

The Evolution of Secured Transactions

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Introduction

Most scholars agree that legal rules favoring the security and transfer of credit are vital to economic development². Advanced secured transactions' laws provide more credit by reducing the costs of borrowing and thus, increasing the amount of available credit in the economy³. Assuming that debt offers an advantage to firms, any reduction in the costs of such debt taking enhances that advantage. The basic device, which provides this cost-reduction, is an asset-based priority credit system⁴. However, commentators have not yet reached an agreement on the question what is the most efficient way for corporate finance (i.e, debt or equity), and what is the right combination of these two financing ways. Modigliani and miller argued in 1958, that the firm's value does not depend on the method of finance⁵. Nevertheless, the debate over this conclusion is still not concluded⁶.

Thus, in terms of the need for secured transactions' legislation, as a promoter of credit taking, we need to assume that firms receive an advantage by having more credit opportunities, and only if this assumption is true, we can conclude that advanced secured transaction legislation is necessary. Scott argues that a regime that privileges secured creditors over unsecured ones (or in other words, a system in which secured financing is more preferred than unsecured financing), may enhance social welfare and thus, Article 9 is an important promoter of social welfare⁷.

The goal of this paper is twofold: The first goal is to compare the evolution of secured transactions' law in Civil Law and Common Law Legal Systems. The second goal is to examine whether harmonization of such laws among countries is

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² Tony Freyer, "Antebellum Commercial Law: common Law Approaches to Secured Transactions, 79 Kentucky Law Journal 59, in p. 593..

³ Alan Schwartz, Security Interest and Bankruptcy Priorities: A Review of Current Theories, 10 Journal of Legal Studies, 1, in p. 4.

⁴ Barry Adler, An Equity-Agency Solution to the Bankruptcy-Priority Puzzle, 22 Journal of Legal Studies, 73, in p. 77

⁵ Franco Modigliani and Merton miller, "The Costs of Capital, Corporation Finance, and the Theory of Investment, 48 American Economics Review, 261.

⁶ Robert Scott, The Truth About Secured Financing, 82 Cornell Law Review, 1437, in p. 1437-1438.

⁷ Ibid, p. 1456.

possible, and in particular, whether Article 9 to the Uniform Commercial Code (UCC 9), which was adopted in the US in the 1950's can provide a model for secured transaction legislation to other legal systems.

In part I, I begin by presenting the selection of legal systems. As mentioned above, the goal of the paper is to compare legal systems from the Common Law, (with the United States as a separate system), and the Civil Law Families. The legal systems presented in the paper are divided to three major groups: Core Countries, Developed Transplant Legal Systems, and Emerging Legal System.

The first group includes England, the United States, and Russia.

England represents the traditional Common Law core country. Normally, the **United States** is also considered as a core Common Law country with respect to several branches of law, but with respect to secured transactions' legislation, it will stand for a separate legal system⁸.

Russia represents a traditional Civil Law country⁹. The reason I chose to present the Russian system instead of other traditional Civil Law systems, such as Germany, is that in the latter, the current secured transactions regime is based on the traditional Roman law's system, and it is not likely to be changed in the near future. As opposed to Russia, which recently adopted a new secured transactions' regime, other countries in the European Community are not expecting to implement any significant changes in the secured transactions' laws in the near future.

The Second group includes Australia, Canada, and Quebec.

Australia, which is still a common law country, **Canada**, which combines common law influence, civil law features (Quebec), and US legislation's influence (not only with respect to secured transactions' legislation).

The third group includes various types of legal systems: Eastern Europe and former Union countries, and African countries.

In part I, I also present six major indicators for evaluating and comparing the different regimes. The first three indicators represent the substance of secured transactions – the contractual arrangements, the nature of secured interests, and the effect on the contractual parties. The next three indicators represent the major important technical aspects¹⁰ of secured transactions – priority rules, registration rules, and enforcement of secured interests. To conclude, Part I consist on a comparative analysis.

⁸ The enactment of UCC 9 reflected a departure from the traditional common law feature, which is based on case law. In fact, one can argue that the model of secured transaction in the US in light of UCC 9 is more similar to that of a civil law country.

⁹ In exploring the evolution of the civil law, I started with the Roman law, which provided the basis for most civil law countries' commercial legislation, including that of Russia and Germany.

¹⁰ Even though defining these indicators as "technical" may be misleading.

In part II, I present in details the evolution of secured transactions' laws in each legal system. This analysis is based on the above six indicators, and its primary goal is to demonstrate that not only the secured transactions' laws vary among legal systems, the pattern of evolution is also different

Part I

Chapter 1 - Selection of Legal Systems

Civil Law

Generally, Civil Law legal systems rely primarily on legislation. Moreover, Civil Law courts do not tend to interpret the laws but rather, to rely on the language of the laws. Thus, Civil Codes (including commercial codes) tend to be clear and organized. Current commercial laws in most civil law countries consist on comprehensive and detailed legislation, which include in most cases the specific rules of secured transactions within these codes.

Most Civil Law codes are rooted in classical Roman law¹¹. These fundamental rules were exported from the Roman law throughout Europe as a result of the activities of glossators and postglossators¹². Due to Colonialism, the Civil Law was exported from core countries such as Russia, France, and Germany, to other places, such as Quebec. The laws of secured transactions are not an exception to this trend; most European countries (except from England, of course) adopted the Roman law's doctrines of secured transactions, and in some Civil Law countries (such as Germany), the basic Roman principles still prevail as of today

Russia has a long history of commercial law legislation, which is dated back to the 16th century¹³. The Russian Commercial legislation is based on the Roman and the early German legislation.¹⁴ Secured transactions' legislation in Quebec is also based on the traditional Roman law principles. Quebec inherited its legal system from France, which is a traditional Civil law country. The reason for choosing Russia and Quebec as representatives for the civil law family is the recent commercial law reforms in these legal systems (Russia in 1992, and Quebec in 1993)¹⁵.

¹¹ Roger Goebel, *Reconstructing the Roman Law of Real Security*, 36 *Tulane Law Review*, 29.

¹² Konstantin Osipov, "The Genesis Of Russian Secured Transactions Law Before 1917", 42 *Clev. St. L. Rev.* 641

¹³ *Ibid.*, p. 653-655

¹⁴ *Ibid.*

¹⁵ For Canadian Reform, see: Michael G. Bridge, Roderick A. Macdonald, Ralph L. Simmonds and Catherine Walsh, *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 *McGill L.J.* 567. For the Russian and Eastern Europe Reform, see: Elizabeth Summers, *Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe*, 23 *Review of Central and East European Law*, 179 (1997).

As opposed to Russia, and to common law countries such as Canada, developed European countries, such as Germany and France (traditional civil law countries) as well as England (a common law country), do not currently consider to departure from their traditional commercial laws¹⁶.

Alongside with the recent Russian reform, recent commercial law reform took place in Eastern Europe and former Soviet Union countries, which are also Civil Law countries. In spite of their traditional reliance on the Civil Law regime, these countries were willing to fully adopt the UCC 9 - type legislation. The main reason for the willingness of transitional countries (as well as developing ones) to adopt the US model is straightforward – most commentators agree that the UCC 9 model is one of the most useful and successful pieces of commercial legislation, which provided simplicity and clarity to the US commercial laws. Moreover, it is argued that such clear legislation promoted credit transactions and thereby, promotes economic activity. According to Alan Schwartz, UCC 9's main success is in reducing the costs of credit not only in regular security, but also in after-acquired secured property¹⁷.

Transitional and developing countries need to promote availability of credit in order to foster development. Thus, it is obvious why these countries chose to adopt an instant and evidently, successful solution. The major question, which cannot yet be answered, is whether the US model is suitable to emerging economies. Ross Cranston states very clearly that Article 9 cannot be a model for Asian developing countries, and his reasoning is also applicable to other developed countries¹⁸. For a more detailed explanation on the unfitness of UCC 9 to developing countries, see below.

The adoption of the US model in Canada was derived from different grounds. A UCC 9-type legislation was fully adopted in all Common Law provinces, and partially adopted in Quebec¹⁹. Even though the desire to promote credit was an important consideration, the major reason for adoption the US model is the desire of Canada to continue its close commercial relationship with the US. Of course, it was easier for the Common Law provinces to adopt the US model, in light of the similarity of the Common Law rules in both legal systems. Nevertheless, the legislature in Quebec had much more difficulty in trying to do the same, and thus, the compromise is understandable²⁰.

¹⁶ Jacob Ziegel, Canadian Perspectives on Chattel Security Law Reform in the United Kingdom, 54 Cambridge Law Journal, p. 433, i. P. 445 (will be referred to as Ziegel 1995),

¹⁷ See Schwartz. P. 5-6.

¹⁸ Ross Cranston, Credit, Security and Debt Recovery: Law's Role in Reform in Asia and the Pacific, 39 St. Louis University Law Journal 759, in p. 776.

¹⁹ Ibid.

²⁰ See Bridge et.al

Common Law

Traditionally, in Common Law countries, the evolution of legal rules is attributable to case law. The Common Law regime is rooted in England, and the laws of secured transactions in England have been obviously developed by case law. As opposed to the Civil Law family, courts in Common Law legal systems tend to interpret the laws, and effectively, create the law. Secured transactions' rules in the 19th century were developed primarily through case law not only in England, but also in the US (see for example, the case of chattel mortgage – below)²¹. Nevertheless, while the US moved away from the case law development (with respect to secured transactions' laws), England still relies on its traditional Common Law regime. However, it should be mentioned that as of today, partial rules for secured transaction in England and Australia are located in the companies Acts and Insolvency Acts. Nevertheless, as will be described below, the location of these rules within the statutes is incidental²².

England has been an exporter of legal systems for many years, because of the Colonialism. The Common Law was adopted in various regions of the world, such as the United States, Australia, and Canada. The laws of secured transaction in The United States were similar to those of England until the 19th century. However, the states developed various complicated rules during the 19th century, which reflected attempts to innovate and departure from the traditional Common Law rules.²³

In fact, as of today, there is no unified statute for secured transaction in England (as well as in other Common Law countries, such as Australia and New Zealand). However, in England and Australia, secured transactions created by corporate debtors are subject to the Companies Acts in both countries. These rules are not only limited by scope, but also create more complexity in the legal systems, when combined with other common law rules governing secured transactions²⁴.

The complexity of secured transactions' legislation in the US existed until the middle of the 20th century. The enactment of UCC 9 in the US reflects a different approach than that of a traditional common law country. As most commentators agree, the remarkable feature of UCC 9 is that it abolishes the multiplicity of Common Law, equitable and statutory security devices and replaces them with the functional concept of a "security agreement" creating a "security interest". This concept is referred to as a "substance over form" principle. However, it is

²¹ Gilmore (1965), In the Preface.

²² For Australian Perspective, see: Anthony Duggan, Personal Property Security Refrom: The Australian Experience to Date, 27. Can.Business L.J. 176. For the English experience, see: Michael G. Bridge, How Far is Article 9 Exportable? The English Experience, 27 Can. Business L.J. 196.

²³ See Gilmore (1965), p. 25

²⁴ See Duggan, p. 180 for the Australian perspective, and Jacob Ziegel, Canadian Perspectives on Chattel Security Law Reform in the United Kingdom, 54 Cambridge Law Journal, p. 433 (will be referred to as Ziegel 1995), for the English perspective

important to emphasize that although UCC 9 abolished the multiplicity of previous doctrines, the previous rules prevail under the unified law. This feature is different from the civil codes in France and Germany, which were designed to be not only comprehensive, but also to replace the existing rules²⁵.

We must ask ourselves whether keeping the previous rules is preferable than replacing them. Gilmore argued that as a statute gets its independent personality, the pre-enactment law becomes less relevant. However, he believes that in the future, the pre-code rules may be useful in understanding the roots on which, the code is built on, and in shaping future developments of the law. Moreover, he also argued that the code is far from being perfect and therefore, such future developments will be necessary. Gilmore's conclusions are that the roots on which UCC 9 is based on are crucial²⁶.

In fact, the legislative process in the US with respect to secured transaction is the opposite from what one may expect from a Common Law legal system. Article 9 has been adopted by all fifty states of the United States, and its influence has been equally remarkable in Common Law Canada where various incarnations of the Personal Property Security Act ("PPSA") have been adapted from the Article 9 model

The different pattern of evolution of secured transactions' law among the above common Law legal system is remarkable. The US, Canada, and Australia received their legal systems from that of England. However, during the 20th century, different patterns of evolution occurred. The US chose to depart from the traditional common Law principles, and chose to rely on a detailed and comprehensive legislation. Canada and Australia also experienced different patterns of evolution: while Canadian Common Law provinces have been adopting secured transactions laws, which are similar to that of the US, since the 1960's (a process that is going on until today)²⁷, Australia (as well as New Zealand) has not agreed to adopt such rules (but several proposals for such an adoption were raised in recent years.)²⁸. Quebec ultimately declined to fully adopt the Article 9 model in its new Civil Code, but adopted it partially.²⁹

Another important similar feature of my selected Common Law countries is the Federal-States issue. Except for England, in all other three countries, the states have independent legal systems, and thus, they can actually resist any federal attempt to unify the commercial laws, which are traditionally, based on state legislation. Moreover, in Canada and the US, some states have not been under

²⁵ Gilmore - in the preface.

²⁶ Ibid.

²⁷ Ibid, and see also Jacob S. Ziegel, Canadian Perspectives on "How Far is Article 9 Exportable?", 27 Can. Business L.J. 226 (will be referred to as Ziegel 1996).

²⁸ See Duggan p. 176-178

²⁹ For Quebec's reform in 1993, see Bridge et.al. and also, see: Martin Boodman and Roderick McDonald, How Far is Article 9 of The Uniform Commercial Code Exportable? A Return to Sources?, 27 Can. Business L.J. 249.

Common Law legal systems (i.e. Quebec in Canada, and Louisiana in the US³⁰). The difference between Quebec and Louisiana is that the former did not follow the other Canadian provinces in adopting a UCC9 – type legislation, and the latter accepted the UCC model (the last state to adopt the model in 1974).

To summarize the situation of Common Law countries, the pattern of evolution in the above four countries is very interesting. England exported its legal system to the US, Australia, and Canada. However, the US departed from the traditional common law, and enacted a brand new secured transactions’ legislation. Moreover, not only that the US departed from the English law with respect to secured transactions’ laws, it influenced Canada to follow this change as well. Australia and New Zealand are currently in the middle – on the one hand, they still rely on the traditional English law. On the other hand, several calls for adoption of a UCC 9 – type legislation have been seriously considered in recent years³¹.

Chapter 2 – The Indicators

A. General

The first three selected indicators focus on the definition, scope, and substance of secured transactions, and the special features of each transaction. In that part, I will introduce the basic forms of secured transactions, and the distinction between possessory and non-possessory rights.

The next three indicators deals with more technical aspects of secured transaction (even though the term “technical” may be misleading). This part includes the indicators of priority (and the principle of perfection), registration, and enforcement.

B. Contractual Arrangements

There are two essential classifications of secured contractual arrangements.

The fundamental classifications in the law of secured transaction, (which is essential in both families), is the distinction between a true secured transaction (in which, the creditor receives a **secured right** in the collateral) and a transfer of ownership or title (in which, the creditor receives more than a secured right, i.e. **ownership, or title**).

³⁰ For the evolution of Secured Transactions’ law in Louisiana, see: Richard Kilbourne, Securing Commercial Transactions in the Antebellum Legal System of Louisiana, 70 Kentucky Law Journal, 609. For the final adoption of the UCC model in 1974, see Gilmore.

³¹ See Duggan, p. 181.

Theoretically, an arrangement, which does not provide a secured right (either if it provides more than a secured right, or less), should not be subject to secured transactions' rules. However, as we will see below, under several legal systems, some transfers of title, are also subject to such legislation.

Civil and Common law families both consider this classification as a fundamental issue, even though the line between a secured interest and a transfer of title is not similar in both families³².

