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The UNCITRAL Model Law and Secured Transactions Law Reform

Louise Gullifer

THE UNCITRAL MODEL LAW AND SECURED TRANSACTIONS LAW REFORM

Louise Gullifer[*+]

1. INTRODUCTION.

I first met Neil Cohen in 2014 when I joined the informal drafting group for the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Secured Transactions[1] (Model Law), and worked with him throughout the adoption of the Model Law, its Guide to Enactment[2] and its Practice Guide.[3] During all the meetings, the alphabet dictated that I (as the sole United Kingdom delegate) sat next to the United States (US) delegation, so I was always able to ask Neil to explain the history and purpose of various provisions, which sometimes seemed baffling to a mere English lawyer. Neil's patience, eloquence, and incredible clarity of thought contributed to these three instruments (as to many before them) to an extraordinary extent. Indeed, the Practice Guide largely came about because of Neil's eloquent presentations about capacity building and his stories of potential borrowers, the day after a reformed law came into force, turning up in Caribbean banks together with their sheep or goats saying: here is the collateral, can we borrow the money?

It is fitting, therefore, that this paper focuses on the Model Law, and asks the question: what place has the Model Law played, and will play in the future, in secured transactions law reform around the world? It is informed not only by my work with UNCITRAL and UNIDROIT (the other transnational law organisation working in secured transactions law reform) but also by three volumes on secured transactions law and law reform around the world, which I have co-edited or co-written.[4]

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* Rouse Ball Professor of English Law, University of Cambridge.

+ Note: This paper is not formatted in the Bluebook style but, rather, conforms to the style adopted in many journals and books in the United Kingdom. Terms defined in one footnote are then used in subsequent footnotes throughout.

1. UNCITRAL, Model Law on Secured Transactions, 2016, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf. [HEREINAFTER MODEL LAW].

2. UNCITRAL Model Law on Secured Transactions, Guide to Enactment, 2017, available at http://www.uncitral.org/pdf/english/texts/security/MLST_Guide_to_enactment_E.pdf. [hereinafter Guide to Enactment].

3. UNCITRAL Practice Guide to the Model Law on Secured Transactions, 2020, at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10910_e.pdf. [hereinafter Practice Guide].

4. SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE (Louise Gullifer & Orkun Askeli eds., Hart Publishing 2016) [hereinafter PRINCIPLES, POLICIES AND PRACTICE]; MAREK DUBOVEC & LOUISE GULLIFER, SECURED TRANSACTIONS LAW REFORM IN AFRICA (Hart Publishing 2019) [hereinafter AFRICA BOOK]; SECURED TRANSACTIONS LAW IN ASIA: PRINCIPLES, PERSPECTIVES AND REFORM (Louise Gullifer & Dora Neo eds., Hart Publishing 2021) [hereinafter ASIA BOOK].

This paper first examines the stated purpose of the Model Law (Section 2) and argues that its potential uses are wider than the stated purpose (Section 3). There follow some reflections on the use of model laws in general (Section 4) and what makes the UNCITRAL Model Law a particularly suitable model for secured transactions law reform (Section 5). The main part of the paper (Section 6) is an analysis of secured transactions law reforms that have taken place in African and Asian countries, in order to determine to what extent the Model Law is actually used, the reasons for its use (or lack of use), and how far the idea of a complete legislative code on secured transactions law (implicit in the Model Law itself) is realised in reality. The conclusion (Section 7) is that the Model Law is being extensively used, with unsurprising local modifications, either as a primary or secondary model for law reform in the jurisdictions examined, and that it will continue to be used in this way in the future.

2. THE PURPOSE OF THE MODEL LAW.

The Guide to Enactment states that the purpose of the Model Law is 'to assist States in developing a modern secured transactions law dealing with security rights in movable assets.'[5] The underlying assumption is that having a modern secured transactions law brings economic benefits. This is a matter on which there is a great deal of literature, both theoretical and empirical,[6] and rests on the propositions that reform brings increased certainty and lower transaction costs. These propositions are based on, first, the substantive content of reformed law[7] and, second, codification and simplification of the relevant law.[8] A number of possible economic benefits likely to flow from

5. Guide to Enactment, *supra* note 2, at ¶ 5.

6. For examples, *see, e.g.*, Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997); John Armour, *The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking?*, 5 EUR. CO. & FIN. L. REV. 3 (2008); Rainer Haselmann, Katharina Pistor & Vikrant Vig, *How Law Affects Lending*, 23 REV. FIN. STUD. 549 (2010); Mehnaz Safavian & Siddharth Sharma, *When Do Creditors' Rights Work?*, (World Bank Pol'y Rsch., Working Paper No. 4296, 2007); Anthony Saunders, Anand Srinivasan, Ingo Walter & Jeffrey Wool, *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309 (1999); Murillo Campello & Mauricio Larrain, *Enlarging the Contracting Space: Collateral Menus, Access to Credit, and Economic Activity*, 29 REV. FIN. STUD. 349 (2016); Charles W. Calomiris, Mauricio Larrain, José M. Liberti & Jason D. Sturgess, *How Collateral Laws Shape Lending and Sectoral Activity*, 123 J. FIN. ECON. 163 (2017).

7. For example, the provisions that enable security to be taken over generically described assets and over future assets, so that security can be taken over all the assets of the borrower. Armour, *supra* note 6, at 14–19. A well-functioning registration system is also a key component of increased certainty, as is the ability of the secured creditor to enforce easily, quickly, and cheaply. *See* ROY GOODE, OFFICIAL COMMENTARY ON THE CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT 15–16 (5th ed. 2022).

8. Complexity and fragmentation of the existing law is often a driver for reform, *See* GULLIFER, *Conclusions and Recommendations*, *in* PRINCIPLES, POLICIES AND PRACTICE, *supra* note 4, at 506–07; GULLIFER, *Conclusion*, *in* ASIA BOOK, *supra* note 4, at 434–36, although merely dealing with these problems is unlikely to lead to actual reform without other economic drivers.

these consequences can be identified:[9] an increase in access to credit,[10] a reduction in the cost of credit, and other improvements for borrowers, such as a reduction in the time it takes for credit to be obtained or an improvement in the terms on which credit can be obtained.[11] Other benefits are also sometimes targeted by reform, such as an increase in lending by, and borrowing from, formal regulated institutions or an increase in lending to enterprises run by women.[12] The theoretical literature discusses whether and how reform will actually increase certainty and lower transaction costs, while the empirical literature seeks to determine whether the identified economic benefits actually do flow from reform. While empirical testing of this type of consequence is always difficult,[13] there are some very encouraging studies. It needs to be borne in mind that what follows in this paper, exploring the place of the Model Law in secured transactions law reform, is predicated on the assumption that reform on these lines brings economic benefit. Indeed, in some of the countries where reform has not yet taken place, the existing system works well to achieve its economic purpose despite being complex and fragmented.[14]

Secured transactions law reform in many countries falls into the category of legal transplant, about which there is a rich literature.[15] There are many difficulties in transplanting a system developed in one country into another, where the legal culture, economic position, and social state are different. A great deal of work is required to achieve a successful reform, only some of it relating to the drafting of the relevant legislation: pre-reform consultation of stakeholders and post-reform capacity building are of the utmost importance. This paper, however, is focused on the part the Model Law can and does play in the drafting process itself.

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9. *See* ASIA BOOK, *supra* note 4, at 10.

10. This is a well-worn phrase and can mean either that a borrower who could not formerly obtain credit at all can, post-reform, obtain it, or that a borrower who could previously only borrow a certain amount can borrow more.

11. For example, an increase in the term of a loan.

12. *See* ASIA BOOK, *supra* note 4, at 10.

13. *See Economic Assessment*, *in* ASIA BOOK, *supra* note 4, at Ch. 1; *Economic Assessment of International Commercial Law Reform*, CAPE TOWN CONVENTION ACAD. PROJECT, https://unidroitfoundation.org/economic-assessment-of-law/ (last visited Aug. 31, 2022), which is run as part of the Cape Town Convention Academic Project.

