Are fixed and floating charges designed to leasing companies to guarantee the repayment of rents?

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In 1969, Mauritius experienced for the first time a legislation dealing with fixed and floating charges headed the ‘’ Loans, charges and Privileges (Authorised Bodies) Act ‘’ which specifically created “Fixed Charge” and “Floating Charge.

These loan instruments were brought into our financial sector when foreign investors started treading the soil of Mauritius. Fixed charge was mainly devised to create guarantee over materials and equipment where the disposal of any property by the borrower is subject to the lender’s consent. On the other hand a floating charge is a security interest over a fund of changing assets of a company and it is designed to give as guarantee mainly stocks. It enables the borrower to dispose any of the finished goods without having to seek prior approval from the lender. That was the spirit behind those loan instruments.

 That legislation was repealed in 1983 and inserted under the articles of the Civil Code. The relevant part under article 2202-3 reads as follows:

 “ A la suite ou dans la perspective **d'un prêt**, **d'une avance** ou **d'un paiement** ou **toute autre obligation consenti** ou effectué par une institution agréée, au bénéfice d'une personne quelconque ou pour le compte de celle-ci, tout ou partie des biens du débiteur ou de sa caution peuvent être volontairement grevés d'une sûreté, fixe ou flottante, en garantie de la somme due, ainsi que des intérêts, commissions et frais en découlant”.

A Google translation gives as follows: Following or in the context of **a loan**, **an advance** or **payment** or **other obligation** made or performed by an approved institution for the benefit of any person or on behalf of it while or part of the debtor's property or bail may be voluntarily subject to a security, fixed or floating, as security for the amount due, plus interest, fees and expenses arising therefrom.

What would be the qualification ascribed to the expression ‘’ other obligation”? It should necessarily relate to a loan facility.

 Is it proper to take fixed and floating charges to guarantee the repayment of rents where the leasing company still remains the owner of the property so leased? A lease agreement is defined as follows:

A contract between a lessor and lessee that allows the lessee rights to the use of a property owned or managed by the lessor for a period of time. The agreement does not provide ownership rights to the lessee; however, the lessor may grant certain allowances to modify change or otherwise adapt the property to suit the needs of the lessee. During the lease period, the lessee is responsible for the condition of the property.

Over the years, the fixed and floating charges have been and are being misused and there is a departure from their first role. They are now being resorted to by leasing companies to guarantee rents payable for leased equipment or materials to companies.

Is this legal?

Leasing companies already creates a “nantissement’’( pledge) when the lease agreement is executed between the lessor and the lessee. The “nantissement” is divided into two parts: the “gage” for movable properties and “l’antichrèse” for immovable properties. In turn the “gage” is divided into two parts: “Le gage sans déplacement” and “le gage avec déplacement”. In the first instance, the property remains in the hands of the lessee and in the second one the lessor keeps the property in his hands.

So far leasing companies are concerned; the property will be subject of a “gage sans déplacement” given that the property will be in the hands of the lessee, e.g someone desirous of obtaining a new brand taxi car on lease, the leasing company will purchase that vehicle for him while remaining the owner and will lease it over to him in consideration of the repayment of rents.

The “gage sans déplacement” is the appropriate guarantee instrument in the leasing transaction. By what stretch of imagination are the leasing companies misusing fixed and floating charges to guarantee rents is a question to be decided sooner by our Supreme Court!

I had the opportunity to discuss that point with Professeur Robert Garron who along with late Edwin Venchard Q.C., brought the major changes to our civil code in 1983. Fixed and floating charges are not designed to guarantee rents resulting out a leasing agreement.

 Bibliography:

The Civil Code, Lease-Wilkipedia, article by Peter Obrien and Sarah Breen from Matheson