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Main elements of a creditor protection system: Key recommendations

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Main elements of a creditor protection system: Key recommendations

Executive Summary

Ukraine is currently in the midst of a serious banking crisis, already the second since 2008/2009. While the reasons for the current crisis are multiple, the lack of a well-designed creditor protection system contributed to the observable increase of non-performing loans, which is a burden for the eventual recovery of the Ukrainian economy.

There is wide empirical support to the fact that high confidence on the side of the creditor about the ability of legal institutions to give effect to creditor’s claims support credit markets to operate efficiently. This means ultimately higher bank lending volumes, better access to external finance, and improved loan characteristics (increased loan sizes, lower interest rates and longer loan maturities).

What elements guide the design of a creditor protection system? In the following analysis, we concentrate on secured lending. Best international practice suggests that a legal framework is needed that clarifies the scope of assets to which it can be applied, how secured assets could be created and recognised (e.g. through a registry) and how they could be enforced. In principle, the framework could refer to all kinds of assets, including movables (like cars) or immovables (like real estate), tangibles (like inventories) or intangibles (like receivables). The complete, accurate, quick, transparent and cost-efficient registration of pledges and mortgages is a fundamental issue in sophisticated secured lending transactions.

However, the best law is worthless if the enforcement process is time consuming, costly and the outcome is uncertain. Amongst the problems that typically arise are protracted court procedures, problems of endorsing bank enforcement titles, a low effectiveness of bailiff’s work and overly formalised enforcement procedures, to name just a few. While there is no one-size-fits-all solution for enforcement, some general lessons can be drawn, which emphasise that both parties should be free to decide about the method of realisation of enforcement, opening the way for out-of-court realisation.

Turning to Ukraine, the main economic objective of the reform of the creditor protection system must consist in a reduction in the cost of credit, thereby increasing its availability. Current initiatives to reduce the number of property-related registries (there are 36 of them in total) are welcome, even though for secured lending purposes, only 3 registers are relevant: the register of companies; the unified state register of immovable property rights and the state register of encumbrances over movables. Regarding the (new) state register of immovable property rights, efforts should be made to retrieve older data, which currently cannot be accessed. Also in terms of on-line access, which is possible, some improvements can be made in the search parameters, which would improve its user-friendliness. Regarding the state register of immovable property, which is the only register with no-online access, offering the latter should be considered. The latest version of the bankruptcy law is a significant step forward, but certain problems for banks with insufficient collateral remain, and should be tackled as currently planned. For an efficient out-of-court realisation, relevant procedures for the sale of pledged/mortgaged assets should be developed. Finally, further efforts should be made to renovate the mortgage law, and remove outdated or unnecessary constraints. The inclusion of provisions that facilitate the registration/transfer/mortgaging of incomplete construction to a new owner is a good step in this regard.

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1. Introduction

The protection of creditor rights is a subject of high complexity given that the degree of creditor protection depends on the law itself, the ability to enforce the law, institutional and cultural arrangements, the economic and legal context, and transparency, among other things.

While Ukraine is relatively advanced with respect to its creditor rights system in comparison to the post-Soviet space, and (partly) also to other transition economies, the level of creditor protection is generally very low, as shown in the relevant “Doing business” indicator of the World Bank. Out of 189 countries, Ukraine is on place 59 with respect to the criteria of registering property, and on place 43 with respect to enforcing contracts. However, resolving insolvency is obviously an even deeper problem, given that Ukraine ranks at a very low position of 142.

Ukraine’s second banking crisis within the last five years (the first being taking place in 2008/2009) is – this is a fundamental thesis of this paper – partly related to the lack of a well-designed creditor protection system, contributing to the explosive increase of non-performing loans during the crisis. The legacy of non-performing loans is a burden for the eventual recovery of the Ukrainian economy. Thus, not only the cleaning up of balance sheets, but also an integrated approach to reform the creditor rights system would be a badly needed structural change to contribute to an environment where a stable and efficient banking sector supports sustainable economic growth. We consider progress in the area of secured loans to be the most feasible and to have the highest impact on the development of a stable credit and banking sector. Therefore, creditor protection in the area of secured loans will take the center stage in this paper.

