

SURVEY on the Application of Title Transfer Collateral Agreement in Securities Markets

(Legal Task Force, ACG, 2013)

NOTE:

The objective of this survey is to collect background materials for the research theme on the Application of Title Transfer Collateral Agreement in Securities Markets. SD&C serves as the coordinator of this theme.

Considering some ACG members function as CSD only, and thus do not deal with problems on participants' insolvency, please distinguish the function of each member (solely CSD, solely CCP or both CSD and CCP). For some solely-CSD members, you could answer the related questions you are interested in by inquiring the CCP(s) of your home markets, or skip all these questions.

In this survey, "security collateral agreement" means an agreement between a collateral provider and a collateral taker providing (in whatever terms) for the grant of an interest other than full ownership in intermediated securities for the purpose of securing the performance of relevant obligations; "title transfer collateral agreement" means an agreement, including an agreement providing for the sale and repurchase of securities, between a collateral provider and a collateral taker providing (in whatever terms) for the transfer of full ownership of intermediated securities by the collateral provider to the collateral taker for the purpose of securing or otherwise covering the performance of relevant obligations.

The term "Collateral Provider" in this survey is used to refer to the party that is required, pursuant to the terms of the applicable credit support arrangement, to provide collateral in respect of its obligations. It is therefore used to refer to the transferor of collateral (under a title transfer collateral) or the party granting a security interest in collateral (under a security interest collateral). Similarly, the term "Collateral Taker" is used to refer to the other party, i.e. the party that is the transferee of collateral or the secured party.

Organization Name:

Contact person and title:

Telephone:

Fax:

E-mail:

Function: (solely CSD, solely CCP or both CSD and CCP)

I - LEGAL FOUNDATIONS

1. Legal basis

-Describe the legal framework for collateral arrangements briefly.

-Please list the title of laws, regulations and rules governing operations of collateral arrangements.

-How many structures and permutations which may be used as collateral arrangements are there in your market?

-“Security interest” (means any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security) may include:

- (a) a pledge;
- (b) a mortgage;
- (c) a fixed charge;
- (d) a floating charge; or
- (e) a lien.

Please give your applicable types of consensual security interests.

-Is it required that the arrangements will be evidenced in writing or in a legally equivalent manner?

-Is it required that formalities such as registration, notification, filing and similar requirements are the essential elements for a collateral arrangement to take effect?

2. Agreement

-Is the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement dependent on the performance of any formal act?

-Please list the main contents of agreement.

-Briefly describe the rights and duties of the collateral taker and the collateral provider.

<p>-Please list types of qualified collateral assets.</p> <p>-Does the collateral arrangement be protected from the rights of third parties</p>	
<p>3.Evaluate laws, regulations and rules</p> <p>-Are there any cumbersome or impractical rules hampering implementation of collateral arrangements?</p> <p>-Are there any cumbersome or impractical rules hampering enforcement of collateral arrangements?</p> <p>-Are there any legal restrictions on the use of collateral by the secured party?</p>	
<p>4.Other issues affecting collateral arrangements</p> <p>-Please summarize factors other than the legal framework affecting the efficiency and effectiveness of collateral arrangements.</p>	

II - OPERATIONAL MECHANICS: KEY ISSUES

<p>1.Financial assets as collateral</p> <p>-Please describe types of financial assets used as collateral.</p>	
<p>2.Possession and control</p> <p>-Are the assets required “in the possession or under the control of the collateral-taker or a person acting on its behalf” pursuant to your rules or agreements? If so, please list the provisions.</p>	

<p>3. Delivery of collateral</p> <p>-How to deliver the securities or cash by a party to another in your collateral arrangements? either:</p> <p>(a) subject to a pledge or other security interest (referred to as "pledge collateral" in this paper); or</p> <p>(b) by outright sale, for example, in the case of a repo transaction, or by deposit, in the case of cash collateral (referred to as "title transfer collateral" in this paper).</p>	
<p>4. Holding patterns of collateral</p> <p>-Do most financial institutions hold collateral in the form of securities in fungible form? If not, please specify the other forms.</p>	
<p>5. Fully entitled collateral</p> <p>-Must the collateral giver be fully entitled to the value of the collateral given under the arrangement? If yes, please give the terms of the arrangement.</p>	
<p>6. Shortfall or surplus of collateral</p> <p>-Please describe the arrangement where there is a shortfall or a surplus of collateral.</p> <p>-Please introduce mark-to-market collateral arrangements in your markets.</p>	
<p>7. Freedom to deal collateral (right of use)</p> <p>-Freedom to deal collateral would include the freedom to sell, lend or repo the securities or to re-pledge (rehypothecate) them to a third party, always subject to an obligation to return equivalent fungible securities to the collateral provider assuming that it performs its obligations in full. Please mention your circumstances about freedom to deal collateral.</p>	

