

Taking effective security in European jurisdictions

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1 Introduction

This briefing paper is an introduction to some of the complexities which may arise for a lender undertaking secured lending in different European jurisdictions.

Lenders and their advisers taking such security must manoeuvre through a maze of local laws governing the taking and priority of security as well as the very different remedies and procedures available on enforcement of the security.

Unlike, for example, Article 9 of the US Uniform Commercial Code (“UCC”), European jurisdictions do not have unified security interest procedures for most categories of tangible and intangible assets, although the EU is taking some tentative steps towards harmonisation. Also, in contrast to Article 9, there is no comprehensive registration procedure to provide public notice of security interests. In some European jurisdictions certain transactions that in economic terms can be regarded as creating security interests are not subject to any public registration or filing requirements to alert other potential creditors (or the general public) to the existence of such “quasi-security” interests.

This paper provides a summary of the security position in a number of European jurisdictions with particular reference to the following:

- General Business Charges
- Receivables
- Intellectual Property
- Inventory

There is no easy way to categorise the European jurisdictions that are hospitable to secured lending, but the observations in this paper will highlight some of the issues to be considered. For the sake of brevity, this paper is restricted to the major western European jurisdictions. The emphasis is on asset-based lending rather than, for example securitisation or project finance.

2 General business charges

A general business charge is a form of charge which constitutes security over all the present and future assets of a corporate debtor, including its inventory (stock of finished goods, work in progress and raw materials) and receivables (including book debts).

The major western European jurisdictions can be divided into the following five “groups” depending upon the extent to which they allow such general business charges:

- jurisdictions allowing a universal registered floating charge (e.g. England);
- jurisdictions that allow a more limited registered floating charge (e.g. Sweden);
- jurisdictions that allow unregistered fiduciary transfers/ownership by way of security (e.g. Germany);
- jurisdictions that allow a registered business charge over specified assets only (e.g. France); and
- jurisdictions that do not permit any general business charges whatsoever (e.g. Portugal).

The English floating charge

First in terms of coverage is the **English** floating charge. This is a universal corporate security which can cover all kinds of property including goods and receivables. The main characteristics of the floating charge are:

- It can cover future property so there is no need to identify and have a new/supplemental security interest for each asset when it comes into existence.
- It floats so that the debtor can deal with the property in the ordinary course of business until the charge crystallises on a default.
- It requires registration so that information as to companies that have charged their assets in this way is available publicly.
- Enforcement options include the appointment of an



“administrator” who may continue to operate the business with a view to disposal as a going concern, potentially avoiding the likely loss of value on a piecemeal disposal of assets.

Other jurisdictions allowing floating charges

In **Finland, Norway and Sweden** local legislation allows for other versions of the floating charge. The main differences with the English floating charge are as follows:

- The “floating charge” is not enforceable in any of these jurisdictions by the appointment of an “administrator” or other type of possessory management and so the only option for enforcement is by sale of the individual assets by the lender.
- These Scandinavian versions of the floating charge can be created by all commercial enterprises, in contrast to England, where it is impracticable for certain non-corporate businesses to do so.

In **Sweden**, the floating charge gives priority in 55% of the available assets crystallised through insolvency/bankruptcy. However, the “available assets” usually only consist of cash, receivables and inventory, as the commonly used lien on real property has first priority. Swedish floating charges must be registered and are ranked in priority depending upon the time of registration.

In **Norway**, a general charge of all of a business’s assets is prohibited. However, a Norwegian business may create floating charges over certain statutorily defined classes of assets, the most important being receivables, inventory and operating assets (including intellectual property rights, but excluding copyright other than acquired copyright). Norwegian floating charges must be registered at a public registry.

Germany and the Netherlands

In **Germany, Austria** and the **Netherlands** the concept of a floating charge over a group of assets is not recognised and security interests can only be created on an asset by asset basis.¹

However, techniques have been developed by the courts and legal practice allowing for a general description of certain collateral in the security documentation as well as creating standard procedures. As a result it is possible in practice to take security in a way that approaches the floating charge, although it does not achieve the all-embracing grasp of the English version.

