

RESEARCH HANDBOOK ON
**Secured Financing
in Commercial
Transactions**

Edited by **Frederique Dahan**



Research Handbook on Secured Financing in Commercial Transactions

Edited by

Frederique Dahan

*Chief Counsel, European Bank for Reconstruction and
Development*

RESEARCH HANDBOOKS IN FINANCIAL LAW



Edward Elgar
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

© European Bank for Reconstruction and Development and contributing authors
severally 2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2014959468

This book is available electronically in the **Elgaronline**
Law subject collection
DOI 10.4337/9781781001844



ISBN 978 1 78100 183 7 (cased)
ISBN 978 1 78100 184 4 (eBook)

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by T.J. International Ltd, Padstow

RESEARCH HANDBOOK ON SECURED
FINANCING IN COMMERCIAL
TRANSACTIONS



European Bank
for Reconstruction and Development

RESEARCH HANDBOOKS IN FINANCIAL LAW

Series Editor: Rosa Lastra, *Queen Mary, University of London, UK*

This important new *Handbook* series presents high-quality, original reference works that cover a range of subjects within the evolving field of financial law. National, regional and global financial markets are at the epicentre of economic, political and social developments. They are shaped by their own intrinsic dynamics, but are also at the receiving end of potent external forces, including monetary developments, state regulation and policies towards international and regional financial integration and free trade areas.

Under the general editorship of Rosa Lastra, these *Handbooks* are edited by leading scholars in their respective fields, and comprise specially commissioned contributions from distinguished academics, who critically, innovatively and substantially analyse a wide range of current issues in financial law.

Each of the individual handbooks is a definitive reference work, essential for both scholars of financial law as well as for practising lawyers. The comprehensive coverage and thorough examinations of the significant topics and ideas in financial law signify the *Handbooks'* position as authoritative and scholarly information resources.

Titles in the series include:

Research Handbook on International Insurance Law and Regulation

Edited by Julian Burling and Kevin Lazarus

Research Handbook on Hedge Funds, Private Equity and Alternative Investments

Edited by Phoebus Athanassiou

Research Handbook on Securities Regulation in the United States

Edited by Jerry W. Markham and Rigers Gjyshi

Research Handbook on Secured Financing in Commercial Transactions

Edited by Frederique Dahan

Contributors

John Armour, Hogan Lovells Professor of Law and Finance, University of Oxford, UK

John Armour is Hogan Lovells Professor of Law and Finance at Oxford University and a Fellow of the European Corporate Governance Institute. He was previously a member of the Faculty of Law and the interdisciplinary Centre for Business Research at the University of Cambridge. He studied law (MA, BCL) at the University of Oxford and then at Yale Law School (LLM). He has held visiting posts at various institutions including the University of Auckland, the University of Bologna, the University of Chicago, Columbia Law School, the University of Frankfurt, the Max Planck Institute for Comparative Private Law, Hamburg, the University of Pennsylvania Law School and the University of Western Ontario. He has published widely in the fields of company law, corporate finance and corporate insolvency. His main research interest lies in the integration of legal and economic analysis, with particular emphasis on the impact on the real economy of changes in company law, corporate insolvency law and financial regulation. He has been involved in policy-related projects commissioned by the UK's Department of Trade and Industry, Financial Services Authority and Insolvency Service, the Commonwealth Secretariat, the Jersey Economic Development Department and the World Bank. He currently serves as a member of the European Commission's Informal Company Law Expert Group.

Spyridon V. Bazinas, Senior Legal Officer, UNCITRAL Secretariat, Vienna, Austria

Mr Bazinas is a Senior Legal Officer in the International Trade Law Division of the United Nations Office of Legal Affairs, which serves as the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). He is currently the Secretary of Working Group VI (Security Interests), which is preparing a draft Model Law on Secured Transactions. As Secretary of the Working Group, Mr Bazinas is responsible for preparing comparative law studies, drafting legislative texts and commentaries, and servicing the Working Group. Mr Bazinas served as Secretary of Working Group VI when it prepared the UNCITRAL Legislative Guide on Secured Transactions (2007), the Supplement on

Security Interests in Intellectual Property Rights (2010) and the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013). He also served as Secretary of the Working Group on International Contract Practices when it prepared the draft Convention on the Assignment of Receivables in International Trade (2001). He has also been involved in the Commission's work on insolvency, bank guarantees, procurement and electronic commerce. He has co-authored or edited eight books and has published numerous articles in English, French, German, Greek and Spanish on various international trade law topics and, in particular, on secured financing. He is regularly involved in law reform assistance projects, lectures on a variety of UNCITRAL work topics and teaches classes on secured financing at the University of Vienna Law School and in academic institutions all over the world.

