

# Book Review

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Joseph J. Norton and Mads Andenas (eds.), **Emerging Financial Markets and Secured Transactions**, London/The Hague/Boston: Kluwer Law International (1998).

This book appeared as Volume 6 in the International Economic Development Law Series, jointly organized at the Southern Methodist University School of Law (Dallas) and the London Institute of International Banking, Finance and Development Law. Earlier publications in this series include Norton/Bloodwatch/Pennington (eds.), *NAFTA and Beyond – A New Framework for Doing Business in the Americas* (1995); Kofele-Kalc, *International Law of Responsibility for Economic Crimes – Holding Heads of State and Other High Ranking State Officials Individually Liable for Acts of Fraudulent Enrichment* (1995); and Sodipo, *Privacy and Counterfeiting – GATT TRIPS and Developing Countries* (1997).

In 1996 the two present editors already published the book *Emerging Financial Markets and the Role of International Financial Organisations* in the same series. That book and the present one are both products of a joint research programme on finance and commercial law in developing, emerging and transitioning countries undertaken at the Centre for Commercial Law Studies, Queen Mary and Westfield College and King's College, all of the University of London. The programme was supported by the European Bank for Reconstruction and Development, the British Institute of International and Comparative Law, the Institute of Advanced Legal Studies (London), the Max-Planck Institute for International Private and Comparative Law (Hamburg), DG XV of the EU Commission, UNCITRAL (Rome), the Parker School of International and Comparative Law (Columbia University School of Law), and others.

The impressive list of participating experts and supporting institutions is explained by the paramount importance of secured transactions for emerging markets. Since Central and Eastern European countries have joined the club of countries in need of international financial aid, the financial means and political will on behalf of sovereign lenders in the First is definitely outpaced by the ever-increasing appetite in the Second and Third World. This, in turn, has put the limelight on private investors. However, where sovereign backing is absent, other forms of securing loans and investments must be found. The cash flows of borrowing enterprises are attractive assets, if they can be effectively secured. A sound legal

framework for foreign lenders to obtain and enforce secured commercial transactions is thus an indispensable element in an investor friendly environment and a key to the success of an emerging market in attracting international capital.

The contributions to the research programme and hence to the book are using the EBRD's 1994 Model Law on Secured Transactions in Market Economies in Transition as point of reference. *Professor Roy Goode* of Oxford and London opens the field by outlining 'The Changing Nature of Security Rights'. His contribution is followed by *Professor Ulrich Drobnig's* chapter on 'A Comparative Introduction to Security over Movables and Intangibles'. This overview, by one of the grandmasters of comparative law and director of the respective Max-Planck Institute in Hamburg, focuses on examples from countries which have developed interesting and different solutions. It also addresses the question whether a newly evolving system should choose a unified security interest with only minor variations between possessory and non-possessory security rights or whether various traditional forms of these security rights should be retained or copied from elsewhere. In this respect, Drobnig expresses a clear preference for the former or North American approach over the latter, which could be called European (including England). By way of further introduction, *Dr Heywood Fleisig* from the Center for the Economic Analysis of Law in Washington contributes the third chapter entitled 'Economic Functions of Security in a Market Economy'. It introduces the micro- and macro-economic foundations of lending and security and briefly outlines the potential economic gain from improvements in the legal framework for secured transactions.

The next two chapters deal with the multitude of security interests in the world. *Professor Philip Wood* of London writes on 'World-Wide Security – Classification of Legal Jurisdictions'. His point of departure is the existence of more than 300 legal jurisdictions, of which more than 200 are commercially active. These can be classified as sympathetic or hostile to security. On a more detailed level, Wood presents various criteria for classification, including the range of assets which may be mortgaged, the question of publicity, the degree of formalities, limitations on the debt which may be secured or the creditors which may make use of them, and finally the remedies which are available. His main conclusion is that the current legal disharmony on security in the world is wasteful, expensive, and a serious indictment of the international legal community. Subsequently, *Professor Oskar Hartweg* of Hannover addresses the topic 'Classification of Security Interests on the Highways of International Commerce'. By contrast to Wood, Hartweg takes a private international or conflicts of law approach and focuses on the applicable law in international commercial transactions, namely when the collateral moves from one jurisdiction to another. Since remedies concern both substantive rules as well as procedural rules, they touch on many difficult and contested issues in private international law. This is illustrated by analysis of a number of cases decided in Europe, the USA and elsewhere. By way of conclusion, Hartweg reminds the readers that any meaningful efforts of harmonization in the international regime dealing with secured transactions will also have to address the complex areas of rights/remedies, conflicts and procedures.

