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978-1-107-02744-2 - Availability of Credit and Secured Transactions in a Time of Crisis

Edited by N. Orkun Akseli

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## 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.

N. ORKUN AKSELI is Senior Lecturer in Commercial Law at Durham University Law School, where he teaches Company Law, Commercial Law, International Banking Law and International Commercial Dispute Resolution.

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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

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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*

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