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MODERNIZATION OF COMMERCIAL LAW: INTERNATIONAL UNIFORMITY AND ECONOMIC DEVELOPMENT

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ABSTRACT

The universality of certain commercial legal institutions is not the product of chance or of cultural imperialism. Commercial legal institutions that are being used uniformly throughout the trading world earn their universality by incorporating best commercial practices. These are the practices that have proven their cost-effectiveness and fairness regardless of the marketplace in which they were first used. Those best commercial legal practices that become universal legal institutions have proven themselves as indispensable legal tools for significant and lasting economic development. By “institutions,” I mean not only the concepts, rules, and principles of interpretation that inspire the “written” or “positive” commercial law of a given country or jurisdiction, but also the attitudes that shape the “unwritten” or “living” law, or the law as it is actually observed or practiced. This living law is, often as not, the one that determines why a legal institution that succeeds in one country or region fails or is less successful in another.

This Article examines why the law of secured lending based on personal property collateral, a key contemporary commercial legal institution and tool for the economic development of countries such as Canada and the United States, among other nations, is likely to succeed in Guatemala and Honduras. It will also show why it will not succeed in Mexico and Peru, unless it is redrafted and the underlying attitudes and practices of these two countries are changed.

Keywords: modernization of commercial law, best practices, the law of secured lending, economic development.

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I. THE INTERNATIONAL UNIFORMITY OF COMMERCIAL LAW, LEGAL INSTITUTIONS, AND LEGAL CULTURE

During the nineteen sixties, a good number of well-intentioned law professors were attracted by the then-fledgling field of “law and economic development”; unfortunately, very few were conversant with the legal systems and cultures of developing nations. Despite their meager understanding of these nations’ laws and cultures, some warned against the modernization of their commercial law by what they described as attempts to “import” legal institutions from developed nations. I placed quotation marks around the word “import” because for many centuries, similar legal concepts, rules, principles of interpretation, dispute resolution procedures, and remedies were viewed by merchants throughout the trading world as *their* law. This was the so-called “law merchant” (or *lex mercatoria*), and it resulted from the commercial practices that national groups of internationally active merchants adopted as a result of their interaction with their foreign counterparts.¹

Hence, the law merchant could not be properly characterized as an “imported” law because it embodied a uniform, reciprocal, and equal treatment of merchants by fair courts, consulates, and eventually, commercial courts, regardless of the provenance of the disputing merchants and the location of these courts.² Eventually, the law merchant was absorbed by the decisional, statutory, and codified law of common and civil law countries; yet, even when “comingled” with other types of law, it has continued to be largely shaped by what merchants deem their best com-

1. See Boris Kozolchik, *The Law of Commercial Contracts in a Comparative and Economic Development Perspective VIII-8* (2008) (printed class materials, on file with author) [hereinafter Kozolchik, Printed Class Materials]. See also PAUL HUVELIN, *ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS ET DES FOIRES* 258 (1897), cited in Kozolchik, Printed Class Materials, *supra*, at VIII-7. In Huvelin’s words:

Thanks to the fairs, groups of merchants could deal with each other governed by the same enforceable law and under the same tribunals. A central authority existed to which the merchants of all nations could demand, successfully in many cases, protection against overreaching attempts by other merchants intent on applying their local law. This is a fact whose historical importance is unsurpassed by any other in the development of the commercial law of the middle ages

Id. See also Boris Kozolchik, *A Roadmap to Economic Development Through Law: Third Parties and Comparative Legal Structure*, 23 ARIZ. J. INT’L & COMP. L. 1 (2005) [hereinafter Kozolchik, *Roadmap*]; Boris Kozolchik, *Highways and Byways of NAFTA Commercial Law: The Challenge to Develop a Best Practice in North American Trade*, 4. U.S. MEX. L.J. 1 (1996) [hereinafter Kozolchik, *Highways and Byways*]; Boris Kozolchik, *Secured Lending and Its Poverty Reduction Effect*, 42 TEX. INT’L L.J. 727 (2007).

2. Kozolchik, Printed Class Materials, *supra* note 1, at VIII-9.

mercial practices—both national and international. It also continues to rely on simple and expedited procedures and methods of adjudication.

The vitality and universality of a commercial law shaped by best practices are apparent in institutions that stretch back as far as the ancient Greek version of the maritime contract and security agreement (known in common law countries as the contract or bond of “Bottomry”).³ Other commercial legal institutions, albeit of a more recent vintage, continue to be used worldwide. Among these are the twelfth century Genoese *Lettera di Cambio* (bill of exchange or draft),⁴ the fourteenth century Florentine double-entry bookkeeping,⁵ the English seventeenth century Goldsmith’s notes and receipts (eventually known around the world as the “checks”),⁶ and the joint stock companies or corporations,⁷ the German-Silesian eighteenth century mortgage notes,⁸ the Anglo-American nineteenth and twentieth centuries’ commercial letter of credit; and the U.S. standby letters of credit⁹ and unitary security interest in personal property collateral.¹⁰ All of these commercial law institutions reflect best practices because they incorporate not only practices that have proven themselves in everyday marketplace transactions as the most cost-effective, but also those perceived as most fair by the regular participants in these transactions.¹¹ By a commercial legal institution, then, I mean not only the con-

3. For a historical sketch of the Contract or Bond of Bottomry, see HUGH CHISHOLM, IV THE ENCYCLOPEDIA BRITANNICA DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 310–11 (11th ed. 1910).

4. For a brief history of the inception of the *Lettera di Cambio*, see Martin Körner & Jean-François Bergier, *Lettera di Cambio*, in DIZIONARIO STORICO DELLA SVIZZERA (2008), available at <http://hls-dhs-dss.ch/textes/i/I26229.php>.

5. See ALFRED W. CROSBY, THE MEASURE OF REALITY: QUANTIFICATION AND WESTERN SOCIETY 199–226 (1997). See also Radio broadcast: John H. Lienhard, Double-Entry Bookkeeping, Engines of Our Ingenuity, Episode No. 1229 (1997) (transcript available at <http://www.uh.edu/engines/epi1229.htm>).

6. See generally GLYN DAVIES, A HISTORY OF MONEY FROM ANCIENT TIMES TO THE PRESENT DAY (3d ed., Univ. of Wales Press 2002) (1994). See also BENJAMIN GEVA, BANK COLLECTION AND PAYMENT TRANSACTIONS 14, 15 (2001).

7. See C.E. Walker, *The History of the Joint Stock Company*, 6 ACCT. REV. 97 (1931).

8. For a brief account of the historical development of mortgage bond financing in Germany, see Tim Lassen, Association of German Mortgage Banks, 3rd Workshop on Housing Finance in Transition Economies: Development of Mortgage Bonds (Dec. 5–6, 2002), available at <http://www.oecd.org/dataoecd/33/10/1844485.pdf>.

9. See generally Boris Kozolchik, *Letters of Credit*, in IX INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 5 (1978).

10. Boris Kozolchik & Dale Beck Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J. L. & TRADE AM. 235, 266, 276, 281 (2005).

11. Boris Kozolchik, *Fairness in Anglo and Latin American Commercial Adjudication*, 2 B.C. INT’L & COMP. L. REV. 257 (1979) [hereinafter Kozolchik, *Fairness*]; Boris

cepts, rules, and principles of interpretation that comprise or inspire the "written" or "positive" commercial law, but also the attitudes that shape the "unwritten" or "living" law, the law as it is actually observed or practiced.

For those of us engaged in commercial legal modernization, the attitudes toward commerce (especially its respectability as a profession) and toward law (especially the manner and extent of its observance) are as important as the positive or governmentally enacted legal institutions. Where commerce is widely regarded as a tricky or picaresque endeavor or as a "zero-sum game," or where for one of the contracting parties to win the other must necessarily lose, or where an equal commercial treatment is only accorded to a family member or close friend and not to third parties or strangers, a weak marketplace and a weak economy are inevitable. Similarly, where the written law is widely disobeyed or disregarded, the economic consequences could be equally negative. The living-law variable, then, is often what determines the success or failure of a commercial legal institution. And, together, the positive or written law and the living law, as well as the above-described attitudes are what I refer to as a nation's or region's "legal culture."

II. INTERNATIONALITY OF PRACTICE AND UNIFORM LEGAL INGREDIENTS OF COMMERCIAL TRANSACTIONS

Why does commercial law tend to be internationally uniform? First, because despite man's innate selfishness and drive for gain, he has learned that cooperation is indispensable in commerce, regardless of where it is conducted. Unlike war, and even unlike hunting and gathering, sustained, gainful commerce cannot be based upon theft, deceit, or variations thereof. A "zero-sum game" attitude toward commerce destroys trust, and with it, the viability of a marketplace. Second, because of the need for cooperation among the regular participants in commerce, the legal ingredients of the various types of contracts, as contrasted with the forms of these contracts, are not as open-ended or variable as is the imagination of the participating merchants. The need for cooperation imposes serious limits on both the operational and moral components of these ingredients.

This does not mean that commercial law should not be open to new types of contracts. Most certainly it must be open and especially to those practices prompted by commercial and financial needs and technological innovations. Thus once it became clear to Roman jurists that most of the

Kozolchyk, *The Commercialization of Civil Law and the Civilization of Commercial Law*, 40 LA. L. REV. 3 (1979) [hereinafter Kozolchyk, *Commercialization*].

transactions in the Roman marketplace consisted of informal sales, they made these transactions enforceable by the “mere consent of the parties” (*solus consensus obligant*).¹² And unlike the pre-existing law of formal sales which applied to highly valuable property (*res mancipi*), consensual sales governed the sale of everyday goods.¹³ Moreover, consensual agreements had to be interpreted according to good faith and not based upon a strict or literal reading (*stricti iuris*).¹⁴ Countless commercial sales later, the Roman insight continues to prove its universal wisdom. This is also why, in our time, consensual electronic transactions are gradually replacing many of their paper-based counterparts.

As suggested by the validation of Roman consensual agreements, the cost-effectiveness of a commercial practice results first from the choice of an appropriate transactional means, including its physical format. Any format that impeded the purpose of a transaction would be inappropriate. Consider, for example, the practice jokingly suggested by an English legal humorist who asked why a valid negotiable bill of exchange or draft could not be created by stenciling its standard binding language on the back of a cow.¹⁵ Obviously, whoever chose a cow as a physical format for a bill of exchange or check ignored not only the mechanics but also the purposes of deposits, negotiations, and payments of these instruments.¹⁶ These mechanics and purposes are inseparable from the rights, duties, and remedies incorporated into a bill of exchange or check, all of which require a compact, portable, standard, inexpensive, durable, and yet easily endorsable or transferable medium. It hardly needs saying that the difficulty of using a cow as a negotiable instrument would be the same regardless of the country or region where the issuers, depositors, banks, or negotiating parties of bills of exchange or checks were located.

Mutatis mutandis fairness (the other main component of a successful or best commercial practice) presupposes that the parties to a transaction (including third parties) must be treated in the same manner as they or regular participants in the marketplace would reasonably expect to be treated. To be a contractually fair party, then, one must place oneself in the position of the other contracting party and ask oneself what that party reasonably expects to get out of the contract, and if that intent is not clear, place oneself in the position of a collective “other,” i.e., that of

12. See Kozolchyk, Printed Class Materials, *supra* note 1, at III-14.

13. See *id.*

14. See *id.* at III-15.

15. See A.P. HERBERT, UNCOMMON LAW: BEING 66 MISLEADING CASES 112–17 (1935) (explaining the case *Board of Inland Revenue v. Haddock*).

16. *Id.*

regular participants in the marketplace, and ask the same question.¹⁷ Commercial fairness, then, presupposes that each commercial legal institution contains a formula of rights, duties, and remedies that bring about a protection of market “otherness” and that these rights, duties, and remedies be inspired by principles without which commercial law and its practices could not discharge their economic development mission.

As I have noted in some of my earlier writings, what distinguished European commercial law during its emergence in the eighteenth and nineteenth centuries as a separate branch of private law was its adherence to a set of principles that I will enumerate in an illustrative and thus nonexhaustive fashion.¹⁸ They are (1) the parties’ ability to bind themselves in a manner consistent with their intent, including the finality and limitation of their liability as to time and amount; (2) the equal treatment of merchants by authorities and merchants, regardless of their country of origin, race, ethnicity, or religion; (3) the parties’ and their adjudicators’ ability to observe and apply best practices derived from standards of customary behavior as well as from the behavior of model or archetypal merchants; (4) the recognition of possession of movable property as equivalent of title to it; (5) the ability to convey better title to movable property, including commercial paper and documents of title, than that received from one’s predecessor (the principle of negotiability); and (6) the protection of parties (contracting as well as third parties) who act in good faith.

