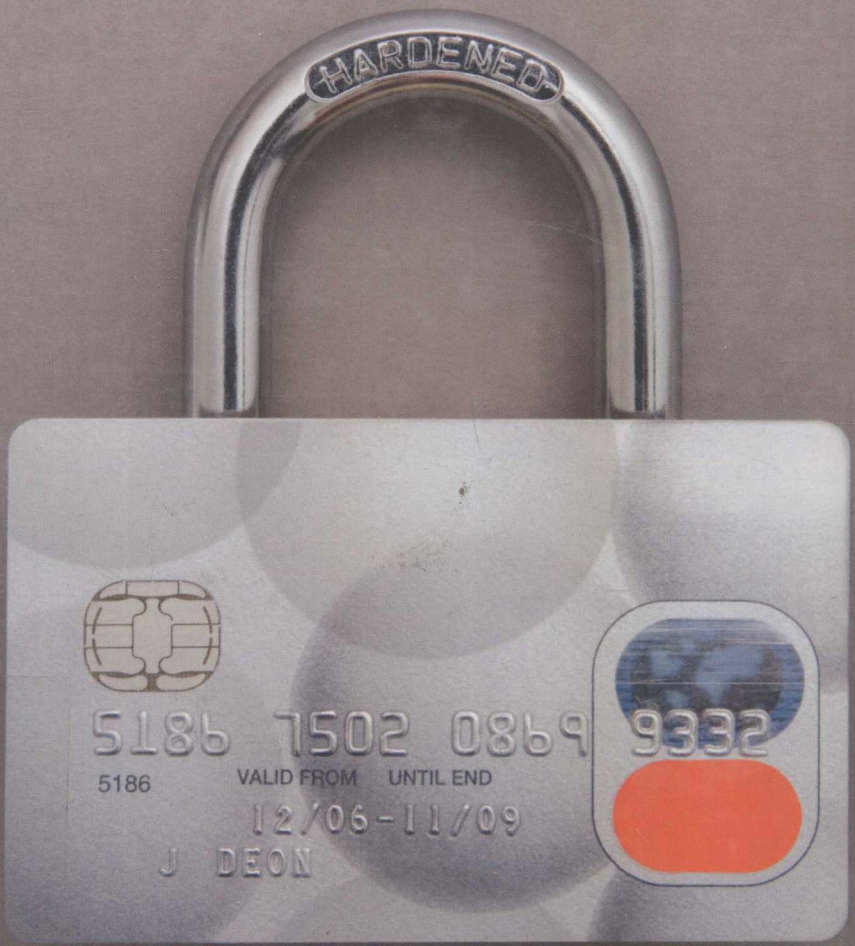
Availability of Credit and Secured Transactions in a Time of Crisis

EDITED BY N. ORKUN AKSELI



CAMBRIDGE

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CAMBRIDGE
UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107027442

First published 2013

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

Library of Congress Cataloguing in Publication data
Availability of credit and secured transactions in a time of crisis / edited by N. Orkun Akseli.
pages cm
Includes bibliographical references and index.
ISBN 978-1-107-02744-2 (hardback)
1. Security (Law) 2. Credit – Law and legislation. 3. Financial crises. I. Akseli, N. Orkun (Nazmi Orkun) editor of compilation.
K1100.A97 2013
346.07′4 – dc23 2013017434

ISBN 978-1-107-02744-2 Hardback

AVAILABILITY OF CREDIT AND SECURED TRANSACTIONS IN A TIME OF CRISIS

In light of the financial crisis, it has become clear that the globalization of financial markets has not been matched by the globalization of legal certainty relating to financial transactions. The ability to give security influences not only the cost of credit but also, in some cases, whether credit will be available at all. Increasing the availability and lowering the cost of credit can make important contributions to international and domestic economic development. Assessing the international challenges posed by inefficient secured credit laws, this book explores how these can be overcome to facilitate credit through legal reforms. Leading authorities in the field address the key issues surrounding the availability of credit; the role of banks in economic development and financial crises; UNCITRAL's legislative efforts, and international organizations and financial institutions and their involvement in the reform of secured transactions law.

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This collection is dedicated to my parents and family

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FOREWORD

ROY GOODE

Many studies conducted by the World Bank over a number of years have demonstrated that developing countries whose laws do not permit non-possessory security in movable property face a serious impediment to economic development. Several organizations, among them the World Bank itself, the European Bank for Reconstruction and Development, the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (Unidroit), have sought to encourage the enactment of secured transactions laws which will encourage banks and other financiers to extend credit and thereby promote economic growth.

