

"HAVE I GOT A LAW FOR YOU..."

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Globalisation of Commercial Law -- Secured Transactions

A primary objective of a national secured transactions regime is to promote the availability of low-cost credit in order to facilitate the successful operation and expansion of domestic business enterprises and improve their ability to compete in the global marketplace.

To this end, a legal regime must be designed in a manner that is effective, efficient and responsive to the needs of borrowers and lenders (both local and international). It must also take account of legitimate expressions of state social and economic policy so as to achieve overall coherence in legal regulation.

The policy objectives pursued in modernizing secured transactions regimes can only be fully achieved if the legislation actually takes root. Ensuring that it does raises issues of implementation.

There are three main types of implementation issue: first, what might be called State or system specific considerations of method and technique; second, what might be called acculturation issues: and third, what might be called transitional issues.

The key State-specific implementation considerations are these: whatever the regime in question, it must be harmonized with the general structure of social, economic, political and legal relations that exists in the country so that the new legislation can quickly take root; and whatever the regime in question, it must be sufficiently transparent, understandable and harmonized with secured lending regimes in other States so that commerce among them may be promoted.

The key acculturation objectives are these: whatever the regime in question, once enacted it must be buttressed by a panoply of educational and other activities for both jurists and judges meant to familiarize them with the principles and possibilities of the new legislation.

The key transitional principles are these: whatever the regime in question, it must be phased in such a manner that acquired creditors' rights are protected, but that the new

regime is immediately applicable to all new transactions, as well as to all enforcement proceedings that have not yet been commenced. I do not address these issues here.

Ten Lessons of Law Reform -- Implementation

To make fully operational any legislation that results from their adoption, it is necessary to attend to the contexts within which this legislation is meant to operate. These contexts include many factors besides the general structure of the legal regime. States have quite distinct socio-economic-political system. In addition, the types and actual role of credit institutions and the contractual practices attending to commercial law generally vary considerably among States. For this reason, it is important to be clear about the various features and conditions that are presupposed by existing regimes of secured lending so that the policy goals sought to be achieved through these principles can be realized in practice.

The central lessons learned from previous attempts at modernization and transplantation of commercial law regimes may be summarized in ten main themes, grouped under considerations of economics, social practices, legal structures and political decision-making.

1. Economic Issues

First Lesson: Attending to economic context and the role of credit institutions

A secured transactions regime is not a free-standing field of legal regulation that exists outside economic practices. As a sub-set of debtor-creditor law, it must be adapted to general practices of credit -granting in the jurisdiction.

2. Legal Issues

Second Lesson: Attending to legal architecture

A second consideration has more to do with legal rather than socio-economic structure. A secured transactions regime must adapt its core principles to the legal architecture of the country in question. Not every legal system deals with specific issues in the same place.

Third Lesson: Attending to principles of property and obligations

More than this, and thirdly, a secured transactions regime must respect the fundamental concepts of private law within a jurisdictions: this is especially true of basic principles of

obligations and property. For example, it is not possible to implant the conceptual structure of Article 9 of the UCC into a civil law country without a radical readjustment to other legal policies.

Fourth Lesson: Attending to the law of civil procedure in action

However well drafted, and however elegant the phraseology and conceptual apparatus, a secured transactions regime must take into account the manner in which the legal infrastructure of civil procedure actually works. For example, if it can take three to four years to obtain a civil judgement, and after that another year to obtain enforcement, without the possibility of obtaining interim and interlocutory orders, the regime cannot be based on premises that assume fast and efficient public enforcement mechanisms.

Fifth Lesson: Attending to regimes of corporate liquidations and insolvency

In addition to the regular law of civil procedure relating to the enforcement of judgements, a regime of secured transactions normally is closely connected to two other legislative regimes that apply to facilitate the collective regulation of debtor and creditor relationships. The most obvious of these regimes are those governing bankruptcy and insolvency and corporate reorganizations.

3. Social Issues

Sixth Lesson: Attending to on the ground practices

Ideas that can be successful in certain types of legal system, with certain assumptions about how debtors and creditors actually deal with legal principles, can run afoul of actual practices in other legal systems. If there is a popular belief that it is appropriate to invent proof and assertions of facts, after an event has occurred, relying on possession as mode of “publicity” for secured rights is perilous.