Nicholas Budd, Consultant, member of the Barreau de Paris and California and Colorado Bar Associations, Paris, France

Nicholas Budd is a former partner of two large international law firms, White & Case and Dentons. Since his retirement from law practice in 2005 he has served as an independent consultant to the World Bank and various United Nations agencies in connection with secured transactions and collateral management law reform initiatives in Africa and Asia. Mr Budd is a member (inactive) of the Barreau de Paris and California and Colorado Bar Associations. He is a past member of the publications Board of the American Bar Association, International Law Section, and has served as an expert in a number of international arbitration proceedings involving secured transactions and collateral management issues. Mr Budd has published widely in banking and legal publications, including the United Nations Natural Resources Forum (Legal and Regulatory Issues Concerning Financing and Hedging of Commodity Producers in Developing Countries) and the *Harvard Business Review* (Commodity Linked Bonds). He is the author of *Credit Enhancement in International Trade Transactions* (Lloyds of London Press) and *Case Histories in Trade Finance* (Euromoney Press). Nicholas Budd has lived and worked in Paris since 1989.

Andreea Simona Burtoiu, Counsel, RTPR Allen & Overy, Romania

Andreea is a counsel at RTPR Allen & Overy, with over ten years' experience in banking and finance, acting on behalf of domestic and international banks and borrowers on syndicated and bilateral credit transactions and advising security takers and providers on the creation

and perfection of security interests. She also provides advice on derivatives and cash management tools, restructuring transactions, as well as capital markets matters.

Richard Calnan, Partner, Norton Rose Fulbright LLP, England

Richard Calnan is a partner at Norton Rose Fulbright LLP in London. He joined the firm in 1975. Apart from three years teaching law at the University of Auckland in the early 1980s, the whole of his professional life has been spent at the firm.

He is a Visiting Professor at University College London and a member of the City of London Law Society's Financial Law Committee.

He is the author of *Taking Security* (Jordans, third edition 2013), *Proprietary Rights and Insolvency* (Oxford University Press, 2010) and *Principles of Contractual Interpretation* (Oxford University Press, 2013).

Dr Frederique Dahan, Chief Counsel, European Bank for Reconstruction and Development

Frederique Dahan presently serves as Chief Counsel and Head of the Financial Law Unit (FLU) in the Legal Transition Team (LTT) at the European Bank for Reconstruction and Development, which provides legal reform assistance to the countries of central and Eastern Europe and the former Soviet Union, and in the southern and eastern Mediterranean countries

Frederique oversees all of the FLU legal reform projects concerning secured transactions and access to credit, insolvency and creditors' rights, corporate governance and securities markets. She has personally led many secured transactions projects, including ongoing country-specific projects in Morocco and Russia. Frederique is a recognised expert in the subject matter, having personally worked on some of the key EBRD standards-setting projects on secured transactions, collateral registers and mortgage lending. She was one of the authors of the EBRD study *Mortgages in Transition Economies*, published in 2008. She is also the editor (with John Simpson) of *Secured Transactions Reform and Access to Credit* (Edward Elgar, 2008).

Prior to joining the EBRD in 2000, Frederique worked as a lecturer at the University of Essex, in the United Kingdom, teaching comparative law, European company law, cross-border insolvency and business and corporate law issues in central and Eastern Europe. She was also a Research Fellow at the Institute of Advanced Legal Studies in London, UK.

Frederique is a qualified French solicitor. She received her Doctorate in Law from the University of Paris I Panthéon-Sorbonne.

