CROSS-BORDER SECURED TRANSACTIONS: ONGOING ISSUES AND POSSIBLE SOLUTIONS

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I. INTRODUCTION

Two years have passed since UNCITRAL adopted the "Legislative Guide on Secured Transactions."[1] In those two years, there has been high activity in terms of reforming secured transactions law. For example, various international institutions and organizations, as well as domestic legislative bodies, have been continually reforming the law in this area.[2] With such activity, it seems only fitting that we take a moment's breath and consider the progress of harmonization within the context of the law governing secured transactions.

The purpose of this article is to review developments in the field of secured transactions law and to consider the future of the secured transactions reform efforts. Part II of the paper briefly examines prior attempts to harmonize secured transactions law. Part III discusses the "Legislative Guide" and its possible impact on harmonization. Next, Part IV considers ongoing issues surrounding harmonization efforts, focusing mainly on domestic-based issues, and argues that it is time to

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[1] G.A. Res. 63/121, U.N. Doc. A/RES/63/121 (Dec. 11, 2008). For the full text of the Legislative Guide on Secured Transactions Draft, *see* U.N. Comm'n on Int'l Trade Law [UNCITRAL], 40th Sess., June 25-July 12, 2007, *Note by the Secretariat: Draft Legislative Guide on Secured Transactions*, U.N. Doc. A/CN.9/631/Add.1 (May 29, 2007) [hereinafter *Legislative Guide*], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/839/78/PDF/V0783978.pdf?OpenElement.

[2] *See* Yuka Kaneko, *A Review of Model Laws in the Context of Financial Crises: Implications for Procedural Legitimacy and Substantial Fairness of Soft Law Making*, J. INT'L COOPERATION STUD., Feb. 2010, at 1, *available at* http://www.research.kobe-u.ac.jp/gsics-publication/jics/kaneko_17-3.pdf (discussing how "soft laws" can be formed through multilateral deliberations or unilaterally formed through "model laws" by international financial agencies).

move toward a more harmonized international approach to secured transactions. Finally, Part V considers the next steps in harmonization efforts.

II. A Brief History of Prior Reform Efforts

In 1977, Professor Ulrich Drobnig, under the auspices of UNCITRAL, undertook the largest comprehensive review of the law of security interests.[3] The review included a survey of the law in 51 countries, including an extensive review of 19 countries, and a look at several regional instruments.[4] The resulting analysis was succinct:

> It would seem that international legislation in the form of a convention providing uniform rules of substantive and conflicts law is not appropriate . . . . It would probably be difficult to obtain sufficient government support for an international conference dealing with the relatively technical topic of security interests; and even if the text of an international instrument could be agreed upon, national parliaments would probably be slow and perhaps even reluctant to ratify such a text.[5]

In the late 1970s, the time was not right for a convention covering security interests, and the report predictably recommended that "[t]he rules be frame[d] in the form of a model law, or model rules."[6] By 1990, there was still little chance of harmonization. Secured transactions were still thought of as domestic-based law, too complex in subject matter and divergent between legal systems to be harmonized:

> In the mid-1990s, the accepted wisdom in the field of [international private law] had placed several areas [of potential reform] in the "impossible" list, consigned to the dustbin because of deep differences in legal

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[3] *See* [1977] 8 U.N. Comm'n on Int'l Trade Law [UNCITRAL] Y.B. 171, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter *Yearbook*].

[4] *See id.* at 219-21. As part of these assessments, Professor Drobnig cataloged prior attempts to achieve some degree of international uniformity with respect to security interests. These attempts included: (1) a uniform conditional sales act enacted by three Scandinavian countries (Norway, Sweden, and Denmark) during 1915-1917; (2) the UNIDROIT draft provisions of 1939 and 1951 concerning the impact of reservation of title in the sale of certain goods; (3) provisions in the draft European Economic Community Bankruptcy Convention of 1970 regarding the effect in bankruptcy of reservation of title in the sale of goods; and (4) model reservation of title clauses contained in several "General Conditions" elaborated by the United Nations Economic Commission for Europe. *See* The Secretary-General, *Report of the Secretary-General: Study on Security Interests*, 171, 208-10, *delivered to the Commission on Int'l Trade Law*, U.N. Doc. A/CN.9/131 (Feb. 15, 1977), *reprinted in Yearbook*, *supra* note 3, at 208.

[5] *Yearbook*, *supra* note 3, at 218.

[6] *Id.* at 218-19.

> traditions, the uses of commercial law, and legislative and cultural difficulties in changing long-standing law.[7]

However, some international organizations refused to accept the conventional wisdom of consigning secured transactions to the dustbin of potential reform.[8] For example, UNCITRAL agreed, at its congress in 1992, to explore the need for harmonization within the area of secured transactions.[9] By 1995, the Commission decided to develop uniform rules in the area of secured transactions and mandated a Working Group.[10] Ultimately, this resulted in the United Nations Convention of the Assignment of Receivables in International Trade.[11] Largely due to the efforts of UNCITRAL and several other international organizations, by the turn of the century, secured transactions was moved from the dustbin to the forefront of legislative reform efforts.

> Within the next two or three years we shall have completed the full panoply of available techniques for promoting the harmonisation of the law in this important area: international conventions to unify aspects of substantive law, conflict of laws conventions, model laws, binding regional instruments, international restatements, guides, and, in specialised fields, model contracts with standardised terminology.[12]

At this time, the reform process was gathering momentum at the national and international level. International organizations, such as the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the Organization of American States, had all begun reform efforts.[13] Also, international financial institutions, such as the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American

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[7] Harold S. Burman, *The Commercial Challenge in Modernizing Secured Transactions Law*, 8 UNIF. L. REV. 347, 347 (2003).

[8] *See id.* at 347-48 (discussing different international organizations that successfully reformed secured finance law).