The World Bank has developed in 2001 principles for effective insolvency rights systems, based on international experience including a system of secured transactions. These principles have been updated in 2011. The EBRD has also devoted great attention on the subject of secured transactions, especially for transition economies. The present paper relies on this work, but considers also other empirical work and a number of theoretical papers.

The paper is structured as follows: First, the basic idea of the economic significance of creditor protection will be explained and substantiated by a short review of empirical studies. Then the paper will summarize the best practice standards with respect to the main scope of the law on mortgages and pledges, dig deeper into the problems of registration systems and look at the conditions which should be fulfilled by an efficient enforcement system. Based on these insights, some recommendations are formulated for Ukraine.

2. Economic impact of a well-designed creditor protection system

If there is a lack of confidence on the side of the creditor about the ability of legal institutions to give effect to creditor’s claims, then it becomes difficult for the credit market to operate efficiently. This means higher interest rates, shorter loan maturities or simply no credit at all.

This connection between the efficiency of the judicial system in terms of creditor protection has been clearly shown in various empirical studies. These studies focus on different economic effects of creditor protection:

- **Volume of bank lending:** Various works have shown that different levels of judicial protection of creditor rights can be associated with different volumes of bank lending. This means, the higher creditor’s protection, the higher the bank lending volume. (See for example Bianco et al. (2001) or Castelar et al. (2001)).

- **Access to external finance:** In various cross-section analyses it has been shown that better creditor rights protection improves the access to external finance. (See for example La Porta et al. (1997) or Galindo (2001)).
• **Improved loan characteristics**: Better enforceability of contracts increases loan size, lengthens loan maturity and reduces loan spreads, according to a cross-country study involving 48 countries. The average loan amount increases by USD 57 m in the hypothetical case that the borrower moved from the country with the weakest protection of property rights to the country with the strongest protection of property rights. The loan maturity increases by 2.5 years, and spreads decline by 41 basis points (see Bae and Goyal (2007)).

The economic impact of judicial efficiency can be illustrated with the following chart, which relates the level of judicial efficiency to bank interest rate spreads based on the work of Laeven and Majnoni (2004).

**Figure 1**

Relationship between bank interest rate spread and judicial efficiency

![Chart showing the relationship between bank interest rate spread and judicial efficiency](image)

*Source: Own estimates based on the data collected by Laeven and Majnoni (2004), which are for the year 2000. The relationship shown is based on a non-linear regression.*

*Note: The bank interest spread is the difference between the average lending rate and the deposit rate. Judicial efficiency is an index ranging from 1 to 5, with a high score indicating more judicial efficiency.*

**3. Best practice design of a creditor protection system**

A sound credit relationship relies on transparency, accountability and predictability. These criteria should guide the design of a creditor protection system. The legal framework for secured and for unsecured lending must be designed jointly with the insolvency law. An example for this need is that the seizure of a secured asset may interrupt the whole production process of a company, leading to insolvency or complicating the insolvency process already under way. On the other hand, if the provision of secured assets cannot be enforced in an adequate time frame, the banking system will be much more reserved about financing corporates or do it only at much higher interest rates.

There is a connection between the complexity of the collateral and the complexity of the required laws and the legal system required to enforce the collateral. The simpler the collateral (for example silver and gold which is common collateral for personal loans in Asia) the simpler it is to formulate a law to get the collateral delivered in case needed. On the other hand, the judicial system will need to be much more sophisticated in the case of complex assets like receivables or receipts of licences. In these cases, a distinction between property rights and the certainty of contractual enforcement, derived from the prevailing legal and institutional framework is required.
The legal framework for unsecured debt should be supported by mechanisms that provide efficient, transparent and reliable methods for recovering debt (enforcement). This does include seizure and sale of immovable and movable assets and sale or collection of intangible assets.

