



AN OVERVIEW OF THE LEGAL FRAMEWORK ON SECURITY OVER MOVABLE PROPERTY IN BOTSWANA

PART 2

The Movable Property (Security Interests) Act, 2022 (the “Act”) was assented into law on 25th February 2022, with the commencement date yet to be announced. Prior thereto, the existing statutory law regime governing security interest over movable property in Botswana comprised essentially of the Hypothecation Act, 1977 (the “Hypothecation Act”), the Deeds Registry Act, 1960 (“Deeds Registry Act”) and the Agricultural Charges Act, 1967 (the “Agricultural Charges Act”) and their respective amendments. These pieces of legislation remain, greatly limited in their application, and therefore equally in their usefulness to business at large. The Hypothecation Act is applicable only in as far as the creditor with the security interest fits the definition of “authorized creditor” per that statute, and the Agricultural Charges Act is limited in scope to security interest in relation to loans of money by the National Development Bank to farmers. Further, registration of notarial bonds in terms of the Deeds Registry Act does not confer real rights in the hypothecated movable property if the bond holder has not taken possession of them.

The Act, on the other hand, establishes for the first time in our jurisdiction a broad framework of written law governing comprehensively the regime of security interest over movable property generally. It also establishes an electronic collateral registry system to serve the public principally as an electronic database of information on all registered security interests in movable property. It records, amongst other things, information relating to particulars of the respective secured creditor and debtor, transactional history, the priority ranking of security interests over a collateral and the state of validity of the security interests. The electronic collateral registry will serve as a valuable tool in commercial due-diligence exercises. This is a significant development in our law.

Perhaps the most important aspect of collateral registry is that registration of a notice in respect of a security interest perfects the security interest without the need for possession of the collateral by the creditor. For movable assets, the prior regime required the physical possession of movable assets by a bond holder in order to establish its perfection against third parties. This proved inefficient for a debtor, as the debtor no longer could make use of such assets for the debtor’s business. This new Act has huge implications for notarial bonds since it renders the instruments practically obsolete. A security agreement registered in terms of the Act creates a higher-ranking security than a notarial bond, at a lesser cost of preparation and registration, and without the need to transfer possession of the collateral from the debtor.

The passing of this new Act heralds a surge of activity in the domestic finance sector, and in business generally. Now there are clearly defined and ascertained rules that governs the diverse base of what is characterized as movable property for purposes of securing repayment of financial debts and performance of other contractual obligations. Whereas previously, security interests in movable property, outside of the Hypothecation Act and the Agricultural Charges Act, were governed under our unwritten common law, and required, in most instances, the intervention of a court order to gain perfection.

The Act now brings clear, simple and practical guidance on what constitutes a security interest in movable property and how parties to commercial transactions can create security interests in all forms of movable property and the path to secure perfection of the security interests. The Act also sets out what factors impact the state of perfection of a security interest as well as its priority ranking in relation to other competing security interests in the same property. This practical framework of law and the clarity it brings to the understanding of the nature of security interests in movable property and its legal parameters stands to promote access to loan finance and deal acquisitions requiring performance security.

Naturally, the Act provides clear prescripts on the rights and obligations of the secured creditor and the debtor, as well as that of related third parties, in the context of the potentially dynamic and transferable nature of a collateral as well as a security interest itself. It also establishes the law relating to post-default rights and obligations of the secured creditor and the debtor, and the method of exercising and enforcing such rights, and the effect of priority of ranking of security interests in post-default enforcement of rights. Interestingly, for instance, this Act also introduces a post-default right and pathway for a debtor, in appropriate circumstances, to reinstate a security agreement with the secured creditor prior to the disposal of the collateral by a secured creditor in satisfaction of a secured obligation.

Intrinsically, the Act appears to be designed to promote and stimulate increased activity in the finance sector and in transactions in respect of which security of performance obligations is an important aspect. Interestingly, it allows the parties, by mutual agreement, to depart from many of its provisions that deal mostly with their interrelated rights and obligations. Further, the Act prescribes a requirement of general good faith and reasonable standards of commercial practice by any person subjected to it. It also sets firmly the jurisdiction of law applicable to the creation, perfection and priority ranking of a security interest in relation to geographical location and holds any contravention by a person of any of its mandatory provisions an offence by such person, with corresponding penal provisions prescribed.

With this new statutory tool at their disposal, business leaders and advisors in all sectors of the economy in Botswana should be well advised to familiarize themselves with the landscape of the Act in order to optimize the benefits to derive from it and to best manage the risks in relation to security interests perfected in terms of the Act.