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The Development of the American "Security Interest" and its Effect on the International Harmonization of Security Rights

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THE DEVELOPMENT OF THE AMERICAN "SECURITY INTEREST" AND ITS EFFECT ON THE INTERNATIONAL HARMONIZATION OF SECURITY RIGHTS

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INTRODUCTION

In this essay, I would like to examine the development of security rights in American commercial law that has resulted in what is now Article 9 of the Uniform Commercial Code (U.C.C). Specifically, I would like to explore how the unique creation of the Article 9, "security interest," has played an important role in the international development and harmonization of security rights law.[1]

I. THE DEVELOPMENT OF AMERICAN SECURITY RIGHTS IN PERSONAL PROPERTY

The law of security rights is about the creation of credit. Credit is necessary to develop an economy, and therefore, the law of secured transactions follows closely with the development of economies. This was markedly true in the United States, and the history of secured transactions in America followed the development of the country's economy in general. In what was a poor country, buyers needed credit within the quickly growing economy.

At the beginning of the nineteenth century, only two known security devices in property were recognized in the United States: (1) the mortgage in real estate and (2) the pledge for personal property.[2] My concern here is not with the real estate mortgage, but security rights in personal property.

As for the simple pledge, we can quickly put it aside as a useful device for large-scale credit. By its very nature, with the creditor taking or keeping possession, it had and has no significant commercial value.

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* Professor of Law, Elon University School of Law. It is my great privilege to be included in this celebration to honor Professor Neil Cohen, my friend and colleague of many years. Neil has brought his immense knowledge of the law and teaching excellence to thousands of students, all of whom have gained tremendously from his guidance. His scholarship has influenced the path of the law in many countries and continents. Normally, a Festschrift, such as this, honors the culmination of an illustrious career, but for Neil, I know we can all look forward to the continuance of his work for many years to come.

1. I am concerned in this paper with the export of the principles of Article 9. Whether Article 9 itself could be the basis for international secured transactions is an interesting topic already ably dealt with by Professor Cohen. *See* Neil B. Cohen and Edwin E. Smith, *International Secured Transactions and Revised Article 9*, 74 CHI.-KENT L. REV. 1191 (1999).

2. GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 59 (Law Book Exchange 2d ed. 1999).

The need for credit was recognized by the commercial classes, and this was reflected by the law, often through the work of the legislatures. For example, one of the first legislative changes was the elimination of the traditional common law bar of sellers retaining a legal interest in goods in which the seller had relinquished possession. The rule gave way to commercial necessity.

From here, American law took off on a trajectory of complications beyond what had previously existed in the English law of secured transactions.[3] This resulted in a complex law of secured transactions that a century later resulted in a concomitant simplification that is the system we have in America today.

The first recognized non-possessory device in personal property in the United States was the chattel mortgage. It was a security device created wholly by statute in the United States.[4] The chattel mortgage attempted to replicate the real estate mortgage by recognizing a "mortgage" in the property if the interest was properly filed.

The statutes creating these security devices were misleadingly simple. They tended to provide only that there was no interest by the creditor unless the creditor filed a mortgage. The nature of the mortgage interest in personal property and whether it was the same interest that existed in a mortgage on real property were questions left to the courts. Were the requirements of the description of the property essentially the same as for real estate? This was also a question that was left to the courts.

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3. This is not to say that the law in England developed along easy and sure routes. Much of what we will examine in the American law looked somewhat similar in the English Law.
First, we must recognize that the English law drew a distinction between mortgages and charges that were deemed real security interests because the creditor had an interest in the debtor's property, and conditional sales contracts that were not seen as real security interests as the seller did not have an interest in the buyer's property as such. *See e.g.*, HUGE BEALE, MICHAEL BRIDGE, LOUISE GULLIFER & EVA LOMNICKA, *The Law of Personal Property Security, in* THE LAW OF SECURITY AND TITLE-BASED FINANCING ¶ 7.03 (Oxford University Press 2d ed. 2012); ROBERT BRADGATE & FIDELMA WHITE, COMMERCIAL LAW 330–33 (Oxford University Press 3d ed. 2005). This distinction arose from the Bills of Sale legislation that imposed a registration requirement for chattel mortgages and the Corporations Act, which required the registration of a company charge. These statutes did not apply to conditional sales contracts.
For similar reasons as we will see in the American law, the English financiers wanted to avoid the registration and enforcement of the requirements of the Bills of Sale Act, and therefore began to rely on the conditional sales agreement. This usage was bolstered when the House of Lords recognized that the Bills of Sale legislation did not apply to a conditional sales contract. McEntire v. Crossley Brothers [1895] AC 457, 460.
This is not to say that the conditional sales contract was a panacea for creditor sellers in England. Under successive versions of the Factors Act and the Court of Appeals case of Lee v. Butler, it became clear that a seller that had retained title under a conditional sales contract would be subject to a good faith purchaser of the debtor-buyer. Lee v. Butler [1893] 2 QB 318.

4. A statute was effectively mandated here. Judges would routinely presume fraud in the case where the buyer had possession and the seller claimed some mysterious continuing right in the goods.

Were chattel mortgages even valid? A court in New York in 1851 was not so sure.[5] The court found that prior to the statute, the mortgage would have been fraudulent as a matter of law against the mortgagor's creditors, whereas with the statute, it was only presumptively fraudulent, and therefore the question could proceed to the jury.[6]

This was not the sort of lack of certainty and risk for which thoughtful businesspeople wanted to be exposed. Moreover, and possibly more importantly, the procedures for creating and enforcing chattel mortgages were generally as onerous and expensive as real estate mortgages. As such, they were not the quick and efficient means desired and required by a rapidly expanding economy growing on credit.[7]

Something else was needed, and this turned out to be the conditional sales contract. As we have seen, the chattel mortgage was just an extension of the long existing law of mortgages on real property. As we shall see, the conditional sales contract is a logical extension of the law of sales.

Before moving to a discussion of the conditional sales contract, I would like briefly to examine the third major nineteenth-century American security device in personal property: the "trust receipt."

The trust receipt was a unique financing device that provided short-term credit by a bank guaranteeing payment to the seller by letter of credit against the delivery of a bill of lading. This allowed the buyer short-term credit on the goods by a bank until the buyer could resell the goods and deliver payment to the bank.[8]

This essentially was a documentary exchange of goods supported by a letter of credit. The "trust" was a two-step process where the bank legally held the bill of lading, and title to the goods while the buyer had actual possession of the bill of lading, allowing the buyer to get possession of the goods and resell them.[9]

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5. Griswold v. Sheldon, 4 N.Y. 581, 599 (N. Y. 1851).

