

Review and Reflections on the Moveable and Immoveable Property Act of Bhutan 1999

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Abstract

The Moveable and Immoveable Property Act of the Kingdom of Bhutan of 1999 is an act dealing with secured loans using moveable or immoveable property as security for the loan.

This article reviews the main legal provisions of the Act and offers some suggestions on how to deal with issues of interpretation as well as with some provisions that could benefit from further analysis.

Key Words: Moveable and Immoveable Property; Bhutan; Loan; Security

1. Introduction

Despite its deceptive name, this Act deals mainly with rights and interests pertaining to the usage of moveable and immoveable property as an asset to secure or guarantee a loan. This is immediately confirmed by the second section that declares that this Act repeals Chapters 1, 2, 3 and 4 of the Law of Bhutan (NGA) Loan Act of 1981.

The subtitle of the Act provides a better indication of its contents as the Act relating to loans, mortgages and other security interests in moveable and immoveable property.

The Act consists of 7 parts:

Part I: General Provisions; Part II: Validity of Agreements' Part III: Attachments, perfection and priorities of security interests in moveable property; Part IV: Default – Rights and Remedies in respect of immoveable property (this title should be questioned when read in conjunction with the first section of the part); Part V: Mortgages (this Part will not be discussed in this article); Part VI: Registration; Part VII: Miscellaneous provisions (this Part will not be discussed in this article).

2. General Provisions

Section 3 defines the legal terms used in this act. Although it defines moveable property, it does not contain a definition of immoveable property. As the title of the Act makes a distinction between moveable and immoveable property, the differences between the two deserve some attention.

2.1 Moveable and Immoveable property

In Part I, an entire section is devoted to the definition of the legal terms. This useful section 3 'General Provisions' section provides the necessary tools for understanding the subsequent sections of the Act but a few questions remain.

Section 3 defines moveable property but it does not contain a definition of immoveable property. Section 3(i) provides that moveable property includes '*documents of title, goods, instruments, intangibles, money and securities and includes fixtures and additions but does not include building materials that have been affixed to immoveable property*'.* This definition leaves quite some room for interpretation.

In essence, the difference between moveable and immoveable property is simple. It is in the nature of the things. It is to be determined by the physical characteristics of the property. Can it be moved or can it not be moved? Such a distinction is easy to use and would mean that there is no real need for a further definition but the 1999 Act itself indicates that things are not so simple.

The definition in section 3(i) contains both tangible and intangible things. Goods are clearly tangible and moveable according to section 3(e) but instruments or securities are excluded from the definition of goods as they are intangible. Their physical characteristics are not relevant for their being and cannot serve as a determination of their moveable character. Is an instrument containing a right to an immoveable property not immoveable? The question of what is moveable or immoveable therefore deserves some further attention.

The title of the act makes clear those goods, rights; documents... have to be either moveable or immoveable. No third category exists. Why does the distinction itself exist?

2.2 The characteristics of immoveable property

As stated, the first observation is that immoveable property has a specific characteristic.

The first characteristic is physical. It is part of the surface of the earth or is attached to it. It has a stability that moveable goods do not possess. Moveable goods can be transported, lost, hidden or destroyed. The stability of immoveable property entails that it can be more easily controlled and regulated by the state/government. Immoveable property is easy to identify and is subjected to publicity (e.g. registration of legal interests).

The second characteristic is economic. The distinction developed in agricultural society was land was the main source of wealth. Immoveable property was therefore given special attention in law as it was the most valuable asset. The element of value has therefore been

element in the assessment whether a property is moveable or immovable. It is the economic value element that created the need to recognise intangible rights to immovable property as immovable.

A third characteristic is psychological. More trust is generally placed in immovable property. For example, as security for a loan, immovable property offers more safety as it cannot be taken away and it cannot be easily destroyed, stolen...

2.3 Categories of immovable property

The first and clearest category is all that pertains to the surface of the earth (e.g. piece of land) or is attached to it (e.g. buildings). The criterion of attachment deserves some further attention. The 1999 Act requires a durable attachment of property that is in its normal usage fixed to a specific location and cannot ordinarily be moved. The common example is buildings. But property that may have a durable connection to the land but is removed for its usage is excluded by the 1999 Act. As such, are goods that have not gained mobility through their relationship the surface of land are excluded, e.g. crops in the field or minerals in the soil or rock excluded. The latter fall under the definition of goods in section 3(e): as tangible moveable property including fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted.

In general law, a second category of property is deemed to become immovable by being fixed to the immovable property but Bhutanese law explicitly rejects fixtures as immovable and retains only building materials as immovable property. This means certainly those elements of the building that are essential for the structure of the building but may also include those elements that are integral to its functionality (e.g. in-built cupboards).

