LL.M. THESIS

"The Economic Efficiency of Secured Transactions: a Comparative Analysis"

by

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ABSTRACT

Countries worldwide are becoming increasingly aware of the existing relationship between the economy and the regulatory environment. The pressure exercised by International Organizations, Financial Institutions and Multinational Corporations is spurring this awareness continuously. Lawmakers across the globe are moulding key areas of their legal systems to get an alleged competitive boost on the international economic markets. One of these key areas is secured transactions.

According to the studies conducted by prominent economists, by the European Bank for Reconstruction and Development (EBRD), by the United Nations Commission on International Trade Law (UNCITRAL) and by the World Bank (WB), access to credit is considered an important development factor both at macroeconomic and microeconomic levels – that is for nations, companies and individuals. Secured transactions laws, therefore, by regulating access to credit are the subjects of these studies, which aim by using econometric methodologies, at evaluating the economic efficiency of that regulatory framework.

On this basis countries are adopting reform suggestions created with the specific intent of easing the getting credit process and, as a consequence, prompt economic development. The wide adoption of these reform suggestions is producing as a result not only a cross-country circulation of legal patterns, but it is also inducing lawmakers to loosen the collateral requirements necessary to the getting credit process.

Examples of this process are the reforms enacted in Quebec, France and Belgium and the deep discussion currently held in Italy regarding the results that a substantial reform of the field would produce for the economy. Common denominator of these reforms in the adoption of a unitary non-possessory security interest developed on the model of the Article 9 of the Uniform Commercial Code.

In this light, two questions arise: if we consider the concept of cultural specificity of the law, how can reform laws designed upon econometric measurements and foreign models be able to perform their function in different legal systems? And then, if loosened collateral requirements are the common denominator of all these reforms, what are the potential negative implications on individual consumers?

// RÉSUMÉ

Les pays du monde entier sont de plus en plus sensibilisés au lien entre l'économie et l'environnement de la régulation. La pression exercée par les organisations internationales, les institutions financières et les sociétés multinationales entretient et stimule cette sensibilisation. À travers le monde, les législateurs façonnent des domaines clés de leurs systèmes juridiques respectifs avec pour objectif d'obtenir un accroissement de leur compétitivité sur les marchés économiques internationaux. Parmi ces secteurs stratégiques se trouve les garanties.

Selon les études conduites par des économistes proéminents, par la Banque Européenne pour la Reconstruction et le Développement (BERD), par la Commission des Nations-Unies pour le Droit Commercial International (CNUDCI) et la Banque Mondiale (BM), l'accès au crédit est considéré comme un important facteur de développement aux niveaux macroéconomique et microéconomique, et cela pour les nations, les entreprises et les particuliers. Par conséquent, le droit des garanties, régulant l'accès au crédit, constitue l'objet de ces études qui, par l'usage de méthodologies économétriques, vise à évaluer l'efficacité de ce cadre règlementaire.

Sur cette base, les pays adoptent des suggestions de réforme élaborées dans l'intention particulière de faciliter la procédure d'obtention du crédit et, en conséquence, leur prompt développement économique. L'adoption de ces suggestions de réforme par une large majorité d'États résulte en une circulation de modèles juridiques à travers les frontières, mais entraine les législateurs à assouplir les conditions de garantie nécessaires à la procédure d'obtention du crédit.

Des exemples de cette procédure se trouvent dans les réformes promulguées au Québec, en France et en Belgique ainsi que dans l'important débat se tenant actuellement en Italie et concernant les retombées d'une réforme substantielle produirait pour l'économie. Le dénominateur commun de ces réformes est l'adoption d'une sûreté unitaire non-possessoire développée sur le modèle de l'Article 9 du « *Uniform Commercial Code* ».

À la lumière de ces explications, deux questions surviennent: si nous considérons le concept de spécificité culturelle du droit, comment des réformes juridiques élaborées d'après des mesures économétriques et des modèles étrangers peuvent remplir leur fonction dans des systèmes juridiques différents ? De ce fait, si des assouplissements de conditions de garantie sont les dénominateurs communs de ces réformes, quels sont les implications négatives potentielles sur les consommateurs ?

1. Introduction

Secured credit legal regimes have historically been among those features inherent to the development of the two major legal families whose individual shape contributed to define the dichotomy between civil law and common law. Secured credit and its regulation have always been found at the intersection between commercial law and property law. Its economic function was conceived to allow the economy of production to work through an extremely basic process of wealth circulation.

However, with the advent of the financial economy and of the *law and development* movement, lawyers, economists as well as International Organizations and International Financial Institutions began to observe worldwide secured credit from a different perspective. By adopting statistical and econometrical methods aimed at measuring the economic efficiency of the law they asserted that access to credit has a central role in economic development for individual, firms and countries. On this basis, these players have joined forces in the effort of pushing legislators across the globe towards implementing secured credit legal regimes that conform to a well-defined set of prescriptions.

Accordingly, to ease the process of getting credit and thus spur economic development, lawmakers are asked to implement a secured credit regime hinged on three main features: one, a unitary non-possessory security interest; two, relaxed collateral requirements and three, a centralized credit registry. The post-communism reconstruction first and the European sovereign debt crisis then have provided a

fertile ground for reforms based on these prescriptions to take place. As a consequence, this practice is producing an extremely large process of legal harmonization, which inevitably leads to a phenomenon of legal transplantation.

Most of the literature so far has only looked at the process of legal harmonization, neglecting to inquire deeper into the legal transplantation phenomenon. This thesis proposes to do so by using the concept of cultural specificity of the law as a point of departure to inquire deeper into the phenomenon. By means of a historic, economic and sociologic contextualisation of the birth and development of secured credit laws across legal families this thesis will question if legal transplantation in the field is actually possible. The analysis will then lead to look at some of the possible negative outcomes generated by such practice. In particular, through a detailed reconstruction of reform processes in France, Belgium, Italy and Quebec, the thesis will bring forth the intricate risks for consumers and for countries connected to the implementation of these reforms.

1.1 Historic Overview of Secured Transactions Laws

Primary goal of this first chapter is to highlight the historical divergences between secured transaction laws across the two major legal traditions. In doing so, I will try to bring forward how the secured credit legal regime in common law countries – due to cultural-specific features – is believed to be to be less risk adverse compared to its civil law counterparts. Historically, the civil law tradition has seen commercial laws and therefore, secured transactions and their effect on society, as being at the border between private law and public law. On the other hand, the propensity of the common law towards embracing risk is believed by many to produce efficient and effective results in the process of getting credit and, as a consequence, it is recognized as the ignition that sets in motion the engines of economic development.

1.2.1. Civil Law

Secured transactions can be defined as those monetary obligations in which the payment of the debt is guaranteed by a property – a collateral – subject to be sold and the sale proceeds used to pay the creditor.[1] The need to regulate this relationship was first understood by the Romans who have lain the foundations upon which most of nowadays secured transactions laws have emerged. Both birth and development of

[1] Lynn M. LoPucki et al., "Optimizing English and American Security Interests" (2013) 88:4 Notre Dame Law Rev. 1785 at 1785. According to LoPucki et al. "Security is a relationship between collateral and monetary obligations. The essence of the relationship is that if the obligations are not paid, the collateral may be sold and the sale proceeds applied to pay the obligations"

secured transactions laws in Europe are said to go hand in hand with birth and development of the overall civil law system. Legal historians assert that in the old continent the history of secured transactions laws is rooted in that *corpus legis* produced by Tribonian with the compilation of the *Corpus Juris Civilis* under the order of Emperor Justinian between 528 and 533 AD.[2]

Before indulging in the historic and comparative overview of birth and development of secured transactions laws a clarification appears necessary. Prior to the *Corpus Juris Civilis*, Roman law already regulated secured transactions. A particular but simple concept by the name of *fiducia* allowed romans to create monetary obligations quickly and effectively. The *Corpus Juris Civilis* though, as history showed, in the same way as any other subsequent codification was meant to embody the culmination of years of intense legal development, which inevitably resulted in some relevant concepts - in our case inherent to secured credit - like the old *fiducia cum creditore*[3] to be arbitrarily left out of the compilation.[4]

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[2] Willem J. Zwalve, "A labyrinth of creditors: a short introduction to the history of security interests in goods" in Eva-Maria Kieninger ed., *Security Rights in Movable Property in European Private Law* (Cambridge: Cambridge University Press, 2004) at 38. On this point is important to note that legal historians also believe that the *Corpus Juris Civilis* laid the foundations for the development of civil law in Europe. For further see William Tetley, "Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)" (1999) 3 Rev. Dr. Unif. 591 at 592.

[3] *"Fiducia cum creditore"* was a special type of "*fiducia"*. It was used to guarantee a credit by handing the property of a movable good to the creditor. It established, therefore, the most ancient form of security interest in Roman law.

[4] *Supra* note 2 at 39.