The second classification, which is also essential in both families, is the classification to possessory and non-possessory secured rights. The line between possessory and non-possessory rights is similar in both families. The role of non-possessory secured transaction in personal property is very straightforward; it allows debtors to continue using the collateral during the period of the loan, and thereby, it promoted business lending. However, it is surprising to see that in most developing countries, nonpossessory secured rights in personal property were recognized only recently, and in Ghana, it has not been recognized yet³³.

As mentioned above, one of the basic classifications of secured transactions law is the classification of possessory and non-possessory secured transactions. In the former, the creditor takes possession in the collateral, and retains it until the debt is repaid. In the latter, the creditor does not take possession in the collateral, but receives a secured right in the collateral. The definition, scope, and degree of a secured right are different among various legal systems. Generally, the Common Law defines possessory right as a "Pledge", and non-possessory right as a "Mortgage", or "Charge". The Civil Law defines possessory right as "Pignus", and non-possessory right as "Hypothec".

The Roman law recognized four basic contractual arrangements between debtors and creditors:

1. The debtor vests both ownership and possession with the creditor.
2. The debtor vests ownership with the debtor, but retain possession.
3. The debtor retains ownership, but transfers possession to the creditor.
4. The debtor transfers neither possession nor ownership to the creditor, but only grants a secured interest in the case of default³⁴.

Of these four forms of transactions, only the last two, the pignus and hypothec, have typically been considered as security devices, because only in these cases is

³² For the common law perspective, see Bridge et.al. For the civil law perspective, see Osipov.

³³ See E.V.O. Dankwa, The End of Pledges in Ghana?, 33. Journal of African Law, 185.

³⁴ Goebel, p. 1

the creditor truly a creditor, rather than an owner or contingent owner. The first two, which are both referred to as fiducia, are in fact considered a transfer of ownership, as opposed to granting a secured interest³⁵. The pignus and hypothec provide the two basic recognized secured transactions in the Civil Law systems. The former is a possessory secured interest, and is similar to the traditional possessory pledge. The latter is a non-possessory secured interest, and is equivalent to a mortgage.

The earliest security interest in Russia assumed the transfer of the collateral by the debtor to the possession of the creditor. This form was similar to the Roman fiducia. In the 17th century, secured transaction in the form of pignus and hypothec were established. However, it was only in 1800 when secured transactions in real estate were allowed to be without possession³⁶. The traditional pignus and hypothec were still based on the Roman law until the recent reform of the Civil Code in 1995. It is important to emphasize that in Russia and in other Eastern Europe countries, non-possessory secured rights in personal property were not recognized until the recent reform in 1994-1997³⁷.

Until the re-codification period, the regime of security on property in Quebec remained largely faithful to its historical roots and intellectual premises. Moreover, even after the reform, the hypothec remained the building block of non-possessory secured transaction in the new law³⁸.

To summarize, the Roman pignus and hypothec still provide the basis for security rights in most civil law countries. Traditionally, the former was used for real estate, and the latter, for personal property. In most Civil Law countries, especially developing ones, this traditional distinction existed until recently. The introduction of non-possessory secured rights in personal property in transitional countries represents a significant move towards advanced security rights' laws.

The English law recognizes three basic secured transactions: the mortgage, the charge, and the pledge³⁹. The first two are the non-possessory secured interests, and the last is the possessory interest. These three basic arrangements prevail in England and Australia until today.

In The US and England, the major development in the 19th century was the recognition of the chattel mortgage, which is a non-possessory secured interest in personal property. In the US, immediately after the introduction of the chattel mortgage⁴⁰, various secured arrangements were developed from this type of

³⁵ Ibid.

³⁶ Osipov, p. 654-655

³⁷ Summers, p. 178-180

³⁸ Boodman and Mcdonald, p. 254.

³⁹ Bridge et. al

⁴⁰ Gilmore, p. 26.

secured transaction. Gilmore believes that until the enactment of UCC 9, the English law's approach to these arrangements was more simple and clear than that of the United States. However, the enactment of UCC 9 in 1954 presented a different approach – a Federal unified code for secured transaction, which is based on the "Substance-over-form" doctrine. The rationale behind that doctrine is very straightforward – anything, which is designed by the parties, in order to provide secured interest, is subject to the law of secured interests (i.e UCC 9). The enactment of UCC 9 reflects a departure of the United States' law of secured transaction from the traditional common law doctrines. However, it is important to say that UCC 9 specifically adopt all the existing arrangements⁴¹.

One important difference between the English common law definition of "secured interest" and UCC 9 definition is the inclusion of title reservation transactions in the former, and not in the latter. Under UCC 9, the definition includes "conditional sale, trust receipt, and other lien or title retention contract and lease or consignment intended as security"⁴². Moreover, it includes "the retention of reservation of title by a seller of goods" within the concept of "security interest" and a reservation of title under a lease or consignment, but only where it is intended as security. Under the English law, Interests that operate to reserve the creditor's original ownership - hire-purchase, chattel leases, and other title retention clauses - are not treated as security interests. In other words, UCC 9's broad definition of secured interests blur the classification between a traditional secured transaction and a reservation of title, by including some title reservation transaction within the scope of Article 9.

The same broad definition was also adopted in Canada. The PPSA in Canada followed the US approach, and included the above title reservation transactions in the definition of secured interests. Moreover, most Canadian acts even went one step further than the US, and recognized leases of any duration as well as secured interests in depository accounts with intermediaries as secured interests.⁴³

To summarize, we know of three groups of secured transaction regimes. Each group has its own classification of contractual arrangements:

- The traditional Civil Law family, which recognizes the possessory pignus and the non-possessory hypothec.
- The traditional Common Law family, which recognizes the possessory pledge and the non-possessory mortgage and charge.
- The United States' UCC 9, which recognizes a secured interest based on its substance rather than on its form.

⁴¹ Gilmore, in the preface.

⁴² UCC 9-102(2).

⁴³ Ziegel (1996), p. 247.

C. Type of Secured Interests

In developing countries in Africa, and Asia, land is the most common type of security offered to lenders⁴⁴. However, in both regions, the use of real estate mortgage was not common, because of the fear of creditors that the rights would not be enforced⁴⁵. In this paper, I focus on secured interest in personal property, but as I will present below, it is important to mention the role of real estate secured interests in developing countries⁴⁶.

Historically, in most developed countries, real estate was used as a security in non-possessory secured transactions, and personal property was used in possessory secured transactions⁴⁷. As the economy developed, and the need for credit increased, the lack of legal rules of non-possessory secured interests in personal property imposed a significant burden on debtors, who wished to borrow for business purpose, but to continue possessing and using their secured assets⁴⁸. As mentioned above, the introduction of advanced personal property secured interest rules reduced the costs of borrowing and thereby, promoted more credit⁴⁹.

The Roman law recognized both possessory and non-possessory secured rights. The *pignus* was a possessory secured transaction, and the *hypothec* was a non-possessory transaction. In most cases, the former was used for security of personal property, and the latter for real estate. However, it seems that the Roman law did not prohibit from using non-possessory secured transaction of personal property, but we do not have evidence that it was widely used⁵⁰.

The clear classification of possessory secured rights in personal property, and non-possessory rights in real property, survived in Civil Law systems for many years. In general, Civil Law jurisdictions have been reluctant to introduce legal non-possessory secured interests in personal property. Nevertheless, several developed European countries invented different specific types of non-possessory secured rights. The French and the German legal systems addressed this problem in two different ways: The former provided for a limited non-possessory lien on equipment. The latter provided a fiduciary transfer of title, which permitted the debtor to retain possession on the collateral⁵¹.

⁴⁴ For Africa, see Wellens et. al in p. 63. In Asia, see Ross Cranston, in p. 779.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ For the traditional Roman law distinction, see Goebel. For Common law perspective, see Gilmore, p. 24 on the period before the chattel mortgage was recognized..

⁴⁸ See Summers on Eastern Europe countries, and Dankwa, p. 186 on Ghana.

⁴⁹ Supra, note 3.

⁵⁰ See Goebel, p. 30

⁵¹ Summers, p. 191.

Security interests law in Russia at the end of the 19th century was generally based on two types of collateral: real estate and personal property. There was no actual possibility for a non-possessory right in personal property. Only in the recent reform, in 1995, the new code provided with explicit provision for non-possessory right in personal property. In other former Soviet Union countries, the situation was, of course, the same. The recent reform in these countries provided for the first time a non-possessory right in personal property. In fact, according to the promoters of the reform, the introduction of such secured interests was the highlight of the reform⁵².

In Common Law countries, the traditional classification between possessory and non-possessory rights was similar to that of the Civil Law in the early years. A pledge was used for personal property, and a mortgage for real estate. Moreover, a transfer of an interest in personal property without delivery of possession was considered under the Common Law in England and the US as a fraud⁵³. However, the fast industrial growth in both, the US and England created a need for a nonpossessory secured right in personal property, and the chattel mortgage was recognized under State laws in the US in the middle of the 19th century. Based on the chattel mortgage device, several advanced secured arrangement were also developed in the US throughout the 19th century. These arrangements included conditional sale, field warehousing, and more. The chattel mortgage device is, of course, recognized under UCC 9, based on the substance-over-form doctrine. In England, the chattel mortgage was introduced in the 19th century, as well as more sophisticated devices, but it continued to rely on common law principles⁵⁴. Naturally, other common law countries, such as Canada and Australia recognized the chattel mortgage when they adopted the English laws.

Another development, which is attributable to the industrial development in England and the US in the 19th century, is the introduction of the **Floating Charge** device. In the US, even before the enactment of UCC 9, it was allowed to provide a security interest in after-acquired property. Under UCC 9, a secured party may take a security interest, which “floats” over all of her debtor’s present and future⁵⁵. Generally, England, Australia, and Canada recognized the same mechanism during the 19th century⁵⁶. In Civil Law countries, the floating charge is currently not recognized. However, Japan adopted the floating charge mechanism in 1958⁵⁷.

Floating charge is an important device because it is used for securing the obligation of bonds, and the mechanism significantly reduces the costs of issuing bonds. Moreover, the floating charge provided for bondholders invites this group

⁵² Ibid, p. 203

⁵³ Gilmore, p. 24.

⁵⁴ Ibid.

⁵⁵ Gilmore, in p. 354-366.

⁵⁶ Gilmore, p. 359, note 2. For Australia, see Duggan, p. 186, note 35.

⁵⁷ Enterprise Hypothecation Law of 1958, cited in Ross Cranston, p. 781, note 64.

of creditors to be more involved in the company's affairs, and in fact, to become joint-venturers⁵⁸.

To summarize, both, Civil Law and Common law legal systems have been classifying between non-possessory and possessory types of secured arrangements. Until the 19th century, real estate was primarily used for the latter type of transactions, and personal property for the former. However, the development of a non-possessory secured arrangement in personal property was significantly different among different legal systems. While in the US, advanced chattel mortgage devices exist for almost two centuries, many developed countries are still struggling today to establish reliable real estate mortgage rules.

In Common Law developed countries, the chattel mortgage was introduced in the early 19th century (beginning in the US in 1820, and then England, Australia, and Canada). Nevertheless, in Civil Law-less developed countries, legislation of non-possessory secured rights in personal property was introduced only recently. There are still many developed countries in which, such legislation does not exist as of today. In developing countries such as Ghana, the non-possessory secured interest is recognized only for real estate, and was introduced only recently (1979)⁵⁹. It is not surprising that in such legal systems, creditors are not willing to lend with a non-possessory personal property security. The same thing happened in Asia; in most countries, non-possessory rights over personal property are difficult, or impossible, especially in Asian countries with Civil Law background⁶⁰.

D. The Distinction between Real and Personal Property Secured Transactions

One of the most ancient distinctions in the law of secured transactions is the separation between secured transactions in real property (immovables) and secured transactions in personal property (movables). Under UCC, the distinction between these two types of property is presented twice, in article 2 (sales), and in article 9 (secured transactions). In spite of the slightly different definition in these two articles, both definitions use the term "Movable" to draw the line between real and personal property.

In most of the legal systems, real estate-secured transactions are subject to separate rules than the rules governing personal property secured transactions. This separation is reflected by the existence of separate laws for each regime.

⁵⁸ Scott, p. 1456.

⁵⁹ Dankwa, 183-191.

⁶⁰ Ross Cranston, p. 781.

Is there a rationale behind the separation between the two systems?

1. Real Property as a Secured Property

From a substantial perspective, real property and personal property secured transactions are substantially similar. Nevertheless, there are several differences in the ways each type of property is used as a collateral. Generally, real property is used primarily in non-possessory secured transactions (except from certain developing countries, such as some countries in Africa). Personal property can be used either for possessory secured transactions, or for non-possessory ones. Nevertheless, in most developing countries, as well as transitional economies, the mechanism of a non-possessory personal property secured transactions is not significant yet.

Thus, in light of the non possessory nature of real estate secured transactions (which is similar in both, civil law and common law systems), legal rules governing such transactions are necessary, especially with respect to registration and priority rules.

2. Real Property Secured Transaction as a Real Property Transaction

In most jurisdictions, real estate transactions (sales, leases, and secured transactions) are governed by a single and separate legal regime, which usually includes a single registration system of all types of transactions. Moreover, real estate transactions' rules include priority rules between purchasers, lessors, and secured creditors. It is important to emphasize that registration of real estate ownership and transactions is routed in most jurisdictions for many years. For that reason, even in legal systems in which, new secured transactions' legislation was introduced (such as the US, Canada, and Russia), these new rules were specifically aimed to personal property, and excluded real estate secured transactions. In the US, the states' legislation with respect to real estate transaction is still in force alongside with the UCC 9, which specifically excludes real estate secured transactions from its scope.

3. Corporate Debtors

One the one hand, it is necessary to keep separate rules for real estate and to include the registration and priority rules of secured transactions within the registration and priority rules of real estate transactions in general, as a single unified regime. The rationale stems from the key role of real property transactions and ownership under every legal system.

On the other hand, more debtors (especially corporations) today provide creditors with both types of secured property - real property and personal property. In particular, many project finance transactions consist on loans secured by the debtors' entire assets, which include real property. In common law countries, the

floating charge usually includes a charge on real and personal property (subject to the specific rules governing floating charges). Nevertheless, it is also not unusual to see projects financed with the corporation's real and personal property.

4. Effectiveness of Registration System

From the above perspective, a unified registration system for both, real and personal property is more effective. In particular, a debtor-indexed based registration system may be more effective if it would combine registration of real property and personal property secured transactions. However, experience shows that such a unification has not been implemented in most legal systems.

The Australian proposals suggested that the reform (which has not been implemented yet) would include land. The efficiency of a unified registration is obvious, especially when the registration is based on the debtor's identification rather than the type of assets. Nevertheless, it is still not clear whether a total unification of the two systems is possible. But a partial unification of registration is possible⁶¹.

5. Conclusions

Real property mortgages are limited in their applicability and their scope. In developed countries, real property-secured transactions are usually subject to the general real property transactions rules, and are separate from personal property-secured transaction rules. Moreover, the registration of ownership, leases, and secured transaction in real property are separate from the registration system of personal property.

In developed countries, it is still not expected that the entire rules governing real property mortgages will be unified with the rules governing personal property secured transactions. Nevertheless, it is reasonable to assume that in more developed countries in which, the registration is computerized, registration of both types of secured transactions may be unified.

6. Real Property Mortgages in Developing and Transitional Economies

There are two unique aspects with respect to real property mortgages in emerging markets. These two aspects are opposite in their impact on the possibility to use real property a collateral. On the one hand, in many developing countries (especially former soviet union countries, and other communist countries, such as Russia, and China), real property could be owned only by the state, and not by individuals. Thus, it was legally impossible for private businesses and individuals to have a mortgage on assets, which they do not own. On the other hand, in most

⁶¹ Duggan, p. 185. See also section 3.7 to the QLRC proposal.

developing countries, valuable personal property, which can be pledged, hardly exists and thus, real property is the only valuable type of property, which can be used as collateral.