[9] UNIF. COMM. LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONG. OF THE U.N. COMM'N ON INT'L TRADE LAW at 271, U.N. Doc. A/CN.9/SER.D/1, U.N. Sales No. 94.V.14 (1995).

[10] *Assignment in Receivables Financing: Discussion and Preliminary Draft of Uniform Rules: Report of the Secretary-General*, [1995] 26 UNCITRAL Y.B. 207, U.N. Doc. A/CN.9/SER.A/1995.

[11] *See* G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002).

[12] Roy Goode, *Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global-Regional*, 8 UNIF. L. REV. (n.s.) 341, 341-42 (2003).

[13] *See, e.g.*, Hague Conference on Private Int'l Law, Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary (2006), http://www.hcch.net/upload/conventions/txt36en.pdf (last visited September 10, 2010).

Development Bank, the International Monetary Fund and the World Bank, initiated reform efforts.[14] On the domestic level, numerous systems,[15] including, but not limited to, England, Canada,[16] France, Australia,[17] and New Zealand,[18] had undergone or were undergoing reform efforts in relation to secured transactions.

By 2008, the secured transactions reform efforts had gathered enough support that numerous domestic systems and most international institutions and organizations were either considering or implementing reforms. In 2009, the United Nations Commission on International Trade Law adopted one of the most significant, ground breaking and expansive secured transactions documents: the "Legislative Guide on Secured Transactions."[19] This Guide provides an important juncture to evaluate the secured transactions reform efforts and to contemplate the appropriate next step in the reform efforts.

III. The Current Legal Texts

The UNCITRAL "Legislative Guide on Secured Transactions"[20] is one of the more comprehensive examinations of secured transac-

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[14] *See, e.g.,* European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (1994), http://www.ebrd.com/downloads/research/guides/secured.pdf (last visited September 10, 2010).

[15] *See generally* Anna Veneziano, *A Secured Transactions' Regime for Europe: Treatment of Acquisition Finance Devices and Creditor's Enforcement Rights*, 14 Juridica Int'l 89 (2008), *available at* http://www.juridicainternational.eu/public/pdf/ji_2008_1_89.pdf .

[16] *See* Canada's Personal Property Security Acts. The relevant legislation is found in: Personal Property Security Act 1990 (Ontario); Personal Property Security Act 1993 (New Brunswick); Personal Property Security Act 1993 (Saskatchewan); Personal Property Security Act 1994 (North West Territories); Personal Property Security Act 1996 (British Columbia); Personal Property Security Act 1996 (Nova Scotia); Personal Property Security Act 1997 (Prince Edward Island); Personal Property Security Act 1998 (Newfoundland); Personal Property Security Act 2002 (Yukon Territory); Personal Property Security Act 2007 (Alberta); and Personal Property Security Act 2010 (Manitoba). Of course, the Personal Property Security Act was not adopted in Quebec, but the Quebec Civil Code was nonetheless influenced by U.C.C. Article 9.

[17] *See generally* David E. Allan, *Personal Property Security in Australia—A Long, Long Trail A-Winding*, 106 Dick. L. Rev. 145 (2001) (discussing the historical aspects of the reform, especially the beginning of the process).

[18] *See* Personal Property Securities Act, No. 126 (1999) (N.Z.), *available at* http://www.legislation.govt.nz/act/public/1999/0126/latest/DLM45900.html. *See also* Henry Gabriel, *The New Zealand Personal Property Security Act: A Comparison with the North American Model for Personal Property Security*, 34 Int'l Law 1123 (2000).

[19] G.A. Res. 63/121, *supra* note 1.

[20] *Legislative Guide, supra* note 1.

tions.[21] As the UNCITRAL drafters note, "[t]he Guide seeks to rise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in states having divergent legal traditions."[22] In an effort to satisfy this purpose, the drafters designed a comprehensive set of principles that recognizes varied state approaches toward secured transactions.[23] In drafting these principles, the drafters relied upon various institutions, commentators, industry experts, and academics to draft this Guide.[24] In the future, this Legislative Guide may prove to be one of the more useful instruments in secured transactions as a finance mechanism; however, it is too soon to tell.

With their primary goal to "provide a broad policy framework for an effective and efficient secured transactions law,"[25] the Working Group determined the law should be designed:

> (a) To promote low-cost credit by enhancing the availability of secured credit;
> (b) To allow debtors to use the full value inherent in their assets to support credit;
> (c) To enable parties to obtain security rights in a simple and efficient manner;
> (d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
> (e) To validate non-possessory security rights in all types of assets;
> (f) To enhance certainty and transparency by providing for registration of a notice in a general security rights registry;
> (g) To establish clear and predictable priority rules;
> (h) To facilitate efficient enforcement of a creditor's rights;
> (i) To allow parties maximum flexibility to negotiate the terms of their security agreement;
> (j) To balance the interests of all affected persons; and

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[21] "The [Guide is the] first comprehensive international instrument in the field of secured transactions law." Penina Mbinya Machoka, *Towards Financial Sector Development—the Role of the draft UNCITRAL Guide on Secured Transactions*, 21 J.I.B.L.R. 529, 530 (2006).

[22] *Legislative Guide, supra* note 1.

[23] *Id.*

[24] *Id.* ¶ 12 at 7. This even included the coordination of its provisions for recognition and secured creditor rights over secured assets and the rights of enforcement have been coordinated with Working Group V of UNCITRAL, which has prepared the Guide on Insolvency Law. For a further discussion, *see* M. R. Umarji, Role of Secured Transactions to Mobilise Credit and Need for Mobilizing the Law (2007), *available at* http://www.uncitral.org/pdf/english/congress/Umarji.pdf.

