



Enforcement of security interest: Azerbaijan and US

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Abstract

This paper examines legislation of secured transaction of Azerbaijan on enforcement in personal property through the comparative analyze with UCC article 9-the most comprehensive and successful piece of legislation nowadays. The main purpose of the work is to build efficient secured transactions law in Azerbaijan-country with transition economy and legal system; as result it will bring flow of capital. It starts from evolution of secured transactions in both countries and then gives a review of remedies available after default of the debtor in each of the countries. As a result of this work it becomes clear what deficiencies in the law impede enforcement mechanism in secured transactions law of Azerbaijan. The amendments and proposals which is made to the current secured transactions law of Azerbaijan in this research paper is taken from the US experience on this field of law.

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Introduction

Nowadays the trend over improvement of legislation on Secured Transactions for countries with transition economy is playing vital role such as for countries of Post Soviet union which only 15 years ago took steps towards market economy. For growth of their economy those countries needs attraction of local and international investors in business sphere. Legal framework of secured transaction is a key issue in creation of investor friendly atmosphere. In developed secured transaction law environment the investor assures its legal enforcement abilities with debtor and at the same time the debtor can use all personal type of its property for getting credit faster and cheaper. On the contrary, with poor secured transaction law environment investors are unwilling to lend credit as the risk of enforcement security is high and not all type of personal property of debtor is available as security for credit, the credit becoming costly in time and in price which as a result leads to undercapitalization of market economy.

One of the Post Soviet countries which currently facing emerging market economy and transition legal system especially in sphere of Secured Transaction is Azerbaijan. Even though Azerbaijan has already took steps for creation Secured Transaction Law by adopting Law on Pledge in 1998, Civil Code in 2001 and Law on Mortgage in 2005, it is still among countries which falls to deficient reform in the sphere of Secured Transaction Law according to EBRD survey in 2003¹. Since in 1992 European Bank of Reconstruction and Development (here and after EBRD) has provided policy advice and technical assistance for legal reforms which foster secured transaction for Azerbaijan along with other countries of Post Soviet Union and CEE.

¹ The EBRD regional survey provides on overview of progress in legal reforms and their implementation, measured against best international practice. For further information See www.ebrd.org

The main purpose of my research is to evaluate the existing Azerbaijan secured transaction legislation on enforcement of security interest in personal property through comparative study with US enforcement mechanism, analyze its deficiency and propose reforms for creation better legal enforcement mechanism for secured transaction which as result leads economy of the country towards prosperity.

Not randomly a concept from Article 9 of UCC on enforcement of security interest in personal property of the US has been chosen for comparative study with enforcement mechanism of security interest in Azerbaijan. UCC article 9-the most successful secured transactions pattern, which meets potential legal demands of modern business in market economy, have been elaborated by drafters in developed market economy country and was tested successfully in state as well as in international practice. Enactment of UCC article 9 was inspiration of making reforms in Canadian secured transaction law and even Canadian civil law jurisdiction-Quebec-was forced to effectuate related reforms.² At the same time UCC Article 9 was the single biggest influence on the Model Law of the EBRD³ which shows that it started its expansion also among civil law families.⁴ Unique UCC article 9 product- self-help on enforcement of security interest in US which be discussed in detail further in this research paper was also exported to Model Law of the EBRD where enforcement in the first instance relies on self-help.⁵ Thus UCC article 9 model is currently the major resource for an effort to harmonize the law of secured transactions globally.

Efficient enforcement mechanism of security interest is very crucial stage of secured transactions since it gives assurance to the creditor that he will not loose his money extended as a credit. As Tajti notes that US enforcement system of secured transactions is efficient

² See Tibor Tajti, *Comparative Secured Transaction Law*, (Akademiai Kiado, Budapest, 2002), at 214

³ See John Simpson, *Ten years of Secured Transactions Reform* (EBRD, London, Autumn 2000) available at <http://www.ebrd.com/pubs/legal/lit002a.pdf>

⁴ In 1994 EBRD published Model Law on Secured Transaction which was intended to form a basis from which a national legislation of transition counties such as CEE and CIS (Commonwealth of Independent States) can be developed, to act as a starting point, indicating through a detailed legal text how the principal of Secured Transaction Law can be drafted.

⁵ See John Simpson and Jan-Hendrik M. Rover, *An Introduction to European Bank's Model Law on Secured Transaction*, 1994 available at www.ebrd.com

because secured party is free to choose self-help i.e. out of court procedure or judicial procedure. In turn, efficient bailiff system and preliminary measures back up the latter.⁶

First chapter will discuss evolution of secured transactions in both countries and what triggers enforcement in both countries, in addition to have a clear cut idea about secured transactions law in Azerbaijan will be given main features and weaknesses of current state laws of Azerbaijan on secured transactions. Second chapter will discuss enforcement mechanism within the scope of UCC article 9. And finally third chapter will discuss enforcement mechanism of security in Azerbaijan and its main weakness compared to UCC article 9.

The result of this work should be what could serve as model from successful UCC article 9 enforcement mechanism to current secured transactions law of Azerbaijan and analyze what other factors in Azerbaijan legal system currently impedes security interest enforcement mechanism in personal property. It should be noted that enforcement of security interest in real property will be in general out of scope of this work.

⁶ See Tibor Tajti, *supra* note 2, at 182

Chapter I Evolution of enforcement of Security interest

1. UCC Article 9 on enforcement of security interest in personal property

1.1. An abridged history of UCC and main features related to enforcement of security interest

An agreement of sponsoring the creation of Uniform Commercial Code (Hereinafter "UCC") between private organizations- National Conference of Commissioners on Uniform State Laws (Hereinafter NCCUSL) and the American Law Institute (hereinafter ALI) was made in 1944, with Professor Karl Llewellyn serving as its Chief Reporter and Soia Mentschikoff as Associate Chief Reporter. The goal of this joint project was an attempt of harmonization law of sales and other commercial transactions in the US. A Permanent Editorial Board (hereinafter PEB) for the UCC "keeps abreast of developments that may require changes" in the statute⁷. Thus UCC being a product of private organizations is not itself the law, but has the force of law if enacted by states. Albeit the UCC was made part of statutory law of each jurisdiction with adjustments to address local concerns or local policy considerations, the outcome was a substantial uniformity in the field.⁸ More important is the UCC's status not as a national law, but as state law within numerous distinct jurisdictions; this has meant not only appreciable variations in enacted wording and in judicial interpretation, but also a complex and shifting interaction with both federal and state laws and regulations.⁹

Article 9 of UCC governs the creation, perfection, priority and enforcement of consensual security interest in personal property and fixtures, as well as most consignments of personal property and sales of certain types of intangible personal property. The term

⁷ See Fred H. Miller, Introduction, UCC article 9 Symposium, 44 OKLA. L. Rev.1.3. (1991)

⁸ See Tibor Tajti, *supra* note 2, at 118

⁹ See Symposium: One Hundred Years of Uniform State Laws, by Bruce W. Frier, 89 Mich.L.Rev.2201

“security interest” defined in UCC as “an interest in personal property or fixtures which secures payment or performance of an obligation”¹⁰. For better understanding of security interest in US it is important to know that in the meaning of Article 9 security interest *in rem* rights. As Tajti noted, the term “security interest” is inextricably limited to *in rem* right-is not related to personal or quasi security¹¹.