The main differences when compared to the English floating charge are as follows:

- A greater degree of identification of assets forming the security is required in these countries. However, the extent to which the assets should be identified varies considerably from jurisdiction to jurisdiction. For example, in Germany, it is not generally possible to take security over “all future property” or “all future receivables” without a more detailed description of the secured assets. Instead, security can be taken in the form of (i) “all debts payable by [specified] debtors” or (ii) “all goods in a [specified] warehouse” or (iii) “all debts payable by [specified] debtors under a [specified] contract” and likewise. Whereas, in the Netherlands, all present and future inventory and other property owned by the borrower can be pledged and there is no need to specify the location of the goods.²
- In Germany and Austria for ease of handling it is recommended that the debtor should separate the secured items from his other assets by, for example, separate storing or marking or registration in special books or lists as stipulated in the relevant loan agreement.
- There is no remedy of possessory management through an administrator (or receiver and manager).³
- No registration is required (except for real estate and certain other assets that are subject to their own security regimes: e.g. ships or aircraft). However, in the Netherlands a non possessory pledge (or, in relation to receivables, a silent pledge) requires registration with the local tax authority unless the pledge is contained in a notarial deed.

¹ In Germany this legal principle is enshrined in the German Civil Code (“Bürgerliches Gesetzbuch”), which deals with the issue of creating security over assets in §§ 854 – 1296 (“Sachenrecht” – law in rem).

² However, according to the Supreme Court of the Netherlands if the charged debts cannot be specifically identified in an administration of the debtor there is a risk that the lender will not have effective security over the debts.

³ However, within Insolvency Proceedings in Germany under the German Insolvency Act (“Insolvenzordnung”) the administrator has to observe all security rights in favour of the creditors and subject to proper taking of security, has to release securities to such creditors. The available assets are distributed observing the respective guidelines provided by German Insolvency law favouring creditors properly secured by the available legal instruments.



- The charge does not always rank after preferential creditors. For example, in the Netherlands the general rule is that a pledgee or mortgagee ranks before preferential creditors, because they are so-called “separatists”, meaning that they can enforce their rights as if there were no insolvency situation. However, there are some exceptions to that general principle (e.g. for certain tax claims the tax authority ranks before the pledgee with a security right over inventory) and in these particular situations the charge ranks after certain preferential creditors.

In **Austria** the courts take a more liberal approach to the pledge or assignment for security of future receivables but are more restrictive on security over inventory (as the secured assets must be stored away in a specific warehouse and be specifically marked).

In **Germany** it is important to be aware of the legal requirements when attempting to take security on all assets owned by a certain company or group of companies. There is, in particular, a potential risk of security interests being held invalid by the German courts under the Principle of Voidness of Immoral Actions if the court considers them to be excessive (i.e. the security exceeds 120% of the credit value) or to violate the principles of good business morals. The abundant case law does not provide clear guidance to the lawyer and creditors trying to stay within the limits of permissible collateralisation.

Countries with restricted business charges

In **Belgium, Denmark, France, Italy, Luxembourg** and **Spain** the law permits commercial enterprises to create restricted business charges over certain assets (typically loose machinery and equipment), but sometimes extending to goodwill and intellectual property. Although there is much variation within this group (see the analysis of individual countries below) the main characteristics are:

- Charges must be registered failing which they are ineffective against other creditors.
- Receivables cannot usually be charged without notice to the debtor in respect of the receivables.
- In this group there is an insistence on identification of assets and thus the general business security does not usually extend to shifting assets such as raw materials, inventory and future assets.
- In some countries within this group the security is only available in favour of specified creditors, such as local credit institutions, thereby inhibiting security in favour of foreign institutions.

The **Belgian** general business charge, the *fonds de commerce*, is limited in scope. The permissible

collateral under this charge is restricted to the following:

- the goodwill and name of the company;
- trademarks and patents;
- supply contracts;
- raw materials and equipment;
- 50% of the value of the goods in stock;
- shares, receivables and cash; and
- immovable property (even if it is subject to a prior charge).