[25] UNCITRAL, 40th Sess., June 25-July 12, 2007, *Note by the Secretariat: Recommendations of the UNCITRAL Draft Legislative Guide on Secured Transactions*, U.N. Doc. A/CN.9/631 (Mar. 16, 2007) [hereinafter *Recommendations*], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/817/11/PDF/V0781711.pdf?OpenElement.

> (k) To harmonize secured transactions laws, including conflict-of-laws rules.[26]

Each of these key concepts recognizes the need for a long-term plan to develop a harmonized secured transactions legal framework. Most importantly, establishing these key objectives gives the Working Group broad guidance in drafting the various recommendations and will serve as a guidepost for the use of the Legislative Guide as a domestic and regional harmonized drafting tool.

One of the most remarkable aspects of the Guide is its breadth of coverage. Other conventions and legal texts enumerate similar key concepts,[27] however, none are as comprehensive in their coverage of the entirety of secured transactions. Most prior texts were limited in focus, usually seeking to establish rules to govern only one type of collateral or a single type of security interest.[28] The Guide is the modern attempt to accomplish all of these goals within a single framework, covering the entire field of secured transactions.

Based upon these broadly stated key objectives, the Working Group divides the Legislative Guide into two main parts: recommendations (in general and specific to particular asset types) and suggested text.[29] The Guide clearly recommends that, in key areas, states adopt concepts imitating the U.S. Uniform Commercial Code Article 9.[30] The use of Article 9 concepts in an international legislative guide, however, presents some problems, mainly because of different approaches to property law and insolvency in domestic legal systems. The Working Group's recommendation of the use of Article 9 concepts is a serious

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[26] *Id.* at 10-11.

[27] *See* Int'l Institution for the Unification of Private Law [UNIDROIT], Convention on International Interests in Mobile Equipment, *available at* http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf (last visited Aug. 10, 2010) [hereinafter Cape Town Convention]; United Nations, Convention on the Assignment of Receivables in International Trade (2004), *available at* http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf [hereinafter Receivables Convention], *see* European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (2004), *available at* http://www.ebrd.com/downloads/research/guides/secured.pdf [hereinafter EBRD MODEL LAW].

[28] *See* CAPE TOWN CONVENTION, *supra* note 27; *see* Receivables Convention, *supra* note 27.

[29] *See, e.g.*, *Legislative Guide*, *supra* note 1, at 91 (specifically dealing with Bulk Assignments); *see also id.* at 143 (relating to Recommendation 34 concerning third party effectiveness).

[30] *Cf.* U.C.C. § Rev. 9-502 cmt. 2 (2000)*; see also Recommendations*, *supra* note 25, Recommendation 55(b), (comparing notice requirements).

step towards the wide-scale adoption of a U.S.-style secured transactions law.[31]

The Guide is designed to allow all debtors to use the full value inherent in their assets to support credit, such that there will be equal treatment of diverse sources of both credit and secured transactions.[32] This approach includes retention of title devices as well as assets in bulk and in future assets.[33] Moreover, parties should be able to obtain security rights in a simple and efficient manner, without unnecessary forms, overly restrictive collateral descriptions, or prohibitively difficult filing procedures.[34]

Also, the Guide seeks to establish a registry system, based upon notice filing,[35] within a general registry.[36] Notice-based registration gives states greater comfort in the system and recognizes a basic first–in-time, first–in-right approach to priority.[37] However, one should not misunderstand the basics of the priority system, as the Guide still allows for the creation of (and protections associated with) proceed tracing[38] and purchase money security interest.[39]

Despite this seemingly simplistic approach, the Guide does not attempt to reduce all asset types into a single, over-simplified system. The Working Group recognized the distinction between general assets and the highly complex structures created in some asset types.[40] As such, the Guide contains specific provisions in relation to some asset types, such as receivables and proceeds.[41] The basic provisions are

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[31] *Id.*

[32] *See Legislative Guide*, *supra* note 1, ¶ 11, at 3.

[33] *See Recommendations*, *supra* note 25, Recommendation 78(c), at 23. In fact, the draft provides that security rights may be created not only in assets that exist or belong to the grantor at the time of the security agreement, but also in assets that arise or are acquired by the grantor thereafter, allowing a single security agreement to cover present, future, or after-acquired assets. For a further discussion, *see* Spiros V. Bazinas, *Key policy Issues of the UNCITRAL Draft Legislative Guide on Secured Transactions*, *in* RÉFORME DES SÛRETÉS MOBILIÈRES: LES ENSEIGNEMENTS DU GUIDE LÉGISLATIF DE LA CNUDCI, (Bénédict Foex, Luc Thévenoz and Spiros V. Bazinas eds., 2007).

[34] *See Recommendations*, *supra* note 25, Key objective (1)(c)-(e), at 3, and Recommendation 58, at 19.

[35] *Id.* Key objective (1)(f).

[36] *Id.* Discussed in greater detail at Recommendation 55.

[37] This, of course, is the general rule. *See id.* Recommendation 78(a), at 23.

[38] *See id.* ¶ 18 (providing that the security right in the encumbered asset should extend to its identifiable proceeds).

[39] *See id.* ¶ 11.

[40] *See id.* Part IV(B).

[41] *Id.*

sometimes specific in relation to asset types.[42] For example, the manner in method of creation of a security right,[43] registration,[44] the rights and obligations of the parties,[45] the effects of security rights on third parties,[46] and the priority rules,[47] are all slightly different among the various asset characterizations. However, this should not be viewed as a need to overcomplicate a simple text. Instead, the distinctions are necessary to allow the various asset types to exist within the larger framework of a single secured transactions legislative guide. For example, in relation to a security right, in a right to payment of funds credited to a bank account, the Guide specifies that the security right may be made "effective against third parties by registration . . . or by the secured creditor obtaining control with respect to the right to payment of funds credited to the bank account."[48] The concept of 'control' is not unfamiliar within the United States,[49] however, it also is not widely accepted by states that do not follow a modern secured transactions system, such as Article 9.[50] However, this concept should be considered essential in relation to the narrow asset types of bank accounts and negotiable instruments.[51] As such, the Guide succeeds in not being overly simplistic in accomplishing its stated goals, by recognizing differences inherent in certain types of assets.[52]

It is the careful drafting of general recommendations and asset-specific recommendations that may eventually be heralded as ground-

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[42] *See id.* Parts IV, V, VI, VII, & VIII.