14. *See* NEO, *Secured Transactions Law in Singapore: Living with Untidiness*, *in* ASIA BOOK, *supra* note 4, at Ch. 19.

15. *See, e.g.*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (University of Georgia Press 2nd ed. 1993); Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, 34 INT'L LAW. 1055 (2000); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

The Guide to Enactment states that to get the full economic benefit of reform, a state should adhere to the Model Law text as much as possible.[16] This is because it is a carefully worked out Code, which fits together to form a well-oiled machine. Piecemeal implementation, it is said, could bring unintended consequences, like omitting a vital component of the machine. Moreover, the more adherence to the text there is, the more harmonisation between different jurisdictions can be achieved. The inevitable policy and legal culture differences between states can be accommodated into this 'full adherence' recommendation, it is said, because, in various provisions which could be contentious, there are options for states to choose from, while some policy matters, such as time periods and types of preferential creditors are left to the enacting state to decide. It is true that the more options and policy decisions there are, the less harmonisation there is, but full adherence would certainly lead to very significant convergence of not only the main principles, but also the most detailed legal rules.

3. A WIDER VIEW OF THE MODEL LAW.

However, in this paper, I am going to suggest that, both as a matter of fact and as a normative proposition, there are many other ways in which the Model Law can make an effective contribution to secured transaction law reform, in addition to wholesale implementation in domestic law. Even where it is not used as the primary model, some of its specific provisions have been incorporated into legal reform.[17] The Model Law can also be influential at another level of abstraction: as an inspiration of principles on which reform is based. There have been several attempts to distil 'modern' principles of secured transactions law, both by institutions such as the World Bank and the European Bank for Reconstruction and Development,[18] and by individual academics, such as Professor Charles Mooney[19] and Professor Roderick Wood.[20] While these principles can be distilled from the various national laws which are seen as modern, such as the US, Canada, New Zealand, and Australia, and increasingly many other countries around the world, the 'purest' form exemplifying the modern principles is the Model Law, as it

16. Guide to Enactment, *supra* note 2, at ¶ 5.

17. *See infra* Section 6.

18. European Bank for Reconstruction and Development, Core Principles for a Secured Transactions Law, 1994, available at www.ebrd.com/what-we-do/legal-reform/access-to-finance/transactions.html; *Principles for Effective Insolvency and Creditor/Debtor Regimes*, The World Bank, www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights (last visited Aug, 31, 2022) and THE WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/ DEBTOR REGIMES (2021), available at https://openknowledge.worldbank.org/bitstream/handle/10986/35506/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf?sequence=1&isAllowed=y.

19. ASIA BOOK, *supra* note 4, at Ch. 2; AFRICA BOOK, *supra* note 4, at 36–40.

20. Roderick J. Wood, *Identifying Borrowed Sources in Secured Transactions Law Reform*, 24 U. L. REV. 545, 545 (2019).

includes no country specific idiosyncrasies and represents input from delegates from all legal cultures.[21]

The Model Law can also be used as a benchmark against which national laws can be assessed (whether reformed or not). Assessment and benchmarking of existing law is an important early part of the process of reform of secured transactions law in a jurisdiction,[22] and the Model Law is a useful, detailed standard against which a secured transactions system can be compared. This benchmarking exercise is a useful guide to specific reforms that need to be included, and is also part, but only part, of the decision-making process as to whether reform should take place. There are some jurisdictions where the law deviates significantly from the Model Law in content and structure, but where reform initiatives have not gained traction, largely because the existing law is perceived to work well and produce the necessary degree of legal certainty.[23] The Model Law is also a useful comparator for reformed law, when this comes to be assessed by commentators[24] and future reformers.[25]

Finally, it is important to emphasise the Model Law's use as an educational aid. Teaching students, or other interested persons, about modern secured transactions law in general, as opposed to teaching a specific system of law in force in a particular country, is greatly facilitated using the Model Law, which provides a more 'neutral' statement of the relevant rules. The (reformed) law of any particular jurisdiction will include idiosyncratic rules particular to that legal system or market[26] and will also reflect the national drafting style, which may be difficult to follow for those unfamiliar with it.[27]

4. USE OF MODELS.

This section includes some brief reflections on the 'model' type of soft law in the context of national law reform. There are various ways of deciding on the content and structure of a reformed law. One is to start with a clean

21. *See infra* Section 5.

22. *See* SECURED TRANSACTIONS AND COLLATERAL REGISTRIES TEAM, WORLD BANK GROUP, SECURED TRANSACTIONS, COLLATERAL REGISTRIES AND MOVABLE ASSET-BASED FINANCING KNOWLEDGE GUIDE 4–8 (2019), available at https://openknowledge.worldbank.org/bitstream/handle/10986/32551/142346.pdf?sequence=4&isAllowed=y. While the World Bank uses the questions from its own Doing Business survey (now discontinued) as the basis for the recommended diagnostic, it is clear from this passage that the UNCITRAL Model Law is also used as a more detailed benchmark.

23. *See*, *e.g.*, NEO, *Secured Transactions Law in Singapore: Living with Untidiness*, *in* ASIA BOOK, *supra* note 4, at Ch. 19, especially at pages 419–22.

24. See, for example, the approach taken in the AFRICA BOOK, *supra* note 4.

25. For the need for constant assessment of reformed law, *see* DUGGAN, *Personal Property Securities Law Reform in Developed Jurisdictions*, *in* ASIA BOOK, *supra* note 4, at 62–65.

26. An obvious example is the concept of chattel paper in the UCC Article 9, which is largely unknown outside North America. U.C.C. art. 9 §§ 9-101–9-809 (AM. L. INST. & UNIF. L. COMM'N 2021).

27. An example is the drafting style used in the UCC whereby the general rule is stated then (often) swallowed up by exceptions.

slate: in a complicated subject such as secured transactions law, this is unlikely to be realistic. Another is for a state to use basic principles that have already been developed (such as those mentioned above)[28] but to develop the details of the content and structure itself. This is broadly what was done by Australia in drafting its Personal Property Securities Act 2009, where the principles of the existing Personal Property Security Acts (PPSAs) in Canada and New Zealand, and the Uniform Commercial Code (UCC), were used to inspire the reform. The Australian drafting, however, appears to have taken a different approach from other PPSAs by adding a great deal more detail and explanation, so that the resulting statute is twice, if not three times, as long as other PPSAs and is extremely complex.[29] A third is to start with one or more model texts, which can then be adapted to local conditions and, if necessary, local drafting style.

There are advantages and disadvantages of starting with a model text.[30] The advantages are reasonably obvious and well documented. First, there is no need to 'reinvent the wheel,' so that the experience of others who have already been involved in secured transactions law reform can be taken into account and unintended consequences avoided.[31] This will save time at the drafting stage and enable the drafters to concentrate on country-specific issues. Second, many secured transactions law reform initiatives have international organisations as advisers or sponsors,[32] and these organisations usually advocate the use of models to follow the modern principles. Moreover, the use of an international model (such as the Model Law) by the reforming state signals to the world that its law complies with best practice and international standards.[33] Also, by using an international model, the reforming state does not align itself with another specific jurisdiction: this can be important in relation to internal politics, especially if a reform is seen as being too 'US' or 'Western' focused. As will be seen, however, sometimes the reverse is true, and a state can value the link with other jurisdictions in

28. *See infra* Section 3.

29. *See* BROWN, *Australian Secured Transactions Law Reform*, *in* *PRINCIPLES, POLICIES AND PRACTICE* , *supra* note 4, at 148–50, and BRUCE WHITTAKER, REVIEW OF THE PERSONAL PROPERTIES SECURITIES ACT 2009 FINAL REPORT 16–17, 30 (2015). *See also* the 2008 reform in Ghana, discussed *infra* Section 6(c)(ii).