In contrast to secured lending, unsecured debt is not pledged to any explicit asset but to all assets which are not pledged in the context of other loan contracts. This chapter will concentrate on secured lending. Unsecured lending is out of the scope of this analysis.

a. Legal framework for secured lending

The legal framework for secured lending should make clear the scope of assets to which the law can be applied, how secured assets could be created and recognised (e.g. through a registry) and how they could be enforced (if needed with the help of a court). In principle the framework could refer to all kinds of assets, including movables (like cars) or immovables (like real estate), tangibles (like inventories) or intangibles (like receivables). As movables are treated in some ways differently than real estate assets (including land) there will be made a distinction between these asset classes.

b. Scope of assets to which the laws should be applied

The mortgage law should apply to immovable property. More concretely it should refer to land parcels and the objects located thereon and inseparably linked to it. The legal regime of immovable property may cover also aircrafts, seagoing craft, riverboats and spacecraft, as is the case in the Law on mortgage of Ukraine.

A secured transactions law should apply to all rights in movable assets created by agreement that secure payment or other performance of an obligation, regardless of the form of the transaction, the type of the movable asset, the status of the grantor or secured creditor or the nature of the secured obligation. More details about the scope of this law are provided in the following box, which summarizes recommendations by the United Nations Commission on International Trade Law (UNCITRAL).

Box 1

**UNCITRAL's Recommendations for the Scope of a Secured Transactions Law (movable assets)**

The law should apply to:

(a) Security rights in all types of movable asset, tangible or intangible, present or future, including inventory, equipment and other tangible assets, contractual and non-contractual receivables, contractual non-monetary claims, negotiable instruments, negotiable documents, rights to payment of funds credited to a bank account, rights to receive the proceeds under an independent undertaking and intellectual property;

(b) Security rights created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection legislation;

(c) Security rights securing all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way; and

(d) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.
The law should not apply to:
(a) Aircraft, railway rolling stock, space objects, ships, as well as other categories of mobile equipment in so far as such asset is covered by a national law or an international agreement to which the State enacting legislation based on these recommendations (herein referred to as “the State” or “this State”) is a party and the matters covered by this law are addressed in that national law or international agreement;
(b) Intellectual property in so far as the provisions of the law is inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property;
(c) Securities;
(d) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions; and
(e) Payment rights arising under or from foreign exchange transactions.
The law should not apply to immovable property except insofar as its application to fixtures may affect rights in the immovable property to which a fixture may be affixed.
Source: UNCITRAL’s Legislative Guide on Secured Transactions

c. Pledge and mortgage registration

The registry takes centre stage in more sophisticated secured lending, e.g. mortgage lending or lending against movables. The International Finance Corporation has developed a list of best practice designed especially for movables. However, most points can also be applied to mortgages.

Pledge registration best practice

1. Centralisation: There should be only one database in which information is captured and from which information may be retrieved. The registry should apply to as many categories of movables as possible. It should include all forms of non-possessory legal interests in all types of movable property wherever located within the jurisdiction in one database. If there are existing registries of special property that already work efficiently, it should be thought about an exception of the rule, as it may be unproductive to abolish them in favour of a newly to be established registry.

Rationale: In a decentralised system it is comparatively more time consuming and costly to get reliable information about the assets pledged, i.e. transaction costs increase.

2. Limited purpose: Registration should serve only the legitimate purposes of registration which is i) to give notice that a security interest may exist in the collateral and ii) to provide evidence for the secured party's priority of the collateral.

Rationale: In many countries there is a misconception about the rationale of a pledge register. Traditionally public registers are seen as sources of verified and guaranteed information. However, pledge registers simply serve to publicise data as provided by the parties. Thus, there is no need to let a court verify the existence of the asset. In the case of a mortgage registry, the issue is somewhat more comprehensive, as will be explained below.

3. Rule-based decision making: Acceptance and rejection standards for registration must be concrete, specific and limited. Reasons for rejection must be objective without discretionary judgements.

Rationale: A pledge register has to meet the practical and economic needs of the secured credit market. Thus, the registration process has to be fast and calculable.

4. Accuracy: The registry should be designed in a way to eliminate as best as possible the possibility of data entry error by registry staff. This may be avoided by doing registration online.
Rationale: Obviously, the basic information documented in the registry should be reliable. Otherwise, it would be useless.

