

A Legal Framework of Secured Transactions to Promote Investment in North Korea*

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I. Introduction

As the investment by the South Korean companies has got a momentum, a number of South Korean businessmen are interested in financing tools backed by their invested assets in the North. It is because proposed investment for establishing or transferring production facilities cost too much for their financial capacity.

On the contrary, South Korean bankers are increasingly reluctant to extend loans to the investors doing business in the North since they are skeptical of the possibility of repayment by borrowers. Fortunately, the situation has

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changed for the better owing to mutual efforts of both two Korean authorities. For example, the four Inter-Korean Economic Cooperation Pacts came into force as from August 20, 2003. The North Korean officials seem to be cooperative to some aggressive suggestions of their counterparts in the South. One of those suggestions is a proposed collateral system in the Special Economic Areas like Gaeseong Industrial District.

Against these backdrops, it is necessary to ensure the enforceability of such collateral system under the North Korean law. After identifying possible means of securing the creditors' claims and ensuing problems, we have to make a suggestion to modify legal framework of secured transactions and to promote foreign investment to the North Korean authorities.

Nowadays, we can see remarkable developments in legal infrastructure both at Gaeseong and Mt. Geumgang districts, where a large scale of investments from the South are hugely anticipated. In this connection, we might refer the case to the experiences of the transition economies in Eastern Europe and Asia.

II. Secured Transactions in the North

1. Property Law in the North

The Socialist Constitution of North Korea, approved by the first session of the tenth People's Supreme Congress in September 1998, has provided for three-type ownership by the state, social cooperative entities and individuals in line with the Marxism-Leninism. One of the remarkable changes was that socio-political associations and trading companies have been qualified as legitimate owners of the means of production in addition to the collective ownership by the state and social cooperative entities.¹⁾

1) Article 20 of the North Korean Constitution.

In a centrally planned economy, an enterprise has only to produce the production goal designated by the state, and is not allowed to modify or finance its own production activities. But the newly amended North Korean Constitution permits an individual to have leeway to conduct side jobs and own resultant products.

Looking into the North Korean Civil Law, we can notice the North Korean people do not know the secured transactions but they allow foreign investors to secure their claims on a limited basis so as to promote foreign investments. The Civil Law, established in 1990 and amended in 1993 and 1999, has several provisions of simple nature on the ownership, but puts aside the private ownership of businesses and individuals which shall be regulated by the foreign capital-related laws and regulations in a restricted manner. It should be noted that the owner's right may be executed subject to the laws and regulations, the Labor Party's platform and the socialist principles. But a number of exceptions are granted to foreign investors or special economic areas. In other words, foreign institutions, companies, businesses and South Korean investors other than North Korean residents may enter into lease contracts of the land in North Korea, and the use right of the land can be granted as mortgage.

2. Collateral System in the North

At present, foreign investors are allowed to grant the right to use the land, buildings and houses, and other ground fixtures as mortgage in a limited basis. So the security grantor may hold and use the collateral continuously. For example, Article 15 of the Land Lease Act of 1993 allows foreign invested enterprises to grant a third party the right to use a whole or part of the leased land subject to the approval of the North Korean land lease authority. In the Free Economic and Trade Areas, mortgage on a building should be established

at once together with the right to use the pertinent land.

However, the Gaeseong Industrial District has a different dimension of collateral system. It is because only the right to use the land, debtor's building and transportation equipment are eligible for registration as collateral at the administration office. The security holder has only to deposit the proceeds of collateral with the administration office and may demand his own share in accordance with the priority of security. In principle, the land is subject to the collective right of the state, while the legitimate security right is limited to non-possessory one against a certain real estate. In the North, the collateral is to confirm the debtor's posture willing to repay and to prevent his moral hazard. In the event of default, collateral makes an effective instrument to transfer debtor's business to a third party.