In addition the chargor must not, by giving the charge, diminish its assets, which is often an unrealistic requirement in practice.

In **Denmark** at present it is prohibited for a company to create security over all current and future assets, but security can be given over the operating equipment and working plant owned by a company when this is secured along with the property on which the business is run. However, this is set to change. The Danish Parliament has recently passed an act (Act no. 560 of 24 June 2005) concerning the rules on general business charges. This act stipulates that companies can create security over all current and future assets comprising (amongst other things), receivables, inventory, cars, operating equipment, plant, goodwill, domain names and patent and trade mark rights. This is currently expected to come into force on 1 January 2006.

In **France**, the general business charge (as in Belgium called the *fonds de commerce*), allows a pledge to be taken over equipment, trade names, patents, trademarks, goodwill and lease rights. However, this general business charge specifically excludes inventory and receivables. This charge must be registered within 15 days with the Registrar of the Tribunal of Commerce and is valid for a period of 10 years from the date of registration. The creditor’s only right of enforcement of the *fonds de commerce* is sale pursuant to court order by public auction. The debtor is free to dispose of the individual assets unless the creditor can prove that the disposal has or will result in a material decrease in the value of the security.

In **Italy**, Article 46 of the Banking Law introduced the limited “enterprise charge”. This provides that medium and long term loans by banks to enterprises may be secured by the *privilegio* on moveable goods not registered in public registers. The *privilegio* may relate to:

- existing and future equipment;
- produced goods of the enterprise;



- inventory; and
- goods purchased with the loan and credits (including future credits) from the sale of the goods purchased with the loan.

The *privilegio* must be in a written deed which must describe exactly the goods and credits over which the *privilegio* has been established (generic descriptions of goods by class are insufficient), the creditor bank, the loan amount and (if less) the amount of the loan secured. The *privilegio* must be published by notice in the *Foglio Annunzi Legali*.

In **Luxembourg** there is a limited form of general business charge called the *gage sur fonds de commerce*.⁴ This type of charge may only be granted by a tradesman over his business in order to secure the sale thereof. The permitted scope encompasses all the assets which compose the business of the tradesman, including equipment, trade names, patents, trademarks, goodwill, lease rights and 50% of the value of the goods inventory. This is a non-possessory business charge and must be registered (which gives rise to an *ad valorem* tax of 0.05% of the amount of the secured debt). This form of charge may only be given to persons or entities authorised by the Luxembourg Government. A number of non-Luxembourg lenders have such authorisation.

In **Spain** it is possible to have “non-possessory” (i.e. the creditor does not have to be in physical possession) mortgages and pledges over certain assets. This is regulated by the Act on Chattel Mortgages and Pledges without Delivery of Possession of 1954 (“1954 Act”). The *mortgage* can only cover the following assets:

- commercial establishments or the place where the business is carried on. In this case the mortgage

will comprise, unless the contrary is specified, the commercial name, logo, distinctive trademarks and any other intellectual and industrial property rights, the machinery, assets, utensils and other production and labour instruments. Such assets must be the property of the holder of the establishment, their acquisition price must be fully paid up, and they must be used entirely and permanently to meet the entity’s industrial or commercial business needs or requirements;

- cars and other motor vehicles, trams and railway wagons;
- aircraft;
- industrial machinery; and
- intellectual and industrial property.

The *pledge* can only cover those assets specifically listed in the 1954 Act (and associated Regulations), namely: fruit, crops, animals and agricultural machinery, inventory, artistic and historic collections. It should be noted that those assets, listed above, which can be mortgaged, cannot be pledged.

Enforcement of both the pledge and mortgage is by court order and public auction although extra-judicial notarial proceedings are available if provided for in the mortgage or pledge.

Countries with no general business charge

In Portugal it is not possible to create a general business charge of any kind.

⁴ Under Luxembourg law it is also possible to have a general business charge over all present and future financial instruments and claims. However, further discussion is outside the scope of this paper.