A. State Ownership of Real Property

The most extreme example for a case of forbidden real property mortgage because of state ownership is China. Under Article 80 of the General Principles of Civil Law, any transaction in real property, including secured transactions, is prohibited. Nevertheless, since 1988, land use rights may be pledged (The 7th National People's congress in 1988 amended Article 10(IV) of the 1982 constitution of China, which prohibited transactions in real property)⁶².

Another less extreme example is Russia. Until 1990, legislation prohibited pledging of "basic assets", which included all types of real property. Only in 1990, it was legally recognized that "Land is the wealth of the people residing on particular territory" and in 1992, the reform introduced rules governing mortgages of personal and real property.⁶³

B. Real Property as the only Valuable Mortgaged Property

In many developing countries, especially third world countries, real property is the almost the only type of property, which lenders accept as a collateral. In Ghana, for example, not only that real property is the primary mortgaged property, until 1979, it was used only in possessory transactions. The reasons for this limited scope of mortgaged property are that not only other types of valuable property (i.e. personal property) hardly exists, creditors would have no confidence in other types of collaterals even if such types of property do exist. This phenomenon is common in many African countries, as well as in other developing countries.

E. Effect on Parties

The Civil Law distinguishes between **owing** and **owning**. Ownership is a direct right in a thing that may be asserted independently of a right to possession or even of material detention itself. Secured interest is a clearly different concept; security is a creditor's conditional right to extract the value of secured assets when the debtor is in default. It is clearly not as ownership right. This distinction between secured right and ownership was recognized in the early stages of the Roman law⁶⁴. In Russia, since the early stages of the secured transactions' legislation, rights arising out of a security interest were defined as the rights to another

⁶² Ho Miew Sin, "Security in Project Finance for the Petroleum Industry of the People's Republic of China, S.J.L. S (1991), p. 55.

⁶³ Neil Fitzpatrick, "The Law on Pledge in Russia and Project Finance", Subednik (1997) Vol. 2, p. 795.

⁶⁴ Goegel.

person's property belonging to the creditor, and which ensured the creditor's right in action to satisfy his interest from the collateral value. Thus, secured rights in a collateral are clearly distinguished from ownership of the collateral⁶⁵.

Quebec remained largely faithful to its historical roots and intellectual premises and thus, kept the same distinction⁶⁶.

In the Common Law, the most prominent feature of secured transactions law freedom of contract⁶⁷. The parties are allowed to design their contract as they wish. The idea of secured interest under the Common Law is very similar to that under the Civil Law. The beneficial title to the collateral originates with the debtor and does not originate with the creditor⁶⁸. England and Australia have been keeping this traditional approach until today. Common Law provinces in Canada, which adopted a UCC 9 - type legislation, consider secured interests the same as in the US.

To summarize, both families distinguish between secured rights and ownership. It is accepted under both families that the secured creditor receives a right to extract the value of the collateral on default. However, the attempts to define the term “secured interest” in the new legislation (i.e. UCC 9 and PPSA) provide a broader scope of what is considered a “secured interest”. Thus, under the broader definition, title reservation transactions might be subject to secured transactions’ legislation in the US and Canada. However, the English Common Law keeps the traditional distinction⁶⁹.

F. Priority Rules

Most scholars agree that one of the major goals of secured transactions’ laws is to establish clear priority rules with respect to the underlying secured assets. Priority rules are necessary where it is possible to have multiple rights on the same collateral.

There are two possible priority conflicts:

- Priority between secured creditors on the same collateral
- Priority between secured and unsecured creditors (in the unsecured creditors group I include all types of creditors and purchasers).

Multiple rights may include secured, unsecured, and ownership rights. There is a practical difference between multiple possessory rights and multiple non-possessory rights on the same collateral. With respect to the former, only one

⁶⁵ Osipov, p. 658..

⁶⁶ Supra, Note 36.

⁶⁷ Bridge, p. 198.

⁶⁸ Bridge et. al.

⁶⁹ Supra, notes 40-41.

creditor can possess the collateral and therefore, multiple rights might occur only when the collateral is pledged to several creditors, or in the case of a sub-pledge. Of course, in such cases, it is likely that the creditors will know about each other, and therefore, will be aware of the priority problem. Thus, priority problems with respect to possessory rights are not a significant issue.

With respect to non-possessory rights, the possibility of having multiple rights is higher, since debtors can provide several rights (secured, unsecured, and ownership rights) to several persons, on the same collateral. In that case, these persons may not know about each other, and this problem is one of the fundamental issues, which secured transactions' rules should solve.

In both cases, it has been well-established under most legal systems that the priority between **secured creditors** is determined according to the principle of first in time⁷⁰. A more difficult problem is how to determine the priority between secured and unsecured creditors, and between secured creditors and good-faith purchasers. In particular, the most obvious problems are:

- What is the priority when we have both, secured and unsecured creditors, and the unsecured creditor is first in time.
- What is the priority when a good-faith purchaser is buying an asset, which has been secured to another person before? In this paper, I did not address this question

The Roman law permitted subsequent security interests. The first in time had priority over others interests; only the first secured party had the right to demand the sale of the collateral and all others had to satisfy their interests from the remainder. However, one of the major disadvantages of the priority rules in the Roman law was the lack of consistency with respect to certain types of creditors. It was not clear whether some creditors have priority over others. With respect to subsequent secured creditors, they could satisfy a precedent creditor's claim with their own assets, thereby subrogating the outgoing secured creditor in his place and positioning themselves closer to the collateral. To summarize, the problem in the Roman law was the lack of consistency with respect to different types of creditors, as well as the lack of registration, and thereby, the lack of a registered order of creditors⁷¹.

The first-in-time doctrine prevailed in Civil Law jurisdictions until today. However, it was not clear what is the status of non-secured creditors against secured creditors. The Russian law did not specify this issue, but implied that when a creditor fails to fulfill the registration requirements, she becomes last in priority, even if her right was first in time. Therefore, it can be implied that

⁷⁰ This principle was recognized in the Roman law – see Goebel, p. 63.

⁷¹ Ibid.

unsecured creditors have no priority over secured creditors even if they are first in time⁷².

In the Common Law countries, the principle of first-in time is also established. However, the mechanism of determining which creditor is first in time varies among different systems. In England and Australia, in the absence of a notice filling system, priority rules are based on a mixture of statutory, Common Law, and equitable inputs⁷³. Canada, on the other hand, followed the US principle of perfection. In the US, until the enactment of UCC 9, the same confusion and mixture of several state statutory rules existed⁷⁴. UCC 9 presented the principle of perfection as a mechanism for determining priorities. With respect to the competition between secured and unsecured creditors, the priority ranking system ranks a secured creditor above all other creditors. Among competing secured creditors, priority rank is determined by the order in which, perfection was accomplished. Note that under UCC 9, creditors achieve perfection by either, a transfer of possession (in the case of a pledge⁷⁵), or by filling of a notice (in the case of a mortgage)⁷⁶.

A unique problem of priority arises with respect to creditors with a floating charge. Under prior Canadian law and current English law, an equitable security interest in the nature of a "floating charge" did not attach to any specific item of collateral until the charge was crystallized⁷⁷. Consequently, interests acquired by competing creditors (secured and unsecured) in specific items of collateral before crystallization generally took priority over the floating charge security. Under UCC 9, the super-priority historically available to the unsecured creditor as against the holder of a security interest in floating collateral is no longer available⁷⁸. This is also the case in Canada, under the PPSA laws.

According to Kanda and Levmore, the rationale behind the first-in-time priority granted to perfected secured creditors over prior-in-time unsecured creditors, and the super-priority granted to subsequent purchase money security interest and subsequent purchasers of chattel papers over prior-in-time perfected secured creditors, as means of metering subsequent new money financing⁷⁹.

To summarize, both families recognize the first in time principle as a basic mechanism for determining priority between secured creditors. The question is how to determine who was first in time. UCC 9 established the principle of

⁷² Osipov, p. 652.

⁷³ Duggan, p. 180

⁷⁴ Gilmore.

⁷⁵ UCC 9-305.

⁷⁶ UCC 9-402.

⁷⁷ Until the debtor's power to deal with the collateral in the ordinary course of business was terminated – see Bridge et. al.

⁷⁸ Gilmore.

⁷⁹ Hideki Kanda and Saul Levmore, Explaining Creditor Priorities, 80, Va, L. Rev. 2103, in p. 2108.

perfection and notice filling as a mechanism for determining priorities. Canadian latest legislation followed the notice –filling principle as well.

G. Registration

The distinction between a possessory right and a non-possessory right is very important with respect to priority rules. This is true also with respect to registration rules, which are, in fact, directly connected to the priority rules. In the case of possessory right, there is no need for registration, since subsequent creditors or purchasers can easily identify that a previous creditor is possessing the collateral and therefore, they can make their own judgment on whether to take second or third secured interest or not.

Registration rules play a key role with respect to non-possessory rights, because of the problem of multiple creditors. In the case of real estate mortgages, most legal systems have separate registration systems for ownership and security rights in real estate. The introduction of non-possessory secured rights in personal property created a need for registration system for such rights, in order to provide subsequent creditors and purchasers with information on previous secured rights.

Although a system of title registration existed in Egypt and Greece, this device was never adopted by Roman Law neither for personal property nor for real property⁸⁰. In Russia, a unified registration system for personal property was established only in 1995⁸¹. In Quebec, on the other hand, there were several specific types of registers, for different types of assets and debtors. However, The C.C.Q. established a comprehensive publication requirement for hypothecs, including the possibility of publication by possession for movable hypothecs, but publication of other rights in movables is only required when specifically prescribed by law⁸².

The pre-UCC 9 pattern included separate filing systems for chattel mortgages, conditional sales, trust receipts, factor liens, and assignments of account receivables. This pattern was not effective, and was extremely expensive for lenders⁸³.

Most commentators argue that one of the most attractive features of UCC 9 is the simple and unified notice-filing mechanism. The notice filling mechanism under UCC 9 is a very straightforward – the parties to the secured transaction fill a standard form in the registrar office (there are many regional offices all over the US). This form is defined in Article 9-402 as a “financing statement”, and it provides only minimum required information (such as signature of both parties,

⁸⁰ Goebel, p. 63

⁸¹ Summers, p. 197

⁸² Boodman and Macdonald.

⁸³ Golmore, p. 463.

the description of the collateral, and the secured party's address. Once the registrar inserts the notice into the system, the information becomes state wide. The notice filling is a very technical action, but has a crucial substantive aspect – the perfection of the secured right. However, despite of the attractiveness of the notice-filing system, as opposed to the complex existing registration systems in these countries, only Canada (which had very complex registration requirements before the adoption of the new rules) adopted a UCC 9 –type notice filling system⁸⁴. The Canadian registration system is similar to that of the US with respect to the simplicity of the notice filling mechanism, and its crucial substantive aspect.

In England, There is no notice-filing system. Until today, the only registration requirement for securities is under the Companies Act (1985). Moreover, the goal of this registration is not to settle the priority between secured creditors. Rather, the Department of Trade and Industry regards the main purpose of the register as being to provide public information about a company's indebtedness, rather than establishing an order of priority among secured creditors⁸⁵. In Australia, there is no specific register for secured transactions. Rather, registration requirements are piecemeal⁸⁶. On the one hand, they discriminate between classes of assets and debtors. On the other hand, some transactions are subject to more than one registration⁸⁷. In Canadian Common Law provinces, there were several separate registration statutes: Conditional sales registration, chattel mortgage registration, and corporation securities registration (under the companies laws). However, Canada followed UCC 9 and established a comprehensive unified registration system for personal property⁸⁸, which is similar to that of the US.

To summarize, UCC 9 provides an effective mechanism for registration, which is considered as one of the major qualities of this law. In fact, most commentators agree that adoption of UCC 9 – type legislation would be useful because of the simplicity of the notice-filing system. Most legal systems, including England, Australia and Civil Law countries continue to rely on piecemeal registration systems (which are based on companies laws, insolvency laws, commercial laws, and state and local laws), and do not have a unified registration system for personal property secured transactions.

H. Enforcement

The effectiveness of security regimes depends on the speed and costs of the enforcement process⁸⁹. Enforcement of secured right is different with respect to

⁸⁴ Ziegel (1996), p. 239.

⁸⁵ Bridge, p. 200, note 14

⁸⁶ For a detailed description of the various registration systems in Australia, see the chapter of Australia below.

⁸⁷ Duggan, p. 180.

⁸⁸ See Ziegel (1996), p. 239, and also, see below the chapter on Canada.

⁸⁹ Ross Cranston, p. 781.

possessory and non-possessory rights. In the former case, the creditor possesses the collateral, and in default, it is easier for her to exercise her rights. In several legal systems, mostly Common Law systems, the creditor can simply perform a self-help action and sell the collateral on default. Such a mechanism is most beneficial to creditors⁹⁰. Many jurisdictions, especially those with Civil Law legal systems, are against a self-help remedy, because of the fear that the creditor will use this remedy carelessly. Moreover, there is a fear that the self-help remedy would lead to breaches of peace, and in some countries, even to extreme violence.⁹¹

The major problem with respect to enforcement is with the non-possessory rights. In a non-possessory right, the debtor still possesses the collateral, and the major concern is how the creditor can exercise her rights. This problem is relevant not only for personal property, but also for real property. From the creditors' point of view, the most efficient remedy is to take possession in the collateral without a judicial process. The concern with respect to such self-help remedy is that creditors may use this remedy in an inappropriate way, including the use of violence.

As mentioned above, the Roman law considered a secured interest as a right to extract the value of the collateral in the case of default. Therefore, in the case of a *pignus*, the creditor has a right in case of default to sell the property to satisfy her interest. The only restriction was the requirement to notify the debtor 30 days before the sale. However, in the case of *hypothec* (where the creditor does not possess the collateral), the creditor needed a judicial help to perform the sale⁹². The Russian law presented more restrictions on execution of the agreement of a possessory right. A security agreement granting a security interest in personal property could be executed by a notary public or by "home" order (not before a notary public). In both cases at least two witnesses had to be present at the execution of the agreement⁹³. With respect to non-possessory rights, a judicial action was also necessary.

A more relaxed approach was recognized in Common Law countries. When the creditor had possession on the collateral, the creditor had right to sell the collateral, based on the Common Law rights.

However, in the case of a non-possessory secured right, the creditor in the Common Law has to apply for a judicial proceeding, and cannot perform a self-help action. In the case of real estate, the regular procedure was a nomination of a receiver, which is responsible for the execution of the sale. In England, this mechanism is used also for personal property until today, under the Insolvency

⁹⁰ Ibid.

⁹¹ Ibid, p. 782.

⁹² Goebel, p. 51

⁹³ Osipov, 661

Act (1986)⁹⁴. Under this act, an administrator is appointed to act in the interests of all of a company's creditors.

The Repossession (Self-help) Remedy under Article 9-503 to UCC 9

UCC 9 presented a more creditor-favored mechanism. Besides the regular judiciary procedure, UCC 9 provides creditors with several extra-judicial enforcement rights (self help), which is referred to as the right to repossess the collateral⁹⁵. Article 9-503 to UCC provides that unless otherwise agreed by the parties, the creditor has a right to take possession on the collateral upon default (but subject to a limitation that the possession would be done without a breach of peace). As mentioned above, the idea behind the repossession remedy is that it will be performed without the breach of peace. The law does not provide special mechanisms to perform this repossession, but according to Gilmore, the goal of the breach of peace restriction is to prevent any use of enforcement in the repossession and thus, if there is a need for enforcement, the debtors should immediately seek for judicial aid. Gilmore also emphasize that there is a difference between corporate and private debtors. With respect to the latter, the creditors are usually inclined to perform a self-help remedy. Thus, there is no enforcement mechanism for repossession – only if repossession is impossible, than the creditor needs enforcement remedies.