But it should be noted that in a socialist state like North Korea, such means of production as the land, machinery and equipment are beyond the private ownership as well as security right. The possessory security right including pledge which deprives the debtor of the right to use is not legitimate in a socialist country. Also the North Korean regime does not know the filing system of properties as requisites for transfer or disposal of them. And the relevant provisions concerning the registration are vague and inappropriate for the purpose of foreseeability and stability of law. In Gaeseong District, however, the North Korean authorities are paying attention to the South Korean businessmen's concern with regard to the foreclosure proceedings. Finally how the value of collateral could be settled and who is willing to buy the foreclosed properties remain to be seen in the future.

In a realistic sense, we have to wait for a brighter picture that more and more properties (including but not limited to machinery, inventories and account receivables) shall be available for collateral on condition that they are subject to registration with the authorities concerned. It depends on the type of businesses because it really matters in the North who provides the production

facilities, and takes the initiative in the management among the South Korean investors and the North Korean partners. But the information technology like the Internet will make it easier to register the collateral and to review its contents. In the long run, the North Korean regime has to learn the lessons from other transition economies and should introduce the market mechanism for a more efficient collateral system.

3. Secured Transactions in Transition Economies

In the 1990s, the former communist countries like Poland, Hungary and the Czech Republic made haste with a modern law on secured transactions to usher in foreign investors. In order to facilitate the smooth transition to the market economy, the European Bank for Reconstruction and Development (EBRD) advised the Central and Eastern European countries of its operation to adopt the EBRD model law on secured transactions in 1994.

The features of the EBRD model law were the compromise of civil law and common law, the establishment of one single charge, or security right, and the requirement of registration for the purpose of notice of such charge. The EBRD model law introduced an efficient system such as a charge manager, and a class charge similar to the floating charge in common law. Under the EBRD model law, self-help is an ordinary course of the enforcement of charge, and the depositary should distribute the proceeds to the creditors except when the court intervenes the proceedings out of inter-party disputes.

Most of those transition economies in Eastern Europe have accepted the core principles of the EBRD model law and the electronic filing system while some other countries like Poland introduced the collateral law very similar to Article 9 of the Uniform Commercial Code under the auspices of IBRD and USAID.

China was swift to legislate the secured transactions, which had been

unknown to Chinese people until the early 1990s. The Collateral Law of 1995 established five types of security rights – guarantee, mortgage, pledge, lien and deposit – so as to make sound the loan portfolios of state-owned banks and to promote foreign investments. For an example, a debtor may grant mortgage to a creditor on his right to use the land, his own buildings, ground fixtures, machinery, transportation equipment and other personal properties subject to the registration with the competent filing office.

In reality, the Chinese mortgage seems to be more or less ineffective. A creditor may elect the foreclosure methods among purchase upon assessment, sale at the market price and competitive sale (auction). But the bankruptcy court is inclined to order, in the socialist tradition, to distribute the proceeds initially to the job-lost employees of the debtor company and other mutually beneficial expenses, then to the first-priority creditors. As a result, most creditors deserve almost nothing from the bankruptcy proceedings.

4. Lessons to be Learned by North Korea

It seems to be inevitable for the North Korean government to establish a modern collateral law so as to induce foreign capital and to boost its sagging economy. It has to modify and upgrade the existing mortgage system after investigating the reasons why the current system has been usually averted by foreign investors.

The first and foremost thing is how to make public the existence of mortgage on the property. It seems to be useful to employ sophisticated information technologies at a competitive cost. Also it is necessary to extend the scope of properties eligible for mortgage, and to enhance the creditor's expectation in the proceeds distribution process. It is crucial for North Korea to consider the harmonization and integration of collateral system with the existing South Korean law so as to invite more and more South Korean

investors.

At this juncture, it is useful to compare the collateral regime between the North and the South. In terms of eligible properties, there is a highly restricted manner in the North. In the South, a creditor usually relies upon the possessory security right or fiduciary transfer of title against moveables and the non-possessory one against real estates to secure his claims.

