



SECURED TRANSACTIONS REFORM

DISCUSSION PAPER 3

A SECURED TRANSACTIONS CODE

The Financial Law Committee of the City of London Law Society (CLLS) has issued a discussion draft of a Secured Transactions Code.

Why have we done so?

The reason is that we think there is merit in discussing whether the law of secured transactions should be codified and, if so, how this should be done. And, if it is worth doing this, then it is worth producing a draft Code to see what it might look like.

We decided that we would not get very far by discussing issues in the abstract. The best way to test something is to draft it. Only once it has been drafted do the real issues become apparent.

You have to start somewhere.

The purpose of the Code is therefore to prompt a discussion. Is there merit in producing a Code and, if so, what should it look like?

If there is a consensus, we can then start to discuss how it might be implemented with the Department for Business, Innovation & Skills and with other relevant bodies such as the Land Registry.

In our Discussion Paper on Secured Transactions Reform in November 2012, we reviewed the workings of the current law, and identified a number of areas where it could be improved. The most pressing of these is the distinction which insolvency law requires to be drawn

between fixed and floating charges; and this was the subject of our second Discussion Paper in February 2014. But, in the longer term, we thought there was merit in attempting to simplify and modernise the current law. In particular, we wanted to see if it would be possible to establish a single security interest - based on the charge - in place of the multiplicity of existing security interests.

It is this which led us to produce the discussion draft of a Secured Transactions Code as the next step in our reform project.

The advantages of a Code

What would be the advantages of a Secured Transactions Code?

One advantage would be that the law on secured transactions could largely be found in one place. It would benefit practitioners dealing with the subject and students learning it; and it would also make it easier for the law to be exported.

The other key advantages of a Code would be that it could clarify the existing law, simplify it and bring it up-to-date. Our law has developed over a four hundred year period and, although it works well in practice, a Code could replace centuries of accretions with a clear and simple system reflecting the practicalities of modern transactions.

There are, of course, dangers in replacing existing law. There is always a concern that any change will wreak unexpected consequences, but that concern can be allayed by proper consultation on the terms of the new Code.

More importantly, it is vital that a new Code should not destroy the flexibility of the current law. A new law must not work only in the context of current ways of doing things. Commercial practice changes, and commercial law needs to be sufficiently flexible to cope with that. For this reason, the Code needs to be written at a level of principle which will enable it to adapt to changing methods of financing.

The advantages of a Code would seem to outweigh its disadvantages. But the only way to test whether it would really work is to draft one. It is only by seeing what it might look like that we can see whether we like it.

The approach to drafting

This is the approach that has been adopted in drafting the Code:

- The Code would largely replace the existing law. The necessary simplicity would be undermined if it were only to sit alongside the current law.
- It covers security over all types of property, including land. There is no point in having one system for personal property and another for land. That does not reflect the way in which security is taken in practice.
- It covers consensual security interests, not those which arise by operation of law.
- For practical reasons, certain of its provisions deal with outright assignments of receivables, but, as a general rule, outright transactions are not included in the Code. We see no reason to recharacterise transactions which are not security as if they were.
- The Code has been drafted at as broad a level of principle as is practicable in the light of the subject matter. This is both to preserve the flexibility of the current law, and also to make the law as simple as practicable.

It is for this reason that the Code has not been drafted in the style of a normal statute. We have tried to make it accessible – both to practitioners and to students. If it were to be brought into effect, this could be done by an enabling statute which would deal with repeals, transitional provisions and ancillary matters.

We should stress that this draft Code is a starting point for a discussion of two questions:

- Is it worth adopting a Code?
- If so, what should it say?

Our starting point in drafting the Code is the current law. It works well in practice, and we want to retain its key elements.

But we have also attempted to simplify and rationalise the law, and to bring it up-to-date. The approach we have taken is to put forward suggestions as to what the law might look like as a starting point for a discussion. Nothing is writ in stone.

This is a discussion document, and we hope that you will join in the discussion.

**City of London Law Society
Financial Law Committee
July 2015**

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