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Secured transactions law in Asia: Principles, perspectives and reform by Louise Gullifer and Dora Neo

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BOOK REVIEW

Secured Transactions Law in Asia: Principles, Perspectives and Reform by Louise **Gullifer** and Dora **Neo**, eds. [Oxford: Hart Publishing, 2021. xlix + 502 pp. Hardcover: £108.00]

Secured Transactions Law in Asia: Principles, Perspectives and Reform is the third in a series of works that critically examine secured transactions law reform around the world. From a focus on reforms in Europe in the first book to reforms in Africa in the second, this third volume looks at Asia, and specifically at reforms in 13 major Asian jurisdictions: China, Indonesia, Japan, Philippines, South Korea, Taiwan, Thailand, Vietnam, Brunei Darussalam, Bangladesh, India, Pakistan and Singapore. The collection of essays by leading experts from academia, legal practice and the World Bank Group was first presented at a 2018 conference jointly organised by the National University of Singapore's Centre for Banking & Finance Law and EW Barker Centre for Law & Business, and University of Oxford's Commercial Law Centre at Harris Manchester College.

This book continues the important contribution of the series to policymakers and practitioners in countries considering or are involved in modernising their secured transactions law. As the United Nations Commission for International Trade Law (UNCITRAL) noted in its Legislative Guide on Secured Transactions, the raison d'etre for secured transactions law "… lies in the premise that the total net wealth of an economy will increase if more secured credit is available as a complement to unsecured credit" (at [46]). Of particular pertinence is the need to make affordable secured credit available to micro, small and medium-sized enterprises (MSMEs) where unsecured credit is unavailable or unavailable at reasonable cost. MSMEs typically represent the majority of enterprises in most countries, especially developing ones (see "Small and Medium Enterprises (SMEs) Finance" <www.worldbank.org/en/topic/smefinance>), and tend to have least access to affordable secured credit because the collateral they can offer mainly comprise business-related *personal* property (*eg* inventory and receivables) rather than the more sought after *real* property. Secured transactions law reform therefore primarily aims to reduce the risks of lending to MSMEs and enhance the latter's ability to leverage personal property as collateral, to gain access to secured credit and at lower costs. Nations seeking reform are encouraged to adopt principles and standards incorporating the "unitary", "functional" approach similar to Article 9 of the US Uniform Commercial Code and the Personal Property Security Acts of various jurisdictions such as Australia, Canada and New Zealand. Though the principles originate from different international or regional standard setting bodies such as the UNCITRAL, World Bank Group and European Bank for Reconstruction and Development, the core of the principles,

known as the "modern principles", largely enjoy global acceptance as representing the best practices for a modern and effective secured transactions law (see *eg* Roderick J Wood, "Identifying Borrowed Sources in Secured Transactions Law Reform" (2019) 24(3) Unif L Rev 545 at 551–554).

To the extent that adoption of the "modern principles" internationally or regionally results in harmonisation of secured transactions law that reduces uncertainty over applicable rules and costs in cross-border credit transactions, economic benefits are also derived (see *eg* Neil B Cohen, "Harmonizing the Law Governing Secured Credit: The Next Frontier" (1998) 33 Tex Intl LJ 173). Beyond economic benefits, the volume reminds us (at 48–49) that reform along the lines of the "functional" approach mentioned above provides "coherence, relative simplicity, certainty, transparency, and user-friendliness".

Although part of a series, the volume works well as a standalone given the comprehensiveness of its coverage: 20 chapters are divided into an Introduction chapter (ch 1) followed by 3 parts. Chapter 1 and Part I ease the reader into this complex subject matter. For instance, Chapter 1 explains the cross-jurisdictional variations in concepts and terminology relating to what constitutes a security interest, different types of security interests or assets, concepts peculiar to reformed secured transactions law and unfamiliar phrases used in relation to the reform process. It provides an excellent overview of the different approaches to reform (wholesale, partial or limited), possible measures of reform success (by reference to the "modern principles", the "Getting Credit" Index of the World Bank "Doing Business" Report or economic objectives achieved), and the characteristics (legal culture, economic indicators and others) of the 13 Asian jurisdictions that could influence the country's attitude towards reform.

