

Malawi

## Commercial Credits Act

### Chapter 48:06

Legislation as at 31 December 2014

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## Commercial Credits Act

### Chapter 48:06

Assented to on 10 December 1970

Commenced on 10 December 1970

*[This is the version of this document at 31 December 2014.]*

*[Note: This version of the Act was revised and consolidated in the Fifth Revised Edition of the Laws of Malawi (L.R.O. 1/2018), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]*

#### **An Act to facilitate the borrowing of money by the proprietors of certain businesses on the security of trading assets and for purposes connected therewith and incidental thereto**

#### **1. Short title**

This Act may be cited as the Commercial Credits Act.

#### **2. Interpretation**

In this Act, unless the context otherwise requires—

“**business proprietor**” means any person (not being an incorporated company or society) who, as the owner or occupier of any premises, carries on trade or business therein as a retailer or wholesaler;

“**commercial charge**” means a charge under this Act;

“**designated institution**” means a bank, company, statutory body or society designated by the Minister, by notice published in the *Gazette*, to be a designated institution for purposes of this Act;

“**register**” means the register provided for in [section 7](#) and “registered” bears a corresponding meaning;

“**trading assets**” includes shop goods, stock in trade, plant and utensils used in any trade or business and any money or things in action employed or received in the course of any trade or business but does not include any real property or landlord’s fixtures.

*[24 of 1972]*

#### **3. Commercial charges on trading assets**

- (1) It shall be lawful for a business proprietor by instrument in writing to create in favour of a designated institution a commercial charge on all or any of the trading assets belonging to him as security for sums due, or to become due, by him to such institution or advanced or to be advanced to him or paid or to be paid on his behalf by such institution and as security for interest, commission and charges on such sums.
- (2) A Commercial charge may be either a fixed charge or a floating charge or both.
- (3) The property affected by a fixed charge shall be such property forming part of the trading assets belonging to the business proprietor at the date of the charge as may be specified in the charge but may include, in the case of trading plant, any plant which may whilst the charge is in force be substituted for the plant specified in the charge.
- (4) The property affected by a floating charge shall be the trading assets from time to time belonging to the business proprietor or such part thereof as is mentioned in the charge.

- (5) The principal sum secured by a commercial charge may be either a specified amount, or a fluctuating amount advanced on current account to, or due and owing for goods and services supplied by, the designated institution not exceeding at any one time such amount, if any, as may be specified in the charge and a charge shall not be deemed to be redeemed by reason only of the current account having ceased to be in debit or by reason only of there being no amount due or owing, as the case may be.
- (6) A commercial charge may be in such form and made upon such conditions as the parties thereto may agree and sureties may be made parties thereto.

#### 4. Effect of fixed charge

- (1) A fixed charge shall, so long as the charge continues in force, confer on the designated institution the following rights and impose on the institution the following obligations, that is to say—
  - (a) a right, upon the happening of any event specified in the charge as being an event authorizing the seizure of the property subject to the charge, to take possession of any property so subject;
  - (b) where possession of any property has been so taken, a right, after an interval of five clear days or such less time as may be allowed by the charge, to sell the property either by public auction, or, if the charge so provides, by private treaty, and either for a lump sum payment or payment by instalments;
  - (c) an obligation, in the event of such power of sale being exercised, to apply the proceeds of sale in or towards the discharge of the moneys and liabilities secured by the charge, and the cost of seizure and sale, and to pay the surplus (if any) of the proceeds to the business proprietor.
- (2) A fixed charge shall, so long as the charge continues in force, impose on the business proprietor the following obligations—
  - (a) an obligation whenever he sells any of the property, or receives any money in respect of trading assets comprised in the charge, forthwith to pay to the designated institution the amount of the proceeds of the sale or of the money so received, except to such extent as the charge otherwise provides or the designated institution allows; the sums so paid to be applied, except so far as otherwise agreed, by the designated institution in or towards the discharge of moneys and liabilities secured by the charge;
  - (b) in the event of the business proprietor receiving any money under any policy of insurance on any of the property comprised in the charge, forthwith to pay the amount of the sums so received to the designated institution, except to such extent as the charge otherwise provides or the designated institution allows; the sums so paid to be applied, except so far as otherwise agreed by the designated institution, in or towards the discharge of the moneys and liabilities secured by the charge.
- (3) Subject to compliance with the obligations so imposed, a fixed charge shall not prevent the business proprietor from selling any of the property subject to the charge, and neither the purchaser, nor, in the case of a sale by auction, the auctioneer, shall be concerned to see that such obligations are complied with notwithstanding that he may be aware of the existence of the charge.
- (4) Where any proceeds of sale which in pursuance of such obligation as aforesaid ought to be paid to the designated institution are paid to some other person nothing in this Act shall confer on the designated institution a right to recover such proceeds from that other person unless the designated institution proves that such other person knew that the proceeds were paid to him in breach of such obligation as aforesaid, but such other person shall not be deemed to have such knowledge by reason only that he has notice of the charge.

