International Secured Transactions Law

Facilitation of Credit and International Conventions and Instruments

N. Orkun Akseli

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Preface

This book grew out of a doctoral thesis I wrote at the University of Manchester. Harmonisation of secured transactions law is critical both on a global basis and domestically. Small businesses are in need of liquidity to expand their businesses. International instruments that aim to harmonise secured transactions are the focus of this book. The book does not intend to employ an article-by-article analysis of international instruments nor does it for English and American laws. It simply provides an overview in which the international instruments, their *travaux preparatoires*, English Law and UCC Article 9 are used as a vehicle to illustrate and distil the unifying principles in creating a harmonisation process in secured transactions law and some of the problems that may be experienced, and some of the conclusions that might be drawn. One of the more feasible methods in achieving this is to use, generally, English and American laws to illustrate problems in secured transactions. The book also does not cover all secured transactions instruments, but deals only with the most influential ones. It is hoped that the resulting distillation of underlying principles may provide a conceptual, and maybe analytical, framework to further the debate on the utility and efficacy of international secured transactions instruments. It is hoped the monograph will be useful to academics, students, law reform agencies and, maybe, practitioners.

At various stages of both my doctoral research and the writing of this book, and in various other forms, I have engaged in many thoughtful discussions with a number of colleagues. My foremost debt is to Gerard McCormack and Andrew Bell, my PhD supervisors, who provided invaluable inspiration and guidance. Spiros Bazinas, Frederique Dahan, Franco Ferrari, Harry Sigman, Richard Hyland and Loukas Mistelis also have provided insightful criticism and encouragement. I have no doubt that their help and suggestions have added substantially to whatever value there is to the arguments made here. While the credit is given to people who have helped me, all that may be found to be unwise in this book remains my responsibility and mine alone. I also would like to thank my Editor, Ms. Katie Carpenter, and my Assistant Editor, Ms. Khanam Virjee, for their wholehearted dedication and for being extremely patient during the publication process regarding my requests of extension of deadlines, and for administering a very smooth publication process. I would like to extend my gratitude to my colleagues and the Newcastle University

Law School for granting me a semester of research leave that enabled me to finalise the monograph.

Finally, I would like to thank my parents Erbil and Sevil, and my brother Ilgaz, without whose support and encouragement during the whole process the project would not have been finalised. Especially, I would like to doubly thank my mother and former boss, Sevil, from whose experience as a lawyer spanning four decades and from whose guidance, I have learned a lot as a lawyer and as a colleague. Certainly my wife, Nicola, and my wonderful daughter, Ela Taylor, deserve my deepest gratitude for their immense patience and assistance in this long and winding road. I love all of them more than they think. I promised to play hop-scotch with my two-and-a-half-year-old daughter once the book is finished. I think I am now free to do that.

N. Orkun Akseli
Newcastle-upon-Tyne, 10 July 2010

Foreword

With his present book, Dr. Nazmi Orkun Akseli achieves a maturity rare for his age and makes another significant contribution to a better understanding of international instruments dealing with secured transactions law, which is a necessary condition for their implementation. His citation in the Introduction from the *Institutes of Justinian* shows clearly that he understands very well the key to secured transactions law, which many, lost in the tensions between debtor and creditor interests, often miss; that is, that security is good for both the debtor (to borrow more and at better terms) and the creditor (to obtain repayment in a more time- and cost-efficient way).

His choice of instruments is a very wise one. The Unidroit Convention on International Factoring (Ottawa, 1988) may not have been widely adopted, but it paved the way for another bold step in the field of receivables financing law, the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).

The latter Convention may not have been widely adopted yet either, but I agree with Dr. Akseli that it will soon become a success (for those that measure success of a convention by the number of ratifications or accessions) and that it is already having an impact to the extent that it influenced national law in several countries and set the standards for national secured transactions law in line with the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (2007).

Having already influenced secured transactions laws around the world, the Guide is becoming the general standard and a common point of reference for law reform in the field of secured transactions law. To mention just some examples, the new Personal Property Security Act of Australia, similar draft legislation in the Republic of Korea, the Draft Common Frame of Reference, volume 6 book IX, proprietary security in moveable assets and the recent publication of the World Bank Group, Secured Transactions Systems and Collateral Registries, bear witness to the increasing influence of the Guide.