[43] *Id.* Part IV.

[44] *Id.* Part VI.

[45] *Id.* Part VIII.

[46] *Id.* Part V.

[47] *Id.* Part VII.

[48] *Id.* at 16.

[49] U.C.C. §§ 9-104-06, 314 (2000).

[50] *See* Michael B. Carsella, *Foreign Territory: Can the Rest of the World Join Us on Asset-Based Lending?* 14 BUS. L. TODAY 47, 48 (2005) ("In the vast majority of countries, you still need to take possession of personal property to effectuate a pledge"). *Id.* at 49 ("yet it is interesting to note that those countries that have historically been the most hospitable to the notion of a non-possessory security interest in someone else's property are common law countries").

[51] For the Legislative Guide's emphasis on control regarding bank accounts, *see Recommendations*, *supra* note 25, ¶50, at 16. For the U.C.C.'s emphasis on control *see* U.C.C., *supra* note 49.

[52] *See Recommendations*, *supra* note 25, at 9-11 (asset-specific recommendations on creation of security right); 16-17(asset-specific recommendations on effectiveness of a security right against a third party); 27-29 (asset-specific recommendations on priority of a security right); 29-31 (asset-specific recommendations on rights and obligations of the parties to a security agreement).

breaking within the area of secured transactions. Within the current legislative initiatives, there are few texts that maintain the overall goals of the drafting text and adopt such a robust approach to asset specific recommendation.[53] While some may argue that other texts do in fact contain similar provisions, the Guide is unique because it uses this approach throughout the text.[54] Similar to the eventual approach adopted by UNIDROIT in its Convention on International Interests in Mobile Equipment,[55] the Legislative Guide uses a set of general guidelines to unify the approach and then recommends specific provisions in relation to the asset type in question.[56] Provided the asset-specific provisions mirror the overall framework, this approach may be the drafting technique to be mimicked for some time to come.

IV. The Ongoing Debate and the Argument to move the Debate Forward

Despite the Guide's robust coverage, several issues relating to harmonization must be resolved before the efforts can move forward. The hottest debates concern two central issues: first, the adoption a unitary security device, defined by the function it serves, and second, what approach should be adopted to remedy conflict of law issues in relation to the third party effects of the security agreement.[57] Until each of these issues is fully addressed, harmonization will remain difficult to achieve.

1. *Unitary Security Devices Defined By The Function Served*

Before the modern secured transactions mechanism, such as that found within the Guide, "the lawyer had to work with a variety of security devices, each governed by its own law."[58] For example, it was often the case that a party could secure property using a pledge, an assignment, a chattel mortgage, a chattel trust, a trust deed, a factor's lien, or

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[53] *See id.* For a contrasting description of Article 9 based modern texts, *see* Gabriel, *supra* note 19, at 1126 ("All transactions that function to secure debt by an interest in personal property are treated in the same way.").

[54] *See Recommendations*, *supra* note 25, at 9-11; *see also supra* text accompanying note 52.

[55] *See* Cape Town Convention, *supra* note 27, at 138, 140.

[56] *E.g.*, *Recommendations*, *supra* note 25, at vii (detailing structure of Section V, "Priority of a security right," as organized into general remarks, asset-specific remarks, and recommendations).

[57] *See infra* Part III.

[58] *In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1048 (9th Cir. 2001) (quoting James J. White & Robert S. Summers, Uniform Commercial Code § 30-1, at 2 (4th ed. 1995)).

a conditional sale.[59] Each of these devices carried with it an elaborate set of rules that controlled its use, and each conferred different rights and liabilities upon the contracting parties.[60] Modern secured transactions regimes bring the "long history of the proliferation of independent security devices . . . to an end."[61] Modernization does so in part by introducing a body of law that governs a "single, unitary security device" commonly referred to with a single term—the security interest.[62]

Of course, this unitary security interest is one of the distinctive features of modern secured transaction mechanisms.[63] The unitary concept originates from the belief that all security interests perform an identical function.[64] This statement is based on the belief that "the essence of a security interest is not determined by the formal legal framework out of which it arises, but in what it seeks to accomplish."[65] Consequently, most modern secured transactions laws define a security interest in functional terms.[66] For example, the Guide describes a security right as "a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right."[67] This definition allows the finder of fact to ignore the label or description created by the parties and, instead, recognize a security interest where the transaction gives a creditor a functional interest in the property that secures payment or performance of an obligation.[68] This type of approach allows a greater variety of transactions to fall

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[59] *See id.* at 1048 (citing GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.1, at 296 (1965)). In fact, at the time, non-statutory common law rules governed some devices, such as the pledge, and state legislation regulated other devices, such as chattel mortgages and conditional sales; *see* Peter Winship, *The Legal Framework to Secure Loans in the United States: A Comprehensive System for Creating Security Interests*, CENTER FOR ECON. ANALYSIS OF LAW, 2001, at 1.

[60] *See Cybernetic*, 252 F.3d at 1048.

[61] *Id.* at 1049 (quoting GILMORE, *supra* note 59, § 10.1, at 296).

[62] *Id.* at 1049 (quoting WHITE & SUMMERS, *supra* note 58, § 30-1, at 2).

[63] *See id.* at 1048-49.

[64] "[R]egardless of the form of the transaction or the name that parties have given to it." U.C.C. § 9-109 cmt. 2 (2000).

[65] Michael G. Bridge et al., *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567, 577 (1998-1999).