In order to fully comprehend the reasons behind the reforms that shaped the modern framework on secured transactions in Europe it is indispensable to begin this overview from the provisions contained in the *Corpus Juris Civilis*.[5]

The already mentioned concept of *fiducia cum creditore* stemmed from the broader notion of *fiducia.*[6] The latter regulated the simple transfer of property, which could be realized *cum amico* or *cum creditore*. Afterwards, during the so-called *classical age*, it was substituted by the narrower and innovative concepts of *pignus* and *hypotheca.*[7]Both were radically different from *fiducia.* According to the explanation given by *Goebel,* in fact:

> [*F*]*iducia* indicated the transfer of ownership to the creditor, who generally but not always retained possession as well; *pignus* indicated the retention of ownership by the debtor, but the transfer of possession to the creditor; and *hypotheca* indicated the retention of both ownership and possession by the debtor, but with the creation of a possessory interest in the creditor.[8]

Characterized by having a nature of *jus in re aliena*[9], both *pignus* and *hypotheca* allowed for the first time the grantor[10] to freely dispose of the property on which a security interest had been ascribed. The property subject to the charge could thus be used to secure another debt and/or transferred to a third party without any risk for the grantee, who could rest assured that his obligation would be satisfied. Ultimately, the

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[5] *Supra* note 2 at 39.
[6] On the concept of *"fiducia"* see Roger J. Goebel, "Reconstructing the Roman Law of Real Security" (1961) 36 Tulane Law Rev.
[7] *Supra* note 2 at 39.
[8] *Supra* note 6 at 29.
[9] "*Jus in re aliena"* is a latin expression meaning "right in the property of another".
[10] The terms grantor and grantee are used to describe respectively the debtor who grants the charge of a security interest over the property and the creditor who accepts the charge.

grantee, in case of default of the grantor, had a right to recover his debt by selling the secured good before the other subsequent creditors.[11]

Obviously, the action of selling the good – an *actio in rem*[12] - required the grantee to have physical possession of the property. In order to do so, the Romans engineered a particular action named *actio serviana.*[13] Effective against inappropriate possession by both the grantor and third parties, the *actio serviana*, after the promulgation of the *Edict of Hadrian* written by Julianus, began to be used beyond the boundaries of credit.[14] Its remarkable diffusion is certainly due not only to its high yield of efficacy, but also to its easy availability to any grantee who lacked possession of the property on which the charge was ascribed. The *actio serviana* allowed creditors to enter monetary obligations in a more confident way, which ultimately resulted in a capillary diffusion of practical applications of both *pignus* and *hypotheca*.[15]

Beside the distinctions already painstakingly highlighted, a notable difference between *pignus* and *hypotheca* concerned their modes of creation. A *pignus* was created by a *traditio* (delivery of possession with the intention of passing ownership) whereas a *hypotheca* by concluding a simple contract. Although Roman law had no rule regarding the specific application of one or the other security interest to either movable or immovable property, the different modes of creation of the charges made the *pignus*, unwillingly but conveniently, best suited to be associated with movables.

[11] *Supra* note 2 at 39.
[12] *"Actio in rem"* indicates a proprietary action taken against that object that is subject to the dispute.
[13] *Supra* note 6 at 36.
[14] *Supra* note 2 at 39.
[15] *Supra* note 6 at 37.

Movable property was easy to delivery, therefore perfect for the *traditio*.[16] On the other hand, the *hypotheca* became associated with those secured transactions in which land was involved.

While both *pignus* and *hypotheca* are often translated as pledge and hypothec, they are far from being synonymous, in a practical perspective, with modern day possessory and non-possessory security interests in civil law systems. In this light, according to Marcianus, a Roman lawyer, the dichotomy between *pignus* and *hypotheca* was purely verbal[17] in Roman law, whereas in most modern day systems theoretical and practical divergences substantiate the dichotomy. On the issue, the legal historian Zwelve purposefully points out that:

> Pignus was created by *traditio*, which is by surrender of *civilis possessio* to the charge. The latter did not become a mere bailee (detentor), as he is in modern continental European civil law, but a possessor, the pledger not even retaining constructive possession. A subsequent surrender of possession by the pledgee to the pledger, however, did not terminate his security interest, as is the case in modern continental European systems. Consequently the object of a *possessory* security interest was infrequently leased to the chargor.
>
> Whenever property had been charged by way of pledge and was subsequently bailed (transferred) to the chargor, there was practically no difference between *pignus* and *hypotheca*.[18]

Under Roman law the grantor was allowed to ascribe multiple charges on the same property. This practice eventually resulted in quite a serious problem for all the grantees. In particular, it generated a great amount of confusion about what was the ranking of each grantee.[19] Until this moment, in fact, the general rule for what is

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[16] *Supra* note 2 at 40.
[17] *Ibid.* at 41.
[18] *Ibid.*
[19] *Ibid.* at 42.

nowadays known as priority was "*prior tempore*, *potior iure*". It literally and practically meant that he who was first in time was also first in right.[20]

To the eyes of the modern jurist implementing a well-defined system of publicity could have easily solved the issue. And that is exactly what the Emperor Leo did in 472 AD.[21] The use of the same property for several *pignus* or *hypotheca* was so common during the *classical age* that it pushed the Emperor to decree that only those security interests that were created as a *"public instrument"* and then signed by three witnesses had automatic priority over those that were not created this way.[22] Soon after the Emperor's decree the issue seemed to be solved but, unfortunately, the reality was quite another. Confusion still reigned supreme. An increasing number of grantees were resorting to criminal law, by means of the *"action in theft"*, to see the secured obligation fulfilled.[23]

Although the implementation of a system of publicity laid the foundations for subsequent important developments in the field, the nature of civil law systems in regulating secured transactions started to come forward already around the 15th century. When the Roman system of security interests had become assimilated in most European countries[24], some of them, namely Germany, Greece and the Scandinavian empire forbid the use of a single *res*[25] for multiple charges.[26] However, the remaining countries, with France leading the way, preferred to attack the issue not

[20] *Supra* note 6 at 61.
[21] *Supra* note 2 at 42.
[22] *Ibid*.
[23] *Ibid*.
[24] The only excpetion being England and Wales.
[25] *"Res"* is the latin word for property.
[26] *Supra* note 6 at 61.

by implementing a full-fledged system of publicity but rather by acting on the consequences that the *hypotheca* produced on movable property.[27] These regulatory efforts would produce substantial effects up to this day.

First implemented in France, a rule named *"mobilia non habent sequela"*[28] established that the most important requirement for a valid *hypotheca* on movables was the continuous possession of the property by hand of the grantor.[29] As a consequence, the transfer of a personal property on which a *hypotheca* was ascribed made the legal validity of the security interest expire immediately. This rule was a stepping-stone towards the complete abolishment of the Roman hypothec on movables. Its history was in fact brought to a conclusion with the 1804 French Civil Code.

The *Code Civil Français* with articles 2017-2072 introduced two new concepts of security interest: *nantissement* and *gage*. Mostly drawn from French customary law, rather than from Roman law, both marked the beginning of a new Pan-European era in the history of secured transactions.

The *nantissement* could be considered as the security interest in incorporeal movables. The *gage*, instead, could be set up only upon corporeal movables. Both *nantissement* and *gage*, possessory in nature, imposed as a necessary requirement the delivery of possession to the creditor.[30] The revolutionary trait of the French Civil

[27] *Supra* note 2 at 44.
[28] The original name of the rule in French was *"Meubles n'ont pas de suite".*
[29] *Supra* note 2 at 45.
[30] *Ibid.* at 47.

Code in the field of secured transactions lied also in the general rule established by article 2076 which claimed that: *"pas de gages sans dépossession"*.[31] This rule will be embedded, although under different forms in the Old Italian *Codice Civile* (1865), in the Spanish *Código Civil* (1863), in the German *Bürgerliches Gesetzbuch* (1900)[32] and, most notably in the *Code Civil* (1804) in Belgium where, as we will carefully examine in chapter three, the abolishment of the rule represented in 2006 the main goal of an important reform.

1.2.2. Common Law

In the common law tradition the secured transactions system was unsurprisingly different. The early English legal system was divided into common law and equity, a macro-distinction that obviously produced repercussions on many micro-areas of the regulatory environment, including secured transactions. Before the year 1870 – during which common law and equity courts were united – some security interests were only recognized in common law courts, whereas, others were only recognized in equity courts.[33] After the unification of the courts, the framework on secured transactions was comprised of two security interests on movable property: the possessory *pledge* also generically called *charge* and the non-possessory *chattel mortgage*.[34]

[31] Translation: *"No pledge without dispossession"*.
[32] *Supra* note 2 at 47.
[33] McCormack Gerard, *Secured Credit under English and American Law. Cambridge Studies in Corporate Law* (Cambridge: Cambridge University Press, 2004) at 39.
[34] *Supra* note 2 at 49.

However, a great debate arose when it was argued that both *pledge* and *chattel mortgage* were in the English system what *pignus* and *hypotheca* were in Roman law.[35] This claim was immediately challenged in the famous case of *Ryall v Rolle.*[36] The judges in deciding the case resorted to the provisions and definitions contained in the *Corpus Juris Civilis*. The Court first argued that the *pledge* stemmed from the Roman *pignus* since the common law was developed upon a customary law which had drawn some of its rules from continental Europe.[37] Then, with a creative interpretation of the words of Tribonian, the Judges promptly rejected the claim that the English chattel mortgage was just a new version of the Roman *hypotheca*.[38]

In 1878 though, with the enactment of the *Bills of Sales Act,* the English *chattel mortgage* was radically changed. The Act established that in order for any *mortgage* to be valid the grantor had to actually convey possession to the grantee, abolishing therefore the non-possessory trait of the *chattel mortgage*. From a different perspective, it should be noted that the British society during the 19th and early 20th centuries was very well known for its involvement in every sort of trade and commerce. As such, the *pledge* had to mutate in order to adapt to the highly demanding changing needs of the British society. Until this moment, the *charge* created with the *pledge* was *fixed*, in the sense that it could be established only upon (a) well-defined asset(s). The introduction of a *pledge* with *floating* charge changed

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35 *Supra* note 2 at 49.
36 William J. Zwalve, "Ryall v. Rolle and the Civilian Tradition" (1996) 56:2 Louisiana Law Rev. 436.
37 England was conquered in 1066 by the francophone Normans, therefore it is not hard to trace a relationship between customary law in Europe and in the newly conquered England.
38 *Supra* note 2 at 49.

everything. Merchants were finally able to secure all the undertakings of a corporation or generic categories of assets in their inventories.