The third category is implicitly recognised by the 1999 Act and concerns intangible property. Section 3(g) defines intangible as all moveable property BUT excludes goods, documents of title, instruments, money or securities. Documents of title, securities, etc pertaining to immovable property is thus considered immovable.

2.4 Special terms related to moveable property

Collateral means *moveable property that is subject to a security interest (section 3(a)).*

Document of title means *any written document that purports to be issued by or addressed to a person who holds moveable property on behalf of another and purports to cover goods in the person's possession which are identified or which are fungible portions of an identified mass, and that in the ordinary course of business the document is treated as establishing that the person in possession of it is entitled to receive, hold and dispose the document and the goods it covers.*

Compare with the definition in the Commercial Sale of Goods Act (2000): *“Document of title” means any document that in the regular course of business is treated as adequately evidencing that the person is in possession of it or is entitled to receive, hold, and dispose of the document and the goods it covers.*

Goods are tangible moveable property including fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted but does not include documents of title, instruments, money and securities.

Compare with the definition of Goods in the Commercial Sale of Goods Act (2000): *Goods means all things (including manufactured goods) that are moveable at the time of identification to the contract for sale. "Goods" include animals and their unborn young. "Goods" also includes minerals, oil and gas, growing crops, and other things to be severed from real property, but it does not include the real property itself. Goods must both exist and identified before any interest in them can pass. Goods that are not both existing and identified are "future goods". (note that the English language version of the Sale of Goods Act uses American terminology, such as real property instead of immovable property).*

Proceeds means identifiable or traceable moveable property in any form which is delivered directly or indirectly from any dealing with collateral or the proceeds of collateral, and includes any payment representing indemnity or compensation for the loss of or damage to the collateral or proceeds of collateral.

Security interest means an interest in moveable property that secures payment or performance of an obligation.

In practical terms, a security interest is thus a right by a creditor to have a specific property sold to satisfy the debt owed to the secured party if the debtors are in default. In order to enforce a security interest against other creditors and in bankruptcy, the security interest must be properly created and perfected (discussed in Part III of the 1999 Act).

Secured party means a party who holds a security interest for the person's own benefit or for the benefit of any other person and for the purposes of Sections 32, 46 to 49, 54 and 55 includes a receiver.

2.5 Other legal terms

Debtor means a person who owes payment or other performance of the obligations secured, whether or not the person owns or has the rights in the collateral, and includes:

- (i) An assignor of an account, and
- (ii) A person who receives the debtor's interest in the collateral following a transfer, or a successor to a debtor's interest in collateral.

Default means the failure to pay or otherwise perform the obligation secured when due, or the occurrence of any event following which the security becomes enforceable under the terms of the security agreement.

Instrument means:

- (i) A bill, note, cheque, or any other writing that evidences a right to the payment of money and is of a type that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assignment, or

- (ii) *A letter of credit and an advice if the letter or advice states that it must be surrendered upon claiming payment thereunder.*

Money is a medium of exchange authorised or adopted by the Royal Government as part of the currency of Bhutan or by a foreign government as part of its currency.

It should be noted that the Royal Government decided on the validity of foreign currency as legal tender in Bhutan. Only if the foreign currency is accepted as legal tender in Bhutan can it legally be described as money. Foreign currency that is not recognised as legal tender in Bhutan should be considered a good that is sold and purchased. It is a good of a special nature but it is nevertheless a good. This does not diminish the definition of a good in section 3(h) of the 1999 Act.

Lease means an agreement to occupy and use land, space, structure, or equipment for a definite term in consideration of a payment usually in the form of rent.

2.6 Scope of Application – Substantive Application.

Section 4(1) of the Act defines the scope of application:

- (a) *The Act applies to every transaction that in substance creates a security interest. This application is without regard to the form of the transaction and without regard to the person who title to the collateral and includes, without limiting the foregoing:*
 - (i) *A debenture, floating charge, pledge, hypothecation;*
 - (ii) *An assignment, lease or consignment that secures payment or performance of an obligation*
 - (b) *A transfer of an account even though the transfer may not secure payment or performance of an obligation*
 - (c) *Every mortgage of immovable property, and*
 - (d) *Every loan agreement*

The terms in this subsection (ii) deserve some further consideration.

A debenture is a debt instrument that is not secured against collateral and thus only guaranteed by the integrity and reputation of the debtor. The agreement that creates a debenture is known as an indenture.

A floating charge is a debt secured against changing collateral (e.g. against the stock of a shop)

A pledge, in general terms, is a solemn promise (e.g. to repay a debt). It is then unsecured. But, it can also be a special kind of possessory security (pawn), where the assets which are being pledged need to be physically delivered to the beneficiary of the pledge (the *pledgee*). The pledgee has a common law power of sale in the event of a default on the secured obligations which arises if the secured obligations are not satisfied by the agreed time (or, in default of agreement, within a reasonable period of time). If the power of sale is exercised,

then the holder of the pledge must account to the pledgor for any surplus after payment of the secured obligations.