5. Speed of registration and information: The registry system should be able to confirm the registration of an asset as fast as possible (ideally immediately after registration in the case of online registration). This information should also be available to any lender.

Rationale: In some countries, the process of registration takes more than a week, in others only a few minutes. Today's technology of online registration enables a quick registration process without violating the other principles of a good registry system.

6. Simplicity and cost effectiveness: The registry technology system should be designed in a simple way, enabling also non-sophisticated users to get the registration done without disproportionate effort. In this context costs should be minimized, for example by requiring online registration as standard.

Rationale: It is important that not only big companies but also small to medium companies, which are especially relying on the banking sector, are enabled to register pledges in a simple and cost efficient way.

7. Add-only: The registry should only permit documents to be added to the record, but never removed.

Rationale: The rationale behind this is that fraudulent termination of a security interest is more difficult to hide.

8. Security: Information must be secure against all types of threats like electronic tampering, human-caused disaster of physical damage done to the registry security.

Rationale: Confidence in the security of the pledge registry is essential for lenders and borrowers alike.

Mortgage registration best practice

The points mentioned above can almost all be equally applied to mortgage registration. However, point 2 from above cannot be applied. Point 2 says that you need only a notice system for a pledge. Instead, when a mortgage is registered it is more than just a notice by the parties that they have entered into a mortgage. Rather, it represents confirmation that a mortgage exists and it is a function of the long register that third parties can rely on its contents. Thus, registration of a mortgage requires greater verification. Having said that, registering a mortgage should be as fast as possible within these constraints.

d. Enforcement of pledge and mortgage

The best law is worthless if the enforcement process is time consuming, too costly and the outcome is uncertain. Amongst the problems that typically arise are the following:

- Protracted court procedures
- Problems of endorsing bank enforcement titles
- Low effectiveness of bailiff's work
- Overly formalised enforcement procedures
- High court and enforcement costs

Enforcement best practice

There is no “one-size-fits-all” solution for enforcement. Each country has to adapt a system which is best suited to its own context and traditions. However, the objective of the creditor when enforcement has to be applied is always the same: To recover out of the pledged/mortgaged assets as much as possible, as fast as possible and as simple as possible. This is nothing else than putting into effect the agreement of both parties, the creditor and the borrower which has led to the borrower to receive better loan terms or a loan at all.

Thus, a few general features can be stated, based on the experience of an EBRD study.
1. **Freedom about the method of realisation on enforcement**: There is no need to prescribe that a court must realise the enforcement. Instead, there has been an increasing trend to allow the parties to agree to out-of-court realisation. This could happen to allow the creditor to lead the realisation process in a commercial and fair manner. Another possibility is to grant private parties (like public notaries, credit institutions, collection agencies) the right to do the enforcement.

**Rationale**: The aim is to achieve a sale of the pledged or mortgaged assets in a manner which increases the likelihood of a realisation of the market value.

2. **Protection of assets**: The creditor needs to be sure that the pledged or mortgaged assets will be protected from the moment enforcement begins. This is especially relevant in the case where the debtor is allowed to keep possession of the pledged assets, which is usually the norm.

**Rationale**: If the assets are not protected, the creditor would face possibly the problem of deterioration or the disappearance of the asset or won't be able to deliver the assets on sale.

3. **Protection against abusive action**: Both debtor and creditor need to be assured of protection against abusive action by the other. The creditor must not enforce without regard to his contractual obligations and his legal duties. The debtor should be prevented from taking actions which only serve the goal to delay the enforcement process and to frustrate legitimate proceedings.

**Rationale**: In extreme cases, such delays could cause assets to become worthless.

4. **Role of the courts still important**: While out-of-the-court enforcement is the most efficient way to enforce pledged or mortgaged assets, courts should be able (if requested) to give the parties assistance. For example this could refer to on particular aspect of the procedure, which would then be solved by the court, after which the out-of-the-court procedure would be resumed.

**Rationale**: There must be a kind of back-stop institutions for out-of-the-court enforcement to work efficiently.

4. **Recommendations**

As a general recommendation, the reform of the current system should be primarily driven by the economic objective of reducing the cost and thereby increasing the availability of credit. Any implementation of the recommendations of this report should be assessed against economic benchmarks.

