UNITED NATIONS COMMISION ON INTERNATIONAL TRADE LAW (UNCITRAL)

Key policy issues of the UNCITRAL draft Guide on Secured Transactions

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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 grantors 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 beli 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!