30. *See* GULLIFER, *Conclusion*, *in* ASIA BOOK, *supra* note 4, at 445–48.

31. *See* Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations*, 34 INT' L L. 1055, 1067 (2000).

32. These can include global organisations such as the World Bank Group and the International Financial Corporation, and regional organisations such as ASEAN, the Asian Development Bank, the EBRD, and the Organisation of American States.

33. The outward sign of this used to be that the state's ranking in the Getting Credit part of the World Bank Group's 'Doing Business' survey would rise. However, this survey has now been discontinued and the WBG is still working on a replacement approach to assessing states' business environments, *see Business Enabling Environment (BEE)*, THE WORLD BANK, https://www.worldbank.org/en/programs/business-enabling-environment (last visited Aug, 31, 2022).

the same legal tradition.[34] Another potential benefit is that, if sufficient countries use the same model, this promotes harmonisation: of course, the level of harmonisation will never be as great as in relation to 'hard law' (treaties), and, in relation to the Model Law, the possibility of states exercising options in different ways also erodes detailed harmonisation somewhat.

There are also some challenges arising from the use of models. These stem from the differences between states, in terms of legal culture, economic, market conditions,[35] and policy objectives.[36] There can also be quite significant reasons why a complete model cannot be introduced into a particular state, such as in Pakistan, where, under its constitutional structure, not everything in a modern secured transactions law could be dealt with at a federal level. It was not politically possible to obtain the necessary consents from the various provinces in order to include the areas covered by provincial law, so the reformed law[37] had several areas missing, such as supplier finance.[38]

The use of a specific national law as a model, as opposed to the Model Law, also has the result that care must be taken to avoid including unsuitable idiosyncrasies. One example is the concept of 'chattel paper,' which is familiar in North America having originated in the context of financing of motor vehicles. This concept found its way into the New Zealand legislation (which used the Saskatchewan PPSA as a model) even though it was not a concept used in New Zealand. Even more obscurely, when the New Zealand statute was used as a model for the reform in Brunei Darussalam, the concept of chattel paper was included,[39] even though it appears in no other legislation in that state. However, during the drafting of the reformed law in Bangladesh,[40] the question of inclusion of chattel paper was expressly considered and discussed, and it was decided not to include it as the concept did not exist in Bangladesh, and including it would, it was thought, make the law more complicated for no gain.[41]

34. See the discussion of Bangladesh in *infra* Section 6(c)(iii).

35. For example, different types of collateral may be more prevalent in different states.

36. The last of these is accommodated within the Model Law, to some extent, by the various options provided.

37. Financial Institutions (Secured Transactions) Act 2016, No. 31 of 2016, THE GAZETTE OF PAKISTAN EXTRAORDINARY (Jun. 29, 2016).

38. *See* DUBOVEC & ABID, *Pakistan's reform of Secured Transactions Law: Challenges and the Road Ahead*, *in* ASIA BOOK, *supra* note 4, at 385–87.

39. Brunei Secured Transactions Order secs. 3(1) and 41.

40. The text refers to the draft Secured Transactions (Movable Property) Act which was approved by the cabinet on 6th April 2022, *see* Hasan Arif, *Bank Loans: Movable assets now allowed as collateral*, THE BUSINESS POST (Apr. 7, 2022, 09:39 AM), https://businesspostbd.com/back/2022-04-07/bank-loans-movable-assets-now-allowed-as-collateral-2022-04-07.

41. *See* DUBOVEC & CHOWDHURY, *Bangladesh Secured Transactions Framework: Moving Towards a Reform*, *in* ASIA BOOK, *supra* note 4, at 353.

5. WHAT MAKES THE MODEL LAW A PARTICULARLY SUITABLE MODEL?

Given that there are several national models to choose from, together with some regional models, such as the Model Inter-American Law on Secured Transactions 2002, drafted specifically for use in the civil law countries of Latin America,[42] what makes the Model Law a particularly suitable model? One advantage is that the Model Law is reasonably simple in style but is reasonably comprehensive and is not a simplified version of a secured transactions law.[43]

There are also two other particular advantages to the Model Law. First, it is (to some extent) legal culture neutral; it avoids idiosyncrasies of national models, and, in theory, is transposable into different legal cultures because it was developed with participation from many states and organisations. How far that is actually the case is, of course, a matter of debate. There are strong resemblances between the Model Law and UCC Article 9 and, even more so (because of the style of drafting), with the Canadian PPSAs. One could suggest that the Model Law is just a more neutrally drafted version of those instruments, and it is certainly true that many of the civil law inspired aspects are linguistic, such as the use of the term 'security right' instead of the common law 'security interest.' Much of the substantive content of the Model Law was determined by the discussions leading up to the UNCITRAL Legislative Guide on Secured Transactions, which was completed in 2007,[44] and which contains a great deal of comparative research on approaches to secured transactions law, out of which the approach in the Model Law was chosen. The approach in the Legislative Guide is overtly functional and practical, and, like the Model Law, was designed to create a system that could work in any legal culture.[45]

The Model Law also comes with an international stamp of approval: it has the UNCITRAL label, a kind of 'quality kitemark,' and is seen as embodying international standards and best practice. The people who originate and facilitate reform: various sponsors and advisers such as the World Bank can suggest it on that basis, and states like the signalling effect that its use brings. As we will now see, in reality, states tend to like to use multiple models. Drafters and their advisers realise that there is merit in

42. Alejandro M. Garro, *Exportability of North American Chattel Security Regimes: The Inter-American Model Law on Secured Transactions,* 43 CAN. Bus. L.J. 200 (2006).

43. These simplified versions can cause problems, *see* GULLIFER, AFRICA BOOK, *supra* note 4, at 428.

44. UNCITRAL Legislative Guide on Secured Transactions, 2010, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf. [hereinafter Legislative Guide].

45. 'The Guide seeks to rise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in States with divergent legal traditions (civil law, common law, as well as Chinese, Islamic and other legal traditions) and in States with developing or developed economies.' *Id.* at 1.

looking at different models if the dangers of picking and choosing the most suitable parts of each are borne carefully in mind.

6. REFORMS IN AFRICA AND ASIA OVER THE PAST TWO DECADES.

In order to explore further the part played, and to be played in the future, by the Model Law in secured transactions law reform, this section will assess the reforms which have taken place in the two continents: Africa and Asia. This assessment is informed by the two books mentioned above. There are other, similar reforms in Latin America, the Middle East, and Central Asia, as well as the Pacific Islands (which were largely based on the Australian and New Zealand legislation), but this paper will concentrate on those about which information is gathered in the books. The assessment will focus on particular aspects of the reforms. First, an assessment of what influence the Model Law actually had (or did not have) on the legislative text. Second, an examination of the reasons why the Model Law (or the Legislative Guide) was used or not used. Third, a discussion of how far the idea of a complete code on secured transactions, explicitly part of the idea behind the Model Law,[46] translates into practical reality.

A. REFORMS BASED ON THE MODEL LAW OR THE LEGISLATIVE GUIDE: COMMON LAW JURISDICTIONS.

First, I will examine countries that have used the Model Law or, because of timing, its parent, the Legislative Guide. All these reforms have some variation from the text: some more than others. There are a few 'Africa specific' variations, such as a rejection of possession as a useful form of perfection (this also comes from concerns about possession being used oppressively by lenders), and an overt provision enabling the registry to order the police force to take possession of collateral if the grantor refuses to give possession on enforcement. Other variations were introduced for policy reasons or to enable the new law to fit with unrepealed old law, for example, insolvency law. I will first examine the common law countries, and then the civil law countries. Two countries whose early reforms are discussed in section (c) below (Ghana and Sierra Leone) also have more recently reformed their law using the Model Law as a model.

Pakistan's reformed legislation was enacted in 2016, although it only came into force in 2020,[47] replacing a regime broadly in line with that of English common law. Because of when it was drafted, it was inspired by the

46. *See supra* Section 2 on why the Guide to Enactment stressed the need to enact the complete text of the Model Law.