The Revised Version (hereinafter RV) of Article 9 was enacted in 2001. Part 6 of RV UCC article 9 sets out the remedies available to a secured party upon the default of the debtor and the protection afforded the debtor against creditor overreaching.

According to Gilmore- “the father of UCC article 9” albeit historically the rights of pledges, mortgages and conditional vendors derived substantially different conceptual systems, nowhere was the movement to unity more apparent than in this area of rights after default¹². Before enactment of UCC article 9, Uniform Conditional Sales Act- and some other acts following this model dealt with the seller’s rights on default in great detail establishing and exceedingly rigid sequence of steps to be followed in repossession and disposition of goods¹³.

And Gilmore argues that:

“Despite the considerable amount of wordage,... Part 5 (Part 6 RV UCC Article 9) rejecting the approach of detailed statutory regulation, opts for a loosely organized, informal, anything goes types of foreclosure pattern, subject to ultimate judicial supervision and control which explicitly provided for... The key provision in Part 5 is that the secured party’s disposition of the collateral must be in all respects ‘commercially reasonable’. This term is deliberately left undefined. In substance,

¹⁰ See UCC 1-201(35)

¹¹ See Tibor Tajti , supra note 2 at, 34

¹² See Grant Gilmore, Security Interest Personal Property (Little & Brown, Boston & Toronto 1965, reprinted in 1999 by the Lawbook Exchange, Ltd New Jersey) at 1181

¹³ *Id* at 1182

Article 9 remits to the court the task of determining standards and refrains from fashioning a statutory rule...”¹⁴

Part 6 of RV article 9 is more comprehensive, detailed and longer compared to former version of Article 9 part 5. While the RV contains 27 sections, the former version contains only 7 sections. However, the basic structure of the part on enforcement didn't change, i.e. debtor's default, repossession or its equivalent in case of intangible collateral, retention of disposition of the collateral by the secured party or its redemption by the debtor, and post disposition relationship (the debtor's right to any surplus or the creditor's right to claim for any deficiency).¹⁵

1.2. Default

1.2(a) Default as a starting point for enforcement of security interest in US

The secured party can not take action on the debt or move against the security until an event of default has occurred¹⁶. In general as long as the debtor faithfully fulfills his obligation on, time the secured party like any creditor, remain a merely passive observer. Default having occurred and the secured party having decided to take advantage of it, he may proceed against the security or he may bring action on the debt¹⁷. Thus, default is the event that transforms the secured party from passive observer to initiator of actions against the debtor and default is starting point for enforcement of security interest by secured party.

Revised UCC article 9-601 doesn't define or otherwise list the incidents which will constitute a default, leaving the contracting parties to define for themselves agreement which

¹⁴ *Id.* at 1183

¹⁵ *See* Tibor Tajti, *supra* note 2 at 184

¹⁶ *See* Grant Gilmore, *supra* note 12, at 1190

¹⁷ *Id.* at 1189

will trigger a default¹⁸ It's a lawyer's job to draft the security agreement so as to cover possible exigencies with appropriate clauses triggering default and the ability to foreclose.¹⁹ The most frequent event of default is the debtor's failure to make payments of principal or interest on time²⁰. Except non-payment of principal and interest as Gilmore notes:

“In a corporate indenture, the list of events of default will take up a good many pages; at the opposite end of the spectrum, the consumer's installment loan agreement consists of only pages but the print is correspondingly finer. In commercial transactions the debtor will typically covenant (breach of covenant being a default) to pay taxes, to keep the property insured, to prevent other liens from attaching to it, to maintain a specified ratio of collateral to debt, to furnish additional collateral...except in inventory financing the will be a covenant not to sell..., though the debtor is to make representations or warranties to the secured party about the collateral ... if the representations are untrue or if the debtor fails to live up to his warranties, the will be a default”²¹.

1.2(b) Acceleration clause

Except default provisions contained in security agreement there is also default-related body of laws which even though only is partly regulated by Article 9 is nonetheless of importance here. Among the most important clauses falling into default-related body of laws is acceleration clause²². Such clause operates when there has been a default such as nonpayment of principal, interest, or failure to pay insurance premiums²³.

¹⁸ See commentary of Revised UCC art.9 by John P. Mc.Cahey available at <http://www.hahnhausen.com/library/Commentary.pdf>

¹⁹ See Douglas J. Whaley, Problems and Materials on Secured Transactions, 6th edition, Aspen publishers, 2003

²⁰ See *Cofield v. Randolph Country Comn.*, 90 F.3d 468, 30 U.C.C Rep. Serv.2d 374 (11th.Cir.1996)

²¹ See Grant Gilmore, *supra* note 12, at 1193-1194

²² According to Black's Law Dictionary “Acceleration clause” -a provision or clause in a mortgage, note, bond, deed of trust or other credit agreement that requires the maker, drawer or other obligor to pay part or all of the

The most limited form of acceleration clause makes the entire loan due and payable on the nonpayment of any required installment of interest or principal²⁴. A somewhat more advanced form matures the loan on the occurrence of specified events: institution of bankruptcy or other insolvency proceeding by or against the debtor, the entry of judgments against him which are allowed to remain unsatisfied more than a specified number of days, the debtor's suffering paramount lien to attach to the collateral²⁵. The most advanced form of acceleration clause provides that the creditor may call provides that the creditor may call the loan whenever he "deems himself insecure", its widespread mostly in consumer loan agreement and other contracts of adhesion²⁶.

UCC § 1-208 provides that a term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in "good faith"²⁷ believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised. Thus the code limits the possibility of using insecurity clauses. As Gilmore notes that the creditor has the right to accelerate if, under all the circumstances, a reasonable man, motivated by good faith²⁸. Thus it follows that in most cases arises the issue whether the creditor acted in "good faith" by accelerating debt in commercial transactions²⁹.