Yet, despite the proven contribution of these principles to the viability of commercial and financial marketplaces, opponents of modernization still argue in favor of retaining autochthonous legal institutions that are inconsistent with these principles for the sake of preserving a national or regional “legal tradition.”

III. POVERTY AND AN EXCLUSIVELY AUTOCHTHONOUS LEGAL MODERNIZATION

Some of these opponents regard the modernization of commercial legal institutions of developing nations as a product of intellectual arrogance or of cultural, legal imperialism. They doubt that developing nations would fare better with legal institutions inspired by what they believe are crassly commercial and materialistic legal cultures.

17. See Kozolchyk, *Commercialization*, *supra* note 11, at 27–28; Kozolchyk, *Fairness*, *supra* note 11, at 233–35.

18. Boris Kozolchyk, *On the State of Commercial Law at the End of the Twentieth Century*, 8 ARIZ. J. INT'L & COMP. L. 1, 7–10 (1991). I have rephrased the original formulation of these principles in later publications. The formulation in the principal text reflects their latest version.

Despite the difficulty of pinning down the meaning of crass materialism, what some of these skeptics truly object to is the prevalence of capitalistically-inspired commercial values. They continue to cling to Marxist-inspired models of economic development, despite undisputable signs of the failure of these models in countries as diverse as China, Cuba, Russia, and those in Eastern Europe. Other skeptics, especially during the nineteen sixties and seventies, seemed under the spell of the bucolic, "return-to-nature" movement of those years. They believe that far from "exporting" their legal institutions, developed nations should learn from developing nations' ability to live with much less and enjoy life as much, if not more, than in capitalist societies. I remember asking one such "neo-Marxist" (who sported the expensive Ivy League tweed jacket and aromatic pipe *de rigueur* among senior "protest" academics of the nineteen sixties) if he had ever discussed his version of life's enjoyment with a poor parent in a developing nation unable to feed, let alone cure, his parasitically bellied child. He had not. I then suggested that had he ever discussed such a topic, he would have quickly learned how heartily that parent would have welcomed any legal institution that provided improvement to such sad living conditions, regardless of the institution's provenance.

Another variation on the theme of exclusively autochthonous solutions to economic development through modernization of commercial law was expressed by a Mexican government official during the North American Free Trade Agreement negotiations. I suggested to him that the Mexican law of secured transactions should be harmonized with Canadian and U.S. laws to be able to provide credit to small and medium-sized Mexican businesses; otherwise, these businesses could not compete on equal terms with their Canadian and U.S. counterparts, which had access to credit at much lower rates of interest. His reply was, "Why should Mexico harmonize its law with that of Canada and the United States and not the other way around?" I told him that his question could only be answered if it was rephrased. What he should have asked was, "Does Mexico want access to credit for its small and medium-sized businesses on the same terms and conditions enjoyed by Canadian and U.S. businesses?" If it did, then, as the old saying goes, "there are only so many ways to skin that cat," and relying on institutions intended for a nineteenth-century world, where, among other principles, real estate was the most valuable asset and movable property was "vile" property, is not the answer.¹⁹

19. See generally Boris Kozolchik, *What to Do About Mexico's Antiquated Secured Financing Law*, 12 ARIZ. J. INT'L COMP. L. 523 (1995).

IV. SOME OF THE MAIN CAUSES OF UNREMITTING POVERTY: LACK OF RESOURCES AND FAILURES OF THE OFFICIAL AND LIVING LAW

Some of the causes of the poverty of our archetypal developing-nation parent are not hard to identify. Nations that lack essential physical and human resources find it much harder to feed their hungry than do nations endowed with such resources. Yet even assuming the presence of a modicum of physical and human resources, as is the case with many a developing nation, the main causes of unremitting poverty are legally institutional in nature, as I, among others, have argued for a considerable period of time.²⁰ A 2006 Report by the World Bank amply confirms this conclusion.²¹ It studies comprehensively the monetary estimates of the range of 120 countries' resources (which it refers to as "assets"), including both the "natural, and intangible—upon which development depends."²² In answer to the question, "[w]hat are the key assets in the generation of well-being?"²³ the authors of the Report emphatically reply: "[m]ost of a country's wealth is captured by what we term intangible capital."²⁴ This is so because "the development process primarily entails growth in . . . [the] sectors of manufacturing and services, which depend heavily on more intangible forms of wealth."²⁵

Thus, "in most countries *intangible capital* is the largest share of total wealth,"²⁶ and this measure of capital includes human capital, the skills and know-how embodied in the labor force. It encompasses social capital, that is, the degree of trust among people in a society and their ability to work together for common purposes. It also includes those governance elements that boost the productivity of the economy. For example, if an

20. See, e.g., BORIS KOZOLCHYK, LAW AND THE CREDIT STRUCTURE IN LATIN AMERICA (1966) [hereinafter KOZOLCHYK, LAW AND THE CREDIT STRUCTURE]; Kozolchyk, *Commercialization*, *supra* note 11; Kozolchyk, *Fairness*, *supra* note 11; Kozolchyk, *Highways & Byways*, *supra* note 1; Boris Kozolchyk, *Law and Social Change in Latin America: The Alliance for Progress*, 44 HISP. AM. HIST. REV. 491 (1964); Kozolchyk, *Roadmap*, *supra* note 1; Boris Kozolchyk, *Toward a Theory of Law in Economic Development, the Costa Rican USAID ROCAP*, 4 LAW & SOC. ORDER 681 (1971) [hereinafter Kozolchyk, *Toward a Theory on Law*]. See also the pathbreaking essays in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison ed., 2001); LAWRENCE HARRISON, THE CENTRAL LIBERAL TRUTH: HOW POLITICS CAN CHANGE A CULTURE AND SAVE IT FROM ITSELF (2006).

21. See THE WORLD BANK, WHERE IS THE WEALTH OF NATIONS? MEASURING CAPITAL FOR THE 21ST CENTURY (2006).

22. *Id.* at XIII.

23. *Id.* at XVII.

24. *Id.*

25. *Id.* at XVIII.

26. *Id.* at 87.

economy has a “very efficient judicial system, clear property rights, and an effective government, the result will be a higher total wealth and thus an increase in the intangible capital residual.”²⁷ As pointed out by National Law Center for Inter-American Free Trade (“NLCIFT”) research fellow *Licenciado* Octavio Sánchez, one of the most important features of this study is its quantification of what an effective legal system can contribute to economic development. The Report concludes that of the world’s total wealth, seventy-eight percent is intangible capital, and of this capital, fifty-seven percent is the direct result of an effective legal system and thirty-six percent of a sound educational system.²⁸

The failures of official and living-law institutions—substantive, procedural, administrative, or judicial—are most clearly reflected in the distrust in which these institutions are held by those who should be able to rely on them.²⁹ A host country’s inability to employ, educate, and feed its hungry suffers when investors are unwilling to invest because of their founded fears that governmental entities or private parties will breach their promises with impunity. Similarly, the lenders’ unwillingness to lend because of their inability to collect or repossess collateral in a timely and inexpensive manner contributes to the failure to overcome poverty. Nowhere is such a failure more apparent than with respect to the absence of credit for micro-, small-, and medium-sized businesses in the developing world, particularly in Latin American countries.

A 2008 study by the NLCIFT on commercial credit in Honduras revealed that even a bank that specializes in micro and small business loans rejects seven out of ten applications for such loans.³⁰ An earlier study on secured commercial credit in Mexico showed that this credit was mostly unavailable to small- and medium-sized businesses, and when available, the rates of interest were simply unaffordable.³¹ Meanwhile, the Central Bank of Brazil established that during 1999 in Brazil, the risk of uncertainty of collection was the most important factor (one-third) in the

27. *Id.*

28. *Id.* at 4 tbl.1.1, 96 fig.7.2. *See also* Octavio Sanchez Barrientos, Culture and Legal Dogmatism in an Era of Immaterial Wealth 3 (unpublished manuscript, on file with author).

29. Kozolchyk, *Toward a Theory on Law*, *supra* note 20, at 740–45.

30. BORIS ROSEN & GEORGE A. GULISANO, DIAGNOSTIC ASSESSMENT OF CURRENT ACCOUNTING, BUSINESS, BANKING, LENDING AND TAX PRACTICES OF INDIVIDUALS AND SMALL TO MEDIUM-SIZED BUSINESSES AND ANALYSIS OF SECTORS WHICH ARE CANDIDATES FOR PARTICIPATION IN THE PROPOSED HONDURAN SECURED TRANSACTIONS PROGRAM 8 (Dec. 2008) (on file with author).

31. *See* TODD NELSON & BORIS KOZOLCHYK, HARMONIZATION OF THE SECURED FINANCING LAWS OF THE NAFTA PARTNERS: FOCUS ON MEXICO 15–38, 119–20 (1995).

steepness of interest rates paid for commercial loans (around forty percent per annum).³²

Furthermore, commercial legal uncertainties have a way of triggering highly uncooperative and economically damaging commercial behavior at times uncontrollably. In a study I conducted during the nineteen sixties for the RAND Corporation in Argentina (a study which included other Latin American nations), I described how negotiable instruments such as drafts and checks that were unlikely to be paid at maturity continued to be taken as payments for goods or services by Argentine merchants and bankers.³³ To my question, “[w]hy would you take such an uncertain instrument as payment of obligations?”³⁴ the answer of merchants and bankers was

because of the false money psychology[;] i.e., the seller takes it because of his need to sell and hopes that he will be able to pass on that bad check or draft to someone else, as if it were a false coin or bill that regularly comes into and leaves his cash register.³⁵

And when asked why that “someone else”—who was as likely to be aware of the poor quality of that quasi-money as the transmitter—would still take that doubtful instrument, the answer was equally picaresque:

[T]he price of goods or services likely to be paid with that bad money would also be highly inflated and the required down payment in cash would cover the cost of the goods or services plus a small profit; the collection of the remainder would be the seller’s gamble . . .³⁶

Thus, the socio-economic cost of a legal uncertainty, nourished by a living law of defaults and a “false money” commercial psychology, sharply increased the already inflated prices of a hyperinflationary marketplace in Argentina.³⁷

The lack of trust in merchants and legal institutions is countered by the merchants’ distrust of those borrowers who are not well known to them because they are not members of their families or are not part of their close circle of friends. Hence, distrust continues to be at the root of the present lack of commercial credit in Latin America. This was apparent when I visited Mexico and Central America two years ago (prior to the

32. See Departamento De Estudios E Pesquisa, Banco Central Do Brasil, *Juros E Spread Bancario no Brasil* (1999) (on file with author).

33. Kozolchyk, *Law and the Credit Structure*, *supra* note 20.

34. Transcript of Questionnaire Prepared by Boris Kozolchyk, for Argentine Retail (Apr. 12, 1965) (unpublished, on file with author).

35. *Id.*

36. *Id.*

37. Kozolchyk, *Law and the Credit Structure*, *supra* note 20, at 25.

present world financial crisis and collapse of lending sources). I was told by banks, government officials, and central bank economists that banks had ample lending capital at their disposal, yet very few were willing to lend to small businesses unless their owners were very well known to the banks and could supply their “personal” signatures and “good” real estate mortgages as collateral.

The remainder of this Article will analyze how legal institutional cures for the lack of commercial credit have fared and are faring in developing Latin American nations. My hope is that the lessons learned from this experience can improve the chances of success of modernized commercial legal institutions in Latin America and in other developing regions.

V. INSTITUTIONAL CURES FOR THE LACK OF COMMERCIAL CREDIT

As relied on by banks in developed financial centers for approximately two centuries, and more recently in some developing nations, the requirements of “safe and sound” commercial lending are the result of universally tried and tested business and legal practices.³⁸ From a business standpoint, the borrower must be trustworthy and able to convince the banker that he or she has the ability and willingness to repay the loan and that he or she is in possession of a reliable source of repayment. Unlike real property loans, whose principal collateral is land or buildings and whose value is steady and often increases over time (except in crises such as the present one), commercial loans rely on assets and sources of repayment that are movable and mutable in value. The number and value of commercial assets fluctuate depending upon variables such as the volume of inventory sales, the amounts owed by accredited customers, the market value of intangibles like the business’ goodwill, or other intellectual property rights.

As first experienced by English bankers and merchants during the eighteenth century, this type of loan functions best when it can be repaid with the proceeds from the sales of goods, whose acquisition it made possible. From a business standpoint, then, the best commercial loan is one that I have described as “self-liquidating” or that “pays for itself.”³⁹ This fact requires the bank to allow the borrower to remain in possession of the loan-repaying collateral and establish realistic ratios of required collateral in proportion to the amount(s) lent. It also requires that the

38. See generally Boris Kozolchik, *Introduction*, in NAT’L LAW CTR. FOR INTER-AM. FREE TRADE, TRANSPARENCY AND TRUTH IN LATIN AMERICAN BANKING (Boris Kozolchik ed., 2001).

