



Key objectives of a modern and efficient regime on secured transactions in the work of UNCITRAL

Spyridon V. Bazinas
Senior Legal Officer
UNCITRAL Secretariat



Outline

1. UNCITRAL
2. UNCITRAL texts on Secured Transactions
3. Promote low-cost credit
4. Allow debtors to use the full value inherent in their assets
5. Simple and efficient creation of SIs
6. Equal treatment of diverse sources of credit
7. Validate non-possessory SIs
8. Notice registration
9. Clear and predictable priority rules
10. Efficient enforcement
11. Party autonomy
12. Balance the interests of all parties
13. Harmonization of ST law

1.1. UNCITRAL, its mandate and composition

- The United Nations Commission on International Trade Law
- Subsidiary body of the UN General Assembly established in 1966
- Mandate: to further the progressive harmonization and unification of the law of international trade.
- The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.
- Composition: 60 Member States representing all regions of the world, legal systems and countries in different stage of development
- All UN Member States may participate as observers but with full rights to participate in the discussions and the making of decisions

1.2. UNCITRAL, its working methods and its work

- The Commission: one session annually, alternating between New York and Vienna
- The Working Groups: two sessions annually alternating between New York and Vienna
- Working Group I: Micro, Small and Medium-sized Enterprises
- Working Group II: Arbitration and Conciliation
- Working Group III: Online Dispute Resolution
- Working Group IV: Electronic Commerce
- Working Group V: Insolvency Law
- Working Group VI: Security Interests

2. UNCITRAL texts on secured transactions

- UN Convention on the Assignment of Receivables in International Trade
- UNCITRAL Legislative Guide on Secured Transactions
- Supplement on Security Rights in Intellectual Property
- UNCITRAL Guide on the Implementation of a Security Rights Registry
- Joint Publication with Hague Conference and Unidroit on Security Interests
- Draft Model Law on Secured Transactions
- WB ICR Standard
- IFC ST Toolkit

3. Promote low-cost credit

- The importance of credit and security
- Security reduces the risk of default
- This is likely to have an impact on the availability and the cost of credit
- Technical infrastructure (registry)
- Judicial infrastructure (enforcement)

4. Allow debtors to use the full value inherent in their assets

- This essentially means that the debtor should be able to create more than one security right in favour of more than one secured creditor in the same assets as long as there is residual value in the assets
- It also means that title devices serving security purposes should be treated as secured transactions
- This results in itself in increased competition of credit providers, which is likely to have a beneficial impact on the availability and the cost of credit

5. Simple and efficient creation of SIs

- Oral agreement, if there is delivery of possession
- Otherwise, written agreement with flexible form requirements
- Ability to encumber present and future assets to secured present and future obligations (revolving credit facilities)
- Proceeds
- Fixtures to real estate
- Goods commingled in masses or products

6. Equal treatment of diverse sources of credit and diverse forms of secured transactions

- Avoid carve-outs and special regimes outside the ST law
 - Factoring
 - ROT sales
 - Financial leasing
- Enhance competition among credit providers
- Beneficial impact on the availability and the cost of credit

7. Validate non-possessory SIs

- Go beyond the traditional pledge (but not to title devices that create credit monopolies)
- The main assets of a company may be inventory (+receivables) or equipment
- A business should be able to use those assets as collateral to raise credit
- At the same time, a business needs them for its operation to generate the income necessary to pay the loan
- Finance institutions are not traders, not interested in holding inventory and equipment and not prepared to cover the maintenance and insurance costs

8. Enhance transparency by a notice-based registration system

- Forget all you know about land registries
 - No creation
 - No document registration
 - No asset-based index
- If legal consequence is to make a SI effective against third parties, registration can be simple, quick and inexpensive
 - Notice need not contain more than a description of the parties and the collateral (no need for other documents)
 - All responsibility for the registration rests with the registrant (no potential liability for the Registry)
 - Registry must be open to the public to search by debtor name or serial asset number
 - Nominal fees to recover operational costs

9. Clear and predictable priority rules

- First in time, first in right
- First in time of advance registration or 3rd-party effectiveness
- Exceptions:
 - Possession of NIs or ND beats registration
 - Control of B/As and L/Cs beats registration
 - Specialized registration beats general registration
 - Acquisition SI beats ordinary SI
 - Supplier acquisition SI beats bank acquisition SI
 - OCOB transactions

10. Efficient enforcement

- If enforcement takes too much time or cost, SCs are likely not to lend or lend less, at higher interest rates and/or shorter repayment periods
- Judicial enforcement subject to general civil procedure law
 - Expedited judicial procedures
- Extra-judicial enforcement subject to ST law
 - Extra-judicial repossession of collateral (notice and consent)
 - Extra-judicial sale of collateral (good faith and reasonable commercial standards)
 - Distribution of proceeds: return of surplus-unsecured claim for shortfall
 - Finality of rights: acquisition free of SI of enforcing SC and junior SIs

11. Party autonomy

- Allow parties the maximum flexibility to negotiate the terms of their agreement
 - Example: subordination agreements
- Exceptions:
 - Minimum content and form of security agreement
 - Obligation of party in possession to preserve the collateral and its value
 - Obligation of party in possession to return the collateral upon full payment
 - Standard of conduct in the case of enforcement
 - Acquisition financing rules
 - Conflict-of-laws rules
- Negative pledge agreements

12. Balance the interests of all parties

- The debtor: rights under security agreement and law
- The debtor of an account receivable: respect rights under other law
- Secured creditors: respect priority
- Unsecured creditors: carve-outs in insolvency
- Judgment creditors: initiate enforcement before SI becomes effective against third parties
- Statutory creditors: suppliers and service providers
- Preferential creditors: limit in type and amount, set out clearly in the law

13. Harmonization of law (incl. conflict of laws)

- Harmonization of ST law
- Cross-border recognition of SIs
- International trade financing
- The first question in a cross-border transaction: the law of which country applies
- Importance of certainty as to the law applicable

- Thank you.
- The views expressed are the personal views of the author and do not necessarily reflect the views of the UN or UNCITRAL.