Securities Dominance – Once and Forever?
Amsterdam - 11 0ctober 2023
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Lending orthodoxy holds that asset-security is a permissible way a creditor to gain extra protection. Thus, in insolvency, it is readily accepted as an exception to the *pari passu* principle, along with privileges/preferences, the only issue being whether encumbered assets are treated within or outside the insolvency estate. The international bodies active in the field, including the World Bank, also readily accept this position. However, could things be done differently? Is there a different construct applicable to the lending contract that would avoid the need for security and how effective could it be? If not, could enforcement and recovery of collateral be mitigated in some way as to promote the objectives of today: rescue and rehabilitation of the debtor and protection of the debtor's family?

When discussing law reform, the idea of path-dependency is often adverted to, particularly in emerging and developing economies where, oftentimes, a preference is expressed for the law or legal system with which the jurisdiction is familiar through the historic connexion, because this law/system appears to work in the context in which it is found. Moreover, reforms which take place in the influencing system are often seen by the influenced as good reforms to emulate, for a variety of legal, economic, social or other reasons. In a path-dependency model peculiar to security, security has always been seen as good, effective and, further, “consecrated” by being seen as part of an ancient model, being derived from Roman Law, the *summum* of ancient law. Thus, the security model is to be desired and its application in modern systems derived from Roman(-inspired) origins wanted. This view is undoubtedly boosted by the view of the international institutions active in the lending and law reform sectors. For them, the presence of an effective security regime constitutes prime access to finance. With the addition of a registration system, by which transactions with certain forms of collateral are better managed, this access is enhanced. The progressive accretion of novel types of assets to the register further enables the commoditisation of collateral, as has happened in many jurisdictions with the creation of asset-specific registers (first immoveables, then moveables, specific or general) or with the creation of non-asset specific security subject to registration. The move to a single register for all forms of security is also reflective of this staged development.

The question here is whether it is possible to get away from using asset security or needing to embed traditional views of asset security as part of the commercial/insolvency legal framework. In other words: are there any genuine alternative strategies or models that can enable us to depart from these time-hallowed asset-security frameworks and structures? Are there any forms of cooperation outside the traditional framework that can exist between creditor and debtor that can secure funding? This may involve, *inter alia*, having to reconceptualise what property law means by “ownership”.