3 Receivables

Notice to third party debtors

European jurisdictions may be divided into two main groups as regards security over receivables, depending upon whether notification to the customer's third party debtor is required:

- No requirement for notice to be given to third party debtors - in **England** and **Germany** effective security over receivables is obtained as soon as the security is created, even if notice is not served on the third party debtor.⁵ For example, in Germany an assignment (*Abtretung*, § 398 BGB) in no specific form (in writing, orally etc.) is sufficient to create the security.
- Notice to third party debtors essential - in **Austria, Italy, Luxembourg, Portugal, Belgium** and the **Scandinavian** countries security over receivables must, if it is to be valid on the pledgor's bankruptcy against his attaching creditors, be notified to the third party debtor in the prescribed form. This formal notification process is impractical in the case of bulk charges and is generally inconvenient. It means that the document of assignment must identify each receivable, instead of a generic description, and it also usually rules out assignments of future debts (see below).

In **France**, the position falls somewhere in between these two groups. The Dailly Act of 1981 allows security over receivables without notice to third party debtors if a list specifying the receivables (*bordereau*) is delivered to the lender. However, there is an important restriction on this principle: the lender must be a licensed banking institution in France and, for example, a US bank without such a licence is forbidden to take security in this way. Even a single one-off banking operation carried on in France by a non-licensed bank can be deemed an illegal exercise of banking activity which is a criminal offence. Otherwise, security over receivables in France can only be created where the security is notified to the third party debtor by a bailiff.

In **Norway** the position also falls between the two groups. Where the security is given over trade receivables (i.e. receivables from goods or services sold) there is no need to notify the third party debtor. For receivables *other* than trade receivables third party debtors must be notified.

Security over future receivables

The extent to which security can be created over future receivables varies considerably from country to country. In **England** it is perfectly possible to create security over future receivables generically by way of an assignment or by way of fixed or floating charge: all that is necessary to identify the asset is that it should be possible to tell whether the asset is charged and when that asset came into existence. However, in almost every other European country covered in this briefing paper it is more difficult to create security over future receivables.

In **Germany** and **Austria** future receivables can be secured so long as they are "determinable" (*bestimmbar*) i.e. as long as the assignment is defined so that at the time a receivable comes into existence it can be ascertained on the basis of the assignment agreement. Moreover, if there is a certain defining characteristic of the receivables, this "class" of receivables may be secured. For example, an assignment of "all future receivables" would be potentially ineffective whereas the assignment of "all debts payable by [specified] debtors" or "all debts payable under [specific] contract" would create effective security over future receivables from the specified debtors so long as the general legal principles are met.

In the **Netherlands** the only future receivables that can be secured are those which arise out of an existing relationship between the pledgor and its debtor, such as an existing legal contract, so that if it is desired to pledge other receivables the pledgor must actually pledge them each time by a fresh deed. The pledgor can provide the pledgee with a power of attorney to do this for him. The pledgee will then create a new (standard) document in which (the pledgee on behalf of) the pledgor pledges all receivables (present receivables and receivables arising out of existing relationships) to the pledgee and will fax this for registration to the tax authority. The cost of this registration is less than € 5.

In **Italy** a future receivable may be pledged provided it is identifiable and, if notified to the potential third party debtor, the pledge becomes effective as soon as the debt arises.

In **France** security over future receivables is generally not available. A supplemental security agreement will be required for each new contract giving rise to a receivable.⁶

⁵ However, in England, the ability of the chargor to use the proceeds freely will convert the charge into a floating charge with a less satisfactory priority and other disadvantages when compared with a fixed charge.

⁶ The question of whether it should be possible to take security over future receivables is currently under review by the French authorities.



In both **Belgium** and **Luxembourg** charges over future receivables are permitted.

In **Denmark** security over future receivables is not possible at present, however, as mentioned above, this will be possible once the new laws in relation to security come into force, which is expected to be on 1 January 2006.