Seventh Lesson: Attending to institutional and professional structure

A secured transactions regime must take into account practices of courts and related public institutions such as the sheriff's office or state execution service. If the idea of an independent judiciary with substantive expertise does not form part of the constitutional order, the enforcement regime has to be designed to accommodate other modes of enforcement and dispute settlement such as independent arbitrations.

Eighth Lesson: Attending to the diffusion of legal knowledge

A secured transactions regime must be sensitive to the character of the legal profession,

the state of capital markets, the nature of entrepreneurship, and the general diffusion of legal knowledge within the State. For example, in some countries there are simply not enough lawyers to provide advice to clients who wish to borrow, and therefore the regime has to be designed so it can be operated by those without a formal legal training.

4. Political Issues

Ninth Lesson: Attending to political culture

The most important lesson is that a secured transactions regime must respect the political culture of the country in question. For example, the widespread use of *private* social insurance programmes in North America, means that a secured transactions regime can be designed to favour lenders to the exclusion of the state (or its agencies), but in many countries, it is only by maintaining an entitlement in bankruptcy that these programmes can avoid insolvency themselves.

5. Pragmatic Issues

Tenth Lesson: The perfect is the enemy of the good

These nine "lessons" are meant to emphasize the relativity of all secured transactions reform. North American jurists who may wish to incorporate into the law of another jurisdiction certain relatively refined principles with which they have become familiar, must remember how domestic law influences legal regimes. It is not possible to produce over-refined legal regimes until there is broad consensus about and acceptance of basic operative principles of a modernized secured transactions regime. Establishing a workable Chevrolet model of secured transactions is better than seeking to legislate a Cadillac that will not take root.

Five Lessons of Law Reform -- Acculturation

While acculturation issues are not really implementation issues in the strict sense, they are essential to the success of any law reform project. Law reform always has to be sold. It has to be sold to politicians and to the principal lobby groups that can influence politicians. It has to be sold to the government in power to make it a legislative priority, and to invest the resources to build the legal infrastructure that the regime requires.

But the exercise of salesmanship does not end at the moment legislation is enacted. To say that a law reform endeavour is successful is to make a claim about its effectivity as a regulatory endeavour. Success implies that: (1) the regime is deployed in practice -- that is, that it actually manages to capture the imagination of lawyers and entrepreneurs

as an efficient and effective means of structuring their affairs; and (2) it is properly understood and interpreted by all those who are called upon to put it into action.

Producing the necessary acculturation does not result from happenstance. It requires a concerted effort in five dimensions. These are briefly noted here.

1. Continuing Legal Education

As soon as a new law comes into force, both lawyers and their clients, as well as public officials such as sheriffs, bailiffs, registrars and judges are required to interpret and apply its terms. Apart from those few jurists who worked on the reform, or who are members of large law firms that are able to invest resources in learning about the new law, most of the above will have limited prior knowledge of the law. This means that Bar Associations and Associations of judges will have to produce materials, run seminars and conferences and provide different forms of basic consultative services in order to re-educate the profession to the requirements of the new law.

2. Doctrinal Commentaries

It is customary in many countries for law reform endeavours to be accompanied by official commentaries prepared by the sponsoring ministry that are meant to help lawyers and judges to understand the rationale and the logic of particular provisions of the law. But new legislation is almost always best understood when there appear doctrinal commentaries that attempt to explain the law, to relate it to previous regimes, and to suggest where existing rules have been explicitly or implicitly overruled.

3. Forms, Precedents and Documents

Most of the transactions that will be developed under a revised secured transactions regime will be variations on standard form documents. Producing contract forms and precedents relating to the granting of security, subordinations, collateral guarantees, waivers, enforcement notices, sale notices, collocation orders and so on, is a key step in ensuring that the logic of the new law quickly percolates through the legal profession.

4. Information Clearing House

Many countries have underdeveloped resources for reporting and commenting on judicial decisions. Successful acculturation demands investment in informational clearing houses, preferably on-line, in order to ensure that the informational base in relation to the reformed legislation is up-to-date, sophisticated and broadly accessible.

5. Legal Education in Law Faculties

At the time of commercial law reform most law faculties quickly develop courses and

teaching materials dealing with the new regime. Soon, law firms came to rely on their younger recruits to structure and paper transactions under the reformed law. Ensuring that the teaching of secured transactions law is attuned to the logic of the new law and to the needs of practice is essential to ensuring the viability of the reform.