

THE ORGANISATION FOR THE HARMONISATION  
OF BUSINESS LAW IN AFRICA

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**UNIFORM ACT ORGANIZING  
SECURITIES**

*Translation*

# UNIFORM ACT ORGANIZING SECURITIES

## 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:

### 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.

### 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 personalty or realty used to guaranty the debtor's obligation.

## PART I COLLATERAL SECURITIES

### CHAPTER I SURETY-BONDS

### 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.

## 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.

### 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.

### 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.

### 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.

**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.

**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.

## **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.

**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.

**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.

### Section 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.

**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 15:**

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

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

**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.

**Article 17:**

Where there are many guarantors for the same debtor and debt, unless they have joint and several liability 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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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 a 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.

**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**

**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.

### **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.

**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.

### **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.



**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.

**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.

**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.

**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.

**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.

**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.

**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.

## **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.

**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**

**Article 41:**

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

**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.

**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.

**CHAPTER II  
PLEDGES****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.

**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.

**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.

**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.

**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.

**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.

## 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.

### 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.

### 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.

### 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.

### 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.

**Article 55:**

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

**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.

**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.

**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.

**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 restitute an equivalent asset.

**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 restitute the pledge, even if it is divisible, to the detriment of joint heirs who have not been paid.

**Section IV. Extinction of the pledge**

**Article 61:**

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

**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.

**CHAPTER III  
PLEDGING WITHOUT DISPOSSESSION**

**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.

## **Section I. Pledging of partnership rights and transferable securities**

### **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.

### **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.
- (7)

### **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.

### **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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

### **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.

#### **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.

#### **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.

#### **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.

#### **Article 89:**

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

#### **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.

### **Section III - Pledging of professional equipment and motor vehicles**

#### **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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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 apply.

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.

**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.

## **CHAPTER IV 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.

#### **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 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.

#### **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.

## Section II - Special liens

### 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.

### 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.

### 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.

### 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.

### 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.

### 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.

### 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.

### 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.



## **PART III MORTGAGES**

### **CHAPTER I GENERAL PROVISIONS**

**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.

**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.

**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.

**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.

**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.

**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.

**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 judgement shown in a report and from payment or deposit of the final compensation for expropriation for reasons of public purpose.

**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 judgement handed down against the creditor or his rightful claimants and which has become absolute shall oblige the registrar to cancel 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.

**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.

**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.

**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.

### **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.

### **Section I - Forcible mortgages**

#### **Article 133:**

A forcible mortgage of a group of creditors shall be provided for by the Uniform Act 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.

#### **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 hold 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.

#### **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.

### **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.

**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.

**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.

**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.

The provisions of this article shall not exclude the publication formalities prescribed by the land law in force.

**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.

**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.

**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 therefor.

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.

**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.

**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.

## **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.

**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.

#### **PART IV DISTRIBUTION AND CLASSIFICATION OF SECURITY**

**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.

**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.

**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.

## **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.

### **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