionally and this registration will take effect till the expiration of a period of one month following the date of the completion of the work, which will be confirmed by a bailiff. If within this period, the registration becomes final with the consent of the parties or decision of the court it maintains its initial date for the whole or part of the debt.

This is an innovation. Under Common Law, a mortgage cannot arise under such situations. However, the contractor or architect may have a lien over the materials on site or a bank guarantee for the payment for work done.

Section II - Court-ordered mortgages

Article 136:

In order to guarantee his claim, besides the cases provided for under Articles 133 to 135, the creditor may be authorized to seek temporary registration of a mortgage on the property of his debtor pursuant to a decision of the competent court of the place where the debtor is domiciled or where the property to be seized is located.

The decision handed down shall indicate the amount for which the mortgage is authorized.

It shall set for the creditor the time limit within which, under penalty of nullity of the authorization, he can file for action before the competent court to establish the validity of the mortgage or the merits of the case, even where such action is in the form of a petition for the issue of a mandatory injunction to pay. In addition, it shall also fix the period of time within which the debtor shall be barred from bringing an action on the merits of the case.

Where the creditor violates the provisions of the preceding paragraph, the decision may be withdrawn by the court which authorized the mortgage.

» A creditor may obtain a court-ordered provisional mortgage over the real property of his debtor in order to secure a debt before it is enforceable.

» The judgment must indicate the amount of the debt for which the mortgage is authorized and determine a deadline within which the creditor must file proceedings to validate the provisional mortgage or proceedings on its merit, failing which the mortgage will lapse.

This is a welcome innovation. Under the Common Law, the court cannot impose a mortgage on the parties. However, the creditor has other remedies available to him, for example, he can sue for the debt due and owing.

Article 137:

The decision may oblige the creditor to prove beforehand his sufficient solvency or, failing that, to give guarantee by deed of suretyship filed with the registry or with a receiver with or without obligation to comply with the rules governing the reception of security.

» The decision or judgment may also require the creditor to provide evidence of the solvency or to provide a surety-bond before the mortgage is granted. This provision is desirable because it would prevent frivolous claims and the possibility of refund if the creditor is later found not to be owed by the debtor. This decision is temporal.

Article 138:

The competent court shall rule on condition that the matter be eventually referred back to it in case of any difficulty. Its decision shall be enforceable immediately, notwithstanding any objection or appeal.

» The court's decision is not final. It can be re-opened if there are problems. The court order is immediately enforceable, notwithstanding any appeal or third-party objections. This is so because a guarantee has been provided by the creditor.

Article 139:

The creditor shall be authorized to make a provisional registration of mortgage upon presentation of the decision showing:

- 1) the name of the creditor, his place of residence, and name of the debtor;
- 2) the date of the decision;
- 3) the origin and amount of the debt being guaranteed, including the principal, interest and expenses;
- 4) the description by number of the land certificate, of each property for which registration was ordered; in the absence of the land certificate, subject to the provisions of Article 119 above, the description of unregistered property shall be done in accordance with the provisions of the national laws laid down for that purpose.
- 5) The provisions of this article shall not exclude the publication formalities prescribed by the land law in force.

» The creditor is authorized to make a provisional registration of the court-ordered mortgage. This provision lists certain information that must be contained in the court order. It includes details of the debt guaranteed, the amount in principal plus interest and cost and the designation of each property over which the mortgage has been granted with its registration number. As usual publication is required (See Article 119).

Article 140:

The creditor shall notify the court decision ordering the mortgage by delivering the writ for proceedings to establish the validity or the merits of the case. He shall also notify the registration within a period of fifteen days of this formality.

He shall elect domicile within the area of jurisdiction of the competent court or the mortgage registry.

- » The creditor must notify the debtor of the court order by serving upon him a summons to appear in the proceedings for validation of the mortgage or the proceedings on the merits, as the case may be within the deadline fixed by the court. He must also notify the debtor of the registration of the mortgage within fifteen days of registration. It is the creditor who initiates the action because he is the one to lose.