Furthermore, in that territory called British North-America and now known as Canada, a large diffusion of the old non-possessory *chattel mortgage* took place. In 1849 the legislative body named *Legislative Assembly of the Province of Canada*, in the wake of the European experience, acted promptly passing legislation requiring the public filing of *chattel mortgages.*[39] The newly enacted legislation aimed at avoiding publicity issues in those cases in which a plurality of creditors was involved. In addition, given the strong relationship between England and Canada the success enjoyed in Britain by the *floating charge*[40] was promptly replicated on the other side of the Atlantic Ocean where, once again, the regulatory body had to introduce *ad hoc* legislation to institute separate registry systems for both *fixed* and *floating* charges.[41] Nevertheless, the regulation was all but friendly to Canadian businesses since a multitude of provincial regulation posed a burden on the shoulders of those willing to set up security interests in different provinces.

In the common law world the 20th century was a moment of intense rationalization and tentative harmonization in the field of secured transactions. The United States, fuelled by the unstoppable demand for legislation by commercial and business entities, were the first to embark in the effort of trying to feed such a demand. In 1940 the *National Conference of Commissioners on Uniform State Law* began to co-

[39] Cuming Ronald, Walsh Catherine et al., *Personal Property Security Law. Essential Canadian Law* (Toronto: Irwin Law inc., 2005).
[40] From now on we will refer to both *fixed charge* and *floating charge pledges* by *Fixed Charge* and *Floating Charge.*
[41] *Supra* note 39 at 3.

sponsor with the *American Law Institute*, the enormously famous and game changing *Uniform Commercial Code*.[42]

Published for the first time in 1952, the *Uniform Commercial Code (UCC)* and, more specifically, its Article 9 was certainly the most innovative and successful framework on secured transactions. The code, which became firstly effective only in the state of Pennsylvania in 1953, was then adopted in all the 50 states.[43] Prior to the Article 9 of the UCC the laws governing secured transactions in the USA were scattered across the 50 different states. This regulatory dispersion generated a huge amount of pressure for rationalization and harmonization.[44] The impressive achievement of the Article 9 of the *Uniform Commercial Code* – which also explains why it became as popular as a model for reform in other jurisdictions – is found in the introduction of a single generic non-possessory security interest.[45] The latter was defined by the Article 9 as *"meaning an interest in personal property or fixtures that secures either payment or else the performance of an obligation"*.[46]

Broad enough, the non-possessory security interest under the first version of the UCC Article 9 set forth certain requirements to be fulfilled in order for obligations to be successfully secured. First, there had to be a written agreement among the parties; second, the grantee had to advance value and; third the grantor had to show proof of

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[42] *Supra* note 39 at 42.
[43] Even Louisiana, a mixed jurisdiction of French civil law inheritance adopted the Uniform Commercial Code.
[44] *Supra* note 39 at 43.
[45] Oscar Spivack, "In Re Article 9" (1954- 1955) 28 Temple Law Quarterly 603 at 605.
[46] *Supra* note 33 at 72.

rights in the property subject to be used as collateral.[47] The Article 9 also provided a clearly designed system of publicity. For every type of collateral, except those transferrable by mere delivery (negotiable instruments and negotiable securities), publicity could be obtained through a simple filing of the arrangement in a public office.[48] Under the Article 9 what we have vulgarly defined as arrangement was called financing statement and, in order to be valid, it had to correspond to certain well-defined guidelines.

Two important concepts were central to the Article 9: attachment and perfection. Attachment refers to the moment in which the obligation is established and the security interest becomes enforceable because it is attached to the creditor/debtor relationship. Perfection instead refers to filing; to that act that makes the security interest effective against third parties.[49]

The article 9, given its importance for the American capitalist economy was during the years subject to various revisions. In 1966, the Permanent Editorial Board for the Uniform Commercial Code first asserted that the Article 9 of the Code was in need for an in depth review. A review committee was thus appointed with the goal of proposing necessary and appropriate amendments.[50] After 5 years of works, the committee published a *"Final Report"*, which highly influenced the revised version of the Article 9. Once again in 1998 the *National Conference of Commissioners on Uniform State Laws* and the *American Law Institute* embarked in a revision of the Article 9.

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[47] *Supra* note 45 at 605.
[48] *Ibid.*
[49] *Supra* note 33 at 73.
[50] Peter F. Coogan, "The New UCC Article 9" (1973) 86:3 Harvard Law Rev. 477.

According to Sigman and Smith, the new version:

> [M]akes significant changes in the rules governing personal property secured transactions. These changes include the expansion of the scope of the Article 9's coverage; additions to and modification of definitions; clarifications of and modifications to the rules for the attachment, perfection and priority of security interests and for the rights of obligations of account debtors and other persons obligated on collateral; amplification of rules governing the relationships between certain third parties and the parties to secured transactions; adjustments to some of the rules for enforcing security interests; and modernization of the framework and operations of the system for perfecting security interests by the filing of financing statements.[51]

The revised version of the Article, although approved in 1999, was enacted by all the states only by 2001.

The Article 9 already in its first version did not fail to become a source of inspiration for the Canadians. In Canada the vastly British imported secured transactions laws were far from being homogenous. The federal regulatory environment did not help either. Very often provincial regulations were very different with one another causing serious concerns in the business community.[52] In particular, the spark that ignited the reform engines was a vast fragmentation of registration policies.[53]

In 1967 the Canadian parliament passed the *Personal Property Security Act* (PPSA). The Act, which came into force only in 1976[54], was vastly engineered upon the design and the structure of the American Article 9 of the *Uniform Commercial Code*.

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[51] Harry C. Sigman & Edwin E. Smith, "U.C.C. Article 9's Transition Rules: Insuring a Soft Landing" (2000) 55:3 The Business Lawyer 1065 at 1066.
[52] *Supra* note 39 at 4.
[53] *Ibid.*
[54] The first Province to enact was Ontario in 1976, then followed by Manitoba 1978, Saskatchewan 1981, Yukon 1982, Alberta 1990, British Columbia 1990, New Brunswick 1995, Nova Scotia 1997, Prince Edward Island 1908, Newfoundland and Labrador in 1999, Northwestern Territories and Nunavut 2001.

The PPSA introduced a single concept of *security interest*[55] in the Canadian secured transactions environment. The new concept, as was the case in the United States, gathered every kind of interest in personal property used to secure repayment of a debt or fulfilment of an obligation under a single regulatory umbrella. The *Personal Property Security Act* also set forth some requirements that needed to be fulfilled in order for a *security interest* to be valid. The requirements were: one, the asset must be personal property; two, the creditor's proprietary interest had to be used to secure payment or performance of an obligation; three, an agreement between the parties and; four, the transaction had to create or highlight a proprietary interest in an asset in favour of a creditor.[56] In the PPSA, like a Matryoshka doll[57], the concept of perfection contained the concept of attachment. In the Act the word perfection is used to refer to the moment during which, the collateral is attached by the parties to the obligation creating therefore a priority status against third parties.[58]

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[55] Italic added to underline that the name *Security Interest* in the *Personal Property Security Act* is used as a noun rather than in generic terms.

[56] Supra note 39 at 12.

[57] A Matryoshka doll is a very popular type of Russian doll. Also referred to as Russian nesting doll or Russian doll it is composed by a set of wooden dolls of decreased size placed one inside the other. The name of the doll is believed to derive from "Matriosha' or "Matriona", both female names which enjoyed large popularity among peasants Russian families. The popularity is given to the fact that the name indicates the matriarch of a typical big Russian family.

[58] *Supra* note 39 at 200.

1.2.3. Mixed Jurisdictions

However, while in common law[59] Canada the PPSA took place fairly easily and harmonized the laws of secured transactions, in Quebec the situation was substantially different. The sole francophone Province, widely known among jurists as a mixed jurisdiction wherein both civil law and common law coexist, has a peculiar legal history. Its narration appears to be relevant for the purpose of this dissertation and for the understanding of the current framework on secured transactions in Quebec and the related preceding reforms.

Secured transactions can be said to lie on that fine border within the territory of private law that separates property law from commercial law. As such a multitude of interests converges on their regulation. Keeping this picture in mind will help the reader grasp the peculiarity of secured transactions laws in Quebec.

In that part of New France[60] now known as Quebec, in 1663[61] first and in 1664[62] then, two Edicts signed by King Louis XIV established that the only laws governing the private law of the newly conquered territory had to be those customary laws contained in *La Coutoume de Paris*. Written for the first time in 1580, the Custom of

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59 "Common Law Canada" is used to generically refer to the legal systems of all the Provinces with the exception of Quebec.

60 The name New France was used to indicate French colonial efforts in the 17th century. The territory comprise by New France was vast and extended from nowadays Quebec until Louisiana in the southern part of today's United States.

61 Edit d'avril 1663, published in Edits, Ordonnances royaux, Déclarations et Arrêts du Conseil d'état du Roy concernant le Canada, De la presse à vapeur de E.R. Fréchette, Québec,1854, vol. 1, 37.

62 Edit de mai 1664, *ibid*., vol. 1, 40.

Paris – as it is translated in English – was created with the purpose of governing the city of Paris and the surrounding region of *l'Ile-de-France*. Some areas of the law though, namely the law of persons and the law of immovable property were not regulated by the Customs. To fill the normative void the French resorted to both Roman and Canon law.[63] In 1763 when Great Britain, by signing the Treaty of Paris acquired New France, the immediate mixture of common law with the French civil law led to a vast normative confusion, in particular in the field of secured transactions. Back then Quebec was mainly a feudal society; therefore the biggest normative concern in terms of property law was with land. Once the English-speaking inhabitants arrived, they brought a society founded upon commerce rather than land. Hence this clash inevitably affected the field object of this dissertation.

