

# **ACCESSORY SECURITY RIGHTS IN SYNDICATED LENDING – THE PROBLEM OF ENTITY SEPARATION**

Doctoral dissertation by mgr Tomasz Tomczak

## **SUMMARY**

The main goal of the dissertation is to answer the following question:

Whether, in case of syndicated lending, it is possible to grant security rights to a security agent instead of lenders, under the assumption, however, that they secure the receivables of the lenders, not the security agent?

Such question in essence expresses one of the main research problems of this dissertation, i.e. to what extent the entity dimension of accessoriness requires that both the security right and secured by it syndicated lending receivables shall belong to the same entity (the problem of entity separation).

However, in the course of the consideration of this first problem, more issues will appear. Firstly, a need to answer the question: under Polish law, what is the most efficient manner of dealing with the problem entity separation? Secondly, how such solution should be potentially improved. The latter will be considered, in the first place, exclusively in reference to Polish jurisdiction (also from a comparative perspective), and subsequently from the perspective of the transnational syndicated lending structures.

The following main theses will be proven in the dissertation:

- 1) All security rights shall be seen, as a rule, as accessory from the perspective of entity dimension, *i.e.*, in reference to all security rights it is required that the title to secured receivable and the title to security rights belongs to the same entity. Accessoriness understood in such way may be subject to relaxation however, conditions of such a relaxation look differently in the case of Proprietary Security Rights and differently in the case of Personal Security Rights. For the former, an explicit consent of the legislation is required, while in the case of the latter, the entity separation will be allowed provided that the parties shaping the Personal Security Right legal relationship will not go beyond the limits of the autonomy of will granted to them and not exceed the limits of freedom of contract principle resulting from article 353<sup>1</sup> of the Polish Civil Code.
- 2) The most optimal way of securing the syndicated lending transaction is structuring of said financing, that the title to the security right will belong to the security agent who will take a form of an indirect representative. Such a thesis results from the problem of multiplicity and collectivity of security rights in case of this transaction.
- 3) At the moment, in the Polish legal system the most optimal solution of the entity separation problem in the case of syndicated lending is the institution of the security administrator. However, such institution, at present, constitutes an imperfect solution, which does not deal with the problem in a holistic way.

- 4) From the perspective of solutions adopted in Polish, Dutch and Ontario's legal systems, the most optimal solution to deal with the problem of entity separation is the trust institution. However, due to the lack of said institution in the Polish legal system and its specificity for common law systems, it does not seem to be a viable way to solve the entity separation problem in Poland and only the improvement of the security administrator institution shall be recommended. Due to the above, from the perspective of entity separation problem and in the context of syndicated lending in reference to the security administrator institution the following theses can be provided:
- a) the security administrator institution shall be extended to all security rights;
  - b) assuming that all security rights from the perspective of entity dimension should, in principle, be deemed as accessory ones, in reference to the security administrator institution there should be no other subject or object restrictions;
  - c) the future regulation should expressly state that the title to security right belongs to the security administrator, not to the lenders;
  - d) a purchaser of the secured receivable should, by operation of law, enter into a legal relationship with the administrator, unless the parties to the assignment contract agreed otherwise;
  - e) the effectiveness of relying on an institution of security administrator in reference to third parties should depend on the fact whether the appointment of it was disclosed;
  - f) together with the extension of the security administrator's institution on new security rights, the scope of application of article 63 sec. 1 point 3 of Polish Bankruptcy Law should be broadened, however the application of this provision should be subject to disclosure of appointment of the security administrator;
  - g) in the event of disclosure of the appointment of a security administrator, the protection of administrator's assets regarding security rights and the proceeds obtained on the basis of them shall be extended to the cases of singular execution.
- 5) The security administrator institution seems to be also the optimal solution of the entity separation problem in reference to the transnational syndicated lending structures, hence it should be regulated in an international convention or at least an act of EU law, *e.g.*, a directive providing the maximum harmonization.

The structure of the dissertation reflects the abovementioned theses. Thus, this dissertation consists of five chapters and the considerations in it took the following form:

In the first chapter the terms which will appear throughout the whole dissertation will be explained, since only their proper comprehension will allow to accurately highlight the problems examined in this paper. These will be such terms as syndicated lending, security right and accessoriness of security rights. Especially, the closer look at the latter of them will allow to answer the question which security rights, from the perspective of entity dimension of accessoriness, shall be seen as accessory.

In the second chapter it will be presented how, in practice, the securing of such a complex transaction as syndicated lending looks like. This will prove why it is so necessary to have security



agent in case of such financing. This will be relevant, since, as it turns out, an attempt to combine accessory security rights with the institution of security administrator (in the form of indirect representative), on the one hand is the most desirable, on the other hand however, it raises the biggest problems in case of such transaction, *i.e.*, it will lead to the entity separation problem.

In the third chapter the author will consider different attempts to solve the entity separation problem under the Polish legal system and will draw conclusions on which of them is the best.

In the fourth chapter the best Polish solution to the entity separation problem will be confronted with the solutions of the same problem adopted in the Netherlands and in Ontario (Canada). What is relevant, the Dutch law is based on the continental (civil) legal tradition, while Ontario's law on the common law tradition, what, as it will turn out, will have significant cognitive value. The summary of this chapter will allow to choose the best of the solutions among these used in these three jurisdictions (Polish, Dutch and Ontario) and to submit *de lege ferenda* postulates in reference to Polish law.

Chapter 5 constitutes a kind of "add-on". In chapters 1-4 it was always assumed that syndicated lending takes place within one jurisdiction (Polish, Dutch or Ontario). While syndicated lending is very often an international financing. In cross-border case the problem considered in this dissertation is only gaining on importance and the transaction itself becomes even more complicated. The entity separation problem becomes even more complex and deserves at least a separate doctoral dissertation which should have more comparative and conflicts-of-law nature. Therefore, this chapter constitutes, to some extent, a simplification and an indication of problems that require further research. However, it is important since it allows to show the broader perspective of the problem and its even greater practical significance. It allows also to propose the international solution of the entity separation problem in case of syndicated lending, which may, due to the limited scope of considerations in this chapter, be subjected to the justified criticism.

The dissertation is closed by the ending, in which all the main theses of the dissertation and those partial theses which were used to prove the main theses, have been collected. The ending contains also *de lege ferenda* postulates regarding the institution of the security administrator.

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Tomasz  
Tomasz