In 1977, the Banking Law Committee appointed by the Government of India argued that the above argument against self-help remedies is not applicable today. The reason it is not relevant any more according to the committee is that in the past, lenders were private people, which might use the self-help remedy in an inappropriate manner. However, most lenders today are banks, and other institutions, which are not likely to use this remedy inappropriately, and thus, such institutions should have the right for extra-judicial remedies⁹⁶.

To summarize, a secured creditor under UCC 9, with a non-possessory secured right, has more enforcement options than the same creditor under traditional Common Law or under Civil Law. The self-help mechanism is another cost-reducer element of UCC 9.

Conclusions

Secured transactions' laws vary not only among legal systems from different families of the law, but also within each family. Moreover, there is a significant difference between such rules in developed countries and developing countries. While in the US, chattel mortgage rules exist for almost two hundreds years, some developed countries have not yet established sufficient rules for real estate

⁹⁴ See Bridge et. al.

⁹⁵ Gilmore. Ch. 44, p. 1211

⁹⁶ Ibid, citing the Indian Government Banking Law Committee Report on Real Property (1977).

mortgages (not to mention chattel mortgage rules). The introduction of a non-possessory secured right in the US and England in the 19th century, and its adoption by other Common Law countries, is probably the most significant event in the evolution of secured transactions in the 19th century. However, many developed and developing countries, from both legal families, have not yet recognized non-possessory secured rights in personal property, and continue to rely on the traditional distinction between possessory rights on personal property, and non-possessory rights on real property.

Nevertheless, the introduction of non-possessory rights had to be accompanied by advanced secured transactions' rules and in particular, priority, registration, and enforcement rules. As Gilmore indicates, secured transactions' rules in the US in the 19th century were too narrow, and could not handle the development of new advanced security devices. The adjustment of the law was very difficult, and took more than a hundred years⁹⁷. When UCC 9 was introduced, it created new standards of legislation. As we can see from the above analysis, UCC 9 provided several advanced tools, such as the notice filing mechanism and the self-help remedy. Most commentators agree that UCC 9 is a successful legislation. The question is how come only few countries followed the US in simplifying and unifying their rules? As we will see in the next part, economic development, political environment, and legal culture aspects provide partial answer to the significant diversity in secured transactions rules among various legal systems.

⁹⁷ Gilmore, p. 288

Part II

Chapter 3 – Core Countries

A. Secured Transactions in The US in the 18th Century⁹⁸

1. Legal Culture

In the 18th century, the US legal system was based primarily on the Common Law traditional legal system (except for Louisiana, which was subject to Civil Law doctrines). Commercial law was based on courts' decisions, and therefore, it is not surprising that the beginning of debt-recording mechanism is attributable to the judicial system. At that period, there were still no commercial codes in the states. Most states adopted commercial legislation only in the early 19th century.

2. Economic Background

The legal system in the US transformed in the first half of the eighteenth century to provide conditions for greater commercialization and economic development. The law transformed in response to an expansion of trade relations accompanying population growth, military expeditions, agricultural specialization, and greater monetization of the economy through government paper-money issues. Colonial legal historians of the last generation have universally agreed on the importance of debt to an understanding of colonial law and its impact on the colonial economy. In the first decades of the eighteenth century, colonists, when extending credit, increasingly relied on signed and sealed credit instruments, particularly **conditional bonds and promissory notes**⁹⁹.

3. The Recession in the End of the Century

Shays' Rebellion was a reaction to the high costs of credit and court fees in an environment of deflation and recession. In conditions of deflation, the value of currency appreciates. Obligations increased in value in real terms as a result of deflation in Massachusetts between 1780 and 1786, because both court fees and

⁹⁸ Claire Priest, *Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion*, 108 *Yale L.J.* 2413

⁹⁹ Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* 8 (1987) (discussing the "overwhelming predominance of debt cases in civil litigation" in the colonial period).

existing debts were set in nominal amounts. In stable economic conditions, high court fees would lower total litigation volume. Under conditions of severe recession and deflation, however, creditors' incentives often changed. During periods of recession, more businesses fail, consumer demand drops, and unemployment increases. Each of these economic forces is likely to increase litigation over debts. Tight money, or greater demand for liquidity, typically a feature of recessions, can in itself have widespread implications for litigation rates, especially in contexts of an interwoven fabric of credit and debt among merchants, traders, farmers, and others. If faced with litigation, a creditor is more likely to begin proceedings against her own debtors, to gather assets to ward off foreclosure. These demands, in turn, pressure debtors to call in debts from their debtors, who are forced to do the same.

Widespread business failure also means that more investments will unexpectedly prove unprofitable, requiring litigation in cases in which it would otherwise not be necessary. Recessions generate greater uncertainty, not only as to which businesses are doing well and which are not, but also as to which debtors are the subject of lawsuits that may allow other creditors to gain priority. Litigation does not follow necessarily. High litigation fees and their depletion of available assets create incentives to reach out-of-court settlements. But the existence of competing creditors complicates the decision.

In 1787 the General Court passed the Confession Act, requiring that all debt litigation commence before a justice of the peace where the debtor was to confess judgment. According to the Act, the parties were required to record the precise amount of the debt and the exact date the debt was due at the hearing. Once this process was completed, creditors could automatically foreclose on the debtors' possessions fifty days after the due date. If a debtor did not appear, a default judgment was to be entered.

The principal purpose of the Confession Act was to encourage creditors to record their debts soon after the time the debt was executed. Thus, the Confession Act marks the moment when the Massachusetts courts established litigation as a recording device. Of course, the Confession Act had further purposes as well. It removed debt litigation from the courts - clearly a political response to the years of protest against the court system and the violent takeover of the courts in Shays' Rebellion. .

Table 1 – Secured Transaction in the US in the 18th Century

Contractual Agreements	Type of secured Interests	Formation of Secured Interest	Priority Rules	Recording System	Enforcement of Secured Interests
1. Promissory Notes Signed written promises to perform a condition or pay a sum of money (like a	Generally speaking, a law permitting creditors to	Creditors brought suits against debtors because becoming	In the 18 th century, there was no system like the current bankruptcy rules to rationalize the	The increase in credit litigation in the 18 th century indicated the creation of a debt recording	If the debt is not repaid, the creditor has to apply to court for remedies. The courts had two

check). Notes were assignable and could circulate throughout a community as a currency.	obtain explicit security interests in the property of their debtors emerged in the beginning of the 19 th century. Creditors and debtors used litigation as a means of endowing credit agreements with greater security.	judgment creditors secured their interests in debtors' property by allowing quick execution at their discretion. Voluntary debtors also requested judgments against themselves, because they too benefited from the credit mechanism.	process of distribution the creditor's assets. Thus, creditors had a strong incentive to be the first to secure a writ of execution to force an auction of the debtor's assets. The immediate effect of the absence of priority rules was a race to the courts to claim any available assets. The bankruptcy rules in the 19 th century were aimed to correct this problem	mechanism, similar to the modern perfection requirement. In particular, in the end of the 18 th century, several states adopted legislation, which transformed the litigation into a recording device (see Confession Act of 1787 in Massachusetts – under the act, the parties were required to record the amount and date of the debt at the hearing).	functions with respect to credit transactions. First, they provided a recording system, and in that "hat", the debt was recorded immediately after the credit was provided. Second, the courts had a role in enforcing the debt, when the debt was not repaid, usually 6-12 months after the debt was due.
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B. Secured Transactions in The US in the Early 19th Century

1. Economic Background

The Economy in US in the early 19th century was based on small or medium size businesses, and consisted on traditional industries, such as agricultural and small manufacturers. The typical debtor-creditor relationship was therefore, composed on small businesses borrowing from numerous creditors. Usually, each creditor was also a borrower. The most significant type of secured interest was commercial paper, even tough, both, real estate mortgage and pledge, were familiar in that period.

The principle of negotiability played a major role in this business order. In particular, extending the negotiability of secured papers gave creditors a stronger legal position. Moreover, the principle was consistent with the government's interests; in an economy in which, negotiable papers provided a large portion of the circulating medium of exchange, an increase in secured credit helped enlarge the money supply¹⁰⁰.

2. Legal System Environment

One of the major observations in the development of commercial law in the US was the diversity of legal systems in different states. For example, Louisiana, which was an important center for national commerce in the antebellum period, was influenced by the civil law legal systems. On the other hand, other major

¹⁰⁰ Freyer, p. 594

states, such as Massachusetts and New York were influenced by the common law¹⁰¹.

Table 2 – The Early 19th Century

Contractual Arrangements	Type of security interest	Formation of security interest	Effect on contract parties	Registration	Priority Rules	Enforcement of security interest
Accommodation loan - secured by a commercial paper.	Personal guarantee	A bill is drawn for the private accommodation of the receiver, with no consideration, to bolster the receiver's credit ¹⁰² .	The bill is a security for the renewal of an existing debt.		According to the "Swift" case, the third party has right of recovery ¹⁰³ .	Enforcement by court (generally, local and district courts).
Pledge ¹⁰⁴ – a security arrangement under which possession of the collateral is delivered to the creditor.	Movable property (tangibles and intangibles)	The creditor take possession on the collateral and in return provides credit to the debtor, in the course of business ¹⁰⁵ .	The pledge secures the obligation between the debtor and the creditor. The creditor has possession on the collateral ¹⁰⁶	Before the introduction of the chattel mortgage, filling was merely an alternative to possession	The creditor has priority over other secured creditors. However, a third party has rights of recovery from the secured movable assets if he is a purchaser in	In default, the creditor, had right to redeem the collateral, based on the common law rights.

¹⁰¹ Kilbourne, p. 609

¹⁰² The common law requires that some promise or consideration must pass between contracting parties before either party can sue the other. Therefore, when A and B have contracting rights, and B endorse his rights to C, the question is how can C sue A for infringement of rights where A and C are not the contracting parties. Therefore, the two main questions as to the above transactions were whether the endorsee, has a claim of right against A, and whether the endorsee can acquire a better right than the original contracting parties.

¹⁰³ According to the Swift case (1842), the negotiability principle (which is relied on commercial law principles), should govern the accommodation loans. The decision was followed by other decisions in the US, which extended the principle to other bills of exchange.

¹⁰⁴ Today it is assumed that a security arrangement under which possession of the collateral is delivered to the creditor when the loan is made or under which the creditor may at any time take possession without default creates a pledge and not a chattel mortgage.

¹⁰⁵ The pledge was a security device used in a business, as opposed to the chattel mortgage, which can be used in personal property as well.

¹⁰⁶ However, the pledgee can obtain possession after the time of loan, but in any time, regardless of the repayments of the debt.

¹⁰⁷ The third party's rights can not be exercised if the pledgee has possession.

					good faith ¹⁰⁷ .	
Real estate Mortgage ¹⁰⁸ – security arrangement under which the creditor receives title on the collateral	Real estate (immovable) ¹⁰⁹	A security interest in immovable property. The property remains in borrower's hands.	The debtor retains the possession in the asset. The creditor has "title" on the asset.	Separate register for real estate.	The creditor has priority over all other creditors (secured and unsecured) ¹¹⁰ .	The creditor has equity rights and can take possession after court's decision.

C. Secured Transactions in The US in the Late 19th Century

1. Economic Background

After the first years of the 19th century, and especially after the civil war, the economy in the US changed its face. Businesses started to grow, and thereby, needed more and more credit. Moreover, creditors also became major players in the business environment. The traditional credit devices were not sufficient for the needs, and the most important need for businesses was a non-possessory security device¹¹¹. One of the most significant developments of secured transactions in the 19th century was the introduction of the chattel mortgage, which allowed borrowers to receive credit, and remain in possession on the secured assets. Gilmore argues that the principal cause of the introduction of the chattel mortgage was the industrial revolution. The rapid expansion of industrial facilities created a demand for credit. During that period, personal property replaced real property is the major indicator of wealth¹¹². Therefore, the traditional devices, which consisted on pledge and real estate mortgage, were not sufficient any more. The recognition of the chattel mortgage was followed by creation of several more advanced devices, which were based on the principle of the chattel mortgage¹¹³. These devices (described below), have been used until the enactment of UCC 9 in the middle of the 20th century, and presented complexity in the security law area.

¹⁰⁸ The distinction between mortgage and pledge is based on the elements of possession and title. A mortgage provides title to the creditor, but not possession in most cases, while a pledge provides possession, but not title.

¹⁰⁹ The rules for real estate mortgage remained separate even after the appearance of the chattel mortgage.

¹¹⁰ However, the question is how fast the creditor perfected his rights. In New York, late perfection of mortgage was vulnerable to the claims of general other creditors, which accrued before perfection. The New York late perfection rules with respect to pledge were different, and the other creditors could defeat the pledgee only if they were purchasers in good faith.

¹¹¹ Gilmore, p. 24

¹¹² Ibid

¹¹³ Ibid

2. Legal Culture - the Beginning on Departure from the Common Law?

Each state had its own legal rules for secured transactions, and the evolution of these rules varies between the states. However, one common feature to all states, which adopted the chattel mortgage device, was that the legislatures of the states left entirely to the courts the task of deciding what the law of chattel mortgage should be¹¹⁴. Thus, most courts, which were still influenced by the Common Law traditional prohibition of chattel mortgage, continued to reject this device. It should be emphasized that in that period, US courts were still subject to the traditional Common Law doctrines, and it was more than a hundred years before the enactment of UCC 9. Therefore, the courts' reaction to the chattel mortgage is not surprising, and it took many years until all states recognized the chattel mortgage.

Table 3 – the Chattel mortgage and Conditional Sale

Contractual Agreements	Type of security interest	Formation of security interest	Effect on contract parties	Registration	Priority Rules	Enforcement of security interest
The Chattel mortgage ¹¹⁵ – non-possession rights in personal property.	Personal (movable - tangible) property ¹¹⁶	A security interest in personal property, which remains in the borrower's hands until the loan is fully paid ¹¹⁷ .	The debtor holds the right to retain the collateral until default.	As non-possessory security interest became familiar, filling became more important, as a way of perfection. However, the typical pre-code pattern included separate filling systems for chattel mortgages, conditional sales, trust receipts, and account receivable.	Creditor gets priority over other creditors.	Creditor can exercise equity rights and possess the property only by court's decision.

¹¹⁴ Ibid.

¹¹⁵ Until the late 19th century, the only non-possessory security device was the real estate mortgage. The development of the chattel mortgage allowed non-possessory secured right in personal property.

¹¹⁶ Note that chattel mortgage was not applicable for intangible property, and when such property was involved, the assumption was that it was a pledge.

Conditional Sale ¹¹⁸ – a secured device based on title retention.	The purchased property	The buyer is paying in credit, and the seller retains title.	The seller is a secured creditor and not an owner of the collateral; the owner of the collateral is the buyer, ¹¹⁹ .	See above. ¹ The similarity to the chattel mortgage treatment required a filling obligation. However, such filling was different in form from the filling requirement of chattel mortgage.	The same as chattel mortgage.	The same as chattel mortgage.
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D. Secured Transaction in the Us in the End of the 19th Century and the Beginning of the 20th - Developments of the Chattel Mortgage Device.

The complexity of the pre-code rules governing personal property security law in the US between the middle of the 19th century and the enactment of UCC 9 provides a major explanation for the remarkable success of Article 9. As Gilmore describes, the English law until that point was simpler, and provided clearer rules for these types of transactions. The following transactions illustrate the complexity of the pre-code system, which was based on states regulations, and on a piecemeal legislation.

Table 4 – Advanced Contractual Arrangements Based on Chattel Mortgage

Contractual Agreements	Type of security interest	Formation of security interest	Effect on contract parties	Priority Rules	Enforcement of security interest
Consignment ¹²⁰	The consigned property	The owner (consignor) delivers the goods to the consignee, and the consignor is suppose to sell them to buyers.	The consignee is under a duty to pay for the goods, whether sold or not ¹²¹ .	The consignor has priority over the other consignee’s creditors, but not against purchasers in good faith ¹²² .	The same as chattel mortgage and conditional sale.

