



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

Taking security over movable assets in Botswana has been regulated by various pieces of legislation including the Hypothecation Act and Deeds Registry Act, and the common law. The conventional security interests created by agreement over movable property are a pledge, notarial bond, lien and security by means of claims.

There are some challenges that this fragmented legislative regime has faced which include the following:



Under the Hypothecation Act, only persons designated as Authorised Creditors can register a deed of hypothec. However, the Act does not provide a clear application procedure and criterion for appointment to the status of Authorised Creditor;

- There are delays in processing applications for appointment as an Authorised Creditor. It takes an average of 4 - 7 months to process an application. These timelines are not practical for lenders who are working under tight time constraints to reach financial close;
- Public access to information pertaining to security interests over movable assets is limited to manual searches in instances where such security has been registered at the Deeds Registry. This is not only time consuming but could be costly and unavailable to international lenders; and
- To perfect a notarial bond, a creditor has to go to court (usually on urgency and without notice to the other party) to seek an order perfecting its bond and permitting it to take possession of the debtor's movable assets. This not only has cost implications but if the security is not perfected by the time the debtor's estate is sequestrated, the bondholder will only have preference over the concurrent creditors with respect to those proceeds of assets covered by the bond which fall into the free residue of the estate.

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The newly enacted Movable Property (Security Interests) Act (the “Act”) seeks to consolidate the laws on security over movable property and to address some of the highlighted challenges. For instance:

- The Act applies to every transaction that creates a security interest in movable property without regard to the status of the debtor or creditor, thus anyone can create and register a security interest at the collateral registry office;
- The Act establishes collateral registry office. This office will be open to the public and any interested party will be able to remotely search the electronic registry to check for any existing interests in the collateral;
- The Act also applies to security instruments created under the pre-existing Acts such as a hypothec or hire-purchase agreement, therefore if the pre-existing legislation were to be repealed, the security instruments created thereunder will be retain their validity and be regulated by the Act; and
- An existing security interest is perfected through registration of a notice regarding the security interest at the Collateral Registry Office, and possession of the tangible asset. Further, this method of perfecting a security interest may be changed by the secured creditor. This means a secured creditor may not have to approach a court to perfect a notarial bond or to take possession of the collateral as these matters can be dealt with contractually.

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In Part two of this series, we will discuss the key provisions of the Movable Property (Security Interests) Act and its impact on pre-existing legislation and security instruments.

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