39. See Kozolchik & Furnish, *supra* note 10, at 243–44; Boris Kozolchik & John M. Wilson, *The Organization of American States Model Inter-American Law on Secured Transactions*, 36 UCC L.J. 15, 20 (2002).

loans be carefully monitored to assure that, among other things, the ratios of collateral and amounts lent continue to be realistic.

At the other end of the spectrum of requirements is the creditor's ability to repossess and resell the collateral as quickly and inexpensively as possible if his or her debtor fails to repay the loan in time.⁴⁰ Side by side with these requirements inspired by best business practices are those derived from the best supervisory practices of national central bankers and their colleagues in public international banking institutions. During the last three decades, these regulators have formulated rules on the adequacy of banking capital that stress the importance of safe and sound risk assessment, collateralization, and transparent reporting practices.⁴¹

Meanwhile, international legislative bodies such as the Organization of American States ("OAS") and the U.N. Commission on International Trade Law ("UNCITRAL") have enacted, respectively, a Model Law of Secured Transactions for the Americas⁴² ("OAS Model Law") and the 2008 UNCITRAL Legislative Guide on Secured Transactions.⁴³ Another such an enactment is the 1994 Model Law on Secured Transactions for Eastern European countries.⁴⁴ What follows is a summary description of the NLCIFT's work in helping to bring about the uniformity of secured transactions law and practice in the Americas by relying on the OAS Model Law as its drafting basis.

VI. THE NLCIFT WORK ON A UNIFORM SECURED TRANSACTIONS LAW IN THE AMERICAS

While the official and living law of secured transactions in the United States and Canada is largely uniform, the rest of the hemisphere, with the

40. Kozolchik & Furnish, *supra* note 10, at 256–57; Kozolchik & Wilson, *supra* note 39, at 88.

41. See BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, BASEL II: INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK (2005), available at <http://www.bis.org/publ/bcbs118.pdf?noframes=1>; BASEL COMM. ON BANKING SUPERVISION, BASEL I: INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS (1988, revised 1998), available at <http://www.bis.org/publ/bcbsc111.pdf?noframes=1>. See also TRANSPARENCY AND TRUTH IN LATIN AMERICAN BANKING, *supra* note 38, at 180–83.

42. ORG. OF AM. STATES, MODEL INTER-AMERICAN LAW ON SECURED TRANSACTIONS (2002), available at <http://natlaw.com/seminar/doc12.pdf> [hereinafter OAS MODEL LAW].

43. U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON SECURED TRANSACTIONS (2008), available at http://www.uncitral.org/pdf/english/texts/security/combined_legislative%20guide.pdf.

44. EUROPEAN BANK FOR RECONSTRUCTION & DEV., MODEL LAW ON SECURED TRANSACTIONS (1994), available at http://www.ebrd.com/country/sector/law/st/core/model/model_law.pdf.

exception of Guatemala and, hopefully soon, Honduras, lacks such a modern uniform law. Hemispheric uniformity had an auspicious beginning with the above-mentioned OAS Model Law. It inspired Guatemala's enactment of Decree 51-2007 of October 24, 2007,⁴⁵ as well as the likely enactment of a Honduran counterpart statute⁴⁶ and implementing legislation. In 2006, Peru also enacted a law inspired by the OAS Model Law,⁴⁷ but it contains serious substantive and registry law deficiencies that have made it basically an inoperative law at this time. Mexico enacted partial versions of the OAS Model law as well, first in 2000,⁴⁸ and subsequently in 2003.⁴⁹

A. The Drafting of the OAS Model Law

1. The Mexican SECOFI Draft and the NLCIFT Principles of Secured Transactions Law

The OAS Model Law benefited considerably from the earlier drafting of a secured transactions law for Mexico, a task that was started in 1996, and concluded in 2003.⁵⁰ At the direction of Mexico's then-President Ernesto Zedillo, the Secretariat of the Economy and Industrial Development ("SECOFI") became the drafting agency, and it invited the

45. *Ley de Garantías Mobiliarias*, Decree 51-2007, enacted Oct. 24, 2007, published in the Official Gazette on Nov. 16, 2007 (Guat.), available at <http://natlaw.com/hndocs/stgubk00033.pdf> [hereinafter Guatemalan, *LGM*].

46. Honduran Law on Secured Transactions (working draft), available at <http://www.natlaw.com/hndocs/sthnbk-drjul08.pdf> (last visited Feb. 17, 2009).

47. *Ley de la Garantía Mobiliaria*, Law 28677, enacted Feb. 10, 2006, published in the Official Gazette on Mar. 1, 2006 (Peru), available at <http://natlaw.com/interam/pe/pp/st/stpepp00001.htm> [hereinafter Peruvian, *LGM*].

48. *Decreto por el que se Reforman, Adicionan y Derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito* [Decree to Enact Secured Transactions Law], Diario Oficial de la Federación [D.O.], 23 de Mayo de 2000 (Mex.), available at <http://natlaw.com/interam/mx/pp/dc/prmx31.htm> [hereinafter *Mexican Decree of 2000*].

49. *Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio, de la Ley de Instituciones de Crédito, de la Ley del Mercado de Valores, de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, de la Ley Federal de Instituciones de Fianzas y de la Ley General de Organizaciones y Actividades Auxiliares del Crédito* [Decree to Reform Mexico's Secured Transactions Law], Diario Oficial de la Federación [D.O.], 13 de Junio de 2003 (Mex.), available at <http://natlaw.com/interam/mx/pp/dc/dcmxbk23.htm> [hereinafter *Mexican Decree of 2003*].

50. For a short account of the drafting of this law and its subsequent equally incomplete reforms, see Kozolchik & Furnish, *supra* note 10, at 278–94.

NLCIFT to participate in the drafting effort.⁵¹ The draft was fully discussed with and approved by the Mexican Bankers Association and members of the management and legal staff of BANAMEX, S.A (at that time Mexico's largest bank). It was also reviewed and endorsed by some of Mexico's most respected commercial law scholars, such as Professor Raúl Cervantes Ahumada and Dean Miguel Acosta Romero of the National University of Mexico Law School. In addition, it was the subject of thorough discussions at the College of Public Notaries that involved highly qualified practitioner-scholars.⁵²

The Mexican notaries submitted a number of questions to the NLCIFT and suggested that joint meetings be held on the topic of "How Compatible Is the Proposed Law with Mexican Legal Institutions: Which Institutions Are Incompatible and Why?" In preparation for these sessions, I used a set of principles first employed when briefing Mexican government officials and legislators (these principles underwent subsequent revisions until a final version was published by the NLCIFT in 2006).⁵³ As will be discussed shortly, these principles proved helpful for didactic and drafting purposes, especially in connection with the subsequent secured lending statutes for Guatemala and Honduras. They can be found in Appendix 1, and the reader is encouraged to review them at this time.

As drafting tools, the NLCIFT Principles proved helpful because (1) they provide summaries of the best practices for secured lending, and they also provide good starting points for the drafting of many rules; (2) they facilitate the search for compatible and incompatible local legal institutions by allowing questionable provisions to be compared with applicable principles; (3) they help to select rules that must be made mandatory in light of inconsistent local law and practice; (4) they contribute to a draft's internal coherence by enabling checks for consistency between or among rules that appear to be in conflict with one another and their supporting or excluding principles; (5) as statements of the rational bases of technically complex rules, they help explain these rules to local legislators, judges, registry officials, or practicing lawyers who lack the

51. The NLCIFT staff members who participated in the drafting efforts with SECOFI were *Licenciado* Francisco Ciscomany, John Molina Wilson, Esq., presently Legal Counsel at the OAS (at that time a Project Coordinator for the NLCIFT), and Boris Kozolchyk.

52. Especially, the highly qualified practitioner-scholar, the then-President of the College of Public Notaries, *Licenciado* Adrian Iturbide and his colleagues, *Licenciado* Miguel Alessio and *Licenciado* Javier Arce Gorgollo.

53. See NAT'L LAW CTR. FOR INTER-AM. FREE TRADE, NLCIFT 12 PRINCIPLES OF SECURED TRANSACTIONS LAW IN THE AMERICAS (2006), available at <http://www.natlaw.com/bci9.pdf> [hereinafter 12 PRINCIPLES]. See also *id.* app. 1. The drafting group for the 12 Principles consisted of Mariana Silveira, Dale Beck Furnish, Marek Dubovec, and Boris Kozolchyk.

necessary transactional background; and (6) their international nature helps to bridge the perceived conflicts between the civil and the common law systems by showing how Roman law (at the root of both) provided conceptual bases applicable to these two systems and their secured transactions laws.

Consider, for example, NLCIFT Principle 2:

A security interest is a preferential right to possession or control of personal property. As such, it does not require that the debtor who grants the interest have title to the personal property collateral; his right to its possession, even though co-existent with other possessory rights in the same property by other creditors and debtors, will allow the creation of the security interest.⁵⁴

Consider also Uniform Commercial Code (“UCC”) section 9-202, whose heading is “Title to Collateral Immaterial.” This provision validates rights and obligations of the parties to a secured transaction “whether title to the collateral is in the secured party or the debtor.”⁵⁵ At first sight, this is sheer heresy to a civil lawyer brought up with the Roman law axiom *regula iuris*—*nemo plus iuris in alium transferre potest quam ipse habet*, also known as *nemo dat quod non habet*. That is, “no one can convey what he does not have” and thus a debtor cannot grant a security interest in property he does not own. Yet, as set forth by NLCIFT Principle 2, the right granted to the creditor by the debtor is not one of ownership, but rather, of possession. As long as the debtor has a right to the possession of the collateral, whatever its lawful source, he or she can convey such a right to the creditor, much as the Romans conveyed possessory rights in the things of others (*jura in re aliena*).⁵⁶

54. *Id.* princ. 2.

55. In its relevant part, this provision states: “[e]xcept as otherwise provided . . . the provisions of this Article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.” U.C.C. § 9-202 (2000).

56. For more on this concept, see Kozolchik & Furnish, *supra* note 10, at 247.

Roman law lawyers referred to as possessory rights or *iura in re aliena*. These are also rights in property owned by others, and even though they were lodged below the exalted level of dominium, or absolute ownership, they were also lodged above the level of rights of detention or of physical, albeit legitimate, control of real or personal property.

Among the rights in rem in property that belonged to others were the Roman usufruct, which could be granted for the life of its beneficiary or for the life of third parties and the predial servitudes. However, unlike the English common law, which regarded “time in the land” rights as transferable and saleable by their holders, Romans, as a rule, regarded the usufruct and analogous rights as personal to their beneficiary and therefore non-saleable.

Thus, neither NLCIFT Principle 2, nor the rules that rely on what are essentially possessory rights to create a security interest, violate the above quoted Roman and civil law maxim or *regula iuris*. The ability to demonstrate the compatibility between U.S. security interests, and the Roman civil law and Mexican possessory rights enabled SECOFI and NLCIFT to secure the endorsement of highly influential Mexico City notaries, among other respected Mexican jurists.

Upon completion of the SECOFI draft, it was forwarded to the Office of the Presidency, which referred it to the Office of the Legal Advisor to the Secretary of the Treasury. At this office, the draft was considerably altered without consultation with the original drafters and its, by then, numerous and important constituencies. While in some respects the final text represented an advance over preexisting law, in most others it was a retrocession. As reformed in 2000,⁵⁷ this law contained several provisions that were contrary to the tried and true banking practices reflected in the NLCIFT Principles. For example, in the event of the debtor's default, it limited the amount of the creditor's recovery to the value of the repossessed or resold collateral.⁵⁸ This requirement did not take into account that the type of collateral involved in commercial loans generally depreciates and does so quickly. Faced with such an artificial limit, the lender was forced to either lend much less or require much more collateral in order to retain a realistic ratio between the amount lent and the supporting collateral. Similarly, the law retained a regime of secret liens by allowing a number of existing security interests that did not require public notice to continue to be used side by side other security interests that did require such notice.⁵⁹ In 2003, the Mexican Ministry of the Treasury tried to correct some of these mistakes and others it made by reinserting some of the SECOFI draft provisions, but in doing so, it retained other problems, especially those that preserved the regime of secret or disguised liens for such massive secured loans as disguised ("simulated") financial leases.⁶⁰

Despite the absence of key requirements, such as the elimination of the regime of secret liens, a perceived improvement in the certainty of collection prompted by the amendments' extrajudicial repossession and resale of collateral caused a significant increase in commercial and consumer lending during the two years that followed their enactment.⁶¹ Yet,

Id.

57. See Mexican Decree of 2000, *supra* note 48.

58. *Id.* art. 379.

59. See Kozolchik & Furnish, *supra* note 10, at 280.

60. See *id.* at 280–94.

61. *Id.* at 239–40.

once lenders realized the continuing secrecy of a number of liens and the delays of extra-judicial enforcement, the volume of secured lending fell again. As of the time of this writing, Mexico's secured lending law remains largely ineffective, awaiting what is hopefully its final revision and implementation.