Soon enough the situation became unstable, in fact, in addition to this, religious[64] and political tensions pushed the British Government towards the enactment of the Quebec Act,[65] which re-established *la Coutoume de Paris* as the law of the territory. Needless to say, even after the Act, the applicable law was different. A few years later in 1791 the Constitutional Act[66] transformed the old territory of Quebec into Lower Canada (nowadays Quebec) and Upper Canada (nowadays Ontario).[67] The

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[63] William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)* (1999) 3 Rev. Dr. Unif. 591 at 606.

[64] Religious tensions were due to the fact that the people living in Quebec before the Treaty of Paris were of Roman Catholic faith. Once the territory was acquired by Great Britain most of the english speaking people that began to inhabitate the territory were of Protestant faith.

[65] An Act for making more effectual Provision for the Government of the Province of Quebec in North America, U.K. 14 Geo. III, c. 83, in force 1 May 1775.

[66] An Act to Repeal certain Parts of an Act passed in the fourteenth Year of His Majesty's Reign, intituled, An Act for making More effectual Provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province, U.K., 31 Geo. III, c. 31.

[67] *Supra* note 63 at 606.

Act, which is still recognized as a stepping-stone in the history of Canada, also instituted common law as the official law of Upper Canada, while leaving the primacy of the civil law in Lower Canada untouched.[68] A few years later, after the Act of Union[69], with which Upper Canada and Lower Canada were unified to form the Province of Canada, in Quebec a strong movement towards codification began to take place. The existence of an old law, rooted in diverse and scattered sources, which, very often, were written in either English or French and not both, fuelled the movement. In 1857 a commission in charge of drafting a civil code was thus formed.[70]

Promulgated a decade later, in 1866, the Civil Code of Lower Canada[71] was largely inspired by the French 1804 Civil Code. The newly established code aimed on the one hand at putting an end to the normative confusion, while on the other hand it reflected a conservative, mostly francophone-catholic society and included elements of economic liberalism that were strongly supported by the commercial Anglophone élite based in Montreal.[72] After the promulgation, the Code was subject to revision at various times with many special laws added. Notable examples for what concerns secured transactions are: *Loi du Nantissement Agricole*[73], which added the articles from 1979a to 1979d to the Civil Code and the *Loi relative au Nantissement*.[74]

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[68] *Ibid*.

[69] An Act to Re-unite the provinces of Upper and Lower Canada, and for the Government of Canada, U.K. 3&4., c.35

[70] *Supra* note 63 at 607.

[71] Name in French *"Code Civil du bas Canada"*.

[72] John E.C. Brierley & Roderick A. Macdonald, eds., *Québec Civil Law: an Introduction to Québec Private Law* (Toronto, Canada:Emond Montgomery,1993).

[73] *Loi du Nantissement Agricole*, S.Q. 1940, c.69.

[74] Denise Pratte, *Priorités et Hypothèques 2nd ed.* (Sherbrooke: Les Editions Revue de Droit de l'Université de Sherbrooke) at 2.

After almost a century in 1955 with the *Loi Concernant la Révision du Code Civil*[75], Quebec decided to reform its Civil Code. Under the direction of Professor P.A. Crépeau the newly and *ad hoc* established *Civil Code Revision Office* (C.C.R.O.)[76] produced, in 1978, a reform project.[77] Within the C.C.R.O. a special Committee on Secured Transactions [78] also recognized the necessity to reform. The special committee published in 1975 le Rapport du Comite du Droit des Sûretés [79] wherein it amply highlighted and explained what was in need of reform and what needed to be done. In the report, the special committee envisaged a single concept of security interests – *l'hypothèque*. The latter and the entire reform process the led to it will be the object of the analysis of part of the third chapter.

2. Unification, Harmonisation and Modernisation of Secured Transactions Laws: Engineered for Efficiency?

Lawyers and economists, in particular those belonging to the *law & development* school of thought, argue that access to credit plays a key role for both firms and individuals. Accordingly, in a market oriented society, law and institutions need to be

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75 *Loi Concernant la Révision du Code Civil*, S.Q. 1954-55, c.47.
76 Name in French *"Office de Révision du Code Civil (O.R.C.C.)"*
77 See Office de Révision du Code Civil, *Rapport sur le Code Civil du Québec*, Volumes 1 et 2, (Québec Editeur Officiel, 1978).
78 Name in French *"Comite du Droit des Sûretés"*.
79 See Office de Révision du Code Civil, *Rapport du Comite du Droit des Sûretés* (Québec, Editeur Officiel 1975).

carefully engineered to foster credit and investments. As such, improving the overall legal environment through *ad hoc* reforms of legal institutions in developing countries and, as is the case today in developed countries as well, is believed to be the key to overall economic development.[80]

The idea that legal institutions drive economic development is not new. Already the *New Institutional Economics*[81] approach asserted that the gap between developed and undeveloped countries is due to the differences between their legal systems and that therefore the best instrument to spur change is the implementation of targeted law reforms. Inevitably trying to close the gaps between legal systems sets in motion a process of legal unification, harmonisation and transplantation. However, particular attention needs to be placed upon the direction that this process has taken. As we will see the common law system has been praised for being more efficient, particularly attractive for business activities and thus more conducive to economic development than the civil law system. This in turn has led towards the designing and proposal by International Organizations and International Financial Institutions such as the *United Nations*, the *European Bank for Reconstruction and Development* (EBRD), the *World Bank* (WB) and the *International Monetary Fund* (IMF) of reform projects aimed at shaping key areas of worldwide private law, as is the case of the field object of this thesis, on the basis of an alleged economic efficiency that is said to be innate of the American common law system.

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[80] Frederique Dahan & John Simpsone, eds., *Secured Transactions Reform and Access to Credit*, (Cheltenham, UK: Edward Elgar, 2008).
[81] Nicholas Mercuro & Steven G. Medema, *Economics and the Law: From Posner to Postmodernism and Beyond*, (Princeton: Princeton University Press, 2006).

The word efficient is very often found in the description of the key objectives that national legislators have to meet when designing their renewed local secured transactions legal regimes upon the model and the guidelines of the EBRD *Model Law on Secured Transactions* and the UNCITRAL *Legislative Guide on Secured Transactions.* Efficiency in secured transactions and its role as economic engine is at the core of many empirical studies.[82] In particular, efficiency is said to be on the one hand inherent to collateral and its role in addressing risks in markets and on the other hand strictly related to the information asymmetry among lenders and borrowers. As a consequence, lawmakers are pushed towards enacting reforms created to provide the secured credit environment with loosened collateral requirements and a better availability of information to the players in the financial market.

Although these reforms are created in principle to produce positive effects on both micro-economic and macro-economic levels, they are also said to stem from an economic agenda known to many as *Washington Consensus*, which key points include privatisation and marketization in a neo-liberal fashion.[83] During the early 1990s International Organizations and in particular International Financial Institutions pushed towards the implementation of major structural reforms, designed exactly upon privatisation and marketization, in post-communism countries of Eastern Europe, with the intent of easing the conversion to market-oriented

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82 See Heywood Fleisig, "The Economics of Collateral and of Collateral Reform" in Frederique Dahan and John Simpson, eds, *Secured Transactions Reform and Access to Credit* (Cheltenham, UK: Edward Elgar, 2008) and R. Haselmann and K. Pistor, "How the Law Affects Lending" (2009) 23 Rev. of Financial Studies 459.

83 On the point see Shahid Javed et al., "Beyond the Washington Consensus: Institutions Matter (Washington: World Bank, 1998) and Joseph Stiglitz, "Globalisation and Its Discontents" (London: Penguin, 2002).

economies, while in the meanwhile, fostering private entrepreneurship.[84] Among those International Financial Institutions notable is the role played by the *European Bank for Reconstruction and Development* and later by the *World Bank*.

2.1 The Model Law on Secured Transactions by the European Bank for Reconstruction and Development (EBRD)

The *European Bank for Reconstruction and Development* (EBRD) was established in 1991 with the mandate of helping the transitional economies of post-communism Central and Eastern Europe countries towards adopting an open-market structure. The mandate extended also to promoting private entrepreneurial initiative and to implementing structural and sectorial legal reforms aimed at creating an ideal habitat where private investment projects could flourish.[85] The EBRD in fulfilling its mandate operates in two separate ways. On the one hand the Bank by operating as a regular commercial bank provides financial support to private or State-owned enterprises. Therefore, the support provided is usually in the form of loans, financial

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[84] Gerard McCormack, *Secured Credit and The Harmonisation of Law: The UNCITRAL Experience* (Cheltenham, UK: Edward Elgar, 2011) at 105.