Prohibitions on assignment

Unlike the position in, for example, the US, no European jurisdiction covered by this paper (other than Austria) has legal provisions that allow contractual prohibitions on assignment to be overridden in relation to receivables.⁷ Therefore, it is generally not possible in any such jurisdiction to take effective security over receivables if the debtor and creditor on the receivable have agreed that the creditor may not assign the benefit

of a receivable. In some jurisdictions, however, an anti-assignment provision will not be upheld unless the assignee had actual knowledge of the provision at the time of the assignment, whilst in others the assignment may be effective as against the assignor, if not against the debtor.

Thus, it is important that any creditor seeking to take security over receivables examines the contracts under which the receivables arise individually. If he does not do so he runs the risk that he has no valid security.

Austria has recently enacted legislation that limits the ability of parties to agree on prohibitions on assignment for business-related receivables and explicitly provides that an assignment of receivables is effective even if it violates a contractual prohibition on assignment. The new provision applies to receivables that have arisen after 1 June 2005.

4 Intellectual property

Intellectual property may represent a valuable collateral asset in any secured financing.

It is, however, not possible here even to begin to describe the different intellectual property rights in European jurisdictions, never mind set out how effective security can be taken over them. Instead, this part of the paper sets out certain facets of intellectual property that the lender must consider.

What is the collateral?

One problem for creditors revolves around their ability to identify and take effective security over items that sometimes have equivocal proprietary status at law. In most western European jurisdictions patents, trade marks and copyrights are recognised forms of property over which it is possible to create security interests by using the respective instruments provided by law.⁸ However, simply stating that a charge is to be fixed over, for example, “the computer software of the borrower” is not conclusive if the lender has not satisfied itself that the borrower has a copyright, patent or even a licence. In the jurisdictions that have the concept of the floating charge (discussed above) this will arguably capture “other” intellectual property rights that cannot be harnessed under a fixed charge. This may not, however, give the creditor what it wants, particularly since a floating charge ranks after preferential creditors.

The security may generally be given by the owner of the intellectual property right or alternatively by a licensee of the property right, in each case over their respective interests. It may generally also cover ancillary rights such as royalties payable.

Registration

Even if a creditor/bank is satisfied that a debtor has an intellectual property right that is valid in the requisite jurisdiction, some countries have registration requirements that must be met in order to create valid security. The registration mechanics differ between the various jurisdictions, assets and security, which can make the registration process significantly lengthier and costlier than was anticipated at the outset.

By way of example, in **Spain** the local Mortgage Registry is not prepared to register any instrument which is not in Spanish and in form and content consistent with Spanish law (a notarised public deed accompanied by a translation into Spanish is required, and with the notary’s status confirmed by apostille). Moreover, once the deed is filed with the Mortgage Registry, the Spanish mortgage registrar will check it to verify if its terms and conditions infringe in a “clear, direct and concrete”

⁷ In Germany, for example, this principle is enshrined in § 399 of the German Civil Code (“BGB”).

⁸ This is not an absolute rule. For example, in Luxembourg it is possible to take security over a patents and trademarks but *not* copyrights (although any financial claims resulting from copyrights may be secured).



manner any Spanish legal provisions. Registration will only be completed once the registrar approves the contents of the deed. Unfortunately, this process is quite slow. Furthermore, stamp duty is payable on the registration of a mortgage over rights in Spain, which again adds to the cost of perfecting the lender's security.

Effects of registration

Even the effect of registration of intellectual property rights in different European jurisdictions can vary considerably. By way of example, **Denmark** and **France** both recognise security interests in trademarks. Under Danish law the proprietor of a trade mark or the party who claims the mark as security may request that the security is recorded in the Trade Mark Register. However, recording a security interest does not automatically create an enforceable security right in favour of the secured party. Notwithstanding the registration of the secured party, the owner of the mark is still permitted to transfer it to a third party and such assignment will be recognised under Danish law.

Conversely, in France, a record of the security on the French Trade Mark Register will prevent a borrower's subsequent assignment of its pledged trade marks to a third party.

