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.
AVAILABILITY OF CREDIT AND SECURED TRANSACTIONS IN A TIME OF CRISIS

Edited by

N. ORKUN AKSELI
This collection is dedicated to my parents and family
CONTENTS

Contributors page ix
Foreword by ROY GOODE xi
Acknowledgements xiii

Introduction 1
N. ORKUN AKSELI

PART I  Availability of credit 9
1 Money, bank debt and business cycles: between economic
development and financial crises 11
DAVID BHOLAT
2 Secured transactions law reform, UNCITRAL and the export of
foreign legal models 33
GERARD MCCORMACK
3 Commentary on the availability of credit 61
JOANNA GRAY

PART II  Involvement of international financial
institutions in secured transactions law reform 65
4 International organizations as global lawmakers: seven shifts in
practice for secured transactions law and beyond 67
TERENCE C. HALLIDAY
5 The creation of international commercial law standards by
international financial institutions: why they do it and whether
they should 91
SPYRIDON V. BAZINAS
The power of secured transactions law and the challenge of its reform 101

Frederique Dahan

Commentary on the involvement of international financial institutions in secured transactions law reform 123

Loukas Mistelis

Part III The availability of credit and the utility and efficacy of UNCITRAL’s legislative efforts 131

The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions 133

Spyridon V. Bazinas

The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit 185

N. Orkun Akseli

Commentary on the availability of credit and the utility and efficacy of UNCITRAL’s legislative efforts in secured transactions 217

Henry Deeb Gabriel

Part IV Availability of credit and secured transactions law reform 225

How may international standards assist law reform in England? 227

Anjanette H. Raymond

Commentary on the international standards and the reform of English personal property securities law 263

Noel McGrath

The UNCITRAL Legislative Guide on Secured Transactions as a model for law reform: some conclusions 275

Hugh Beale

Index 293
CONTRIBUTORS

N. ORKUN AKSELI is Senior Lecturer in Commercial Law at Durham University Law School, UK.

SPYRIDON V. BAZINAS is Senior Legal Officer and the Secretary of Working Group VI (Security Interests) at the International Trade Law Division of the Office of Legal Affairs, UNCITRAL Secretariat, Vienna, Austria.

HUGH BEALE QC is Professor of Law at the University of Warwick and Visiting Professor at the University of Amsterdam and the University of Oxford.

DAVID BHOLAT is Visiting Scholar at Newcastle University, UK.

FREDERIQUE DAHAN is Lead Counsel and Head of the Financial Law Unit in the Legal Transition Team of the European Bank for Reconstruction and Development (EBRD).

HENRY DEEB GABRIEL is Professor of Law at Elon University Law School, North Carolina and an elected member of the Governing Council of the International Institute for the Unification of Private Law (Unidroit).

ROY GOODE QC is Emeritus Professor of Law and Fellow of St John’s College, Oxford University and the Director of the Secured Transactions Law Reform Project.

JOANNA GRAY is Professor of Financial Regulation at Newcastle University Law School, UK.
X

LIST OF CONTRIBUTORS

Terence C. Halliday is Co-Director, Center on Law and Globalization, American Bar Foundation and University of Illinois College of Law; Research Professor, American Bar Foundation; Adjunct Professor of Sociology, Northwestern University; Adjunct Professor, School of Regulation, Justice and Diplomacy, Australian National University.

Gerard McCormack is Professor of International Business Law at the University of Leeds, UK.

Noel McGrath is Lecturer at the University College Dublin School of Law.

Loukas Mistelis is Clive M. Schmitthoff Professor of Transnational Commercial Law and Arbitration at Queen Mary University of London Centre for Commercial Law Studies.

Anjanette H. Raymond is Assistant Professor of Business Law and Ethics at the Kelley School of Business at the University of Indiana in Bloomington.
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.