

Remedies under Security Interests

Edited by
Ian M. Fletcher
and Odd Swarting



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Remedies under Security Interests

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Remedies under Security Interests

The Insolvency and Creditors' Rights Committee (Committee J) of the Section on Business Law of the International Bar Association (IBA) commissioned a Project in 1994 under the Chairmanship of Richard Broude of New York to consider the security systems in a number of countries around the world. Subsequent Co-Chairmen have also included Gabriel Nadal, Jausas Nadal & Vidal de Llobatera of Barcelona, Ian Fletcher of Stephenson Harwood in London and Odd Swarting of Advokatfirman Lindahl of Sweden. At the Vancouver Conference of the IBA held in September 1998, an important step was taken by holding a substantial hypothetical presentation which considered the constitution of securities and upon default the enforcement arrangements in a number of different countries.

It was determined shortly after the Vancouver Conference that there was an important legal market for the compilation of contributions from various countries around the world on the subject of Remedies under Security Interests and we are extremely pleased that 14 countries around the world have submitted substantial and very worthwhile contributions in respect of their jurisdictions. We are particularly grateful to the contributors who have spent a great deal of time and effort in submitting their contributions to this publication.

We would also like to take the opportunity of thanking the IBA and Kluwer for taking on board the project as a publishing proposition and for their help and support in procuring the completion of the publication process.

Finally, we would like to thank the office bearers of Committee J and our colleagues in the Committee for their continued support and encouragement for this whole project.

Ian M Fletcher/Odd Swarting
Joint Editors

International Bar Association

The Global Voice of the Legal Profession

In its role as a dual membership organization, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organizations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

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The Insolvency and Creditors' Rights Committee is the premier association of international insolvency and secured transactions lawyers, and provides a forum for discussion of new developments in legal practice pertaining to insolvencies, liquidations and reorganizations.

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Chapter One

Security Interests under Argentine Law

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Brons & Salas, Buenos Aires, Argentina

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I. LIST OF PROPERTIES THAT MAY BE OWNED BY A BUSINESS UNDER ARGENTINE LAW

1. Property Rights to Tangible Assets

1.1. *An Overall View of Real Estate Title Holders' Rights*

Title 4, Section 2,502 of Argentine Civil Code ("Civil Code") stipulates that real rights may only be created by law. It further states that any contract or last will or testament which sets up other real rights or modifies those stipulated in the Civil Code shall only be effective as personal rights, if permitted by law. This is a public policy regulation and means that owners cannot create rights "*in rem*" other than those stipulated by the Civil Code. Should this occur, such rights will be valid as personal rights. As a consequence, the creditor may only claim collection of the credit from the debtor but cannot invoke the specific asset or subject-matter of the obligation as grounds therefor.

Section 2,503 of the Civil Code contains a list of real rights ("*derechos reales*"), namely:

- (1) Ownership and co-ownership ("*dominio y condominio*"), which means the respective individual and joint power to use and dispose of property.
- (2) Usufruct ("*usufructo*"), which entails the enjoyment or use of another party's property and the right to benefit from the fruits thereof without altering its substance.

- (3) Use and habitation (“*uso y habitación*”), which means the right to use or gratuitously enjoy the fruits of another person’s property for one’s basic needs and the right, free of charge, to dwell in a house or real property.
- (4) Easement (“*servidumbre*”), which basically means a right of way (if it allows the owner of the dominant estate to benefit from use of the servient estate) or covenant (if it requires the owner of the servient estate to take or not to take some specific action), etc.
- (5) Mortgage (“*derecho de hipoteca*”), which is deemed to be a right *in rem* over the thing in question.
- (6) Pledge (“*derecho de prenda*”), whereby personal property is given to secure an obligation.
- (7) Antichresis (“*anticresis*”), whereby the debtor transfers to the creditor its rights to the fruits of real property. This right may only be granted by the owner of real property or by a party who is entitled to the fruits of such property.

1.2. Real Property or Real Estate

A public announcement, through registration with a real estate registry, is required to fulfil the legal requirement to serve notice of acquisitions or transfers of real property. The acquisition will be completed upon registration with the Public Register of Property (“Registro de la Propiedad”) that is competent within the jurisdiction where the property is located. Mortgages, must also be registered with the Public Register of Property vested with jurisdiction in the district where the property is located in order to be valid, otherwise they may not be invoked *vis-a-vis* third parties.

1.3. Fixtures (Technical Installations and Attached Machinery)

When affixed to a piece of real estate this type of property will be treated in the same way as real property under the Civil Code. At the time it is separated from the real estate it will be considered movable property, thus the security rights attached to the asset will be canceled and replaced by securities of a different kind (pledge, etc.) encumbering the property in order to secure debts.

