

# **COMMENTS ON TABLES**

## COMMENTS ON TABLE I:

### i) **Formalities:**

Formalities serve the following purposes: to prevent fraud; to mark the seriousness of transaction for the debtor; to improve collection of documentary taxes; to secure publicity via notarised public deeds and to mitigate false wealth objection.

Certain formalities relate to the admissibility of the document as evidence, for example: judicial enforcement. In Spain for example, notarisation is an executive authenticated act not requiring further proof, having the presumptions of validity and being desirable to avoid delays in Court enforcement.

Disadvantages of formalities include their inconvenience and expense, and the fact that they are impracticable for frequently changing margin collateral.

*Comment:*

In most of the civil jurisdictions, writing is a minimum for admissibility in evidence; Spain is the exception in requiring a public deed to ensure validity of the pledge against third parties.

### ii) **Certainty in identifying the securities:** means that the securities concerned must be specifically particularised and identified.

*Comment:*

All jurisdictions have restrictions to a greater or lesser degree with respect to the pledge; however in some of the jurisdictions with new special pledged accounts this will not be an obstacle, e.g. Italy, France and Belgium.

### iii) **Substitution risk:** means that substitution of securities by the pledgor may convert a fixed charge into a floating charge in the English case; in other jurisdictions the substitution destroys the pledge.

*Comment:*

France appears to be the more flexible in this aspect with the new Security Account Pledge permitting transfers from or to an account, because it does not require release of the pledge. In France therefore substitution (outside insolvency) is of no effect the rest of the jurisdictions present substitution risk in different ways.

- iv) **Possession of the securities:** It is clear in almost all of them that the pledgee must either have possession of the securities or custodian must acknowledge that it holds securities for the benefit of the pledgee (direct or indirect possession).
  
- v) **Pledgee's liability to be secured:** There is a generic rule codified in the Civil Code states, establishing by a case law in the English case, whereby a pledgee must take reasonable care of the assets pledged and will be liable for losses arising from his failure. This may be relevant in those cases where there is a delay in realisation of the pledge and the pledgor complains that the pledgee should have sold securities before fall in the market.

## COMMENTS ON TABLE II:

- i) **Transfer to a special account:** perfection for these new types of collateral will take place as soon as the security is registered in the special account or if applicable it is filed with the register of pledges of the custodian (Italian case) or when amount of the securities is credited to the pledged account (Belgian case). Use of these special pledged accounts means perfection requests are no longer an issue.

The most flexible mechanisms are the French, Belgian and Italian ones.

- ii) **Taking possession:** in the case of pledges as possessory security, the secured party must perfect its security by actually taking possession of the secured property, the principle being that a debtor not in possession of its property puts third parties on notice that its interest may be encumbered.
- iii) **Service of notice:** particularly in relation to an assignment of a contract debt, the creditor will acquire an enhanced security interest by serving notice of the security on the contract debtor. It is usually necessary to comply with formalities, which limit flexibility.

In this sense the most flexible ones are Belgium and Italy.

- iv) **Notarisation:** this may be a mandatory requirement, and in any event it may be desirable for the secured creditor to ensure that the security document is notarised by a qualified notary.

France for the case of Societe Civil shares by notarial deed, Spain and Portugal will be the supporters.

- v) **Registration:** Lack of registration in some cases may invalidate the security. For example, in Belgium, if registration is delayed more than 15 days after signing a security document over registered securities and is made within the pre-bankruptcy risk period, the security will be voidable.

## COMMENTS ON TABLE III:

**Public auction/private sale:** in some jurisdictions, enforcement may be subject to the delay and formalisation of a court ordered public auction, as opposed to a private sale of the secured asset. This is generally for the protection of the debtor and can lead to delays in realising the security assets. The public auction gives priority to the proceeds of sale, but not control over the asset itself. Private sales permit a rapid disposal of the asset without delays or court costs, but the pledgee is under duty to conduct the sale reasonably and to obtain the best reasonable price.

Those jurisdictions which permit only public sale give protection to the debtor. There is only flexibility in this regard in Belgium and Germany because here, they provide the possibility of a private sale.