A hypothecation is a contract that creates an encumbrance or lien on collateral to secure a loan or mortgage. Hypothecation - also known as 'trust receipts' - are relatively uncommon forms of security interest whereby the underlying assets are pledged, not by delivery of the assets as in a conventional pledge, but by delivery of a document or other evidence of title. In business law, hypothecation is seen in relation to bills of lading, whereby the bill of lading is endorsed by the secured party, who, unless the security is redeemed, can claim the property by delivery of the bill.

The heading of subsection (a) makes clear that there are no requirements as to the form. The agreement can therefore be in writing or can be concluded orally. It deserves strong recommendation to conclude the agreement in writing to ensure that it can be proven easily.

A simple sale agreement does not establish a security interest and is not covered by this act but fall under the scope of application of the sale of goods act or other relevant legislation.

2.7 Scope of Application – Temporal Application

The 1999 Act is applicable to all agreements as defined in section 4(1) irrespective of whether such agreement has been concluded before the entry into force of the 1999 Act or thereafter.

A special transitional measure exists for agreements that predate the entry into force of the 1999 Act. For such agreements, the secured party had six months to register the security interest or mortgage. If such registration takes place, the secured party has the full rights as accorded by this Act as between the contracting parties as well as against any third party. If the secured party has failed to register the security interest or mortgage within the six month period, then the security interest or mortgage remains valid but will take a lower rank when it comes into competition with a security interest or mortgage validly concluded or registered under the 1999 Act. This lower ranking will only be applicable if the person registering a security interest or mortgage was in good faith, which is, if the person was unaware of the security interest or mortgage and make a search in central file of the registry system established under this Act.

2.8 Scope of Application – Exclusions

The 1999 Act is not applicable to a lien given by statute or rule of law. These are special circumstances defined by law or court judgment.

2.9 Part II: Validity of Agreements

3. Effectiveness as between contracting parties and third parties (section 6)

An agreement concerning a security interest, loan or mortgage is effective against the contracting parties and any third parties.

3.1 Delivery of a copy of the agreement (section 7)

The secured party shall deliver a copy of the agreement to the debtor within 30 days. If the secured party fails to do so, the debtor can obtain a copy through a Court order.

It can be questioned whether this is the most efficient way to ensure both contracting parties have a copy of the agreement. It may be worth considering requiring that at the moment of conclusion of the agreement, it is drawn up in as many copies as there are parties to the contract.

3.2 Failure to describe some of the collateral (section 8)

The 1999 Act aims to make the agreement effective wherever possible even if it has not been drawn up in a perfect form. Section 8 therefore provides that even if some collateral for a security agreement or land for a mortgage has not been described, the agreement will remain valid for whatever collateral has been described.

3.3 Guarantee agreements (section 9)

A guarantor to a security agreement, mortgage or loan agreement undertakes the same obligations of the debtor.

The secured party or guarantee alone has the choice to enforce the agreement against the debtor directly or against the guarantor. He need not go after the primary obligor (debtor) first. There is no obligation on the secured party/guarantee to exhaust its rights against the debtor first. In fact, if the guarantor offers better prospects for the fulfilment of the obligations in the agreement, the secured party/guarantee would be well advised to seek performance of the obligation (or payment) from the guarantor first.

3.4 Circumstances invalidating an agreement

3.5.1 Incapacity of a minor to conclude a contract (section 10)

A minor is defined by the law (section 10(3)). The current age is 18.

The Act provides that minors are protected by the Court. Therefore no loan to or from a minor is valid, nor is any agreement for the sale, lease, mortgage or other disposition of the property of a minor is neither effective nor enforceable unless it has been approved by the Court prior to execution.

Any attempt to conclude such an agreement without prior approval of the Court is a criminal offense punishable with a fine of up to half the value of the transaction.

3.5.2 Duress (section 11)

If a loan agreement has been entered into under duress by one of the parties, the agreement shall not be effective or enforceable. However, duress does not render the agreement automatically void. It becomes voidable through court proceedings.

A claim of duress must be made to the Court within 15 days following the day on which the agreement was executed. The limitation in time of using duress as a valid defence against the enforcement of such an agreement contributes to legal certainty and predictability of the legal status and situation. In some cases, it may lead to an unjust situation, e.g. where the duress is continuing after the execution of the agreement, this making it difficult for the party to address the Court. A compromise can be found in the English common law. English common law requires that the victim must seek rescission as soon as possible after the original pressure has ceased to operate. The most well-know precedent is a case known as *The Atlantic Baron* [1975]. Conceivably, section 11 of the 1999 Act has to be read in conjunction with section 22 of the 1999 Act (Application of principles of law and equity). The joint reading opens the possibility to interpret section 11 of the 1999 Act in similar fashion as the *Atlantic Baron* case, safeguarding legal certainty but ensuring that a victim of continued duress is not disadvantaged. Such an interpretation of the joint reading of section 11 and section 22 would promote an equitable outcome.