Dr Marek Dubovec, Senior Research Attorney, National Law Center for Inter-American Free Trade, United States

Marek Dubovec earned a law degree from Slovakia in 2003, master's degree (LLM) in International Trade Law in 2004 and the Doctor of Juridical Science degree (SJD) in 2009 at the James E. Rogers College of Law, the University of Arizona. Since 2004, he has been a senior research attorney and secured transactions projects coordinator at the National Law Center for Inter-American Free Trade, Tucson, Arizona. Marek has coordinated the secured transactions law reform programme in Honduras and has been involved in a number of reform projects in the region, including in Colombia and Mexico. He is also a consultant to the International Finance Corporation of the World Bank Group on the secured transactions reform projects in Ghana, Liberia, Indonesia, Malawi, Nigeria, Pakistan, Sierra Leone, South Sudan and Zambia. Since 2005, he has been a delegate to the UNCITRAL Working Group VI on Security Interests and participated in the working group that drafted the 2009 Organization of American States' Model Registry Regulations. He is also a visiting professor teaching UCC Article 9 Secured Transactions and International Commercial Transactions at the James E. Rogers College of Law.

Louise Gullifer, Professor of Commercial Law, Fellow and Tutor in Law at Harris Manchester College, University of Oxford, UK

Louise Gullifer is Professor of Commercial Law at Oxford University and fellow and tutor of Harris Manchester College, Oxford, where she is director of the Commercial Law Centre. She has been teaching at Oxford since 1991, and before that she practised as a barrister.

Her research interests focus broadly on commercial law and corporate finance. She writes extensively in areas such as security and title financing, corporate finance, corporate insolvency, personal property and set-off. Recent publications include *The Law of Personal Property* (co-authored with Michael Bridge, Gerard McMeel and Sarah Worthington), *Set-off in Arbitration and Commercial Transactions* (co-authored with Pascal Pichonnaz), and the 5th edition of *Goode on Legal Problems of Credit and Security*.

She is particularly interested in financial collateral and intermediated securities. She is executive director of the Secured Transaction Law Reform Project and is the Oxford Law Faculty Academic Lead for the Cape Town Convention Academic Project.

Ivor Istuk, Principal Counsel, European Bank for Reconstruction and Development

Ivor Istuk is a finance specialist in the Financial Law Unit of the Office of the General Counsel. Ivor is working on a number of projects aiming to facilitate access to finance across the bank's region. His work includes the reform of secured transactions laws, various asset-based lending regimes (such as factoring and leasing), credit bureaus, and so on. In cooperation with the bank's agribusiness team, Ivor is working on the introduction and implementation of agrarian financing regimes aiming to facilitate lending to agricultural producers in the pre- and post-harvest phase of production cycle (for example Russia, Ukraine, Serbia, Bulgaria). Prior to joining the EBRD Ivor was an attorney at law at Zurich and Partners Law Firm in Zagreb where he advised major international and local clients on corporate finance and capital markets matters. He received his Masters in Law from the University of Zagreb and thereafter completed a master's degree at the London School of Economics and Political Science specialising in Banking and Financial Law.

Tom Johnson, Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada

Tom Johnson is a faculty member of Osgoode Hall Law School. His research interests include secured transactions, structured finance, infrastructure development and law and development. He is Director of Osgoode's Intensive Program in Business Law and Co-Director of York University's joint JD/MBA Program. He has over 20 years' experience as a consultant to the World Bank and the Inter-American Development Bank, working on access to finance and land tenure reform projects in developing countries. In that role he has advised governments in Central and South Asia, Latin America, the Caribbean, the Middle East and East Africa.

Ouns Lemseffer, Associate, Clifford Chance, Morocco

Ouns Lemseffer is an associate in the Casablanca office of Clifford Chance. She specialises in acquisition finance and project finance, mostly in France and North Africa. She has a broad knowledge of the Moroccan legal and business environment and has extensive experience assisting public authorities in Morocco on a variety of legislative and regulatory drafting matters.

