UNITED NATIONS COMMISION ON INTERNATIONAL TRADE LAW (UNCITRAL)

Key policy issues of the UNCITRAL draft Guide on Secured Transactions

Spiros V. Bazinas
Senior Legal Officer
UNCITRAL secretariat
spiros.bazinas@uncitral.org

PHILOSOPHY OF UNCITRAL

• UNCITRAL and the UN General Assembly
  – Respect for State sovereignty
  – Respect for the principle of separation of powers

• UNCITRAL and globalisation
  – International trade: equality of and mutual benefit to States
  – The needs of developing countries

• Main principles of UNCITRAL
  – Catholic participation: all can participate
  – Orthodox consensus: general agreement but no veto

• Power v. principle: a time of crisis

KEY OBJECTIVES OF THE GUIDE

• Provide guidance to legislator
  – Recommendations
  – Commentary

• Promote secured, i.e. lower-cost, credit
  – Functional approach (pledge, non-possessory pledge, ROT, TOT, financial leases, etc.)
  – Comprehensive approach
  – Unitary or non-unitary approach

• Economic value of
  – Security (non-possessory security right)
  – Registration and priority
**SCOPE**

- All types of obligations may be secured
- All types of persons (limit: consumer protection)
- All types of rights serving security purposes
  - Pledge, non-possessory pledge
  - Transfer of title
  - Retention of title and financial leases
  - All-asset security
- All types of movable property, tangible and intangible, except immovable property, securities, wages
  - Impact on immovable property and securities
  - Attachments to immovable property
  - Receivables from the sale or lease of immovable property
  - Mortgages securing payment of a receivable
  - Perfection and priority under securities law protected but proceeds of securities that are not securities are subject to the Guide.

**CREATION**

- Effectiveness between the parties
- Written agreement and, in the case of a possessory security right, dispossession of the grantor
- Signature or evidence of intention to be bound
- Receivables: general rule and principles of UN Convention
- Negotiable instruments, bank accounts and letters of credit: general rule
- Negotiable documents: general rule but SI in document creates SI in the goods covered by the document

**EFFECTIVENESS AGAINST THIRD PARTIES**

- Registration of a notice in the security rights registry
  - Some key characteristics of the registry
    - Electronic
    - Time and cost efficient
    - Centralized
  - Dispossession of the grantor
  - Registration in a specialized title registry or notation on a title certificate
  - Control (sole method for L/Cs, superior method for bank accounts)
PRIORITY 1.

• Main rule: first in time of registration of a notice
• Proceeds: first in time of registration of SI in original collateral or proceeds
• Special rules:
  – L/Cs: first in time of control
  – Bank accounts: first in time of control
  – Negotiable instruments and negotiable documents: first in time of possession
  – Assets subject to specialised registration: first in time of registration in the specialised registry
  – Attachments to immovable property: first in time of registration in the immovable property registry

PRIORITY 2.

• Special rules
  – SI follows the asset but buyers of assets take free of a SI if:
    • Sale takes place with the authority of the secured creditor
    • Sale relates to inventory sold in the ordinary course of business
  – Preferences prevail but should be limited and transparent
  – Judgement creditors prevail if they acquired rights before SI became effective against third parties
  – Insolvency administrator: priority of secured creditor should be respected. Limited and transparent exceptions
  – Negotiable instruments and negotiable documents: first in time of possession
  – Assets subject to specialised registration: first in time of registration in the specialised registry
  – Attachments to immovable property: first in time of registration in the immovable property registry

ENFORCEMENT

• Judicial v. extra-judicial enforcement
• Notices (of default, of intention to pursue extra-judicial enforcement or of intention to pursue extra-judicial disposition)
• Enforcement methods
  – Repossession and disposition
  – Acceptance of asset in satisfaction of the secured obligation
  – Collection of receivables
  – Distribution of proceeds: surplus and shortfall
  – Finality of disposition: buyer in good faith takes free of SI of enforcing sec. creditor and of junior SIs
INSOLVENCY

• Encumbered assets part of the estate
• Protection of the value of the assets
• Effectiveness of security right respected, subject to avoidance actions
• Priority of security right preserved, subject to preferential claims
• In re-organization, sec. creditors to receive as much as in liquidation
• Post-commencement financing

PRIVATE INTERNATIONAL LAW

• Lex rei sitae for SIs in tangibles
  – Law of the grantor for mobile goods
  – Exception: goods subject to specialised registration
• Law of the grantor for intangibles
  – Exception: intangibles subject to specialised registration
• Bank accounts: law governing the account agreement or law of the branch maintaining the account
• Letters or credit: law chosen on the letter of credit and, in the absence of a choice, law of the branch of the payor
• Enforcement: law of place of enforcement or law governing security agreement

MISCELLANEOUS

• How American is UCC article 9 (or how German is the BGB)?
  – Does it matter?
    • Need for grantees to use full value of their assets to obtain credit, while they remain in possession of their assets
    • Need of secured creditors not in possession to have reasonable certainty with respect to priority
    • Need of the economy for increased access to lower-cost credit
• Need for reform?
  – Multiplicity of statutory or other laws
  – Inconsistency and gaps
• Casus belii for treatment of ROT
  – ROT sellers with super-priority, including in proceeds
  – Subject to registration (SIs in consumer goods exempted)
  – Ownership rights in enforcement within and outside insolvency protected but for all acquisition financiers
CONCLUSIONS

• A vehicle to modernise and harmonise secured transactions law
• Certainty and flexibility combined
• Potential benefit: increased access to lower-cost credit
• A product of a consensus-based legislative committee of the United Nations!