

Hire purchasing, Leasing and Loans

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Hire - purchase



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Applicable law

- Consumer Credit Act (No.29 of 1982) and its amendments
- Roman –Dutch law which is the applicable common law for hire-purchase

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Hire – purchase agreement

- An agreement under which goods are let on hire
- Under this agreement, “the possession of goods is delivered by the owner to another person, on the condition that such person pays an agreed amount in periodical instalments”
- The hirer has an option to purchase the goods in accordance with the terms of the agreement or in an alternative, the property in the goods is to pass to the hirer on the payment of the last of such instalments.

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Who is an owner?

- The person letting, hiring or agreeing to sell goods under a hire-purchase agreement.
(Definition in the Act)
- A person to whom the owner's property in the goods, or any of the owner's rights or liabilities under the agreement, has passed by assignment or operation of law.

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Who is a hirer

- "Person who obtains or has obtained possession of goods from an owner, under a hire-purchase agreement"
(Definition in the Act)
- A person to whom the hirer's rights or liabilities under the agreement has passed by assignment or by operation.

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Passing of property in hire-purchase

- The property in the goods passes to the hirer only on the completion of the purchase, in the manner provided for in the agreement.

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Obligations of the hirer

- To comply with the hire purchase agreement
- To give information to the owner as to the whereabouts of goods
- To make use of the goods in accordance with the hire-purchase agreement.
- To take care of the goods
- Obligation not to defraud the owner of the goods

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Rights of the hirer

- To purchase the goods, at any time, by paying the balance due on the hire purchase price, with a rebate.
- To terminate the hire-purchase agreement, at any time
- To appropriate payments in respect of two or more hire-purchase agreement with the same order.
- To assign his rights and obligations under the hire-purchase agreement to another party.
- When the owner-repossesses a good and sells it, the hirer has a right to recover any excess of moneys left after the owner recovers his dues.

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Obligations of the owner

- To supply copies of the hire-purchase agreement and information
- To supply information regarding the hire-purchase transaction to the hire- purchase transaction to the hirer

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Rights of the owner

- To terminate the hire-purchase agreement when there is a default in the payment of the instalment or a breach of the agreement by the hirer.
- If so the owner is entitled to:
- Retain the instalments and the initial deposit paid by the hirer, and to recover the balance due, if any.
- To recover possession of the goods, subject to the provisions and the restrictions of the Act.
- To claim damages for any loss he suffered
- To assign his rights and obligations under the hire-purchase agreement to another party.

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Leasing



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Applicable law

- Finance Leasing Act (No. 56 of 2000) and its amendments.

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Concept of leasing

Finance lease definition according to the Act,
“an agreement between a lessor and lessee”

- For the possession and use by lessee for an initial period of not less than one year from the date of the agreement, of an equipment specified by the lessee and provided by either, the lessor or a supplier selected by the lessee;
- For the payment by the lessee to the lessor, for the possession and use of such equipment, of such sums to be calculated so as to take into account in particular the amortization of the whole or substantial part of the cost of equipment;
- Which after the acceptance of the equipment by the lessee, is not terminable by the lessee during the initial period, mentioned above
- Which may or may not provide for the extension of the initial period mentioned above.

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Concept of leasing

- General meaning of leasing
- A contract between the lessor and lessee, which allows the lessee to use an asset of the lessor for a specified period of time by making specified periodic payments.
- Profits are earned through use and not ownership of an asset.

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Concept of leasing

- Lessor: the person, who transfers the right to possession and use of an equipment and use of an equipment under lease, to a lessee.
- Lessee: the person, who acquires the right to possession and use of an equipment, under the lease.
- Supplier: A person who supplies equipment for the purpose of a finance lease.
 - A lessee who himself supplies equipment is not included in this definition of a supplier.
- Equipment : Any tangible asset which has an economically useful life of more than one year.
 - it does not include land
 - referred as the “leased asset” also

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Lessee's right to undisturbed possession

- The lessee has the right of undisturbed and peaceful possession of the equipment or leased asset.
- This right will not apply to the lessee, if he has caused an act or omission which makes him lose this right.

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Supply, delivery and non- delivery of the leased asset

- Supply agreement : “agreement entered into by a lessor with a supplier for the supply of equipment by the supplier, under a finance lease ”
- The lessor cannot enter into a supply agreement with a supplier as detailed above, until the lessee agrees in writing to the terms and conditions of this supply agreement.
- Once the lessee agrees in writing, and the lessor enters into the supply agreement, the lessee get a right to enforce this supply agreement as if he too were a party to it.
- The supplier is under an obligation to supply the equipment to lessee as per the terms and conditions of the supply agreement.
- Lessee has already agreed to the supply agreement, he has to accept the equipment supplied, as long as they confirm to the specifications in the supply agreement.