[66] *See id.* at 572.

[67] *Recommendations*, *supra* note 25, at xv. This should seem familiar to a U.S. lawyer as U.C.C. Article 9 defines a security interest as an "interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201 (35) (2001).

[68] *See* U.C.C. § 9-109 cmt. 2 (2000).

under secured transactions law.[69] For many, this principle is one of the main advantages of the modern secured transactions mechanism.[70]

Moreover, this approach broadens the reach of secured transactions law. It would apply to various transactions, such as sales involving title retention,[71] the consignment of property for resale, as well as leases of property.[72] This classification structure limits parties' ability to subvert the requirements of the secured transactions regime by creating a transaction that serves essentially as security but is labeled otherwise.[73]

Still, the use of a unitary security interest, defined by its function, is far from a closed debate. Europe remains resistant to such a device:

> The unified treatment of security interests in personal property embodied in Article 9 of the Uniform Commercial Code (and adopted in the Canadian Personal Property Security Acts), which treats title-retention devices as security interests, has long been accepted as the sensible business approach in the United States and Canada, where in both cases all the federal units except one are common law jurisdictions, but, as Professor Garro has pointed out, has not taken root in Europe, where importance is attached to the freedom of parties to choose different instruments with different legal effects even if serving the same economic function.[74]

Even when the coverage of the unitary interest is more narrow, there is still resistance:

> In the early stages of work on the Cape Town Convention it was envisaged that the functional approach to security interests which was the cornerstone of Article 9 would be adopted, so that the convention would deal simply with security interests in mobile equipment, including sales under reservation of title and certain types of finance lease. But this was later abandoned when it became clear that there was no enthusiasm for it from the European members of the Study Group.[75]

Europe, and England in particular, continues to reject the unitary security interest for two basic reasons: (1) the system over-captures interests never intended to be within the secured transactions system, and (2) the system defies already existing property law.[76] Also, as will be

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[69] *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 21-2 (5th ed. 2000).

[70] *See* Alejandro M. Garro, *Harmonization of Personal Property Security Law: National, Regional and Global Initiatives*, 8 UNIF. L. REV. 2003 1/2 357 (2003).

[71] Unlike England—to name just one. *See* Bridge et al., *supra* note 65.

[72] *See id.*

[73] *See id.*

[74] Goode, *supra* note 12, at 345.

[75] *Id.*

[76] *See id.* at 345; *see also* Bridge et al., *supra* note 65, at 575.

discussed in the 'ongoing issues' section, England rejects the unitary system for a third reason: that it is too costly.[77]

One of the Europeans' criticisms of the unitary, functionally defined security interest system is that it pulls in secured transactions which were never intended to be subjected to the regime.[78] The essential argument according to Professor Bridge,[79] and others,[80] is that the use of a functional approach captures within the secured transactions regime every finance mechanism that uses collateral as a means to secure payment or performance.[81] This 'over-capture' eliminates other viable means of finance, and levels the devices into one unitary legal regime.[82] As such, any advantages developed or realized through the use of other mechanisms are eliminated.[83]

Moreover, in many systems, the further a particular interest moves away from a full ownership right, the fewer enforcement rights exist.[84] Consequently, it is argued that functional secured transactions regimes defy the concepts embodied in traditional property law.[85] Michael Bridge asserts that

> The problems encountered in attempting to apply a purely functional analysis to title based transactions such as conditional sale, bailment, and trust–and to legal issues arising outside of, if closely connected to, the ones which Article 9 systems address—show that concepts which focus on the distinction between what is owned and what is owed may be unavoidable in the law.[86]

Therefore, the use of a unitary and/or functional secured transactions regime is not legally possible as the concept of title is a necessary element of any secured transactions system.[87]

The arguments against the use of a unitary, functionally defined secured transactions system are losing their clout as more and more systems move toward secured transactions systems that recognize both

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[77] Roy Goode, *Security in Cross-Border Transactions*, 33 TEX. INT'L L.J. 47, 49 (1998). *See also* The Law Commission, *Company Security Interests*, 2005, Cm. 6654, §1.4, at 5, *available at* www.lawcom.gov.uk/.

[78] Bridge et al., *supra* note 65, at 576-78.

[79] *See id.* at 577-78.

[80] *See* Goode, *supra* note 12, at 345.

[81] *See* Bridge et al., *supra* note 65, at 577-78.

[82] *Id.* at 621-22.

[83] *See id.* at 621-23.

[84] *See id.* at 573.

[85] *See id.* at 575.

[86] *Id.* at 567.

[87] *See id.* at 577-78.

concepts.[88] In addition, the weight of the argument is further lessened by the growing number of domestic-based systems that have moved away from the English or European approach and have moved towards—or are soon to move towards—unitary and functionally defined secured transactions regimes.[89] States such as Canada,[90] and New Zealand,[91] and newcomers Australia,[92] and France,[93] are now moving toward or have fully incorporated unitary security devices defined by the function of the device.[94] As the number of domestic systems grows, the prior criticisms lose weight.

While the debate is ongoing, the question remains what should be done in the interim to allow for the harmonization of secured transactions. In terms of the issue of unitary security devices, the weight of the outcome of the debate can be reduced by finding temporary, partial solutions. For example, the OAS Model Law on Secured Transactions uses a uniform registry and priority system to eliminate some of the main concerns arising from various asset types.[95] Under this approach, states adopting the model law must create a unitary and uniform registration system for all security devices.[96] Consequently, enacting states may keep the individual designations of pledges, chattel mortgages, retention of title or conditional sales, and all other traditional devices, but all must be recorded in the same manner,[97] in the same place,[98] and subject to the same principle of first-in-time, first-in-right.[99] While this does not achieve the final goal of a unitary security interest, the approach is having limited success as a first step in modernizing various domestic laws.[100] As such, one could argue this is a

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[88] *See id.* at 569-70.

