

THE TRANSFER OF PROPERTY ACT (1882) 財産移転法(1982 年)

CHAPTER IV

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES 第4章 不動産の譲渡抵当及び担保権

(不動産譲渡抵当の定義、種類、効力発生要件)

58 (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

58 (a) 譲渡抵当 (mortgage) は、貸付の方法により行われた又は行われる金銭の支払、既存又は将来の負債、金銭的責任を生じさせうる約束の履行を担保するために、特定の不動産に対する利益を譲渡するものである。

譲渡者(transferor)を譲渡抵当権設定者(mortgagor)と称し、受譲者(transferee)を 譲渡抵当権者(mortgagee)と称する。金銭の元本及び支払いが行われるまでの元本に対す る利息を被担保債権(mortgage-money)と称し、譲渡の効力を発生させる法律文書(存在 する場合)を譲渡抵当捺印証書(mortgage-deed)と称する。

- (b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.
- (b) 譲渡抵当物件(mortgaged property)の占有を移転することなく、譲渡抵当権設定者が、 自ら被担保債権の弁済義務を負い、契約に従った弁済の不履行が発生したときには譲渡抵 当権者が譲渡抵当物件を売却してその代金を必要な限度において被担保債権の弁済に充て



ることについて明示的又は黙示的に合意する場合、その取引を基本譲渡抵当 (simple mortgage) と称し、譲渡抵当権者を基本譲渡抵当権者 (simple mortgagee) と称する。

- (c) Where the mortgagor ostensibly sells the mortgaged property:
- on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale; Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale.
- (c) 特定日における被担保債権の弁済不履行を条件として売却が完全なものとなる、弁済がなされることで売却が無効となる、又は弁済がなされることで買主が売主に物件を移転するという条件を付して譲渡抵当権設定者が表面上譲渡抵当物件を売却する場合、その取引を条件付売却による譲渡抵当 (mortgage by conditional sale) と称し、譲渡抵当権者を条件付売却による譲渡抵当権者 (mortgagee by conditional sale) と称する。ただし、本取引は、条件が売却の効力を発生させる又は効力発生を目的とする書類に条件が記載されない限り、譲渡抵当とはみなされない。
- (d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.
- (d) 譲渡抵当権設定者が譲渡抵当物件の占有を譲渡抵当権者に移転し又は明示的もしくは 黙示的に占有移転の義務を負い、被担保債権の弁済まで占有を保持し、物件から生じる賃 料及び収益の全部もしくは一部を受領し、それをもって利息、被担保債権もしくはその双 方の支払いに充当する権限を付与する場合、その取引を用益権型の譲渡抵当(usufructuary mortgage)と称し、譲渡抵当権者(mortgagee)を用益権型の譲渡抵当権者(usufructuary mortgagee)と称する。



- (e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.
- (e) 譲渡抵当権設定者が特定日に被担保債権を再度弁済することを約して譲渡抵当物件を 完全に譲渡抵当権者に移転するが、合意どおり被担保債権を弁済することにより譲渡抵当 権者が譲渡抵当物件を譲渡抵当権設定者に再移転することを条件とする場合、その取引を イングランド型の譲渡抵当(English mortgage)と称する。
- (f) Where a person in any of the following towns, namely, the towns of Rangoon, Moulmein, Bassein and Akyab, and in any other town which the President of the Union may, by notification in the Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.
- (f) ラングーン(Rangoon)、モーミャイン(Moulmein)、バセイン(Bassein)、アキャブ (Akyab) 又は連邦共和国大統領が官報で公告することにより特定するその他の都市に所 在する人が、債権者又はその代理人に対して担保を設定する意図をもって不動産に対する 権利に関する文書を交付する場合、その取引を権利証書の預託による譲渡抵当(mortgage by deposit of title-deeds)と称する。
- (g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.
- (g) 本章の意味において基本譲渡抵当 (simple mortgage)、条件付売却による譲渡抵当 (mortgage by conditional sale)、用益権型の譲渡抵当 (usufructuary mortgage)、イングランド型の譲渡抵当 (English mortgage) 又は権利証書の預託による譲渡抵当 (mortgage by deposit of title-deeds) に該当しない譲渡抵当は、変則型の譲渡抵当 (anomalous mortgage) と称する。
- 59. Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be



effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

59. 被担保債権の元本が 100 ルピー以上の場合、権利証書の預託による譲渡抵当 (mortgage by deposit of title-deeds) 以外の譲渡抵当は、譲渡抵当権設定者が署名し、少なくとも 2 人の証人により証明される登記文書によってのみ効力を発生させることができる。 被担保債権の元本が 100 ルピー未満の場合、前記の登記文書又は担保物件の交付(基本譲渡抵当の場合を除く)のいずれかにより効力が発生する。

(受戻権及びその行使方法)

60. At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished;

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the



share of a mortgagor.