6. *Id.*

7. There were a multitude of other problems embedded in the chattel mortgage. For example, after acquired property did not set well with the traditional common law concept that one could not transfer an interest in property that one did not yet own.

8. The time and expense of a chattel mortgage would have made it a virtual impossibility as a basis for this type of financing.

9. I have always thought the trust receipt is the most ingenious of security devices. If the bank has possession of the bill of lading as a pledgee, the buyer cannot get possession of the goods to resell them. If the bank gives the possession of the bill of lading to the buyer, the bank no longer has possession and loses the security rights of a pledgee. The solution is to create a trust receipt by which the buyer only holds the documents in trust for the bank and only for the limited purpose of getting the goods to resell them. In the case of a trust receipt, the effect of possession provides some of the benefits of possession without others. The legal effect of possession depends on the purpose for which you ask the question. The trust receipt beautifully captures the essence of the common-law trust, the wonderful division of legal and beneficial rights. It, of course, lays waste to the general rules of possession that govern documents of title.
For a history of the rise and fall of the trust receipt in American law, *see* Grant Gilmore, *Chattel Security: II*, 57 YALE L.J. 761 (1948).

The trust receipt was an effective way to finance imports and commodities, but it did not provide the basis for longer-term credit or, more specifically, when the buyer needed the goods for their use.

This brings us to the conditional sales contract. The conditional sales contract was a simple credit device in which the seller sold the goods to the buyer on credit with the seller retaining title to the goods until the buyer had paid the purchase price.

The development of the conditional sale was not well received in the United States. Throughout the last half of the nineteenth century, many American cases found them void on "vaguely articulated grounds of public policy."[10] Moreover, it was thought that the conditional sales contract provided an easy means for committing fraud.

As the courts battled the validity of the conditional sales contract, the lawyers, and often the legislatures, came up with something else, such as, as we have seen, the trust receipt and the chattel mortgage.[11] Each new device was an attempt to wiggle the law in a new direction to provide a functional security device.

But to a large extent, this proved to be futile. It had long been accepted in the common law that if the seller gave up possession of the goods to the buyer before the buyer had "title," the buyer could resell the goods to another buyer - a good faith purchaser -who would then have good title to the goods. It is worth noting that the courts and the legislatures were unwilling to give up the concept of title, so in these cases, we refer to the buyer having "voidable title," but title all the same.[12]

In *Lee v. Butler*,[13] the English Court of Appeals held that the buyer in possession rule applied against an original seller in a conditional sales contract. The American courts took note.

American sellers thought the buyer in possession rule was "outrageous nonsense."[14] The conditional sales contract was simple, quickly created, and required no external costs such as registration. It was also a clear articulation of the intent of the parties. Yet, with only a few common-law exceptions,[15] the conditional seller was treated as an unsecured creditor.

The trust receipt is still used in some jurisdictions. For an explanation of its use in contemporary commercial practice *see* ROY GOODE, GOODE ON COMMERCIAL LAW 1122–24 (Ewan Mckendrick ed., Penguin Books 4th ed. 2010).

10. GILMORE, *supra* note 2, at 62 & n. 2–3.

11. *Id.* at 63–64.

12. "Voidable title" is not "good title," but something just good enough to allow the resell of the goods. It would have been analytically easier to say the non-possessing seller has relinquished title, and therefore the buyer has "title" (good title), but the blemish of the fraud puts a taint on the purity of the concept of "title."

13. *Lee*, 2 QB at 321–22.

14. GILMORE, *supra* note 2, at 64.

15. These were (1) the right to stop in transit if the buyer had not received possession and was insolvent, (2) the right to reclaim in a cash sale, and (3) fraud by insolvency. *Id.* at 65. These latter

It should be noted that it had long been the case that most mutual promises to perform in contract law were implicitly dependent.[16] This sets up the basic underlying structure of a "sale absolute" where concurrent performance is required by both parties. This provides the legal basis for a "conditional sale" when the parties expressly provide for the division of performance by separating delivery from title.

Yet, party autonomy alone was never going to suffice for the simple reason that although the parties might have had some purely theoretical right to allow the seller to retain title, such an unrestricted right provided fertile ground for one of humankind's most treasured activities: fraud. In this case, the culprit was the hidden lien.

Despite these problems, the attractiveness of the conditional sales contract was clear. First, unlike the ability of the seller to retain some amorphous notion of a mortgage, with the conditional sale, the seller had "title," "ownership," or the "property rights." This was not a lien on someone else's property. This was ownership,[17] and it was ownership without the expense, filing requirements, and arcane enforcement mechanisms of the chattel mortgage.

In addition, unlike the trust receipt, the conditional sales agreement could be created without all the shuffling around of bills of lading, letters of credit, trust receipt documents, and all the other accouterments that commercial practice demanded. The conditional sales agreement could be just a term in an otherwise straightforward two-party sales agreement.

The inevitable growth of the conditional sales contract resulted in the adoption of several statutes that expressly provided for these security devices.[18] These tended to provide for registration (to avoid the hidden lien) and the preservation of the debtor-buyer's equity on default as opposed to the court made rule, consistent with general contract law, of a forfeiture by the buyer upon the repossession by the seller.[19]

Inevitably, though, came the hairsplitting. Both chattel mortgage statutes and conditional sales contract statutes set up the sensible requirement of filing to avoid the problem of the hidden lien. The courts understood, however, both theoretically and factually that the two security devices were supported by separate legislation, that these two security devices were different creatures. Therefore, although they served the same function, the filing of one did not suffice to validate the other.

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two were rationalized under the doctrine of "voidable title" and therefore subject to the claims of a good faith purchaser. *Id.*

16. *See e.g.*, Boone v. Eyre, 1 H. BI 273, 126 Eng. Rep. 160(a) (K.B. 1777), where Lord Mansfield makes this clear.

17. "Although the idea is one that is hard to pin down, the title retention devices have always been looked on as somehow 'stronger' than the 'weaker' lien devices of mortgage, pledge and factor's lien." GILMORE, *supra* note 2, at 67.

18. *Id.* at 68.

19. *Id.*

The courts understood that a conditional sales agreement was essentially a sale. It was not a loan, and a loan, however, disguised as a sale could not be secured with a conditional sales agreement. In addition, a conditional sales contract was not only a sale but was usually limited to a purchase money sale.

Cases and statutes notwithstanding, the law struggled to accommodate the conditional sales contract. One court went as far as invalidating an otherwise valid conditional sales agreement because the financing seller was in the general business of lending money.[20] Although this was an aberrational case, it shows that even in the mid-twentieth century, the American courts were having trouble with the effectiveness of a sales agreement with the retention of title.

