SECURED TRANSACTIONS
AND
DIGITAL RECEIVABLES FINANCE

by

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Topic, Takeaways and Disclaimer

Topic:

Digital receivables finance, in a broad sense,

INCLUDING the rights of payment of funds credited to a bank account and the assignments of claims arising from financial instruments, provided that these instruments are neither recorded in book-entry form, nor regarded as securities under national law.

Takeaways:

Adopting a functional approach based on a concept of “control”;

For cross-border contractual issues, relying in the first place on party autonomy;

For cross-border proprietary issues, relying on either the time of registration, or the time of achieving control.

Disclaimer: The following opinions are my own and do not reflect CERIL’s view.

Premises

- RF is a self-liquidating operation. There is a coincidence between the secured claim and the securing asset; the security enforcement does not require a debtor’s default; and the secured creditor also plays the role of an intermediary in the payments.
- RF is becoming increasingly sophisticated – claims may arise from financial operations and/or involve financial operations.
- RF is becoming increasingly digitalised. Usually, this digitalisation does not produce a digital asset, such as a token. Nevertheless, we cannot rule out that in the future RF digitalisation may produce an electronic record that is subject to both control and transfer.
- RF increasingly often involves a cross-border element.

⇒ MLST – Functional approach, and the l.a. to contractual issues

- Regulating RF in an autonomous MLST chapter devoted to self-liquidating operations. This should include all secured transactions, whether in analogical or digital form, performed through the "pre-payment" of the relevant claims.
- Adopting a functional approach that is based on a legal concept of control (UNIDROIT, Principle No 6) encompassing the creation of "security rights in movable assets" (Art. 1.1 MLST), the collateralisation of the rights of payment of funds credited to a bank account and the "outright transfers of receivables" (Art. 1.2 MLST).
- In cross-border transactions, the law applicable to contractual issues concerning the grantor and the secured creditor must be either the law the parties have previously chosen or, if they have not chosen any, the law governing the security agreement (Art. 84 MLST).

⇒ MLST – Registration, functionally equivalent methods, and cross-border proprietary issues

- Adopting a technologically neutral approach and encouraging the use of registers.
- Adopting a principle of functional equivalence and establishing the conditions whereby already existent registers may be considered as trustworthy.
- Ensuring that, for each operation, only one register may have legal effects. For example, if the relevant claims originate from a sale of physical assets that are already required by law to be registered, such as cars, only the required registers should have legal effects.
- Recognising a functional equivalence between the point in time of registration and the point in time of achieving control.
- In cross-border transactions, proprietary issues, such as “effectiveness towards third parties” and “priority”, must be solved by relying on either the time of registration, or the time of achieving control.

Many Thanks for Your Attention