1.2(c) Secured Party's option on default of the debtor

balance sooner than the date or dates specified for payment upon the occurrence than of some event or circumstance described in the contract. *See* Black's Law dictionary, 6th edition, West, 1990

²³ *See* General Motors Acceptance Corp. v Shuey, 243 Ky. 74, 47 S.W.2d 968

²⁴ *See* Gilmore, supra note 12, at 1195

²⁵ *Id* at 1196

²⁶ *Id* at 1196

²⁷ § 1-201 of UCC defines "good faith" honesty in fact in the transaction concerned

²⁸ *See* Gilmore supra note 12 at 1197

²⁹ *See* for example McKay v. Farmers & Stockmen's Bank of Clayton, 92 N.M. 181, 585 P 2d 325

Enforcement is generally private issue under article 9. On default of the debtor the secured party decides what steps it wants to take and when to take them. The secured party is not required to take any actions when the debtor defaults. An event of default which is characterized by security agreement, gives secured party the opportunity not the obligation to exercise his rights and remedies under part 6 of UCC.

The importance of UCC article 9 is that he the secured creditor's right's whether statutory, contractual or judicial is simultaneous under part 6. In other words the secured party has the right to exercise any recognized remedy when the debtor defaults, which includes pursuing alternate remedies simultaneously. Under article 9 he may exercise his rights without judicial proceedings. This so called self help remedy of secured creditor which is confined to repossession, disposition and strict foreclosure with certain limitation principles such as "without breach of peace," "good faith" and "commercial reasonable" which will be discussed in detail in next chapter. Alternatively secured creditor may ignore the fact that he holds security interest and proceed, like any creditor, on the underlying debt: sue to judgment take out execution and have a levy made on the judgment debtor's assets, followed by a sheriff's sale. The main uniqueness of UCC article 9 is that it provides self-help remedy which is least acceptable in civil law countries. Thus secured party is free to choose whatever proceeding is appropriate for him. Under part 6 of UCC article 9 concentrates not only on what the secured party may do to enforce its interest but also what he may not do and further what jeopardy it will face if later held by the court to have gone beyond the confines of its proper authority *i.e.* by providing certain rules for secured creditor while he exercises his enforcement rights and guaranteeing debtor and other secured parties redemptive and other rights.

2. Evolution of enforcement of security interest in Azerbaijan

2.1. An abridged history of Secured Transactions in Azerbaijan

Secured Transactions was totally unfamiliar to Azerbaijan till the 19th century. Azerbaijan being under influence of Persian Empire had a Sheriat law (Islamic Law) which was prohibiting interest-taking and undue speculative practices³⁰. In general money could be given only for lending without any security and without any interest.

After occupation by Russian empire in 19th century Azerbaijan started to practice Roman law traditions as Russian empire has its legal roots coming from Roman law. By the end of 19th the security interest started to be formed thanks to Russian Empire Statute Book. The pledge and mortgage along with other methods of securing the performance of obligations were contained in the Russian Empire Statute Book³¹. Additionally, some methods of security interests arising from loans made by credit organizations were set forth in the Credit Rules and in the Charters of private and public organizations.³² In case of default the creditor could repossess the collateral only after the court's order; the appraisal of the collateral could be made only by the court and the debtor had the right to redeem the collateral³³.

During the Soviet period of command economy, elaborate provisions for securing the repayment of debts were unnecessary because both the providers and the major consumers of credit belonged to the state. State banks made generous loans on extremely favorable terms to government enterprise; if an enterprise defaulted on its loan, the government had simply transferred funds from one pocket to another, it was of little importance where the money eventually happened to accumulate³⁴. This attitude was reflected in the skeletal provisions on

³⁰ Islamic Law and Finance Frank E. Vogel and Samuel L. Hayes, 3, published by Kluwer Law International, The Hague, Netherlands 1998

³¹ See Konstantin Osipov, The Genesis of Russian Secured Transactions before 1917, Clev.St.L.Rev.641

³² *Id.*

³³ *Id.*

³⁴ See Jason J. Kilborn, Securing Russia's Future: A plea for reform in Russian Secured Transactions Law, 95 Mich. L. Rev. 255

pledge in the old Soviet Civil Code, and no separate law existed to expand on this miserly treatment³⁵. When the Soviet Union collapsed and Azerbaijan gained its independence with transformation from plan economy to market economy “hopelessly rudimentary” provisions on pledge in the Soviet Civil Code³⁶ grossly failed to provide the necessary legal framework for efficient system of secured transactions.

2.2. Current State Laws on Secured Transactions: general features and weaknesses

The first step which was taken towards introduction of modern secured transactions which was supposed to satisfy demand of new Independent Azerbaijan with transition economy striving for Western investment along with other countries of Former Soviet Union was made in 1998 by adopting Law on Pledge. Main assistance in drafting Pledge Law of 1998 was made by EBRD, Model Law of EBRD served as a basis while drafting of this law³⁷. Pledge Law regulates security interest in both movable and immovable property. The term pledge has broader meaning within law of Azerbaijan compared to US law. It refers not only to transactions where an obligation secured by personal property, but to any contract where performance is secured by a property interest.

In 2001 Civil Code was entered into force where chapter 12 “Proprietary Security Law. Pledge and Mortgage (Hypothec)” is devoted to secured transactions law. Unlike the Pledge Law, most of provisions of Civil Code dealing with pledge and mortgage are drafted on the basis of CIS Model Law and the Russian Civil Code with the assistance of GTZ (German Assistance for Technical Cooperation). While the Pledge Law had more detailed provisions regulating security interest in personal property silent provisions on many issues of Civil Code regulating security agreements brought only uncertainties in the field of Secured

³⁵ *Id.*

³⁶ See Christopher Osakwe, Modern Russian Law on Banking and Security Transactions: A Biopsy of Post-Soviet Russian Commercial Law, 14 Whitter.L.Rev.301, 1993

³⁷ See EBRD Country Reforms Program from 1996-2007, country Azerbaijan. Available at <http://www.ebrd.org/country/sector/law/about/project.pdf>

Transactions as it will be seen further from this research paper³⁸. The last step towards improvement of secured transactions law particularly in the sphere of real property was made in 2005 by adoption of Law on Mortgage.

The right to pledge and mortgage means a property right of a creditor with respect to the property of a debtor, and at the same time a method of securing performance of a financial or other commitment of a debtor before a creditor. Thus it can be concluded from these provisions of Civil Code that right to pledge and mortgage is exclusively *in rem* rights.

A pledge is limitation of the movable property (except the movable property which is subject to mortgage) and mortgage is limitation of immovable property and as well as movable property which is subject to registration³⁹. Thus the main difference between pledge and mortgage is that the former requires state registration and in most cases refers as security in real property⁴⁰ while leaving uncertain what types of movable property i.e. personal property should fall under mortgage agreement.