The pressure by businesses to overcome the resistance of courts to provide for legal recognition of conditional sales led to the creation of the Uniform Conditional Sales Act for adoption by the states by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

The Uniform Conditional Sales Act defined a "conditional sale" as a: ". . . contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price."[21]

This is clear enough, and it gets to the heart of the issue: the seller retains title until the seller is paid for the goods. The statute also provided notice filing to avoid the problem of hidden liens.[22]

That this arrangement was intended to overlay a simple contract for the sale of goods is also clearly articulated: "The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer."[23]

The simple rules of modern secured transactions are laid out in this Act. The seller is subject to claims of the buyer's purchasers, creditors, or others

20. Hughbanks, Inc. v. Gourley, 120 P.2d 523, 526 (Wash. 1941).

21. The definition also included finance leases:

> [A]ny contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the good, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

UNIF. CONDITIONAL SALES ACT § 1, 2 U.L.A. 1–2 (1922).

22. This goes back to the good old days when filing was mostly done locally in the country clerks' office of the respective counties of the individual states. The Uniform Act proposed a filing fee of ten cents. *See id.* § 10 at 16–17. The effectiveness of this as notice created a nightmare that is the subject of its own independent study.

23. *Id.* § 2 at 16–17.

that have attached or have a lien on the property unless these parties have notice[24] or the filing has occurred.[25]

Moreover, recognizing that the buyer may be getting the goods for reselling, the Uniform Conditional Sales Act provided protection for buyers in the ordinary course of business by providing that:

> When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents[26] that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this Act.[27]

What the Uniform Conditional Sales Act did not resolve was how to manipulate and balance questions of title. For this resolution, the law needed and received Article 9 of the U.C.C.

Article 9 of the U.C.C. synthesized all prior American security devices in personal property security rights law. It was an amalgam of, among other prior law, the Uniform Conditional Sales Act, the Uniform Chattel Mortgages Act, and the Uniform Trust Receipts Act.[28]

Article 9 was a great leap forward. The prior law relied on sales law (contract and property), mortgage law (property), and negotiable documents law (trust receipt) to achieve essentially the same goal: to allow for secured credit in personal property.

Among these prior laws, it was only in the conditional sales contract that traditional notions of title were addressed and manipulated to achieve a

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24. U.C.C. Article 9 gets rid of the element of actual notice. We have long come to appreciate it is just an annoying fact question that serves to muddle up an otherwise easy to understand and apply priority system. U.C.C. art. 9 §§ 9-101–9-809 (AM. L. INST. & UNIF. L. COMM'N 2021).

25. UNIF. CONDITIONAL SALES ACT § 5, 2 U.L.A. 6 (1922). I stated the filing rule to simplify my analysis. Under the Uniform Conditional Sales Act, the seller creditor priority does not run from the time of filing. It runs from the time that the conditional sales contract is created if the filing occurs within ten days. This is the relation back period of priority that we accord purchase money secured creditors to give the creditors time to handle the paperwork and filing when a buyer pops up off the street and requests credit for a purchase. This is still enshrined in contemporary American law. *See* U.C.C. § 9-317. Because of modern technological advances and the lack of need to manually keep records, this can be done much more quickly. We have responded to this commercial reality by giving the creditor twice as much time. *Id.*

26. Consent by the secured party is not necessary under current American law; a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller even if the buyer in the ordinary course of business is aware of the existence of the security interest. U.C.C. § 9-320. This modern rule, of course, simply recognizes that retailers routinely have their inventory financed and the marketplace requires the ability of these retailers to sell their goods without the ultimate buyers having to worry about any hidden interests in the goods.

27. UNIF. CONDITIONAL SALES ACT § 9, 2 U.L.A. 15 (1922).

28. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958) (noting that, effective October 1, 1958, the UCC replaced the Uniform Conditional Sales Act and the Uniform Trust Receipts Act as well as "numerous other statutes").

security device. However, in a sense, this was no different from the other security devices in that they all sought to manipulate and squeeze from existing legal constructs some basis for achieving legal recognition of secured credit.

To clear the path from this mess, the unifying element needed to be isolated. The unifying element is blunt: lend someone money and hold their goods hostage until they pay off the debt.

The Romans understood this.[29] It certainly has been well understood in the English common law and the late nineteenth century, embodied in both the English Factors Act of 1889 and the English Sale of Goods Act of 1893.[30]

This was understood by any creditor lending money in pre-Article 9 America. But all these pre-U.C.C. Article 9 American versions of security rights, based the right to a security interest on some underlying, and possibly inconsistent, legal concept of title, ownership, or lien.

This was where American law was ripe for invention. Could all of the complexity be replaced by a single unifying right that reflected the purpose of a creditor's right?

In the early part of the twentieth century, when NCCUSL was drafting both the Uniform Chattel Mortgages Act and the Uniform Conditional Sales Act, some quarters sensibly suggested the creation of a single act to achieve the goal of both acts since they essentially did the same thing. This advice went unheeded.

With this background, we come to Article 9 of the U.C.C. and its definition of "security interest": "'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."[31] In other words, lend someone money and hold their goods hostage until they pay off the debt.

To be a bit more refined about explaining the language of this definition, we can quote the primary drafter Grant Gilmore. He said, "[i]t is not suggested that anything useful could have been done to explain the phrase 'an interest . . . which secures . . . an obligation."[32]

The drafters of Article 9 knew they were moving into uncharted territory. In anticipation of the inevitable hue and cry, it was pointed out that no statute had ever tried to define a mortgage.[33] A mortgage was what courts said a

29. The pledge, a possessory security interest was recognized by Roman law, but the Roman law also recognized non-possessory security rights; the *hypotheca.* This was, essentially, what would be a chattel mortgage under the common-law. *See, e.g.*, W. W. BUCKLAND, A TEXTBOOK ON ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 475, (Peter Stein ed., Cambridge University Press 3d ed. (1975).

30. ENGLISH FACTORS ACT (1889); ENGLISH SALE OF GOODS ACT (1893).

31. U.C.C. § 1-201(b)(35) (AM. L. INST. & UNIF. L. COMM'N 2005).

32. GILMORE, *supra* note 2, at 334–35.

33. *Id.*

mortgage was based on history and practice. It worked and it works. Likewise, the concept of a security interest would work.[34]

How did we get here? For years, lenders drafted security agreements as sales to avoid the restrictions of mortgage law. Conversely, the courts struck down the agreements as sales and declared them mortgages.[35]

For years, parties tried to twist and turn the concept of title into something to achieve a specific goal: to provide for a secured transaction. It should have worked. That was the import of the various conditional sales contract statutes. These statutes said in effect, "for purposes of retaining a security interest, we will declare the seller retains a property interest, and this interest allows the seller to take possession of the goods when the buyer defaults on the obligation."