¹¹⁷ The filling requirements were very strict, since third parties could not know wether an underlying chattel was under mortgage or not.

¹¹⁸ Conceptually, the conditional sale, as a secured transaction, was a device based on title retention. Both in a conditional sale and a chattel mortgage the creditor's title to the collateral is acquired via the mechanics of a sale transaction and, in both, title functions as security.

Leases ¹²³	The leased property	The lessee is paying rent payments for the property, and using the asset as long as the payments are made.	The lessor retain the title, and the lessee has only the right to use the property ¹²⁴	The lessor holds the title, and is protected from the lessee's creditors, even from good-faith purchasers.	The same as consignment.
Hire-Purchase ¹²⁵	The purchased property	The bailee pays the amount until the whole amount is paid, and can exercise an option to purchase the property for nominal price.	The bailee is not a buyer in possession. He only has an option to buy.	The bailee has no priority over third party.	If the bailee fails to pay, the property should be returned to the bailor (the bailee has no rights).
The Trust Receipt financing.	The purchased goods	The buyer provides to the seller a bank promise to pay for the goods. The buyer receives a bill of lading.	The bank pays the purchase price, and possess the bill of lading. This creates a secured loan between the bank and the buyer.	The buyer posses the goods, but the bank has title on the goods, as chattel mortgage. The secured interest is shifted to the proceeds of the sale.	The bank can possess the goods in any time, even before the loan is due, since it has the title.
The Factor's lien ¹²⁶	The seller's inventory ¹²⁷	The factor receives the inventory from the seller, and had a lien on that inventory.	The factor receives possession on the inventory assigned to him. ¹²⁸	The factor has priority over other creditors of the seller.	
Field warehousing – secured inventory financing ¹²⁹	The borrower's inventory	The lender lends money to the borrower, and the inventory is used as a collateral, and is located in a warehouse, owned by a warehouseman.	The inventory and the proceedings from such inventory are the collateral for the loan. The warehouseman is also a guarantee for the loan	The lender has a priority over third parties (as pledge). If the warehouseman assume the liability, he becomes the owner of the inventory/proceedings	The warehouseman assumes the liability and can possess the secured inventory without a need for court decision.

¹²⁰ Under a true consignment, the owner of the goods deliver them to the consignee for sale. If the consignee does not sell some of the goods, he is not liable for such unsold goods, and has the right to return them to the consignor. The title retained in the hand of the consignor.

¹²¹ This is the difference from a true consignment according to which, the consignee has the right to return the unsold goods to the consignor

¹²² If an underlying consignment is not a true consignment but rather a secured transaction, it is deemed to be similar to conditional sale.

¹²³ A true lease is not a secured transaction

¹²⁴ A lease, which is considered as a secured lease rather than a true lease, is subject to the same treatment as a secured consignment.

¹²⁵ This is a variation of a finance lease, and is usually performed as a substitute for actual sale.

¹²⁶ This is the old version of the factor, as a seller. The factor since the beginning of the 20th century is a banker, and not a seller.

¹²⁷ Even with respect to the new factor, the inventory is used as a collateral.

¹²⁸ The new finance factor has only non-possession rights in the inventory, since he is no longer responsible for the sales.

¹²⁹ This arrangement was developed as a non-possessory pledge.

E. Secured Transactions in the US in the 20th Century (Under UCC 9)¹³⁰

1. History

The UCC 9 was developed from the Uniform Trust Receipts Act. The first official text of the code was introduced in 1952, as a model for states to use when adopting a commercial code. Generally, most states adopted it almost completely. The first state to adopt the model was Pennsylvania, in 1953, and the last one was Louisiana, in 1974. In 1972, the model was revised, and the states followed this revision¹³¹.

Gilmore argues that one of the major distinction between the codification of secured transactions' laws in UCC 9 and the codification in Europe is that UCC 9 is not designed, as the European codes may have been, to abolish the existing law of secured transactions¹³². Thus, all the existing devices, which were used as secured devices for many years, were subject to the definition of secured interest under UCC 9. Note that with respect to real estate mortgages, the old rules (which are based on states rules) are still in force, and UCC 9 is only applicable to personal property.

Table 5 – the Basic Principles of UCC 9

Contractual Agreements.	Type of Secured Interests	Formation of Secured Interest	Effect on Contract Parties	Registration	Priority between Secured Creditors ¹³³	Priority between Secured and unsecured creditors	Enforcement
Article 9-102(2) lists security interests to which it is expressly applicable. These include a "conditional sale, trust	Section 1-201(37) defines "security interest" to mean any "interest in personal property or fixtures	The secured interest is attached to the property when it is perfected. Perfection is accomplished by either filling, of	The debtor retains the residual beneficial title to the collateral (, unless the security takes the form of a	Article 9 unified the filling of all types of secured interests, except from real estate mortgages, into one	The priority ranking system ranks a secured creditor above all other creditors.	In light of the functional definition of "secured Interest" UCC 9 does not provide priority rules between secured and	Besides the regular judiciary procedure, UCC 9 provides creditors with several extra-judicial enforcement

¹³⁰ The distinctive feature of Article 9 is that it abolishes the pre-Code distinctions between the multiplicity of common law, equitable and statutory security devices and replaces them with the generic concept of a "**security agreement**" creating a "**security interest**".

¹³¹ See Gilmore in the preface, and also Summers, p. 187.

¹³² See Gilmore in the preface and also U.C.C. § 9-102(2) providing that Article 9 applies to all "security interests created by contract" and lists the different forms that secured transactions took under prior law

¹³³ There are three exceptions to the first-in-time priority rules: the extraordinary protection afforded to the floating lien creditors, the super-priority granted to purchase-money security creditors, and priority to chattel papers holders.

receipt, and other lien or title retention contract and lease or consignment intended as security." It includes "the retention of reservation of title by a seller of goods" within the concept of "security interest" and a reservation of title under a lease or consignment, but only where it is intended as security ¹³⁴ .	which secures payment or performance of an obligation, ¹³⁵ Under UCC 9-204, after-acquired property can also be secured.	possession	pledge): the secured party's real remedies against the collateral are contingent upon the debtor's default and are then limited to the value needed to satisfy the secured obligation.	single notice filing register. The notice is referred to as "financial Statement", and is signed by both parties. Note that the filing does not validates the transaction, but rather, serves as an information tool.	Among competing secured creditors, priority rank is determined by the order in which, perfection was accomplished.	unsecured creditors. Moreover, the super-priority historically available to the unsecured creditor as against the holder of a security interest in floating collateral is no longer available ¹³⁶ However,	rights (self help). Self-help includes repossession of the collateral and selling it, foreclosure by sale, concluding an agreement with the debtor.(UCC 9-503 and 9-504)
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F. Secured Transactions in England

1. General

The development of personal property security and in particular, the non-possessory security devices (chattel mortgage) in the 19th century had been different in the US and in England. In England, the adjustment of the traditional medieval security law to the needs of the industrialized society was achieved in a much simpler way than that of the US. In particular, the complexity of the special devices in the US (described above), which were based on the newly recognized chattel mortgage device, was not a part of the English system. Therefore, as Gilmore summarized, English Law and American law, in this area, split apart during the 19th century¹³⁷. However, the adoption of UCC 9 in the US, and the refusal to adopt a similar system in England, created an opposite situation according to which, the US system is much more simple and clear today¹³⁸. In

¹³⁴ U.C.C. 1-201(37) expressly excludes leases and consignments not intended as security from the definition of "security interest".

¹³⁵ A definition, which is broad enough to include *any* distinctive claim to assets of a debtor that a creditor might assert on default.

¹³⁶ Recently, several US scholars addressed this issue For a recent set of articles on this matter, see Symposium on the Revision of Article 9 of the Uniform Commercial code (1994), 80 Va. L. Rev. 1783-2311.

¹³⁷ Gilmore.

¹³⁸ Jacob S. Ziegel "Canadian Perspective on Chattel Security Law Reform in the United Kingdom, 54 Cambridge Law Review, 430

fact, as of now, the English legislature refuses to adopt any elements of UCC 9, and insists on maintain the traditional Common Law rules.¹³⁹

We can understand the rejection of UCC 9 in England in light of the principle of freedom of contract, which is routed in the English law. According to this principle, the parties (i.e. the debtor and creditor) are free to arrive at whatever bargain they deem suitable to advance their interests, and may ignore the interests of any one in the outside world. In such a world, a UCC 9 – type legislation might not fit¹⁴⁰.

2. Economic Aspects

One of the most praised adjustments of the English laws to economic situation was the creation of the floating charge. The industrial revolution in England and the creation of large companies happened in the beginning of the 19th century. The need to raise funds from bonds led to the Common Law creation of the floating charge rules (see below)¹⁴¹.

3. Legal System Aspects

It is well-known that the British legal system is suspicious with respect to adoption of American laws. Moreover, the judiciary system in England is conservative, and prefers to keep the old and traditional rules rather than adopt new ones. When the English system is faced by a European community requirement (such as the adoption of certain company law provision), it must be more flexible¹⁴². However, as long as the EC is not even considering the adoption of a UCC 9 – type system¹⁴³, it is unlikely that England will change its security laws.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ziegel (1995), p. 445

¹⁴³ Ibid.

Table 6 – the Fundamental Secured Transactions’ Rules in the Common Law

Contractual Arrangement	Type of Secured Interests	Effect on Contract Parties	Recording System	Priority between secured creditors.	Priority against other creditors.	Enforcement
According to classic analysis, English law knows of only three nominate consensual securities: Mortgage ¹⁴⁴ Charge ¹⁴⁵ Pledge ¹⁴⁶ . "Security" is limited to interests in property created by grant from the debtor: the possessory pledge and the non-possessory mortgage, lien, or charge. Interests that operate to reserve the	There is no general concept of a "security interest". Security is differentiated from title retention and understood in a strict sense as consisting of certain types, each with its own characteristics. There are no appreciable restrictions on the assets that may be subjected to one of the three nominate consensual securities.	Under each of these three arrangements, beneficial title to the collateral originates with the debtor, or more accurately, does not originate with the secured party	There is no notice-filing system ¹⁴⁸ . Rather, the chargor or chargee sends to the Registrar of Companies ¹⁴⁹ both the instrument of charge and what are called the "prescribed particulars of charge. Once issued, the Registrar's certificate is conclusive evidence that the requirements of registration have been met.	The basic principle is the first in time principle. However, the absence of notice filing makes it difficult to determine priorities. The registration of corporate charges provides a partial answer.	Under the Insolvency Act (1986), secured creditors with a fixed charge have priority over preferred creditors. However, preferred creditors have priority over a floating charge.	Under the Insolvency Act (1986), an administrator is appointed to act in the interests of all of a company's creditors. The administrator is given certain powers to deal with assets which are the subject of a security and to enter into dealings in conducting the affairs of the company serving to diminish the priority positions of existing

¹⁴⁴ A mortgage that complies with the necessary forms and deals with property that exists at common law will be a legal mortgage, otherwise it will be an equitable mortgage.

¹⁴⁵ A charge exists only in Equity. However, The legal or equitable status of a security does not matter when the security is asserted against unsecured creditors or their insolvency representatives, but will frequently matter when it comes to determining priority contests among secured creditors. Apart from this, there is rarely any practical significance in the distinction between mortgages and charges, and the distinction between them is commonly eliminated in the drafting of debentures. Consequently, the English law of security is more appropriately divided into the non-possessory -- which mortgage and charge do not have to be but usually are -- and the possessory.

¹⁴⁶ A pledge is a common law creation. . As a possessory security, pledge is confined for business purposes to documentary intangibles, such as share certificates and bills of lading, and is usually of a short-term nature.

¹⁴⁷ However, in one instance, the English legislature recognized the form over substance and thereby, recognized conditional sales and hire-purchase as secured transactions. This instance is with respect to Sections 10(1) and 10(4), 11(3) and 15(1) to the Insolvency Act (1986).

¹⁴⁸ The introduction of such a system was under review by the Department of Trade and Industry, see "Company Law Reform": Proposal for Reform of Part XII of the Companies Act 1985 (November 1994).

¹⁴⁹ Currently, the only registration system is under the Companies Act (1985). However, the Department of Trade and Industry regards the main purpose of the register as being to provide

<p>creditor's original ownership -- hire-purchase, chattel leases, and other title retention clauses -- are not treated as security¹⁴⁷</p>						<p>secured creditors.</p>
<p>Floating Charge</p>	<p>The essential hallmarks of a floating charge security are that it cover present and future assets of a shifting or circulating character (notably inventory and book debts) and that the creditor undertake to leave the management of these assets in the hands of the debtor to deal with in the ordinary course of business free of control by the secured</p>	<p>An equitable security interest in the nature of a "floating charge" did not attach to any specific item of collateral until the charge was crystallized, i.e., until the debtor's power to deal with the collateral in the ordinary course of business was terminated. Consequently, interests acquired by competing secured or creditors in specific items of collateral before crystallization generally took</p>	<p>Under the Companies Act (1985), any charge on the company's assets should be registered (the same as the mechanism above).</p>	<p>The priority rules favor fixed charges over floating charges, even if the latter are granted earlier in time</p>	<p>Preferred creditors have priority over creditors with a floating charge.</p>	<p>Secured debentures almost always contain a clause granting the chargee the right to appoint a receiver on behalf of the chargor company.</p>

public information about a company's indebtedness, rather than establishing an order of priority among secured creditors.

	party:	priority over the floating charge security.				
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G. Secured Transactions in The Roman Law¹⁵⁰

The Historical Evolution of the Security Interest in Roman Law

There were four major stages in the evolution of secured transaction in the Roman law:

- The Fiducia was the first form of transaction. However, it effectively represented a transfer of ownership, and not a secured transaction. This device was, of course, very harsh to the debtor.
- At some point, the pignus was introduced, allowing the debtor not to give up ownership. But still, the debtor had to give up possession, and thus, could not use the property to repay the debt.
- The hypothec was developed in the mid-empire, and allowed the debtor to retain both possession and ownership.
- Another subsequent development was the general hypothec, which covered all the property of the debtor, including future acquired property. This is of course, similar to the floating charge of the common law.

Table 7 – the Fundamental of Secured Transactions Rules in the Roman Law

Contractual Arrangements	Type of secured transactions	Formation of Secured interests	Registration	Priority Rules	Enforcement ¹⁵¹
Fiducia.	This is today the model of the civil law sale with a right of redemption and general assignment of book debts. Thus, none of the traits of the pledge/mortgage concerning another person's collateral can be found in fiducia. Fiducia was not the establishment of the pledge, but was the transfer of ownership of the collateral	The debtor vests both ownership and possession of the property in the creditor, subject to a personal obligation to reconvey on repayment.	Although a system of title registration existed in Egypt and Greece, this device was never adopted by Roman Law	When the creditor retains ownership, there is no question of priority.	In the event of default the creditor definitively obtained the ownership rights, thereby eliminating the conditional proviso. The creditor could retain the collateral or sell it to satisfy his interest. Any surplus the creditor received through the sale was not necessarily

¹⁵⁰ This chapter is based on Goebel, Osipov, and Bidge et. al.