Azerbaijan Civil code similar to Russian Civil Code provides that any property, including things and proprietary rights (claims), except for the property withdrawn from the turnover and the certain personal rights such as alimony or injury compensation is subject to security interest^{41,42}. Thus similar to UCC article 9 Civil Code provides variety of options to encumber the property. However UCC article 9 doesn't regulate security interest in real property.

³⁸ The Law on Normative acts Azerbaijan from 2000, states if two normative legal acts with equal legal force contradict one another, the later-enacted legal act shall apply. Thus the provisions of Pledge Law apply to the extent that it doesn't conflict with Civil Code and Mortgage Law. Yet some provisions of Pledge Law and as well as Civil Code which contradict to a later enact laws and remain dead letters will be mentioned for general discussion.

³⁹ See art. 269.4 of Civil Code

⁴⁰ See Sukhanov, Grazhdankoye Pravo , part 2, at 107 , published by BEK, Moscow 2000.

⁴¹ It should be notice that Azerbaijan legal system unlike the UCC doesn't know the concept of security interest. In essence security interest is right to pledge and mortgage. Thus "security interest" herein and after will be used in the meaning of right to pledge and mortgage.

⁴² See art. 276 of Civil Code of Azerbaijan.

Security interest is characterized on two factors. First factor depends on type of collateral: divided to physical possession and non-physical possession. And second factor is attachment in the meaning of registration and notarization of collateral.

Significant change which was made in Mortgage Law is that mortgage agreement is valid by the time of state registration while on the contrary Civil Code provides that mortgage agreement is valid by the time of agreement. Thus change of this provision solves problem of priority issues before the creditors. However it is not solved the priority problems in practice as state organizations which should deal with registration of security interest in movable property is not established yet. It should be also noted that section of Civil Code and Pledge law doesn't require in most cases registration of movable property *i.e.* in personal property. In contrast its fundamental feature of UCC article 9.

The security agreement must be in written form. An additional requirement is notarization of security agreements. Security agreements must be notarized if the underlying contract must be notarized. Notarization of contract is required if specified by law, or any party to the agreement insists upon notarization. Failure to comply with the notarization requirements renders the security agreements invalid and unenforceable against the debtor. Notarization fee is usually between 1.5% and 2.5% of the value of collateral, represents a significant additional cost, and often make acquiring a security interest “prohibitively expensive”, as suggest by EBRD⁴³. Thus notarization is another feature that may create more costs to the secured transactions by making the credit costs to expensive.

⁴³ See Law in transition report of EBRD 2003 , available in www.ebrd.org

2.3. Default and Acceleration clause

According to article 295 of Civil Code enforcement of security interest is possible on the event of non-performance of obligation or improper performance of obligation by the debtor. It is strengthened by the article 6 of Civil Code which provides autonomy of the parties while they specify clauses of their contract.

Law on pledge specifies some events of default such as: delay with repayment of major loan or some in part; violation of schedule for payment of interest on loan specified in principal agreement; failure to fulfill specific terms of payment specified in principal agreement which give the right to the creditor to demand enforcement against the subject of security interest. These are usual clauses that can be faced in US security agreements between the secured creditor and the debtor.

The law on mortgage also specifies some event of default such as breaking interest payment schedule in respect of the main commitment twice one after another; very similar to Pledge Law⁴⁴. Both Pledge Law and Mortgage Law reaffirm autonomy of the parties while they make security agreement⁴⁵. Thus it can be concluded that on the point specifying the event of default of the debtor, secured transactions law of Azerbaijan doesn't contradict to each other.

Like in US law creditor is passive observer until the default event is happened and the parties are free to determine what constitutes events of default.

While Pledge law and Mortgage law is silent about the acceleration clause, Civil Code specifies some grounds for acceleration of the debt by the creditor :when the creditor finds out that the debtor no more actual owner of the pledge or mortgage in other words the debtor is ostensible owner of pledge or mortgage; the security interest has been lost or destroyed

⁴⁴ See art. 34.1.2 of Mortgage Law

⁴⁵ See art. 10, 23 of Pledge Law and art.26 of Mortgage Law

physically, except the case when the creditor was responsible for the safety of collateral; in case the debtor is breaking rules of possession and use of collateral while it's a security interest of the creditor⁴⁶. Possible concerns of these provisions of the Civil Code is that secured creditor at least has some device to rely on when he finds out that his security interest is just on the "paper". However provision of Civil Code dealing with acceleration of the debt by the creditor is still weak as Civil Code doesn't specify such as insecurity clause as UCC⁴⁷ neither it prohibits other grounds for acceleration of the debt.

⁴⁶ See art. 293 of Civil Code

⁴⁷ See UCC §1-208.

Chapter II Remedies after default in US

1. Self-help repossession in US

The right to repossess is absolute once default has occurred; the secured party is not required to give advance notice of his intention to retake the property. On default the normal course for the secured party is, if it important to him to assert his security rights immediately instead of suing the debt to judgment, is to take possession of the collateral (unless, of course, he already holds it in pledge)⁴⁸. In some case there are obstacles to possess because of nature of collateral e.g. heavy equipment from debtor's plant and storage of the collateral pending disposition maybe impractical or unduly expensive. In such cases UCC 9-609 provides secured creditor to render collateral unusable or dispose at debtor's premises. Yet this must be done in "commercial reasonable manner" which will be discussed further in this research paper.

Repossession could be done in two ways under article 9: private repossession when the secured party may repossess collateral without judicial process *i.e.* self- help repossession and repossession by action when the creditor must file affidavit, post a bond and get the sheriff to seize the goods. In general, the right to repossess accrues only and continues as long as the default has not been cured or waived. The uniqueness of UCC article 9 enforcement mechanism of security interest is that it provides self-help repossession which is least acceptable to civil law families including Azerbaijan. It should be mentioned that the general term 'self-help' in the context of UCC article 9 confined to repossession, disposition and [strict] foreclosure.

⁴⁸ See Gilmore, *supra* note 12, at 1211

The secured party's right to take possession of collateral on default and without judicial proceedings is a relatively late development in US⁴⁹. However it's already approved itself as one of the best options in repossession the collateral along with judicial proceedings. By repossessing the collateral, the secured party not only preserves the collateral for a prospective sale or strict foreclosure, but he or she also, by repossession, protects it from the possibility of debtor concealment, disposal, or misuse, between the time of default and the time of sale or strict foreclosure⁵⁰. Thus, it is a quick, secure, and inexpensive method for the creditor to avoid a possible major loss and obtain at least partial payment on the underlying debt.

