

Tribal Secured Transaction Law – An Important Tool for Tribal Economic Development

I. What is *secured transaction law* and why is it important?

- a. Market economies depend on the ability of organizations and individuals to access credit and encourage investment
- b. To effectively enable access to credit by businesses and individuals, rules are needed to govern “lender–borrower / creditor-debtor” transactions and relationships, including systems for collecting debts and bankruptcy systems for terminating the collection of unpaid debts
- c. Three basic systems in modern market economies have developed for collecting debts
 - i. *Unsecured lending* – a system that does not depend on collateral to secure a creditor’s interest
 - ii. ***Secured lending*** – a system that uses “personal” property (movable and/or intangible things) as collateral to secure a creditor’s (lender or unpaid seller) interest. (Collateral = secondary source of payment)
 - iii. *Mortgage lending* – a system that uses “real” property (land, fixed things) as collateral to secure a creditor’s interest
- d. *Secured lending / secured transaction law* – Almost all developed private enterprise economies have laws or codes that provide the rules governing secured loans or transactions. These are the procedures and rules for borrowing and lending, how risk is allocated among competing creditors, and how risk is managed upon default of payment against debt. (*In a private enterprise economy, the primary source of funding or credit is not the government but individuals, banks and other private lenders*)
- e. Developing and transition economies around the world have made adoption of secured transaction laws a priority to attract outside investment and to kickstart economic development, recognizing that earlier efforts to promote economic development have been hindered by the lack of secured lending legislation and pledge registration systems (i.e., Albania, Russia, Georgia, Kazakhstan, Kyrgyz Republic, Uzbekistan, Azerbaijan, China, Indonesia, Thailand).

II. Development of secured transaction law in the United States as part of the UCC

- a. By the late 1800s and into the early 1900s, it was becoming increasingly apparent that interstate commerce was being greatly hindered by a lack of common commercial and other laws among the states. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was created in the early 1890s for the purpose of creating model or uniform laws for state legislatures to consider for enactment.
- b. The Uniform Commercial Code (UCC) was developed by the NCCUSL in the 1940s for the purpose of establishing a reasonably consistent legal environment for commercial transactions throughout the U.S. It took 14 years for the NCCUSL to draft the UCC, and another 10 years for all states to enact it in some form or another. (Also the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands)

- c. The “near uniform adoption of the UCC has enabled **cross-border** business between states to take place efficiently and cost-effectively.
- d. The UCC is comprised of 12 “codes” or articles
 - 1. Article 1 - Definitions and General Rules
 - 2. Article 2 - Sales
 - 3. Article 2A - Leases
 - 4. Article 2B - Licenses
 - 5. Article 3 - Negotiable Instruments
 - 6. Article 4 - Bank Collections
 - 7. Article 4A - Funds Transfers
 - 8. Article 5 - Letters of Credit
 - 9. Article 6 - Bulk Sales
 - 10. Article 7 - Documents of Title
 - 11. Article 8 - Investment Securities
 - 12. Article 9 - Secured Transactions**

III. Components of Article 9 – Secured Transactions

- a. Creation and attachment of security interests in collateral
 - i. A security interest is a legal interest held by a creditor in *personal property* owned by a debtor or third party
 - ii. Security interest is a *consensual* “lien” created by agreement of the parties
 - iii. Attachment – the point at which the security interest in collateral (or proceeds of the original collateral) becomes enforceable against the debtor
- b. Types of property that can be used as collateral
 - i. *Personal property* - any property that is not real property (equipment, goods)
 - ii. *Changeable property* – some real property in some places can become personal property (i.e., harvested crops)
 - iii. *Intangible property* - (i.e., account receivables, deposit accounts, license rights, intellectual property rights)
 - iv. *Payment instruments or documents* (i.e., promissory note, bill of exchange, stock certificate, warehouse receipt)
 - v. *Proceeds* – property received by a debtor for the sale or exchange of property subject to a security interest (i.e., cash received for the sale of equipment that is collateral for a debt)
- c. Perfection of a security interest
 - i. A security interest must be perfected to make the interest enforceable against third parties
 - ii. The process to perfect an interest is designed to put third parties on notice of the existence of prior security interests.
 - iii. The process operates in conjunction with the bankruptcy system. A security interest will be invalidated if not perfected prior to bankruptcy filing or so close in time as to give the creditor an unfair preference over other unsecured creditors.
 - iv. Three ways to perfect depending on type of collateral
 - 1. possession (pledge)
 - 2. filing (debtor or third party retain possession of the collateral)

3. control (pertains to intangible property, such as book entry securities)
- d. Priorities among creditors with interests in the same collateral
 - i. Objective of creditor taking a security interest in collateral is to ensure the interest is enforceable not only against the debtor but also against other parties that may obtain interests in the same property.
 - ii. The code provides the rules that establish the order in which competing creditors have rights in the same collateral
 - iii. General rule: “first to file is first in right”
- e. Filing as a means of public notice of security interests
 - i. A filing or registry system is the mechanism for putting the public on notice of security interests
 - ii. Filing systems should be convenient, accurate, and easy to access
 - iii. Most states house their filing systems in their respective Secretary of State offices
 - iv. Financing statement – provides name of debtor, name of creditor and describes the collateral subject to a security interest
 - v. Processes for continuing, terminating, modifying and assigning
- f. Default and enforcement rules
 - i. Rights and responsibilities of both creditors and debtors
 - ii. Special consumer protections
 - iii. In the event a debtor defaults, a creditor must be allowed to exercise its rights against the collateral (i.e., self-help repossession, right to dispose of collateral, judicial process)