47. Financial Institutions (Secured Transactions) Act 2016, No. 31 of 2016, THE GAZETTE OF PAKISTAN EXTRAORDINARY (Jun. 29, 2016). *See generally* DUBOVEC & ABID, *Pakistan's reform of Secured Transactions Law: Challenges and the Road Ahead*, *in* ASIA BOOK, *supra* note 4, Ch. 18.

Legislative Guide rather than the Model Law, but amendments were introduced in 2020, bringing the drafting (and some of the content) closer in line with the Model Law.[48] The Pakistan legislation is limited in two ways because of existing legislation. First, in Pakistan, legislative powers are divided between the Federal and Provincial Legislatures, although the Federal Legislature can legislate on matters within the Provincial Legislature's competence with their consent. As mentioned earlier, this meant that certain areas, such as supplier credit, were not included in the reforming statute.[49] Second, the registration regime in relation to security interests created by companies remains in force, and so such interests are not registrable in the Secured Transactions Registry, which was set up and regulated by the Financial Institutions (Secured Transactions) Act 2016.[50]

Despite this limitation in scope, in other respects, the Act (as amended) follows the Model Law quite closely. Some of the previous differences, such as the omission of any provision overriding anti-assignment clauses,[51] have been eliminated by the revisions in 2020. The revisions have also aligned the Act more closely to the unitary approach of the Model Law, by eliminating references to specific types of security interests (pledges, floating charges) and specific rules relating to those types of interests.[52] They also clarified that security interests could be granted over future (as well as after-acquired) property.[53] The amendments appear to be the result of a review to align the legislation more closely to international instruments[54] (particularly the Model Law, but the UCC Article 9 and the PPSAs were also looked at by the drafters), and have resulted in a text that, apart from the limitations mentioned above, can be said to be an implementation of the Model Law adapted for the legal culture of the jurisdiction.[55]

48. The amendments were made by Ordinance No. IV of 2020, THE GAZETTE OF PAKISTAN EXTRAORDINARY (Apr. 29, 2020).

49. Financial Institutions (Secured Transactions) Act 2016, No. 31 of 2016, sec. 2(1)(xlvi), THE GAZETTE OF PAKISTAN EXTRAORDINARY (Jun. 29, 2016). (definition of secured creditor as a financial institution).

50. *See id.* sec. 18, which states that the registration Part of the Act only applies to 'an entity creating a security interest': entity is defined in sec. 2(1)(xvii) as 'a person other than a company'.

51. This was an overt policy choice in relation to the 2016 legislation, *see* DUBOVEC &ABID, *in* ASIA BOOK, *supra* note 4, at 392 (n. 36), but Ordinance IV of 2020 introduced a provision (now sec. 55 of the Financial Institutions (Secured Transactions) Act 2016) which tracks Article 13 of the Model Law very closely.

52. For example, the specific priority rule relating to floating charges in sec. 48 Financial Institutions (Secured Transactions) Act 2016 has been deleted, *see* Ordinance No. IV of 2020, THE GAZETTE OF PAKISTAN EXTRAORDINARY (Apr. 29, 2020) sec. 31.

53. *Id.* at sec. 3(b).

54. DUBOVEC & ABID, *in* ASIA BOOK, *supra* note 4, at 394–95 (n.36).

55. An example of this adaptation is the provision in, The Financial Institutions (Secured Transactions) Act 2016, No. 31 of 2016, sec. 55(3), THE GAZETTE OF PAKISTAN EXTRAORDINARY (Jun. 29, 2016), where an assignment of a receivable is not notified to the account debtor, and the account debtor pays the customer, the customer holds the proceeds on trust for the secured creditor.

Kenya enacted its Movable Property Security Rights Act in 2017, having previously had a common law secured transactions regime closely based on English law.[56] It is probably the most faithful implementation of the Model Law so far in Africa, tracking the language closely, although there are some deviations in content. Some examples of these deviations reflect the general African viewpoint. For example, registration is the sole method of third-party effectiveness. This decision was made after considering other African reforms, and for reasons similar to other countries.[57] Possession was seen as impractical, the concept of control was not known in that country and automatic perfection was seen as non-transparent.[58]

Although the generalised definition of a security right tracks that in the Model Law,[59] the statute also includes a separate section on the scope of the statute in terms of transactions covered, including a non-exhaustive list of such transactions taken from the PPSA model.[60] The list includes the fixed and the floating charge, which was important for Kenya since the distinction between these two forms of security interest had to be maintained as it was an important trigger for various consequences in the recently enacted Insolvency Act, based on English law legislation.[61] It was considered politically difficult to amend the Insolvency Act fully as a result of the enactment of the Movable Property Security Rights Act (although some limited amendments were made).[62] Therefore, it still remains necessary to determine whether a security right is a fixed or a floating charge in order to decide whether the secured creditor can appoint an administrator (a restructuring officer) out of court,[63] whether an administrator can dispose of encumbered assets without the leave of the court,[64] and whether preferential creditors have priority over the encumbered assets.[65]

There are also some more specific deviations from the Registry provisions in the Model Law. Some are reflected in other African reforms (for example, the requirement for statistical information to be entered on the registry, such as whether the majority of the ownership of the borrower is female)[66] and the provisions for indexing and searching of specific encumbered assets by serial number.[67] Other deviations reflect policy

56. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 4 Section B.
57. *Id.* at 103.
58. *Id.* at 107.
59. *Movable Property Security Rights Act*, No. 13 sec. 2 (2017) (Kenya); Model Law Art. 2(kk).
60. *Personal Property Security Act*, S.S., 1993, ch. P-6.2, sec. 3(1)(b).
61. *Insolvency Act*, No. 18 (2015) (Kenya).
62. *Companies Act*, No. 17 (2015) (Kenya), was more heavily amended. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 100–03, 115–17.
63. *Insolvency Act*, No. 18 secs. 534–40 (2015) (Kenya).
64. *Id.* at secs. 587–88.
65. *Id.* at sec. 473–74 and sec. 615.
66. *Movable Property Security Rights Act*, No. 13 (2017) (Kenya) sec. 27(1).
67. *Id.* at sec. 27(1)(c); and *Movable Property Security Rights (General) Regulations*, 2017 (L.N.86/2107) Reg. 11(2).

choices, such as the prohibition of registration before a grantor has authorised it,[68] unlike the Model Law, which allows authorisation after registration.[69] It was felt in Kenya that such a provision would be politically challenging and might hold up the passage of the Bill.[70]

The Kenyan Act is an example of a wholesale reform; whereby the new law replaced existing law effectively and provided an entire codified system based on the Model Law. Even so, the interaction with the recently enacted Insolvency Act is potentially problematic, but a real attempt was made to keep such problems to a minimum. In contrast, the reform in Nigeria took place in stages, and suffers from uncertainty because of a reasonably high level of overlap with pre-existing statute law in relation to company charges which has not been repealed.[71]

Nigeria's Secured Transactions in Movable Assets Act was also enacted in 2017, replacing a similar common law regime to that of Kenya.[72] Unlike Kenya, where the registration system was set up contemporaneously with the legal reform,[73] Nigeria had already introduced a collateral registry whose regulations were based on modern principles but were limited in the scope of interests covered because they were issued by the Central Bank, which had limited powers.[74] The scope was widened when the Secured Transactions in Movable Assets Act came into force. However, the previous registration system for security interests created by companies under the Companies and Allied Matters Act[75] was not repealed, so that the interaction between the two statutes remains a source of uncertainty. Moreover, the retention of a fragmented registration (and priority) system means that the reform does not approach the Model Law objective of a complete code.[76]

Although the Model Law (and the Legislative Guide) were clearly the primary inspiration for the Nigerian legislation, some of the details of the text

68. *Movable Property Security Rights Act*, No. 13 (2017) (Kenya) sec. 24.

69. Model Law Art. 36.

70. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 109.