The main issue which is important in self-help repossession and which is left undefined by UCC §9-609 is the term 'without breach of peace'. The 'without a breach of peace' condition was already enshrined into the Uniform Conditional Sales Act and the Uniform Trust Receipt Act⁵¹. What constitutes a breach of the peace is determined by the law of the jurisdiction where the collateral is located *i.e.* Article 9 and its predecessors left that matter for continuing development of the courts⁵². To determine whether a breach of peace occurred, the courts inquire mainly into whether the creditor entered the debtor's, and whether the debtor or one acting on his behalf consented or objected to entry and repossession⁵³.

Self-help repossession has also its disadvantages. As Gilmore notes "In the finance of business of debtors repossession causes little trouble or dispute; in the underworld of consumer finance, however repossession is a knockdown, drag out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play"⁵⁴. The main issue arises

⁴⁹ *Id.* 1212

⁵⁰ See generally Am. Jur. 2d, Secured Transactions § 590

⁵¹ See Tajti, *supra* note 2, at 188

⁵² In the case of *Thompson v. Ford Motor Credit Company* breach of peace was defined by the court as "a disturbance of the public tranquility, by any act or conduct "inciting violence" See: *Thompson v. Ford Motor Credit Company*, 324 F.Supp.108.115 (D.S.C.1971).

⁵³ See White & Summers, Robert S., Uniform Commercial Code, 4th edition, ST Paul, Minn. West Group, 1995 at 896.

⁵⁴ See Gilmore *supra* note 12, at 1112

again whether there was a breach of peace while the creditor was repossessing the collateral from debtor.

At least four justifications can be found for the breach of the peace limitation on the right to repossess privately: 1) to prevent the escalation of repossession disputes into violence, 2) to protect the dignity of debtors, if chattels are removed under humiliating circumstances, 3) to protect the sanctity of private dwellings and 4) to enable debtor to force creditors to proceed by action (contestation of repossession)⁵⁵. In case of breach of peace by secured creditor the court usually finds tort action of secured creditor which will follow by making the secured creditor to be liable for punitive damages to the debtor⁵⁶.

In some states self-help repossession in certain types of collateral is restricted e.g. in Wisconsin state, self help repossession of motor vehicles is prohibited until after a court determination that the creditor is entitled to the collateral; it was concluded that this approach increased the costs of repossessions, decreased the number of repossessions, and resulted in larger down payments required of purchasers of used cars⁵⁷.

In the past, constitutional questions have been raised in connection with the attempts of secured parties to obtain possession of the collateral. In a number of cases, it was claimed that the secured party's right to repossess the collateral peacefully was unconstitutional⁵⁸ on the grounds that it deprived the debtor of his or her property without due process of law. The main issue in such cases is whether any state action is involved. Because no judicial or other state proceeding is involved, it is generally held that the mere enactment of a statute giving the right to peaceful repossession his not sufficient state action to bring the deprivation within the protections of the federal constitution⁵⁹. Yet this issue is a dead letter in US now.

⁵⁵ See Tajti supra note 2, at 188

⁵⁶ See for e.g. *Hester v Brandy*, 24 U.C.C.Rep.2d 1344 (Miss.1993)

⁵⁷ See Whitford and Laufer, *The Impact of Denying self help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 Wis.L.Rev. 607

⁵⁸ Fourteenth amendment of Constitution of US provides that “no state” shall deprive of “life, liberty or property” without “due process of law”.

⁵⁹ See for e.g. *Teeter Motor Co v First National Bank*, 260 Ark 764, 543 SW2d 938 (1976); *Penney v First National Bank*, 385 Mass 715, 433 NE2d 901 (1982). In both of these cases the court held that self-help repossession by private party doesn't involve private actions.

It should be also noted that as self-help repossession is private action, the law enforcement body such as police or sheriff can not assist secured party in self-help repossession. However he can be a passive observer unless breach of peace is not happened⁶⁰.

2. Strict foreclosure

After repossession of collateral the secured creditor has two next options: he can foreclose the collateral against obligation of the debtor or dispose the collateral in a certain way.

The best and simplest way of liquidating any secured transactions, default having occurred, is for secured party to keep the collateral as his own free of the debtor's equity, waiving any claim to a deficiency judgment⁶¹ i.e. by way of strict foreclosure⁶². This avoids the tricky and difficult problem of arriving at a fair valuation of the collateral as well as expense and delay involved in sale or other methods of foreclosure judicial or non judicial⁶³. It also expressed in Official Comment the belief that strict foreclosure should be encouraged and often produce better results than disposition for all concerned⁶⁴.

Obstacles to strict foreclosure arise when the value of collateral is less or more than secured obligation together with other expenses of the foreclosure. Consequently when the

⁶⁰ See for e.g. *US vs. Coleman* (1980 CA 6) Mich. 628 F2d 961

⁶¹ See *Gilmore*, supra note 12, at 1220

⁶² Foreclosure is a legal proceeding aimed at terminating a mortgagor's interest in property, instituted by the lender (mortgagee) either to gain title (strict foreclosure) or to force a sale (judicial foreclosure) in order to satisfy the unpaid secured by the party. Strict foreclosure is a rare procedure that gives the mortgagee title to the mortgaged property-without first conducting a sale-after a defaulting mortgagor fails to pay the mortgage debt within by the court specified period. It is use limited to special situations except in a few states where it is permitted as a general remedy. Opposed to that, judicial foreclosure is available in all jurisdictions and is exclusive and most common method of foreclosure in at least 20 states irrespective that it is a costly and time-consuming procedure. It is a foreclosure method by which the states irrespective that it is a costly and time-consuming procedure. It is foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as filling of a complaint, service of process and a hearing. See *Black's Law Dictionary*, supra note 22

⁶³ See *Gilmore*, supra note 12, at 1220

⁶⁴ See UCC §9-620, OC (2)

amount of the collateral is not equivalent to the secured obligation either debtor or creditor is in disadvantage situation.

When the value of collateral is the lesser the main question in such situation whether secured creditor is entitled for deficiency judgment. In US law the right to of secured parties has been recognized yet together with gradual disappearance of strict foreclosure and the common law election of remedies doctrine under the pre-Code conditional sales legislation⁶⁵. However the drafters of UCC article 9 rejected the solution made by pre-Code conditional sales legislation and permitted strict foreclosure again.