The consequence of duress according to the 1999 Act is that the amounts payable will be returned and the extorter shall be liable to pay a fine equal to the amount of the agreement.

3.5.3 Gambling debts

As in many other jurisdictions, in Bhutan, agreements for the loan or repayment of debts incurred as a result of gambling are not effective or enforceable.

This can be contrasted, for example, with the UK. Until April 2005, the rules were the same as in Bhutan. The British Government then saw an opportunity to raise revenue from gambling by granting a licence to casino's (gambling halls). The UK Gambling Act 2005 makes gambling debts enforceable like any other form of borrowing.

3.5.4 Loans from non-Bhutanese

In line with some other jurisdictions, Bhutan restricts the control of foreigners over immovable property. It is therefore not allowed to use immovable property as collateral for a loan taken from a non-Bhutanese. If prior agreement has been granted by the Royal Government, then such a loan or mortgage agreement may be entered into.

If such a loan agreement or mortgage is entered into with a non-Bhutanese without such agreement from the Royal Government, then the loan must be repaid within 90 days on request of the Royal Government. Failure to do so will result in the property being forfeited to the Royal Government. The property will then be sold and the proceeds will go to the repayment of the loan.

3.5.5 Restrictions on Religious Articles

Certain religious articles cannot be pledged as collateral for a loan. The list of such items is established by the Cultural Properties Division of the Royal Government.

If an agreement is executed involving such a prohibited religious article, both parties shall be liable to pay a fine not exceeding one half of the amount involved in the transaction. The religious articles involved in the transaction will moreover be forfeited to the Royal Government.

3.5.6 Unenforceable provisions

Any provision in an agreement concerning a loan, sale, mortgage, lease or other disposition of immovable or moveable property which stipulate that upon default, a person's property is to be subject to harm, or that a person is to be imprisoned is not effective or enforceable.

Such provisions could be qualified as special forms of duress: duress to goods and duress to the person respectively.

3.5.7 Mortgage of Immoveable Property belonging to Monastic Bodies is not permitted

An agreement in respect to a mortgage of other encumbrance of immovable property belonging to a Monastic Body is not effective or enforceable. An exception exists for such agreements that have received prior approval by the Council for Ecclesiastical Affairs (Dratshang Lhentshog).

Both parties to such a prohibited agreement are guilty of an offence and liable to a fine not exceeding half of the amount involved in the transaction.

The immovable property that is subject of the agreement will be restored to the registered owner.

3.6 Interest

Unless otherwise provided in an Act of the Kingdom of Bhutan, persons are free to agree on the interest rate in an agreement up to 15 percent as a simple annual rate. Only registered financial institutions which have been duly licensed to extend credit can exceed this percentage.

Interest is defined by the 1999 Act as the amount by which:

(a) The total sum that the borrower is required to pay if the payments are made as they become due, including all such sums regardless of the purpose or reason for the payment or the time of the payment, exceeds,

(b) The sum actually received in cash by the borrower (plus insurance fees or other costs prescribed by regulation, if any, actually paid by the lender.)

Where no interest is stipulated and no evidence can be produced to the satisfaction of the Court of an interest rate being fixed, then no interest shall be chargeable or recoverable.

The interest has to be stated clearly as an annual rate. If the interest rate is stated in an other way (daily, weekly...), the equivalent annual rate must be stated in the contract. This annual rate cannot exceed 15 percent per annum for the period and no compounding will be permitted.

Any excess in interest as described in the circumstances above (section 17 (limit of 15 percent); section 18 (no interest payable because interest not stipulated); section 19 (any excess above simple annual rate) is recoverable. Such payments can be recovered back from the lender or deducted from any principal or interest that is still payable under the contract.

If the agreement is contested in court proceedings, the interest on the loan, security or mortgage agreement continues to accrue at the rate specified in the agreement until the time such judgment has been rendered and satisfied. If such a judgment or if a decree, rule of order of any Court in civil proceedings makes payable any sum, costs, charges or expenses, then this will be considered a judgment debt that is subjected to the same interest rate as specified in the underlying agreement for which the judgment was granted.

3.7 Custom and Equity

Except in so far as they are inconsistent with the express provisions of the 1999 Act, the principles of Bhutanese Customary Law and Bhutanese Common Law shall supplement this Act and will continue to apply. Such principles include but are not limited to the law relating to capacity to contract, principal and agent, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law.