Article 141:

Release or reduction of the mortgage may be obtained from the President of the competent court which authorized the mortgage, sitting in emergency session, subject to the deposit with an official receiver designated by him of the principal, interest and expenses, with special allocation for the debt. The release or the reduction of the mortgage shall be requested within the month following notification of the writ to establish the validity or the merits of the case.

Where the debt in dispute is the object of a final judgment, the sums deposited with a receiver shall be specially allocated, in preference to any other uses, to the payment of the debt of the plaintiff. The said sums shall remain under a distraint order throughout the duration of the proceedings.

- » Release of the mortgage or a reduction of its amount may be obtained in urgent summary proceedings before the president of the court which gave the original order on condition that the debtor deposits with an escrow agent the amount of the debt in principal, interest and costs and that this amount is specifically set aside for payment of the debt concerned. Such summary proceedings must be filed within one month of service of the creditor's summons. The proceedings are carried out before the president of the Court of First Instance.

- » If the debtor's request is granted, and if the creditor subsequently obtains a final judgment in his favour in respect of the debt in question, he has an overriding preferential right to the sums held in escrow which are specifically allocated to payment of the debt. These sums are frozen throughout the proceedings on the merit.

Article 142:

The court before which the matter is brought may, in any case, and even before deciding on the merits of the case, order a total or partial release of the mortgage if the debtor provides serious and legitimate reasons therefore.

In the event of forfeiture of the right to bring action, or withdrawal of action or suit, the cancellation of the provisional registration that has not yet been granted shall be awarded by the court which authorized the said registration and the cancellation shall be effected upon submission of its final decision.

» The debtor may also obtain from the court, at any time, a partial or total release of the mortgage on condition that he can show that there are cogent and legitimate reasons for such a release. In practice, this may arise if the debt does not appear to be well founded in principle or that there are no circumstances that jeopardize its recovery.

» If the creditor fails to bring proceedings on the merits within the deadline fixed by the court, or if he lets such proceedings lapse or withdraws them, the court which authorized the registration of the mortgage may order its discharge if the creditor does not agree to it voluntarily. In such an event, the discharge is made by filing the court's judgment with the land registry once it has become final and binding.

Article 143:

When it is proved that the value of the property is double the registered amounts, the debtor may seek to limit the scope of the initial registration to the property which he shall choose for that purpose.

» The debtor can limit the scope of the mortgage if he can show that the value of the mortgage property is more than twice the amount of the debt. In such an event, he may request that the mortgage be limited to certain property within the original scope of the mortgage.

Article 144:

Where the debt is acknowledged, the decision on the merits of the case shall maintain the whole or part of the mortgage already registered or shall grant a final mortgage.

Within a period of six months from the day on which this decision became final, it shall be required to register the ensuing mortgage in accordance with the law on the publication of landed property transactions. The mortgage maintained shall acquire a rank with effect from the date of provisional registration, whereas the mortgage granted shall acquire a rank from the date of final registration.

Where the final registration is not done within the above-mentioned period, or if the debt is not acknowledged by a final decision, the initial registration shall become voidable *ab initio*, and its cancellation may be requested by any interested party, at the expense of the registering party, before the court which authorized its registration.

- » If during the court proceedings on the merits the existence of the debt is confirmed, the judgment may either maintain in full or in part the provisional mortgage as already registered or grant a final mortgage.
- » The creditor must register the mortgage resulting from the judgment within six months after the judgment has become final and binding.
- » If he fails to do so or if the debt is not confirmed by a final judgment, the provisional registration of the mortgage becomes *void ab initio* that is retroactively and any interested party may apply to the court which ordered it, to seek its de-registration at the expense of the party who registered it.

CHAPTER IV EFFECTS OF MORTGAGES

Article 145:

Where the mortgaged property becomes inadequate to guarantee a debt following the destruction or deterioration of the property, the creditor may take action for payment of his debt before the term or to obtain another mortgage.

- » If as a result of destruction or damage affecting the property, its value becomes insufficient to guarantee the payment of the debt, the creditor may either seek payment before the due date or obtain a new mortgage.

