



The key legal elements of asset-based lending from the perspective of UNCITRAL

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12. Summary

1. The overall objective of the ABL regime

- To promote the availability and decrease the cost of credit
 - By reducing the risk of debtor default and insolvency
- Limitations:
 - No law can on its own have an automatic economic effect
 - Other conditions: a modern and efficient enforcement infrastructure, registry, and coordination with insolvency and property law
- Disclaimer:
 - The current crisis is to a large extent due to the violation of the principles of ABL (e.g. asset valuation and monitoring by the secured creditor), and the lack of supervision by regulatory authorities

2. The functional, integrated and comprehensive approach

- A regime composed of various laws addressing different aspects of secured transactions and ABL is bound to result in gaps and inconsistencies
- The functional, integrated and comprehensive approach (based on the principle of “substance over form”) results in:
 - Comprehensive coverage of all devices serving security purposes, including transfers of title for security, ROT sales and fin. leases
 - Competition of credit providers, which is likely to have a beneficial impact on the availability and the cost of credit
 - Harmonization: cross-border recognition of security devices, which is likely to facilitate international trade financing

3. Simple and efficient creation of SIs

- Simple creation: by agreement and, in the case of possessory SIs delivery
 - If there is delivery, oral agreement is enough
 - If there is no delivery, written agreement is required, but with flexible form requirements (e-form and signature)
 - Agreement has to identify the parties and describe the secured obligation and the encumbered assets
- Security in future assets to secure future obligations
 - Need to protect borrowers from excessive economic commitment , while avoiding to protect them to ... death, depriving SME's of the only credit available to them, secured credit, often based on future assets

4. Third-party effectiveness

- Third-party effectiveness and priority methods
 - general registration
 - Specialized registration or title certificate system
 - Possession
 - Control
- Results:
 - Creation is not complicated by unnecessary formalities
 - Form-free transactions (ROT sales) may be covered
 - Time- and cost efficient registration
 - Transparency as to the existence of SIs
 - Objective method for determining priority

5. Efficient registration system

- Notice, not document registration
- Minimum content of notice: publicity and confidentiality combined
- Legal consequence: third-party effectiveness and basis for priority, not creation
- Electronic registry: time- and cost-efficiency
- Certainty with ST law, practicality and flexibility with registry regulations

6. Comprehensive and efficient priority rules

- Ability of borrower to use the full value of its assets as collateral raises the issue of priority (who gets paid first)
 - But, If there is no certainty as to the priority, no secured creditor is likely to be willing to lend or will lend at a cost
- General priority rule:
 - First in time of advance registration (registration before creation of SI) or third-party effectiveness (creation and registration)
- 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

7. Efficient enforcement mechanism

- 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
 - Protection of SC: expedited procedures
- Extra-judicial enforcement subject to ST law
 - Protection of debtor in the case of extra-judicial repossession of collateral (consent, notice and absence of objection during repossession)
 - Extra-judicial sale of collateral: good faith, reasonable commercial standards)
 - Distribution of proceeds: unsecured claim for shortfall and return of surplus
 - Finality of rights: acquisition free of SI of enforcing SC and junior SIs

8. Coordination with other law (quasi security devices)

- ROT sales, fin. leases, acquisition SIs: subject to registration
 - Result: no more hidden SIs, level playing field that should encourage competition and drive down cost
- Still, policy of favouring suppliers of goods on credit can be pursued by giving priority to acquisition over non-acquisition SI and to supplier over bank credit
- Importance and priority of acquisition financing
 - Acquisition SC helps enrich the borrower's estate
 - Acquisition SC has priority but only if subject to registration within a short period of time after delivery of the goods
 - Priority of an acquisition security right extends to proceeds with the exception of cash proceeds of inventory
- Unitary v. non-unitary approach in the case of enforcement

9. Certainty as to the law applicable

- Importance of applicable law in int'l ST: scope of application of substantive law, determination of the country in which registration must take place, cross-border recognition of SIs
- Matters covered: creation, third-party effectiveness and priority of a security right (in most cases subjected to the same law)
- *Lex rei sitae* for security rights in tangibles
 - Law of the grantor's location for mobile goods
 - Exception: law of the State of the registry for goods subject to specialized registration
 - Special rule for goods in transit and export goods
- Law of the grantor's location for intangibles
 - Exceptions: intangibles subject to specialized registration, B/As, L/Cs, IP, NIS
- Separate rule for mutual rights and obligations of the parties
 - Law chosen by the parties and, in the absence of a choice, law governing the security agreement
- Separate rule for enforcement
 - General tangible assets: *lex rei sitae*
 - General intangible assets: law governing priority

10. Coordination with property law

- With banking law, if the asset is a B/A
- With L/C law if the collateral is an L/C
- With NI and ND law, if the collateral is a NI or a ND
- With IP law, if the collateral is IP
- With NIS law, if the collateral is NIS

11. Coordination with insolvency law

- Encumbered assets are part of the estate (subject to stays)
 - Liquidation v. reorganization and relief for secured creditor: protection of the value of the assets, monthly payments additional security
- Effectiveness of SI respected, subject to avoidance of preferential or fraudulent transfers within the suspect period
- Priority of SI preserved, subject to preferential claims
 - Limit preferential claims and state them clearly in the law
- In re-organization, SCs may be forced to accept the plan but must be protected and receive as much as in liquidation
- Post-commencement financing: no priority unless ordered by the insolvency court subject to protection of SIs

12. Summary

- The overall objective of a modern and efficient ST law
- The functional, integrated and comprehensive approach
- Simple and efficient creation of SIs
- Third-party effectiveness and priority
- Efficient registration system
- Comprehensive and efficient priority rules
- Efficient enforcement mechanism
- Coordination with other law (quasi security devices)
- Certainty as to the law applicable law
- Coordination with property law
- Coordination with insolvency law

- Thank you!

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