Part I comprises 4 essays (chs 2–5) that set the stage for a deeper appreciation of the country-specific chapters in Parts II and III. Chapters 2 and 4 usefully set out and discuss the general benchmarks used by the country-specific chapters to assess reform success or need for reform, namely the "modern principles" and the UNCITRAL Model Law (a prime example of the "modern principles") respectively. Chapter 2 (at 28–29) lists the main features of the "modern principles" to include:

"(i) public notice as a general condition for third-party effectiveness (perfection), including (x) a grantor identifier-based registry for registration of notices of security interests, and (y) possession of tangible assets;

(ii) clear and easy to achieve methods for creation of security interests;

(iii) clear and predictable priority rules, including the general effectiveness of security interests in insolvency proceedings and priority of security interests over other interests;

(iv) provision for effective enforcement of security interests following a debtor's default, including extrajudicial enforcement;

(v) availability of all types of personal property as collateral, including future assets securing future obligations;

(vi) free assignability of receivables;

(vii) comprehensive coverage of all forms of security devices;

(viii) extension of security interests to the proceeds of collateral;

(ix) the general acceptance of freedom of contract for inter-party relations;

(x) general equality of treatment of creditors providing acquisition financing;
(xi) clear private international law (choice-of-law) rules".

Chapter 4 then introduces the UNCITRAL Model Law and discusses the key objectives and policies of its provisions on the creation, third party effectiveness, priority and enforcement of security interests, the registry provisions and the conflicts of law (at 70). While Chapter 2 discusses problems associated with "legal transplant" of the "modern principles", Chapter 4 delves into the merits of and policies underlying the Model Law's provisions pertaining to the different elements mentioned above.

Chapter 5 treats the reader to the insights of an expert with over 20 years' experience in the design, development and implementation of secured transactions law and infrastructure reform in East Asia. Reflections on the factors critical to reform success are drawn from the experiences of developing countries (*eg* Laos, Cambodia, Philippines, Indonesia, Thailand and Malaysia). Chapter 3 completes the picture with observations of not only the peculiar challenges of a reformed jurisdiction with a federal system where secured transactions laws are under state control and not harmonised across the states (via a comparison of the Canadian experience with Australia and the US) but also of the importance of continual review and updates of the law in reformed jurisdictions generally.

Among the illuminating themes that emerge from Part I are:

Reality of resistance to 'legal transplant': Chapter 2 notes resistance to the adoption, among others, of the unitary, functional approach of the modern principles which treats rights arising from all transactions that "functionally" secures or protects the creditor against non-payment of debts or non-performance of obligations by recourse to an asset, whether because the creditor was granted a proprietary interest in the asset or by virtue of being the absolute owner from the outset as "security rights" (at 41). These rights, with a few exceptions, require registration to be effective against third parties (at 41). This approach runs counter to established doctrines of civil or common law systems where ownership and security interests are strictly distinct concepts and where only the latter require registration for third party effectiveness. Resistance may come, for example, from legal elites (*eg* judges or legal academics) opposed to adopting principles that are misaligned with existing legal culture (at 33–34 and 41) or from parties with an entrenched interest in preserving the status quo such as creditors who utilise retention of title (ownership) devices to protect themselves against non-payment without the need, under existing law, to register their interest for third party effectiveness (at 36). Resistance to the use of the system post-adoption of the "modern principles" could occur, for example, because the public registration system is costly or complex, or there is low valuation expertise among lenders of personal property collateral or a weak secondary market that makes enforcement of such collateral uncertain (at 39–40).

Importance of capacity building and stakeholder buy-in in the reform process: Both Chapters 2 (at 47–48) and 5 (at 95–96) emphasise the necessity of capacity building as crucial to reform success. This includes ensuring continued commitment of the public and private sector stakeholders to the reform project through, for example, pre- and post-reform engagement and education of the benefits of reform (with the aid of public sector champions), establishment of a user-friendly online registration system, and educating lenders and borrowers on how to use the

reformed system responsibly. Post-reform capacity building includes developing the necessary supporting ecosystem of valuation expertise and secondary markets for personal property collateral as well as providing training for legal practitioners and judges of the reformed laws.

Importance of consequential amendments to existing statutes interlinked with secured transactions law: Secured transactions law interacts with other laws such as insolvency and companies law and Chapter 5 warns (at 94) of low utilisation of the new secured transactions law regime if consequential amendments to affected, existing laws are overlooked. Uncertainty would arise where the provisions of the new and old come in conflict.

Reform takes time: Based on practical experience, Chapter 5 indicates (at 95–96) that the reform process involves 3 phases that takes an estimated minimum of 9 years to complete while Chapter 2 acknowledges (at 49) that improvements in secured transactions law can occur through partial reform (as opposed to wholesale reform) with "progress often [proceeding] incrementally and along a winding path".

Need for continual review and update of reformed regimes: Even within reformed jurisdictions, secured transactions law and practices need to be updated to keep abreast of new business practices and new forms of assets (*eg* digital assets) that could be used as collateral. Chapter 3 emphasises (at 62–68) the importance of ensuring resources to fund review initiatives, including funds to effect technological upgrades to public registers and carry out user-engagement.

A minor quibble with Part I pertains to the arrangement of chapters – the two chapters dealing with benchmarks (chs 2 and 4) should more appropriately be arranged consecutively and perhaps Chapter 3 on the challenges of *reformed* jurisdictions should have come at the end of that section. Nonetheless, Part I works well as the introduction of many themes that are reiterated and illustrated in the country-specific chapters in Parts II and III.