This provision is similar to the position under the Common Law jurisdictions.

Article 146:

In case of non-payment on the due date or in the case provided for under Article 145 above, the creditor shall exercise his right of pursuit and his preferential right in accordance with Article 117 above.

The right of pursuit shall be exercised against the debtor or any third holder of the property whose title deed was published after the mortgage.

Although the third holder is not personally bound by the debt, he may pay off the pursuing creditor to the tune of the full amount of his debt including capital, interest and expenses and becomes the creditor

» It gives the creditor a right of action of foreclosure on the due date for non-payment of the debt. (See Article 117).

However, the third party holder may pay off the mortgagee and then pursue the debtor. It is presumed that he steps into the shoes of the creditor and can then realise the mortgage.

PART IV

DISTRIBUTION AND CLASSIFICATION OF SECURITY

*The classification and ranking of securities inherited from French Law was particularly complex and confusing. It was therefore appropriate to draw up a separate classification of securities relating to immovable or real estate (solely in article 148) and another for movable property (solely in article 149). This method clearly determines the rank of any security. (See Joseph Issa-Saygegh, *Le classement des sûretés. La distribution du prix des biens du débiteur entre ses créanciers en droit sénégalais*, Revue EDJA, No. 14, p. 3 et S.).*

Of course, this does not prevent a Member State from creating a new security in its domestic law. If the security is one where registration with the land registry or the commercial registry is required, it will be ranked from the date of its registration. If on the other hand, the security is one where no registration is required there are two situations:

- *If it is a security on moveable assets, the ranking of creditors will depend on the order of creation in terms of time.*
- *In the case of general preferential right, for example, the tax authority who have an interest in all the estate of the debtor, each Member State has to indicate expressly the ranking of such security interest with reference to other security interests in article 107 of the Uniform Act. If the domestic law fails to define the rank of the new security interest, it will automatically be in the last rank (Article 106).*

Under the English system, there is no general commercial code. However, principles of law have been developed and some provisions are provided by way of statute in insolvency

proceedings. If the business is a going concern and there is enough to go round there is no problem. However, if the debtor is unable to pay his debts then formal procedures are involved in the case of an individual, bankruptcy and also in the case of a company, winding-up and ranking becomes important.

In general, at Common Law security interests or real rights are enforceable against the debtor's estate whether or not it has been perfected, that is registered. A fully secured creditor may ignore any insolvency process and proceed in securing his rights. They are really not contenders in the priority stakes. Even costs of administration cannot be taken out of the secured asset.

Under the Common Law, the ranking of securities is as follows:

- 1. In the first position, the secured creditors which include mortgages and debentures are paid.*
 - 2. In the second place, the cost of administration is paid..*
 - 3. In the third place, preferential rights of creditors such as the wages of employees, tax and social security authorities are paid.*
 - 4. Finally, in the fourth position, the unsecured creditors are paid last.*
- (See R. M. Goode, Commercial Law, op.cit., pp.757-785 and pp. 893-912)*

Article 147:

The procedure for distributing the proceeds of seizures shall be determined by the governing measures of execution subject to the following provisions relating to the order of distribution.

» The rules of distribution of proceeds of sale is regulated according to articles 324 et seq. of the Uniform Act Relating to Simplified Recovery Procedures and Measures of Execution of Judgment. If there is only one creditor, the proceeds of sale will be given to him up to his payable debt plus interest and additional costs. If there is any remaining amount of money, this will be given back to the debtor. In the case where, there are several creditors, there are two possibilities:

- 1) There should be an agreement between the creditors on the manner of distributing the proceeds of sale. This agreement should be sent to the Registrar in Chief who holds the proceeds of sale and he will distribute the money according to the agreement.
- 2) In case there is no agreement between the creditors, any creditor may ask the president of the competent court or the court having jurisdiction, that is, the court which sold the goods or a delegated magistrate to decide on the rules of distribution of the proceeds of sale.

» For the detailed rules of distribution of the proceeds of sale reference should be made to article 148 with regard to immovable assets and article 149 with regard to movable assets in the Uniform Act relating to securities.