This collection of essays has as its primary purpose an evaluation of the *Guide on Secured Transactions* published by the United Nations Commission on International Trade Law. UNCITRAL has several important instruments to its credit, including its 1985 Model Law on International Commercial Arbitration and its 1997 Model Law on Cross-Border Insolvency, both of which have been highly influential. Disappointing so far has been the response to its 2001 Convention on the assignment of receivables in international trade, which, after 11 years, has secured only a single ratification. Possible explanations are offered in this volume. The great advantage of the Guide is that it is soft law, available as a tool for countries planning to modernize their personal property security law but requiring no ratification and posing no threat to national laws. The Guide is an impressive work, organized under the direction of Spyridon Bazinas, Senior Legal Officer of UNCITRAL, and deserves close examination. In these essays it has been criticized as heavily influenced by Article 9 of the American Uniform Commercial Code and defended on the ground that if this is the case, it may be because the ideas embodied in Article 9 represent the best approach to secured transactions law. Whatever view one has on this debate, it is undoubtedly the case that American lawyers take their commercial law seriously, mould it to produce solutions to practical issues and invest a huge amount of time and resources to produce the

instruments required. One also should not overlook the fact that Article 9 and equivalent Personal Property Security Acts have now been enacted in well over seventy States in several different countries, two at least of which are outside the US hegemony. It would therefore be surprising if the ideas embodied in Article 9 did not feature significantly in the Guide. On the other hand, as was demonstrated in work leading to the Cape Town Convention on International Interests in Mobile Equipment and its associated Protocols, civil law and other systems have much to bring to the table, including intellectual rigour, the elegance of civil code drafting and an awareness of the need to provide due safeguards for debtors and certain other restrictions on freedom of contract in the broader interest of society.

This collection of essays, skilfully edited and introduced by Orkun Akseli, brings together a number of leading experts from different countries and in different fields to examine the role of credit generally and secured lending in particular, as well as the role of international organizations in setting and promoting international standards in this field. The view that bank credit is an unqualified good is rightly subjected to critical scrutiny. Moreover, as many commentators have pointed out, the reform of security law to open up access to credit, though a necessary condition of economic growth, will not be effective unless underpinned by adequate bank regulation and an independent and efficient judicial system. Other contributors have noted the value of plurality of legal approaches and the importance of offering legal regimes which have due regard to a country's culture, traditions and state of development. This volume provides new insights into what is a complex and controversial field of law and policy at both national and at international level. It is to be warmly welcomed.

Roy Goode
Oxford
14 March 2013

ACKNOWLEDGEMENTS

This collection, and the conference from which it emanates, would not have been possible without the generous support it has received from the World Bank and the *Modern Law Review* Seminar Funds. I am grateful to both of these institutions for their financial support. I am indebted to all those who held papers, chaired sessions and made contributions to the conference and to this volume, who have shown great patience with the project as it has progressed, in particular, to Spyridon V. Bazinas (UNCITRAL), Professor Hugh Beale QC (Warwick), Dr. David Bholat (Newcastle), Dr. Frederique Dahan (EBRD), Professor Henry Gabriel (Elon), Professor Sir Roy Goode QC (Oxford), Professor Joanna Gray (Newcastle), Professor Terence C. Halliday (American Bar Foundation), Professor Gerard McCormack (Leeds), Dr. Noel McGrath (Dublin), Professor Loukas Mistelis (CCLS, Queen Mary London), Professor Riz Mokal (the World Bank), Anjanette H. Raymond (Indiana) and Harry Sigman (California). Cambridge University Press staff has provided crucial support. I would like particularly to thank Kim Hughes, Richard Woodham, Samantha Richter and Fleur Jones for their patience, ongoing support and efficient management of the production process.

CONTENTS

Introduction

N. ORKUN AKSELI

This collection of essays emanates from a conference – *International Legal Standards on Secured Transactions, Facilitation of Credit and Financial Crisis* – sponsored by the World Bank, funded by the *Modern Law Review* Seminar Funds and hosted by Newcastle University Law School in May 2010. That conference addressed the challenges posed by inefficient secured credit laws and explored the avenues to overcome these difficulties by examining the international legal standards set by international financial institutions and international legislative bodies.[1]

This collection, along the same lines, assesses the challenges posed by inefficient secured credit laws by looking at how challenges can be overcome to facilitate credit through legal reforms based on international standards set by international legislative bodies and financial institutions in the light of the financial crisis. The collection focuses particularly on the legislative texts prepared by the United Nations Commission on International Trade (UNCITRAL), and harmonization and modernization initiatives by the World Bank and the European Bank for Reconstruction and Development (EBRD). The collection deals with key issues such as the availability of credit, international financial institutions and their involvement in secured transactions law reform, utility and efficacy of the UNCITRAL's legislative efforts, and the extent to which these international standards set by international standard-setting bodies and financial institutions may be used to help reform the law of credit and security.