3. Attachment, Perfection and Priorities of Security Interests in Moveable Property

Part III deals with legal steps required to make a security interest in moveable property effective after it has been created. In the process, we can distinguish four steps:

- (1) The creation of a security interest as between the contracting parties. This is not the subject of this Part III
- (2) Attachment is the legal act of connecting the security interest to the collateral
- (3) Perfection relates to making the security interest to the collateral known, making sure it receives the necessary publicity to makes third parties aware of the security interest in the collateral. This can be done e.g. through registration, but also through possession
- (4) Priorities regulate the order and rank of the holders of a security interest.

3.1 Scope of application of Part III (section 23)

Section 23 defines the scope of application as security interests in moveable property. It does not extend to the creation or assignment of an interest in moveable property.

It does not include a mortgage, charge or lease of immovable property, other than an interest in a fixture or an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest on the immovable property.

3.2 Attachment (section 24)

A security interest although effectively established as between the parties (creation) is not enforceable against third parties unless it has attached.

A security interest attached whenⁱ:

- (a) The secured party or a person on behalf of the secured party other than the debtor obtains possession of the collateral; or when the debtor signs a security agreement that contains the description of the collateral sufficient to enable it to be identified.*
- (b) Value is given; and*
- (c) The debtor has the rights in the collateral*

Unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time.

3.3 Future Advances (section 25)

The future advances clause can secure a security interest in any and all obligations now existing or in the future.ⁱⁱ

Section 25 provides that *a security agreement may secure advances of money, credit or other value to be made in the future.*

3.4 Perfection

3.4.1 Unperfected security (section 26)

Even though a security interest may have attached; a security interest in the collateral which has not been perfected

- (a) has a lower priority than the interest of a person,*
 - (i) who has a perfected security interest in the same collateral, or who has priority or a lien given under any other Act or by the rule of law, or*
 - (ii) who assumes control of the collateral through the execution of court order.*
- (b) Is not effective against a person who represents the creditors of the debtors;*
- (c) In documents of title, securities, instruments or goods is not effective against a purchaser of the same who gives value and receives delivery without knowledge of the security interest, provided the purpose of the transfer is not solely for securing payment or performance of an obligation.*

3.4.2 Perfection (section 27)

A security interest is perfected when,

- (a) It has attached; and*
- (b) All steps required for perfection,*
 - (i) By registration under section 29, or*
 - (ii) By possession or repossession under section 31, or*
 - (iii) By the rules governing temporary perfection under section 32, have been completed, regardless of the order of the occurrence.*

If a security has been perfected in any way permitted under this Act and is again perfected in some other way permitted under this Act, shall be deemed to be continuously perfected provided that there was no period between the first and the second perfection when the interest was unperfected. (Continuous perfection – section 28(1))

When a security interest is assigned or transferred, the person who receives the security interest assumes the perfection status the transferor has at the time of the transfer. (Assignees – section 28(2))

3.4.3 Perfection by Registration under section 29

Registration perfects a security interest in any type of collateral on condition that the registration statement is registered in accordance with the provisions of this Act and the regulations.

3.4.4 Perfection by Repossession (section 31)

Possession or repossession of the collateral by the secured party, or on the secured party's behalf by a person other than the debtor perfects a security interest in:

- (a) goods;*
- (b) instruments;*
- (c) securities;*
- (d) negotiable documents and titles; and*
- (e) money*

but only while it is actually held as collateral.

3.4.5 Temporary Perfection (section 32)

4.3.5.1 Temporary Perfection of instruments and documents of title (section 32(1))

When a person takes a security interest in an instrument or negotiable instrument of title and the security is documented in a written security agreement, then such security shall be deemed to be perfected for the first ten days after the agreement is signed.

4.3.5.2 Temporary Perfection of other moveables (section 32(2))

A security interest perfected by possession in moveable property that a secured party delivers to the debtor remains perfected for the first ten days after the collateral comes under the control of the debtor, provided the property is or,

- (a) Unlimited sale or exchange,*
- (b) Presentation, collection or renewal,*
- (c) Registration of transfer,*
- (d) Loading, unloading, shipping or transshipping, or*
- (e) Manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange.*

4.3.5.3 Ten Day Rule (section 32(3))

Once the ten days period has expired, the security interest must comply with the normal rules on perfection as provided for in the 1999 Act.

3.4.6 Perfection as to the Proceeds (section 35)

Where collateral gives rise to proceeds, the security interest also covers the proceeds. But if the proceeds are money, see section 32(2)(c)!

Where the security interest was perfected by registration when the proceeds arose, the security interest in the proceeds remains continuously perfected so long as the registration remains effective. If perfection as to the proceeds occurred in any way, the security interest in the proceeds remains perfected so long as the conditions of such perfection are met.