2. The OAS Model Law

In December 1998, the OAS Permanent Council convened a meeting of experts to establish the topics for its forthcoming treaty/model law sessions.⁶² It approved discussion of using a joint Mexican-U.S. Draft of a Model Inter-American Law on Secured Transactions as the working document. This document contained rules responsive to the NLCIFT Principles, SECOFI's draft law, as well as to the rules in UCC Article 9, the Canadian Personal Property Security Act, and the United Nations Convention on Assignment of Accounts Receivable in International Trade.⁶³ The OAS delegates agreed to study this draft at two subsequent experts' meetings.⁶⁴ Finally, delegates and experts appointed a drafting committee headed by the delegations from Mexico and the United States, which produced an annotated draft of the Model Law in 2000.⁶⁵

Ironically, the draft that Mexico and the United States submitted to the General Assembly of the OAS for its approval retained most of the provisions from the same SECOFI draft that was discarded by Mexico's own Office of the Legal Advisor to the Secretary of the Treasury a few months earlier. As just noted, this OAS draft of a Model Law for the Americas was carefully studied by the OAS Group of Experts, comprised of highly respected jurists and commercial law specialists from the entire hemisphere.⁶⁶ After a thorough examination, it was approved and submitted to the General Assembly of the OAS for a final vote. During this vote, OAS delegates made some changes, particularly to the provisions on extrajudicial enforcement. The final vote was unanimous in favor of recommending its adoption by Member States.

62. See Org. for Am. States [OAS] P.C. Res. 1173/98, OAS Doc. CP/RES. 732 (Oct. 21, 1998).

63. For a detailed description of the drafting and adoption processes at the OAS, see Kozolchyk & Wilson, *supra* note 39, at 22–35, 40–42, 59.

64. OAS G.A. Res. XXVIII-O/98, OAS Doc. AG/RES. 1558 (June 2, 1998).

65. Among the participants in Washington, D.C., were, on behalf of Mexico, Alejandro Ogarrio, Jorge Sánchez Cordero, Leonel Pereznieta, and José Luis Siqueiros, and on behalf of the United States, José Astigarraga, Boris Kozolchyk, and John M. Wilson. See Kozolchyk & Wilson, *supra* note 39 (opening sentiments of gratitude).

66. See Boris Kozolchyk, *Meeting of OAS-CIDIP-VI Drafting Committee on Secured Transactions Conference Transcript*, 18 ARIZ. J. INT'L & COMP. L. 321 (2001).

B. Adoptions by OAS Member States

In addition to the above-described partial and incomplete adoption by Mexico in 2000 and 2003, the OAS Model Law has been adopted by Peru and Guatemala and is expected to be adopted by Honduras in May or June of 2009. El Salvador continues to debate its adoption and the Costa Rican and Ecuadorean governments have recently expressed an interest in doing the same. The following are brief reviews of the existing and likely adoptions.

1. Peru

Peru adopted its version of the OAS Model Law in 2006.⁶⁷ Unfortunately, many of its provisions contradict the OAS Model Law and misinterpret the NLCIFT Principles and practices that inspired them. As a result, this law is already being criticized by Peru's bench, bar, and commentators.⁶⁸ Several provisions illustrate its poor quality.⁶⁹

Article 7 allows the perfection of successive security interests in the same collateral, but requires that a notary public give notice to the holder of the "first" security interest (presumably the secured creditor who recorded first).⁷⁰ This provision misunderstands the principle of functional notice as set forth in NLCIFT Principles 6 and 7. As stated by NLCIFT Principle 7, in relevant part: "[r]egistration should be inexpensive and should take place in a public registry easily accessible to third parties regardless of nationality or economic sector, if at all possible by electronic means"⁷¹ By requiring a notarial notification where, for some unexplained reason, the only party to be notified appears to be the holder of the first recorded security interest, a costly and incomplete notice is introduced.

Article 9 precludes the co-existence of, say, a possessory security interest in goods warehoused and in transit, with the security interest in a

67. Peruvian, *LGM*, *supra* note 47.

68. For an illustration of some of the criticism, see *Crítica a Ley de Garantías Mobiliarias*, <http://vlex.com.pe/tags/critica-a-ley-garantias-mobiliarias-466469> (last visited Apr. 12, 2009).

69. This section is based on a Memorandum submitted to the Peruvian *Superintendencia Nacional de Registros Públicos*. Boris Kozolchyk, Memorandum, *Comentarios a la Ley de Garantías Mobiliarias del Perú* (May 1, 2009), available at http://www.natlaw.com/interam/pe/bk/sp/sppebk_00002.pdf.

70. Peruvian, *LGM*, *supra* note 47, art. 7. "Successive Security Interests. During the term of effectiveness of a security interest, the grantor [of the security interest] may create a subsequent security interest with lower priority over the same movable property, by giving notarial notice to the senior secured creditor." *Id.* (author's translation).

71. See 12 PRINCIPLES, *supra* note 53, princ. 7.

document of title covering the same warehoused or transported goods.⁷² This provision ignores the long-standing and important practice of providing a carrier or warehouseman with a statutory lien or right of retention of the goods for the unpaid freight or storage fees, while allowing the creation of a contractual security interest in the document of title that covers the same goods. There is no reason for these security interests not to co-exist as long as a clear priority rule is provided for them as is done by the OAS Model Law.⁷³

The second paragraph of Article 15 misunderstands what proceeds are in the context of manufactured goods and how they are used as collateral. These misunderstandings create a costly and outside-of-the-registry system of notarial notice. This paragraph states that

[i]f the debtor transforms personal property collateral [an original good or raw materials] into a second good, such a good will be subject to the security interest. The debtor[, however,] is obligated to notify the secured creditor within a period of five days by means of a notarial communication de [sic] date during which the transformation took place and features of the new movable property. In such a case the secured creditor shall record in the corresponding registry that security interest over the new movable property, cancelling the preexisting security interest.⁷⁴

Note the limitation placed upon proceeds when they are referred to as a “second good.” It would seem, then, that only a first generation of

72. Peruvian, *LGM*, *supra* note 47, art. 9.

Security interests in documents of title over movable property. When, pursuant to the provisions of this Law, a security interest is granted in a document of title over movable property, it shall not be possible to create a direct security interest over the movable property covered by such document of title.

Id. (author’s translation).

73. See OAS MODEL LAW, *supra* note 42, art. 26, ¶ 2 (“A security interest in documents may coexist with one on the movable property covered by it; the latter will have the priority given to it by Article 51.”).

74. See Peruvian, *LGM*, *supra* note 47, art. 15.

If the debtor transforms the movable property granted as security interest into additional movable property, the security interest will cover the new movable property. The debtor must give notice to the secured creditor of the date in which the movable property was transformed and the characteristics of the new movable property resulting from the transformation, [notice must be given] by means of a notarial letter and within [five] days. In this case, the secured creditor must register the security interest in the new movable property at the Registry, freeing it from the security interest previously created.

Id. (author’s translation).

proceeds is allowed as collateral and presumably based upon a separate proceeds' filing. Yet, the Peruvian law's own definition of "inventory," defective though it is,⁷⁵ authorizes the inclusion of "second" goods as components of such inventory collateral. In addition, what Article 15 refers to as a "second good" bears the same conceptual restriction of collateral referred to as "products" in early twentieth-century agrarian pledge laws in Latin America; that is, goods that replaced earlier goods had to be of the same kind as those replaced or manufactured with the same raw material as collateral.⁷⁶ Needless to say, such a restriction makes the Peruvian concept of "second goods" considerably narrower than that of proceeds in both the NLCIFT Principles and the OAS Model Law.⁷⁷

Some of the dysfunctional, costly, and uncertain consequences of Article 15 can be illustrated in the following everyday transaction. "M," a manufacturer of furniture, purchases lumber on credit from "S," M expects to manufacture thousands of individual chairs, tables, etc., secured by loans from S and M's bank, "C." S and C rely on the same raw materials, inventory, and proceeds as their collateral. Article 15 requires that by means of a notarial communication, M notify S (and presumably C as well) of the date(s) the furniture was manufactured and of the new furniture's features, conceivably even the features of each new desk or chair. Moreover, it does not clarify whether S and C's priorities on the pieces of furniture and other proceeds will depend upon when each creditor received notice of their manufacture or upon the dates of their respective filings; nor does it even clarify whether the original filings on "raw materials and inventory" or their floating lien (*garantía abierta*) will retain

75. *Id.* art. 2(10) ("Inventory: a set of moveable goods in the possession of a person for its consumption, transformation, sale, exchange, lease or any other commercial transaction in the ordinary course of its commercial activity."). It should be noted that the inclusion of consumer goods as part of inventory for goods, while part of an inventory, are not supposed to be consumed by whoever holds them as such. They become consumer goods once they are bought and taken out of a commercial inventory.

76. See Kozolchik & Furnish, *supra* note 10, at 257; Kozolchik & Wilson, *supra* note 39, at 37.

77. Notice that NLCIFT Principle 3 makes it clear that a security interest may be created in assets, present or future, tangible or corporeal, and all types of intangible or incorporeal, including rights to the same, as well as in the proceeds of this collateral, whether in their first or future generations. This principle assumes that personal property collateral is open in number (*numerus apertus*) and that a security interest may be created in any personal property susceptible to monetary valuation. 12 PRINCIPLES, *supra* note 53, princ. 3. For illustrations of proceeds included in the OAS Model Law that are not included as proceeds in the Peruvian law category of "second goods," see OAS MODEL LAW, *supra* note 42, arts. 2, 3(V), 25, 51(III).

their respective priorities based upon the dates of their original recordings. Finally, it does not answer the question of why S and C should have to undertake the notarial notifications and additional recordings if the Peruvian law allows security interests in collateral, generically described as “raw materials and inventory,” and allows an open-ended floating lien, referred to as an “open security interest” (*garantía abierta*).⁷⁸

Articles 17 and 19 leave the impression that what must be filed in Peru to give notice to third parties and affect their rights in the collateral is not merely the simple and terse financing statement required by the OAS Model Law, but actually the security agreement itself, or the *acto jurídico constitutivo de la garantía*.⁷⁹ This requirement contradicts the above-mentioned NLCIFT Principles 7 and 8 of a “functional notice” or notice filing. It also subjects the filing of the agreement, in lieu of a standardized financing statement, to possible actions on nullity, because the agreement itself may lack the formalities required by Peru’s civil or commercial code, or it may contain an invalid “cause” (*causa*). It also forces the registry to become an evaluator of the legal soundness of security agreements, rather than an automated custodian of financing statements with only ministerial responsibility for the completeness of the filings.

To compound this confusion, Article 19 requires additional elements in the security agreement. After listing data such as the identification and domicile of the grantor of the security agreement, signature, and “in the case of unrecorded personal property, an affidavit by the grantor that he is the owner of the property subject to the security interest,” it indicates that the grantor shall “assume the civil and criminal liability derived from the falsity of such a declaration.”⁸⁰

78. Peruvian, *LGM, supra* note 47, art. 3(3.4) (provision on open security interests).

79. *Id.* art. 17 (stating, in its relevant part, that the relationship between the parties to a security agreement is created by means of a bilateral or multilateral contract, which it alludes to as the *acto jurídico constitutivo* and goes on to say that it must be recorded in the appropriate registry).

80. *Id.* art. 19.

Content of the legal contract (*acto jurídico constitutivo*) creating the security interest. The contract creating the security interest must contain, at least: (1) Information to identify the grantor [of the security interest,] secured creditor and debtor, including their domicile, as well as written or electronic signature of the grantor. (2) In the case of collateral that is not subject to registration, an affidavit by the grantor stating that s/he is the owner of the movable property granted as security interest. The grantor will be civil and criminally liable for deceit or inaccuracy of this statement.

Id. (author’s translation).

Consider the predicament of a Peruvian secured transactions lawyer having to advise his client-debtor-grantor of the security interest on his civil and criminal liability flowing from an affidavit of ownership. Assume that the collateral pledged by the secured debtor are inventory goods subject to a retention of title agreement until the full purchase price is paid to the seller or to another secured lender (an agreement that is as common in Latin America and Europe as it was in the United States until the nineteen fifties and the adoption of Article 9 of the UCC). Even though his client, the secured-debtor, has possessory rights in that collateral, and thus should be able to use them to secure a loan in a manner compatible with the retention of title by the seller, he must advise her not to do so, lest his client risk a jail sentence.

This is one of the reasons why the above-mentioned NLCIFT Principle 2 as well as OAS Model Law Article 2 make it clear that title to the collateral is immaterial and can be in the hands of the secured creditor or debtor, among others. A similar requirement of secured debtor ownership of the collateral appears or is implied from the language of Articles 21–24 of Peru's law.