Since the early 1970s, an increasing variety of international conventions and instruments on secured transactions law have been produced by international legislative and financial organizations. The general aim of these instruments has been to modernize the law of secured credit with

[1] In particular, the UN Convention on the Assignment of Receivables in International Trade; UNCITRAL *Legislative Guide on Secured Transactions.*

the assumption that harmonized modernization of the law of secured credit lowers the cost of credit. In that context, these instruments aim to assist both developing and developed economies in reforming their laws. The law of secured transactions has remained within the boundaries of domestic law with close links to the law of property, contracts and insolvency, where the law represents cultural stance and public policy preferences that vary among States. These factors are coupled with different economic or political expectations, competition among legal systems, the tensions inherent in international law making[2] and the scepticism of legal practitioners towards new rules and adapting to them. For years, all of these factors have prevented a meaningful secured transactions law reform that could have successfully accompanied the globalization of financial markets. In terms of international instruments on secured transactions law, certain arguments have been put forward that some of these instruments have been influenced by a particular legal system.[3] While this argument may have some theoretical support, it is clear that many of the principles of international instruments on secured transactions have been implemented in national laws and derive from these laws and not from a particular system. This has been done in two ways. First, States directly implemented principles of the international texts in their domestic law; and second, States that have implemented a secured transactions law that is consistent with the recommendations of, for example, the UNCITRAL Secured Transactions Legislative Guide, have essentially implemented the principles of the Receivables Convention in their domestic law.[4]

It needs to be understood that law is 'a vehicle for social change'.[5] At a time when a country's social fabric, economic and financial strength are changing due to the global financial crisis and ensuing credit crunch, it is crucial to modernize the law of secured credit and respond to the needs of businesses. That can be achieved either by taking international

[2] *See* R. Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' 54 *ICLQ* 539 (2005).

[3] *See e.g.* G. McCormack, *Secured Credit and the Harmonisation of Law: The UNCITRAL Experience* (Cheltenham: Edward Elgar, 2011).

[4] For more discussion on this matter *see below* G. McCormack 'Secured Transactions Law Reform, UNCITRAL, and the export of foreign legal models'; S.V. Bazinas 'The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions' and N.O. Akseli 'The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit', Chapters 2, 8 and 9, respectively, below.

[5] R. Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford University Press, 2006), p. xii.

instruments as an example, adapting their rules according to the needs of domestic law and legal tradition, or looking at other comparator jurisdictions and taking example from their experiences. This is obviously not something that can be done overnight. It can only be achieved with a clear remit, inclusion of all interested parties and on an incremental basis. If the law responds to the needs of businesses, this will not only be significant for the economic growth of a country, but also indicative of the fact that the country's law is regarded as an influential example or suitable for exportability to overseas law reform activities.[6]

The ability to give security influences not only the cost of credit but also, in some cases, whether credit will be available at all. The difficulties posed by inefficient secured credit laws are felt acutely in both advanced and emerging economies as a result of financial crisis. Businesses have expectations from the law[7] and the State has a responsibility to establish a financial and legal framework which understands the barriers to access to finance, and either addresses those barriers or enables businesses to negotiate them. In emerging or developing markets, unpredictable and poor secured credit laws deter international financial organizations and banks from extending credit and investing in those countries. In developed markets, inefficient secured transactions laws hinder further economic growth. Arguably, increasing the availability of credit and lowering its cost contributes to international and domestic economic development. It is believed that international instruments on secured transactions law aim to provide predictability and modernized rules which will have a positive impact on the availability and cost of credit and can be influential and taken as helpful examples in the domestic law reform activities. International standards set by international legislative bodies and financial organizations have the necessary merit to achieve this.

The collection encompasses essays from a broad range of perspectives in order to contextualize the availability of credit and secured transactions law reform: from the role of banks in economic development and financial crises (Bholat); from the facilitation of credit and political and policy

[6] For similar lines of argument, *see* R. Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonization of Commercial Law' 50 *ICLQ* 751 (2001).