1. We generally support the current initiative by the Ministry of Justice to reduce the immense amount of property and property-rights related registers from the current 36 registers down to 4. This will increase transparency and thus lower transaction costs. For secured lending purposes, 3 particular registers are relevant (i) the **register of companies** (also available online); (ii) **unified state register of immovable property rights** (on-line access is available); (iii) **state register of encumbrances over movables** (no on-line access). State land cadastre continues to exist but is less relevant in terms of secured lending.

2. The new **unified state register of immovable property rights**, which has the function to be the ultimate basis to check property rights and encumbrances, is still incomplete, as older data can only partially be retrieved. The new register allows retrieving the information from the old register of titles (also on-line), register of mortgages and register of prohibition on alienation of real estate. Those data that cannot be retrieved are (i) titles to land plots registered before 2013; (ii) those titles that have not been registered in digital registers, but rather kept purely in paper form hard copies - unfortunately this is still rather common. While this is not a problem for bank enforcement, as having all proper registrations is a prerequisite for loan issuance, it may ease the issuance of loans.
3. The processes for registration of mortgages and for accessing information in the mortgage registers should be made simple, fast and inexpensive. With effect from January 2015, information from the unified real estate register can be publicly accessed on-line. There are still minor shortcomings in this access (like search parameters, which is only the address of the real estate object, but not its register number or cadastral number of the land plot). The Ministry of Justice promised to cooperate closely towards elimination of these shortcomings.

4. The centralised state register of encumbrances over movables is already established; records are made under a pure “notice” system and banks have access to the system. An idea would be to create an on-line access to the state register of encumbrances over movables - in fact this is the only register, which still cannot be retrieved on-line by the public.

5. To improve the system of state registers further, a number of more technical changes should be pursued:
   - Software for real estate register should be changed in a way to render any deletion of the title registration record impossible.
   - Cross-referring of the information about title to buildings and underlying land plots is still not performed in the register or performed occasionally.
   - Identical, clear instructions to state registrars are necessary: Which documents are required to enforce on the collateral and register the title in name of the mortgagee (requirements of the registrars vary case to case);
   - Instructions to state registrars are also needed on which documents are necessary to terminate the mortgage and lift the encumbrance;
   - All records in state register of state register of encumbrances over movables automatically vaporize from the register after 5 years unless the mortgagee re-confirms them. Many banks forget monitoring this deadline. The legal limitation of 5 years does not appear reasonable to us, and should be prolonged.

6. The bankruptcy law from 2013 seems to be a significant improvement versus the previous one, but is still in need of further improvements. Banking associations complain about adverse court precedents, where banks agreed to issue loans on inadequate collateral and then had difficulties in participating in bankruptcy procedures on the unsecured claims. Even though the new law reduced the role of secured creditors in bankruptcy decision-making, banks should have been able to participate as unsecured creditors if security is insufficient. We support current plans by the Ministry of Justice to consider revisions to the law.

7. A simple, fast and cost-efficient procedure for an out-of-court sale of pledged and mortgaged assets should be introduced. This process should happen under the control of the secured creditor and aim at the rapid realisation at market value in a manner which is fair for the creditor and the debtor alike.

8. The rules and procedures for court involvement on enforcement of pledges and mortgages should be revised to ensure that the courts will provide practical and timely assistance or protection if needed by either party during out-of-court enforcement.

9. The mortgage law should be reviewed to remove unnecessary or out-of-date restrictions and constraints, and to make mortgage an attractive and flexible instrument of security which gives maximum economic benefit to borrower and lender. In this context, we welcome the fact that the law now has sufficient provisions to facilitate the registration /transfer/mortgaging of incomplete construction projects to a new owner, if necessary.
Annex

Figure 2

Enforcement of charged assets, international comparison (EBRD)

Source: EBRD Legal Indicators Survey, 2003

Note: Data for Tajikistan were not available. Data for Serbia and Montenegro include the Republic of Serbia only. Data for Montenegro and Kosovo were not available. Ratings for each dimension range from 0 (worst) to 10 (best).
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