These are not the only problems to which Articles 17 and 19 of the Peruvian law give rise. When Article 36 sets forth the duties of the registrar of security interests in movable property, it notes that his evaluation of the filed transaction's legality and formal validity and of the contracting parties' capacity is "limited only to what appears in the pre-printed form (financing statement) and its certification The registrar shall, in no case, request the filing of the security agreement (*acto juridico constitutivo de la garantia mobiliaria o generador del acto inscribible*)."⁸¹ So, what needs to be filed to "affect the rights of third parties"—the security agreement or the financing statement? Or is it perhaps both, because as will now be discussed, there are two registries created by this law, one for the movable property collateral and the other for contracts or security agreements?

Article 32 provides a list of recordable juristic acts or transactions in two distinct registries:

81. *Id.* art. 36.

The evaluation made by the Registrar as to the legality and validity of the registered transaction and the capacity of the parties [to such transaction] will be limited only to the content of the Registration Form and its certification. The Registrar must evaluate the legal authority [of the parties], if applicable. The registrar may under no circumstances request the filing of the contract creating the security interest or the contract that generated the registration.

Id. (author's translation).

- (1) Security interests, their creation, perfection, amendments or eventual assignment;
- (2) Judicial or administrative decrees and arbitral awards as related to this law;
- (3) The juristic acts enumerated hereafter for purposes of their notice, priority and ability to raise them against the contracting or third parties, whatever their form, if they have an effect upon moveable property or rights thereto, whether they are determined or determinable, subject to terms or conditions or not, including: a) assignment of rights; b) trusts; c) ordinary leases; d) financial leases; e) consignment agreements; f) pre-trial cautionary proceedings; g) preparatory agreements; h) options; and i) other juristic acts that create rights in moveable property.⁸²

When the recordable acts or transactions referred to in this Article involve movable goods already registered in the Registry of Movable Property (“RMB”), they are recorded in the appropriate section of that Registry. If they do not, they are recorded in the Registry of Security Agreements (“RMC”). Recordable acts or transactions that involve future movable property shall be recorded in the RMC, where they remain even after they cease to be future goods, with the exception of movable goods certain to come about, which shall be registered in the RMB, whose recorded acts shall be transferred to the corresponding registry.⁸³

82. *Id.* art. 32.

83. *Id.*

Acts that may be registered.

The following contracts related to movable property listed under article 4 of this Law may be registered: (1) The security interest to which this Law refers and contracts related to its effectiveness, amendment or possible assignment. (2) Judicial, arbitral or administrative decisions related to security interests governed by this Law. (3) With respect to their priority, effectiveness against third parties and publicity, the legal contracts listed below, regardless of their form, nomenclature or nature, [and] whose object is to affect movable property or rights of all natures, present or future, determined or determinable, [and] whether they are subject or not to a formality, including: (a) assignment of rights; (b) trusts; (c) leases; (d) financial leases When the contracts listed in this article affect movable property registered at a Property Registry, these [contracts] will be registered in their relevant registry sheet. Otherwise, they will be registered at the Registry of Movable Contracts. Contracts related to future movable property will be registered at the Registry of Movable Contracts and will remain there even when they are no longer future movable property, except for real movable property that must be registered at the Property Registry, [in which case] these registered contracts will be transferred to the relevant registry.

If the reader is puzzled about the meaning and consequences of this provision, he or she is in good company. At a recent hemispheric Rule of Law Conference held in Mexico City in June 2008, I moderated a panel of Latin American chief justices, and Chief Justice Francisco A. Tavera Cordova of the Supreme Court of Peru wasted no time in inquiring, with evident concern, if the NLCIFT or I had anything to do with this law, and in particular with Article 32. I quickly disabused him of any notion of NLCIFT involvement.

To begin with, this Article directs the filing of the security interest in personal property to two ill-defined, possibly overlapping and thus competing registries. In addition, Article 32 does not clarify the relationship, if any, between or among these registries and other possible registries, such as those for airplanes and aircraft parts, railroad equipment and tracks, fixtures, and crops. For example, where does a security interest in fixtures and crops have to be filed, in the Article 32 registries or in the Real Property Registry? If in the latter, in the case of, say, fixtures, the number of registries to check in Peru would have to be at least three. The possibility of conflicting results on the perfection and priority of the various recordings looms large in Peru—and so does endless litigation.

And as if all of the above were not enough, Article 36 requires the two registries mentioned in Article 32 to engage in a legal evaluation of the filers' powers of attorney to enter into the security agreement, as well as the presence of an interrupted chain of title to the movable property collateral (as if it were possible in the majority of instances).⁸⁴ These two

Id. (author's translation).

84. *Id.* art. 36.

In case of movable property subject to registration [at a property registry], the Registrar shall also verify that the content of the Registration Form is consistent with the registry's information In this case, the filer, the person granting the security interest or any of the parties related to the filing, may file before the Registrar, additional documentation as needed, including the contract creating the security interest or contract related to the registration. In case of [filing of] the latter documents, the Registrar will limit its evaluation only to what is necessary to make the Form consistent with the registry information

In case that the Registrar finds that the filing has a . . . defect that may be corrected, [the Registrar] will make a precautionary notation of the relevant filing for ninety (90) business days If the defect is corrected within such term, the Registrar will register the filing, converting the precautionary notation into a definite registration. Otherwise, the precautionary notation will be terminated by law. The term previously mentioned[] may be modified by the SUNARP by means of a regulation.

Id. (author's translation).

requirements, among others, are responsible for serious delays in the filing of security interests in Peru, thereby negating the functional notice required by Principles 7 and 8 of NLCIFT and implemented by Articles 42–46 of the OAS Model Law.

2. Guatemala

(a) *The Law and Some of Its Goals*

On October 24, 2007, the Guatemalan Congress approved the country's law of secured transactions and Latin America's first statute fully congruous with the purposes and text of the OAS Model Law as well as the NLCIFT Principles.⁸⁵ It took Guatemala approximately three years of drafting, followed by intensive lobbying of numerous constituencies, including the congressional representatives of commercial and farming interests; official and unofficial leaders of small businesses and farmers; chambers of commerce and chambers of exporters and importers; banking associations and central bankers; and other high government officials, such as legislators and judges. In its official news release, the Head of Public Affairs of the Guatemalan Congress stated:

By means of Decree 51-2007 the Plenum of the Congress of the Republic approved the "Law of Secured Transactions on Personal Property" (*Ley de Garantías Mobiliarias*) whose purpose is to enable access to credit to small producers who will be able to provide their tools, equipment, crops and harvests, and other assets as securities. Access to credit by means other than real estate mortgages implies a sensible increase in the working capital of small producers thereby increasing their productive capacity.⁸⁶

This news release's emphasis on agricultural credit was neither accidental nor mistaken. Even though the law enabled the collateral and security interests to take on an open-ended nature that favored all types of small- and medium-sized businesses, the small farmers and their cooperatives were the ones who most actively campaigned in favor of this law. Contrary to my expectations, the members of the bankers' association, whom I had envisioned as beneficiaries of this law, were not among its initial supporters. They were unwilling to assume the risks of lending to small businesses and farmers even if secured by valuable assets, albeit

85. See Guatemalan, *LGM*, *supra* note 45; OAS MODEL LAW, *supra* note 42; 12 PRINCIPLES, *supra* note 53.

86. Héctor Solís, Departamento de Comunicación Social, Congress of the Republic of Guatemala, *Cosechas u Otros Activos* (Oct. 24, 2007), available at http://www.congreso.gob.gt/gt/ver_noticia.asp?id=4377.

with which they had little experience. After all, theirs was a stable and profitable industry. Why take risks that in their eyes endangered the safety and soundness of their traditional assets? Conversely, the small farmer and businessperson had never had access to asset-based credit and were only too willing to campaign for this law.

The need for a sound secured transactions law had been identified by *Fundación para el Desarrollo de Guatemala* ("FUNDESA"), one of Guatemala's premier private sector associations. As pointed out by a FUNDESA 2002 study,⁸⁷ while eighty percent of developed countries' credit transactions were secured by business assets of one type or another, only thirty-five percent of Guatemalan banks' loan portfolios were secured by assets in general, and only four percent of all of their total loans were secured by business assets of any kind.⁸⁸ Accordingly, the FUNDESA study confirmed the bankers' reticence to lend to small- and medium-sized businesses on the security of their business assets.

In earlier decades, this reticence might have quickly caused a congressional rejection of the proposed law of secured transactions. Yet times had changed; twenty-first-century Guatemala is a more pluralistic country. Surely, the Guatemalan Congress was willing to listen to bankers, its traditional interlocutors in financial matters, but it was also willing to listen to farmers, farming cooperatives, small business associations, and their supporters inside the State's Monetary Council (Guatemala's most influential governmental body in financial and economic decision making).

(b) How to Attain the Law's Goals

i. Participants and Tasks

Even the shortest of summaries of this landmark statute's enactment must mention the work of the Vice Minister of the Economy, Carlos Herrera, a man endowed with innate wisdom, courage, humility, unshakable honesty, and concern for the "little people" of Guatemala. In the absence of bankers willing to participate, he appointed a Drafting Commission ("Commission") comprised of distinguished former public and private banking lawyers who were also sympathetic to the plight of Guatemala's

87. FUNDESA-BID-CIEN, *Análisis de los Impedimentos a la Competividad en Guatemala: Garantías Financieras* 3 (2003) (Guat.) (on file with author) [hereinafter *FUNDESA Study*].

88. *Id.* at 3 n.1.

small businesses.⁸⁹ Jorge Molina was the coordinator of the Commission. *Licenciado* Molina was a nonlawyer but had been a superintendant of banks; in that position he acquired a firm grasp of the preconditions of a modern commercial credit system and came to regard the NLCIFT Principles as “the spirit of the law.” I acted as the technical advisor of the Commission.

Prior to drafting, the Commission arrived at a consensus on observing the NLCIFT Principles as, in *Licenciado* Molina’s words, the “guiding spirit” behind the OAS Model Law and Guatemala’s future law. The next decision was to prioritize the sectors most deserving of protection by the law. The first sector chosen was agriculture. Given its economic importance for Guatemala, the financing of agricultural production for local and international consumption had to be given special attention. Hence, attention was paid to the rules that governed security interests in seeds, fertilizers, equipment, and present and future crops, whether warehoused or transported, whether covered by paper-based or electronic documents of title. The law’s focus on commercial credit at reasonable rates of interest aimed to replace the usurious practices of those who bought small farmers’ crops for fractions of their market value and resold them at many times their purchase price.

Other sectors similarly chosen for protection were the small urban and rural shop owners, and professionals who would also be able to use their inventories, fixtures, equipment, contract rights, and accounts receivable as collateral, however informally recorded or documented.

ii. The Drafting

Unfortunately, much of the initial generous funds made available by the Inter-American Development Bank (“IADB”) to Guatemala had been spent on workshops concerning the advisability of a law of secured financing and on poorly drafted projects. By the time I joined this project, only meager funds were left, and none were available for field research on contemporary market conditions and practices or on the crucial design of a secured transactions registry. Commission members had to rely on their own knowledge of these conditions and practices. Later drafts benefited from the participation of *Licenciada* María del Pilar Bonilla, an able banking and commercial lawyer and law professor who quickly and firmly grasped the “spirit” of this law. Her presence as one of the drafters

89. The drafting commission was formed by *Licenciado* Daniel Orlando Cabrera García, Secretary; Jorge Molina, Coordinator; Augusto René Ramírez Hernández; Arturo Martínez Gálvez; and Gustavo Antonio de León Asturias.

made the final drafting style more “Chapin” like (“Chapin” is a popular expression in Guatemala to denote what is peculiarly Guatemalan).

a. The Problem of Consistency with French-Inspired Civil Codes

One of the first warnings I received from members of the Drafting Commission was the need to avoid, whenever possible, the abrogation of Guatemalan Civil Code provisions. I was aware of the importance of civil codes in the private law of civil law nations, where they often act as the “constitutions” of their private law by providing basic definitions, general principles, and default rules that fill the gaps in their companion commercial codes, among other private law statutes.⁹⁰ I was also aware, however, that many of the nineteenth-century French-inspired civil codes were not supportive of commercial legal institutions in particular or of profit making through commerce and related endeavors. After all, unlike commercial codes, civil codes governed “civil,” meaning “not for profit,” transactions. This attitude was responsible for the characterization of the professional, albeit profit-making, activities of physicians, lawyers, accountants, and engineers as those of not-for-profit “civil law associations.”⁹¹ In addition, civil codes of the French extraction tended to ascribe greater certainty to agreements entered into with costly formalities such as *actes authentiques* (public or notarial deeds) and to “typified” and classified contracts than to those agreements concluded by means of the informal communications common to everyday commerce.⁹² These codes also lacked provisions for contracts entered into *inter ausentes* or by parties at a distance from one another, and for the protection of third parties who lent or purchased relying on what appeared in France’s first and highly uncertain land registry.⁹³ Their requirement of both a legal and moral cause (*causa*) as one of the pillars of a valid contract, such as a loan agreement, endangered the rights of third parties, such as subsequent and innocent holders of negotiable instruments issued by the original debtors. This was especially true where the underlying loan agreement was deemed usurious; however loosely defined, usury automatically embodied an illegal or immoral cause. And where a registrar had to evaluate such a cause to determine the validity of an underlying contract, as is the case of the Peruvian law discussed earlier, the results could be equally as damaging.