¹⁵¹ The concept of security neither comprised nor commanded a right of foreclosure as an enforcement remedy (a right to its capital-value). At the point of enforcement, security was neither use nor capital, but only the right to extract the capital value of the asset up to an amount sufficient to pay off the secured obligation.

					returned to the debtor.
This type of transaction is also considered as Fiducia.	This is the classical civil law instalment sale, the resolutive condition in sale, the seller's right of revendication, the foreclosure agreement (pacte comissoire), and the finance lease.	The Debtor vests ownership in the creditor, but retains possession of the property by leave of the creditor.		When the creditor retains ownership or takes title, there is no question of priority.	The creditor (pledgee/mortgagee) has a right in case of default to sell the property to satisfy his interest (that is to dispose of the property).
Pignus.	This is today the civil law pledge or pawn, the unpaid seller's lien, and the right of retention.	The debtor retains ownership of the property, but grants possession irrevocably to the creditor, until repayment of the debt. Possession of the collateral did not give the creditor the right to use it		Roman law permitted subsequent security interests. The first in time had priority over others interests; only the first secured party had the right to demand the sale of the collateral and all others had to satisfy their interests from the remainder. But subsequent secured creditors could satisfy a precedent creditor's claim with their own assets, thereby subrogating the outgoing secured creditor in his place and positioning themselves closer to the collateral. Such a transfer of seniority to the person satisfying the first secured party was called a hypothec succession. If the proceeds of the sale were insufficient to satisfy all the subsequent creditors, then the deficiency was resolved in the same manner as if there had been only one creditor. Each secured creditor was granted a cause of action from the obligation on equal grounds	The creditor (pledgee/mortgagee) has a right in case of default to sell the property to satisfy his interest (that is to dispose of the property). This right was always subject to a notice requirement. A special agreement was needed allowing the creditor to dispose of the collateral. A separate agreement had to be entered into to enable the creditor to retain the pledged collateral and to expand his ownership to it
Hypotheca.	This is the civil law - mortgage .	The debtor retains both ownership and possession of the property, but transfers to the creditor a possessory interest in the property.		Same	The creditor (pledgee/mortgagee) has a right in case of default to sell the property to satisfy his interest (that is to dispose of the property).

Conclusions

The Roman law recognized only two types of secured transactions: the pignus, and the Hypothec. The fiducia is considered as a transfer of ownership rather than a secured transaction. In modern terms, the pignus represent a possessory pledge, and the hypothec represents a non-possessory pledge (or a mortgage). Both devices could be used for real property and personal property. The Roman law provides a comprehensive set of secured transactions' rules, which have been used for many years in civil law countries. Moreover, the ideas of pignus (the Civil Law's equivalent to a pledge) and hypothec (the civil law's equivalent to a mortgage) still prevail in many legal systems, such as Quebec (even after the reform in 1993).

H. Secured Transaction in Russia Before 1992¹⁵²

In general, the law of secured transaction in Russia was primarily based on the origins of the Civil Law doctrines, from the Roman law.

1. History

In ancient times, the debtor himself--his personality--secured payment of debts. The debtor usually "sold" himself to the creditor by undertaking to repay the debt in the course of his work for the creditor.

As the economy and trade developed in Russia there arose the zalog institution, which was widely used in the trade cities of Russia. The earliest security interest in Russia assumed the transfer of the collateral by the debtor to the possession of the creditor.

The earliest form was similar to the Roman fiducia in that it alienated the property rights to the creditor with retention of the right to redemption upon performance of the obligation by the debtor. Like with the fiducia, the creditor's ownership of the collateral was limited only to the extent that he had to return the collateral when the debt was repaid. .

In the 16th century an attempt was made to reform the traditional concept of the creditor's ownership of the collateral of the debtor upon default. The cause for the reform was the same as in Roman law.

Thus, according to the 1557 Decree, the creditor had to alert the debtor of the possibility of being deprived of his property in the event the debtor delayed in repaying the debt. The creditor could sell the collateral with witnesses present and

¹⁵² This chapter is based on Osipov.

satisfy his interest from the proceeds if the debt was not repaid; any surplus from the sale had to be returned to the debtor. The debtor was liable to the creditor to the extent of the outstanding balance if the proceeds were insufficient to cover the principal and the interest. Professor Shershenevich suggests that the 1557 Decree bore a temporary character because soon after its adoption there was a widespread trend in the Russian economy to deem the collateral as the creditor's property if the debtor defaulted.

In the 16th century another type of security interest became popular, especially between monasteries and fee holders

In the 17th century Sobornoie Ulozheniie (the statute-book adopted by the 1649 Council) became the most significant statement of Russian law. Provisions of the Sobornoie Ulozheniie developed the concepts of the pledge and mortgage. Article 196 of Title 10 stated the already mentioned rule that the creditor became the owner of the collateral upon default and could freely dispose of it.

In the 18th century, the statute, effective August 1, 1737, declared a new procedure for recovering debts under security agreements by providing for public sales. The surplus of the sale, if any, had to be returned to the debtor-owner of the collateral

It was not until 1800 that a definitive and final abolition of the old procedure of claiming satisfaction of the collateral occurred when new Bankrotskii Ustav [Bankruptcy Rules] for real estate were promulgated. The new Rules eliminated the need for giving possession of the estate to the creditor, but the estate was deemed under a prohibition that basically deprived the owner of his right to sell or obtain a second mortgage. The prohibition on obtaining a second mortgage was very straining to the debtor, and moreover, without any benefit to the creditor. As a rule with respect to personal property, the collateral could be retained by the creditor, if the debtor did not demand that it be sold. If the debtor did demand the collateral be sold and the proceeds were insufficient, the creditor had a claim in the unpaid amount against debtor's other property.

By the end of the 19th century, security interest law eventually formed. The pledge and mortgage along with other methods of securing the performance of obligations were contained in the Russian Empire Statute Book. Additionally, some methods of security interests arising from loans made by credit organizations were set forth in the Credit Rules and in the Charters of private and public credit organizations.

Commercial law in Russia before 1917 recognized only four classical civil methods of securing of obligations: (1) down payment, (2) forfeit, (3) guarantee (surety), and (4) pledge/mortgage.

Legal issues connected with security interests were not widely discussed or litigated until after the promulgation of the Russian statute dealing with those matters in 1993. Since that time, a number of significant changes have affected security interest regulation in Russia. The recently adopted Civil Code of Russia, in its General Part, also devotes a number of articles to these questions.

Table 8 – Secured Transaction in Russia Before the Reform

Contractual Agreements	Type of Secured Interests	Formation of Secured Interests	Effect on Parties.	Priority Rules	Enforcement
Mortgage ¹⁵³	Security interest in real estate (mortgage).	An agreement was entered into at a notary public's office, which was then to be submitted by the notary to a chief notary public. The chief notary public entered the transaction on the Record of Feudal Affairs. Upon entry of the mortgage the chief notary established a prohibition over the fee mortgaged, and issued an order for publication by the Senate Printing House. The security interest attached at the time of entry by the chief notary public.	The owner granting a security interest in his fee did not deprive himself of the right to dispose. Granting security interest in collateral was nothing more than the creditor imposing limits on the owner (debtor), but it did not bar the owner from his right to dispose of the property.	Mortgaging to "different hands" is not possible, and only subsequent mortgaging to different persons can take place. When the proceeds from the sale of the debtor's property are not enough to satisfy several creditors, subject to the court's order the recovery expenses and the secured claim are to be promptly paid due to the security interests seniority.	The creditor had a right to the value of the collateral. The law provided the creditor a right to demand through a court that the collateral be sold in case of default. The collateral must be sold and cannot be appreciated by the creditor. Moreover, the sale must be administered by a court in compliance with established procedure and not by the creditor. If the proceeds were less than the principal amount of the debt, as a matter of practice the creditor had no opportunity to extend his claim to other property owned by the debtor.

¹⁵³ Note that only real estate could be secured in a non-possessory secured transaction.

Pledge	Security interest in personal property (pledge), including rights in action and securities ¹⁵⁴ .	Personal property - the common procedure had two components: 1) a written security agreement ¹⁵⁵ ; and 2) taking possession of the collateral.	Same	Between secured creditors, the First in Time principle prevailed. With respect to other creditors or purchasers, the regular rule applied - Taking possession protected the interests of third persons, who might consider the collateral to be free of encumbrances and make advances to the debtor based on the collateral ¹⁵⁶	A security agreement granting a security interest in personal property could be executed by a notary public or by "home" order (not before a notary public). In both cases at least two witnesses had to be present at the execution of the agreement. When personal property was pledged the creditor had a right to turn his recovery, to the extent not covered with the proceeds from the sale, to the other debtor's property.
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The Reform¹⁵⁷

Prior to 1992, Soviet Civil law imposed significant limitations on the right to pledge. The Russian Federation Civil Code of 1964 provided limitations on the property, which can be qualified for a pledge. In particular, the non qualified property included buildings, installation, and equipment. Thus, most real estate was out of the scope of the qualified property, and only certain types of circulating assets were qualified. As a result, the use of pledge prior to the reform was very limited.

Another important aspect in the pre reform law was the ownership of land, which was primarily owned by the state. Only in 1990, it was recognized that the people own their land, and not the state.

Recognizing that the 1964 civil code is insufficient for a market economy, the Russian government appointed some scholars (including British and Russian), to draft a more advanced law, which can accommodate secured credit. However, during the period of 1991-1992, it was still not clear whether the Russian economy is willing to accommodate market reforms, and to move into a market economy.

¹⁵⁴ The law recognized as collateral securities in which the right under the instrument was indissolubly connected with the right to the instrument.

¹⁵⁵ Note that without a written agreement, the security interest as a right in rem is void against purchasers and other creditors.

¹⁵⁶ Note that without a written agreement, the security interest as a right in rem is void against purchasers and other creditors.

¹⁵⁷ This section is based on Fitzpatrick, p. 55-75.

In 1992, the draft was adopted and referred to as: The Law on Pledge of the Russian Federation of 1992” (LOREF). Two and a half years later, Part I of the Civil Code was adopted, and consolidated the existing pledge rules, including the LOREF.

The law provided a framework for secured transaction rules, and specifically addressed the relationship between a pledgor and a pledgee, with emphasis on the freedom of contract. One of the most important aspects of this reform was the recognition of private ownership and further to such recognition, the recognition of the citizens’ responsibility to their debts.

Table 9- the 1992 Reform

Contractual Agreements	Type of Secured Interests	Formation of Secured Interests	Effect on Parties.	Priority Rules	Registration	Enforcement
<p>A pledge (“zalog” – is used for describing both, possessory and non-possessory secure rights.</p> <p>1. The title and possession remain with the debtor, subject to the pledge (Article 5).</p> <p>2. Transfer of title, with a future reversion of title back to the debtor.</p> <p>3. Transfer of possession to the creditor, without title.</p>	<p>Article 6(1) to the LOREF provides that any property, which is capable of being alienated, may be pledged. Thus, property, which may not be transferred under Russian law, can not be pledged. In general, the LOREF divides pledges between possessory and non-possessory types of assets.</p>	<p>As opposed to common law, the Russian law is very strict about the formalities of the agreement. Both under the LOREF (Article 10) and the civil code (Article 339(1), a pledge contract must be in writing, and contain terms, which include: the type of pledge, the nature of the claim secured, the amount of claim, the terms of performance, and the content and value of the pledged assets</p>	<p>The 1992 law defines the secured interest as “ A mean of securing an obligation whereby a pledgee acquires the right, in the event of debtor’s failure to perform the obligation, to receive satisfaction at the expense of the pledged property and preferentially before other creditors...” (Article 334 of the civil code).</p>	<p>Article 21 of the LOREF allows for subsequent pledge of a pledged property (except for certain limitations). Under Article 22(1), the claims of subsequent pledgees shall be satisfied out of the value of the collateral after satisfying the claims of prior pledgees. An additional tool for assisting in priority disputes is the requirement under Article 18, that pledgors register all their pledges, and this will be public records.</p>	<p>In 1992, a national unified registration system of pledges had not been established. Rather, the LOREF provided that registration is restricted to certain types of property, and usually serves as a validation rather establishment of the pledge.</p>	<p>There is no self help possibility. Article 28 requires realization of the pledged property in a public auction. Unless the parties decide on a non-judicial enforcement, a court’s order for the realization is always necessary.</p>
<p>Real Property Mortgage (“ipoteka”)</p>	<p>The civil code provides that real property includes land plots, enterprises, buildings, installations, and other immovables. The pledgor must have a legal right</p>	<p>In addition to the formal requirements for a pledge contract, real property mortgage requires additional details, such as the location of the asset, its value, and</p>	<p>Article 338 to the civil code provides that property on which, a real property mortgage is established, shall not be transferred to</p>	<p>Priority is determined according to the same regular rule of first in time.</p>	<p>There is a distinction between movables and immovables secured transaction. With respect to the latter, registration is</p>	<p>Under Article 349, the demands of a pledgor of immovable property can be satisfied only pursuant to a court order.</p>

	in the property, in order to be eligible to pledge it.	more. Moreover, a mortgage agreement, as opposed to a simple pledge, requires notarization.	the pledgee. Thus, real property can be pledged only in a non-possessory transaction.		always required, but with respect to the former, it is not. A mortgage agreement is registered in a special land registrar.	
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Chapter 4 - Transplant Legal Systems

A. Secured Transaction in Canada

1. General

As far as Common Law provinces in Canada are concerned, the basic themes of UCC 9 have been adopted almost entirely since the 1960th, except from certain elements, such as the floating charge. Various incarnations of the Personal Property Security Act ("PPSA") adapted from the Article 9 model are in operation in all but one of the Common Law jurisdictions.¹⁵⁸ The regime of security on property in Quebec remained largely faithful to its historical roots and intellectual premises, even though in its recent reform (1993) it moved towards the same direction¹⁵⁹. However, one of the major problems in Canada is the unwillingness of the provinces to unify their rules according to a single model, as the United States have agreed on with UCC 9.

2. Political and Economic Aspects of the Reform

One of the fundamental questions with respect to the Canadian reform of secured transactions' laws is what were the reasons for the easy acceptance of the US model of UCC 9. In the 1960, when some provinces began to discuss the possibility of reforming their laws, the complexity of the legislation was significant. For example, in Ontario, there were four separate registration systems: The Assignment of Books Debt Act (1960), ch. 24, the Bills of Sales and Chattel Mortgage Act (1960), ch. 34, the Conditional Sales Act (1960) Ch. 61, and the

¹⁵⁸ In order of implementation, the nine provinces (and one territory) are: Ontario (R.S.O. 1990, c. P-10); Manitoba (R.S.M. 1987, c. P-35, to be replaced by S.M. 1993, c. 14, which is not yet in force); Saskatchewan (S.S. 1993, c. P-6.2); Yukon Territory (R.S.Y. 1986, c. 130); Alberta (S.A. 1988, c. P-4.05); British Columbia (R.S.B.C. 1996, c. 359); New Brunswick (S.N.B. 1993, c. P-7.1); Nova Scotia (S.N.S. 1995-96, c. 13); Prince Edward Island (S.P.E.I. 1997, c. 33); and Newfoundland (S.N. 1998, c. P-7.1, which was not in force as of 12 February 1999)

¹⁵⁹ For the recent reform in Quebec, see Bridge et. al. and also Boodman and Macdonalds.

Corporation Securities Registration Act (196), Ch. 71. The same situation existed in most other provinces.

The sector, which mostly pushed for the legislation was the non-banks sector, which had to deal with this complexity. The banks, on the other hand, did not resist the reform, but did not need it so much, since section 427 of the federal banking act provided them with special simple tools. As Ziegel argues, this aspect is what distinguishes between the acceptance of the reform in Canada, but its rejection in the UK. According to Ziegel, the main registration requirements are those, which are applicable to corporations under the Companies Act, and are easier to comply with. Thus, as Ziegel suggests, the main reason for the easy acceptance of a UCC 9 – type legislation in Canada is the need to reduce complexity¹⁶⁰.

Another important aspects of the easy acceptance of the US model can be attributable to the location of Canada, which is not only an economic aspect, but also cultural and political ones. In particular, the Canadian economy is strongly connected to that of the US, and cross-border secured transactions between the two countries are probably not uncommon. Moreover, Canadian policy makers are probably influenced by the US economic and legal impact, and what can be more reasonable than adopting a successful regime?

The legal culture aspect play a major role in the infusion of US laws into Canada. Both countries are considered common law legal systems (except from Quebec), and as Ziegel mentioned (p. 227), it is easier to adopt the same concepts when the two legal systems come from the same family. The fact that Quebec only partially adopted the model supports that argument.