3.5 Rights and Responsibilities of the Secured Party over the Collateral

4.4.1 Responsibilities of the secured party in possession: reasonable care

A secured party in possession has a duty to take reasonable care of the collateral. Where a secured party is in (re-)possession of the goods, the secured party shall take reasonable care in custody and preservation of collateral in his possession. In the case of an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

The secured party thus has specific rights and duties if the collateral is in the possession of the secured party. A specific agreement can determine these rights and obligations. In the absence of such an agreement, section 33(2) lists them:

- (a) Reasonable expenses, including the cost of insurance and payment of taxes and other charge incurred in obtaining and maintaining possession of the collateral and in its preservation, are chargeable to the debtor and are secured by the collateral;
- (b) The risk of loss or damage, except when caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage;
- (c) The secured party may hold as additional security any increase or profits, except money, received from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith upon its receipt in reduction of the obligation secured; and
- (d) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled mixed with like fungibles.

For the purposes of this section, *fungible goods and fungible securities are goods or securities, as the case may be, of which any unit is, by nature or business practice, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement.* (section 33(3))

Responsibility of the secured party for loss or damage: Section 33(4) adds to section 33(2)(d) that the secured party is responsible for damage or loss if the secured party does not fulfil the obligations imposed by section 33(1) and (2).

The secured party is also responsible for preparing a list or itemised inventory of all property and its condition. This document must be signed by both parties. Failure to do so will lead to a rebuttable presumption that that inventory is accurate.

4.4.2 Responsibilities of the secured party in possession: furnish information (section 34)

The debtor or a person who has an interest in the collateral or who is an authorised representative of such a person, may require, by written notice, that the secured party is to furnish at the address specified in the notice, the following:

- (a) A statement in writing setting out, or approving or correcting the amount of the indebtedness, and the terms of payment as of the date specified in the notice;
- (b) A statement in writing, approving or correcting as of the date specified in the notice, a statement of the collateral or a part of the collateral as specified in a list attached to the notice, or
- (c) A true copy of the security agreement.

Section 34(2) further provides that the secured party must permit the person (or his representative) who has requested a true copy of the security agreement, to inspect the security agreement or a true copy of the agreement during normal business hours.

4.4.3 The secured party may use the collateral in limited circumstances (section 33(5)):

- (a) *In the manner and to the extent provided for in the security agreement;*

- (b) For the purpose of preserving the collateral or its value; or*
- (c) Pursuant to an order of the Court upon application by the secured party.*

3.6 Limitations of the rights of the secured party against good faith purchasers

Transactions of the sale of goods in the ordinary course of business do not transfer the (perfected) secured rights (section 36), unless the buyer also know that the sale constituted a breach of the security agreement

Transaction in the purchase of instruments (instrument, negotiable document of title, ..) encumbered by a security agreement and perfected by registration or temporary perfected under the Ten Day Rule (section 32) , gives the purchaser priority over the secured party if three conditions are met:

- (a) gave value for the interest purchased
- (b) purchased the instrument or negotiable document of title without knowledge that it was subject to a security interest; and
- (c) has taken possession of the instrument or negotiable document of title.

3.7 Priorities (section 38)

The rule in section 38 on priorities is an additional rule. Any more specific rules in the 1999 Act take precedence, e.g. the rules in sections 36 and 37.

The general rule states that if collateral is encumbered by more than one security interest is the temporal rule:

- (a) If the security interests are perfected by registration, the temporal rule applied: first registration takes priority
- (b) If perfection was achieved by registration for one security interest and in a different manner for another security interest, the security interest that was first perfected takes priority.

Additional clarification for the temporal rules includes:

- (a) If the security interest is continuously perfected (see section 28(1)), it shall be treated at all times according to the method by which it was first perfected.
- (b) Future advance: where subsequent advanced of money, credit or other value are made while a security interest is perfected, the security interest has the same priority with respect to each subsequent advance as it has with respect to the first advance.

3.8 Special Priorities

Liens for materials: where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has over the materials or services has priority over the perfected security interest

Crops: where a creditor provides funds to grow a crop and this security interest has been perfected, then this security interest in the crops or the proceeds from their disposition takes priority over other security interests in the crops. If more than one creditor has provided funds and has perfected their security interest, the security interest will be divided in accordance with the ratio of funds provided as compared to the total amount advanced.

Fixtures and additions:

- anyone who has a security interest in fixtures attached to moveable or immoveable property or additions, has priority over any person having a security interest in the property to which they are attached.
- Only in case of default, may such person having a security interest in a fixture or addition remove them, unless otherwise agreed.
- However, he shall reimburse the encumbrancer or owner of the whole building who is not a debtor for any physical injury caused by their removal.
- Such a person entitled to reimbursement may refuse permission for removal until adequate security is given for the reimbursement
- A person having an interest in the whole building and having a security interest with a lower priority than the person with a security interest in the fixtures or additions, may retain the fixtures or additions before removal, if he pays the secured party the amount owing in respect of the fixtures or additions.