<p>8. The transferor's claim</p> <p>-What kind of claim the transferor will have against the transferee? (a mere contractual claim, or the other. please specify)</p> <p>- Could the transferor be an unsecured creditor for the value of the collateral in the event of the transferee's insolvency?</p> <p>-Could the collateral provider (the pledgor) be able to redeem its securities from the estate of the pledge, in the event of the insolvency of a taker of pledge collateral (a pledgee)?</p>	
<p>9. Relevant financial obligations</p> <p>"Relevant financial obligations" means the obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments.</p> <p>Relevant financial obligations may consist of or include:</p> <ul style="list-style-type: none"> (a) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement); (b) obligations owed to the collateral taker by a person other than the collateral provider; or (c) obligations of a specified class or kind arising from time to time. <p>Please mention your circumstances.</p>	
<p>10. Enforcement event</p> <p>"Enforcement event" means an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realize or appropriate financial collateral or a close-out netting provision comes into effect;</p> <p>Please describe the applicable enforcement event pursuant your rules and agreements.</p>	

III - TITLE TRANSFER COLLATERAL ARRANGEMENTS

<p>1. Title transfer collateral</p> <p>-Does the law in your market permit a title transfer collateral agreement to take effect in accordance with its terms? If so, please specify.</p>	
<p>2. Priority</p> <p>-Please explain how to protect title transfer collateral arrangements from an action by a third party, such as an assignee or attaching creditor, seeking to take the collateral in priority to the collateral taker.</p>	
<p>3. Legal and beneficial ownership</p> <p>-What kind of interest is required to be transferred: legal (if applicable) and beneficial ownership, full ownership, or full entitlement? Please specify.</p>	
<p>4. Legal risk</p> <p>-Would the title transfer collateral be recharacterised as pledge collateral because its purpose is similar to the purpose of pledge collateral in your jurisdiction?</p>	
<p>5. Close-out netting provision</p> <p>-Does the collateral agreement, or of a set of connected agreements have “close-out netting provision”?</p> <p>-How to define a close-out netting: contractual or statutory arrangements, or both?</p> <p>-Please list enforcement events of a close-out netting provision.</p> <p>-Please describe acceleration of obligations in a close-out netting provision.</p> <p>-Please specify other requirements for close-out netting provisions to take Effect.</p> <p>-Would a close-out netting provision give way to the application of these insolvency rules? If so, please explain.</p>	

IV - THE ADVANTAGES AND DISADVANTAGES

1. The two principal approaches to the establishment of collateral

-Please compare the two principal approaches to the establishment of collateral, in aspect of:

- (a) use of collateral assets and legal restrictions;
- (b) negative pledge – where the provider is prohibited from creating security over any of its assets;
- (c) formalities – additional requirements in order to be enforceable against third parties (forms of registration or notification requirement);
- (d) limits on enforcement of security;
- (e) realization of collateral;
- (f) tax;
- (g) regulatory issues;
- (h) who is entitled to the investment return;
- (i) others.

V - OTHER LEGAL CONCERNS

1. Certain insolvency provisions

-Are there certain insolvency provisions that would inhibit the enforcement of security interests and title transfer collateral?

-Do you have “zero hour” rules or something like these rules in your jurisdiction? If yes, please explain whether or not collateral arrangements would be subject to those rules.

VI - Conclusion and legal advice

1. Advice for statutory law

-Please list and comment on any other issues related to a legal framework essential for sound and secured operations of collateral arrangement that you believe to be important but not yet covered by this questionnaire.

2.Advice for legal environment	
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-Please give your comments on a clear, practical legal regime for collateral, as well as a high degree of practical harmonization across jurisdictions.	
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