[7] *See* 'Secured Transactions Law: The Case for Reform' available at http://securedtransactionsproject.wordpress.com/case-for-reform/ (last accessed 12 January 2013). It is submitted that the Secured Transactions Law Reform Project is an excellent platform to discuss the inefficiencies of secured transactions law and unpick the shortcomings of the current secured transactions law in England, and a basis to reform the law incrementally in a way that responds to the needs of businesses in the twenty-first century.

perspectives (McCormack); from the position of international financial institutions (Bazinas and Dahan); from the involvement of international organizations and the impact of this on the law and the market (Halliday); from UNCITRAL's legislative texts (Bazinas and Akseli); and from the domestic perspective of the secured transactions law reform in England (Raymond). The volume's conclusions present a clear view of the efficacy and utility of international legal standards and their impact on making the credit available and secured transactions law reform in a time of crisis (Beale). The comments under each part (Gray, Mistelis, Gabriel and McGrath) reflect critical perspectives.

Part I of the collection focuses on the availability of credit, challenges in access to credit, and the problems in harmonizing and reforming the law by adopting a specific model. Taking the role of banks in economic development and financial crises with particular reference to their loan portfolio in Britain in the period leading up to and following the Great Recession as the starting point for his analysis, David Bholat, in his chapter 'Money, bank debt, and business cycles: between economic development and financial crises', looks at the role conventionally attributed to banks in economic theory and history. Bholat focuses particularly on Joseph Schumpeter, who draws a distinction between economic growth and economic development on the basis of the presence or absence of banking. He then presents a more sceptical story based on Friedrich Hayek's theory, which tends to depict banks as uniquely problematic institutions in the making of financial crises. Finally, Bholat offers some UK data on the behaviour of banks leading up to and following the current crisis. In particular, the relative growth in net lending secured on real estate, among other evidence, casts doubt on their role in economic development, indicating instead their centrality to what has been described as 'financialization'. In his chapter, 'Secured transactions law reform, UNCITRAL and the export of foreign legal models', Gerard McCormack, develops his earlier argument that modernization does not equal a liberalization agenda and subjects it to greater scrutiny. In this novel treatment, McCormack analyses the effects of recognizing security rights. He criticizes the harmonization of the law of secured credit, particularly in the 'liberal' American-nuanced way that the UNCITRAL Guide seeks to do. He then considers why 'liberal' secured credit regimes are considered to be beneficial. Moreover, McCormack addresses in greater detail critical perspectives on the international harmonization and modernization agenda. He concludes against the secured transactions reform in the American-oriented manner that the Guide seeks to effect. Joanna Gray, in her contribution in

Part I of the collection, stresses the interplay between the ability to create security, increased financialization and the banking crisis of 2008.

Part II of the collection considers the role and interest of international financial institutions and international organizations in setting standards on secured transactions for robust financial systems in emerging economies and credit facilitation. In his chapter, 'International organizations as global lawmakers: seven shifts in practice for secured transactions law and beyond', Terence Halliday undertakes an in-depth analysis of the impact of law on the market by questioning why international organizations produce standards. Halliday analyses four theories (professional, ecological, realist and idealist) in responding to why international organizations and financial institutions develop standards. He then develops his argument into how and whether they should produce standards and suggests seven shifts in international organizations' orientation and practices. These include comparing private international financial institution lawmaking to public international organizations' lawmaking, naive developmentalism to contingent developmentalism, unexamined theories to tested theories, arbitrary exemplars to alternative models, narrow disciplinarity to broad inter-disciplinarity, globalized localisms to normative options, static norms to recursivity. In his initial chapter, 'The creation of international commercial law standards by international financial institutions: why they do it and whether they should', Spyridon Bazinas discusses the examples of overlap between international legislative bodies and the international financial institutions in producing international legal standards on secured transactions law. Bazinas suggests that international financial institutions should coordinate their efforts with international legislative bodies to continue their economic development mandate and could focus on the economic analysis of law to achieve an efficient law reform. Frederique Dahan, in her chapter, 'The power of secured transactions law and the challenge of its reform', analyses the philosophy that the EBRD, as an international financial institution, has applied in its work in the field of secured transactions reform. Dahan states that this philosophy is based on two important elements in secured transactions law and law reform: the facilitative objective of the secured transactions law should be made legally efficient, and secured transactions law is versatile and the law reform should embrace that versatility. She maps out the EBRD's work in reducing the credit risk in a legally efficient manner by analysing the Core Principles for secured transactions law. The chapter then progresses to the EBRD's recognition of secured transactions' versatility. Dahan concludes that the secured transactions law reform will