The RV UCC article 9 is more flexible to strict foreclosure. Under former Article 9 strict foreclosure was a relatively limited procedure, whereby only a secured party in possession of tangible collateral could propose to keep that property and then only in full satisfaction of the debt *i.e.* RV UCC 9 allows also strict foreclosure without repossession of collateral and with partial satisfaction of the debt⁶⁶. This procedure, however, requires that additional conditions be met. The debtor's affirmative consent in an authenticated record after default is required, so that the secured party cannot effect partial satisfaction merely by notice and failure to object. In addition, the proposal for partial satisfaction must also be sent to all "secondary obligors", who have a greater interest in this procedure because it will leave a deficiency for which they may be responsible⁶⁷. Moreover partial satisfaction is not allowed in consumer transactions⁶⁸.

When the value of the collateral exceeds the amount of secured obligation debtor or third creditors would get in disadvantage situation. The aim of legislators in such situation should be prevent "forfeiture agreements" whereby the debtor's equity could be sacrificed in

⁶⁵ See Gilmore, *supra* note 12, at 1221

⁶⁶ See former UCC §9-505 and RV §9-620

⁶⁷ See UCC 9-620 (c) (1)

⁶⁸ See UCC 9-620(e) and OC (12)

order to protect consumers from the misuse of economic power⁶⁹. That's why the right to strict foreclosure is subject to certain limitation.

The first limitation is through "compulsory disposition" with 60% percent rule; the secured party can only dispose collateral within 90 days after taking possession and the debtor can waive his right solely in a written statement. Former UCC Section 9-505(1), RV 9-620- applicable only to consumer finance was based on analogous provision in the Uniform Conditional Sales Act (§19) and the underlying idea is simple enough: if the debtor has paid as much as 60 per cent, there is a good chance that he has built up an equity which should be protected by requiring a compulsory disposition which will, hopefully, produce a surplus to be returned to him⁷⁰.

The second limitation is so called "proposal-and objection model". Opposed to other strict foreclosure limitation, the "proposal-and-object model" is generally applicable, detailed set of steps to be followed in effectuating strict foreclosure⁷¹. According to this model of strict foreclosure secured creditor has to send proposal to the debtor and other creditors about acceptance of collateral for specific time period. In case of full acceptance of collateral within 20 days the debtor or other creditors doesn't object to proposal it is deemed to be acceptance; if secured creditor receives written notice he has to dispose of the collateral according to the rules on disposition. In case of partial satisfaction 20 days rule doesn't apply; the secured creditor must obtain the debtor's agreement in a record authenticated. It can be concluded that the main idea of limitation of strict foreclosure is to ensure the protection of the debtor and interests of other creditors.

If the collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured party's acceptance of the collateral in satisfaction of secured obligations would constitute a sale to the secured party. That sale normally would give rise to a new security interest (the ownership interest) under Sections 1-201(37) and 9-109. However, the procedures

⁶⁹ See Tajti, *supra* note 2, at 190

⁷⁰ See Gilmore, *supra* note, at 1222

⁷¹ See Tajti, *supra* note at 190

for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement authenticated by the debtor would not be necessary⁷².

3. *Disposition*

Secured party who proceeds under the default provision of Part 6, who is not entitled to retain the collateral under partial or full satisfactions of the obligation under 9-620 *i.e.* by strict foreclosure and who hasn't chosen collect intangibles, must sooner or later dispose of the collateral under 9-610 (a) which states "After default, a secured party may sell, lease, license or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing. The first key provision appears in subsection 9-610 (b) where every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. For example, if a secured party does not proceed under Section 9-620 and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a "commercially reasonable" manner.

Subsection 9-610 (c) provides that secured creditor can liquidate collateral through public as well as through private sale, however with due diligence and commercial reasonable manner. The main purpose behind the provisions of giving the secured creditor more options while disposing of the collateral is to let him dispose the collateral in most profitable way, which will benefit both the secured creditor and the debtor.

Section 9-627 provides guidance for determining the circumstances under which a disposition is "commercially reasonable."The disposition of collateral was made in

⁷² See RV §9-620 OC (7)

commercial reasonable manner if disposition is made: (1) in the usual manner or any recognized market⁷³; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition⁷⁴. However, none of the specific methods of disposition specified in subsection (b) is required or exclusive. As it will be seen from the cases below in practice to determine whether of all of nuisances of disposition has been carried out by secured creditor in commercial reasonable manner is complicated. The question is decided by the courts by taking into consideration all factual circumstances. As it was stated by the court in *Alco Enterprises Inc. vs. Goldstein Family Living Trust* “the UCC provisions regarding security agreements leave the determination of the commercial reasonableness of the disposition of collateral to case-by-case determination on the facts”⁷⁵.

In the *US vs. Willis* (applying the Ohio UCC as the federal rule of decision) the court held that the secured creditor didn’t act in commercial reasonable manner by choosing to sell the collateral in public sale when the secured creditor had chance to sell the collateral to private purchasers who were offering more money for the collateral. The court said that whatever discretion the secured party had in choosing the method of sale was limited by its good faith duty to maximize the proceeds upon sale of the collateral, and that, if the original choice of method was unreasonable, it mattered little, if at all, that this unreasonable choice was executed in a reasonable and proper fashion⁷⁶.

Another additional requirement when secured creditor disposes the collateral through the sale is notification. The secured creditor has to send to the debtor and also to other

⁷³ A “recognized market,” as used in subsection 9-627(b) and Section 9-611(d), is one in which the items sold are fungible and prices are not subject to individual negotiation *e.g.* the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions. *See* UCC RV §9-627 OC (11)

⁷⁴ *See* UCC §9-627(b)

⁷⁵ *See* *Alco Enterprises Inc. vs. Goldstein Family Living Trust*, Or. App.2002.51 P.3d 1275, 183 Or .App.328

⁷⁶ *See* *United States v Willis* (1979, CA6 Ohio) 593 F2d 247, 14 Ohio Ops 3d 443,25 UCCRS 1178

certain “secured parties” in consumer transactions “reasonable notification” about the future details of sale of collateral. Secured party must give debtor reasonable notice of time and place of public sale of collateral or reasonable notice of the time after which any private sale is to take place.⁷⁷ The purpose of requirement that secured party sends reasonable authenticated notification of disposition to debtor is to give the debtor an opportunity to protect his interest in the collateral by exercising any right of redemption or by bidding at the sale, to challenge any aspect of the disposition before it is made, or to interest potential purchasers in the sale, all to the end that the merchandise not be sacrificed by a sale at less than the true value⁷⁸. Thus it follows that notification is closely connected to redemptive rights of debtor which will be discussed later in this research paper. Notification is not required in 2 cases when the collateral is “perishable or threatens to decline speedily in the value” and the other case is when the collateral is “of a type customarily sold on recognized market”.⁷⁹