[85] Wayne McArdle, "EBRD and the Reform of Secured Transaction Laws" (1998) 26 International Bus. Law. 306 at 306. See also the foreword by the EBRD General Counsel Emmanuel Maurice in Jan-Hendrick Röver, *Secured Lending in Eastern Europe: Comparative Law of Secured Transactions and the EBRD Model Law* (Oxford: Oxford University Press, 2007).

consulting, equity investments, and advice in restructuring and in privatising. On the other hand the EBRD, as we have said before, "fosters transition towards open and democratic market economies"[86] by providing countries with legal assistance in the designing of policies directed at easing the getting credit process for other private investors in the region.[87]

Needless to say, easing the getting credit process requires reform activities in the field of secured transactions. In 1992 the Office of the General Counsel of the EBRD began working on the so-called *Secured Transactions Project*, which ultimately resulted in the famous EBRD *Model Law on Secured Transactions* published in 1994.[88] Composed by 35 articles with each article followed by a commentary, the Model Law was shaped upon the results drawn from a comparative survey administered in 26 countries with the purpose of empirically assess the state of secured transactions in each country.[89] The results of the assessment were then used

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86 European Bank for Reconstruction and Development, online: EBRD Website www.ebrd.com.
87 *Supra* note 84 at 106.
88 European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (London: European Bank for Reconstruction and Development, 1994).
89 See Duncan Fairgrieve and Mads Andenas, "Securing Progress in Collatteral Law Reform: The EBRD's Regional Survey of Secured Transactions Laws in Central and Eastern Europe" (1999) 4 Y.B. Int'l Fin. & Econ. L. 413 at 414: "The Regional Survey was carried out over a period of 12 months by the Secured Transactions Team. The overriding aim of the survey was to monitor and assess the state of collateral laws in the 26 countries of the Bank's operations after 10 years of reform work and to establish a base from which to stimulate and direct further reform. The survey highlights the progress that has been made in improving the legal and institutional environment in respect of security for payment. The survey also indicates those areas where further reform is needed if full economic benefit is to be gained from the collateral regime. It thus heightens awareness of the importance of an effective framework for secured transactions and encourages further initiatives on the basis of cross-jurisdictional comparison.".

to establish what key areas were still in need of reform and what was required to guide countries towards an efficient legal regime of secured transactions.[90]

Engineered to be best effective in civil law jurisdictions, the Model Law is intended as a tool to help countries build their own secured transactions laws. Mostly derived from the American common law system and from the experience of the EBRD in assisting transitional countries, the rules contained in the Model Law are designed to maximise the economic function of security.[91] The EBRD team devoted to the creation of the Model Law has placed particular attention upon both microeconomic and macroeconomic functions of security.[92] From a microeconomic perspective the provisions contained in the Model Law aim at reducing the risk of losses of the credit provider by guiding countries to design legal efficient security interests and collaterals.[93] A reduced risk of losses is said to be beneficial from the debtor's perspective as well because it allows for lower interest rates[94], better terms and conditions and less upfront contributions.[95] From a macroeconomic perspective, the highest ratio of credit circulation, its easier availability and its lower cost are said to produce a boost in the overall investment climate of a country.[96] This rationale,

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[90] *Supra* note 84 at 107.
[91] Jan-Hendrik Röver, *Vergleichende Prinzipien dinglicher Sicherheiten* (München,1999).
[92] Jan-Hendrik Röver, "The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions" (2010) 15 Uniform Law Review 479 at 490.
[93] N. Orkun Akseli, "The Utility and Efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit" in N. Orkun Akseli, ed, *Availability of credit and secured transactions in a time of crisis* (Cambridge: Cambridge University Press, 2013).
[94] The reduction in interest rates is easy to see. High interest rates are associated with high risk since the preliminary function of interest rates is to provide the lender with equitable and fair compensation for his credit in case of borrower's default.
[95] *Supra* note 93.
[96] *Supra* note 92 at 491.

underpinned in the general purposes and objectives of the EBRD Model Law is embodied in its *Core Principles for a Secured Transactions Law*. The latter is comprised of ten principles:

> 1.Security should reduce the risk of giving credit leading to an increased availability of credit on improved terms; 2. The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the security of the use of his assets; 3. If the secured debt is not paid the holder of security should be able to have the charged assets realised and to have the proceeds applied towards satisfaction of his claim prior to other creditors; 4.Enforcement procedures should enable prompt realisation at market value of the assets given as security; 5. The security right should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it; 6. The cost of taking, maintaining and enforcing security should be low; 7. Security should be available (a) over all types of assets (b) to secure all types of debts and (c) between all types of person; 8.There should be an effective means of publicising the existence of security rights; 9. The law should establish rules governing competing rights of persons holding security and other persons claiming rights in the assets given as security and 10. As far as possible the parties should be able to adapt security to the needs of their particular transaction.[97]

The core principles, according to the EBRD are not intended to dictate solutions on countries but rather to show what results should be achieved. Furthermore, unsurprisingly the highlighted principles almost overlap with the key objectives contained in the subsequently produced UNCITRAL *Legislative Guide on Secured Transactions*.[98]

At the heart of the Model Law there is a single security right for all kind of property. As such it might appear similar to the concepts of single security right contained in both the Article 9 of the Uniform Commercial Code and in the UNCITRAL

[97] European Bank for Reconstruction and Development, *Core Principles for a Secured Transactions Law* (London: European Bank for Reconstruction and Development, 1994).
[98] *Supra* note 92 at 494.

Legislative Guide. However, there are a few divergences among them. First of all the EBRD Model Law is designed to also cover securities over immovable – a feature that is foreign to both the American Article 9 and the UNCITRAL Guide. Furthermore, under the EBRD Model Law the role of publicity – also a requirement for the creation of the charge – is extended so that it requires not only the filing of the charge but also detailed information about the property and the parties.[99] This broadened view of the publicity requirement is set to act on the alleged economic effects resulting in more information available to both borrower and lender and to the players in the financial markets overall. On the point, economists argue in fact, that a high presence of sources of information in the credit market increases the efficiently allocation of credit, its access, its cost and its overall availability.[100] The best way to achieve this was envisaged by lawyers at the EBRD in the wake of a "simple computer-based centralised system for the registration of security interests in movable property in several central European countries".[101]

On this note, the results of the course of action taken by those countries that have adopted the Model Law are annually assessed by the EBRD. The assessment is developed on the basis of performance indicators that analyse the status of the transition towards a market-oriented economy. The methodology behind the assessment consists of questionnaires surveys sent to local businesses, law firms and academics to evaluate the effectiveness of the law. Once collected, the data is then

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[99] *Supra* note 84 at 108.

[100] Florencio Lopez-de-Silanes, *"Turning the Key to Credit: Credit Access and Credit Institutions"* in Frederique Dahan & John Simpsone, eds., *Secured Transactions Reform and Access to Credit*, (Cheltenham, UK: Edward Elgar, 2008) at 6.

[101] Wayne McArdle, "EBRD and the Reform of Secured Transaction Laws" (1998) 26 International Bus. Law. 306 at 307.

compared with a benchmark: developed market economies.[102] The same methodology will be used in 2004 by the World Bank to create its Doing Business reports, rank countries and formulate reform suggestions.

Almost a decade later the United Nations Commission on International Trade Law will publish a Legislative Guide also built on the assumption that low-cost credit and its readily availability are beneficial for national economies. The UNCITRAL believes that the best way to produce these effects is through the adoption of an efficient and harmonised secured transactions regime.

2.2 The UNCITRAL Legislative Guide on Secured Transactions

With the approval by the UN General Assembly of the Resolution 63/121 of December 2008, the UNCITRAL *Legislative Guide on Secured Transactions* became officially part of that increasing effort by International Organizations to engineer an efficient legal regime for secured transactions.[103] Designed upon the Article 9 of the Uniform Commercial Code, the Legislative Guide is aimed at harmonising and modernising the law of secured transactions worldwide while, at the same time,

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102 See Frederique Dahan and John Simpson, "Secured Transactions in Central and Eastern Europe: European Bank for Reconstruction and Development (EBRD) Assesment" (2004) 36 Uniform Commercial Code Law Journal 77.
103 Gerard McCormack, "Secured Transactions Law Reform, UNCITRAL and the Export of Foreign Legal Models" in N. Orkun Akseli, ed, *Availability of credit and secured transactions in a time of crisis* (Cambridge: Cambridge University Press, 2013).

spurring at a macro-level economic development and at a micro-level the growth of individual business.[104]

The road that led to the Guide was neither short nor easy. The UNCITRAL, the *United Nations Commission on International Trade Law*, was established in 1966 as a unit of the General Assembly by a resolution of the United Nations. Since its inception, goal of the newly established commission was the "harmonisation and unification of the laws of international trade".[105] The reasoning behind this goal is to be found in the strong belief of the General Assembly that removing the discrepancy between the laws of different countries would produce a strong development in the field of international trade.[106] In particular, the latter was seen as a mean to promote the interests of developing countries, which according to the UNCITRAL, could be done through a process of unification and harmonisation following "the adoption of international Conventions and uniform laws".[107] On the point, among other things[108], worthy of mention is surely the widely know *Convention of Vienna on Contracts for*

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[104] *Ibid.* at 33.
[105] General Assembly, 21st Session, Resolution 2205 (XXI), A/RES/2205, 17 Dec. 1966.
[106] *Supra* note 85.
[107] Gerard McCormack, Secured Credit and The Harmonisation of Law: The UNCITRAL Experience (Cheltenham, UK: Edward Elgar, 2011) at 2.
[108] Other works worthy of mention are: UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) and UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001); UN Convention on International Bills of Exchange and International Promissory Notes (1988); UNCITRAL Model Law on International Commercial Arbitration (1985); UNCITRAL Model Law on International Credit Transfers (1992); UNCITRAL Legislative Guide of Privately Financed Infrastructure Projects (2000) and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003); UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997); UNCITRAL Legislative Guide on Insolvency Law (2004).

the International Sales of Goods, which was promulgated by the UNCITRAL in 1980 and then widely adopted worldwide.[109]