## 5. Effect of floating charge

A commercial charge creating a floating charge shall have the like effect as if the charge had been created by a duly registered debenture issued by a company:

Provided that—

- (a) the charge shall become a fixed charge upon the property comprised in the charge as existing at the date of its becoming a fixed charge—
  - (i) upon a receiving order in bankruptcy being made against the business proprietor;
  - (ii) upon the death of the business proprietor;
  - (iii) upon the dissolution of partnership in the case where the property charged is partnership property;
  - (iv) upon notice in writing to that effect being given by the designated institution on the happening of any event which by virtue of the charge confers on the designated institution the right to give such notice;
- (b) the business proprietor, whilst the charge remains a floating charge, shall be subject to the like obligation as in the case of a fixed charge to pay over to the designated institution the amount received by him by way of proceeds of sale or in respect of trading assets, under policies of insurance and [section 4](#) shall apply accordingly except that it shall not be necessary for a business proprietor to comply with such obligations if and so far as the amount so received is expended by him in the purchase of trading assets which on purchase become subject to the charge.

## 6. Supplemental provisions as to commercial charges

- (1) A commercial charge shall have effect notwithstanding anything in the Bills of Sale Act and shall not be deemed to be a bill of sale within the meaning of that Act.
- (2) Commercial charges shall in relation to one another have priority in accordance with the times at which they are respectively registered under this Act.
- (3) Where a commercial charge creating a floating charge has been made, a commercial charge purporting to create a fixed charge or a bill of sale comprising any of the property comprised in the floating charge shall, as respects the property subject to the floating charge, be void so long as the floating charge remains in force.
- (4) Trading assets subject to a commercial charge shall not, for the purposes of section 40 of the Bankruptcy Act be deemed to be goods in the possession, order or disposition of the business proprietor in his trade or business by the consent of the true owner thereof under such circumstances that he is the reputed owner thereof.

*[Cap. 11:01]*

- (5) Where a business proprietor who is adjudged bankrupt has created in favour of a designated institution a commercial charge on any of the trading assets belonging to him and the charge was created within three months of the date of the presentation of the bankruptcy petition the amount which but for this provision would have been secured by the charge shall be reduced—
  - (a) firstly, by the amount of any debt payable in priority to other debts by virtue of section 35 (1) of the Bankruptcy Act; and
  - (b) secondly, where such charge operated to secure any sum owing to the designated institution immediately prior to the giving of the charge, unless it is proved that the business proprietor

immediately after the execution of the charge was solvent, by the amount so owing to the designated institution immediately prior to the giving of the charge:

Provided that nothing in this section shall prejudice the right of the designated institution to enforce any other security for the amount of any reduction made under this section or to claim payment of such amount as an unsecured debt.

- (6) A commercial charge shall be no protection in respect of property included in the charge which but for the charge would have been liable to distress for rent, taxes or rates.
- (7) An instrument creating a commercial charge shall be exempt from stamp duty.

*[Cap. 48:03]*

## 7. Registration of commercial charges

- (1) Every commercial charge shall be registered under this Act within seven clear days after the execution thereof, and, if not so registered, shall be void as against any person other than the business proprietor:

Provided that the High Court on proof that omission to register within such time aforesaid was accidental or due to inadvertence may extend the time for registration on such terms as the court thinks fit.

- (2) The Registrar General shall maintain a register of commercial charges in such form and in such manner as may be prescribed.
- (3) Registration of a commercial charge shall be effected by sending by post to the Registrar General at his principal office a memorandum of the instrument creating the charge and such particulars of the charge as may be prescribed, together with the prescribed fee; and the Registrar General shall enter the particulars in the register and file the memorandum.
- (4) The register kept and the memoranda filed under this section shall at all reasonable times be open to inspection by any person on payment (except where the inspection is made by or on behalf of a designated institution) of the prescribed fee, and any person inspecting the register or any such filed memorandum on payment (except as aforesaid) of the prescribed fee may make copies or extracts therefrom.
- (5) Any person may on payment of the prescribed fee require to be furnished with a copy of any entry in the register or of any filed memorandum or of any part thereof certified to be a true copy by the Registrar General.
- (6) Registration of a commercial charge may be proved by the production of a certified copy of the entry in the register relating to the charge and a copy of any entry purporting to be certified as a true copy by the Registrar General shall in all legal proceedings be evidence of the matters stated therein without proof of the signature or authority of the person signing it.
- (7) Registration of a commercial charge under this section shall be deemed to constitute actual notice of the charge and of the fact of such registration to all persons and for all purposes connected with the property comprised in the charge as from the date of registration or other prescribed date and so long as the registration continues in force:

Provided that where a commercial charge created in favour of a designated institution is expressly made for securing a current account or other further advances, the institution, in relation to the making of further advances under the charge, shall not be deemed to have notice of another commercial charge by reason only that it is so registered if it was not so registered at the time when the first-mentioned charge was created or when the last search (if any) by or on behalf of the institution was made, whichever last happened.

## 8. Frauds by business proprietors

If, with intent to defraud, a business proprietor who has created a commercial charge—

- (a) fails to comply with the obligations imposed by this Act as to the payment over to the designated institution of any sums received by him by way of proceeds of sale or in respect of other trading assets or under a policy of insurance; or
- (b) removes or suffers to be removed from his holding any property subject to the charge,

he shall be liable to a fine of five hundred pounds and to imprisonment for three years.

## 9. Regulations

The Minister may make Regulations for the better carrying out of the purposes and provisions of this Act and without prejudice to the generality of the foregoing such regulations may provide for—

- (a) the form of the register;
- (b) the form and content of any memorandum or other document used for the purposes of this Act;
- (c) inspections and searches under this Act, including the times when they may be made;
- (d) the provision of any copies of any documents under this Act and the certification of such copies;
- (e) the payment of fees for anything done or supplied under this Act;
- (f) anything which in accordance with this Act is to be prescribed.