Other restrictions

Apart from specific jurisdiction-based restrictions and difficulties with the availability of security there are often limitations springing from the form of property itself:

- Where security is given by a licensee of an intellectual property right care should be taken to ensure that the terms of the licence do not cancel the licence on the insolvency of the licensee. A security over a licence, which can be cancelled on the licensee's insolvency, is valueless.
- Non-assignability clauses in licences.
- Negative pledges (i.e. restrictions on creating further security) in the owner's credit documents.

5 Inventory

For the purposes of this paper we have used the term "inventory" to mean stocks of finished goods, work in progress (i.e. half finished goods) and raw materials held by businesses.

As a general rule it is possible throughout the European jurisdictions discussed in this paper to take security over inventory that is in the possession of the creditor by way of the "possessory pledge", whereas security over inventory that remains in the possession of the debtor is only available in certain of these jurisdictions.

The possessory pledge

The possessory pledge, under which the creditor has possession of the inventory, is available in all European jurisdictions covered by this paper. However, outside trade finance, the possessory pledge is of little practical value, as businesses normally need to be able to use their assets and hence to have possession.

The possessory pledge is mainly used to secure short-term finance. For example, if goods are located in an independent warehouse, the creditor can have security over these goods by constructive possession (i.e. by holding the key of the warehouse) which removes from the debtor the opportunity to dispose of the goods. In England, it is also possible to obtain a pledge by taking possession of a document of title to the goods, the main example being the bill of lading.

There are seldom any registration requirements for possessory pledges. However, for example, Spain has the same registration requirements for possessory pledges as for chattel mortgages (please see the section of this paper on "Intellectual Property: Registration").

Non-possessory mortgages

The availability of non-possessory mortgages for inventory differs greatly between the jurisdictions considered in this paper. Apart from the various forms of general business charge that can encompass inventory (discussed above) European jurisdictions can be grouped depending upon how sympathetic they are to non-possessory mortgages over inventory:

- The common law jurisdictions (i.e. England) and Scandinavian countries are most sympathetic to non-possessory mortgages over inventory. In these jurisdictions it is possible to take security over inventory by way of a general business charge, which is usually registrable. In England, however, technical issues under the Bills of Sale legislation mean that such security can be given by a company, but not by a sole trader or partnership.



- **Germany, the Netherlands and Switzerland** are second in terms of sympathy to security over inventory. No physical delivery is required to create security but a certain degree of advance identification of inventory is necessary. In some jurisdictions (i.e. Germany) this prevents generic security over all future property. The rights of the debtor will depend upon the agreement but normally, using standard clauses, the debtor is permitted to work with and sell the secured inventory in the normal course of business.

In **France, Austria, Luxembourg and Portugal** virtually no security can be created over inventory whilst the debtor remains in possession of the assets (although, in Portugal, a pledge given to a *bank* has a specific legal regime which exempts the physical delivery of the secured asset).

In **Denmark** non-possessory mortgages can only be given over identified chattels, registrable at the local court of the domicile of the debtor. The assets must be individualized or specifically listed and the security cannot generally cover a class of assets such as “inventory” (although, as mentioned above, this is set to change).

In the **Netherlands** a non-possessory pledge may be taken over inventory in the form of the *bezitloos pandrecht*: i.e. a notarial deed (or a private deed which is registered in a non-public register) which reasonably describes the assets is required. The normal practice for the debtor is to produce a list of pledged assets at

regular intervals or when requested by the creditor. The debtor is usually expressly permitted to work with and sell the assets in the ordinary course of business. The pledge can cover both present and future claims so long as the claims are sufficiently determinable at the time the pledge is created: common practice is for the debtor to complete the pledge forms and send them to the creditor from time to time with regard to each new debt. On default, as prescribed by the pledge agreement, the creditor may call upon the debtor to hand over the pledged assets to himself or a third party, thereby converting the non-possessory pledge into a possessory pledge (this practice is almost equivalent to an English floating charge). In order for a secured creditor’s claim to be sufficiently determinable, the Supreme Court of the Netherlands has decided that it is sufficient if the claim of the creditor is described as: “all claims the creditor has at this moment and all claims the creditor may have in the future against the debtor”.