3. The Federal – Provinces Aspects

Similarly to the US and Australia, the federal government in Canada is limited in its legislation power and thus, the commercial legislation is within the provinces' power. However, the way of adopting the secured transactions' legislation was different between the countries. In the US, the model was proposed by the federal government, and each state adopted it, almost identical to the proposal. The same attempt was made in Australia (i.e. a proposal for adoption by the states), but it was refused. In Canada, there was no such proposal and thus, each state adopted its own version. Even though most common law provinces followed the same concept (the US model), there is still a great deal of disharmonization among the various laws, and if we add to this disharmony the Quebec model, we are faced with some confusion¹⁶¹.

¹⁶⁰ Ziegel (1996) p. 226.

¹⁶¹ Ziegel (1996) p. 245

B. Canadian Civil Law Province - Quebec¹⁶²

1. Proposed Reform – Adoption of a UCC 9 – Type Code?

Between 1955 and 1993, reform of the private law, including the law of security on property, preoccupied Quebec jurists. In 1978, the Civil Code Revision Office released a Draft Civil Code proposing the adoption of something akin to Article 9 for the law of secured transactions. The regime envisioned by the Draft Civil Code featured the establishment of a single, solely consensual security device based on the hypothec, which could be taken over immovable and movable property, and over corporeal as well as incorporeal property. The hypothec would also be capable of charging single assets as well as universalities of property. The proposal of the Civil Code Revision Office also contained a "substance of the transaction" rule in the form of a "presumption of hypothec". Much of the regime proposed by the Revision Office was, following at least two further legislative iterations in the form of Draft Bills, ultimately adopted in the Civil Code of Quebec ("C.C.Q."), which was proclaimed into force on January 1, 1994. The "presumption of hypothec" was, however, not carried forward into the C.C.Q.¹⁶³.

Table 9 – Secured Transaction rules in Quebec after the Reform

Contractual Arrangement	Type of secured transactions	Formation of Secured interests	Registration	Priority Rules	Enforcement
The only security arrangement allowed is the hypothec .	The C.C.Q. does not announce a "substance of the transaction" principle. Therefore, it identifies those title transactions, that are deemed to be used as security, and then, it subjects them to the regulatory controls on hypothec-type security devices.	Formation of an hypothec secured transaction is subject to several formalities: individuals cannot enter into such a contract without delivery. Hypothecs on movables must be in writing, and must sufficiently identify the property.	The C.C.Q. establishes a comprehensive publication requirement for hypothecs, including the possibility of publication by possession for movables, but publication of other rights in movables is only required when specifically prescribed by law. ¹⁶⁴	The regular rule of the first in time prevails.	Four enumerated hypothecary recourses can be exercised: a creditor must give a prior notice or its intention to exercise recourse. The debtor has a right to remedy the default and defeat an acceleration clause. The debtor or a lower ranking creditor may force a realizing creditor to abandon the taking in in payment recourse.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ The following movable transactions require publication: installment sales and rights of redemption, (only in respect of movable acquired for the service or exploitation of an enterprise), and finance leases.

Conclusions

Even though Quebec has not followed the other provinces in adopting a UCC 9 – type legislation, the new C.C.Q is much more similar to the American model than to secured transactions’ legislation in European Civil Law countries. The new code consists on a compromise between the wish of the legislature in Quebec to keep the Civil Law tradition on the one hand, and the need to be more consistent not only with the other provinces, but also with the US.

C. Canadian Common Law Provinces¹⁶⁵

The previous Canadian Common Law recognized the same secured interests as in England:

- The unpaid seller's reservation of ownership pending payment of the price, which was not really security
- The classic chattel mortgage under which the debtor conveyed title to specific goods as security
- The fixed equitable mortgage or charge on after-acquired assets
- The floating charge over shifting assets (inventory and accounts) under which the debtor retained the power to manage and dispose of the collateral in the ordinary course of business.

Since the 1960’s, almost all of the Common Law provinces reformed their secured transactions’ legislation and adopted laws, which are similar to UCC 9. Even though the provinces did not adopt the same model (as opposed to the states in the US, which adopted UCC 9 exactly as it was proposed), the rules in all provinces are very similar to each other.

Table 11 – Secured Transaction rules in Common Law Provinces after the Reform

Contractual Arrangement	Type of Secured Interests	Formation of a Secured Interest	Effect on Parties	Registration	Priority between Secured Creditor	Priority between Secured and Unsecured	Enforcement
“Every transaction that in substance creates a security interest, without regard to its form” ¹⁶⁶ Note	'Security interest' means an interest in personal property that secures	Under all the Canadian PPSAs, all security interests are subject to the same attachment requirements, i.e., that the	The beneficial title in property subject to a security interest is, or remains, in the debtor and	PPSA priority regime is premised on registration (a unified register system, as in the US ¹⁶⁸) as the principal mechanism	Under all the Canadian PPSAs, in the absence of a specific rule to the contrary,	Under all the Canadian PPSAs, failure to perfect by possession or filing subordinates the security interest to competing perfected	PPSA enforcement regime is constructed around the premise that the debtor retains the residual beneficial title to the collateral: the secured party's real remedies against

¹⁶⁵ Ibid. See also Ziegel (1996)

¹⁶⁶ New Brunswick *PPSA*, s. 3(1).

that most Canadian acts even went one step further than the US, and recognized leases of any duration as well as secured interests in depository accounts with intermediaries as secured interests	payment or performance of an obligation." ¹⁶⁷	secured party extend value, that the debtor have rights in the collateral, and (for the purposes of third party enforceability) that the security interest be evidenced by either possession by the secured party or the execution of a written security agreement	that once the secured obligation has been discharged the debtor becomes the unencumbered owner of the collateral.	for ranking priority both among secured creditors and as between the secured creditor and the debtor's general creditors (first-to-register priority rules).	security among competing perfected security interests in the same collateral is presumptively determined by the order in which the perfecting step in relation to each was taken.	security interests, the interest of a buyer or lessee of the collateral, the interest of an unsecured creditor, and the debtor's trustee in bankruptcy ¹⁶⁹ . The super-priority historically available to the unsecured creditor as against the holder of a security interest in floating collateral is no longer available	the collateral are contingent upon the debtor's default and are then limited to the value needed to satisfy the secured obligation
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Conclusions

The adoption of the American model in Canada is not surprising, and is only one of several examples of the influence of the US legal system on its neighbor. This phenomenon exists for more than a century, and can be explained simply by the desire of the Canadian to remain the major trade partner of the US. Moreover, the similarity is also attributable to the fact that both countries are from the same legal family, and the diffusion of the rules is not as hard as in the case of different families (as in the case of Quebec, which adopted a different type of legislation)¹⁷⁰.

D. Secured Transactions in Australia¹⁷¹

1. Legal Culture

Australian (as well as New Zealand's) personal property security laws are based primarily on the traditional Common Law principles. Since 1971, several

¹⁶⁷ New Brunswick *PPSA*, s. 1: As with leases, Article 9 and the *PPSAs* distinguish a true commercial consignment from its security counterpart according to whether the agreement functions to secure payment or the performance of an obligation. Apart from leases, neither the U.C.C. nor the *PPSAs* purport to extend their reach to a non-security bailment under which the only performance that the bailor's reservation of title secures is the bailee's obligation to return the goods to the owner at the conclusion of their relationship

¹⁶⁸ In fact, the centralized register under the Canadian laws is much more efficient and computerized than that of the US.

¹⁶⁹ New Brunswick *PPSA*, *ibid.*, ss. 20, 35.

¹⁷⁰ *Ibid.*

¹⁷¹ This chapter is based on Duggan

proposals for reforming the personal property security law in Australia have been proposed. The first Australian proposal for adoption of a unified secured transaction legislation was presented by the Molomby committee in 1971¹⁷². However, this proposal has not been implemented yet. Nevertheless, the proposal was not totally unproductive, since it promoted the revision of some of the states' consumer credit legislation. Moreover, the enactment of the companies Law in 1985 also signaled for a move towards the Article 9 - type legislation, but only with respect to debts of corporations.

Table 12 – Secured Transaction in Australia

Contractual Arrangements	Type of Secured Interests	Effect on Parties	Registration	Priority Rules
In general, the traditional common law arrangements (mortgage, charge, and pledge) are recognized. (Including the floating charge). However, under the Companies law, only the first two are established, while a pledge of personal property is recognized only for certain types of assets (such as shares and other securities).	Transactions are regulated according to their form rather than their substance.	The rights of immediate and third parties are determined on a case-by-case basis, and not on policy or commercial basis.	Existing registration requirements are piecemeal. On the one hand, they discriminate between classes of assets and debtors ¹⁷³ . On the other handsome transaction are subject to more than one registration. Moreover, in some cases, registration is compulsory ¹⁷⁴ .	Existing priority rules are based on a mixture of statutory ¹⁷⁵ , common law, and equitable inputs.

In 1988, the New Zealand Law Commission produced a report recommending the adoption in New Zealand of personal property legislation based on Article 9.¹⁷⁶ Between 1990-1993, The Australian Law Reform Commission (ALRC) also initiated a similar proposal, based on Article 9.¹⁷⁷ None of these proposals were enacted.

¹⁷² Committee of the Law Council of Australia, Report to the Attorney General for the State of Victoria on Fair Consumer Credit Law (1971). Cc 5.9-5.15.

¹⁷³ In addition to the rules under the Companies Law, there are special states registration rules, and also special registration requirements for certain types of assets, such as livestock and corps.

¹⁷⁴ Under the Companies Law, registration of secured interests is compulsory, and there are criminal penalties for non-compliance.

¹⁷⁵ Priority between competing registrable security interests under the companies law are based partly on the order of registration, and partly on the order of notice.

¹⁷⁶ New Zealand Law Commission , A Personal Property Securities Act for New Zealand (Report No. 8, 1989).

¹⁷⁷ Personal Property Securities (ALRC Discussion Paper No. 52).

There were Several Reasons for the Calls for Revision:

1. Transactions under current legislation are regulated according to their form, and not their substance. Thus, the rights and obligations of the parties are determined according to un-adjustable rules, which may be inconsistent with commercial reality.
2. The current registration systems are piecemeal. In particular, there are several registration systems, which may overlap on the one hand, or miss some important transactions on the other hand. In addition to the federal corporate law registration system, the states implemented various registration systems for several types of secured assets, such as livestock, wool, crops, sugar canes, and fruits. This variety of registration systems discriminates between various types of debtors, as well as between various types of secured assets.
3. Registration imposes a heavy burden on doing business not only because of their uncertainty, but also because in some instances, the registration is compulsory, and failure to register may lead to criminal charges. Moreover, the registration may require an annual renewal, and is also subject to potential technical errors.
4. Priority rules are based on the English traditional law and thus, consist on a mixture of statutory rules (corporate laws), common law rules, and equitable aspects.
5. Current corporate law legislation include the following:
 - A. Applicable only to debtors, which are corporations.
 - B. Limited only to conventional secured transactions, such as mortgages and charges, and not includes more complicated arrangements, such as title retention transactions.
 - C. Limited only to certain types of personal property.
 - D. Priority rules consist on partially registration order, and partially notice filling order.
 - E. Does not include future advances priority rules.
 - F. Registration is compulsory

In general, as Duggan correctly summarizes, the objective of the Australian proposals is to simplify and modernize the law. Moreover, such modern laws, especially the simplification of the registration rules, would reduce the costs of lending and thus, would promote secured lending transactions. Nevertheless. It is important to balance the costs of implementing th new regime with the benefits of reducing the lending costs, and see whether moving into the new regime is

efficient. Duggan believes that with respect to Australia, the savings would be higher than the costs and thus, implementing a UCC 9 – type legislation would be economically efficient.

2. Federal - State Aspects

Similarly to the federal system in the US, the Australian federal structure consists on states' sovereignty (which is specifically defined in the constitution), and thus, federal legislation is very limited in its application. The ALRC is a federal body, which recommended a federal legislation. However, comprehensive personal property securities legislation is beyond the constitutional power of the federal parliament in Australia. Therefore, a cooperation of the states (i.e. enactment of the same rules in the states' legislation) was necessary. Such a proposal was raised by the QLRC and VLRC, and according to this proposal a model statute will be introduced by the federal government, and each states will have to adopt this model into its internal laws. Under this proposal, a single national registration system will be established, and its operation will depend on the states' cooperation. This approach is similar to that of the US, which allowed its federal legislature to introduce the model, and to the states to choose whether to adopt it

3. Conclusions

Unlike Canada, which adopted the US model, Australia and New Zealand did not follow the proposals to do so, and continue to rely on the traditional Common Law rules. There are two possible explanations for this refusal. The first one is the constitutional problem, which imposes a burden of states' approval of commercial legislation. The second reason is probably the desire to continue the traditional Common Law rules. As opposed to Canada, Australia does not consider similarity to US's law as a crucial matter, and prefers to stay with the good old English law.

Chapter 5 - Transitional and Developing Countries

G. Secured Transactions in Eastern Europe – The 1994-97 Reform¹⁷⁸

1. Economic Aspects - The Need for Reform

The legal systems in the former Soviet Union countries were based, of course, on the Russian legal system (above). Generally, until 1994, the most prevalent secured transaction in Eastern Europe was the possessory pledge or pawnshops.

¹⁷⁸ This chapter is based on Summers.

The creditors took possession on the collateral, and exercised their rights to sell it to a third party should the debtor fail to repay the loan. This type of secured transaction severely restricted the debtors' activity, since the debtors could not retain possession, and use the collateral to generate income to pay the debt. One of the goals of the legal reform in the former Soviet Union countries was to enhance economic development through advanced legal systems. Therefore, one of the major goals of the recent reform (sponsored by USAID) was to find legal rules for non-possessory pledge transactions (similar to those of the US under UCC 9). The assumption of the drafters was that such rules would promote the shift of the economy of these countries from planned economy into market economy. The rationale behind that assumption is that creditors will provide more credit only if they have sufficient safeguards, and therefore, the secured transactions legislation is aimed primarily for the benefit of lenders.

2. Legal Institutions – Pledge Registration

One of the major tools for enhancing secured transactions system is a pledge registry. In most former Soviet Union countries, registration of contracts in a notary process is a requirement for validity of most contracts. Such a system should be used for registration pledges, in order to establish creditors' priority, and public notification. The establishment of such a registration process was, therefore, very crucial. One of the major distinctions between the new legislation and UCC 9 is the role of filling – while in the US, the filling is used as a device for information and determination of priorities, in the above Eastern Europe new laws, filling is used to valid secured transactions.

3. Can UCC 9 be a Model for Civil Law Countries?

The model for the reform was based primarily on the US model of UCC 9. The major concern is whether this model can fit in Civil Law countries? The UCC model is currently the major resource for an effort to harmonize the law of secured transaction globally (see also the case of Canada). However, we know that in Quebec, it was not fully adopted, due to the major differences between the Civil and Common Law concepts. Since Civil Law courts rely heavily on the language of the statute (as opposed to Common Law judges, which tend to interpret much more), in Civil Law countries, these new laws must be clear, so that their application would be meaningful.