How important in the conditional sales contract was title? For example, would this affect an insurable interest in the goods? The answer was that, although the title vested in the seller for purposes of the security interest, title vested in the buyer for the purpose of being able to insure the goods. In other words, title was where it needed to be for the purposes it needed to serve.

Was this all a shell game? Not really. Title served the function for which it was needed under the circumstances.

What Article 9 does is cut out the middleman. It goes right to the function of the various security devices. This is where we want to end up anyway.

Here, for example, are three middlemen: (1) For a conditional sales contract, title is a conclusion and not a requirement; (2) For a chattel mortgage, an undefined mortgage interest is assumed valid if it is commercial reasonable to do so; and (3) For a trust receipt, a trust receipt can be legally valid by treating possession as if it is not possession. Thus, we can ask what these three things have in common. The answer is that they are all security interests. They all create "an interest in personal property or fixtures which secures payment or performance of an obligation."[36]

Because of this pre-U.C.C. Article 9 mess, we arrive at the concept of the "security interest." To get here, we had to jettison the concept of title as being a necessary element to create a security interest.[37]

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34. *Id.*

35. *Id.*

36. U.C.C. § 1-201(b)(35).

37. Some contemporary observers in the United Kingdom have noted this. *See* Louise Gullifer, *'Sale' on Retention of Title Terms: is the English Law Analysis Broken?*, 133 L.Q. REV. 244 (2017). What Professor Gullifer correctly notes is that the traditional legal structure of a conditional sales contract in inventory financing misses the point in providing for the seller to "retain title" to the goods. Outside of insolvency, the seller wants to treat the goods as if they were the buyers' and therefore allow the buyer to have maximum freedom to dispose of the goods. What the seller wants is protection against other creditors of the buyer if this protection is needed. Thus, from a practical business perspective, what the seller wants, and needs is a charge against the goods, not retention of title. This, Professor Gullifer correctly notes, is essentially the analysis that justifies the American U.C.C. and the Canadian, Australian and New Zealand PPSA's. *Id.* at 265.

This was not much of a loss. First, the concept is a functional one that did not have any fixed content in the law for many years. Second, and equally important, we have seen that it is only one avenue that was taken to create security rights, so it would not appear to have any stronger standing than any other legal theory to create security rights.

Possibly the greatest advantage of this unified concept of the security interest is that it lets one focus on its purpose and easily see how various transactions fit within its scope. Once this core concept is understood, the idea that we want to provide some way to allow a creditor to finance the debtor's assets, the door opens up to all sort of ancillary transactions.

Thus, a security interest includes consignments,[38] finance leases,[39] and the sale of accounts.[40] These are all assets that had been, in one way or another, used for security rights prior to Article 9. It is easy to see how they fit into one simple, legal regime instead of having to work through the arcane and distinct methods that were necessary to create secured credit prior to Article 9.

Whether the secured creditor's interest in the debtor's property is a real interest in property or a personal interest that might be created by contract is a problem that has vexed other common law jurisdictions to this day and is simply not addressed in the definition of a security interest or the substantive provisions of Article 9.[41]

This does not answer the question: what exactly is this interest in the debtor's property? Apparently, it is enough to say it is what it says it is. We accept it, suggests Gilmore, as a "declaration of faith."[42]

For those who toil with the U.C.C., understand that most of it is simply a well-revised statement of the pre-Code law. The articles on sales and

38. U.C.C. § 9-109(a)(4).

39. U.C.C. § 9-109(a)(1).

40. U.C.C. § 9-109(a)(3).

41. This is not to say that there are not residual problems of title that have to be tweaked and massaged at various points of Article 9. *See, e.g.*, U.C.C. §§ 9-318 and 9-319 (which deal with the title rights of creditors and purchasers of some secured assets).

It is worth noting that the definition of a security interest is in Article 1 of the Uniform Commercial Code. Article 1 contains general provisions that govern the entirety of the Uniform Commercial Code. U.C.C. art. 1 §§ 1-101–1-209. This strategic placement allows the rest of the substantive articles of the Uniform Commercial to cross-reference the definition and the role of secured transactions in the rest of the Uniform Commercial Code. This is particularly important with the relationship between secured transactions and sales law. Specifically, Article 2 of the Uniform Commercial Code, the article that governs the sale of goods, denies the ability of a conditional sales contract to function for any purpose other than as a security interest. U.C.C. art. 2 §§ 2-101–2-725. U.C.C. § 2-401(2) provides that "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." The relationship between sales law and secured transactions law are not left in doubt. *Id.*

42. GILMORE, *supra* note 2, at 334.

negotiable instruments are updates and revisions of existing law that largely retain the legal rules from the earlier law from which they are derived.[43]

This is not the case with the law of secured transactions embodied in Article 9 of the U.C.C. Although the scope of Article 9 covers those areas that, to a large extent, were subject to existing laws, Article 9 did something more radical. Article 9 abandoned the common-law structure of secured transactions based on contract and property concepts and left the essence of secured transactions. What we have left is the functional security interest and the core principles derived from it.

II. THE CORE PRINCIPLES OF ARTICLE 9 DERIVED FROM THE UNITARY SECURITY INTEREST

Article 9 of the U.C.C. is a product that has sold itself to the larger world; however, no other jurisdiction has adopted it, and there have been no proposals to adopt it verbatim. What has been done and what has been proposed is the adoption of the core principles of Article 9 that evolved from the functional unitary security interest. It is these principles that have guided work over the last three decades to develop new and efficient laws of security rights. Thus, it is important to note that it is these principles and not the text of Article 9 that have dominated secured transactions law.

An articulation of these principles[44] has been put forth by the Secured Transactions Law Reform Project,[45] an organization in the United Kingdom that studies secured transactions laws throughout the world with the goal of

43. As hard as they tried, the drafters of Article 2 did not eliminate the concept of title in the law of sales. The drafters certainly wanted to rid U.C.C. Article 2 of title as a relevant aspect of sales transactions. *See*, U.C.C. § 2-401 cmt. 1:

> This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article [Chapter] is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

44. *Policy Paper*, SECURED TRANSACTIONS LAW REFORM PROJECT, (Apr. 2016), https://stlrp.files.wordpress.com/2016/05/str-general-policy-paper-april-2016.pdf.

45. The Secured Transaction Law Reform Project was established under the Executive Directorship of Professor Sir Roy Goode to involve interested parties from the professions and the relevant sectors of finance, commerce, and industry as participants in the work of considering the effectiveness of the current law, and the ways in which it can be improved. *Secured Transactions Law Reform Project: About Us*, SECURED TRANSACTIONS LAW REFORM PROJECT (Nov. 5, 2015) https://securedtransactionslawreformproject.org/about-secured-transactions-reform/.

establishing a basis for the best models available. A list of elements of a modern personal property secured transactions system include:

> a. The system should be based on the use of a universal security interest with the ability to use any suitable asset to secure an obligation.
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> b. The system should use a definition of secured transaction that includes both present and future interest and is identified by substance rather than form.
>
> c. The security agreements should be subject to few requirements intended to establish the intent to create a security interest, the identity of the parties, and a description of the assets.
>
> d. There should be notice based on registry filing system based on a central registry with control or possession as alternative bases for notice.
>
> e. There should be a clear priority structure.
>
> f. Priority should be determined by the date of filing or the date of effective control or possession.

