

SECURED TRANSACTIONS: NEW POSSIBILITIES

Law on Encumbrance of Movables, dated 2 May 2017, came into effect on 28 May 2017. According to it, creditors (obligees) are given tools for prioritising their claims in movables by making encumbrances public. To place claims into the public domain, creditors can record them in the encumbrances' register, have them into possession, acquire control of the encumbered items (such as moneys in bank accounts), and, also, use a combination of those options.

The Law deals with contractual and non-contractual (*e.g.*, seizure by court order) encumbrances on a "first-come, first-served" basis save for some exceptions. The ranking of contractual encumbrances may be altered by the security holders' agreement though.

As opposed to non-contractual encumbrances, making contractual encumbrances public is not mandatory and depends on a security provider's consent.

The register of encumbrances of movable property (the Register) will, when established, be maintained by the Financial Market Supervisory Authority (chamber) of the Republic of Azerbaijan. It would serve to record, on a fee basis, encumbrances in movable property (other than securities), including claims and rights, not registered in any of the existing official title registers (*e.g.*, an official register for vehicles with engine capacity 50 cubic centimetres and more and designed maximum speed above 50 km/h). It will be run in an electronic form only and used to record the creation of an encumbrance, changes and objections to it, and also its termination.

Contractual (consensual) encumbrances, to include, among others, pledges, leases, and liens, would be recorded by creditors (obligees or beneficiaries) subject to a consent of a security provider. This notwithstanding, encumbrances existing by the effective date of the Law can be recorded upon a notification to a security provider within nine months of the Register's launch.

The validity of the online recordings in the Register will last from the entry becoming visible to others for a period specified in the entry.

Entries made to record contractual encumbrances would have to specify, among others, the parties to a contract, detailed description of concerned property, secured obligation, and whether the security provider is a new customer or not, and, should the customer be individual, his/her gender.

Besides recordation, encumbrances can be made public by:

- taking possession of cash, jewellery, unregistered securities, warehouse certificates, bill of lading; and
- acquiring control (including, arguably, the right of direct debiting) over security provider's proceeds on bank or deposit accounts run by notaries. However, in this case, creditor's claims would be subordinated to other payments (of alimonies, taxes, bank loan repayments, *etc.*) prioritized on the basis of Sub-Section 965 of the Civil Code of the Republic of Azerbaijan.

The Law restates the possibility provided by the Civil Code to create an encumbrance over a movable item (as opposed to a bulk of movables) yet to come into ownership of its grantor.

The Law allows for the pledge (as well as other encumbrances) of movables within arguably a property complex and establishes the rules for defining the priority of such pledge *vis-à-vis* a hypothec over such complex.

The Law ensures the survival of the priority of secured creditors' claims to the movable property mixed with other movables whether or not by preserving its original state. Such claims are measured by the value the property had prior to commingling.

The priority of secured claims established pursuant to the Law (*i.e.*, by, among others, filing with the Register) survives any disposition of the concerned property. Although the Law does not assure the survival in relation to the claim not recorded in the Register, such is generally guaranteed by the Civil Code.

Pursuant to the Law, enforcement (foreclosure) can be through a sale (a public auction and otherwise) or claiming ownership of encumbered property. This, however, as well as a sale, other than by a public auction, should not be possible in relation to pledges (by virtue of the limitations imposed by the Civil Code).

Enforcement by one secured creditor would trigger higher ranked claims of other creditors who may join the enforcement processes (cross default).

Enforcement is required to be notified to an obligor or, if different, a security provider and, if any, other known secured creditors no later than seven business days before the sale. During that period, the security provider would have the right of first refusal for acquiring the property on sale. The sale is required to be for an adequate price. Should the property be sold for a price below adequate (reasonable) price, the creditor could be held liable for damages caused by such sale to the security provider, other secured creditors, and persons having rights in such property.

Within five business days of completion of the sale, the enforcing creditor must notify the security provider and obligor of the allocation of the sale proceeds and, within ten business days thereof, pay the balance, if any, to the obligor (security provider). A failure to do so would make the failing creditor liable for damages caused by the failure to the security provider.

Should the sale proceeds be insufficient to pay the secured claim, a foreclosure upon other property of an obligor would be possible subject to a parties' agreement on this, but without attaching priority to the creditor's residual claim.

LIST OF OFFSHORE "TAX HAVENS" APPROVED

Following amendments to the Tax Code effective January 2017, the President of the Republic approved on 11 July the list of low-tax foreign jurisdictions (and territories), *i.e.*, those "where the tax rate is at least twice lower than the rate established by [the] Tax Code and with law protecting confidentiality of information of companies able to protect secrecy of their financial data or [beneficial owners]". Payments to persons of such jurisdictions will be considered sourced from Azerbaijan, transactions with such persons will be valued for taxation based on transfer prices, and income of an Azerbaijani tax resident from holding directly or indirectly more than 20 per cent of the charter (equity) capital of or more than 20 per cent of the voting powers in a non-resident deriving income in such jurisdiction will be taxable in Azerbaijan.

The list includes the following 40 jurisdictions: Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Dominica, Gibraltar, Grenada, Guernsey, Hong Kong (China), Isle of Man, Jersey, Liberia, Lichtenstein, Macao (China), Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Palau, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Turks and Caicos Islands, Vanuatu, and US Virgin Islands.

The list is effective during 2017 and, subsequently, will be updated annually.

**PLEASE CONTACT US FOR ANY QUESTIONS AND FURTHER
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