90. See FREDERICK HENRY LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN, NOVEMBER 16, 17, 18, 19 AND 20, 1953, at 167 (1955).

91. See Kozolchyk, *Commercialization*, *supra* note 11, at 4.

92. See *id.* at 6–17. See also Kozolchyk, Printed Class Materials, *supra* note 1, at IX-7.

93. See Kozolchyk, *Commercialization*, *supra* note 11, at 6, 12.

Another harmful feature of the French Code Civil, where commercial legal institutions were concerned is its Aristotelian-scholastic style for drafting definitions and classifications, especially in the sections on obligations and contracts. Consider, for example, the manner in which the term “contract” is defined and classified in Articles 1101, 1102, and 1103 of the Code Civil:

A contract *is* an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something.

A contract *is* synallagmatical or bilateral when the contractors bind themselves mutually some of them towards the remainder.

It *is* unilateral when it binds one person or several towards one other or several others, without any engagement being made on the part of such latter.⁹⁴

Following the Aristotelian method of definition, the Code identifies what it treats as the essential feature of the defined object, i.e., the feature that is peculiar or unique to the species of agreements known as contracts, the voluntary creation of obligations or engagements. The purpose of this feature was to distinguish contracts—permanently and universally—from other agreements that extinguish or modify previous obligations, but do not form engagements. This interest in classification and taxonomy, surely an Aristotelian legacy, is responsible for the assumption of many an interpreter of this type of code that only what has been defined or classified can exist (and at times physically exist) as a contract. The “is” part of the definitions appeals to the universality and thus to the permanence or immutability of the concept. This feature explains why there are so many enumerations of legal institutions “closed in number” (*numerus clausus*) such as those for movable goods and security interests. Having in mind precisely this *numerus clausus* feature of the Code Civil and its progeny, NLCIFT Principle 3 states:

The security interest may be created in any personal property susceptible to monetary valuation whether present or future, tangible or intangible including rights to the same, as well as in the proceeds of this collateral, whether in their first or future generations. Thus, personal property collateral, as well as security interests in them are open in number (*numerus apertus*), and these security interests are not limited to preexisting devices such as the pledge, with or without dispossession of the

94. CODE CIVIL [C. CIV.] ch. I, arts. 1101–03 (1804) (Fr.), reprinted in CODE NAPOLEON (1827) (trans. George Spence), available at http://www.napoleon-series.org/research/government/code/book3/c_title03.html (emphasis added).

collateral, chattle mortgages, retention of title or conditional sales, etc.⁹⁵

During the drafting discussions on Guatemala's law, I pointed out to the Commission that some civil codes, such as Germany's *Bürgerliches Gesetzbuch* ("BGB" or "Civil Code") of 1900, are more supportive of commerce than the French and Spanish Civil Codes. The latter codes are responsible for the slow development of crucial commercial legal institutions such as "sales with retention of title" or "conditional sales," or of pledges without the debtor's dispossession. The French and Spanish codes rely on definitions of sales contracts as "consensual" and thus on the transfer of title from the seller to the buyer from the moment of the agreement.⁹⁶ This makes the title retention by the seller hard to justify. They also require that the pledgor transfer his possession of the collateral to the pledgee-creditor.⁹⁷

b. Incompatible Features of the Guatemalan Civil Code

Despite its late twentieth-century extraction (1963), the Guatemalan Civil Code still evidences traces of French and Spanish civil code influence. It opted for a system with the following features: (1) formally created pledges (whether in a public or private deed); (2) a highly detailed description of the collateral in the security agreement;⁹⁸ (3) a closed number of movable goods that can be used as collateral⁹⁹ and en-

95. 12 PRINCIPLES, *supra* note 53, princ. 3.

96. *See* C. CIV. art. 1583 (1804). This provision provides that the sale is perfected and ownership is acquired by the purchaser from the moment that there is agreement on the subject matter and price of the sale. *Id.*

97. *Id.* art. 2071. Additionally, Appendix 2 of this Article contains comparative charts of two archetypal civil codes, the French Code Civil of 1804 and the German. Despite the fact that the latter is also a civil code, it is more commercial, or less hostile to commerce, than the former. The goal of these charts is to illustrate how different attitudes toward commerce are reflected in provisions such as those on the formalities of contracts and protection of third parties, among others. The reader is encouraged to review these charts at this point.

98. GUATEMALAN CIVIL CODE art. 884 (1963) (on file with author).

99. *Id.* art. 451 (providing an enumeration of moveable property).

Art. 451 Movable property are[]

Property that can be transferred from one location to another without detriment to such property or to the immovable property in which they are located;

Temporary buildings on land property of a third party;

Natural resources that may be taken in possession;

forcement for only the allowed security interests; (4) a strictly judicial collection, repossession, and foreclosure remedies;¹⁰⁰ and (5) a limitation of the successful creditor's recovery to the value of the recovered collateral.¹⁰¹

c. Guatemala's New Law, the NLCIFT Principles, and the OAS Model Law

Article 3 of Guatemala's new law of secured transactions on personal property collateral ("GSTL") echoes both the OAS Model Law and the NLCIFT Principles by defining a security interest

as an *in rem* security right created by a secured debtor in favor of a secured creditor to secure performance of one or several obligations of the secured debtor or a third party. It is the preferential possessory right, including the right to enforce the collateral granted to the secured creditor¹⁰²

It also adopts the open number (*numerus apertus*) approach to the available security interests by providing that

[t]he concept of security interest also includes those contracts, agreements or clauses commonly used to secure obligations with respect to movable property, such as [] retention[s] of title, guarantee trusts (*fideicomisos*), floating liens over business establishments, [sales and] discounts of [accounts] receivable[] . . . in the creditor's books, financial leases and any other security in movable property regulated prior to the adoption of this law.¹⁰³

The GSTL enables the creation of both possessory and nonpossessory security interests¹⁰⁴ for individual credit extensions or for "line of credit

Shares or stock and obligations of stock companies, even when they are incorporated for the purpose of acquiring immovable properties, or for construction or other type of business in relation to this type of property;

Rights to receivables related to movables, cash or personal services; and,

Copyrights or patents of literary, artistic or industrial property.

Id. (author's translation).

100. *Id.* art. 882 (concerning the nullity of the *Pactum Commissorium* or clause enabling the creditor to repossess and foreclose on the collateral without judicial intervention).

101. *Id.* art. 881. This provision is not found in either France's or Spain's civil codes, but has been advocated by consumer protection commentators in these countries.

102. Guatemalan, *LGM*, *supra* note 45, art. 3. *See also* OAS MODEL LAW, *supra* note 42, art. 2; 12 PRINCIPLES, *supra* note 53, prins. 2–3.

103. Guatemalan, *LGM*, *supra* note 45, art. 3. *See also* OAS MODEL LAW, *supra* note 42, art. 2.

104. Guatemalan, *LGM*, *supra* note 45, art. 5; OAS MODEL LAW, *supra* note 42, art. 2.

agreements” with their corresponding “after acquired debts” and “after acquired collateral” clauses.¹⁰⁵ It lists the statutory liens present in Guatemalan law for the purpose of providing certainty to secured creditors and bona fide purchasers of the collateral.¹⁰⁶ In a pathbreaking manner for Latin American law, it adopts for the first time a unitary and unifying approach to the concept of the security (*garantía mobiliaria*). In the same manner initiated by UCC Article 9, GSTL Article 7 provides that

the term security interest will include all guarantees in movable property, including, but not limited to, civil or traditional pledges; agricultural, cattle and industrial pledges; pledges over warehouse receipts [and] asset-backed bonds [and] bills of lading or ocean bills of lading, factoring, mortgage bonds, notes, certificates of deposit, trust certificates, negotiable instruments, deposits in checking accounts and claims to proceeds of an insurance policy[, among others].¹⁰⁷

The creation (or “attachment,” in UCC Article 9 parlance) of a security interest requires that an agreement, except for possessory security interests, be granted in writing, whether in a public deed, private document with certified signatures, or electronic form, or by any other means that leaves a permanent record of the parties’ consent to the creation of the security interest. Unlike the Peruvian law, the description of the collateral may be in generic or detailed fashion. In addition, it reminds the parties that if they wish to avail themselves of a private, extrajudicial enforcement of the security interest, the security agreement is a good place for it.¹⁰⁸

As with UCC Article 9, the OAS Model Law, and NLCIFT Principles, perfection of the security interest is acquired by the creditor’s or his agent’s possession when the security interest is possessory; in the case of a nonpossessory security interest, perfection is acquired by public notice in a registry or by the control of the collateral by a designated third party acting on behalf of the secured creditor.¹⁰⁹ Unlike the Peruvian law discussed earlier, the Guatemalan law is clear on the use of a financing statement instead of the security agreement and on the essentially automated, nonevaluative functions of the registrar. It also provides for a public, easily accessible, and nationally and internationally interconnected registry.¹¹⁰

105. Guatemalan, *LGM*, *supra* note 45, art. 5.

106. *Id.*

107. *Id.* art. 7.

108. *See id.* art. 12(d), (g), (j).

109. *See id.* art. 15; 12 PRINCIPLES, *supra* note 53, princs. 5–7; OAS MODEL LAW, *supra* note 42, art. 10.

110. Guatemalan, *LGM*, *supra* note 45, arts. 40–41.

In a sharp departure from the drafting methodology of UCC Article 9, but in accordance with that of the OAS Model Law, the GSTL adopted a segmented approach to the rules on perfection and priority of the security interests in the major types of collateral. This was done to facilitate the application of concepts, rules, remedies, and principles of interpretation new to most of their users, even at the expense of some repetition. Thus, perfection and priority rules are provided for security interests in proceeds (Article 16); purchase money security interests (Articles 17, 45, and 55); accounts receivable (Articles 19–24, and 56-c); nonmonetary claims such as contract rights (Articles 25–26); documentary credits and their proceeds (Articles 27–30); negotiable instruments and documents of title (Articles 31 and 56-b); paper-based or electronic nonnegotiable documents (Article 32 and 56-a); control of goods in possession of bailees (Articles 34 and 56-e); control of bank and investment accounts (Articles 35 and 56-e); inventory (Article 36); intellectual property rights (Article 37); and fixtures (Article 56-d).¹¹¹

d. Enforcement

Finally, the enforcement provisions are a novel combination of the UCC Article 9 self-help-without-breach-of-peace remedies,¹¹² the OAS Model Law judicial and extrajudicial remedies,¹¹³ and Guatemala's own arrangement of judicial, extrajudicial, and expedited procedures:

Article 65. Voluntary enforcement. The secured creditor and secured debtor may agree in the security agreement or at any time, before or during the judicial enforcement procedure established in this law, that the enforcement against the collateral will be performed privately under the terms and conditions that they may freely agree on.

They may agree on the delivery or repossession of the collateral, the form and conditions of sale or auction, and any other matter, provided that they do not infringe the parties' and third parties' constitutional rights.

In case of chattel mortgage bonds and guarantee trusts, the parties may agree that enforcement is done in accordance with the Law of Warehouses and the Code of Commerce, as the case may be.

111. *See generally id.*

112. *See, e.g.,* U.C.C. § 9-609 (2004).

113. OAS MODEL LAW, *supra* note 42, arts. 53–66. (Article 61 is particularly informative.)

Article 66. Secured debtor's right. In any event, the secured debtor will retain the right to claim damages for the abuse of rights by the secured creditor.¹¹⁴

e. The Registry

Unfortunately, the lack of funds with which to set up the type of registry contemplated by the GSTL and the OAS Model Law has resulted in the creation of a temporary registry, which will hopefully be redesigned soon and set in full motion with the support of the IADB. Despite the rudimentary nature of the current registry, a Guatemalan daily recently reported on the warm reaction by the business community (lenders and borrowers) to the presence of this registry under the auspices of the GSTL.¹¹⁵ Hopefully, a registry such as the one contemplated by the GSTL and being built in Honduras as of this writing will also be in operation in Guatemala in the near future with IADB support.