Parts II and III take the reader on a journey across the experiences of 13 Asian countries, included in the volume based on their being important Asian economies with different legal cultures, at different stages of economic development and different stages of the reform process (at 2). This permits a contextualised glimpse into each country's specific motivations for modernisation (or lack thereof), peculiar challenges and/or the methods of accommodation of the "modern principles", which makes for a fascinating read.

Although there are overlaps in the conceptual and practical differences between a system aligned with the "modern principles" and the common law or civil law system, differences unique to each legal tradition also exist. Indeed, the "modern principles" being similar or based on Article 9 of the US Uniform Commercial Code (and its progeny) have greater proximity to common law systems (at 103). Thus, Part II comprises chapters on civil law countries and opens with a chapter (ch 6) devoted to highlighting civil law concepts that require change or accommodation to align with the "modern principles". Meanwhile, Part III covers chapters on common law countries and also opens with a chapter (ch 15) that focuses on common law concepts that need to change to be "modern principles" compliant while noting areas where translation, rather than change, is required. Unlike Chapter 6, however, Chapter 15 includes a brief description of the (wholesale) reform effort of a common law Asian country, Brunei Darussalam, to illustrate some points that it makes.

One wonders if the experience of Brunei Darussalam could have been a chapter of its own instead.

That aside, Chapters 6 and 15 contain nuggets of insights. Chapter 6 notes (at 102) that where major differences exist between a legal system's pre-existing "concepts, principles, practices or legal solutions… [and] the inspiring international models, modernizing efforts often collide with impeding inertia on the part of institutions or market actors… [leading] to path-dependency responses rather than really transformative solutions, and a probable 'rejection'… [of] what is perceived as a 'legal transplant'". Despite this, Chapter 6 raises optimism (at 105): technological solutions might enable civil law jurisdictions to "embrace [the] modern principles… without seriously compromising the dogmatic basis of their legal traditions, and also find more opportunities to creatively develop and test alternative models inspired by the international principles". For example, the modern principles require easy methods to create security rights and favour registration in advance of its creation (notice-basis) to promote efficiency and ease of access to credit. Meanwhile, the civil law's more complex, time-consuming and costly requirements of public notaries' intervention in the creation of a valid security agreement and registration post-creation (transaction filing basis) involving legal assessments by the registrar aim to ensure "ex-ante legal certainty" to minimise future litigation. Chapter 6 suggests (at 114–119) that efficiency and ease of access might be dovetailed with ex-ante legal certainty if technological solutions could streamline and speed up the authentication processes performed by notaries and registrars.

Among other interesting points, Chapter 15 notes (at 320–323) that the proximity of common law concepts to the "modern principles" means that many common law concepts already accord with the modern principles (such as permitting security to be taken over future assets under equitable principles that can be described generically, freedom of contract and extra-judicial enforcement). This same proximity implies that some common law concepts, such as the "floating charge" and priority rules relating to retention of title devices (at 328–330) do not require change to be "modern principles" compliant, but merely require "translation". However, the proximity also reduces incentive for reform especially where the similar concepts have "worked well" (at 320). Nonetheless, Chapter 15 emphasises that substantive structural reform (via codification in a single statute, taking a unitary, functional approach to "security rights" including registration requirements on a notice-basis and application of the "first to file" rule for priority) is necessary to remove complexity and fragmentation that exists in the secured transactions law of unreformed jurisdictions (at 320 and 323–327).

The country-specific chapters not only inform but provide critical assessments of reform efforts or lack thereof, with arguments and suggestions for further action. Deftly bringing all the issues and arguments in Parts I to III together into a coherent and comprehensive whole, the concluding chapter (ch 20) bookends the volume with a critical overview of the attitudes towards reform (the drivers and detractors), the methods of reform and the substance of the law (the modern principles and how they were treated by reforming countries), referencing examples in the country-specific chapters. Although one could question the decision to put the Conclusion chapter in Part III given its content, it is undeniably an excellent bookend to the volume and an illuminating read on its own.

In sum, while the book argues mainly in favour of (wholesale) reform, at the same time, it does not downplay the enormity of the undertaking or the practical or conceptual obstacles involved, but analyses them (generally and in country-specific contexts) with a clear view to identifying what would or would not conduce to successful reform and to ongoing review. The volume therefore provides a nuanced, balanced and informative analysis that more than fulfils its objective (at 1) of providing a resource for those "involved in considering secured transactions law reform, its content, the process by which it is achieved and its operation in practice". Accessibly written, it would also be a useful resource for newcomers to secured transactions law reform generally, and to those seeking to learn about reform in the specific Asian jurisdictions discussed in the book.

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