4.7 Voluntary Subordination

A secured party may, in the security agreement or otherwise, subordinate its security interest to any other security interest and such subordination is effective according to its terms.

4.8 Transfer of the Rights in Collateral by the Debtor

The rights of the debtor in collateral may be transferred but such a transfer does not prejudice the rights of the secured party under the security agreement or otherwise.

4 Part IV Default – Rights and Remedies in Respect to Moveable Property

It should be noted that the title in English incorrectly refers to Immoveable property. Section 44 makes clear that this Part **applies only to moveable property**.

This part deals with the situation of default. As discussed in Part I under general provision, Default means *the failure to pay or otherwise perform the obligation secured when due, or the occurrence of any event following which the security becomes enforceable under the terms of the security agreement.*

This Act deals with secured debt. That is a situation where the creditor holds a security interest, i.e. *an interest in moveable property that secures payment or performance of an obligation.*

In practical terms, a security interest is a right by a creditor to have a specific property sold to satisfy the debt owed to the secured party if the debtor is in default. As discussed in the previous section, a security interest must be properly created, attached and perfected to be enforceable against the debtor and third parties.

When in default, the creditor has special rights to ensure repayment of the money or performance of the obligation in relation to moveable property. Section 46(5) provides that when the collateral is moveable and immovable, the creditor can proceed with the moveable OR treat both as immovable and proceeds under the rules and procedures applicable to immovable property.

How to recuperate money in a situation of default?

4.3 Appoint a receiver (section 47)

The receiver is appointed by the creditor or by the court according to the contractual rules or the instructions of the Court. The Court can always be applied to for further instruction and guidance as well as to the remuneration of the receiver or any other matter as the Court sees fit

4.4 Collection Rights (section 48)

Upon default, the creditor has the right to collect any proceeds from the collateral as payment for the debt or in lieu of the performance of the obligation. This include, giving notice to the holder or assignor of an account or an instrument to hand over the proceeds or to take control of any proceeds to which the secured party is entitled.

4.5 Right to take possession upon default (sections 49 & 50)

Upon default, the secured party can take possession without further formalities (no intervention of the Court required) unless taking possession requires violence or a breach of the peace

If the collateral is equipment and taking possession is not possible, the secured party may render the equipment unusable. This will be considered taking possession. Equipment are goods that are not inventory or that are not used primarily for personal, family or household purposes.

If taking possession is not possible in normal circumstances, the Court can issue an order that can be enforced with the help of the Royal Bhutan Police.

4.6 Disposal (section 51)

Upon default, the secured party may dispose of the property by public sale, private sale, lease or otherwise as long as it makes commercial sense (*'is commercially reasonable'*).

The secured party can dispose of the property as is or makes repairs, process, prepare for disposition (if commercially reasonable). The proceeds of the disposition will be used first to cover such repairs etc, then to repay the loan.

The secured party can wait with disposal for the right time in commercial terms.

4.7 Notice (subsection 51(4) to 51(10))

Before disposal, the secured party must give at least 30 days notice to all concerned. This includes:

- The debtor
- Anyone known by the secured party before the notice is given to be owner of the collateral or receiver of proceeds
- Anyone who has given prior notice to the secured party of their security interest in the collateral.
- Anyone who has given prior notice to the secured party of their interest in the collateral.

The notice includes:

- Description of the collateral
- Amount required
- Amount of expenses
- Statement that anyone with a security interest, an interest or a right may redeem the collateral after payment (see 51(4))
- Statement that unless payment is made, disposal will take place and debtor liable for deficiency
- Date, time and place of public sale, or date after which disposal is to be made

Notice is given in person or by registered mail to last known or usual address.

No notice required if:

- Perishable
- Rapid decline in value expected
- Can be sold on recognised market
- Cost of storage disproportionate

- If the Court so decides
- If all persons receiving notice agree
- If disposal through debtor's business

4.8 Distribution of surplus

First, if no other claims to the debtor

If written claims are received by the secured party, pay into Court

4.9 Deficiency

The debtor is liable for deficiency unless otherwise agreed in the security agreement.

4.10 Acceptance of collateral in lieu of performance

The secured party can accept the collateral in lieu of payment but must give notice as in subsection 51(4). If such persons consider they might be negatively affected, they should give notice within 30 days. The secured party must then dispose of the collateral. Such persons must be able to furnish proof of their interest to the secured party upon request.

The secured party can apply to the Court to be allowed to accept the collateral despite objections if:

- If the objection does not relate to an interest in the collateral
- If they proceeds of the collateral according to fair market value is less than the secured amount (and expenses)

Foreclosure: after 30 days, the secured part can take ownership in full satisfaction of the obligation secured. The ownership will not be encumbered by existing interests in the property.