Table 13 – the Basic Principles of the Reform

Country	Types of Secured Transactions	Secured Assets	Priority Rules	Enforcement
Kazakstan (1994) and Armenia	Possessory and non-possessory pledge.	Definition is very broad, and includes any movable and intangible property (including inventory), with a few	There is no explicit requirement to register pledges in a centralized registrar. Therefore, even though the	The creditor shall obtain a court order for enforcement, unless the parties have agreed to a self-help method in their contract, and the collateral is in

(1996).		limitations (such as prohibited property). The creditors can take security interest in after-acquired property. The creditor's rights continue after the collateral is transferred, and include proceeds, but only if such a transfer is permitted in the contract.	priority rules determine that demands of subsequent creditors will be satisfied after the demand of the preceding ones were satisfied, the lack of registration make it hard to determine who was the first in time. Moreover, secured creditors might have second priority in comparison with other types of creditors.	the possession of the debtor.
The Kyrgyz Republic (1997)	The law provides explicitly for non-possessory pledge. Moreover, it recognizes that creditors may have rights in assets acquired by the debtor in the future.	Movable and immovable, including inventory, securities, and intangible rights. It is not clear whether the creditor's rights continue to the proceeds generated by the debtor's transfer of the collateral	The registered or perfected secured creditor has priority over all subsequent claims, including debts owed to the government.	The parties are authorized to agree upon the circumstances under which, the creditor's rights are to be enforced in default. Once a default occurs, a judicially enforcement procedure is carried out, involving a public or a private sale.
Bulgaria (1996)	The law recognizes non-possessory pledges, but only to debtors engage in business activity. Creditors are able to establish rights in collateral acquired in the future.	Very broad, and Include all movables, and intangibles.	To establish priority, all pledges must be registered, and priority rank among pledges is determined in accordance with sequence of registration. However, note that registration expires after 5 years, and this implies that loans are usually performed for a short term.	The parties can agree on default events. This right includes the right for self-help, which can be initiated by the creditor. If there is not agreement on self-help, the law determines judicial enforcement procedure (generally, a sale).
Poland (1996)	Recognition of a non-possessory pledge.	Collateral can be any transferable movable or property right, including property acquired in the future, and proceeds from the disposition of a collateral.	Registration is necessary in order to determine priority between secured creditors. However, there are other types of creditors, which might take better priority, such as alimony and worker claims, as well as government's lien. Registration is problematic, since it requires the court's approval.	In addition to civil code procedures, the law contains practical judicial procedures. The creditor can either take the collateral, ask for a private sale, or in the case of banks, perform a quick type of execution.
Ukraine (1994)	Creditors can take both possessory and non-possessory pledge.	Movable and intangible property, including after-acquired property and proceeds.	No provision that creates a mechanism for third parties' notice or identification of priority rank, such as a pledge registration.	The parties are not allowed to agree on extra-judicial enforcement (no self-help). Thus, only judicial enforcement is allowed. However, the creditor can take the secured asset. .

H. Secured Transactions in China

1. General

Even though the Chinese secured transactions' legislation has been developing in recent years, there is still no national code on mortgages. At present, legal provisions on mortgages are found in Articles 80, 81, and 89 of the General Principles of Civil Law, and on Paragraphs 112-117 of the Opinion of the Supreme People's Court on the General Principles of Civil Law (adopted in 1988).

Table 14 – Secured Transactions in China

Contractual Arrangement	Type of Secured Interests.	Creation of Secured Interest	Effect on Parties	Priority Rules	Registration	Enforcement
There are two recognized devices: "Mortgage" (Article 89(2)), and "Lien". (Article 89(4)) The former is a nonpossessory right, and is created by an agreement, and the latter is a possessory right, and can be created by the law.	Personal property can generally be pledged unless it is prohibited by the law Real property can not be pledged (Article 80). Since 1988, ownership rights can be pledged ¹⁷⁹ .	Mortgage contract has to be in writing (Paragraph 112 to the Opinion). Without a written contract, it is required to provide alternative sufficient proof for the contract.	Under Chinese Law, a mortgage gives to the mortgagee the right to dispose of the collateral when the mortgagor fails to pay the secured loan (Paragraph 117 to the 1988 Opinion).	A second mortgage is prohibited, unless the mortgagee agree (Paragraph 114 to the Opinion). In the case of such agreement, the ranking of the priority is determined according the first-in-time rule (Paragraph 115).	There is no national registration system. The local registration systems are piecemeal. These local systems are silent with respect to the consequences of not registering a mortgage.	The enforcement mechanisms of secured transactions upon defaults are based on local laws. There is no nationwide agreed mechanism of self-help, and generally, forfeiture is possible only through judicial decision.

I. Secured Transactions in Ghana¹⁸⁰

1. General

One of the major features of the economy in Africa is the rural nature of the economy. Thus, most the real estate in Africa consists on farms. This element is very crucial in the case of real estate secured interest, since in most African

¹⁷⁹ In 1988, the 7th National People's Congress Amended the Chinese Constitution of 1982, and allowed to put mortgages on land use rights.

¹⁸⁰ See Dankwa

countries, lenders prefer to take possession in the real property. This arrangement makes it harder to the borrowers to repay their debt. Thus, in most countries in Africa, only possessory secured rights have been recognized until recent years, and in most cases, the secured assets were real estate¹⁸¹.

However, attempts to speed-up the enactment of mortgage laws in some of the African countries were not successful. In Kenya, such an attempt was unsuccessful for several reasons. The most significant problem was the inability to enforce the mortgage and foreclose the secured property when the borrowers default in repaying the debt. The reason for inability to enforce the secured rights is that most borrowers hold their land for many years and even generations. A foreclosure of the land is almost impossible without violence in these cases, and creditors, their agents, or enforcement authorities are subject to real danger in attempting to enforce the mortgage.

The result of this attempt, as well as similar attempts in other African countries, was that not only the number of secured transaction did not increase, secured transaction were reduced. The reason is that creditors did not believe that they could enforce their rights and thus, preferred to continue the reliance on possessory secured rights.

2. The Case of Ghana

The case of Ghana reflects a more extreme case than that of Eastern Europe countries. Not only that only possessory secured transaction was recognized, this type of a secured transaction was used for real estate as well as for personal property. The lack of non-possessory secured rights can be explained by the refusal of creditors to take the risk of not being able to enforce their rights. The lack of established legal systems, which can assist in such enforcement, also contributed to such a fear.

Before 1979, the only secured device recognized in Ghana was the pledge, for both, personal property and real estate. Therefore, only a transfer of possession to the creditor was considered as a valid secured transaction. In 1979, the Mortgages (Amendment) Decree, 1979 changed this situation, and introduced a non-possessory right in real estate. However, Ghana was still not ready for a non-possessory right in personal property.

3. Does the Reform Contributes to the Economic Growth in Ghana?

On the one hand, introduction of non-possessory rights in real estate provide debtors with the possibility to get loans and to continue generating income from the secured land. Moreover, the non-possessory nature of the transaction allows

¹⁸¹ S. Parker, M. Robert, C. Vogel, and Phillip Wellens, *Financial Reform: A Manual for Assessing the Roles of Law and Culture*, Harvard Institute for International Development, 49 (1995).

debtors to receive credit from more than one creditor. On the other hand, to some extent, commentators argue that the new law effectively abolished the pledge mechanism. Creditors, of course, prefer to have possession on the collateral. Thus, it is not clear whether creditors will trust the legal system to provide them with the appropriate enforcement of their rights. The new rules are similar to traditional mortgage rules, and the only question is whether they will be enforceable, so creditors can rely on them.

Table 15 – the 1979 Reform in Ghana – Introduction of Mortgage Rules

Contractual Arrangements	Type of Secured Interests	Effect on Parties	Priority Rules	Enforcement
Mortgage (non possessory) and Pledge ¹⁸² (possessory).	The new law was applicable for immovable property (mortgages). For movables, only pledge was applicable.	“ A mortgage shall be an encumbrance on the property charged, and shall not, except as provided by this decree, operate so as to change the ownership, right to possession, or other interest (whether present of future) in the property charged”.	Under the old law, there was no possibility to have more than one creditor. However, under the new law it is possible to have several creditors. The priority is based on the first-in-time principle.	In default, the creditor must provide a 30 days notice and only than, can ask for a court order to sell the property, or to possess the property.

Conclusions

The new mortgage law has brought the secured transactions’ laws in Ghana into line with customary practices. However, since it is still not established, it might be harmful to the economy in the first years, since creditors would not be willing to lend money under the new regime. Wellens et. al. conclude their suggestions by saying that such reforms may create more damage than benefit, if the legislature would not consider cultural, religious, and social aspects. Thus, mortgage rules may be dangerous in rural areas. Nevertheless, they suggest to implementing different rules for credit, without collateral requirements¹⁸³.

¹⁸² For traditional pledges, the previous laws prevailed.

¹⁸³ Wellens et. al. p. 83-85.

Chapter 6 - Attempt of Harmonization – The UNIDROIT Convention¹⁸⁴

In light of the differences between the Common Law and Civil Law regimes, it is not expected that UCC 9 will be adopted in any of the developed European countries in the next years. However, one initiative with respect to international adoption of a UCC 9 –type model is worth mentioning – The one sponsored by the UNIDROIT, which deals with secured financing of mobile equipment. The proposal is for a multilateral convention, for cross-border aspects of secured finance of mobile equipment.

Table 16 – the Major Issues Involved in the UNIDROIT Proposal

Contractual Arrangements	Type of Secured Interest	Effect of Parties	Priority Rules	Registration	Enforcement
There was no question that the convention should apply to possessory and non-possessory secured rights. The question was whether the convention would apply to a common law type secured interest, or should it include title-reservation transactions. Moreover, whether it shall apply to leases (even true leases).	The convention should apply to movable assets, but the question was the scope. What types of equipment should be included? Only valuable mobile assets, such as aircrafts, or any mobile assets.	One significant proposed principle is that when a secured transactions is valid under domestic laws, even if its was not perfected under the convention. On the other hand, in order to provide some power to the international convention, if a security interest is valid under the convention, it is enforceable even if it is not valid under domestic laws.	It is obvious that from international perspective, priority rules are much more complicated than the domestic perspective. The question was what should be the scope of the participant, which might be subject to the rules. Should it include only secured creditors and trustee in bankruptcy, or include also other types of creditors, and buyers of the assets? The proposal suggested that the convention will determine priority rules between an international security interest and other security interests, and between an international	It was proposed to establish an international registry. The question was how should it be structured? Should it be assets-based, or indexed by debtors' name (as UCC 9 registry)? The scope of registration was also questionable-should it include just secured rights, or also ownership. Finally, the question of cooperation between the international registry and domestic ones arose. The convention permits contracting states to link their local registries to the international registrar, so that a registration, recording, or	On the one hand, the convention cannot override domestic rules. On the other hand, it should have some effective enforcement tools. The question was to what extent should the convention regulates enforcement rules, and what should be the impact of such rules on domestic enforcement rules.

¹⁸⁴ Charles Mooney Jr. Exporting UCC Article 9 to an International Convention: The Local Law Conundrum, 27 Can Business L. J. 278.

			security interest and interests of buyers.	filling under local law will constitute an international registration.	
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Conclusions

Harmonization of the law of secured transactions through an international convention might be the first step towards further harmonization of domestic laws. The challenge of such harmonization is even greater, in light of the differences between the families. However, since the basic idea of what is the nature of secured right is similar among families, it is not impossible for countries to agree on basic mutual principles in a convention. It should be emphasized, that the scope of the UNIDROIT convention is very limited, and we have still a long way to go until countries will harmonize their secured transactions' legislation. Should UCC 9 be the model for such harmonization? If civil law countries will move towards harmonization (in this might happen in the near future in the European Community), UCC 9 will probably be the model for it.

Summary

It is interesting to see that even though the building blocks of secured transactions' laws in both families are more or less similar, the evolution of the law among various legal systems differs significantly. There is also a significant difference in the pattern of evolution among families and legal systems. In the Civil Law family, the Roman law introduced comprehensive set of rules for secured transaction, which recognized possessory and non-possessory types of rights. Surprisingly, most Civil Law legal systems continue to rely on the traditional Roman secured transactions' law until today. Nevertheless, within the Civil Law family, developed countries introduced more advanced rules since the 19th century, while developing countries (such as Eastern Europe countries), reformed their laws only recently.

In the Common Law family, the pattern of evolution is different. The traditional Common Law rules (originated in England), were exported to several other legal systems, such as the US, Canada, and Australia. Since the 19th century, secured transactions' laws in the US have started their departure from the traditional Common Law rules, a process that was finalized with the introduction of UCC 9. Canada followed that trend, and introduced similar rules in the late 20th century. Australia and New Zealand are still relying on the English laws, but seriously consider to following Canada. Thus, within the Common Law family, we see a diversity of among developed countries. Each legal system turned into a different direction with respect to its secured transactions' legislation.

With respect to developing countries from both families, the major reason for adoption is to promote secured transactions' activity. The introduction of non-possessory secured rights in personal property is supposed to increase dramatically the scope of secured interests. Moreover, it will allow debtor to continue holding their assets (and thus, continue generating income with the collateral). The introduction of a single, comprehensive debtors' name-indexed register is supposed reduce the costs of gathering information. Moreover, the introduction of bright-line priority and enforcement rules will increase certainty. In short, an introduction of an Article 9-type legislation in developing countries will promote secured lending transactions.

The question most commentators are asking today is whether harmonization of secured transactions laws is possible, and in particular, whether the difference between the civil and common law families may impose an additional burden on attempts for harmonization. As we have emphasized above, most developed countries do not consider the adoption of a UCC 9 – type legislation, regardless of the legal family to which they belong. On the one hand, Common Law countries such as England and Australia have not adopted such legislation (in spite of several suggestions to do so), and developed European civil law countries have not even considered it. On the other hand, civil law developing countries, have been adopting a UCC 9 – type secured transactions' legislation in recent years.

UCC 9 represents a universal solution for secured transactions' legislation. Its unique feature is that it can be implemented in legal systems from both families. On the one hand, the substance of the law is based on common law grounds, and thus, common law legal systems, such as Canada, can find it easy to adopt a similar law. On the other hand, the codification method is similar to civil law legal systems and thus, such legal systems can easily adopt a similar type of legislation.

In my opinion, the increasing need for adoption of a UCC 9 –type legislation in legal systems from both families is derived from a neutral aspect (neutral with respect to the differences between the families). Most commentators praise the simplification of the UCC 9 regime and in particular, the registration mechanism. As argued by Duggan, Bridge, and Ziegel, the main reason for the adoption of a UCC 9 –type legislation in Canada (as well as the consideration to do so in Australia) is the need to simplify the complexity of registration. Moreover, they argue that one of the reasons for not adopting a similar regime in England is that the registration system in England is relatively simple and therefore, there is no urgent need for simplification of this system. Thus, they agree that adoption of a UCC 9 – type legislation is derived from reasons that are not connected with the legal family to which, the underlying legal system belongs.

Appendix A – The evolution of Secured Transactions Laws in Developed Economies

The Country	18 th Century	19 th Century	20 th century (I)	20 th Century (II) – last 20 years
United States	Traditional Common Law	1820 – introduction of the chattel mortgage.	Complex state’s legislation. 1954 – the introduction of UCC 9	1972 – the last state (Louisiana) adopts the UCC model.
England	Traditional common Law	Introduction of the Chattel mortgage and the floating charge.	No significant changes.	1989 – proposal to adopt a UCC 9 – type legislation (not accepted)
Russia	Traditional civil law (based on the Roman Law)	Introduction of real estate mortgages.	Restricted possibility to secure transactions (mainly because of the state-own property.	1992-1996 – reform of movables and immovables secured transactions
Canada	-	Traditional common law	Same. In the 1950’s first calls for reforms.	1968- 1993 reforms in most provinces, and adoption of UCC 9 – type legislation (except for Quebec).
Australia	Traditional common law	Same	Same	1971 – first calls for reforms. Not accepted

Appendix B – The Evolution of Secured Transactions in Developing Countries in Recent 50 Years

Country	1950-1970	1970-1980	1980-1990	1990-2000
Russia	1964 – the civil code imposes significant limitation on secured transactions.	Same	1987 – 1990 first recognition of private ownership on real and personal property	1992-1996 – reforms of personal and real property secured transactions laws.
Former Soviet Union Countries	Same as Russia	Same	Same	1994-1998 – adoption of UCC 9 – type legislation.
China	No national mortgage rules. Real property mortgage is legally not allowed.	Same	1982- the constitution does not allow RP mortgages. 1988 – a change in the cons. Provide a legal possibility to put a mortgage on leases.	Several proposals to reform the secured transaction legislation
Ghana	Pledge of real property is the primary secured transaction.	1979 – introduction of real property mortgage laws	Same. No non-possessory rights in persona property.	Same.