Chapter 6 by *Professor J.H. Dalhuisen* of Utrecht is entitled 'The Conditional Sale is Alive and Well!'. His main point is that ownership- and security based transactions should be kept apart in legal analysis and regulation since they require different treatment. He backs this claim by elaborate analysis of the treatment of ownership based credit in the Netherlands, France, Germany, the UK and the US and the common differences between finance sales and secured transactions.

Chapters 7 to 10 then introduce in some detail the EBRD's Model Law on Secured Transactions. First *John Simpson* and *Jan-Hendrik Röver*, who both worked on the Model Law inside the Bank, present 'General Principles of a Modern Secured Transactions Law'. *Professor John Spanogle* of George Washington University School of Law in Washington DC then provides 'A Functional Analysis of the EBRD Model Law on Secured Transactions'. This is followed by *Professor Karl Kreuzer's* chapter 'The Model Law on Secured Transactions of the EBRD from a German Point of View'. The academic from Würzburg not only evaluates the EBRD Model Law but also provides an overview of Germany's rules on secured transactions and the various proposals for their reform. Finally, *Professor Attila Harmathy* from Budapest examines 'The EBRD Model Law and the Hungarian Law' and thus contributes the first experiences from Central and Eastern Europe.

The remaining chapters of the book deal with specific legal rules on secured transactions which can provide inspiration for legislative drafters in emerging market economies. *Spiros Bazinas* from the United Nations Commission on International Trade Law reports on 'UNCITRAL's Work in the Field of Secured Transactions'. *Professor Ross Cranston* of the London School of Economics then deals with 'Credit Security and Debt Recovery: Law's Role in Reform in Asia and the Pacific'. This is followed by a chapter on 'Difficulties in Obtaining Secured Lending in Latin America: Why Law Reform Really Matters', contributed by *Alejandro Garro* from the Parker School of Foreign and Comparative Law. *Professor Peter Winship* writes on 'Selected Security Interests in the United States', followed by a short article entitled 'Mixed Systems: Scotland', by *Professor George Gretton* from Edinburgh. In Chapter 16, *Alexei Zevrev* from the EBRD deals with 'Security Issues under Russian Law'.

*David Banowsky* and *Joseph Norton* deal with 'Secured Financing Issues for International Lenders: Bridging the Gap Between Civil and Common Law through Asset-Backed Securitisation – Lessons From and Respecting Argentina and Mexico'. Their conclusion is that certain asset-backed securities, which were initially intended for the stimulation of affordable mortgage loans in the private housing sector in Mexico and Argentina, have proven useful for a broad range of financial products and are thus worthwhile of imitation elsewhere.

*Masao Yanaga* from Tokyo adds a chapter on 'The Japanese Approach'. This is followed by a paper from *Sonali Abeyratne* from the LSE on 'Enforcing Security in India, Sri Lanka and Malaysia'. *Tim Whitehead* from the Asian Development Bank and *Le Thu Hang* from Hanoi contribute a chapter entitled 'Overview of Laws Relating to Security Interests in Vietnam'. Finally, *Lucille Barale* from the Asian Development Bank writes on 'China's New Security Law: A Closer Look'.

In the appendices the reader finds the EBRD's Model Law for Secured Transactions in Market Economies in Transition, the Draft Convention on Assignment in Receivables Financing, and the revised Draft Articles of a future UNIDROIT Convention on International Interests in Mobile Equipment. A professional index completes the book.

Overall, Norton and Andenas have compiled an excellent overview of the subject of secured transactions and their regulatory treatment in many developed and developing economies. Obviously, some choices had to be made and more jurisdictions could have been included. Some readers will regret that the coverage of Central and Eastern Europe is not very broad which may be explained by the fact that laws in these countries are still very much in flux. However, a short chapter on the very interesting Polish system for registered pledges could have benefited the overall work. In any case, the book will prove most useful for legislative draftsmen and women and all those working on commercial and financial law in parliamentary services in emerging economies. Policy and decision makers in Western developed countries should find many a good idea for reform and ultimately harmonization of their own rules for secured transactions. Last but not least, practitioners can gain valuable background information on the approach to security taken in certain countries and the respective precautions advisable for lenders.

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