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Non delivery of the leased leased asset

- In this situation the lessee has a **right of rejecting the asset and terminating such lease.**

In this situation lessee also entitled to the followings

- To withhold any payments he has to make to the lessor on the lease.
- To recover from the lessor any monies held by the lessor in relation to the lease, after deducting the following:

:Benefits derived by the lessee prior to the termination .

:Expenses incurred by the lessor in connection with the lease

:Loss in the value of the asset, due to the negligence of the lessee

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Acceptance and return of equipment

Acceptance of the equipment

When the lessee accepts the equipment under a finance lease, the terms and conditions of the lease becomes irrecoverable.

In such a situation, it becomes the duty of the lessee to observe all such terms and conditions.

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Acceptance and return of equipment

Return of equipment

- Upon the expiry or prior termination of the lease period, the lessee shall return the equipment to the lessor, in the same condition it was delivered to the lessee at the commencement of the lease. But fair wear and tear and any modifications agreed to by the parties, being excepted.

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Default by lessee

- Default : a failure or breach where the lessee fails to comply with certain terms and conditions of the lease , and that failure amounts to a substantial failure on the part of the lessee with regard to the lease.

Examples: non- payment of the lease installments

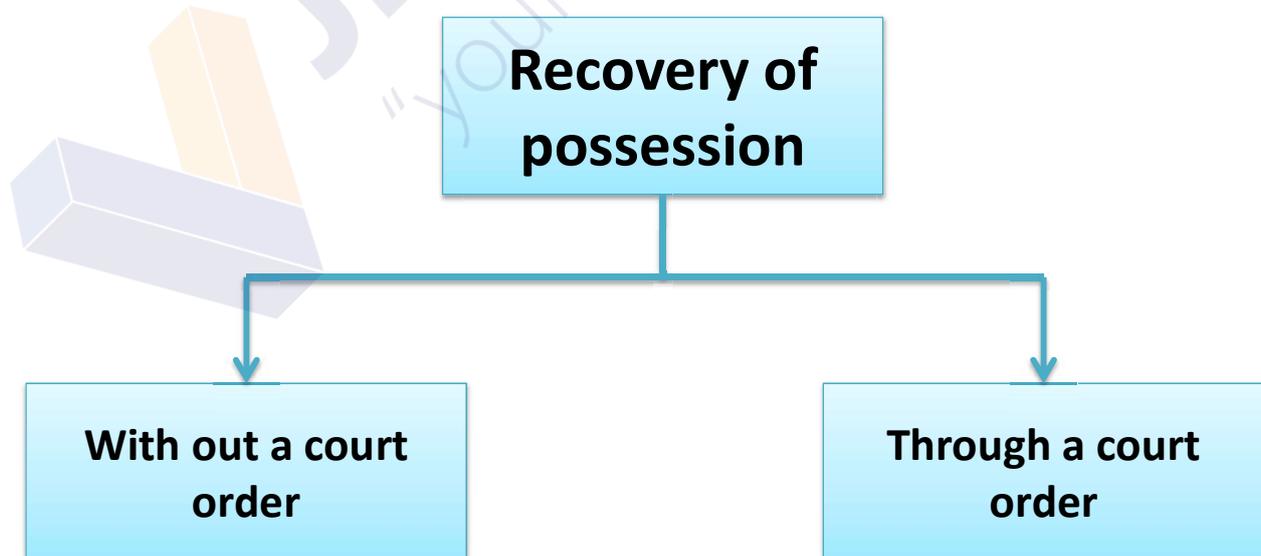
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Remedies available to the lessor

- To require the lessee to make **accelerated payment** of the monies due under the lease.
- if the lessee fails to make such accelerated payments, the lessor can terminate the lease and:
 - recover the possession** of the leased asset
 - recover damages**, as would place the lessor in the position he would have been if not for the breach by the lessee
- the lessor must send a notice by the registered post to the lessee prior executing both options

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Recovery of possession of leased asset by the lessor



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Recovery of possession of leased asset by the lessor

With out a court order

- The lessor should follow the following steps before executing this remedy
 - Notify the police about the breach, and the lessor's intention to recover possession of the asset.
 - Obtain the assistance of the police in order to prevent a breach of the peace when exercising the recovery option.
 - Recover possession of the asset, if it can be obtained without any resistance.

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Recovery of possession of leased asset by the lessor

Through a court order

Lessor has the option of making an application to the District Court, and obtaining a **court order** for the possession of the asset.