<Figure> Comparison of Collateral between the North and the South

Real Estate (In the North, only the right to use the land and buildings) ⇒ Registration with Filing Office	Machinery & Equipment ⇒ Addition to the collateral list under the Factory Mort- gage Act	Inventories ⇒ Fiduciary transfer of title	Personal Properties ⇒ Delivery
		Automobiles & Heavy Machinery ⇒Registration	
Account Receivables ⇒ Transfer	Intellectual Property Rights ⇒ Registration		

* The square inside the thick lines indicates the frequently used collateral in the South, while the gray tone square indicates the currently used collateral in the North.

III. The Collateral Available in the North

1. Overview

At present, the properties located in North Korea would be granted as collateral as follows:²⁾

The eligible property is limited in general, but might be extended somewhat in the Special Economic Areas. As a matter of fact, the existing system limits the properties only to the right to use the land and buildings, and, in some cases, transportation equipment subject to the registration with the filing office. But the creditors could not be satisfied with the current collateralized properties. The maximum amount of the collateral will be the purchase price of the factory building and the land in the North. Moreover, South Korean investors would be concerned with the enforcement of mortgage and the proceeds distribution.

From the creditor's point of view, the stage of doing business in North Korea would dictate the eligible collateral as follows:

▷ *At the initial stage:*

- The lender may extend a loan on credit to a selected group of small and medium-sized enterprises (SMEs). So SMEs with sufficient track records would be preferred.
- A feasibility study of the proposed project exceeding a certain amount of investments and the qualitative analysis of cash flows are recommended to prevent moral hazard of investors.
- The registration of the right to use the land and buildings is required for granting mortgage.
- Collateral is exempted in case the North Korean partner invests in kind by means of the right to use the land, buildings, or machinery and equipment because such assets cannot be foreclosed.

▷ *At the growth stage:*

- Materially important machinery and facilities should be insured appropriately.
- Account receivables may be granted as collateral if stable cash flows

2) Whon-Il Park, "How to Secure Creditors' Claims in the Gaeseong Industrial District", *North Korean Law Journal*, June 2003, pp.190-195.

are expected. Future cash flows might be transferred in case they will be specified and confirmed in the near future. In this case, an offshore escrow account in a creditworthy third country is highly advisable.

- The origin of cash flows should be buyers in South Korea with good credit standing because the notification of the transfer of account receivables and relevant debt service take place in the South.

▷ *At the full-fledged stage:*

- In most cases, the collateral based on the real estate is of little value in view of the total credit amount.
- When cash flows are considered constant and stable, asset-backed loan or securitization based upon a pool of account receivables and trade receivables would be possible in association with other businesses generating considerable revenues.

▷ *In other areas than the Free Economic Area:*

- All the collateral should be acquired as mortgage. However, the value of collateral and the effect of enforcement cannot be ensured in the socialist country.
- The debtor should prove to be profitable enough to repay the debt.

2. Some Considerations

Creditors should bear in mind the followings:

- Though the Inter-Korean Investment Guarantee Agreement ensures South Korean investors the prompt and sufficient compensation for any public expropriation by the North Korean government, it remains to be seen that production machinery and facilities are totally under the control and ownership of South Koreans. The Addenda of the Gaeseong Industrial District Act provides that the ultimate interpretation of the Act belongs to the authority of the Standing Committee of the People's Supreme Congress.

- It is advisable that the North shall establish a modern law on secured transactions as envisaged in such transition economies as Poland and China.
- All the discussions, understanding and agreements between the parties should not be contrary to the current legal regime and should be settled in writing and endorsed by the duly authorized representatives of the government.
- Each and every agreement should include an appropriate governing law and dispute settlement process.

The South Korean investors as well as creditors might be satisfied by the scheme that the offshore account receivables the businesses could earn from the buyers in South Korea or a third country will be transferred to the creditors as a reliable source of cash flows enough to repay the debt. In this connection, however, an alternative to mortgage, i.e., fiduciary transfer of properties located in the North by a debtor to a creditor, might cause legal entanglement if the North Korean authorities would not acknowledge or consent to the transfer.