3. Honduras

The NLCIFT signed its contract with the Millennium Challenge Account—Honduras (“MCA—Honduras”) in October 2007.¹¹⁶ This contract enabled the NLCIFT to put together an ambitious but feasible plan of action to bring commercial credit to small- and medium-sized businesses in a developing nation that truly needs them. Having established the state of Honduran law and practice under previous contract work with Booz Allen Hamilton and the United States Agency for International Development, the NLCIFT's plan for the MCA—Honduras work consisted of first establishing the conditions under which local and foreign lenders could commit to providing corporate and individual merchants' lines of credit for the various sectors of the Honduran economy.¹¹⁷

With this in mind, the NLCIFT invited Michael Quinn of J.P. Morgan Chase, among other prominent U.S. bankers, to a preliminary meeting with Honduran public and private sector representatives. One of the purposes of this meeting was to evaluate the type of secured lending that Mr. Quinn's bank was willing to undertake in Honduras and other Central American countries, as well as in Mexico, either directly or with local

114. Guatemalan, *LGM*, *supra* note 45, arts. 65–66.

115. Cristóbal Veliz, *Diez Empresas se Adhieren al RGM, Siglo XXI* (Feb. 10, 2009), <http://www.sigloxxi.com/noticias/26460>.

116. Contract for Consulting Services Between MCA—Honduras and National Law Center for Inter-American Free Trade (NLCIFT) (Oct. 9, 2007) (on file with author) [hereinafter Contract].

117. U.S. AGENCY FOR INT'L DEV. & BOOZ ALLEN HAMILTON, FINAL REPORT, TRADE AND COMMERCIAL LAW ASSESSMENT—HONDURAS (2005) (on file with author).

banks. After listening to the various presentations by Honduran exporters and U.S. importers of Honduran products, Mr. Quinn stated that depending upon the volume, timeliness, and quality of the products and effective security interests in them, his bank was willing to consider extending credit to Honduran exporters and their U.S. importers on the basis of “supply chain financing,” i.e., acquiring the accounts receivable owed to the Honduran exporters by acceptable U.S. importers, and securing them with a UCC Article 9-like statutory provision and an easily accessible, reliable, and inexpensive registry system that would enable perfection and priority on the collateralized accounts and their proceeds, both in the United States and in Honduras.¹¹⁸ These preconditions were helpful because they confirmed that a certain segment of the Honduran export market could be financed at reasonable rates of interest by a respectable and reliable U.S. source.

From there, the project moved to Honduras. Having established the state of Honduran law and legal practice, the NLCIFT had to accomplish seven different but related objectives: (1) determine the conditions under which local bankers would be willing to lend in a manner similar to that which decided J.P. Morgan Chase’s likely participation; (2) reactivate the drafting of a Honduran law inspired at this point by not only the NLCIFT Principles and the OAS Model Law, but also the just-enacted Guatemalan law; (3) create a working group of U.S. and Honduran or other Latin American experts to plan the design and operation of the Honduran secured transactions registry, including its networking with other local, regional, and international registries; (4) establish the business and accounting practices of small- and medium-sized Honduran businesses and the type of collateral they could offer to the satisfaction of their local and foreign lenders; (5) prepare standard accounting and lending forms, including those to be filed as financing statements; (6) create a regulatory working group formed by Honduran bankers and bank regulators as well as foreign experts in the regulation of secured loans; and (7) provide training sessions for bankers, banking lawyers, judges, and law professors.¹¹⁹ In order to accomplish these objectives, a group of NLCIFT researchers traveled to Honduras to interview local bankers (big and small), farmers, small-shop owners or operators, importers and exporters, cattle ranchers, fishermen, and their cooperatives, professionals, and artisans.

118. First Regional CAFTA Implementation Meeting, MCA—Honduras and National Law Center for Inter-American Free Trade (NLCIFT), in Tegucigalpa, Honduras (Feb. 28–29, 2008).

119. See Contract, *supra* note 116.

The object of this field study was to find out not only what the local lenders required by way of security, but also what their actual or potential borrowers could offer by way of collateral.¹²⁰ And if, say, central market stall operators (by the hundreds) and taxi drivers (also by the hundreds) presently offered as collateral to their very expensive lenders the licenses or franchises (*fichas*) used to operate their respective businesses, would bankers and other less expensive lenders be willing to take the same collateral, and if so, under what conditions? How about accounts receivable—would a very rudimentary form of accounts accompanied by simple bookkeeping records suffice to procure a line of credit geared to the borrower's volume of sales, rather than to the threat of losing an operator's license? And then what would the lenders like to monitor, and would any of the monitoring be possible with filings in the future registry, as "attachments" to the filings or otherwise? Or, if subsistence farmers in Honduras had to sell their crops for a fraction of their market worth (as they did in Guatemala) simply because they lacked a simple vehicle to transport their produce to the market, would a micro- or small-business bank be willing to finance the cost of acquiring such a vehicle with the security of the proceeds of the sales of produce?

The purpose of this extensive research was to be able to write a better law by taking advantage of the findings on Honduras' living law of business and accounting practices or on lenders' relied-upon collateral (such as the above-mentioned licenses). It was also completed in order to design a truly certain but also flexible and dynamic registry, one that accommodated the need for reliable information on collateral and available assets with a highly efficient, automated, and eventually fully electronic filing, search, and interconnected database system. Once the official law component is in place, including an effective secured transactions law, registry regulations, and bankruptcy law, commercial lending could start, and its results upon the Honduran economy could be measured, month by month.

I am happy to report that the final draft of the secured transactions law has been approved by the Honduran Supreme Court and sent to the Honduran Congress for a vote, which will possibly take place in May or June 2009. The registry software is about to be tested in April 2009, and the registry regulations will be completed shortly thereafter. Meanwhile, accounting practices and suggested registry forms are being tested. The

120. Nat'l Law Ctr. for Inter-Am. Free Trade, Report, Consulting Services for the Implementation of the Honduran Secured Transactions Law: Roadmap Documents (Mar. 2008) (unpublished confidential report, on file with author). This report was provided to MCA—Honduras. *Id.*

intrinsically transparent nature of both a modern registry and modern accounting practices will indeed challenge Honduras' culture of non-payment of taxes. In such a tax-avoidance culture, there is an obvious disincentive to record liens, maintain accurate business records, and abandon secrecy in business and commercial dealings. Such a scenario invariably presents itself in all such secured transactions modernization reform efforts in the developing world.

As the project further progresses, a U.S. banking regulator will be meeting with his Honduran counterparts, and hopefully risk management and safe and sound secured lending lessons learned from the U.S. (and the world's) financial meltdown can be applied in Honduras. Last but not least, a computerized, interactive teaching manual on the law of secured transactions is about to be completed as well.

CONCLUSIONS

As I reflect upon the failures and successes of the efforts to facilitate economic development in Latin America by enacting statutes patterned after the OAS Model Law on Secured Transactions, I must conclude that the reason why Mexico and Peru have yet to properly modernize their secured lending laws and practices and experience their undisputed economic benefits is because responsible policymakers have failed to ask the right questions.

There are still politicians and bureaucrats in Mexico who continue to ask themselves variants of the same question I was asked during the NAFTA negotiations, "Why us?" Or who remain convinced of the validity of the autochthonous slogan: "[w]hy should we change our law if it is the one that best reflects our legal culture?" On the other hand, other influential lenders echo the same autochthonous slogan but know better than to take the slogan seriously. The real question they ask themselves is "[w]hy should those of us who are doing well under the present non-transparent legal regime want to give up its secrecy and our priority?"

In Peru, an effective reform effort will require that drafters and implementers of its secured transactions law and registry regulations ask the following: What is the purpose of the statute we are about to enact? Who are its intended beneficiaries, and why? Who must it protect for it to function effectively? What are its essential concepts, rules, and principles of interpretation, and why? What is a truly functional registry? How could the substantive, procedural, and registry requirements best be implemented by encouraging best business, administrative, and judicial practices? Do we also need to modernize our bankruptcy law to prevent it from becoming a prime device to enable evasions of the secured trans-

actions' law while at the same time becoming a tool for the rehabilitation of deserving debtors?

In sharp contrast, Honduran and Guatemalan legislators, judges, and constituent small- and medium-sized borrowers and supporting agencies such as MCA—Honduras and the IADB asked the questions in the preceding paragraph and concluded that the satisfactory answer was to modernize the laws involved by modernizing and harmonizing them with those that reflect the best secured lending, notice, and accounting and business practices.

Clearly, the enactment of good laws and registry regulations are only the first step of a long process of day-to-day implementation. The success of these and other developing nations in accessing commercial and consumer credit at reasonable rates of interest will only be attained if they rely on both the "top-down" and "bottom-up" approaches to the modernization of their commercial law. The top-down approach presupposes the implementers' ability to select the most effective official legal institutions, as tested in the most active and efficient secured lending markets and as accompanied by a sufficient understanding of how to adjust them to local law and practice.

This is the understanding that led the Guatemalans to avoid the pitfalls of relying on institutions inspired by the French and Spanish Civil Codes, which are contrary to the purposes of the desirable law and which would only produce retrogressive judicial or administrative decisions. It is also this understanding that enables the inviolate preservation of the fundamental constitutional protections of debtors and creditors alike.

The bottom-up approach, consists of identifying those living law institutions that can best help attain the goals of a modernized official law, including commercial, banking, bookkeeping, accounting, registry filing and searching, and taxpaying customs and practices. Once the helpful living-law institutions have been identified, the next step is both crucial and delicate: incorporate those local customs and practices into official legal institutions, such as laws or regulations, or into official or unofficial compilations of best practices and explain and evaluate them in thoughtful, academic-doctrinal, yet nondogmatic, commentaries.

When properly carried out, this selection of best practices would distinguish between those practices that can best function in, say, a highly active, trusting, and sophisticated marketplace from those required by a much smaller, unsophisticated, and distrusting marketplace. Thus practices associated with the former marketplace, such as a preponderant reliance on electronic records and filings by only one of the parties (usually the creditor), may have to be modified to accommodate for the filing of some paper-based documents and signatures by both parties as well as

for other “trust-inducing” practices. These trust-inducing practices may also require legitimizing those filings that involve unusual collateral (by developed-country standards) such as governmental licenses or permits that enable the operation of small businesses ranging from market stalls, artisans and craftsmen’s shops, and taxis, to rudimentary bookkeeping entries in grocery shops’ “booklets” (*libretas*).

At the end of the day, the top-down and bottom-up methods of modernization of commercial law must be combined to reflect what is internationally uniform or universal and what is the best local practice. In doing this, the result must always be consistent with the above-discussed seminal principles of commercial legal institutions in general, as well as those that inspire the institution in question. It is not an easy task, but I am convinced that it is the only one that can succeed when using modernized commercial law as the prime tool of economic development: it is in some markets and can be in others.

APPENDIX I

NLCIFT 12 PRINCIPLES OF SECURED TRANSACTIONS LAW IN THE AMERICAS¹²¹

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1. Secured commercial and consumer credit is an effective tool for economic development because it allows the debtor's use, transformation, sale or barter of collateral (mobilization). The mobilization of these assets leading to their sale or disposition makes possible the payment or self-liquidation of the loan. A single security interest can support a series of loans whose amount and collateral can vary during the life of the loan or loans. By executing a single security agreement and by giving public notice of the loan or line of credit, the secured creditor establishes his priority in the collateral over third parties without having to enter into new credit extension agreements or having to make successive filings. Self liquidation can take place only when the following corollary principles are implemented by legislators, the parties, registries and courts.

2. A security interest is a preferential right to possession or control of personal property. As such,

1. Las garantías mobiliarias del crédito comercial y del consumo propician el desarrollo económico porque permiten al deudor el uso, transformación venta o permuta de los bienes garantizadores (movilización de los activos). El producto de la venta o disposición de estos activos o de sus bienes derivados o atribuibles hacen posible la auto-cancelación o pago del préstamo. La ejecución de un solo acuerdo de garantía y su publicidad registral efectuada desde el momento de ese acuerdo puede garantizar a una serie de préstamos o "línea de crédito" cuyo monto y cantidad o valor de bienes garantizadores pueden fluctuar durante la vida de ese préstamo o préstamos. Publicitada la garantía, el acreedor establece su prioridad respecto a terceros sin necesidad de acuerdos o registros sucesivos. La auto-cancelación de las garantías mobiliarias requiere que los siguientes principios, corolarios de la misma, se implementen por los legisladores, las partes, los registros y las cortes.

2. La garantía mobiliaria es un derecho de posesión o de control preferente sobre bienes muebles.

121. 12 PRINCIPLES, *supra* note 53.

it does not require that the debtor who grants the interest have title to the personal property collateral; his right to its possession, even though co-existent with other possessory rights in the same property by other creditors and debtors, will allow the creation of the security interest.