The key features are a single type of security interest for which the same rules of registration, priority, and enforcement are applied. The "perfection" of the security interest is either by registration, possession, or control. Registration could be in advance of the creation of the security interest, and the priority of the security interest is governed by the date of perfection, subject to an exception for the purchase of money security interests. Transactions that serve the same function as a security interest, such as conditional sales contracts, trust receipts, hire purchase agreements, finance leases, and assignments of receivables, are included and subject to the same rules.

What is clear is that these principles are all consistent with and are specifically derived from the American rules on secured transactions.

III. THE INTERNATIONAL SALE OF THE "SECURITY INTEREST"

As for the broader distribution of these principles, it must be noted that although Article 9's unitary concept of a security interest may be a good idea, it is not necessarily easy to implement.

Twenty-four years ago, I published an article in the *Monash Law Review* where I suggested that although there was not much in the rest of the U.C.C. that was worth exporting, it might be worthwhile for other jurisdictions to examine the American law of secured transactions as a basis for law reform.[46] It was not a particularly novel suggestion. The Australian Law Reform

46. *See generally* Henry Gabriel, *The Revision of the Uniform Commercial Code in the United States and Its Implications for Australia*, 24 MONASH L. REV. 291 (1998).

Commission issued a report in 1993 suggesting the same idea.[47] Moreover, following the lead of Ontario, the Canadian provinces had embarked on a revision of the provincial laws consistent with the functional approach of the U.C.C. Article 9 security interest.[48]

Subsequent to my article, and soon after New Zealand adopted a Personal Property Securities Act (PPSA) consistent with the Canadian revisions, Australia revised its personal property security rights law consistent with the general concepts of Article 9.[49] Consistent with American law, the Australian PPSA law adopted the concept of a functional security interest.[50] Under this law, a conditional sales contract; a contract with a title retention clause, is specifically covered by the legislation.[51] A purported title retention clause does not operate as a condition to the transfer of title; it operates to create a security interest. A title retention clause triggers the operation of the PPSA, and the seller must register the interest or do whatever would otherwise be necessary to perfect the interest.

It was not surprising that such sweeping legislation would be disruptive. The Australian government, to ascertain the effectiveness of the new legislation, commissioned a report to study its effects and possible problems.[52] In 2015, the Australian government released the report, which weighed in at 542 pages.[53]

One problem articulated in the report was this very question of title retention in a contract for the sale of goods. A quick overview of pre-PPSA Australian law will suggest the source of the problem. Prior to the PPSA, one could generally divide security devices into two categories: those where the

47. Australian Law Reform Commission, *Personal Property Securities* (Report No 64, 27 May 1993).

48. For a comprehensive history of the adoption of the current Canadian PPSA's, *see* Catherine Walsh, *Transplanting Article 9: The Canadian PPSA Experience*, *in* SECURED TRANSACTIONS LAW REFORM: PRINCIPLES POLICIES AND PRACTICE 49–94 (Louise Gullifer & Orukun Akseli eds., Hart Publishing 2016).

49. *Personal Property Securities Act 2009* (Cth) (Austl.). The Act came into force on 30 January 2012. Article 9's general concept of a unitary security has shown up in some other places in recent law reform efforts, for example in Malawi.

50. *Personal Property Securities Act 2009* § 12(1) (Cth) (Austl.): "A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regards to the form of the transaction or the identity of the person who has title to the property)." The scope of the Australian PPSA does not fully track the American law. Thus, for example, consignments, assignments of accounts and chattel paper and leases and bailments for over a year are "deemed" security interest. This is based on the realization that these transactions may or may not actually serve to function as a security right. Article 9 does not assume that consignments and assignments of accounts are "security interests"; instead, Article 9 simply says they are governed by the legislation. *See* U.C.C. § 9-109. Article 9 also differs from the Australian law in that it only covers those leases that appear to function as security. *See* U.C.C. § 9-203.

51. *Personal Property Securities Act 2009* at § 12(2)(d) (Cth) (Austl.).

52. ANTHONY DUGGAN & DAVID BROWN, AUSTRALIAN PERSONAL PROPERTY SECURITIES LAW XV (Lexis Nexis Butterworths 2d ed. 2015).

53. BRUCE WITTAKER, REVIEW OF THE PERSONAL PROPERTY SECURITY ACT 2009 (2015).

creditor took an interest in the debtor's property[54] and those in which the creditor retained, by way of contract, some level of title in property.[55] It should be clear that both categories are covered under the PPSA.[56]

However, what becomes evident from the government report is that some who were deeply steeped in the prior law had trouble with this conclusion. The confusion arose from the language of the PPSA that provides that the creditor has an interest in the debtor's property (the interest, of course, being a security interest). The report suggests this makes sense as a security interest in the case where the debtor has title to the goods, and the creditor retains an *in rem* interest, but this does not make sense when the creditor, by way of contract, retains some contractual right against the buyer, as the contract right would not be effective against third parties.[57]

This seems to me to be a very sensible misunderstanding of the law, but a misunderstanding all the same. Although the statute specifically states it covers retention of title transactions,[58] I suspect that a real concern is the fact that lawyers were having a hard time adjusting to the fact that the legislation carved out a portion of the law of contract and put it in the PPSA.[59]

Having a commercial code in the United States that covers both sales and secured transactions, we get to this point more directly. Article 2 of the U.C.C. on Sales tells the reader that for purposes of title retention, one is in the wrong place. One needs to go to Article 9.[60] There is no such guidepost in the Australian law.

It is worth noting that neither the abolition of title retention devices nor the wholesale adoption of the American system is necessary to run an efficient secured transactions system. Many legal systems have title retention sales, and none of these jurisdictions are having a failure of the credit system because of this.[61] Moreover, a blended system combining both the central tenets of the unitary security interest as well remnants of more traditional security rights law may work well.

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54. This includes chattel mortgages and company charges. *See e.g.,* DUGGAN & BROWN, *supra* note 52, at 8–9.

55. This includes conditional sales contracts, hire-purchase agreements, and financial leases. *Id.* at 12–15.

56. Those closely affiliated with the legislation seem to harbor no doubts on this point. *Id.* at 15.

57. WITTAKER, *supra* note 53, at 43–45.

The question is whether all "security interests under the PPSA are effectively *in rem* rights that would be effective against the world at large, or whether the PPSA is intended to include purely personal rights that are created under contract law." For a further explanation of this, *See* BROWN & DUGGAN, *supra* note 52, at 57.