After disposal, the buyer buys free of any interests

4.11 Redemption

Before disposal or before final acceptance by the secured party, any party eligible to receive notice can fulfil the obligations and take possession. If more than one party wants to redeem, priorities in accordance with their secured interest applies.

4.12 Any person with an interest can apply to the Court

The Court can take any and all measures, including recognising rights, relief obligations, extending deadlines, give directions, makes orders...

5 Mortgages

This Part deals with immovable property. It is outwith the remit of this article.

6 Registration

The Act establishes a central office for registration and branch offices, led by the Registrar and branch registrars. Registrar and branch registrars are public servants designated by the Royal Government.

6.3 Registration

A notice of a mortgage may be registered in the register in the appropriate Dzongkhag or City Corporation.

A security interest in moveable property may be registered in the appropriate registry office

A security interest in moveable property may be registered in the land registry if:

- The collateral is or includes fixtures or goods that may become fixtures or crops, or minerals or hydrocarbons to be extracted, or timber to be cut; or
- The security interest in a right to payment under a lease, mortgage or charge of immovable property to which the 1999 Act applies.

6.4 Effect of Registration

Where a notice has been registered, every person dealing with the collateral shall be deemed to have knowledge of the security interest.

No conveyance of immovable property encumbered by a mortgage may be registered by the Land Registry unless there is prior written permission of the mortgagee. Sanction for the Dzongkhag or City Corporation registering conveyance without a certificate from the registrar immediately prior to the conveyance that there is not mortgage encumbering the immovable property, engenders liability for the mortgage for the Dzongkhag or City Corporation.

No transfer of vehicles encumbered with a security interest can be registered by the Surface Transport Authority without prior written permission of the secured party. Sanction for the Surface Transport Authority when registering conveyance without certificate of the registrar immediately prior to the conveyance declaring the vehicle free of any security interest: liable for the debt secured by the vehicle

For sanctions: mortgagee or secured part is entitled to a Court order enforcing payment

6.5 Certificate and Certified copies

Upon request of any person, the registrar can issue a certificate whether a property is subject to a security interest. Existing registers are:

- Land records index
- Individual debtor name index
- Business debtor name index
- Motor vehicle identification number index

The certificate is issued upon payment of the fee and is considered proof (in the absence of evidence to the contrary)

The registrar may include information in the certificate relating to a property, debtor or vehicle identification number that is similar to the name or number to which the inquiry was made

A certified copy of the registration document may be requested upon payment of the fee. It shall have the status of proof (in the absence of evidence to the contrary).

6.6 Registration by delivery of the registration document

Registration is effected by delivery of the registered document in the prescribed form.

Errors do not invalidate the registration if no reasonable person is likely to be misled materially by the error or omission.

6.7 Discharge

When the payment has been made or the obligation performed, or when part of the collateral is released from the security interest after part payment or performance, such collateral can be discharged at the request of any person having an interest.

Request is made to the secured party or mortgagee who will deliver - within 15 days - a registration change statement, or a notice of (partial) discharge.

6.8 Removal of information from registration system by registrar without notice

- If the registration is no longer effective
- Upon receipt of a registration change statement discharging the registration
- Upon receipt of a Court order

6.9 Removal of information from registration system by registrar with notice

The registrar shall give notice to the secured party before removing the information related to a registration change document if:

- The document does not set out the correct information or file number as set out in the registration statement or registration change statement to which it relates
- The document does not set out the name of the debtor as that name if set out in the registration statement or registration change statement to which it relates

7 Miscellaneous Provisions

The Part is outwith the remit of this article

8 Conclusion

Despite its deceptive title, the Moveable and Immoveable Property Act of the Kingdom of Bhutan of 1999 provides a clear legal framework for loans that are secured by moveable or immoveable property. It is reassuring for any lawyers that the Act also contains some scope for interpretation but it deserves recommendation that some uncertainties would be clarified by a legal amendment or, probably more likely and more desirable through practice and judicial interpretation. We hope that some of the suggestions made in this article could prove useful in this regard.

End Notes:

The usual disclaimers apply.

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* Extracts taken from sections or complete sections of the Act or other Acts are printed in italics.

ⁱ Compare with section 9(203b) of the United States Uniform Commercial Code: UCC 9-203(b):

- (a) The secured party must give value;
- (b) The debtor must have rights in the collateral; and
- (c) The debtor has authenticated (e.g., signed) a security agreement.

See further: Robert K. Weiler, Basics of Creation and Perfection of Security Interests under 9 of the Uniform Commercial Code, Presented by to the Onondaga County Bar Association (September 2006).

ⁱⁱ Compare Robert K. Weiler, Basics of Creation and Perfection of Security Interests under 9 of the Uniform Commercial Code, Presented by to the Onondaga County Bar Association (September 2006)

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