3. The security interest may be created in any personal property susceptible to monetary valuation whether present or future, tangible or intangible including rights to the same, as well as in the proceeds of this collateral, whether in their first or future generations. Thus, personal property collateral as well as security interests in them are open in number (*numerus apertus*), and these security interests are not limited to pre-existing devices such as the pledge, with or without dis-possession of the collateral, chattel mortgages, retention of title or conditional sales, etc.

4. Security interests may be created by contract or by law. The effectiveness of a security interest between the secured creditor and debtor arises from their contract or from a statutory or judicial imposition without any additional formality. Nevertheless, third party rights, including the rights of judgment creditors and trustees in bankruptcy, will not be affected by the se-

Como tal, no requiere que el deudor garante sea el propietario del bien mueble garantizador; su derecho a la posesión del mismo bien, así sea coetáneo con otros derechos posesorios de otros acreedores o deudores, permitirá la creación de la garantía mobiliaria.

3. La garantía mobiliaria se puede constituir sobre cualquier bien susceptible de valoración pecuniaria, sean ellos presentes o futuros, corporales o incorporeales, incluyendo derechos sobre los mismos, así como sobre los bienes derivados o atribuibles a la venta o permuta de estas garantías, ya sea en una primera o ulterior generación de tales bienes derivados o atribuibles. Por tanto, los bienes garantizadores al igual que las garantías sobre los mismos son de número abierto (*numerus apertus*) y no se encuentran limitadas a figuras pre-existentes tales como las prendas con o sin desplazamiento o las hipotecas mobiliarias, o ventas con reserva o retención de dominio, etc.

4. Las garantías mobiliarias pueden ser creadas mediante contrato o en virtud de la ley. La efectividad de una garantía mobiliaria entre el acreedor garantizado y el deudor se origina por el contrato entre los mismos por imposición de la ley o decisión judicial, sin necesidad de formalidades adicionales. Sin embargo, los derechos de terceros, incluyendo los de los acreedores

curity interest unless proper notice of it is provided to third parties.

5. A principal goal of a secured transactions public notice system is to eliminate secret liens. Public notice can either be attained by the creditor's or designated third party's possession or control of the collateral, or by registration. A perfected security interest in personal property can merge with a negotiable instrument, in which case it will become a negotiable security interest and, thus, an "abstract" undertaking, independent of rights and equities associated with the underlying transaction, thereby allowing its "true sale" or unrestricted negotiation to a *bona fide* purchaser.

6. Effective public notice by a specialized registry occurs when all known or future legal mechanisms with the effect of guaranteeing the payment of a debt against personal property are treated as a unitary security interest. The effect of such a recorded security interest, including its priority, upon third parties (such as other secured creditors and purchasers) commences from the time of its filing, irrespective of the time of its creation.

quiografarios con sentencias de embargo o remate y los de los síndicos, no quedarán afectados a menos que la garantía mobiliaria haya sido debidamente publicitada.

5. Uno de los objetivos principales del sistema de publicidad de las garantías mobiliarias es el de eliminar los gravámenes ocultos o secretos. La publicidad (perfeccionamiento) se puede lograr ya sea mediante registro público o por la posesión o control del bien garantizador en manos del acreedor o de un tercero designado por éste. La garantía mobiliaria perfeccionada sobre un bien mueble podrá fusionarse con un documento negociable, en cuyo caso se convertirá en una garantía mobiliaria negociable y, en consecuencia, en una obligación abstracta, independiente de los derechos y obligaciones de la transacción subyacente, permitiendo así su venta autónoma (*true sale*) o negociación sin limitaciones a un tercero de buena fe.

6. La publicidad efectiva por parte del registro especializado se logra cuando todos los mecanismos legales, presentes y futuros, cuyo efecto consiste en garantizar el pago de una deuda a través de bienes muebles, son tratados como un derecho de carácter unitario. El efecto de dicha garantía mobiliaria registrada (incluyendo su prioridad) ante terceros (tales como otros acreedores garantizados y compradores) da comienzo a partir

7. Registration should be inexpensive and should take place in a public registry easily accessible to third parties regardless of nationality or economic sector, if at all possible by electronic means. The filing, in standardized fashion, should contain only the essential data to identify the parties, the amount of the loan or line of credit and collateral, consistent with the needs of actual and potential third parties to discover all recorded liens against the debtor's assets. Generic descriptions of collateral such as "inventory" or "accounts receivable" should suffice. The registry should be indexed generally by the debtor's name and, only exceptionally, by the serial number of the goods.

8. A "purchase money," or "acquisition" security interest should take priority, to the extent that the credit provided is used directly to acquire the collateral, over prior existing perfected security interests in the same kind of collateral, as an incentive to those wishing to provide timely, valuable and needed loans and as a safeguard against the monopolization and immobilization of the collateral available by one or more secured creditors. Perfection of a purchase money secu-

de su inscripción, independientemente del momento de su constitución.

7. El registro de la garantía deberá ser lo más económico posible y deberá realizarse en un registro público fácilmente accesible a terceros sin distinción de giro comercial o nacionalidad, y, de ser posible, en forma electrónica. La inscripción deberá contener los datos más esenciales, en forma estandarizada, a efectos de identificar a las partes, el monto del préstamo o línea de crédito y los bienes garantizados, en forma coherente con las necesidades de información de terceros, actuales o potenciales. Resultarán suficientes las descripciones genéricas de los bienes garantizados, como ser "inventario" o "cuentas por cobrar." El índice deberá organizarse en general con base al nombre del deudor y, excepcionalmente, en base al número de serie de los bienes.

8. En la medida en que el crédito proporcionado en base a una garantía mobiliaria de "adquisición" o de "compra de bienes específicos" se utilice directamente para la compra de los bienes garantizados, dicha garantía tendrá prioridad sobre otras garantías mobiliarias pre-existentes que cubran la misma clase de bienes, creando así un incentivo para quienes deseen proporcionar los préstamos necesarios y oportunos, y una protección en contra del monopolio e inmoviliza-

rity interest should require, in addition to the appropriate filing, a special notice to pre-existing security interests.

9. A buyer in the ordinary course of business takes free of a perfected security interest created by his seller, even when the buyer may know of that security interest. If the sale occurs outside the ordinary course of business, then the buyer takes subject to the security interest even if he pays a fair purchase price.

10. Self liquidation of the security interests requires that repossession of the collateral and foreclosure take place by means of a contractual, rescissory and extrajudicial enforcement that confers upon the creditor or agreed-upon fiduciary the power to repossess or retain and foreclose on the collateral privately or by means of a highly expeditious judicial foreclosure.

11. Whenever possible—and until such time as a perfected and modern bankruptcy system that duly protects debtor and creditor

ción de los bienes garantizados disponibles por parte de uno o más acreedores garantizados. Además de la inscripción correspondiente, para el perfeccionamiento de la garantía mobiliaria de adquisición se requerirá un aviso especial a los acreedores pre-existentes.

9. El comprador en el curso ordinario de los negocios adquiere los bienes libres de cualquier garantía mobiliaria perfeccionada anteriormente por el vendedor, incluso en los casos en que el comprador pueda tener conocimiento de su existencia. Si la venta ocurre fuera del curso ordinario de los negocios, entonces el comprador se encuentra sujeto a la garantía mobiliaria, incluso cuando haya pagado un precio de compra justo.

10. La auto-cancelación de las garantías mobiliarias exige que la reposición de las garantías y su ejecución se puedan realizar a través de mecanismos de resolución contractual y de ejecución extrajudicial, confiriéndole al acreedor o a quien se haya acordado habrá de actuar como fiduciario la potestad de tomar posesión o retener y hacer ejecutar la garantía ya sea de manera privada o a través de un proceso judicial altamente expedito.

11. En la medida de lo posible—y hasta el momento en que rija un sistema moderno en materia de quiebras que proteja en forma ade-

rights has been adopted—the perfected security interest should not become part of bankruptcy proceedings and the law of bankruptcy or any other branch of the law should not become a tool to delay, avoid and evade secured obligations. Exceptionally, where the bankruptcy takes the form of a business reorganization, collateral may become part of the bankruptcy estate, subject to the exclusive jurisdiction of the bankruptcy court to confirm the perfection of the security interest and establish its priority against the claims of other creditors, to determine the extent and value of the security interest and ultimately to decide whether the collateral is essential to a feasible reorganization that shall protect valid security interests.

12. The harmonization of secured transaction laws—including conflict of law rules—is essential in order to promote cross-border extension of credit.

cuada los derechos de los acreedores y deudores—la garantía mobiliaria perfeccionada no deberá formar parte de los procedimientos de quiebra, y las leyes relativas a quiebra o a otras ramas del derecho no habrán de convertirse en un vehículo para retrasar, evitar y evadir el pago de las obligaciones garantizadas. De manera excepcional, si los procedimientos corresponden a un concurso preventivo, los bienes garantizadores pueden pasar a integrar la masa de la quiebra, sujetos a la jurisdicción exclusiva del tribunal de quiebras, a efectos de confirmar el perfeccionamiento de las garantías mobiliarias así como su prioridad con respecto a los reclamos de otros acreedores, de determinar el alcance y valor de las garantías y, en última instancia, para decidir si los bienes garantizadores son esenciales para el éxito de un concurso preventivo que habrá de proteger a las garantías mobiliarias válidas.

12. La armonización de las leyes sobre garantías mobiliarias—incluyendo las normas de conflicto de leyes—resulta esencial a los efectos de promover la disponibilidad del crédito transfronterizo.



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APPENDIX II

RULES THAT ENCOURAGE OR DISCOURAGE THE COMMERCIALIZATION OF CONTRACTS CIVIL CODE OF FRANCE AND THE GERMAN B.G.B.

Civil Code—France ¹²²	B.G.B.—Germany ¹²³
Formality: only authentic acts (notarial deeds) and documents under private signature—i.e., documents formally acknowledged by the signing party—are given evidentiary value as literal (full) proof of the obligation. (Articles 1317–32.)	Lesser formality: where the law requires a writing, a signature is required; informal contracts can be signed without formal acknowledgment of signatures. Telegraphic communications can be binding, and contracts by exchanges of letters are also binding; however, authentication of signatures may be required. (§§ 126–27.)
No Comparable Provisions. Generally, enforceable contractual promises require the acceptance of the promisee (as Pothier’s pollicitations).	Promises can be enforceable without the expressed acceptance of a promisee. <i>See</i> executory promises (formally <i>nuda pacta</i>), § 780 (<i>Abstract Promise</i>), § 781 (<i>Acknowledgment of a Debt</i>), § 787 (<i>Payment Instruction</i>), §§ 793–94 (<i>Bearer Instruments</i>), and § 657 (<i>Public Offer of a Reward</i>).
Promises are unenforceable unless they contain a lawful and valid underlying cause. (Articles 1108 and 1131.)	Abstract promises are enforceable regardless of the underlying cause. (§§ 780–82.)
Mortgage is a causal contract, and its certificate cannot be made out to “bearer” as in 1195 of the BGB. (Articles 2124, 2127, and 2115–16.)	Provisions on the <i>Grundschild</i> or Territorial Debt. Mortgages can be abstract contracts and be made out to “bearer.” (§§ 1191–98.)

122. C. Civ. (1804).

123. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 1, 1975, *translated in THE GERMAN CIVIL CODE* (Ian S. Forrester, Simon L. Goren & Hans-Michael Ilgen trans., 1975).

No regulation for contracts <i>inter-ausentes</i> .	Express regulation of contracts <i>inter-ausentes</i> (§ 130) including offers binding during a time specified by the offeror and others made during auctions (§§ 147–56 and 158–63).
Restrictive provisions on the enforcement of contracts for the benefit of third parties. (Articles 1165 and 1121.)	Liberal enforcement of contracts for the benefit of third parties. (§ 328.)
No comparable provisions are found in the Code Civil.	Simplifies claims by third-party beneficiaries by applying rules on the interpretation of contracts and the use of assumptions. (§ 330.)
Contracts for the sale of land can be rescinded if the seller sells for a price lower than 7/12th of market value (objective lesion), third parties' rights notwithstanding. (Article 1674.)	A loss suffered while selling land below its market value is not protected unless in cases of subjective lesion (§ 138). Third parties who purchase land based on the land registry records are protected (§ 892).
Ownership of goods/raw materials determines ownership of the processed final goods unless the value of the workmanship is surpassed by much of the value of raw materials/goods. (Articles 570–71.)	The value of the work invested in processing or transforming another's goods/raw materials determines ownership of the final goods, if the value of the latter is not substantially less than the value of former. (§ 950.)
In an agency contract, the principal is not bound to perform if the agent exceeds the principal's instructions. (Article 1998.)	Ostensible authority binds the principal under certain circumstances. (§ 166.)
Only regulates Civil or Non-Profit Associations. (Articles 1832–73.)	Regulates Civil or Non-Profit Associations, as well as Commercial or Profit Associations. (§ 21 et seq.)