58. *Personal Property Securities Act 2009* § 12(2)(d) (Cth) (Austl.).

59. There appears to have been similar resistance in New Zealand when it adopted its PPSA. Louise Gullifer & Orukun Akseli, SECURED TRANSACTIONS LAW REFORM: PRINCIPLES POLICIES AND PRACTICE, 117, 125–28 (Louise Gullifer & Orukun Akseli eds., Hart Publishing 2016).

60. U.C.C. § 2-401(1): "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."

61. This certainly is the case in England, Ireland and Germany.

For example, the Cape Town Convention (the Convention) is a modern approach to secured transactions that provides for both title retention and the American model of the unitary security interest. The Convention is drafted with the possibility of both security interests and title retention agreements as the basis for a security right.[62] Moreover, the definition of a "security interest" in the Convention itself can cover both interests that assume some title retention by the creditor or a lien type interest in the goods: "A security interest is an interest created by a security agreement . . . and includes a security transfer of ownership, [or] a charge in the sense of an encumbrance which binds the asset but leaves ownership with the debtor . . . ."[63]

This, of course, is a marriage of convenience, but it does provide a way to bridge analytically the question of whether a security interest is more like a mortgage lien or whether it should be treated as property rights by the creditor in the goods. The Convention simply defines a security interest as either, and therefore includes both.

In Article 9 of the U.C.C., all the manifestations of secured finance in personal property are implicitly recognized. Would the simple, functional definition of a security interest in Article 9 have worked in the Convention? I think it clearly could have. But to achieve that, the drafters would have had to risk the possibility that the concept would not be widely understood or accepted. Certainly, that was not a risk worth taking.

It may be worth comparing the Convention definition to the definition of a security right in the United Nations Commission on International Trade Law (UNCITRAL) Model Law of Secured Transactions (the Model Law). In the Model Law, "[s]ecurity right" means:

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62. The Convention also included leases, but that is not relevant to our discussion. CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS: OFFICIAL COMMENTARY § 2.37 (3d ed. 2013):

> A security interest is an interest created by a security agreement (Article 1(jj)) and includes a security transfer of ownership, a charge in the sense of an incumbrance which binds the asset but leaves ownership with the debtor, a pledge and a contractual lien, which differs from a pledge only in that the asset is delivered to the creditor not as security but for some other purpose, such as storage or repair, so that the contractual provision secures future obligations. All four forms of security interest fall within the scope of the Convention. However, the pledge, being possessory in nature, does not feature significantly in aviation finance. By contrast, a contractual lien may be taken to secure charges relating to the aircraft object, such as charges or storage or repair. Non-consensual rights or interests do not fall within the definition of a security interest and are dealt with separately, specifically in Articles 39 and 40. A title reservation agreement (also commonly known as a conditional sale agreement) is an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement.

Under Article 9 of the Uniform Commercial Code, since finance leases are considered security interests, U.C.C. § 1-201(b)(35), once a lease is considered a finance lease, U.C.C. § 1-203, the question of how leases work within the system of security rights is effectively solved by the inclusion of leases within the realm of security rights.

63. UNCITRAL Model Law on Secured Transactions (2016), Art. 2(kk).

> A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation . . . .[64]

The Model Law quite consciously is written to provide a model for security rights law based on the North American and Antipodes approach,[65] all of which are based on the U.C.C. This provides a broad definition of security rights that is intended to capture all transactions within its definition. It is unclear what the long-term influence of the Model Law will be, but by basing the Model Law on the unified security interest, the success of the Model Law will be the success of the influence of the American law of secured transactions.

It may well be argued that the internationalization of the American unitary security right has already been successful. To some extent, this is certainly true. The strongest examples of the influence of Article 9's unitary security interest can be seen in the legislation of Canada, New Zealand, and Australia.[66] This alone may signify the successful exportation of the unitary security interest.

But how much beyond these adoptions might we expect? It has been suggested that the Canadian reform of personal property security rights arose from the same need as the reform in the United States: the law in Canada had become "highly fragmented" and had evolved into "a complex mix of security devices" and that each device "was subject to a discrete conceptual and legal framework as well as discreet and often highly technical public

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64. *Id.*

65. UNCITRAL Legislative Guide to Secured Transactions (2010), Chapter I, ¶ 110:

> Under [this] approach, all types of rights serving security purposes would be abolished and the specific transactions and financing practices they envisioned would be subsumed into a single, uniform notion of security rights. There would be a single set of rules applicable to all secured transactions because there would only be one type of security device available.

In an unusual hedge, though, the Legislative Guide to the Model Law provides that, "[u]nder [this] approach, the names of the old security devices, such as pledge, floating charge, transfer of title for security purposes and retention of title, would be preserved and used." *Id.* This untested proposition is ripe for confusion and misunderstanding. It is wholly unclear how one would expect a system to operate that provides for aa security interest that displaces prior security devices and yet retains the names of the very security devices that are displaced.

66. As with Article 9, the scope is broad, and some transactions on the margin of secured finance, such as leases, consignments and receivables finance are covered.
The coverage is not uniform among these jurisdictions. For a discussion of some of the differences, *see* Hugh Beale, *An Outline of a Typical PPSA Scheme*, *in* SECURED TRANSACTIONS LAW REFORM: PRINCIPLES POLICIES AND PRACTICE (Louise Gullifer & Orukun Akseli eds., Hart Publishing 2016).

registration requirements."[67] The same reasons instigated the reforms in New Zealand[68] and Australia,[69] as they both had the same common law structure and problems that moved Canada toward reform.

By using Article 9 of the U.C.C. as a template, these jurisdictions had a ready model for reform as the problems that Article 9 addressed were historically and structurally similar. But this was copying and not leading, and therefore the reforms of the laws of Canada, New Zealand, and Australia alone cannot explain why the exportation of the core principles of Article 9 should succeed beyond where it has already been successful.

But other factors suggest a greater continued adoption of the unitary security interest. Certainly, the success of the Convention is a positive move in that direction. But the Convention may not be the best indicator of future adoptions. The Convention, for all its success, is a niche product for a niche market of high value, specific delineated assets.

I believe a better indicator of possible future growth in adopting the unitary security interest will be the success of the Model Law. As with Article 9 of the U.C.C. and the PPSAs of Canada, Australia, and New Zealand, the Model Law was designed to be adopted for the use in domestic law for all types of secured transactions irrespective of the value or type of asset secured.