Article 148:

Proceeds from the sale of property shall be distributed in the following order:

- 1) to creditors owed legal costs incurred in the process leading to sale of the property and in the actual distribution of the proceeds;
- 2) to creditors of highly preferred wages;
- 3) to creditors having a contractual or forcible mortgage and individual creditors registered within the legal deadline, each according to the rank of his registration in the land register;
- 4) to creditors with a general lien subject to publication, each according to the rank of his registration in the Trade and Personal Property Credit Register;
- 5) to creditors with a general lien not subject to publication according to the order laid down in Article 107 above;
- 6) to unsecured creditors in possession of an enforceable title arising from a distraint order or objection to the distribution procedure.

In case the funds to pay off the creditors mentioned in (1), (2), (5) and (6) of this article are inadequate, and the said creditors occupy the same rank, the distribution shall be in proportion to their total debts.

- » 1. In the first place only the legal costs incurred in the sale of the assets and in distributing the proceeds of sale will be paid first, that is, given first priority. Of course, only the persons or creditors who have paid these costs or advanced the money to meet these costs will be paid back. In case the proceeds of sale is not sufficient, then the creditors will compete with unsecured creditors proportionately to the total amount of their claim.
2. In the second position, the salaries of wage earners which cover the last twelve months of salaries before the adjudication in bankruptcy or the twelve months before the death of the debtor or the twelve months before the foreclosure of the assets. If the immovable assets which have been foreclosed are not sufficient, then the creditors will compete with unsecured creditors proportionately to the total amount of their claim.

3. In the third position, the secured creditors who have obtained a mortgage on the assets are given priority. Among these specified creditors who have obtained a mortgage, the ranking is determined by the date of registration of the mortgage. There will be established an order according to the date and time of registration. In case the proceeds of sale are insufficient, the first creditor will be paid fully and the others will not be paid. There is no rule of proportional distribution among the creditors.
4. In the fourth position, secured creditors who have a general privilege, for example, tax authorities, customs authorities and social security stated in article 108 of this Uniform Act. For this general privilege to be enforceable, it must be registered and published in the Trade and Personal Property Credit Register. In case, the proceeds of sale are insufficient, the distribution will be the same as in the case of secured creditors with a mortgage mentioned above in number three.
5. In the fifth position, secured creditors who have a general privilege, for example, tax authorities, custom authority, social security, salaries of wage earners which is not the last twelve months but before the last twelve months. In this category, there is no requirement for registration and publication. The ranking would be the same as that established under article 107 as follows:
 1. Funeral cost and medical cost before death.
 2. living expenses
 3. Salaries before the last twelve months.
 4. The debt owed to artists, writers or authors of intellectual property.
 5. Tax authority, custom authority and social security.

As in the case of secured creditors with a mortgage, the first creditor is paid totally and if the proceeds of sale is insufficient the other creditors will forfeit payment. However, within the same rank, if there are many creditors in competition, the distribution will be made proportionately among them.
6. In the sixth position, the unsecured creditors come last. They cannot benefit from the distribution of the proceeds of sale unless they have obtained a writ of execution or an enforceable right. If the foreclosure had been initiated by some creditors and for some reasons, some particular creditors were not among them when they obtained the writ of execution, the creditors can only join the others if the court accepts the reasons why they were late.

Article 149:

The proceeds from the sale of chattels shall be shared in the following order:

- 1) to creditors owed legal costs incurred in the process leading to the sale of the property and in the actual distribution of the proceeds;

- 2) to creditors who assumed the cost of conserving the debtor's property in the interest of the creditors with older debts;
- 3) to creditors of highly preferred wages;
- 4) to creditors guaranteed by a pledge according to the date of establishment of the pledge;
- 5) to creditors guaranteed by a pledge or preferential right subject to publication, each according to his rank in the Trade and Personal Property Credit Register;
- 6) to creditors with a special lien, each according to the property to which the lien attaches; in case of creditors with a special lien having conflicting claims over the same property, preference shall be given to the first to bring action for distraint;
- 7) to creditors with a general lien not subject to publication according to the order prescribed by Article 107 above;
- 8) to unsecured creditors in possession of an enforceable title following a distraint order or an objection to the distribution procedure.