Christian de Lima Ramos, Partner, Ramos e Zuanon Advogados, Brazil

Christian de Lima Ramos is a founding partner of Ramos e Zuanon Advogados, heading its banking and finance and agribusiness groups. He is qualified to practise law in Brazil, holding a law degree from the University of São Paulo, Brazil, a master's degree from Georgetown University, USA, and a diploma in International Business and Finance from New York University, USA.

Christian is a leading lawyer in the Brazilian agriculture sector, acting as liaison between the international financial and capital markets and Brazilian producers, trading companies, sugar mills and other relevant players in the field, sitting on the board of directors of a number of these companies.

Julia Lymar, Professional Support Lawyer, White & Case LLC, Russia

Julia is a professional support lawyer in the Moscow office's Energy, Infrastructure, Project and Asset Finance (EIPAF) group. She focuses on Russian law security, currency control, banking and bankruptcy issues.

Julia assists the EIPAF group in developing standard forms and training programmes, preparing client alerts, managing the know-how created by the practice and answering enquiries from practitioners.

Julia has also been involved in the pledge reform project together with Natalia Nikitina.

Clare Manuel, Director, The Law & Development Partnership, UK

Clare Manuel is a UK lawyer with particular expertise in the areas of investment climate reform and private sector development in developing countries. As a lead author of the IFC's *Gender Dimensions of Investment Climate Reform* guide and co-author of six subsequent IFC Gender and Investment Climate Reform Assessments Reports, Clare has led the way in thinking about the intersection between gender issues and investment climate reform, including in relation to property and land rights. Having gained her initial experience in a City of London commercial law firm, she has acquired more than 20 years' experience in working at senior levels in government – in the UK, Africa, the Caribbean and the South Pacific. As a founder and director of The Law & Development Partnership, Clare has advised extensively on private sector development, justice and gender issues in developing countries.

Michael J.T. McMillen, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, and Adjunct Professor at University of Pennsylvania Law School, USA

Michael J.T. McMillen is a partner of Curtis, Mallet-Prevost, Colt & Mosle LLP. Michael is internationally recognised for his work in Islamic finance and investment and project finance. His transactional work focuses on the Americas, Europe, the Middle East and Asia. Michael teaches Islamic finance at the University of Pennsylvania Law School, The Wharton School of Business and numerous other educational and training institutions. He publishes and speaks throughout the world on Islamic finance and investment and project and infrastructure finance and is the author of a leading book on Islamic finance: *Islamic Finance and the Shari'ah: The Dow Jones Fatwa and Permissible Variance as Studies in Lethargism and Legal Change*. He has twice been a recipient of the Euromoney award for Best Legal Advisor in Islamic Finance and has also received the Sheikh Mohammed Bin Rashid Al-Maktoum award for Best Legal Advisor in Islamic Finance for North America. He twice served as Chair (and was the founding Chair) of the Islamic Finance Section, a division of the International Law Section, of the American Bar Association. In 2014 he was recognised as one of ten Global Leaders in Islamic Finance (Emmy Abdul Alim), the only lawyer included in the list. Euromoney recognised Michael as one of the eighteen pioneers of Islamic finance.

Michael received his MD from the Albert Einstein College of Medicine, his JD from the University of Wisconsin Law School, and his BBA from the University of Wisconsin – Madison.

Antonia Menezes, Senior Financial Sector Specialist, World Bank Group

Antonia Menezes is a Senior Financial Sector Specialist for the World Bank Group's Debt Resolution & Insolvency ROSC and Technical Assistance Program, advising governments around the world on the development of insolvency and debt recovery systems. Prior to joining the World Bank, Antonia was an attorney in a leading American law firm in Paris, France, advising both corporates and governments in international arbitrations. Antonia is a UK lawyer (LLM, LPC, LLB) and a 2014 Fellow of INSOL International. She has published and lectured widely in the area of insolvency and creditor rights.

Mustapha Mourahib, Partner, Clifford Chance, Morocco

Mustapha Mourahib is the partner in charge of the Casablanca office of Clifford Chance and is the Global Head of North Africa. His practice focuses mainly on mergers and acquisitions, structured finance and banking and financial regulatory. He has an excellent knowledge of the Moroccan legal and business environment and has extensive experience assisting public authorities in Morocco on a variety of legislative and regulatory drafting matters.

