

DIFFERENCES BETWEEN COMMON LAW AND QUEBEC CIVIL CODE AS IT APPLIES TO COMMERCIAL CREDIT

NACM – Canada's 14th Annual Credit Conference

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Options available to all creditors, whether secured or unsecured

- Threaten to sue
 - Collection / demand letter
- File lawsuit
 - Legal hypothec / execution
 - Writ of seizure / injunction – Mareva, Anton Piller
- Petition the debtor in bankruptcy
- Invoke the rights of unpaid supplier, where applicable (article 81.1(1) BIA)

Improve your position

- With the aforementioned options:
 - Possibility of never receiving payment
 - Long delays
- What should be done to prevent a loss:
 - Negotiate good terms and conditions
 - Obtain valid security

Why be secured

- Secured creditors rank in priority to unsecured creditors in a bankruptcy
- Secured creditors can repossess and sell their collateral
- Secured creditors get notice if other secured creditors enforce their own security (for Québec : need to file Notice of Address)

What types of security are available

- In Québec:
 - Hypothec
 - Suretyship / personal or corporate guarantee
 - Reservation of ownership (instalment sales)
 - Leasing (as vendor)

What types of security are available

- In Ontario:
 - Purchase Money Security Interest
 - Security Agreement – General or Specific
 - Capital / Financing Lease
 - Personal or corporate guarantee
- In both provinces:
 - Registration of leases

Review of the various types of security available

Hypothecs (Québec)

- Hypothecs (Québec)
 - A hypothec is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosoever hands it may be (article 2660 *Civil Code of Quebec* (“C.C.Q.”)).
 - Advantages:
 - To take possession of it or to take it in payment
 - To sell it or cause it to be sold
 - To have a preference upon the proceeds of the sale

Hypothecs (Québec)

- If your purchaser or guarantor is the owner of an immovable, it must be granted by notarial act *en minute* (2693 C.C.Q.)
- Movable hypothecs must be granted in writing (2696 C.C.Q.) and most sufficiently describe the property or the nature of the universality of property (2697 C.C.Q.)

Security Interest (Ontario)

- PPSA applies to “every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest...”
- Security interest is defined in the PPSA as “an interest in personal property that secures payment or performance of an obligation...”
- Transfers of account or chattel paper
- A lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation (introduced in 2007)

Requirements

- Attachment
 - Value given
 - Debtor has rights
 - Security agreement or possession
- Perfection
 - Possession
 - Registration

Review of the various types of security available

Ontario

- Any agreement where an interest in personal property is given to secure payment or performance of an obligation but typically:
 - General Security Agreement
 - Specific Security Agreement
 - Conditional Sales Agreement
 - Leases
 - Bill of Sale with title retention clause

Suretyship (Personal or Corporate Guarantee)

- **Definition:** Suretyship is a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfil it (art. 2333 C.C.Q.)

Reservation of Ownership (Instalment Sales)

- **Definition:** An instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price (art. 1745 C.C.Q.)

Important (Instalment Sale)

- Must be registered within 15 days of the sale.
Assignment of such right must also be registered
- If creditor chooses to take back the property, it must do it by respecting the rules regarding the exercise of hypothecary rights (art. 1749 C.C.Q.)

Leasing

- **Definition:** Leasing is a contract by which a person, the lessor, puts movable property at the disposal of another person, the lessee, for a fixed term and in return for payment.
The lessor acquires the property that is the subject of the leasing from a third person, at the demand and in accordance with the instructions of the lessee.
Leasing may be entered into for business purposes only (art. 1842 C.C.Q.)

Other rights

- Sales with right of redemption (vente avec faculté de rachat) (1750 C.C.Q.): a sale with a right of redemption is a sale under a resolutive condition by which the seller transfers ownership of property to the buyer while reserving the right to redeem it.
 - must be published and has effect against 3rd parties from the date of sale provided the right is published within 15 days.
- Right of retention (1592 C.C.Q.): A party who, with the consent of the other party, has detention of property belonging to the latter has a right to retain it pending full payment of his claim against him, if the claim is exigible and is directly related to the property of which he has detention.
- Consignment sale (Ontario)

Lease

- **Definition:** Lease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of a movable or immovable property for a certain time. The term of a lease is fixed or indeterminate.

Leases

- In Quebec, there is no category of leases identified as capital or financing leases
- Specific rules exist for leases of dwelling
- Rights resulting from a lease can be published. Publication is required however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable determined by regulation, or any movable property required for the service or operation of an enterprise.
- The opposability of these rights operates from the date of the lease if they are registered within fifteen days.

Before taking security, remember to:

- Proceed with a search at the RPMRR (Québec) or the PPSA (Ontario)
- Assess rank of other secured creditors
- Obtain assignment of rank (Québec) / priority and standstill agreement (Ontario)
- Register your rights at the appropriate registry

Priorities

- If registered – the order of registration
- If registered and possession – the order of perfection (Ontario)
- If unperfected – the order of the attachment (Ontario)
- PMSI's – security interest to secure payment or financing of purchase or lease

Registering

- Financing Statement – Form 1C (Ontario)
- Financing Change Statement (Ontario)
 - Transfers of collateral
 - Name changes
 - Correct mistakes
 - Partial discharges
- RPMRR: different form for each rights to be registered
 - Modification of a published right

Where to file – jurisdiction (Ontario)

- Debtor's location – place of business or chief executive office
 - Either – place of business or
 - Chief executive office
- Amendments have been made but not proclaimed in force:
 - Corporations, limited partnerships and other entities where public disclosure is required – the province or territory where the disclosure takes place
 - Individuals – personal residence
 - Partnerships – governing law of the partnership agreement

Where to file (Québec)

- For a movable asset:
 - RPMRR (Register of Personal and Movable Real Rights)
- For an immovable asset (including rent)
 - Land Registry located in the registration division where the immovable is acquired

Where to file (Ontario)

- For Personal Property
 - Personal Property Registration Branch of the Ministry of Consumer and Business Services
- For Land
 - Land Registry Office (on line) for the registry division where the land is located

Reminders

- Important: the terms and conditions of the contract as well as the terms of the security must comply with the *Consumer Protection Act* (Québec), if the debtor is a consumer
- It is important to obtain the legal name and name(s) of business of the debtor prior to registration