In case the funds to pay off the creditors mentioned in (1), (2), (3), (6), (7) and (8) of this article are inadequate and the said creditors occupy equal rank, the funds shall be distributed proportionately to their total debts.

» This article states the distribution of the proceeds of sale of movable assets as follows:

1. In the first position, legal cost incurred in the realization of the sale and distribution of the movable assets (see article 148(I) above).
2. In the second position, the costs incurred in the preservation of the assets, for example, the garage owner will be paid first because he is the one who preserves the value of the assets thus maximizing the value of the estate.
3. In the third position, creditors who are wage earners. The rules are the same as those stated in article 148 number two above.
4. In the fourth position, creditors guaranteed by a pledge. If a movable good has been given as a pledge to different creditors, the criteria for ranking would be according to the date of registration of the pledge (see article 49). If there is insufficient money, then they will compete with unsecured creditors proportionately to the amount of their claims.

5. In the fifth position, creditors guaranteed by a pledge over movable goods and those in possession of a general privilege subject for publication (See Article 108). These creditors exercise their preferential rights over movable goods to be pledged. In case of any competing claim on the same goods, creditors who have registered are classified according to their dates of registration in the Trade and Personal Property Credit Register.
6. In the sixth position, creditors with a special lien. In case there are several creditors having security over the same assets, then the ranking will depend on the date of registration. In case the proceeds of sale is insufficient, they will compete with unsecured creditors proportionately to the amount of their claim.
7. In the seventh position, creditors who have a general privilege which is not subject to registration. The rules applicable here are the same as those stated in article 148, number 5.
8. In the eighth position, the unsecured creditors come last. The rules applicable here are the same as those stated in article 148 number 6.

In case the proceeds of sale are insufficient to pay all the creditors mentioned in this article and the creditors have equal rank, the proceeds would be distributed proportionately according to the amount of their respective claims.

PART V FINAL PROVISIONS

Article 150:

All previous provisions repugnant to those of this Uniform Act are hereby repealed. This Uniform Act shall apply only to securities granted or established after its entry into force.

Any security granted, established or created prior to this Uniform Act and in accordance with the laws then in force shall remain subject to that law until its extinction.

» Securities which were issued before January 1 1998 are still subject to the previous law applicable to every member State until its termination.

Securities issued after January 1998 remain in force in accordance with the present Uniform Act. This is the case with surety-bonds applicable after the entry into force of this

Uniform Act as regard the legal duty to provide a bond imposed on exporters of coffee and cocoa by a decree No 95-637 of 23 August 1995. (Court of First Instance in Abidjan, Judgment No 31 of 22 March 2001, CSSPA C/ Sté Afrocom, ecobank et BACI, *Révue Ecodroit*, No 1, July-August 2001, p. 39).

This Uniform Act abrogates provisions in the laws of the Member States which are contrary to its provisions. For example, surety-bonds, letters of guaranty on first call, pledges, and mortgages. Hence, by virtue of article 10 of the OHADA Treaty, and according to the advisory opinion of the CCJA (Advisory Opinion No. 01/2001/EP of 30 April 2001-observations of ISSA-SAYEGH Joseph, OHADA.com. ohadata J-02-02).

The effect of article 10 is to abrogate and to prohibit for the future any national legislative or regulatory provision which has the same purpose as the Uniform Act and which conflicts with these. The advisory opinion adds that this also applies to any provision identical to the provisions of the Uniform Acts.

Article 151:

After consideration, the Council of Ministers of the Contracting States present and voting, in accordance with the provisions of the Treaty of 17 October 1993 on the Organization for the Harmonization of Business Law in Africa, hereby adopts unanimously this Uniform Act.

This Uniform Act shall be published in the Official Gazette of OHADA and of the Contracting States. It shall enter into force on 1 January 1998.

Done at Cotonou on 17 April 1997