Edward Murray, Consultant, Allen & Overy LLP, UK

Edward Murray is a consultant to and the former senior partner of the Derivatives and Structured Finance practice at Allen & Overy LLP. He is a senior external legal adviser to the International Swaps and Derivatives Association (ISDA) and Chairman of the ISDA Financial Law Reform Committee. He is a member of PRIME Finance (the Panel of Recognised International Market Experts in Finance), based in The Hague. He was a member of the UK Financial Markets Law Committee from 2005 to 2013.

Mr Murray is a Visiting Professorial Fellow at the Centre for Commercial Law Studies of Queen Mary London and a visiting lecturer at the Université Panthéon-Assas (Paris II). He has also given guest lectures at the London School of Economics, the Bucerius Law School in Hamburg, the Universities of Oxford and Cambridge and the Commercial Law Centre at University College Dublin. In October 2009 he was appointed a Recorder of the Crown Court (part-time criminal court judge) and, in September 2013, authorised to sit as a Deputy High Court Judge in the Chancery Division (part-time civil court judge).

Natalia Nikitina, Partner, White & Case LLC, Russia

Natalia Nikitina advises on a wide range of finance transactions, including traditional commercial lending, structured and acquisition finance, as well as asset-based financings and project and pre-export finance.

With 15 years of on-the-ground experience in Russia, Natalia is able to offer her clients particular insight into the nuances specific to this market. She has also been the driving force behind a number of first-of-their-kind and award-winning deals, and her clients value this 'ability to find solutions in complicated structural deals' (*Legal 500*, 2014).

Natalia regularly works with a wide range of participants active in the Russian market, who benefit from her commitment to finding made-to-measure fixes, and to spot innovative ways to secure her clients' interests. In addition to her transactional work, Natalia is also a leading figure in

numerous important legislative projects, including the pledge law reform and standardised Russian loan agreements for syndicated lending.

She has worked on many of the major deals in Russia and the CIS, where her experience and knowledge helps her clients to proceed confidently with their transactions. She was instrumental in a power plant financing deal which has been described as ‘creating a Russian project finance template’ (*Trade Finance Magazine*).

Natalia is also highly respected in the transportation sector, having earned recommendations from both clients and legal benchmark publications. She was recently appointed as the Coordinator of the Russian National Contact Group to the prestigious Aviation Working Group’s Legal Advisory Panel in recognition of her work with the Russian Federation’s ratification of the Cape Town Convention, and her dedication to the development of the aviation sector in Russia. She has advised on a vast number of aviation finance and leasing transactions, including the first export credit financing of the Sukhoi Superjet aircraft, which paved its way to the Western market.

Victor Pădurari, Partner, RTPR Allen & Overy, Romania

Victor Pădurari is a partner of RTPR Allen & Overy (the affiliated office in Romania of Allen & Overy LLP). He is primarily involved in banking and finance and projects transactions, including secured lending, project finance, LBOs, real estate finance, PPPs, concessions, governmental public debt and municipal finance, as well as general corporate and commercial law, real estate and state aid. Victor also has significant experience in the energy sector.

Dr Jan-Hendrik Röver, Professor, University of Augsburg, Germany, Rechtsanwalt and Barrister (Middle Temple), Managing Director, goetzpartners Corporate Finance GmbH, Germany

Jan-Hendrik Röver is a member of the Executive Board of goetzpartners Corporate Finance, where he is responsible for human resources and knowledge management. He is heading the industry groups energy and financial institutions. Prior to goetzpartners Corporate Finance he worked at HypoVereinsbank/UniCredit in Munich (as Head of Equity Funds in the Project and Asset Based Financing Division) and at the European Bank for Reconstruction and Development in London. He has been involved in many large national and international financings and M&A transactions. He teaches banking and capital markets law at the University of Augsburg and holds a lectureship at the Ludwig-Maximilians-University Munich for jurisprudence.