[89] *See id.*

[90] *See* Canada's Personal Property Security Acts, *supra* note 16.

[91] *See* Personal Property Securities Act (N.Z.), *supra* note 18.

[92] *See* Allan, *supra* note 17.

[93] *See* Veneziano, *supra* note 15.

[94] *See* sources cited *supra* notes 15-18.

[95] Organization of American States [OAS], Sixth Inter-American Specialized Conference on Private International Law [CIDIP-VI], *Model Inter-American Law on Secured Transactions*, CIDIP-VI/RES.5/02 (Feb. 27, 2002), *available at* http://www.uncitral.org/pdf/english/colloquia/3rdSecTrans/John_Wilson_ML.pdf [hereinafter OAS Model Law]; *see id.* Titles IV and V.

[96] *See id.* art. 44.

[97] *See id.* art. 38.

[98] *See id.*

[99] *See id.* art 48.

[100] The OAS Model Law has been used throughout Latin America and the Caribbean. *See generally* Boris Kozolchyk & John M. Wilson, Nat'l Law Ctr. for Inter-Am. Free Trade, The Organization of American States' Model Inter-American Law on Se-

reasonable interim provision while the harmonization efforts move forward.

In contrast, the Guide adopts a position focused on compromise between domestic systems.[101] The Guide clearly prefers that title retention devices be considered within the functionally integrated and unitary approach[102]. The Guide softens the position however, by allowing adoption of one of two available options in relation to acquisition financing devices.[103] The first option is based upon a state's willingness to collapse the distinction between various forms of acquisition financing transactions by adopting a single characterization of their security devices.[104] The second option allows states to retain their existing scheme, as well as the characterizations the parties give to their agreement.[105] However, states that adopt the second approach would then need to create functional equivalence between the various devices, providers, and effects of the divisions within the area.[106]

While the Guide may seem to provide a reasonable effort to compromise, one could argue that the elaborate attempts at compromise may not be in the best interest of long-term harmonization. Moreover, the Guide's elaborate attempt to allow states to retain devices that serve the same function as a security device without fully treating it as a security device under the law may do nothing more than add to the confusion within the area. As Christian von Bar and Ulrich Drobnig discovered in their *Study on Property Law and Non-Contractual Liability Law as They Relate to Contract Law,* businesses and legal professionals complain about differences in the field of credit securities, particularly different manifestations of title retention.[107] Such confusion stifles business because participants find it difficult to use certain types of assets

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CURED TRANSACTIONS 62-64 (2002), *available at* http://www.natlaw.com/hndocs/artoasmlbkjw.pdf.

[101] *See* UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, ¶¶ 1-3, at 1, U.N. Sales No. E.09.V.12 (2010) [hereinafter FINAL LEGISLATIVE GUIDE].

[102] Consider within the context of an 'Acquisition Security Right' under the Legislative Guide. The FINAL LEGISLATIVE GUIDE recommends that states adopt the second of these two approaches to enacting a "functional, integrated, comprehensive and uniform" secured transaction regime. FINAL LEGISLATIVE GUIDE, *supra* note 101, ¶ 65, at 334.

[103] *See id.* ¶¶ 178-202, at 374-81 (overview of available options for states).

[104] *See id.* ¶ 75, at 336-37.

[105] *See id.* ¶ 76, at 337.

[106] *See id.* ¶ 80, at 338.

[107] CHRISTIAN VON BAR & ULRICH DROBNIG, STUDY ON PROPERTY LAW AND NON-CONTRACTUAL LIABILITY LAW AS THEY RELATE TO CONTRACT LAW, SANCO B5-1000/02/

as collateral to secure lending. Despite such confusion, the Legislative Guide may provide a decent, and important, first step down the road of harmonization.

2. *Third Party Effects and Conflict of Law Rules*

Under the traditional conflicts approach, the creation, perfection, and priority of a security interest is governed by the law of the collateral's location.[108] While historically this approach has made sense, today, because of the ease at which property is now often moved across national borders, the location of the collateral can implicate various domestic laws.[109] Moreover, security interest holders can also be faced with an unfamiliar or unfriendly system that fails to adequately protect its validly created foreign security interest.[110] For example, some systems do not recognize certain types of security interests, or they fail to recognize after-acquired property clauses, or provide limited or no enforcement rights upon default.[111] In fact, some systems refuse to recognize validly created foreign security interests if the security interest is not recognized in the receiving jurisdiction, or refuse to recognize foreign created security interests in the domestic bankruptcy estate.[112] Situations such as these impose additional costs upon the security interest holder because the holder must both know and comply with various domestic laws to adequately protect its interest. Moreover, in many situations, this high level of uncertainty concerning applicable law and enforcement rights can impact a business's use of certain asset types as collateral, and can, in some circumstances, lead to some asset types being unavailable for use as collateral.

Because of various national, non-harmonized approaches to secured transactions, it has been difficult to agree on and to adopt a general set of conflict of law rules applicable to secured transactions.[113] The biggest roadblocks arise in terms of third-party effectiveness and

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000574, ¶¶ 525-29 (2003), *available at* http://ec.europa.eu/consumers/cons_ int/safe_shop/fair_bus_pract/cont_law/study.pdf.

[108] *See id.* ¶¶ 525-28.

[109] *See* U.C.C. § 9-301 (2009).

[110] *See* Ross Cranston, *Theorizing Transnational Commercial Law*, 42 TEX. INT'l L.J. 597, 606 (2007) (discussing the movement of assets across national borders).

[111] *See* Heywood Fleisig, *Secured Transactions: The Power of Collateral*, 33 FIN. AND DEV. 2 (1996). *See also* Carsella, *supra* note 50, at 48.

[112] *See* Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings*, 33 TEX. INT'l L.J, 53, 65-66 (1998).