After disposition of collateral by the secured creditor the main issue is proceeds of disposition as not randomly the amount which the secured creditor obtains from disposition of the collateral either less or more than the amount of the debt. UCC §9-615 is principal part which regulates liability for deficiency and right to surplus. For the distribution of cash proceeds following rule applies: the proceeds are applied first to the expenses of disposition, second to the obligation secured by the security interest that is being enforced, and third, in the specified circumstances, to interests that are subordinate to that security interest⁸⁰. The enforcing secured party is required first to pay excess proceeds to subordinate secured parties or lien holders whose interests are senior to that of a consignor and finally to a consignor⁸¹. If the transactions is sale of accounts, chattel paper, payment intangibles or promissory notes the

⁷⁷ See *Corp. v Vigliarola*, 1985, 611 F.Supp.923, affirmed 835 F.2d 1429

⁷⁸ See *Coxall v. Clover Commercial Corp.*, NY.Civ.Ct.2004

⁷⁹ See UCC 9-611 (d) .The reason notice non- requirement when collateral to be sold is a type customarily sold on a recognized market is that in such case the debtor would not be prejudiced by a lack of notice. See *Wippert v. Blackfeet Tribe of Blackfeet Indian Reservation*, 215 Mont.85.695 P.2d 461

⁸⁰ See UCC 9-615 (OC 7)

⁸¹ See UCC 9-615 (a)

debtor is not entitled to any surplus and the obligor is not liable for any deficiency. Finally non-compliance with provisions set §9-615 through §9-616 leads the secured creditor liable before debtor for the surplus or the debtor (obligor) to be liable before the secured creditor for any deficiency.

4. Redemption

According to Gilmore the debtors' right to redeem collateral is "ghostly remnant" of the past as defaulting debtor almost never does in fact cure the default and redeem his property; redemptions rights of the debtor merely adds complication and expense to the secured party's attempt to use the collateral for payment of the debt⁸². The legislators of 17th century when allowed to exercise the right to redeem the collateral in mortgage agreements- the main policy behind the redemption right was not to find a fair balance of rights between the creditor and the debtor, rather to maintain stability of land tenure: "whatever could be done to keep the land in the ownership of the mortgagor and his family was a good thing; therefore the mortgagee must be hindered and delayed at all points in his efforts to become the new owner of Blackacre"⁸³. However current legislation policy behind redemptive rights is based on different grounds. In some cases to deprive the debtor and other secured parties to exercise redemptive rights will have negative economic aspects on secured creditor and as well as on debtor and other secured parties. Thus all the pre-code drafters decided to follow existing institution *i.e.* redemption rights.

Under current law the right of debtor and other secured parties to redeem the collateral continues until the secured creditor has sold, leased, licensed or otherwise disposed of collateral or entered into a contract for its disposition or become entitled to retain the collateral in discharge of obligation or collected collateral from account debtor or any other obligated

⁸² See Gilmore at 1216

⁸³ *Id.*

debtor⁸⁴. The right to redemption is expanded under RV Article 9. Now lien holders and secondary obligors can exercise redemption rights in determined circumstances.

To redeem the collateral the debtor or other secured parties must tender the full amount secured by the collateral, all reasonable expenses, and also the secured party's attorney's fees if they were provided in the security agreement and are not prohibited by other law⁸⁵. It follows that in case of acceleration of the debt by secured creditor the entire of amount debt is also required to be tendered in order to enjoy redemptive rights. Tendering fulfillment can not be a new right to pay.⁸⁶ When the secured party has chosen to dispose of the collateral in parcels, rather than all at once, a party may redeem the remaining collateral with the same rule of tendering⁸⁷.

In addition debtors or secondary obligors may enter to a post default agreement to waive the rights of redemption, except in consumer good transactions. A waiver agreement entered into with the debtor wouldn't affect redemption rights of other parties unless they also parties to the waiver agreement⁸⁸.

⁸⁴ See UCC §9-623 (c)

⁸⁵ See UCC §9-623 (b)

⁸⁶ See UCC §9-506 (OC)

⁸⁷ See UCC §9-623 (OC)

⁸⁸ See Gilmore supra note , at 1220

Chapter III Remedies after default in Azerbaijan

1. *Repossession and Strict Foreclosure*

Contrary to US Secured Transactions law self-help in the context of repossession, strict-foreclosure and disposition is unknown in Azerbaijan secured transactions law as it will be seen further in this research paper.

The Law on Pledge provides that satisfaction of claims of the secured creditor is realized in out of court proceedings⁸⁹. However it is unclear what the legislation meant. Because further contrary to UCC article 9 it is silent on issues such as “breach of peace” while repossessing the collateral in other words Law on Pledge neglects to address the means by which a creditor can take a possession of collateral after default. In any case the adoption of Civil Code made availability out of court proceedings of Pledge Law a dead letter.

Based on CIS model, bureaucratic Azerbaijan Civil Code led the out of court proceeding far away from the secured creditor. Out of court proceeding is available if such agreement is envisioned in security agreement between the parties; moreover the security agreement is required to be certified by notary⁹⁰. Otherwise enforcement is available only through the court proceedings.

In addition when the property is subject to joint ownership or shared ownership, separate notary agreement is required between the all property owners in order to encumber the property. Otherwise security agreement is void and not enforceable as it violates the rights of other owners of the encumbered property⁹¹. Notarization in Azerbaijan is much different

⁸⁹ See art. 26.1 of Law on Pledge

⁹⁰ See art. 296.1 of Civil Code

⁹¹ See art. 296.2 of Civil Code

than in US. It is a quasi judicial function that is far more complicated than an American notarization, and may take weeks to accomplish⁹².

Thus it follows that in practice when the future creditor faces with so many requirements while making security agreement he relies only too lengthy court proceedings in future. In addition notary costs couples with lengthy court proceeding making the price of credit too expensive; consequently leading the economy of the country towards undercapitalization.

As was noted before Law on Mortgage while in most cases refers to security interest in real property, it regulates as well as security interest in movable property, i.e. personal property. While this Law has detailed provisions regulating enforcement of real property, it leaves enforcement of movable properties unnoticed. Thus enforcement of movable property which is subject to mortgage agreement is regulated mostly by Civil Code.

Pledge law similar to UCC article 9 provides notification of the debtor in case of strict foreclosure and the value of collateral must not exceed the amount of secured obligations⁹³. However it is uncertain about the application and the procedure of strict foreclosure as contrary to UCC article 9 it doesn't separate consumer transactions, rights of other secured parties and silent about the partial satisfaction of debt with the collateral.