71. *See Id.* at 151–62; Gregory Esangbedo, *Secured Transactions in Moveable Assets Act, Company Charges and Funding Micro, Small and Medium Enterprises under Nigerian Law*, 64 J. AFR. L. 81 (2020).

72. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 7.

73. In fact, the registration system became operational two weeks after the reform, which caused some uncertainty at the time, *see* GULLIFER, AFRICA BOOK, *supra* note 4, at 103.

74. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 150.

75. *Companies and Allied Matters Act* (2004) Cap. (C.20) (Nigeria), which was based on English law and provided a registration system for company charges.

76. *See* Esangbedo, *supra* note 71, at 99. *See also* William C. Iheme, *The Defects of Nigeria's Secured Transactions in Movable Assets Act 2017 and their Potential Repercussions on Access to Credit: A Comparative Analysis and Lessons from Anglo-American Law*, 27 COMPAR. L. REV. 9 (2021). Other fragmentation may come from the fact that it is uncertain whether the Act covers outright assignments of receivables, and to what extent leases are covered, *see* GULLIFER, AFRICA BOOK, *supra* note 4, at 152.

are drawn from the PPSAs[77] and the UCC Article 9.[78] There are also some significant deviations from the Model Law text. The African approach to perfection is followed, so that registration is the only method,[79] and the provisions on (extra-judicial) enforcement include a right for the secured creditor to obtain assistance from the police to facilitate peaceful repossession.[80] Despite the fact that the definition of security interest[81] closely tracks the Model Law definition of security right,[82] the unitary approach envisaged by the Model Law is not really achieved, since the distinction between fixed and floating charges (arguably) remains as a result of the unrepealed Companies and Allied Matters Act 2004.[83]

B. REFORMS BASED ON THE MODEL LAW OR THE LEGISLATIVE GUIDE: CIVIL LAW OR MIXED JURISDICTIONS.

The other Asian and African reforms considered in this section are either in civil law jurisdictions or those with a mixed system, but where the property law (and therefore the previous secured transactions law) is predominantly civil law. The use of the UNCITRAL instruments in the reform of civil law secured transactions regime is of particular interest, given that national models of common law jurisdictions are unlikely to be suitable here, and it is interesting to see how much the participation of different legal cultures in the preparation of those instruments has facilitated their use in this regard.

The Personal Property Security Act in the Philippines,[84] where the previous law was a mixture of the Civil Code[85] and the Chattel Mortgage Law 1906[86], was enacted in 2018. It is based closely on the Model Law, both in content and in drafting, although there are some deviations for local

77. See, for example, the right of a grantor to reinstate the security agreement by remedying defaults. *Secured Transactions in Movable Assets Act*, No. 58 sec. 50 (2017) (Nigeria); *Personal Property Security Act*, S.S., 1993, ch. P-6.2, sec. 62 (Can.).

78. *Secured Transactions in Movable Assets Act*, No. 58 sec. 29(2) (2017) (Nigeria) provides that a transferee of cash or funds from a deposit account takes free of a previous security interest unless acting in collusion with the grantor in breaching the security agreement. This mirrors U.C.C. § 9-332 rather than the Model Law Art. 47(6) where the transferee does not take free if it has knowledge of any such breach.

79. *See Secured Transactions in Movable Assets Act*, No. 58 sec. 8(2) (2017) (Nigeria), which expressly provides that possession is not a method of perfection.

80. *Id.* at sec. 40. The potential involvement of the police in enforcement is mirrored in other African reformed statutes, such as in Sierra Leone and Ethiopia. For criticism, see Iheme, *supra* note 76, at 41.

81. *Secured Transactions in Movable Assets Act*, No. 58 sec. 63(1) (2017) (Nigeria).

82. Model Law Art. 2.

83. GULLIFER, AFRICA BOOK, *supra* note 4, at 152–54; Gregory Esangbedo, *Conceptual or Pragmatic? Differentiating Floating Charges from Unitary Security Interests under Nigerian Law*, 66 J. AFR. L., 491 (2022.

84. *See* ABAD, ROSARIO, & SANTOS, *Banked the Unbanked: An Examination of the Personal Property Security Act of the Philippines*, *in* ASIA BOOK, *supra* note 4, at Ch. 10.

85. *Republic Act, 1949* (Act No. 386/1949) (Phil.).

86. *Chattel Mortgage Law* (Act No. 1508/1906) (Phil.).

conditions, some of which appear to be inspired by the PPSAs. One example is the inclusion in the regime of operating leases over one year,[87] which is found in the Canadian, Australian, and New Zealand statutes.[88] An example of a local deviation in drafting is the omission of the requirements for the content of a security agreement found in Article 6(3) of the Model Law. The Philippines PPSA merely requires a security agreement to be contained in a signed written contract,[89] leaving it up to contract law to determine whether the contract is effective. There was a strong desire to limit formal requirements (in contrast to the previous law) because of the low level of education and understanding of many grantors, and also not to replicate law found elsewhere: in this case, the law on validity of contracts which was already part of Philippines law.[90] Whether the lack of clear guidance as to the content of the agreement found in the Model Law proves to be a benefit or a problem remains to be seen: the requirements are minimal and are designed to enable both parties (and courts) to be clear as to the parties and subject matter of the security agreement.

Another express variation from the Model Law is that a transferee of an encumbered asset in the ordinary course of business takes subject to a registered security interest because if the interest is registered, a transferee is not in good faith.[91] This version of the taking free rule does not reflect the Model Law, the PPSAs, or the UCC Article 9, but was a policy choice of the Technical Working Group and the Philippines Government. Despite these, and other minor variations, the Philippines PPSA is a reasonably faithful implementation of the Model Law text, which had strong support from stakeholders and regional organisations.[92] While its economic success remains to be seen, considerable local support for the reform still seems to be present a few years after its enactment.[93]

87. *Personal Property Security Act,* secs. 3(i), 3(j) (Act No. 11057/ 2017) (Phil.) (definitions of secured creditor and security interest).

88. *See Personal Property Security Act*, S.S., 1993, ch. P-6.2, sec. 2(1)(y) (Can.), *Personal Property Securities Act* 2009 (Cth) div. 3 secs. 12(3)(a),13 (Austl), and *Personal Property Securities Act* 1999, sec. 16 (N.Z.).

89. *Personal Property Security Act,* secs. 3(i), 3(j), 6 (Act No. 11057/ 2017) (Phil.). Another deviation from the Model Law is that the agreement must be signed by both parties and not just the grantor.

90. *Personal Property Security Act*, secs. 5-6 (Act No. 11057/ 2017) (Phil.), and ABAD, ROSARIO & SANTOS, ASIA BOOK, *supra* note 4, at 203.

91. *Personal Property Security Act*, sec. 21 (Act No. 11057/ 2017) (Phil.).

92. *See* ABAD, ROSARIO & SANTOS, ASIA BOOK, *supra* note 4, at 199–200.

93. *See*, *e.g.,* Wildly L. Pahayahay, *The shift to better Personal Property Security Laws*, BUSINESSWORLD (Mar. 22, 2022, 6:12 PM), https://www.bworldonline.com/opinion/2022/03/22/437550/the-shift-to-better-personal-property-security-laws/; *see, e.g.* Vicente D Gerochi IV & Camille Angela M. Espeleta-Castillo, *The Lending and Secured Finance Review: Philippines*, THELAWREVIEWS (July 14, 2022), https://thelawreviews.co.uk/title/the-lending-and-secured-finance-review/philippines.