V. THE HARMONIZATION OF THE LAW OF SECURED CREDIT

If we place the Model Law in the context of efforts for the harmonization of commercial law over the last three decades, questions of secured transactions have had a dominant role. Of course, there has been work in other areas, such as contracts[70] and arbitration.[71] However, this work has mostly been derivative of existing law. No work in those areas has been as revolutionary as secured transactions have.[72]

Where the overall harmonization of commercial law seems to have lost its steam in the last few years, secured transactions[73] law keeps plugging

67. Walsh, SECURED TRANSACTIONS LAW REFORM: PRINCIPLES POLICIES AND PRACTICE, *supra* note 48.

68. *See generally*, Mike Gedye, *The New Zealand Perspective*, *in* SECURED TRANSACTIONS LAW REFORM: PRINCIPLES POLICIES AND PRACTICE (Louise Gullifer & Orukun Akseli eds., Hart Publishing 2016).

69. *See e.g.,* BROWN & DUGGAN, *supra* note 52, at 18–19.

70. In addition to the CISG, there is also the UNIDROIT Principles of International Contracts. UNIDROIT Principles of International Contracts (2016).

71. *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (1985) (with amendments as adopted in 2006).

72. There has been much work in the area of electronic commerce, but this work has not been designed to create new substantive rules of law, but instead to provide for new modes of transacting business based on existing substantive law.

73. The use of the term secured transactions is meant to cover all transactions such as pledge and mortgage where the principal aim is to give security, not in the more limited usage of only covering movables as in the American Uniform Commercial Code or Cape Town Convention. UNIDROIT Convention on International Interests in Mobile Equipment (2001) (Cape Town Convention).

along. The work on the international harmonization of security rights law has been constant for the last thirty years, and it does not appear to be slowing down.

To appreciate the importance of this work in security rights harmonization, one must understand the significance and centrality of secured finance in modern commercial transactions. Quite simply, without external finance, most large transactions in goods and services, both domestic and international, would not take place.

At the heart of the work in the area are two assumptions. First, that capital is global, and second, the reduction of risks in financing will increase credit and thereby the availability of goods and services.[74] Both assumptions underlie the recent work in the harmonization of secured finance.

For example, studies conducted by the World Bank have demonstrated that developing countries whose laws do not permit non-possessory security in moveable property face a serious impediment to economic development.[75] Collateral provides the basis for credit markets that many developing markets lack. Creating and establishing credit is essential to economic development.

The use of collateral is restricted in many countries for the lack of adequate laws and registries to govern secured transactions. Establishing registries is an essential element of modern secured finance that allows businesses to leverage their assets into capital for investment and growth, thereby increasing both the availability as well as the reduction in the cost of credit.[76]

Secured credit may be essential for economic development,[77] but does this also suggest the need for international harmonization? I suggest that it does. What we have witnessed in the last few decades is the rise of global capital moving seamlessly across jurisdictions. With this movement of capital, there has developed a set of general principles that have been shown to be the most effective in the financing of assets both domestically and internationally.

Thus, harmonization serves two functions. First, it serves to provide easily recognized legal principles of secured transactions among international

74. Henry Deeb Gabriel, *Commentary on the Availability of Credit and the Utility and Efficacy of UNCITRAL's Legislative Efforts in Secured Transactions*, *in* AVAILABILITY OF CREDIT AND SECURED TRANSACTIONS IN A TIME OF CRISIS 217 (Orkun Akseli ed., Cambridge Univ. Press 2013).

75. Elaine MacEachern et al., *Secured Transactions and Collateral Registries*, THE WORLD BANK (Oct. 5, 2015), http://www.worldbank.org/en/topic/financialsector/brief/collateral-registries.

76. *Id.*

77. The key is effective reform and modernization. There have been instances of secured transactions reform in other countries around the world that have not led to increased lending, primarily because the reforms were incomplete; did not feature factors described in this document; or failed to repeal existing laws governing lending. For example, after New Zealand introduced its Personal Property Securities Act, there was a sharp rise in lending, with many new security interests being registered. In Eastern Europe, particularly Albania and Romania, the number of security interests registered rose substantially after the reform.

commercial parties that reduce the transactions costs of operating among different legal systems. Second, the principles of secured transactions themselves have been shown to be efficient and further reduce transaction costs.

In this harmonization, how important is the unitary security interest? In other words, is there any reason to assume the movement toward harmonization of security rights law should necessarily intersect with the development of security rights law based on the American model? Whether it was inevitable, it certainly has been the case that it has been central to the major international instruments in security rights law: the Model Law[78] and the Convention.[79] Moreover, it has been integral to some regional developments in security rights law as well, such as the European Bank for Reconstruction and Development's Model Law for Secured Transactions,[80] the Organization of American States Model Inter-American Law on Secured Transactions,[81] and the Organization for the Harmonization of Business Law in Africa's Uniform Law on Security Interests.[82]

The Model Law is the premier example of an attempt to harmonize domestic security rights law across the globe. It is, therefore, useful to note the long gestation period of this instrument by many of the world's leading experts in the field. Over several decades, the Model Law, completed in 2016, morphed out of a prior instrument: the UNCITRAL Legislative Guide on Secured Transactions, completed in 2007.[83] The UNCITRAL Legislative Guide to Secured Transactions expanded upon the earlier, more limited in scope, United Nations Convention on the Assignment of Receivables in

78. *See generally* UNCITRAL Model Law on Secured Transactions (2019).

79. *See generally* UNIDROIT Convention on International Interests in Mobile Equipment (2001).

80. EBRD Model Law on Secured Transactions (2014).

81. OAS Model Inter-American Law on Secured Transactions (2002). The purpose of the Organization of American States' Model was to modernize secured transactions law by having OAS member states approve the law. The law was drafted to "foster economic growth in Central and South America, creating a 'regional credit market for the Western Hemisphere.'" *See* Hannah L. Buxbaum, *Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform*, 8 UNIF. L. REV. 321, 333 (2003); John M. Wilson, *Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions*, 33 UCC L. J., 43, 43–107 (2000).

82. Alex Bebe Epale et al., *The Revised OHADA Uniform Act on Security Law*, HOGAN LOVELLS (2012), https://www.hoganlovells.com/-/media/hogan-lovells/pdf/africa-microsite/publication2012/africa_newsletter_dec_2012_-_the_revised_ohada_uniform_act_on_security_law.pdf. OHADA is an international organization created by treaty signed by fourteen African states. These states realize that while their land is abundant with natural resources, no one will finance these expeditions without a stable legal and commercial framework that would provide for and protect private investment and property, nor without an independent judicial system to settle impartial disputes. This is an attempt both modernize and harmonize the business law arena in Africa.

83. With the Legislative Guide completed in 2007, UNCITRAL followed up the legislative guide with the UNCITRAL Legislative Guide on Secured Transactions (2011) and UNCITRAL Guide on the Implementation of a Security Rights Registry (2013).