2. Disposition of the collateral

After the default of the debtor secured creditor as a general rule relies on judicial action. The secured creditor has to file a petition in to appropriate Court and attach all the necessary documents. In case when the security agreement requires notary registration the secured creditor has also to get notice from the notary. After the approval of the Court that

⁹² See Law in transition report of EBRD 2003 , available online at www.ebrd.org

⁹³ See art. 29.1 and 31.1 of Law on Pledge

security agreement is valid and the debtor in default, notice is sent to the debtor by the Court⁹⁴. The Court renders preliminary judgment in favor of the secured creditor. The court is seized and makes a decision which is presented to enforcement officers at the location of debtor⁹⁵. Further realization of collateral is carried out by court bailiff through the public auction. The charge holder doesn't have control in the sale of collateral.

Prior adoption of Civil Code, the Law on Pledge allowed disposition of collateral through private sale as well as through public sale. Close to UCC article 9 doctrine of "commercially reasonable disposition" the Law on Pledge provided that the secured creditor is required to do all necessary steps in order to reach a fair price for the collateral and before disposition of the collateral he has to give notice to the debtor⁹⁶.

Adoption of bureaucratic Civil Code impeded enforcement of collateral again. Contrary to the Civil Code of Azerbaijan, the UCC article 9, as it was discussed before in this research paper, provides secured creditor with flexibility and the obligation to dispose of the collateral in a way that makes commercial sense. One of the critics of limitation of sale of collateral solely to public auction in the US was Grant Gilmore. Gilmore emphasized his "firmly held belief" that requirements like Azerbaijan public provision "make it impossible to dispose of the collateral at a decent price"⁹⁷. Moreover, Gilmore challenged the effectiveness of public auction in preventing fraud "On the rockiest ledge, in the tiniest cranny, through the most nearly invincible loophole, fraud knows how to flourish luxuriantly; this is disquieting but true"⁹⁸. While the same situation in practice currently is faced in Azerbaijan, an introduction of well prepared provisions allowing private sale of collateral along with public sale in Civil Code would be panacea to both the creditor and the debtor while disposing of the collateral.

⁹⁴ The debtor like in US has redemptive rights during the proceedings; it will be discussed in the next subchapter.

⁹⁵ Art. 50.1 of Law of Azerbaijan on Execution of Court Orders from 2001 provide that maximum in one month after the order of the court the collateral must be seized. Further this Law in art.53 states that in case of objection of debtor, the seized collateral is not sold for 3 months.

⁹⁶ See art.30.2 Pledge Law

⁹⁷ See Grant Gilmore, The Secured Transactions Article of the Commercial Code, 16 Law and Contempr.Probs.27 (1951).

⁹⁸ *Id*

The procedure for the sale of the collateral according to EBRD survey in the public auctions of Azerbaijan is following. After the submission of relevant documents (court decision, court order, information on the collateral's original value, bank account into which funds should be transferred) and the price thereof must be published in the mass media⁹⁹. This procedure takes at least 6 months and is quite difficult to carry out¹⁰⁰. If an item is not sold at a first auction, then up to four more auctions will be conducted as necessary. The price of the item at the second auction will be reduced by 10 percent; 20 percent at the third auction, and 40 percent at the fourth auction. On average, realization through the court procedure takes between 12 and 18 months¹⁰¹. This lengthy enforcement procedure coupled with the corruption in the courts creates unfriendly environment for investors and impedes flow of capital in Azerbaijan¹⁰².

Proceeds from the sold collateral in the public auction first covers enforcement cost such as court costs, bailiff costs and auction costs. After the realization costs of the collateral is covered the secured creditor obtains right to satisfy his interest. In case of surplus of proceeds from the realized collateral the debtor has a right to enjoy that surplus. In case of deficiency the secured creditor is entitled to attach other properties of the debtor except the case when the security agreement provided contrary¹⁰³. However in case of attachment of other property of the debtor the secured creditor doesn't have priority rights over other secured parties on that property. It can be concluded that Civil Code of Azerbaijan and §9-605 of UCC treats surplus and deficiency of the sold item with the same principle however not surprisingly Civil Code is far less detailed.

⁹⁹ See Enforcement of charges survey in Azerbaijan by EBRD in 2003. Available online at <http://www.ebrd.com/country/sector/law/about/assess/case/azer.pdf>

¹⁰⁰ *Id*

¹⁰¹ *Id*

¹⁰² According to EBRD survey corruption in the courts of Azerbaijan is also one of the most problematic areas while enforcing the security interest. *Id*

¹⁰³ See art.298.2 of Civil Code

3. Redemption

Civil Code provides that the debtor and other parties have a right to redeem the collateral at any time before the sale of collateral and terminate measures of disposition by fulfilling the obligation¹⁰⁴. The agreement which limits this right is deemed to be void. Similar to UCC article 9 the Civil Code of Azerbaijan states that apart from the fulfillment of secured obligation the debtor must also compensate other costs to creditor related to disposition of the collateral. However in contrast with UCC 9-623 the debtor is not required to tender a full amount secured by the collateral. The debtor is entitled to redeem the collateral also with partial installment. This impedes the rights of secured creditor again while enforcing the security agreement.

¹⁰⁴ See art.298 of Civil Code

Conclusion

An effective enforcement procedure lies in the heart of the law of secured transactions, ensuring consistency and predictability that are so crucial to the parties concerned. Efficient legal framework on enforcement of security interest encourages investors, makes availability of credit easy and cheap which as a result prevents undercapitalization of economy. Thus this work analyzed enforcement of security interest in personal property of Azerbaijan through comparing it to comprehensive and successful UCC article 9 enforcement mechanism. While enforcement mechanism of UCC article 9 is not wholly transferable to developing legal system as Azerbaijan, it could serve a model for the optimally effective guidelines for the enforcement of the collateral.

As a result of this research paper first was found out that while currently Azerbaijan legislature has enacted three laws on Secured Transactions, each of them brought only uncertainties to the legal framework by contradicting to each other. A possible solution to solve this first issue is to come up with a comprehensive unified law regulating secured transactions law in Azerbaijan. Secondly it was found out that non-judicial enforcement of security interest which is inexpensive and fast procedure compared to judicial enforcement proceeding is uncertain in Azerbaijan. Therefore unique to UCC article 9-non-judicial enforcement mechanism such as self-help repossession and strict foreclosure should be served as model and be encouraged in Azerbaijan. Thirdly creditors in Azerbaijan heavily rely on judicial action which is also inefficient: a weak bailiff system, procedure for realization of collateral takes too long time, corruption in the courts. Therefore adequate steps should be taken to create efficient bailiff system and transparency in the courts. And the last problem is realization of collateral through the sale is limited to public auction. The secured creditor is not involved in the process of the disposition of the collateral. Thus introduction of UCC article 9 model of private sale of the collateral could serve also a guideline to give the creditor realize the collateral in a better way.

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