

THE ENGLISH LAW OF SECURED TRANSACTIONS: THE WAY FORWARD?

Professor Louise Gullifer,
University of Oxford

WHAT DO WE WANT FROM A MODERN SECURED TRANSACTIONS LAW?

- To facilitate lending to businesses
- To simplify and increase the transparency of the system
- To enable the creation of security in a way that everyone recognises and that has consequences that are intended

WHAT QUALITIES SHOULD AN IDEAL SECURED TRANSACTIONS LAW HAVE?

- Clear, certain and accessible
- A creditor should be able to obtain security over any asset, including future assets, as cheaply as possible
- Transparency
- Clear priority rules which can be bargained round
- Effective enforcement whether borrower solvent or insolvent
- Default rules which can be contracted around, but default position should be the one most likely to be required in general, to reduce costs

WHY REFORM ENGLISH LAW?

- English law has several benefits, but needs to be best in class
- Should take advantage of innovative technology
- The current law is complex and hard to source
- Ease of doing cross-border and international business
- Technical problems still unresolved

SECURED TRANSACTIONS LAW REFORM PROJECT APPROACH TO REFORM

- Core of a modern law
 - A simplified and codified law of secured transactions.
 - Single concept of a (consensual) security interest.
 - A regime which enables security to be taken over any asset, present and future.
 - A regime of secured transactions covering security interests granted by all business debtors (corporate or non-corporate)
 - A fully electronic system of registration, in which registration takes effect without human intervention
 - A set of clear priority rules based on rational distinctions, including a rule that priority between registered interests is by date of registration.
 - Effective enforcement mechanisms

AREAS FOR DEBATE

- Details of registration system
- Interaction with insolvency law (fixed/floating charges)
- Inclusion in regime of
 - Outright assignments of receivables
 - Finance leases/ HP agreements
 - Retention of title sales
- Whether security interests created by consumers should be included in the same regime as those created for business purposes.
- Financing of particular assets eg financial collateral

REGISTRATION

- Document filing or notice filing?
 - Notice filing:
 - very brief particulars, searcher to make enquiries of registered creditor
 - only one filing for series of transactions
 - Document filing:
 - upload security agreement
 - confidentiality issues?
- Filing in advance
 - Do we need it?
 - Priority notice system if adopt document filing system

OUTRIGHT ASSIGNMENT OF RECEIVABLES

- No recharacterisation
- Options:
 - Registration a priority point: no invalidity on insolvency for non-registration
 - Registration a priority point + perfection: unregistered assignment void on insolvency
- What to register?
 - Particulars (notice)?
 - Document: confidentiality issues

ASSET FINANCE

- Options:
 - Registration a priority point :
 - no recharacterisation
 - no invalidity on insolvency for unregistered interests
 - Registration a priority point + perfection :
 - no recharacterisation
 - invalidity on insolvency for unregistered interests
 - Registration a priority point + recharacterisation
 - recharacterisation as a security interest
 - no invalidity on insolvency for unregistered interests
 - Registration a priority point + perfection + recharacterisation
 - recharacterisation as a security interest
 - invalidity on insolvency for unregistered interests

FIXED/FLOATING CHARGES

- **Insolvency neutral.**
- **Uncertainty which potentially increases costs**
 - Uncertainty as to what amounts to operational control
 - Affects all transactions *ex ante*.
- **Replacements for ‘fixed/floating charge’ divide: US model.**
 - Priority ranking for all security interests
 - But complex range of checks and balances on secured creditor dominance not easily replicated
- **Replacements for ‘fixed/floating charge’ divide: PPSA model.**
 - Australia: ‘circulating assets’
 - New Zealand: security interests over particular types of assets.
- **Policy options**
 - **outright sales.** Include all security interests (over certain types of assets) but exclude outright sales.
 - **Security interest over all assets of the borrower.**
 - **In relation to either, should secured creditor be able to opt out of top-slicing by taking control.**
 - **Keep the fixed/floating distinction?**

TO DO LIST

- Interaction between registers
- Tacking
- Interaction with rules on land
- Private international law (jurisdictional reach and choice of law)
- Retention of title clauses (over inventory)/supply chain financing
- More work on priority notices

YOUR FEEDBACK

- We really value your feedback!
- General policy paper at <https://securedtransactionslawreformproject.org/draft-policy-paper/>
- Detailed discussion papers at <https://securedtransactionslawreformproject.org/discussion-papers/>
- **Please get in touch:**
- louise.gullifer@hmc.ox.ac.uk
- securedtransactionsproject@gmail.com

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