IV. Why are secured transaction codes, or “UCCs”, important in Indian Country?

- a. Need and desire for successful and sustainable economic development in Indian Country with the goal of building viable, sovereign nations.
- b. Fundamental to this goal is the need to create an environment in Indian Country that encourages lenders and other non-tribal businesses to do business not only with tribes but also tribal members and non-tribally owned Indian businesses, and that protects the interests of all parties engaged in financial transactions.
- c. Key to this are the governing and legal infrastructures that not only support and strengthen the effective exercise of tribal sovereignty, but that also satisfy the fears that have been routinely expressed by prospective lenders, business partners and investors. Faced with uncertain or no rules, lenders may be unlikely to lend and investors are unlikely to invest.
- d. Commercial codes or laws are the rules that can provide this certainty.
- e. Benefits
 - i. Creates certainty and predictability about the rules.
 - ii. May encourage more lenders to do business with a tribe and/or tribal members, therefore increasing competition
 - iii. Particularly useful for development of Indian businesses not owned by a tribe or tribal enterprise and for tribal member consumers, where there is unequal bargaining power
 - iv. Harmonization with state laws may reduce the cost of transactions

- f. Concerns
 - i. Sovereignty, self-governance, self-determination
Are we just adopting “state” laws?

V. Secured Transaction Law in Indian Country Today

- a. Fairly recent development
- b. Examples of different models
 - i. Tribal Commercial Codes
 - 1. Navajo Nation – comprehensive commercial code (1986)
 - 2. Sac and Fox Tribes – comprehensive commercial codes
 - ii. Montana Model Tribal Secured Transaction Code – 1997
(www.umt.edu/lawinsider/library/lawbysub/ucc.htm)
 - 1. drafted by Indian Law Clinic, University of Montana
 - 2. Hoopa Valley Tribe and Northern Cheyenne Tribe adopted with modifications
 - 3. based largely on old Article 9 (before revisions to Article 9 were finalized), modified to address tribal needs and concerns
 - iii. By resolution, tribe adopts state UCC – incorporation by reference
 - 1. Little River Band of Ottawa Indians, limited to Little River Casino Resort Expansion Project – State of Michigan UCC
(www.narf.org/nill/Codes/Ircode8.htm)
 - 2. Cheyenne River – compact with State of South Dakota
 - 3. Mashantucket Pequot Tribal Nation – State of Connecticut UCC
 - iv. By resolution, tribe adopts model UCC – incorporation by reference
 - 1. Eastern Band of Cherokee Indians, limited to TCGE Refinancing Transaction
(www.narf.org/nill/Codes/ebcicode/eccodech16dgamingord.htm)
 - v. Collection Codes - for sole purpose of providing rules for enforcement of judgments
 - 1. Oglala Sioux Tribe
(www.narf.org/nill/Codes/oglalacode/chapter02-civilactions.htm)

c. PROBLEMS

- i. Incorporation of state law, even with carve-outs, may impose unintended and inappropriate legal rules due to the all-inclusive incorporation of other law into the state law
- ii. Collection code approach is incomplete
- iii. Many tribally drafted codes are based on old Article 9 – may encounter issues with lack of harmonization

VI. NCCUSL Committee on Liaison with Native American Tribes

- a. NCCUSL Tribal Secured Transaction Code
 - i. In drafting process, expected to by year end 2004
 - ii. Based on revised Article 9, with some components of Article 1, 2, 8
 - iii. Modified to address tribal needs and concerns
 - iv. Revision process benefit
 - v. Implementation Guide

- b. Special tribal considerations - examples
 - i. Fixtures (personal property that, once affixed to land, becomes real property; this may be an issue if trust land or other land with restrictions against alienation is involved)
 - ii. Filing systems (will tribe have its own system, “piggy-back” on state system, or form a cooperative system with other tribes?)
 - iii. Sovereign immunity (i.e., limited waivers)
 - iv. Manufactured homes
 - v. Ability to vary by agreement
 - vi. Lack of other law to reference
 - vii. Consignments
 - viii. Scope of code – will it apply to transactions within the tribe?
 - ix. Per capita distributions – exclude from eligible collateral?
 - x. Self-help remedies (make available or not?)
 - xi. Choice of law and choice of venue issues

- c. Challenges
 - i. More tribal input needed to identify issues the committee may not be considering
 - ii. Comprehensive code versus scaled back version
 - iii. Coordination with other law (i.e., bankruptcy law, contract law, consumer laws)

KEY: It is critically important for a tribe to consider all of the specifics of a proposed law as it will affect the tribe and its members to best effectuate tribal sovereignty

VII. Other Needs

- a. Court systems
 - i. independent (separation of powers), impartial (must be perceived as fair)
 - ii. competent to adjudicate complex commercial cases (judges must be educated in commercial law)
- b. Coordination with other law – does tribe have rules of civil procedure, rules of evidence, appellate procedures, etc.?
- c. Publication of laws and decisions – must be freely accessible
- d. Education (tribal judges, tribal attorneys, business, economic development and housing reps)
- e. Filing Systems