The Civil Code establishes that movables are assets that can be transferred from one place to another, either self propelled or by an external means, with the exception of those that are accessory to real estate. With the exclusion of those movables that are subject to registration and those movable that are affixed or accessory to real estate, Section # 2412 of the Civil Code upholds the adage of “possession grants title” – it is established that the ownership of movable assets will be presumed to be vested in the good faith holder thereof and the power to prevent any action for recovery in the event that the thing has been stolen or lost, save for proof to the contrary.

Movable assets, in a broad sense, are generally used to secure loans, but practically always resort is made to movable assets that can be the subject of registration. The law also construes movable assets to consist in the solid or fluid parts of the ground, separate from the latter, such as earth, metals,

constructions temporarily built on the surface of the ground, treasures, coins or other objects placed underground, materials stored for the construction of buildings before they are used, materials proceeding from the demolition of a building, public or private instruments evidencing the purchase or acquisition of personal rights and public instruments evidencing rights *in rem* consisting in mortgages and antichresis.

1.4. Motor Vehicles, Aircraft, Ships and Other Movable Assets Subject to Registration

These are movable assets subject to registration, therefor their ownership or transfer must be recorded in the pertinent Public Register. Pledges on these kinds of assets must also be registered with the Public Register of Pledge-Backed Credits ("*Registro Nacional de Créditos Prendarios*"), therefore, pledges must be set up in writing and will be effective *vis-a-vis* third parties as of the date of registration.

(a) Motor Vehicles

They are no longer subject to the system set by Section 2,412 of the Civil Code as established by Decree Law # 6582/58 and its amendments. According to Section 1 of this Decree Law, the conveyance of ownership of automobiles must be formalized by public or private instrument and shall only produce effects between the parties and third parties as from the date of registration thereof with the Register of Automobile Ownership ("*Registro de la Propiedad Automotor*"); this registration is not merely informative, it is a record of ownership. Section 2 of the said Decree Law states that "registration in good faith of an automotive vehicle with the Register grants the owner possession of the vehicle and the power to impugn any action for recovery if the car has not been stolen." It is hence evident that insofar as concerns automotive vehicles the law has replaced the principle of "possession grants title" by this second, namely, "registration grants title".

(b) Aircraft

Ownership of aircraft is governed by Sections 45, 49 and 50 of the Aeronautics Code, incorporated into the Commercial Code ("Com. Code"). Duly authenticated public or private title is required to convey their ownership and further, to challenge their transfer to third parties, they must be registered with the National Register of Aircraft.

(c) Ships and Vessels

They are subject to the system set by Law No. 20,094, incorporated to the Com. Code. Ships may be registered. The conveyance of ownership of ships with a tonnage of ten tons or more in the aggregate must be formalized by means of public or private authenticated instrument, "under penalty of becoming null and void" and such conveyance shall only be effective against third parties as from the date of their registration with the National Register of Vessels and Ships (Section 158 law 20,094).

(d) Other Movable Assets

(i) Livestock and pure bred animals: With the exception of pure bred race horses, they are subject to the system set up by Law 22,939 which discriminates amongst three types:

- (1) Animals without any brand or mark – or with a blurred or unclear brand or mark, are subject to the system set up by Section 2,412 of the Civil Code.
- (2) Branded or marked animals: it shall be deemed, save for proof to the contrary, that they belong to the person who has registered the design of the brand or the mark branded on the animal in his name. It is also presumed – *iuris tantum* – that the unbranded calves belong to the owner of the mother if they are at the foot of the latter.
- (3) Pure bred animals (except pure bred race horses): are not branded or marked, therefore conveyance of their ownership must be registered and such ownership is evidenced with the respective registration certificate in recognized genealogical and selective registers. These genealogical registers have been traditionally carried for: cattle, sheep, swine and asses by the Sociedad Rural Argentina; and for pure bred carriage horses by the Jockey Club.

(ii) Pure bred race horses: Law 22,939 expressly excludes from its provisions those pure bred race horses subject to Law 20,378, and stipulates that the conveyance of ownership of these animals “shall only be perfected between the parties and invoked *vis-a-vis* third parties by means of the registration of the respective acts of conveyance in the genealogical registers at the Jockey Club, since it is an incorporated record of entry.

2. Intangible Assets

2.1. An Overall View of the Trademarks and Patents Regulations Current in Argentina

Trademark Law No. 22,362 and Decree No. 558/81 provide that ownership of a trademark grants the right to its exclusive use. Registration with the Registry of Trademarks is required because registration, and not use, confer proprietary rights. Trademark registration lasts for renewable ten-year terms and is based on the international classifications of trademarks. Use is also required to maintain the validity of the trademark since any third party is entitled to claim its caducity when it has not been used within the five-year term preceding such claim.

Patents grant their owners the right to exclusive use of new industrial products, new methods and new applications of known methods. Patents are granted for twenty-year terms under Patent Law No. 24,481. When a patent is applied for in Argentina, after applications have been filed in other countries, and always provided a year has passed since the first filing, the applicant may enforce the priority date of said application (by submitting the pertinent supporting documentation).