Zimbabwe, whose Movable Property Security Interests Act was enacted in 2017,[94] similarly had a previous regime consisting of a mixture of common and civil law. The main security devices were the possessory pledge and the notarial bond, the jurisprudence of both of which was heavily influenced by the law of neighbouring South Africa.[95] The Zimbabwe legislation was based on the Model Law as a matter of content (with some inspiration from the PPSAs and UCC Article 9 and some substantive policy deviations) but the structure is, on the face of it, different. It consists of a short general statute (13 sections) setting out definitions, some provisions on scope, some general provisions on registration, some provisions on rule-making powers, amendments of other statutes, and transitional provisions. The detail of the Act is set out in two schedules: the first covering creation and registration, and the second covering priority, rights, and obligations of the parties, enforcement, and conflict of laws. Despite the unusual use of schedules, the chapters of the Model Law are represented, in largely the same order as they are in the Model Law itself. Like the jurisdictions considered above, Zimbabwe has a codified system of secured transactions law. However, the legislation is not yet in force, since the Collateral Registry, though now set up, has not yet gone live. The latest estimate appears to be that it will go live in the third quarter of 2022.[96]

As well as some drafting variations, there are some substantive deviations from the content of the Model Law driven by policy considerations. For example, after consultation with stakeholders, it was decided when the Bill was presented to Parliament that registration should be the only form of perfection to increase transparency[97] (this would have aligned with the position in some other African countries, as mentioned earlier).[98] However, late on in the progress of the Bill, a clause was added providing that, in addition to registration, a security interest could be perfected by 'any formal or informal mode recognised by the common law,'[99] thus enabling perfection by possession. However, interests perfected by registration have priority over interests otherwise perfected,[100] which provides an incentive to register. Another difference is that extra-judicial remedies are only available for security interests over intangible property and not tangible property. This was a result of concerns that Parliament might reject a Bill providing for extra-judicial enforcement over tangible property (despite the support of the stakeholders for such a provision).[101] The Act, as

94. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 16.

95. The law in South Africa is still unreformed.

96. *See*, Nelson Gahadza, *RBZ to launch collateral registry*, THE HERALD (May 19, 2022, 12:05 AM), https://www.herald.co.zw/rbz-to-launch-collateral-registry/.

97. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 364, 373.

98. *Supra* 6(a).

99. *See Movable Property Security Rights Act*, Cap 13:45 sec. 3(4) (2017) (Zim.).

100. *Movable Property Security Interests Act*, Cap 13:45 sec. 7(7)(3) (2017) (Zim.).

101. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 362, 373.

finalised, appears to mean that a secured creditor can take possession of a tangible asset but must obtain a court order to dispose of it. There is a concern that this position may affect the willingness of lenders to extend credit;[102] thus illustrating the difficulties of achieving an optimal text in final legislation even when using a model such as the Model Law.

Ethiopia is a civil law jurisdiction with some common law influences.[103] Its reforming legislation, enacted in 2019, is based nearly entirely on the Model Law.[104] The English language version of the legislation (called a Proclamation) tracks the text of the Model Law quite closely, but the translation into Amharic (the official language of Ethiopia), which was critical in achieving local acceptance and understanding of the reformed law, was challenging given that some of the concepts used were unfamiliar in Ethiopia.[105] The Proclamation does not entirely create a scheme based on the unitary approach. Both financial leases and hire-purchase agreements are included in the definitions in the Proclamation.[106] Hire-purchase is defined as a retention of title sale with payment by instalments whereby ownership passes to the purchaser in tranches, and financial leasing as a transaction where the lessee has the use of goods in return for periodic payments, and where (if agreed) the lessee has the option to purchase at the end of the agreed period.[107] In relation to hire-purchase, the non-unitary approach is overly applied.[108] The position in relation to financial leasing is, however, unclear: it may fall within the definition of a security interest in the Proclamation[109] (which tracks the Model Law definition), but opinions differ.[110] A major omission from the Model Law structure is that there is no section on conflict of laws.[111]

Some of the variations between the Proclamation and the Model Law are those that appear in other African jurisdictions. For example, the collateral registry has the power to order the police force to execute possession if the

102. *See id.* at 373.

103. *Id.* at 264–65.

104. *See generally Movable Property Security Right Proclamation* No. 1147/2019 (2019) GOVERNMENT GAZETTE (Eth.). For detailed discussion, *see* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 12; *See generally* ASRESS ADIMI GIKAY, ETHIOPIAN LAW OF SECURITY RIGHTS IN MOVABLE PROPERTY: POSSESSORY SECURITY RIGHTS (2021), *available at* https://ssrn.com/abstract=3777423.

105. GULLIFER, AFRICA BOOK, *supra* note 4, at 284.

106. *Movable Property Security Right Proclamation* No. 1147/2019 arts. 2(17), 2(21) (2019) GOVERNMENT GAZETTE (Eth.).

107. The terms 'hire purchase' and 'financial leasing' are not stable and have different meanings in different countries, *see* Legislative Guide, *supra* note 44.

108. *Movable Property Security Right Proclamation* No. 1147/2019 art. 4(2) (2019) GOVERNMENT GAZETTE (Eth.).

109. *Id.* at art. 2(43).

110. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 279; GIKAY, *supra* note 104, at 141–42.

111. Model Law Ch. VIII.

grantor objects to out of court taking of possession on enforcement.[112] While possession is a permissible method of perfection, it is only available for intangible collateral. It was decided that enabling secured creditors to take possession over tangible collateral might incentivise them to continue the practice of taking possession (either constructively or actually) of the grantor's inventory or even equipment which creates difficulties for borrowers.[113] However, generally, the Proclamation is a good example of how the Model Law, and the Legislative Guide, have been used in reforming the law of a civil law jurisdiction that previously was fragmented and outdated.

Burundi's Law on Security Rights[114] was enacted in 2016 and was part of a larger reform of credit infrastructure laws.[115] The Burundi statute, which replaced the previous civil law system, was based on the Legislative Guide (and, to some extent, although it was not adopted at the time, the Model Law) but also on French law to the extent that this was compatible with the overall approach. The main (and most interesting) variation from the Model Law approach is that Burundi decided to follow the non-unitary approach suggested in the Legislative Guide as an alternative to the unitary approach, although not followed or included in the Model Law.[116] The non-unitary approach involves retention by a jurisdiction of the concepts of retention of title sales and finance leasing, but the consequences of these transactions are adjusted so that they are functionally equivalent to those flowing from the existence of an acquisition security right (that is, a security right granted by a person in relation to credit extended to acquire the collateral over which the security right is granted).[117] Thus, under the non-unitary approach, retention of title sales and finance leases have to be created in the same way as acquisition security interests,[118] have to be perfected by registration (or other means)[119] and the priority rules relating to acquisition security interests apply to them.[120] Burundi only adopted the non-unitary approach for retention of title sales[121] and not finance leases (these are covered by the 2016 Law of

112. *Movable Property Security Right Proclamation* No. 1147/2019 art. 81(2) (2019) GOVERNMENT GAZETTE (Eth.).

113. *See* GULLIFER, AFRICA BOOK, *supra* note 4, at 280, 284.

114. The Law is in French, and its title is 'Loi no. 1/10 du 12 Aout 2016 Régissant Les Sûretés Mobilières Conventionenelles au Burundi.' For discussion of the Law, *see* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 11.

115. This phenomenon is common in African countries: most of the countries considered have reformed laws other than secured transactions law at around the same time, including insolvency law and leasing law.

116. GULLIFER, AFRICA BOOK, *supra* note 4, at 245.

117. Legislative Guide, *supra* note 44, at 338–39.

118. *Id.* at 342.

119. *Id.* at 344–45.

120. *Id.* at 350.

121. The legislation makes it clear that a retention of title sale is where there is a provision in a contract of sale whereby the vendor remains the owner of the asset which is the subject of the

Leasing, which provides, inter alia, for registration of finance leases). The non-unitary approach was followed because retention of title devices were widely and successfully used in Burundi and it was felt that their recharacterisation by the proposed legislation would jeopardise the passing of the Act through Parliament.[122] Despite the fact that the statute has been in force for some years, it seems that the collateral registry is not yet operational, and so the legal framework for secured transactions cannot operate as intended.

