

Contractual Guide on Secured Financing

*Issues suggested by
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The proposed Contractual Guide on Secured Financing will be for the purpose of entering into contracts for lending money between the banks, financial institutions and other lenders on the one part and the borrower (grantor in terms of the Secured Transactions Guide) on the other part. Various issues to be covered by such a contract between the lender and the borrower could be as under:

Recommendation 14 of the Guide on minimum content

Recommendation 15 on Form of Security Agreement

Information about Debtor / Borrower:

- ❖ The form of legal entity of the borrower
- ❖ Jurisdiction of such entity
- ❖ Restriction on Amalgamation / Merger in the context of effect of registration of security interest

Description of Property given as Security (general / specific):

- ❖ Whether should be specific or general
- ❖ Declaration about the title to property
- ❖ Undertaking not to create any encumbrance without the consent of the secured creditor
- ❖ Extending the security for proceeds of the property including any receivables for the sale (Recommendation 19)

Loan Amount

- ❖ The maximum amount of the loan to be lent
- ❖ Whether the facility is a Fixed Term Loan or Revolving Credit
- ❖ Rate of interest and other charges such as Commitment Charges and Pre-payment Penalty, Penal Interest on defaulted amount etc.
- ❖ Repayment Schedule
- ❖ Power to accelerate balance instalments in the event of default

Default:

- ❖ A clear definition of default which will trigger right of enforcement for the secured creditor
- ❖ **Obligations of grantor (borrower)** to preserve and protect security
- ❖ Obtain insurance cover for the secured assets
- ❖ Maintain adequate level of security to cover the outstanding loan
- ❖ In case of revolving credit against security of raw materials, finished goods etc. to replenish such stock / goods to maintain the security coverage for the loan outstanding
- ❖ Power to sell goods / secured assets in the ordinary course of business subject to security right over sale proceeds

Obligation on the part of secured creditor:

- ❖ To act in fair and commercially reasonable manner in exercise of all powers of secured creditors
- ❖ Give notice of default
- ❖ Give notice if future instalments are accelerated
- ❖ Power to take possession of securities in the event of default
- ❖ Power to sell securities
- ❖ Power to assign receivables (securitise receivables)

**UNCITRAL - Third International Colloquium on Secured Transactions
Presentation by M R Umarji**

In addition to the above mentioned issues relating to contract for borrowing money, between the borrower and the lender, there are certain other issues which affect such contract between the parties as under:

- (i) The existing contract law in the enacting State may already be making a provision for possessory securities and enforcement thereof (Law for Pawn/Pledge of movables). If there are such existing provisions, same will have to be brought in conformity with the secured transactions law or restrict the applicability of secured transactions law to non-possessory securities.
- (ii) The enacting State also should make a clear demarcation between consumer transactions and commercial transactions to protect interests of consumers.
- (iii) In case the enacting State has a Federal Structure with legislative powers on secured transactions vested in the States, there will be a need to enact uniform law applicable in all the States.
- (iv) The enacting State may have separate laws in regard to financial lease, hire purchase or other title retention contracts relating to movable properties and if so, the State will have to decide whether such transactions should be brought on par with secured transactions as contemplated under the Guide.
- (v) Under the Guide there are certain provisions requiring exercise of good faith and acting in a commercially reasonable manner. Such requirement may be already necessary under existing Contract Law and if not the enacting State will have to decide whether to amend the existing Contract Law or make provision in Secured Transactions Law to be enacted.