His publications include: *EBRD Model Law on Secured Transactions* (London, 1994) (co-authored with John Simpson); *Vergleichende Prinzipien Dinglicher Sicherheiten* (Munich, C.H. Beck, 1997); *Secured Lending in Eastern Europe* (Oxford, Oxford University Press, 2007); *Rechtshandbuch Projektfinanzierung und PPP* (2nd ed., Cologne, Munich, Carl Heymanns Verlag, 2008) (co-edited with Ulf R. Siebel and Christian Knütel).

Mahesh Uttamchandani, Global Lead – Credit Infrastructure, World Bank Group

Mahesh Uttamchandani is the World Bank Group's Global Lead for Credit Infrastructure (Insolvency & Creditor Rights, Secured Transactions & Moveable Collateral and Credit Information), advising governments around the world on the development of insolvency, collateral, credit information and debt recovery systems. Prior to joining the World Bank, Mahesh was Insolvency Counsel to the European Bank for Reconstruction and Development (EBRD), where he led the reform of insolvency systems throughout Eastern Europe and Central Asia.

Mahesh is a Canadian lawyer who practised for several years exclusively in the area of insolvency and creditors' rights at a leading Canadian law firm and has published and lectured extensively in North America, Europe and Asia. He is a board member of the insolvency-related legal journal, *International Corporate Rescue*, as well as an Adjunct Professor of Law in the St. John's University Law School LL.M in Insolvency, an Honorary Professor of Law at Nottingham Law School and a Board Director of INSOL International.

Dr Kristin van Zwieten, Clifford Chance Associate Professor of Law and Finance, University of Oxford, UK

Kristin van Zwieten is the Clifford Chance Associate Professor of Law and Finance in the Law Faculty at the University of Oxford, and a Fellow of Harris Manchester College. She was previously the John Collier Fellow in Law at Trinity Hall, Cambridge. She has been a visiting scholar at Columbia Law School and the University of Melbourne, and an occasional lecturer at the University of Hamburg. Her research interests include corporate insolvency law, and law and financial development in emerging markets. She has been involved in a number of insolvency law projects in emerging markets, particularly in India. She previously qualified as a solicitor in an Australian corporate law firm.

Philip R. Wood CBE, QC (Hon)

Philip R. Wood CBE, QC (Hon) is Special Global Counsel, Allen & Overy LLP, and Head of the Global Law Intelligence Unit at Allen & Overy. He is Visiting Professor in International Financial Law, University of Oxford, Yorke Distinguished Visiting Fellow, University of Cambridge, and Visiting Professor, Queen Mary College, University of London.

Foreword

Creditors with a security interest are typically super-priority creditors on the bankruptcy of the debtor, and indeed the whole purpose of a security interest is to confer this priority on bankruptcy. One of the most remarkable features of bankruptcy laws is that nowhere is there equality of distribution of the assets of the bankrupt. Rather, there is a lengthy and intricate ladder of priorities as creditors battle each other in climbing the rungs of this ladder, fighting to escape the rising swirls of debt, gasping for the bubble of oxygen at the top. To queue is human.

Security interests are one of the trio of these super-priority creditors, which are evident to a greater or lesser extent in the jurisdictions of the world. The identities of the three musketeers swaggering down the road showing off their superiority are: (1) secured creditors; (2) creditors entitled to bankruptcy set-off (and thereby able to get paid); and (3) claimants who are beneficiaries under a trust – who can get back their property held by the debtor in the debtor's own name, notwithstanding that the property appears to belong to the debtor. An example is custodianship.

The reception of each of these claimants is quite patchy around the world, but the fact that they do claim primacy, and often get it, means that their position sometimes raises eyebrows amongst those who are less favoured.

The law and practice relating to security interests is by far the most complex compared with the other members of the trio. There are various explanations for this, including (amongst others) the fact that there is a huge range of assets involved (some codes will accord special treatment to between 40 and 50 different categories of asset) and the fact that the number of legal issues is very large. For example, a question of priorities can lead to a discussion of at least a couple of dozen different priority contests. The arrival of this set of excellent essays edited by Frederique Dahan is therefore to be warmly welcomed.

There are a number of other reasons why this particular collection is of exceptional value.

Firstly, huge amounts are involved in security interests, which are often seen as unlocking capital for beneficial development.