C. REFORMS WHERE NEITHER THE MODEL LAW NOR THE LEGISLATIVE GUIDE WERE USED.

It is perhaps even more interesting to look at countries where the decision was taken not to use the Model Law. These countries fall into various categories. First, those where the reforms took place before the Model Law was adopted: the only model available was, therefore, a national PPSA. Jurisdictions in this category used a national PPSA as a model, with the Legislative Guide providing further guidance. Second, jurisdictions that wanted to go it alone, that is, to draft without using any real model, although both discussed here have now introduced another reform based on the Model Law. Third, jurisdictions that made a deliberate choice to use the PPSA rather than the Model Law. Fourth, jurisdictions that have only partially reformed along the lines of the modern principles, and so while basing reform on some of the modern principles, have tended to follow local drafting techniques to make the limited reforms that have been made.

i. Reforms that Took Place Before the Model Law was Adopted.

Malawi reformed its law in 2013, when its Personal Property Security Act was enacted, and the Act came into force in 2015 when the registry became fully established.[123] Those drafting the legislation, and their advisers, took the view that a model was necessary and that the best was the (then) recent model of the New Zealand PPSA, which was in turn based on the Saskatchewan PPSA.[124] The Australian PPSA was thought too complex to be used as a model.[125] The Legislative Guide was considered a resource that

contract until full payment of the purchase price. Loi No. 1/10 du 12 Aout 2016 Régissant Les Sûretés Mobilières Conventionenelles au Burundi art. 81 (2016) (Burundi).

122. GULLIFER, AFRICA BOOK, *supra* note 4, at 245. Another example of this type of reasoning is the use of the term 'gage' (pledge) instead of 'security right' since this term was familiar to those operating in the market.

123. For discussion of the Malawian Act, *see* DUBOVEC & KAMBILI, *Secured Transactions Law Reform in Malawi: The 2013 Personal Property Security Act*, *in* PRINCIPLES, POLICIES AND PRACTICE, *supra* note 4, at Ch. 8.

124. *See id.* at 185.

125. *Id.*

could be consulted for guidance.[126] This certainly makes sense, because although the Legislative Guide sets out the principles which a modern secured transactions law should follow, it does not provide a drafted scheme, and if a suitably drafted scheme can be found, this would be a useful model.

As well as matters of drafting and terminology,[127] there are some differences between the PPSA model and the Model Law. One of some significance is the way in which the creation of a security interest is analysed. In the Model law, the process has only one stage: a security interest is created by a security agreement (provided that the grantor has rights in the assets to be encumbered or the power to encumber it).[128] In the PPSAs, the requirements for a security agreement are stipulated, but then there is a set of further requirements before the security interest 'attaches' to an asset (which includes that an advance has been made).[129] Despite the use of the New Zealand PPSA as a model, the Malawian law follows the Model Law (and Legislative Guide) approach in this regard.

The New Zealand scheme does include some national idiosyncrasies, one of which has been followed very rarely. In most modern secured transactions law, an unperfected interest is not effective against an insolvency officer of the grantor. However, a deliberate choice was made on the part of those drafting the New Zealand statute to deviate from this position, and an unperfected interest is valid against an insolvency officer such as a liquidator.[130] This position was very controversial. The Malawi drafters clearly decided that they would not follow this idiosyncrasy, and the orthodox position prevailed.[131] However, the Malawi Act does follow the New Zealand legislation in omitting any anti-assignment clause override, which is entirely contrary to the Model Law.[132]

Zambia, which reformed its secured transactions law in 2016,[133] followed Malawi in using the New Zealand legislation as a model, although, in fact, the Malawian law itself was also a model. The drafters did consider the Legislative Guide and drafts of the Model Law itself (the final version was not completed in time). The main difference in the Zambian law from its models is not the content, but the structure and style, which changed in order to fit in with Zambian drafting standards, thus facilitating adoption by

126. *Id.*

127. For example, the PPSAs use the term 'security interest' while the Model Law uses 'security right.' Also, most PPSAs refer to the person who creates the security interest as the 'debtor' while the Model Law (and the Australian PPSA) refers to that person as the 'grantor.'

128. Model Law Art. 6(1).

129. *See, e.g.*, *Personal Property Securities Act* 1999, sec. 40 (N.Z.). For further discussion, *see* GULLIFER, ASIA BOOK, *supra* note 4, at 15–16.

130. *See The New Zealand Perspective*, *in* PRINCIPLES, *POLICIES AND PRACTICE, supra note* 4, *at* 130.

131. *See Personal Property Security Act* sec. 129(6) (2013) (Malawi).

132. Model Law Art. 13.

133. *See generally Movable Property (Security Interest) Act*, 2016 (3/2016) (Zambia). *See* GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 8.

Parliament. Despite its use of national models, its content tracks the Model Law quite well, and avoids some of the idiosyncrasies of the New Zealand model, including the effectiveness of an unperfected security interest against an insolvency officer[134] and the lack of an anti-assignment override.[135]

The Zambian law appears to follow both approaches to the creation of a security interest mentioned above. The Model Law approach is followed in sub-sections 33(3) and (4) of the Zambian Act, which provide that a security interest is created by a security agreement when the debtor has rights or power to create it.[136] However, in section 36, the Zambian Act reproduces the requirements for attachment found in the New Zealand statute (with some drafting changes).[137] The law is therefore rendered more uncertain because of the overlap in the use of models.

Rwanda, a jurisdiction whose law was civil law based on Belgian law, but which is moving to a common law system reformed its secured transactions law in 2013.[138] Its reform was not based on the Model Law (or Legislative Guide) or on the PPSAs, but on a simplified model which had been developed by experts familiar with the PPSA and the UCC Article 9. The simplified model has many omissions and ambiguities, and gives rise to considerable uncertainty.[139]

ii. Jurisdictions Who Went It Alone.

In 2008, Ghana, which previously had a secured transactions law based originally on English law, but which also included customary law, enacted the Borrowers and Lenders Act.[140] The legislation was developed by the Bank of Ghana without using an international or national model, and was considerably changed by the legislature before enactment. The 2008 Act deviated in many significant ways from the approach of the UNCITRAL Legislative Guide and the PPSAs. It was also limited in scope (for example, first, the definition of 'lender'[141] is limited to a person advancing loans as part of a business, thus excluding credit sales, and, second, the scope of the legislation is defined in terms of specific types of transactions[142] rather than generally as under the Model Law). The Act contained many gaps, which had

134. The relevant Malawian provision, *supra* note 129, is included (for the avoidance of doubt). *See Movable Property (Security Interest) Act*, 2016 sec. 5(3) (Zambia).

135. In fact, the Zambian anti-assignment override goes further than that in the Model Law, as it is not limited to trade receivables, *See Movable Property (Security Interest) Act, 2016* sec. 42 (Zambia) and Model Law Art. 13.

136. *See Movable Property (Security Interest) Act, 2016* secs. 33(3)–(4) (Zambia).

137. *See Movable Property (Security Interest) Act, 2016* sec. 36 (Zambia).

138. *See generally Law No. 34/2013 of 24/05/2013 on Security Interests in Movable Property* (2013) (Rwanda).

139. GULLIFER, AFRICA BOOK, *supra* note 4, at Ch. 14.

140. *Id.* at Ch. 3.

141. *Borrowers and Lenders Act*, 2008 sec. 38 (Ghana).

142. *Id.* at secs. 1–5.

to be filled by existing law which was often unclear.[143] Its unsatisfactory nature eventually led to a new Act in 2020, which is based much more closely on the Model Law, and was drafted over several years in conjunction with local stakeholders.

Sierra Leone copied the Ghanaian legislation in its Borrowers and Lenders Act 2014,[144] and therefore its legislation had similar defects. However, as with Ghana, a new Act was passed in 2019 (though the new regulations for the collateral registry are still in the process of being drafted)[145] based closely on the Model Law. The Ghanaian and Sierra Leone legislation has one particular difference from all other reformed legislation: it includes land as a form of collateral. This was done in order to enable land to be more freely available as collateral, particularly in relation to areas governed by customary law.[146]

iii. Deliberate Choice.