In **France** it is not possible to have a non-possessory mortgage over inventory. However, there do exist companies specialised in the construction and supervision of “on-site” third-party controlled inventory pledge warehouses. A portion of the debtor’s plant is closed off by fencing erected by the specialist company and all secured inventory is moved into this closed-off area. Access to this area is controlled by the specialised company, which permits inventory to be moved out of the closed area only upon instructions signed by both the debtor and the creditor.

6 International initiatives

Recent years have seen numerous initiatives aimed at the harmonisation of cross-border security interests in movable property, such as the European Regulation on Insolvency Proceedings, and the UN Commission on International Trade Law (UNCITRAL) model Law on Cross-Border insolvency.

The Financial Collateral Directive (implemented in the UK by regulations which came into force in December 2003) has to some extent simplified the taking of security in the EU and clarified certain conflict of laws issues, but is directed primarily at security over cash and financial collateral in the context of the capital markets.

UNCITRAL has also been working towards the creation of substantive uniform rules for the assignment of international receivables and, in 2001, the UN General Assembly adopted and opened for signature the UN Convention on Assignment of Receivables in

International Trade (the “Convention”), based on rules formulated by UNCITRAL. Depending how widely it is adopted, this may, when it comes into force, introduce a measure of greater uniformity for some of the matters considered above (such as assignability, the impact of non-assignment clauses, and the rights of the debtor), where there is a bulk assignment of international receivables, or a cross border assignment of receivables.⁹ In general terms, however, harmonisation remains a somewhat distant prospect, given the diversity of legal regimes and substantive laws.

⁹ The Convention has so far been ratified by three states (including the US), and will enter into force on ratification by five states.



7 Conclusions

Unfortunately using the word *conclusions* to describe this last section is a misnomer.

Almost the only conclusion that can be drawn from this summary of the legal framework applicable to security in these jurisdictions is that the validity and sufficiency of any security arrangements will generally depend upon the law of the country where the charged assets are situated (together with the governing law of the security document, where this is different).

Indeed, a survey of the European reception of security reveals great disparities:

- One group of countries allows universal security over all the assets of the debtor, including future assets, and for future debt, permits the collateral to be sold without court intervention, and enables the secured creditor to appoint a possessory manager to run the business without selling.
- A number of other jurisdictions also allow universal corporate security but limit it in different ways. The main difference in these countries is the absence of a possessory manager who displaces the directors on an enforcement action.
- At the other end of the scale another group of countries takes a different view. These jurisdictions make it difficult to take security over goods, receivables and contracts either by prohibiting the security altogether or by prohibiting its effect; e.g. by

restricting the security to existing specific assets, by excluding security for future debt and by restricting enforcement by requiring a judicial public auction.

In between these groups there are many gradations and “carve-outs”, with considerable variation in attitude to scope of assets, after-acquired property, priority of preferential creditors and ease or otherwise of realisation.

Perhaps one conclusion that can be drawn is that there is a trend towards the various European jurisdictions developing laws and legal systems that are hospitable to secured lending. However, with the exception of initiatives such as those mentioned in part 6 above, this has very much been at local level through the revision of individual country laws rather than by introducing uniform provisions internationally.

So as the business world becomes more global, laws dealing with security in European jurisdictions retain, at least for the present, their essentially national characteristics. The US has successfully exported Hollywood movies, Starbucks and commercial aircraft to Europe. It remains to be seen whether uniform provisions for the validity and sufficiency of security arrangements, as provided in Article 9 of the UCC, will follow suit.



8

Contact

For further information, please contact:



Andrew Evans

e: andrew.evans@ffw.com

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Field Fisher Waterhouse 35 Vine Street, London, EC3N 2AA
t: +44 (0)20 7861 4000 f: +44 (0)20 7488 0084 e: info@ffw.com
www.ffw.com www.thealliancelaw.com