For what concerns the specific involvement of the UNCITRAL in the field of secured credit, in 1970s Ulrich Drobnig, a Professor at the University of Hamburg, was put in charge of drafting a report containing an outline of secured transactions laws in many jurisdictions.[110] In addition, Drobnig was asked to illustrate whether or not, on the basis of other harmonisation efforts undertook by the commission, a model law on secured transactions would have been capable of producing substantive results while, at the same time, winning popularity and acceptance among countries.[111] Ultimately, the studies conducted by Drobnig induced the UNCITRAL to determine that it was not possible at the time to attain a cross-country unification of the laws of secured transactions worldwide. This was due to the fact that, as we have seen in the previous chapter, on the worldwide scene the laws of secured transactions were scattered and different one with the other. On the point, McCormack asserted that:

> [T]he laws of the States differed fundamentally at the time on matters such as the degree of formality needed to create a security interests; the extent to which non-possessory security was recognized: the validation of all-assets or floating security; the availability of a single unitary security interest over all the assets of the debtor; the extent to which security interest needed to be publicised by registration; and the possibility of out-of-court enforcement of security of interests upon the debtor's default.[112]

Only a few years later, in 1992, when the effect of locally induced micro-harmonisations started to show, the UNCITRAL shifted its policy towards the

109 United Nations Convention on Contracts for the International Sales of Goods (1980).
110 On the point see "Study on Security Interests" (1977) 8 UNCITRAL Yearbook 171; UN Doc A/CN 9/SER A/1977.
111 *Supra* note 85 at 11.
112 *Supra* note 85 at 12.

feasibility of harmonising secured transactions laws. The policy shift led to the creation of two specific reports circumscribed to the area of receivable financing, which at the same time marked the beginning of the works on harmonisation. The two reports eventually resulted in the creation of the *United Nations Convention on the Assignment of Receivables in International Trade*.[113] Promulgated in 2001, the Convention "promotes a sophisticated model for the modernisation of domestic assignment laws, as well as overall harmonisation of the law of assignment of receivables in international trade."[114] In the same year the UNCITRAL noticed that many countries had "limits on the use of non-possessory security rights in credit transactions". [115] This issue led the Commission to a further study [116] and, subsequently, to the creation of a specific Working Group with the purpose of designing "an efficient legal regime for security rights in goods involved in commercial activity";[117] a work that led straight to the creation of the *Legislative Guide on Secured Transactions*.

The Guide reached its final development stage in 2010. Designed as an instrument of soft law; it is detailed in nature.[118] It follows an approach to the regulation of secured transactions that has been often referred to as functional.[119] The approach refers to that legal functionalism that is found in the creation of a unitary concept of "security right". The very same approach that is at the core of the UCC Article 9 and of the

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[113] *Ibid.*
[114] *Supra* note 93.
[115] *Supra* note 84 at 12.
[116] UNCITRAL Report on the work of its thirty-fourth session (A/56/17).
[117] *Supra* note 84 at 358.
[118] An intellectual property annex was released on 15 July 2010.
[119] Roderick A. Macdonald, "A Model Law on Secured Transactions: A Representation of Structure? An object of idealized imitation? A type, template or design? (2010) Unif. L. Rev. 419 at 420.

EBRD Model Law.[120] The proposed guidelines are gathered together into a virtual container so that countries can mould their secured credit legal regimes free from the risk of normative gaps. The envisaged legal regimes, according to the Guide, should be designed with the following key objectives in mind:

> to promote low-cost credit by enhancing the availability of secured credit; to allow debtors to use the full value inherent in their assets to support credit; to enable parties to obtain security rights in a simple and efficient way; to provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions; to validate non-possessory security rights in all types of assets; to enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry; to establish clear and predictable priority rules; to facilitate efficient enforcement of a secured creditor's right; to allow parties maximum flexibility to negotiate the terms of their security agreement; to balance the interests of all persons affected by a secured transactions; and to harmonise secured transactions laws, including conflict-of-laws rules relating to secured transactions.[121]

In line with the Article 9 of the Uniform Commercial Code, the Guide encompasses a broad array of assets that can be used as a security.[122] On the matter, recommendation 2(a) specifically states that the law should allow for:

> Security rights in all types of movable asset, tangible or intangible, present or future, including inventory, equipment and other tangible assets, contractual and non-contractual receivables, contractual non monetary claims, negotiable instruments, negotiable documents, rights to payment of funds credited to a bank account, rights to receive the proceeds under an independent undertaking of intellectual property.

Only contractually created security rights are within the scope of the Guide.[123] Within the scope are also security rights created by both companies and individuals – legal

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120 Spyridion V. Bazinas, "The Utility and Efficacy of the UNCITRAL Legislative Guide on Secured Transactions" in N. Orkun Akseli, ed, *Availability of credit and secured transactions in a time of crisis* (Cambridge: Cambridge University Press, 2013) at 139.

121 See recommendation (1) of UNCITRAL Legislative Guide on Secured Transactions.

122 *Supra* note 85 at 131.

and natural persons.[124] On the other hand, the Guide leaves out of the scope both security rights over immovable property and over investment intangibles. This choice arises from the effort of trying to avoid normative overlapping with international conventions and with local laws.[125]

However from a theoretical perspective a line should be traced between the EBRD Model Law and the UNCITRAL Legislative Guide. A legislative guide is to be looked in the same way as a student looks at a textbook: to learn and do better.[126]

The conceptual framework behind the UNCITRAL *Legislative Guide on Secured Transactions* is to provide national legislators with guidance and help them cross the road from inefficient to efficient. On the contrary, according to Macdonald a model law should be "an ideal to which one should aspire"[127]. In this general sense a model law is seen to provide great transferability of provisions directly into national legislation.[128] But is this the case of the EBRD Model Law? If we go back to look for a moment at the Ten Core Principles posited by the Model Law the first thing we notice is an important clarification: the Core Principles are not intended to provide

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[123] See recommendation (2) of UNCITRAL Legislative Guide on Secured Transactions.
[124] *Supra* note 84 at 132.
[125] *Supra* note 84 at 133. McCormack asserts that the UNCITRAL avoided to include the regulation of securities over investment intangibles since they are regulated by the work of the Hague Conference on Private International Law. In the same way the author believes that the commission leaves immovables out of the scope of the guide in order to avoid competence issues with national, regional or provincial governments.
[126] *Supra* note 92 at 503.
[127] Roderick A. Macdonald, "A Model Law on Secured Transactions: A Representation of Structure? An object of idealized imitation? A type, template or design? (2010) Unif. L. Rev. 419 at 420.
[128] Supra note 92 at 503.

country with a solution but rather to show them how the desirable results should look like. As mentioned secured transactions lie at the border between private law and commercial law: a sensible area. Therefore a model of secured transactions ready for copy-paste appears rather unattainable. Even though commercial law is open to harmonisation and unification, which inevitably in order to be accomplished requires a certain degree of transplantation, property law on the other hand is so deeply rooted in the legal system of each nation and, most importantly in its evolution, that proposing a one-size-fits-all[129] approach could produce a ripple effect leading to a necessary adoption of adjustment reforms in other fundamental areas of private and public law. Yet today a one-size-fits-all approach to legal reform not only is proposed is also strongly advocated.

The general tendency worldwide in the field of secured transactions is to overcome that systemic boundary that has characterised the main divergence between the secured transactions regime in civil law – in its French model – and the common law – in its American entrepreneurship oriented structure. French civil law, as history showed us, has been strongly attached for years at the rule that *"pas de gage sans dépossession"*, an approach that is deeply in contrast with the more liberal unitary and non-possessory efficiency oriented security interest of the Uniform Commercial Code Article 9. The latter, although built in a very unique historical and social context such as the post World War II United States[130], is now proposed and used as a ready-to-go model law. In particular, among its advocates notable is the World Bank,

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[129] *Supra* note 127.

[130] For an economic analysis of the post-war policies that led the United States into a period of high economic growth see: David R. Henderson, "The U.S. Postwar Miracle" (2010) Mercatus Center George Mason University Working Paper No 10-67.

which in its Doing Business reports strongly supports the efficiency of the Article 9 for strengthening the getting credit process and producing economic enhancing effects.

2.3 "Getting Credit" according to the World Bank

In 2004 the IFC, the *International Finance Corporation*, a member of the *World Bank Group*, published the first issue of the widely known Doing Business (DB) reports. Issued annually, their goal is to make a cross-country comparison among more than 130 countries and then rank the economic attractiveness of each legal system.[131] The methodology behind the reports consists of a set of ten indicators – namely: Starting a Business; Dealing with Licenses; Employing Workers; Registering Property; Getting Credit; Protecting Investors; Paying Taxes; Trading Across Borders; Enforcing Contracts and Closing a Business. Each indicator is designed to register the extensiveness of the regulatory framework concerning every aspect of the business lifecycle. Among those aspects, getting credit is also measured under a specific indicator.

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[131] For further information see online: www.doingbusiness.org.

From a general perspective the data the large pool of data used to perform the analysis is collected through questionnaires sent to chosen local businesses and law firms, in the same way as the surveys administered by the European Bank for Reconstruction and Development. Every questionnaire is developed on the base of a representative real life case for each of the ten indicators. Ultimately, the *World Bank* ranks countries according to their performance under each indicator. To those countries that have poorly scored on the rankings, the World Bank suggests reforms aimed at improving their scores and, as a consequence, their economic attractiveness for outside investors. Today, the reports have the highest circulation ratio registered by any *World Bank* publication, which has made them significantly influent on the agendas of worldwide policymakers.