This section briefly considers two jurisdictions where a deliberate choice was made to follow a PPSA model rather than the Model Law. In Bangladesh, a final version of a draft Secured Transactions (Movable Property) Act[147] was approved by the cabinet on 6th April 2022,[148] but does not appear to be in force yet. It was decided not to use the Model Law as a model, but rather the Canadian PPSAs in order to take advantage of the rich common law heritage (of which Bangladesh was a part). Great effort was made to contextualise the draft taking into account the legal and social culture of Bangladesh.[149] However, the Model Law was also an inspiration, and some specific provisions from it were included.[150]

143. For example, the Borrowers and Lenders Act had the following gaps: no rules on requirements to create a charge, overlap with existing legislation on registration and retention of the fixed and floating charge, no rules on priority, gaps in rules on enforcement, and no conflict of laws or transitional provisions. GULLIFER, AFRICA BOOK, *supra* note 4 at 77–78, 80, 87–89.

144. *Id.* at Ch. 9.

145. *See* Leroy N. Johnson, *Basel III in Sierra Leone: Delivering on it*, J. OF ECON. & MGMT. RSCH., May 24, 2022, at 4. (available at https://www.onlinescientificresearch.com/articles/basel-iii-in-sierra-leone-delivering-on-it.pdf.).

146. I have benefited from many discussions on this topic with Benjamin Osei-Tutu, whose doctorate on the inclusion of land in a reformed secured transactions scheme I am supervising.

147. *See* DUBOVEC & CHOWDURY, ASIA BOOK, *supra* note 4, at Ch. 16.

148. *Bank loan to be given against collateral of immovable property: Cabinet Secretary*, BANGL. SANGBAD SANGSTHA (Apr. 7, 2022, 12:05 AM), https://www.bssnews.net/news/54697.

149. *See* DUBOVEC & CHOWDHURY, ASIA BOOK, *supra* note 4, at 346–47; Junayed Ahmed Chowdhury, *What is Bangladesh's new secured transactions regime?*, WHITEBOARD (Mar. 17, 2022) https://whiteboardmagazine.com/2914/what-is-bangladeshs-new-secured-transactions-regime.

150. For example, Model Law Art. 8 makes clear what assets could be the subject of a security interest. *See Movable Property (Secured Transactions) Act*, 2022 sec. 29 (Bangl.).

Brunei Darussalam reformed its law in 2016 by enacting the Secured Transactions Order.[151] It used the New Zealand PPSA as a model, and this order tracks the drafting of that Act (though not the structure) very closely. The reason for choosing the New Zealand Act (as opposed to another model) is not entirely clear (although the timing was such that the Model Law was not yet completed), but Brunei does have close trade links with New Zealand through ASEAN and trade agreements, and the use of the New Zealand statute enabled experts from New Zealand[152] and Australia[153] to assist with post-enactment capacity building. Unfortunately, the Brunei legislation is a good example of the phenomenon mentioned earlier, whereby idiosyncrasies of the model appear in the reformed law.[154] Under the Brunei Order an unperfected security interest is valid against an insolvency officer, and that Order includes no override of anti-assignment clauses.[155] Both of these approaches were deliberate policy choices in New Zealand, and it would be unfortunate if they became part of Brunei law without a corresponding policy debate.

iv. Partial Reform.

Several countries in Asia[156] have partially reformed their law, for example, by introducing a new security device[157] or reforming the law relating to a particular device,[158] or by introducing registration for a limited range of security interests.[159] Most are civil law jurisdictions, but India is also

151. For discussion, *see* GULLIFER, *Secured Transactions Law Reform in Common Law Jurisdictions*, *in* ASIA BOOK, *supra* note 4, at Ch. 15.

152. *See Briefing on Collateral Registry System and Enforcement of Secured Transactions Order*, BRUNEI NEWS GAZETTE (Oct. 14, 2016), https://www.bruneinewsgazette.com/briefing-on-collateral-registry-system-and-enforcement-of-secured-transactions-order-3/, which describes a briefing from a senior solicitor from the New Zealand Companies Office about the collateral registry.

153. Bruce Whittaker, who wrote the statutory review of the Australian PPSA, was involved in the post-reform implementation and capacity building.

154. *Supra* Section 4.

155. *See* the discussion of the Malawian legislation at *supra* Section 6(c)(i).

156. This discussion is limited to those jurisdictions included in the Asia Book. GULLLIFER, ASIA BOOK, *supra* note 4.

157. For example, the general security right created in the Thai Business Security Act 2015, *see* KASITINON, *Implementation of International Standards into the Thai Legal System: Possibilities and Proposals*, *in* ASIA BOOK, *supra* note 4, at 266–67, and that created by the South Korean Act over Movable Property and Claims 2012, *see* Y. KWON, 'Korea: the Co-Existence of Old and New Secured Transactions Law Regimes.' *Id.* at 223–24.

158. For example, the repairer's lien in Taiwan, *see* LIN, *Law Reform of the Secured Transactions Regime in Taiwan: Modernisation, Controversies and Prospects*, *in* ASIA BOOK, *supra* note 4, at 244–45, and the expansion of assets which could be taken as security under the existing security interests in China under the China Real Property Act 2007, *see* WANG, *The Law of Secured Transactions in China: Comparison and Future Reform*, *in* ASIA BOOK, *supra* note 4, at 130.

159. *See* UMARJI, *Secured Transactions Law in India: Suggestions for Reforms*, *in* ASIA BOOK, *supra* note 4, at 362–64. *See also* the incremental reforms that took place over a period of 10 years in Vietnam. PHAM, *Secured Transactions Reform in Vietnam: Prominent Achievement, Experiences and Lessons Learnt*, *in* ASIA BOOK, *supra* note 4, at Ch. 14.

in this position. Some of these reforms are inspired by the Legislative Guide[160] (in many cases, the reforms predate the Model Law) and, more generally, by the modern principles which are derived from the Model Law.[161] However, given that one of the chief features of the Model Law is that it is a complete code, it is hard to say that a partial reform is modelled on the Legislative Guide or Model Law in the same way as those discussed above.[162]

7. CONCLUSION.

This, albeit limited, survey shows that, since its adoption, the Model Law is being used in secured transactions law reform. The situations where this has not been the case are largely explained by the timing of the reform (and the fact that the Legislative Guide, though valuable, was not a legislative model), by the fact that the reform was partial, or by deliberate choice to use a particular national law as a model. Even where a state decides it does not want the Model Law as a primary model, it will look at it as a secondary inspiration and may take certain provisions from it.[163] The same is true where the Model Law is used: specific provisions may well be taken from national laws.

In any event, whatever model is used, there will be local variations, adaptations, and deliberate policy choices. This is, of course, inherent in any legal transplant, but what is interesting about the Model Law is that, where it is used, the variations are often quite minor, with not only the spirit of the Model Law but the detail of the drafting being largely replicated in many, perhaps even most, provisions.

Going forward, then, the place of the Model Law in secured transactions law reform seems reasonably secure. However, as discussed earlier, the Model Law also has value as an inspiration, a benchmark, and an educational aid. I can personally attest to the last of these in relation to the comparative secured transactions law courses I have taught around the world.[164] Given the evidence from the jurisdictions examined in this paper, it can be said with reasonable confidence that the hard work of Neil Cohen and the rest of the UNCITRAL delegates was worthwhile.

160. See, for example, Kwon (n.147) at 222. *See* GULLIFER, ASIA BOOK, *supra* note 4, at (n.147) 222.

161. *See supra* Section 3.

162. For an argument that Vietnam's method of reform is flawed and that reform along the lines of the Legislative Guide would be preferable, *see* Xuan-Thao Nguyen & Bich Thao Nguyen, *Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries*, 40 N.C. J. OF INT'L LAW 52 (2014).

163. For example, Bangladesh. *See supra* Section 6(c)(iii).

164. In Cambridge, Leiden, Singapore and the US.