Lenders should pay attention to the *ex post* management of collateral and effective enforcement of mortgage. By doing so, they would head off moral hazard on the part of debtors.

IV. Prospects

1. Core Principles

In principle, a modern collateral system is inevitable for the North to facilitate foreign investment and to achieve economic development. China was a good example in that the newly established collateral law was indispensable

for state-run banks to keep non-performing loans under control regardless of their socialist ideology.

In the meantime, the North Korean authorities have to ensure the foreign investors, including the South Korean creditors, favorable treatment with a letter of undertaking on secured transactions and the legal effect of investors' claims. Most of all, the freedom of travel, free communications and fast customs clearance are crucial to foreign investors doing business in the North.

Then what kind of collateral system is appropriate and recommendable to North Korea? There are three alternatives: the Polish Collateral Law in line with Article 9 of the U.S. Uniform Commercial Code, the EBRD Model Law on Secured Transactions, and the Chinese Collateral Law of 1995.

In anticipating a unified Korea, two Koreas have no option but to establish a similar legal framework of secured transactions each other. Otherwise, the different legal system would be enormous barriers to economic cooperation between the North and the South. Therefore, we have to advise the North to adopt modern principles on secured transactions, while we hurry up to introduce a coherent, comprehensive and effective legal framework for non-possessory security over moveables like inventories and account receivables.

Also it is highly recommendable for any borrower in North Korea to give security over such assets in possession as personal properties, monetary certificates, receivables and other claims while the debtor continues to use the collateral and conduct economic activities. In this context, a public notice filing system is required to determine the priority of the security right. The state of art information technology has made it possible to establish a nation-wide electronic filing system at a reasonable cost.

The EBRD has suggested the following core principles for a modern secured transactions law:³⁾

3) John Simpson and Joachim Menze, "Ten years of secured transactions reform", *Law in*

- Security should reduce the risk of giving credit leading to an increased availability of credit on improved terms.
- The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the security of the use of his assets.
- If the secured debt is not paid, the security holder should be able to have the charged assets realized and to have the proceeds applied towards satisfaction of his claim prior to other creditors.
- Enforcement procedures should enable prompt realization at market value of the assets given as security.
- The security right should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it.
- The cost of taking, maintaining and enforcing security should be low.
- Security should be available over all types of assets, to secure all types of debts; and between all types of persons.
- There should be an effective means of publicizing the existence of security rights.
- The law should establish priority rules governing competing rights of persons holding security and other persons claiming rights in the assets given as security.
- As far as possible, the parties should be able to adapt security to the needs of their particular transaction, indifferent to their nationality.

The above principles should adopt the followings, in particular, in Gaeseong Industrial District:⁴⁾

- The administration office is required to acknowledge mortgage akin to that of South Korea and self-help foreclosure in view of little possibility of open market in Gaeseong area.

transition, Autumn 2000, p.26. The same contents may be found at
<http://www.ebrd.com/english/region/legtran/secured_trans_core.htm>.

4) Park, *op.cit.*, p.208.

- There would be high probability that the registered debtor is different from the actual operator of business.
- The administration office has only to inspect the surface of documents submitted by the applicant.
- All the machinery and equipment and other valuable moveables in the factory should be insured in a proper manner and registered in addition to transportation equipment.
- The registration system should be accessed through the Internet for filing and perusal of the content.

2. Required Infrastructure for New Collateral System

The newly adopted collateral system requires upgraded infrastructure for efficient creation, maintenance and enforcement of security rights.

There should be plenty of specialists who are engaged in the assessment, due diligence review and inspection of collateral on the site. Also there should be an exchange or exchanges, possibly in Seoul, where detailed information or database of the collateral could be inspected and traded. In the long run, a list of prospective buyers of businesses in the Free Trade Areas should be prepared.

The registration and maintenance of security rights should employ sophisticated information technology including the Internet. By doing so, the self-help enforcement of security rights could be realized based on the integrated database efficiently at a low cost.