The *World Bank* gained most of its inspiration to embark in the *Doing Business* project from the works of the Peruvian economist Hernando de Soto rather than from the studies conducted by scholars belonging to the *New Institutional Economics*. Within the Bank a prominent economist, Simeon Djankov, can be certainly considered to be the master behind the methodology used in the Doing Business project.[132] He was enlightened by the studies conducted and then published in 1989 in *"The Other Path"*[133] a book by de Soto. An intellectual student of Ronald Coase[134], de Soto started and operated a company in one of the poorest neighbours in Lima with the purpose of collecting empirical data regarding time and costs necessary

132 In 2004, when the first Doing Business report was published, Simeon Djankov was Chief Economist in the Finance and Private Sector Development Vice-Presidency of the World Bank.

133 Hernando De Soto, *The Other Path* (New York: Harper & Row 1989).

134 Ronald Coase was a Nobel Prize laureate and a Professor at the University of Chicago. He is well known for its "The Problem of Social Cost" (1960) and "The Nature of the Firm" (1937). He is also the author of the the "Coase Theorem".

to establish and run a new venture. *"De Soto's research team followed all the necessary bureaucratic procedures in setting up a one-employee garment factory in the Peruvian capital; the experiment took 289 days and $1.231 to legally start the operations".* [135] The experiment concluded that fulfilling the necessary legal requirements poses a threat to the ease of doing business.[136] In other words, de Soto and his team believed that the heavier the regulation on business is, the harder it would be for the poorest sectors of society to successfully establish and operate a business.

In *"The Mistery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else"*,[137] a subsequent publication, de Soto went further in his analysis by exposing the damaging effects of heavy business regulation and poorly-defined property rights. His thesis asserted that with onerous entry regulation, only few entrepreneurs worry to register their businesses, therefore those who don't, end up choosing to operate in the informal economy.[138] Furthermore, he believed that poorly defined property rights generate high transaction costs on those would-be entrepreneurs willing to get formal property title to their assets. Hence, many of them prefer owning assets in the utmost informality with all the related consequences.[139]

In addition, the *Doing Business* team at the *World Bank* also gained its inspiration from the *Legal Origins* thesis. The thesis came to light in 1997 when four

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135 World Bank Group, *Doing Business in 2005 – Removing Obstacles to Growth"*(Washington, DC: World Bank Group 2004) at 9.
136 *Supra* note 133.
137 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York, NY: Basic Books 2000).
138 *Ibid*.
139 *Supra* note 137.

economists, often referred to by the initials of their last names *"LLSV"*, R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, published an article entitled *"Legal Determinants of External Finance".*[140] The thesis argues that legal origins or traditions have a significant impact on economic growth and that, by extension, common law countries perform better than civil law ones. Specifically, the author argued that the American common law system due to its traits could be deemed as more economically efficient than French civil law.[141]

At the beginning the thesis was developed only in the area of investors' protection.[142] The authors argued, in fact, that the strength of investors' protection is not only related to a country's financial development, but it is related in particular to its legal origins.[143] In this light, after examining forty-nine countries, *LLSV's* analysis found that common law countries protect investors better than civil law ones. Empirical in nature, their study, documented the level of investors' protection across legal traditions. As a result, common law jurisdictions appeared to be placing more protection upon outside investors than their civil law counterparts.[144]

In their following publications *LLSV* broadened the focus of their analysis and thesis. The four economists traced, from a historical perspective, the origins of the various legal traditions and how they spread across the world. Subsequently, by using

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[140] Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, Robert W. Vishny, *"*Legal Determinants of External Finance*"* (1997) National Bureau of Economic Research W.P. 3589.
[141] *Ibid.*
[142] Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law" (2009) American Journal of Comparative Law 57 at 768.
[143] Mathias M. Siems, "Legal Origins: Reconciling Law & Finance and Comparative Law" (2007) 52 McGill L.J. 55 at 60.
[144] *Ibid.*

econometric methods and tools they measured to what extent legal rules and, therefore, legal origins influenced countries economic development.[145]

As a conclusion *LLSV* asserted that the influence of legal origins is not exclusively restricted to investors' protection and therefore to finance.[146] On the contrary, legal origins have an impact on economic growth and thus common law jurisdictions perform better than civil law ones. This broader conception of the thesis is said to rely on two assumptions. One is that law matters because it has an impact on economic growth.[147] The other is that legal origins matter because they shape the legal institutions of the legal system, which in the end affects the economic outcome of both civil and common law traditions.[148]

To substantiate the claim that legal origins matter *LLSV* argue that the *alleged* economic superiority of the common law tradition over the civilian one is justified by two arguments. The first posits that in common law the judges are more independent therefore reducing the influence that governments have on markets and on their development. This argument is referred to as the *"political channel"*. The second, called the *"adaptability channel"*, asserts that the common law foundation in *case-made-law* is proven to be more adaptive to changing societal circumstances because it responds to the quickly arising socio-economic needs of the society, a feature that is

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[145] *Ibid.* at 58.
[146] Rafael La Porta et al., "The Quality of Government" (1999) 15 J.L. Econ & Org. 222 at 261 and Simeon Djankov, "The Regulation of Entry" (2002) 117 The Quarterly Journal of Economics 1 at 271.
[147] *Supra* note 142 at 768.
[148] *Ibid*.

said by *LLSV* to be missing in what they have defined as the static and codified civil law.[149]

As already mentioned, the *Doing Business* reports since their first issue, in line with the *Legal Origins* thesis have praised common law countries for their alleged economic superiority. On this basis, the reports carry an implicit reform suggestion: the *panacea* to get competitiveness on the global markets and spur economic development is to adopt the common law system.[150] *A one-size-fits-all* approach is therefore proposed. Unsurprisingly, the *World Bank* has been very successful thanks to the recent sovereign debt crisis[151] in inciting reforms worldwide, in particular in Europe and in developing countries.

In light of the described methodology and getting back to secured transactions, from a narrower and closer perspective the *"getting credit"* indicator and the measurement therein contained are built on the basis of a study conducted by Simeon Djankov, Caralee McLiesh and Andrei Shleifer. The authors in *"Private Credit in 129 Countries"*[152] looked at the cross-country determinants of private credit to analyse, by using empirical data "on legal creditors rights and private public credit registries in 129 countries" how high ratios of private credit to GDP relate to a strong protection of creditors rights and to an abundant availability of information among players on

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149 Thorstein Beck, A. Demirguc-Kunt, R. Levine, "Law and Finance: Why Does Legal Origins Matter?" (2003) 31 J. of Comparative Economics 653 at 654.
150 Antonio Gambaro, "Misurare il Diritto?" lettura di Mario Lauria, Accademia Pontaniana e Società Nazionale di Scienze, Lettere e Arti in Napoli (15/10/2010).
151 The recent sovereign debt crisis has pushed governments to enact reforms with the goal of regaining competitiveness and spur GDP growth.
152 Simeon Djankov, Caralee McLiesh and Andrei Shleifer, "Private Credit in 129 Countries" (2005) NBER Working Paper No 11078.

the credit market.[153] The authors asserted that legal origins are an important component of both creditors rights and availability of information, with the latter being a feature primarily associated with public credit registries.[154]

The indicator therefore, in order to measure the impact of the existing laws on the rights of debtors and creditors, measures how the applicable local collateral and bankruptcy laws facilitate the getting credit process and how credit information, in the sense of credit registries allows for the flow of information to circulate.[155] Once data is collected through questionnaires sent to local financial lawyers, countries are then ranked according to the ease of getting credit, which is determined using a benchmark called *"frontier score"*. More in depth, the World Bank measures the strength of legal rights of debtors and creditors by assessing if for each country examined they allow for the creation of a unitary security interest and how this security interest is "created, publicized and enforced".[156] The World Bank in assessing the strength of legal rights tries to see if the national secured transactions legal regimes provides for: one, the creation of a non-possessory security interest on movables; two, the creation of a security interest over future assets; three, the creation of a well-defined collateral agreement; four, the existence of a notice-based online collateral registry; five, priority to secured creditors in the case of insolvency procedures and business liquidation; six, the court system to allow secured creditors to an automatic stay on enforcement procedures involving the debtor; seven, the

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[153] *Ibid.*
[154] *Ibid.*
[155] *Doing Business Reports Getting Credit Methodology* online: Doing Business Measuring Business Regulation
< http://www.doingbusiness.org/methodology/getting-credit>.
[156] *Supra* note 152.

"parties to agree in the collateral agreement that the lender may enforce its security right out of court".[157]

On the other hand, the availability of credit information is measured by surveying banking supervision authorities to confirm the existence of a credit national public credit registry. The registry entity, if exists, is then asked to provide the World Bank with a detailed report on its structure and the applicable laws that it has to comply with on a daily basis.[158] The World Bank then evaluates if the existing credit registry allows for: one, the distribution of data on both firms and individuals; two, the availability of positive and negative credit information on both debtors and creditors; three, the distribution of data from retailers, utility companies and financial institutions; four, the distribution of a minimum of 2 years of historical information; five, debtors to access data regarding themselves; six, data users to access information on debtors online; seven; credit scores to be offered to help data users evaluate the creditworthiness of debtors.[159]

As mentioned earlier, the World Bank, thanks to the widespread diffusion of the Doing Business reports, has been successful in exhorting those countries in need of regaining credibility on the international markets and in need of seeing a growth in their national GDPs to enact secured transactions reforms based on the evaluation and the subsequent suggestions made under the umbrella of the getting credit indicator. This practice provides a fertile ground for a process of cross-country circulation of legal patterns to flourish. As a matter of fact, easily noticeable are the commonalities

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[157] *Ibid.*
[158] *Ibid.*
[159] *Supra* note 152.

with the EBRD *Model Law on Secured Transactions*, with the UNCITRAL *Legislative Guide on Secured Transactions* and with the Article 9 of the *Uniform Commercial Code*, which is quickly spreading worldwide being inexplicitly adopted as the *best practice* in terms of secured transactions legal regime. In terms of reforms, worthy of mention are certainly the cases of France first and Belgium then, where common trait of the enacted reforms was the implementation of a framework that hinges on the implementation of a single non-possessory type of security interest in movable apt to ease the process of getting credit and comply with the *soft prescriptions* of the *World Bank* and with the harmonisation process ignited by the EBRD and the UNCITRAL.