[113] *See* Burman, *supra* note 7.

priority.[114] This is primarily because security rights are contractual in nature but have a proprietary effect.[115] A security interest is contractual in that the security agreement establishes the scope of the interest and the rights of the creditor upon default of the debtor.[116] However, within the modern secured transactions system, the rights that occur upon default extend against third parties, other creditors and insolvency claims.[117] This is because a properly perfected security interest grants a position of 'priority' over other creditors, giving the security interest holder the rights to the collateral or proceeds to the exclusion of others.[118] The ability to exclude third parties, other creditors, and insolvency claimants implicates domestic property and insolvency law.[119] These areas have proven to be very difficult to harmonize,[120] which has not proven any less true within the realm of secured transactions.

One attempt to harmonize applicable law has been advanced in the United Nations Convention on the Assignment of Receivables in International Trade.[121] Under the Receivables Convention, "[a]ny conflict involving an international assignment or an international receivable would be resolved by referring to one single law, namely the law of the location of the assignor."[122] Appreciate the pure simplistic approach and the groundbreaking effect of this provision. The law of the assignor will provide the applicable law to *any* issues in relation to

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[114] *See Recommendations*, *supra* note 25, Parts V and VII.

[115] *See* Juliet Taylor, *Retention of Title and the Trans-Tasman Supply of Goods*, 12 N.Z. BUS. L. Q. 71, ¶ 4.3.1 (2006).

[116] *See id.*

[117] *See Recommendations*, *supra* note 25, Part X(A).

[118] *Id.* Part V.

[119] *See id.*

[120] Europe continues to struggle with these types of difficulties—although headway is slowly being made. *See generally* The EULIS Service: European Land Service Information (2010), *available at* http://www.eulis.org (allowing visitors to search some EU member states' land registries online).

[121] *See* The United Nations Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, Preamble, U.N. Doc. A/RES/56/81 (Dec. 12, 2002) (promoting the unification of international trade law amongst member nations).

[122] Michel Deschamps, *The Priority Rules of the United Nations Receivables Convention: A Comment on Bazinas*, 12 DUKE J. COMP. & INT'L. L., 389, 391 (2002).

priority.[123] However, it is this simplicity that has lead to criticism.[124] Some commentators and drafters complain that:

> [The] issue seems to have been effectively avoided by . . . resort to private international law . . . . *If* this proposal is adopted at the next session it will in my view make the completion of the convention much easier. However, there is a danger . . . that *all* questions of difficulty might be referred to private international law. In my view a convention which simply referred all problems to the assignor's state of business would hardly be worth drafting.[125]

Although this criticism is a bit of an overreaction, it does highlight the valid concern that a simplistic approach may leave many issues unresolved. The Convention's approach leads to a greater level of certainty by resolving priority conflicts with a single, predictable legal conclusion.[126] Creditors, however, will still be left to grapple with the assignor's domestic law.

In contrast, the Legislative Guide creates a set of comprehensive conflicts of law provisions.[127] As a general rule, the Guide proscribes that the law of the state in which the property is located guides the creation of a security right in tangible property, third-party effectiveness, and priority.[128] However, because of concerns that such an approach would result in uncertainty, in the case of tangible property commonly used in more than one state, it was determined that the

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[123] Except in the face of insolvency proceeding and/or mandatory law. *See* G.A. Res. 56/81, *supra* note 121, ¶ 30 (stating that the law of the assignor does not govern in the face of insolvency proceeding and/or mandatory law).

[124] *See* Mara E. Trager, *Towards a Predictable Law on International Receivables Financing: The UNCITRAL Convention*, 31 N.Y.U. J. INT'L L. & POL. 611, 631 (1999) (noting criticism directed towards the United Nations Convention on the Assignment of Receivables in International Trade).

[125] *Id.* at 631 (quoting Letter from Christopher Doyle, Office of the Attorney General, to Trager (Nov. 10, 1997) (emphasis in original) (on file with Trager)).

[126] *See* G.A. Res. 56/81, *supra* note 121, ¶ 30 (resolving priority conflicts by relying upon the law of the State where the assignor of the property is located).

[127] *See generally* UNCITRAL, Sub-Comm'n on Security Interests, *Report of Working Group VI (Security Interests) on the Work of its Twelfth Session*, ch. XIII, U.N. Doc. A/CN.9/620 (Feb. 26, 2007) [hereinafter UNCITRAL, *Conflict of Laws*] (creating provisions dealing with conflicts of laws).

[128] *See Recommendations*, *supra* note 25, ¶ 202 (recommending that the law of the State where the grantor is located shall govern security rights in tangible property); *see also* UNCITRAL, *Conflicts of Laws*, *supra* note 127, ¶ 32 (promoting the same recommendation as the above UNCITRAL section).

security rights in such property should be subject to the law of the state in which the grantor was located.[129]

In this situation, it is possible that the Guide has adopted the more reasonable approach to conflicts issues. While the end result may not be ideal and looks American on its face, eventually a single conflicts approach will be necessary if harmonization is ever to be achieved. However, until the vast majority of domestic systems begin to use this approach it may be problematic, as the solution seems to differ substantially from many already existing domestic laws.

V. The Next Step Forward and Why There Will Not be a Single Harmonization Instrument Any Time Soon

The harmonization of secured transactions will not occur in a single instrument any time soon because any new secured transactions law must be harmonized with an eye toward the already existing legal structure. Secured transactions harmonization requires states to consider the relationship between secured transactions and the general law of obligations, property, procedure, and, of course, insolvency law. This places a very high burden upon states, which want to modernize their secured transactions law, as oftentimes it requires the state to reform vast portions of their law.