It is pivotal to have a branch of leading South Korean banks in Gaeseong, which is to conduct loan provisions, exchange transactions, collection of claims for South Korean customers at the site. And specialists at the bank office will perform cash flow analysis, feasibility study, collateral administration, on-site examination and provide extensive consulting services, technical assistance,

and human resources recruitment, etc. Also business insurance service is necessary through a specialized association or cooperative body, which may provide education and training programs to North Korean officials who are interested in the market economy.

<Table> Security available in the North

Collateral	Advantage	Disadvantage
Mortgage	<ul style="list-style-type: none"> - The scope of security is clear. 	<ul style="list-style-type: none"> - The collateral is restricted. - The market value of collateral is insufficient against the outstanding loan amount.
Transfer of Account Receivables	<ul style="list-style-type: none"> - It is easy to control the cash flows of the businesses in the North. 	<ul style="list-style-type: none"> - Public notice filing or perfection is required against the third party. - The effect of security depends on the capacity of creditors.
Asset-backed Securitization (ABS)	<ul style="list-style-type: none"> - It is convenient to raise fund based on the current and future cash flows. 	<ul style="list-style-type: none"> - Public offering is impossible in the North. - The aggregate amount should be enough to cover the expenses paid to the relevant parties.

In terms of risk management, there should be professional institutions in the Free Economic and Trade Areas, which provide insurance products, appropriate coverage of any deficient cash flow. Further to the discussion, there will be increasing needs for insurance and risk management of business operations in North Korea.

V. Conclusion

As explained above, there are plenty of restrictions in enforcing the security right over a specific property so as to recover creditor's claims. So we had better turn to a paradigm shift in collateralization which took place in the 1990s.⁵⁾ In the United States, it is generally called "structured financing". The object covers any asset that could generate comparatively stable cash flows in nature, for example, commercial buildings, personal properties, account receivables, trade receivables, and so on. Thus financial institutions and business entities are able to securitize their assets including distressed loan portfolios and real estate backlogs at a competitive cost.

The similar structure is being applied to project finance in which a project company, i.e., SPV, is established for the purpose of off-balance sheet financing. Revenue-generating assets of the project will be set aside for the repayment to project financiers. Project financiers shall maintain security rights over the assets related with the project, not because they want to dispose of such assets, but because they should prevent third parties from intervening in the project as security holders.

Considering that the considerable portion of revenues of the businesses located in the North derive from the South, creditors may be satisfied by the transfer of receivables to be paid by the buyers in the South. Those receivables could be transferred to the creditors through bulk assignment of receivables.

Financial institutions will be ready to support the businesses by means of project financing when the scale and volume of cash flows of such businesses are sufficient.⁶⁾ For example, the total revenue is required to cover more than

5) For instance, asset-backed securitization (ABS) is widely felt to function as collateral. In other words, when an originator transfers a pool of assets to a special purpose vehicle (SPV), investors of the bonds or investment certificates issued by the SPV could be satisfied by cash flows and total values of the separated, or bankruptcy-remote, assets.

120 percent of the amount of debt service. In this case, creditors hold mortgage over the assets in the North so that creditors may take an initiative to transfer the operation of the business to a third party if the debtor proves to be incompetent or insolvent.

In conclusion, structured financing like ABS or project financing,⁷⁾ which is focused on the cash flows rather than the value of collateral, would be useful even before the North Korean regime embarks on adopting a modern secured transactions law. This new sort of financing is believed to play a major role to develop the deteriorated infrastructure in North Korea in a unification era. Financial institutions and specialists in business operations and law should be prepared to this type of financing and the best practices, in particular, concerning the non-possessory security right against personal properties.

