
Contractual Guide on Secured Financing

1. Definition of the content of the Guide according to its target audience.

- 1.1. Creditors or Debtors?
- 1.2. Comparison with the target audience of the Construction Works Contractual Guide.

2. Definition of the content of the Guide according to its purpose.

- 2.1. A pre-legal reform or a post-legal reform guide?
- 2.2. A negotiation guide or a contract guide?
- 2.3. Needs to be delocalized and remain updated.
- 2.4. Comparison with the purpose of the Construction Works Contractual Guide.
- 2.5. Promoting fair play.
- 2.6. Promoting new financial products.

3. Approach of the Guide to the different topics

- 3.1. Answers-oriented or questions-oriented?
- 3.2. Length.
- 3.3. Comparison with the approach of the Construction Works Contractual Guide.

4. Content

4.1 Parties

- 4.1.1 Who is the creditor/debtor?
- 4.1.2 Who is providing the security?

4.2 Secured obligation(s) and secured amount(s)

- 4.2.1 Scope. Are you securing all the relevant obligations (e.g. variable/fixed amounts, interest, costs)?
- 4.2.2 Is the security for the relevant obligations subject to any legal restrictions (e.g. because the obligation is uncertain)?
- 4.2.3 Is there a clear payment schedule in the credit (or main) contract and a clear/efficient way of proving a default (including in case of covenants – i.e. debt/capital ratios, EBITDA)?
- 4.2.4 Is it clear what is the maximum secured amount?
- 4.2.5 Is there any mechanism to reduce/increase the secured amount? Which party controls the mechanism? Is it effective?

4.3 Encumbered assets

- 4.3.1 Does the person providing the security have the right to do so? Are there any limitations that should be considered?
- 4.3.2 Is there any restriction on using the assets as security? Are any third party rights or public regulations applicable?
- 4.3.3 Scope.

- Are you describing the asset(s) in a comprehensive way? Are you including important related assets/parts (e.g. accessories, spare parts, manuals, records, rights of way, list of quantities, description of quality)?
 - Are there any special rights or obligations that you should consider or include in the scope of the security? (e.g. rights of way, right to access the site)
 - Do you need any additional right or related asset/right to make the asset useful/resalable in case of enforcement of the security?
- 4.3.4 Do you need to consider any special provisions because the asset is generic?
- 4.3.5 Are the asset's characteristics or its legal position/rights likely to change? Do you need to include any provision in this regard?
- 4.3.6 Are the assets covered by insurance? Is the insurance sufficient (amount of the insurance, insured risks)? Do you need to be joint insured?
- 4.3.7 Covenants related to the encumbered asset(s). Do you need to include any covenants to protect the encumbered assets or mitigate the risk of loss/deterioration? Do you need to limit the right to change the location of the assets, define non-acceptable levels of deterioration/change or other important aspect (or consider these as events of default)?

4.4 Effectiveness against third parties

- 4.4.1 Is the security effective against third parties (registry/possession)?
- 4.4.2 Is it easy to identify the asset? Should you mark it in any way, etc?
- 4.4.3 Covenants related to third parties. Do you need to limit the right to transfer title of the assets, use them to secure additional obligations or any other important aspect (or consider these as events of default)?

4.5 Default and enforcement

- 4.5.1 Does the security contract have clear provisions indicating when the debtor is in default (of payment obligations or other obligations, as the case may be) and the creditor can enforce the security?
- 4.5.2 Is it easy to prove the default?
- 4.5.3 Do you need to send a notice to the debtor? Do you need to consider any other conditions for enforcement?
- 4.5.4 Can you rely on the secured transactions law or do you need to include special provisions in your contract regarding enforcement?
- 4.5.5 Do you need to include any special provisions to make effective extrajudicial enforcement (e.g. keep an extra set of keys, have an express right to access the site, etc)?
- 4.5.6 Consider carefully whether it is worth providing for arbitration in relation to any aspects of the contract.

4.6 How strong is your security?

- 4.6.1 Insolvency risk.
- 4.6.2 Risk of unknown or undisclosed third party rights.
- 4.6.3 Risk of loss or deterioration of the assets.
- 4.6.4 How enforceable is your security?
- 4.6.5 Does criminal law provide any support (e.g. fraudulent transfer)?
- 4.6.6 What is the attitude of judges when enforcing security interests?