The EBRD Model Law on Secured Transactions (1994) has already been implemented in a number of countries in Eastern Europe, and the Core Principles for a Secured Transactions Law (1997) has also guided legal reform in several countries. And last but certainly not least, the Convention on International

Interests in Mobile Equipment (Cape Town, 2001) is a remarkable success already by any standard. Of particular importance is the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001), which has given the world its first asset-based international registry that is based on notice (rather than document) filing and results in the perfection (rather than in the creation) of an interest.

The discussion in the book is very practical, analytical and thorough. To take an example, Dr. Akseli's criticism of the view that is trying to discount all these international instruments on the grounds that they have been unduly influenced by Article 9 of the Uniform Commercial Code, is very justified.

The first and most important question that one should raise with regard to a legislative text is whether it addresses the concrete practical problems it is supposed to address in an effective and balanced way. In the case of a trade law text, this essentially means whether the text facilitates national and international trade while taking into account the interests of all stakeholders in a balanced way without, of course, violating the integrity of the national legal system.

The functional approach to secured transactions is one of the key characteristics of Article 9 UCC (which is itself the result of an enormous comparative law and harmonisation effort, and constitutes a departure from common law), but all these texts adopt it because there is no other way to rationalise secured transactions laws at the national level and harmonise secured transactions laws at the international level. Notice filing for perfection purposes may also come from Article 9 UCC, but again no other way has been suggested so far for an efficient registry system that can provide an objective way for ordering priorities of security interests, including interests serving security purposes (for example, retention-of-title or financial lease interests).

Equally justified is Dr. Akseli's criticism of the view that these international instruments may somehow threaten the integrity of national legal systems, propagate a virus or constitute unsuitable legal transplants. Conventions are the best instrument for the cross-border recognition of security interests, a result that in itself may promote the extension of credit against assets that are likely to cross national borders. In addition, the principles developed by the EBRD and the Guide developed by UNCITRAL provide legislators with sufficient flexibility to address secured transactions law issues in a focused way, taking into account the needs and the legal tradition of every country.

To mention another example demonstrating the thorough analysis of issues in this book, Dr. Akseli is absolutely right that good old asset-based lending did not cause the financial crisis; the violation of its fundamental principles caused it and, of course, the lack of proper control by the supervisory authorities. It is time to return to the principles of asset-based lending to provide markets with the necessary liquidity to grow their way out of this unprecedented financial (and not only) crisis.

Another example of the analytical nature of the book is the structure of the materials. After the first introductory chapters, the book discusses scope and party autonomy, creation, third-party effectiveness and priority of a security interest,

acquisition financing and applicable law, following the order in which a legislator would have to address these matters in the law. The fact that the book does not discuss security interests in securities and intellectual property or enforcement and insolvency law issues does not reduce its value and is understandable. Securities and intellectual property raise a whole set of different issues that would justify the writing of a second book. The same applies to enforcement and insolvency law issues, a discussion of which would justify the writing of a third book.

On a personal note, for the benefit of those who may find it strange that a Greek lawyer writes the foreword of a book of a Turkish lawyer, I would like to mention that, in my view, the cup of the historical relations between our two peoples is more than half full; and the interests that bring us together today are stronger than those that may set us apart. This is why the legacy of our two great leaders, Venizelos and Atatürk, is one of peace and friendship. In line with this tradition and in view of the merits of this book, it is an honour and a pleasure for me to write the prologue and wish that the book may have a great journey.

Spiros V. Bazinas*

* Senior Legal Officer, International Trade Law Division, Office of Legal Affairs, United Nations. The International Trade Law Division of the United Nations Office of Legal Affairs serves as the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The views expressed are the personal views of the author and do not reflect the views of the United Nations or UNCITRAL.

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I would also like to thank Professor Roderick A. Macdonald (McGill University) and acknowledge his permission to cite his paper, 'A Model Law on Secured Transactions: A Representation of Structure? An object of imitation? A type or Design?' presented at The UNCITRAL Third Colloquium on Secured Transactions (1–3 March 2010, Vienna) in the Introduction to this book.

Table of cases

Table of Conventions, Instruments and Statutes