International Trade,[84] which was promulgated in 2001, and for which work began in 1995.

Moreover, the Model Law assumes "that [the] model law was sufficiently flexible and could be adapted to the various legal traditions . . . ."[85] In other words, irrespective of the concerns that the developing law of secured transactions favored a specific legal tradition, it was now felt that the development of secured transactions law, both in international instruments as well as domestic enactments, had reached the point of a universal consensus so that a Model Law would have broad acceptability.[86]

That many government delegates, lawyers, and academics over two and a half decades have agreed that the Model Law provides the best model for providing personal property secured credit does not in and of itself ensure that the Model Law or other law that reflects its core principles will be more successful than it is now. Being the law of the United States, Canada, New Zealand, and Australia, as well as comprising the core principles of the Convention, may be enough indicia of success. But will the American idea of the unitary security interest find a broader audience, particularly in Civil Law jurisdictions?

Part of the answer to this question may be found in the success of the Convention.[87] Having come into force in 2001, the Convention creates binding international law for registering ownership, security interests, and leases in certain movable property.[88]

Most importantly, the Convention effectively resolves the widely differing approaches legal systems have for security and title reservation rights. In other words, the Convention directly confronts the major issue that

84. United Nations Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001.

85. Comm'n on Int'l Trade L., Rep. of Working Group VI (Security Interests) on the Work of its Twenty-First Session, ¶ 75, U.N. Doc. No. A/CN.9/743 (May 23, 2012).

86. As the direct descendent of Article 9 of the Uniform Commercial Code, the UNCITRAL Model Law on Secured Transactions (2019), as well as the UNCITRAL Legislative Guide on Secured Transactions (2011), follow the core principle of modern personal property security rights law, the unitary approach of a security interest for all security rights in personal property. Thus, a secured loan, a retention of title sale, and a finance lease are all within the scope of the unitary security interest governed by a single set of filing, registration, and priority rules. *See* UNCITRAL Model Law on Secured Transactions (2019).

87. UNIDROIT Convention on International Interests in Mobile Equipment (2001).

88. The Convention provides a detailed structure for an "international security interest." It also provides, among other issues, for priorities, proceeds, and creditor and third-party rights. The Convention itself does not provide for any specific assets that might be used as collateral. These assets are provided for in separate protocols that proscribe the particular assets. The Convention itself has eighty-three contracting States; the Aircraft Protocol has eighty contracting states; the Rail Protocol has three ratifications and eleven signatures; the Space Protocol has four signatures; and the Mining, Agricultural, and Construction Protocol has five signatures. UNIDROIT Convention on International Interests in Mobile Equipment (2001); *Convention on International Interest in Mobile Equipment – State Parties*, UNIDROIT (Nov. 11, 2001), https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/.

harmonization of security rights across borders presents how to have a system that is compatible with different legal systems and legal traditions.

The general structure and the principles of the Convention, to a large extent, are consistent with what may be considered the modern principles of secured transactions derived from Article 9 of the U.C.C. – a single security system,[89] a registry system, clear priority rules, the concept of perfection, and straight forward enforcement rights.[90]

As noted earlier, consistent with modern security rights law, the security interest created by the Convention – the "international interest," covers not only security interests, but also conditional sales contracts and finance leases. In other words, it is a functional definition. Those interests, irrespective of what they are called, are covered by the Convention if they function as a security interest and give the creditor a right in the assets upon the debtor's default. This is the central element of modern secured transactions law.

CONCLUSION

Based on this American law, the provinces of Canada have adopted similar legislation in their respective PPSAs.[91] New Zealand followed suit in 1999 and adopted its PPSA,[92] and Australia followed with similar legislation in 2009.[93]

As I have noted, although these four countries have adopted similar laws based on similar principles, one should not assume that this is limited to common-law jurisdictions. These principles are the core principles of the UNCITRAL Legislative Guide and Model Law and the Convention.[94]

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89. This is referred to as an "international interest." UNIDROIT Convention on International Interests in Mobile Equipment (2001) § 2.2.

90. There is one major distinction between the Convention and other laws of secured transactions. Where most secured transactions registries are debtor based, the Cape Town Convention provides an asset-based registry. This makes sense for the limited scope of the assets that are likely to travel among various jurisdictions. UNIDROIT Convention on International Interests in Mobile Equipment (2001) Chapter IV.

91. *See, e.g., Personal Property Security Act, R.S.O. 1990*, c P.10 (Can.).

92. Personal Property Securities Act 1999 (N.Z.). The scheme is like the Canadian Acts in structure and content, with one major exception. This is that unregistered security interests are not void against unsecured creditors, although they are against secured creditors, execution creditors and buyers or lessees of collateral. The New Zealand law is primarily based on the Saskatchewan Personal Property Security Act. *The Personal Property Security Act, S.S. 1993*, c P-6.2 (Can.).

93. *Personal Property Securities Act 2009* (Cth) (Austl.).

94. Despite some suggestion to the contrary, the developed and developing international consensus in these principles of security rights law is not part of a plot by American imperialists to inflict upon the world a new American hegemonic economic order. One strong suggestion that it is has been put forth by Gerald McCormack who, using the UNCITRAL Legislative Guides as his target, has suggested that: "In the sphere of secured credit, the UNCITRAL Guide can be considered as an instrument by which the norms set out in Article 9 of the American Commercial Code are writ large across the globe." GERARD MCCORMACK, SECURED CREDIT AND THE HARMONISATION OF LAW: THE UNCITRAL EXPERIENCE 76 (Edward Elgar Publishing 2011). This is simply nonsense. The Guide's recommendations are closely aligned with the principles of the American Uniform Commercial Code and the Canadian Personal Property Security Acts, but that is because the North

All these developments are based on the concept of the unitary functional security interest of Article 9. This was a leap that American law made seventy years ago, and it has worked well here and in other jurisdictions that have followed its path. As we have seen, this is also the approach taken in the Model Law. But for the Model Law and similar instruments to be adopted, countries will have to move beyond the formal rules of contract and property and take the leap of faith provided by what I have deemed the generally accepted principles of secured transactions. That means a security interest is what a security interest says it is.

It is an interest in the debtor's property to secure a debt. Beyond that, as we have seen, we cannot define it. Yet, this is the standard in which so much energy has been put forth in the attempt to harmonize personal property security law throughout the world.

How far this harmonization will go internationally is yet to be seen. It is worth noting, though, that this is a product that sells itself.

American model appears to be the most efficient method for a widespread system of secured credit. I pointed out twenty years ago that the United States only exports its good law and retains for domestic purposes alone its less impressive commercial law. Gabriel, *supra* note 46.