The most formidable obstacles, however, are not faced by systems that need major reform, but rather by domestic systems that need reform but are already semi- modern in their approach towards secured transactions.[130] The best example of this difficulty can be demonstrated by a quick examination of the situation in England. England has a long and storied secured transactions tradition, but the present law stands in stark contrast to the modern system.[131] For example, in England only certain types of charges can be created and filed, and borrowers file the instrument.[132] England's largest harmonization problem however, is the divergent approach towards a unitary security

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[129] *See* UNCITRAL, *Conflict of Laws*, *supra* note 127, ¶ 32 (responding to concerns over uncertainty when tangible property is used in numerous states).

[130] *See* Goode, *supra* note 77, at 49 (discussing ability to implement Model Laws better in less modern countries versus more developed systems).

[131] *See* U.K. Law Commission, Company Security Interests, Law Com No. 296, 2005, at 2 (critiquing the old securities system as being out of touch with modern times).

[132] For a brief discussion and description, see Company Charges, http://www.companieshouse.gov.uk/about/gbhtml/gba8.shtml#one (last visited Sept. 7, 2010) (citing Companies Act, 1985, c. 6, §§ 395-96 (Eng.)).

device and the use of formal requirements.[133] While the modern secured transactions mechanism uses a unitary model and function over form, England remains tied to property law concepts and, as such, uses different types of security devices that are only recognized within a very form-based system.[134] These fundamental differences jeopardize long-term harmonization, as England has recently decided to not undergo modernization efforts.[135]

England's decision to reject modernization is understandable as England is currently under no pressure to reform. England is one of the world's players in terms of finance and, as such, has been able to justify its rejection of the modernization efforts on the basis of burden and cost.[136] Put simply, it would be too difficult and too costly to update all of the affected parties, and in turn it would be too difficult and costly for those parties to overhaul their already existing structures.[137] These reasons seem justified, given that England is one of the world financial players and is not within a region that has undergone major modernization efforts. As such, even though the English law does not match its neighbors', modernization efforts would not change the situation.[138] The time is simply not right for England to take on this burden, as the benefits seem small.[139] England's position demonstrates the ongoing barriers to harmonization—some of the major players in

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[133] *See* MICHAEL BRIDGE, PERSONAL PROPERTY LAW 169 (Oxford University Press, 3rd ed. 2002).

[134] *See* ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY 10 (Sweet and Maxwell, 3rd ed. 2003) (1982).

[135] U.K. Law Commission, Company Security Interests, Law Com No. 296, 2005, at 3. This was the third time the Law Commission has examined the topic in recent years. In 2002, the Law Commission published a consultation report (CP No 164) and in 2004 a more detailed consultative report was published (CP No 176). *See id.* at 6 (citing U.K. Law Commission, Registration of Security Interests: Company Charges and Property Other than Land, Consultation Paper No. 164, 2002; U.K. Law Commission, Company Security Interests, Consultation Paper No. 176, 2004). These reports followed a long line of publications by noted scholars on the topic. *See* A.L. DIAMOND, A REVIEW OF SECURITY INTEREST IN PROPERTY (H.M.S.O. 1989); GOODE, *supra* note 134.

[136] *See* U.K. Law Commission, *supra* note 135, at 5.

[137] *See id.* at 21 (mentioning the criticism and resistance to modernization provisions that challenge existing structures).

[138] *See* Goode, *supra* note 77, at 48 (discussing the differences between common law jurisdictions' approach to securities, like England, and civil law jurisdictions' approach, like many other countries in the region).

[139] *See* U.K. Law Commission, *supra* note 135 (explaining the lack of need to adopt sweeping changes in the existing law at this time).

terms of finance do not feel enough pressure to justify the burdens required to undertake modernization.[140]

Moreover, domestic systems that are semi-modern, such as England, cannot risk becoming parties to a convention within the area, as it will most likely stand in stark contrast to the already existing domestic law in several key areas.[141] Consequently, semi-modern states cannot run the risks associated with participating in a dual system, as one secured transactions law would apply to purely domestic transactions, and another set of laws would apply to transactions with an international element. The difficulties and confusion created would be too great to overcome. The alternative is to create a convention with a large number of exclusions; however most of the exclusions would involve key areas and thus thwart the goals of harmonization.

The lack of pressure on major players can be overcome by domestic systems modernizing their secured transactions law. Unfortunately, domestic reform must be the next step in the harmonization efforts. One could argue that a single convention might push the issue forward, but to date attempts such as this have not been well-received. This is not surprising as the divergences are great and the impact upon other areas of law would be widespread. The Guide is a good step forward in agreeing to essential concepts so that domestic systems can begin to modernize their existing laws, but the harmonization process will not be accomplished in a single step, and it will not occur any time soon.

VI. Conclusion

The harmonization of secured transactions law is slowly becoming a reality. Although many domestic systems remain in a non-modern state, inroads are being made to facilitate harmonization. It appears, at this time, that domestic harmonization must be a primary step in the process. Clearly, the UNCITRAL Legislative Guide goes a long way toward accomplishing this goal. Time will tell if the Guide is in fact used as it is intended, but, as one of the first legal texts designed to cover the entirety of secured transactions and all the corresponding issues, one must appreciate the effort involved. However, several of the areas addressed within the text may remain issues for some time to come

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[140] *See* Goode, *supra* note 77, at 49 (stating "the differences between national laws too great" to make complete harmonization realistic).

[141] *See id.* at 48-49 (clarifying the problems associated with using two different legal systems for security interests).

and this will slow the harmonization process. The use of the alternative choices within the text could assist in lessening the risks associated with systems using the Guide as a basis of domestic harmonization. But problems remain as criticisms have also emerged based upon the Guide seeming very American in its approach. However, criticism of a legal text based merely on its influences is a bit short-sighted. The time has come to put aside limits to harmonization and to begin to recognize the value that would occur if the harmonization of secured transactions could be achieved. This is the case even if the harmonization has to be accomplished at a slower pace than hoped and with some remaining divergences not being fully addressed.