※ Key Words: Inter-Korean economic cooperation, means of production, collateral, mortgage, transition economies, cash flow, asset-backed securitization (ABS), project financing

6) Trading partners may argue that the North Korea-made products have been manufactured on the subsidy by South Korea in violation of the WTO Subsidy Code. Also the issue of country of origin might be an obstacle to export of some industrial products to the United States and the EU member states. If we fail to defend Korea's position on the basis of inter-Korean trade, the revenues originating from the businesses in the North would fall short of the expected cash flows.

7) In January 2003, the Working Group to Study Corporate Legislation (Collateral System) of Japan published the final report on "New Financing Schemes based upon Cash Flow rather than Real Estate Mortgage". According to this report, the Working Group enumerates, as new financing schemes for Japanese corporations, i) inventory or receivable-backed financing focused on the origin of cash flow, ii) structured financing through securitization of income-generating assets, and iii) project financing based upon cash flow from a specific project.

<<http://www.meti.go.jp/feedback/index.html>>

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<국문 초록>

대북 투자진출 기업에 대한 금융지원 방안

박원일

남북경협이 활기를 띠에 따라 북한에 진출하는 기업들이 현지에 투자하는 자산을 담보로 제공하고 국내 금융기관들로부터 원활하게 자금지원을 받을 수 있게 되기를 바라고 있다. 현재 북한에 투자 진출하려는 기업들은 대부분 중소기업들로 신규 투자 또는 설비이전에 필요한 자금을 자체 조달하기에는 부담이 큰 실정이다.

그러나 국내 금융기관들은 북한소재 투자자산의 담보가치 및 채권회수 가능성에 회의적이고 대북진출 기업의 대출 요청에 소극적인 것도 사실이다. 최근 들어 여건이 상당히 호전되고 있는데, 이미 남북 투자보장합의서가 발효되어 남한 기업이 북한에 투자하였다가 일방적으로 국유화 또는 수용을 당할 가능성은 크게 줄어들었고, 남북 당국간의 노력으로 북한 소재 자산을 담보로 활용할 여지가 확대되었다.

북한 소재 담보의 취득방안으로서 경협 초기단계에는 북한의 현행 법규상 이용할 수 있는 토지이용권 및 건물에 대한 저당권 설정이 고작일 것이다. 이것만으로는 담보가액이 절대 부족하므로 경협사업을 하는 중소기업에 대하여는 정책금융기관에 의한 신용대출이 불가피한 상황이다.

개성공업지구 등 경제특구에서의 사업이 활기를 띠게 되면 안정된 수익모델을 기초로 매출채권 등을 담보로 취득할 수 있을 것이다. 본격추진단계에서는 상업금융기관들도 매출채권을 담보로 대출 취급이 가능할 것으로 보이며, 현금흐름을 중시하는 금융기법으로서 프로젝트 금융과 자산유동화(ABS)를 이용할 경우에는 추가적인 자금조달도 가능할 것으로 여겨진다.

담보의 취득 못지 않게 담보권의 실행을 통한 환가처분이 중요하나 해당 담보 목적물의 수요자가 그리 많지 않은 북한 지역에서는 그 실효성이 의문시된다. 북한도 동구의 체제전환국이나 중국을 모델로 근대적인 담보법제를 도입하여야 외자유치도 순조롭고 경제발전의 기초를 다질 수 있음을 유의할 필요가 있다.

북한의 현행 법규상 현지 담보의 취득은 그 대상의 제한, 담보가액의 절대부족 등으로 그 자체로서는 상징적인 의미밖에 없다. 그러나 근대적인 담보법제의 정비가 체제전환국의 외자도입 조건이라 한다면 우리는 북한에 대하여 끈기 있게 개선방안을 제시하여야 할 것이다. 정보기술의 발달로 가변적인 목적물에 대한 담보권의 공시도 어렵지 않게 되었다. 따라서 북한에 제안하는 것 못지 않게 우리나라의 담보법제를 비점유형 담보권 중심으로 보강하는 것도 필요하다고 생각된다.

※ 주요어: 남북경협, 생산수단, 담보, 저당권, 체제전환국, 현금흐름, 자산유동화, 프로젝트 금융