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Loans and security

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Loans and security

Main types of securities taken by lenders

- Land
- Mortgages on assets lent
- Life policies
- Shares limited liability company
- Guarantees from third parties
- Performance bonds
- Trust receipts

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Mortgages

- Mortgage Act (No. 6 of 1949) and its subsequent amendments.
- mortgage includes any charge on property for securing money or money's worth.
- example

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Parties to a mortgage

- Mortgagor : A person who borrows money to buy a property.
- Mortgagee: A person or an institute that lends money to the mortgagor to buy property.

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Mortgage bond

- Provisions on repayment of the loan, with interest.
- Provisions on how the mortgagor can use the mortgaged asset.
- Provisions on how the mortgagee can deal with the mortgaged asset, if the mortgagor defaults.

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Recovery for default under a mortgage

- Recovery actions can be initiated under the following:
- The **Mortgage Act (No. 6 of 1949)**, and its subsequent amendments.
- Parate execution, in certain instances.

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Guarantors and collaterals

- Guarantor/ Surety: a person who promises to answer for the present or future debt of another person, called the principal debtor.
- Guarantee: promise
 - :Made to the person to whom the principal debtor is liable to or will be liable to in the future.

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Guarantors and collaterals

- A guarantee is a collateral security of secondary liability which involves the following parties.
 - Guarantor
 - Principal debtor
 - Lender or creditor
- A collateral security: an additional security in reinforcement of the main security (in the context of mortgage).

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Guarantors and collaterals

Applicable law

- The Roman- Dutch law (common law)
- Prevention of Frauds Ordinance (No.7 of 1840)

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Guarantors and collaterals

The main requisites of a contract of guarantee

Contact must be in writing and signed by the guarantor himself.

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Guarantors and collaterals

Common law privileges available to a guarantor

- To request the creditor to **first proceed with action against the principal debtor** and only if such recovery is not possible to claim from the guarantor.
- When there is more than one guarantor, the creditor is required to divide his **claim on a pro-rata basis among these guarantors** in initiating action against each guarantor.
- A guarantor who pays in full on behalf of the principal debtor and discharges the principal debtor from his obligations, is entitled to **assume the position of the creditor**.

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Guarantors and collaterals

- Practically all lenders request the guarantor to renounce these privileges. This renouncing effectively places the guarantor in the same position as the principal debtor.
- For a renouncing to be effective it must be
- Made expressly
- Made with full knowledge of the meaning of the rights that are being renounced.

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Debt recovery

Parate execution by financial institutions

Parate execution: debt recovery process where a mortgagee is invested with a power to sell the mortgage property without recourse to courts.

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Debt recovery

- **Parate execution by financial institutions**
- The financial institute which gave the loan, first demands the due payment from the defaulting customer, which is thereafter followed by a written notice called the “parate notice”
- A resolution is adopted by the board of directors of the financial institute, and if the defaulting customer does not pay, the financial institute has a right to auction the asset/s mortgage by the defaulting customer, and recover its debt.
- This procedure of parate execution is exercised solely by the financial institute, the defaulting customer or any interested party has the option of going before a court of law and getting a stay order to stop the proposed sale of his mortgage asset/s
- Generally court hears the customer’s case ex-parte

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Debt recovery

- Applicable law relating to parate execution: Recovery of Loans by bank (Special Provisions) Act (No. 4 of 1990)
- When ever default is made in the payment of any sum due on any loan, the board of directors of the bank which gave the loan , may in its direction, take action as specified either in Section 5 or in section 4 of the Act.

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Debt recovery

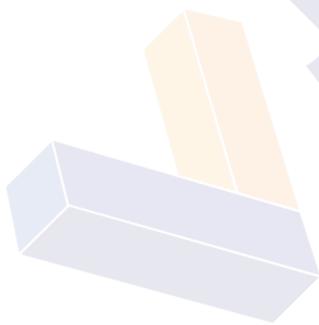
- Section 4: board may by Resolution authorise a specified person to sell by public auction, any property mortgage to the bank as security for any loan which has been defaulted. This resolution must be gazetted and advertised in public newspapers of all three languages, namely English Sinhala Tamil.
- The purpose of this sale is to recover the whole of the unpaid portion of such loan, together with the costs recoverable under the Act.

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Debt recovery

Section 5: Board may by resolution authorize a specified person

- **To enter** upon:
 - any immovable property, which has been mortgage to the bank as security for any loan which is in default or
 - any agricultural or industrial undertaking on which any plant, machinery or other movable property is situated and which plant machinery or other movable property has been kept as security for any loan which is in default.
- To **take possession** of such property or to take possession of such agricultural or industrial undertaking in which such plant machinery or other movable property is situated.
- To exercise the same powers in the **control and management** of such property as might have been exercised by the mortgager if he had not made default



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