60. 被担保債権の元本の支払期限が到来した後はいつでも、譲渡抵当権設定者は、適切な時期及び場所における被担保債権の弁済又は弁済の提供を行うことにより、 (a) 譲渡抵当権者の占有又は権限の下にある譲渡抵当捺印証書及び譲渡抵当物件に関する全ての証書を引き渡し、(b) 譲渡抵当権者が譲渡抵当物件を占有している場合には当該占有を譲渡抵当設定者に引き渡し、(c) 譲渡抵当設定者の費用において、譲渡抵当物件を譲渡抵当設定者もしくは譲渡抵当設定者が指定する第三者に引き渡すか又は譲渡抵当権者への利益移転による譲渡抵当設定者の権利減少は消滅したことの承認書を締結し登記することを、譲渡抵当権者をして行わせる権利を有する。

本条による権利は当事者の行為 (act of the parties) 又は裁判所の判決 (decree of a Court) によって消滅しない。

本条による権利は受戻権 (right to redeem) と称し、受戻権を行使するための訴訟 (suit for redemption) を受戻訴訟と称する。

本条におけるいかなる事項も、元本の弁済期の経過を認める規定又は弁済期が確定していない場合に譲渡担保権者が元本の弁済又は弁済の提供前に合理的な通知を行う権利を与える旨の規定を無効化するものとはみなされないものとする。

本条におけるいかなる事項も、譲渡抵当物件の一部の持分にのみ利益を有する人に対して、 譲渡抵当について弁済期が到来している金額のうちの相応する金額を弁済することのみに よって自身の持分を受け戻す権利を付与するものではない。ただし、譲渡抵当権者、2名以 上の譲渡抵当権者がいるときには全ての譲渡抵当権者が、譲渡抵当権設定者の持分を全部 又は一部取得した場合は除く。

(担保物件売却手続)

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.



A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed:

- (a) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
- (c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.
- 67. 反する契約がない限り、譲渡抵当権者は、被担保債権の弁済期が到来し譲渡抵当物件の判決がなされるか又は被担保債権が弁済されるかもしくはこの法に基づき預託される前であればいつでも、譲渡抵当設定者の物件の受戻権を完全に喪失させる判決又は物件の売却判決を求める権利を有する。

譲渡抵当設定者による譲渡担保物件の受戻権を完全に喪失させる判決を求める訴訟を、受 戻権喪失訴訟(suit for foreclosure)と称する。

本条におけるいかなる事項も以下に述べるものとはみなされないものとする。

- (a) 条件付売却による譲渡抵当権者又は受戻権喪失の権利を譲渡抵当権者に認める変則型の譲渡抵当の譲渡抵当権者を除く譲渡抵当権者に対する受戻権喪失訴訟を提起する権限の付与、用益権型の譲渡抵当権者又は条件付売却による譲渡抵当権者に対する物件売却訴訟を提起する権限の付与
- (b) 信託受託者又は法律上の代理人として譲渡抵当権者の権利を保持し、物件の売却のため に提訴することができる譲渡抵当設定者に対する受戻権喪失訴訟を提起する権限の付与
- (c) 鉄道、運河又は公共の利益の維持に係る事業についての譲渡抵当権者に対する受戻権喪失又は売却訴訟を提起する権限の付与 又は
- (d) 被担保債権の一部についてのみ利益を有する人に対する譲渡抵当物件の相応する部分 のみに関する訴訟を提起する権限の付与。ただし、譲渡抵当設定者の合意を得て、譲渡抵



当権者が譲渡抵当に基づき利益を実行する場合を除く。

- 69. (1) A mortgagee; or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:-
- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the President of the Union in the Gazette;
- (b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government;
- (c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Rangoon, Moulmein, Bassein, Akyab or in any other town or area which the President of the Union may, by notification in the Gazette, specify in this behalf.
- (2) No such power shall be exercised unless and until:
- (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.
- (3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.
- (4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances; if any, to which the sale is not made subject, or after



payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other

- 69. (1) 譲渡抵当権者又はその代理人は、被担保債権の弁済不履行の場合、以下に述べるときには、本条の規定に基づき裁判所の関与なくして譲渡抵当物件又はその一部を売却し又は売却に参加する権限を有する。
- (a) 譲渡抵当がイングランド型の譲渡抵当であり、譲渡抵当設定者、譲渡抵当権者のいずれ もヒンズー教徒、イスラム教徒、仏教徒又は連邦共和国大統領が官報において適宜特定す るその他の人種、宗派、種族又は分類に該当する人でないとき
- (b)裁判所の関与なくしての売却権限が明示的に譲渡抵当捺印証書において譲渡抵当権者に 付与されており、かつ譲渡抵当権者が政府であるとき
- (c) 裁判所の関与なくしての売却権限が明示的に譲渡抵当捺印証書において譲渡抵当権者に付与されており、かつ譲渡抵当捺印証書の締結日の時点で譲渡抵当物件の全部又は一部がラングーン(Rangoon)、モーミャイン(Moulmein)、バセイン(Bassein)、アキャブ(Akyab)又は連邦共和国大統領が官報で公告することにより特定するその他の都市に所在していたとき
- (2) 売却権限は、(a)被担保債権の元本の弁済を求める通知書が譲渡抵当権設定者又は複数の譲渡抵当権設定者がいる場合にはそのうちの1名に対して送達され、通知書の送達から3ヶ月経過後も被担保債権の元本又はその一部の弁済不履行が続く場合、又は(b)譲渡抵当にかかる500ルピー以上の債務が弁済期到来から3ヶ月以上未払いの状態にある場合に限り行使が認められる。
- (3) 売却権限の行使が表明され、売却が実行される場合、買主の権原は、売却権限を発生させる事象が存在しない、あるべき通知がなされていない、又は売却権限が不適切もしくは不規則に行使されたという理由に基づいては否定されないものとする。不適切又は不規則な売却権限の行使により権利を毀損された者は、権限を行使した者に対して損害賠償による救済を求めるものとする。