3. International Reform Examples

In this chapter a comparative analysis of secured transactions reforms in Quebec, Belgium, France and Italy will be carried out. It will reveal interesting commonalities across the four countries. In all of them reforming the local system of secured transactions is seen as a solution to the widely acknowledged problem of specific, rigid and fragmented rules, which are deemed – in light of the analysis realised throughout the previous chapter – as been incapable to efficiently cope with modern business needs and practices. This normative ineptitude is believed to constitute a handicap preventing countries from performing competitively in the international investments environment. As a consequence, by trying to overcome this obstacle, countries and international organisations have triggered a quest for normative competitiveness aimed at finding the *better law*. This research is conducted by

looking at the *law of the neighbour* and trough the acceptance of harmonisation and transplantation practices. Ultimately, this process results – in some cases – in an adoption of exogenous legal patterns, whose reception, as we will see in chapter 4, blindly neglects to take into consideration the context-specific needs of each country normative microcosm.

However, some of the analysed countries have chosen to pursue a slightly more context-oriented approach to reform than others, through the positive conservation of important macro-normative features and concepts embodied in the structure of their legal systems. In spite of this, all of them have embarked on the same path. Quebec, Belgium, France and Italy have in fact designed reforms that propose to achieve the expected results through the implementation of general and flexible rules, whose outcome, from an operational perspective, is represented by loosened collateral requirements and reduced information asymmetries on the credit markets.

3.1. The Case of the Civil Code of Quebec

Continuing the analysis of secured transactions in Quebec, the 1978[160] proposed *Draft Civil Code of Quebec* brought forth a single concept of hypothec, which together with the related legal regime concerning its "creation, scope, effectiveness, third party effects, enforcement, and priorities"[161] was based on a design mostly drawn upon the feature of the UCC Article 9. Contained in the fourth book of the

160 *Supra* note 78.
161 Roderick A. Macdonald, "Article 9 Norm Entrepreneurship" (2006) 43 Can. Bus. L.J. 240 at 243.

Draft Civil Code in articles 281-285, the new hypothec would be capable of being set upon movable and immovable property, corporeal and incorporeal assets, as well as taken over a single asset or a universality of property.[162]

In 1985 the Ministry of Justice created various working groups with the task of examining the books of the proposed *Draft Civil Code*. Among these, a working group in charge of designing the reform of securities on property was created.[163] The working group, composed by representatives of the Quebec Bar, by notaries and law professors, began working with the goal of questioning whether or not to take the legal regime contained in the *Draft Civil Code* as a point of departure for the creation of a final reformed normative solution. Among the many issues that the members had to overcome, two, according to Macdonald, raised particular concerns:

> [t]he working group was sceptical about two other features of the DCC proposal: the one being the opening of secured credit broadly to consumers by permitting non-dispossessory security over moveable property; the other being the adoption of a "functionalist proposal for rationalizing transactions intended as security – the presumption of hypothec.[164]

The first concern related to the potential applicability of the *Quebec Consumer Protection Act*[165] relatively to the envisaged unitary hypothec, a feature that was not well perceived by consumers groups. The second concern, stemmed also from the *Quebec Consumer Protection Act*, from Article 9 of the *Uniform Commercial Code* and from articles 1040a-1040e of the *Civil Code of Lower Canada*. The so-called

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[162] Michael G. Bridge, Roderick A. Macdonald, Ralph L. Simmonds and Catherine Walsh, "Formalism, Functionalism and Understading the Law of Secured Transactions" (1999) 44 McGill L.J. 567 at 649.
[163] The Working Group was called in French *"Comité d'étude sur les sûretés et la publication des droits réels"*.
[164] *Supra* note 161 at 245.
[165] Consumer Protection Act, CQLR c P-40.1, online: http://canlii.ca/t/51v54.

presumption of hypothec was a feature of the fourth book of the *Draft Civil Code of Quebec*, which aimed at reproducing, although restrictively, the functional approach of UCC Article 9 – a transplant of a common law principle into a civilian tradition.[166] These two issues along with a local legal profession that was rooted in the civilian tradition of Quebec, ultimately, resulted in a *tout court* rejection of the secured transactions legal regime contained in the Draft Civil Code as a starting point for reform.[167]

As a result the 1989 *Avant-Projet de Loi* – the reform project – deviated quite strongly from the propositions contained in the 1978 *Draft Civil Code*. On the contrary, it was rather rooted in the works of the ministerial working group. As a matter of fact, the 1989 reform project proposed an entirely separate book – a new sixth book – for the regulation of secured transactions, rather than the proposed fourth book on property. In addition, according to Macdonald, the project contained the following features:

> Rather than abolish non-consensual security, it retained five prior claims and four legal hypothecs, including the legal hypothec for construction. Rather than seek a rationalization of consensual security and title security, it rejected the presumption of hypothec, and opted to provide for specific regulation of certain title devices – instalment sales, resolutory condition, sales with a right of redemption, finance leases, and at the last minute, security trusts – at the same time prohibiting the giving-in-payment (automatic mortgage foreclosure-type) clause.[168]

That is why when in 1994 the *Civil Code of Quebec* came into force the regulation of secured transactions – of the hypothec – was not mottled and scattered across the

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166 Antoine Leduc, *Mondialisation et Harmonisation du Droit des Sûretés* (Montreal: Les Éditions Thémis 2012) at 143.
167 *Supra* note 161 at 246.
168 *Supra* note 161 at 246.

various feature of the newly established hypothec.[169] From a practical perspective, a conventional hypothec without delivery of possession is now available,[170] mirroring therefore the results achieved in the rest of Canada under the *Personal Property Security Act*. The Code also provides for the creation of a floating hypothec on an "enterprise".[171] It allows the charge to be granted upon the entirety or any part of the property of the enterprise, without any specific difference between movable, immovable, future, present, tangible or intangible.[172] The validity of the security is subject to a registration requirement, which determines the date for the priority ranking.[173] Both hypothec over movable and immovable property need to be established through written agreements with the exception that, a hypothec over immovable needs to be notarised to be valid. There is no need for the agreement that creates the hypothec to be in French. However, if parties were to choose English as the language of the agreement, a specific clause would be in need to be inserted specifying the wish of the parties.[174]

The legal regime of secured transactions under the *Civil Code of Quebec* can be seen as a *melange* between formalism and functionalism. This appears particularly true if we follow the reasoning of Bridge *et al.*[175] according to whom the *Civil Code of Quebec* "differs from the Article 9 regimes in that it presumes that there is no necessary primacy of functionalism as applied to secured transactions in comparison

[169] *Ibid.* at 281.
[170] Article 2660 C.C.Q..
[171] Article 2715 C.C.Q..
[172] *Supra* note 75. See also Article 2660 C.C.Q..
[173] See C.C.Q. Book VI – Title III – Section II.
[174] Philip R. Wood, *Law and Practice of International Finance: Comparative Law of Security Interests and Title Finance,* 2nd ed. (London: Sweet and Maxwell 2007) at 471.
[175] *Supra* note 162.

with, for example, functionalism as applied to sale, mandate or lease."[176] A comparison between the main features of article 9 and the *Civil Code of Quebec* seems to be capable of proving this claim. In addition, a deeper inquiry reveals that some traits of the legal regime in Quebec do not conform to some of the prescriptions of efficiency that we have extensively seen in chapter 2. In particular, in terms of information, the *Civil Code of Quebec* provides a special regulatory framework. While registration is required by the general rule for a hypothec to be immediately valid and for priority to be set, an exception may apply. For example, under article 1741 C.C.Q. – the right of resolution for thirty-day goods – there is no mandatory requirement of registration. Nevertheless, in other cases in which the security interest is extended for a prolonged amount of time, a specific type of publicity may be prescribed: i.e. finance lease according to Article 1847 C.C.Q. as well as instalment sales under Article 1745-2 C.C.Q.[177] In terms of treatment of the parties involved in the transactions, the UCC Article 9 makes sure to treat debtors and creditors in the same way. In such a case the underlying assumption is that both parties share a common interest – the successful conclusion of the transaction – and that both parties are also acting in *bona fide*. But, as Bridge *et al.* point out: "[t]his, to one trained in the civil law (and to the traditional common law lawyer), is counter intuitive".[178] That is why the *Civil Code of Quebec* "rests on a number of constitutive formalities that limit lender financing; for example, physical persons not carrying on an enterprise may not grant hypothecs over movables without delivery".[179]

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[176] *Supra* note 162 at 659.
[177] *Supra* note 162 at 660.
[178] *Ibid.* at 660.
[179] *Ibid.* See also Article 2683 Civil Code of Quebec.

Ultimately, the legal regime of secured transactions in Quebec shows a coexistence of functionalism and formalism. The Civil Code of Quebec does not purport to create a general principle regulating creation, publicity and enforcement of all types of title security.[180] This characteristic is a result from the attempt to transplant Article 9 into the legal system of Quebec, which eventually failed in order for a revised – modern – regime of secured transactions to be developed with consciousness regarding the existing private law of the Province in which formalism embodies its civilian heritage. The case of the *Book Six* of the *Civil Code of Quebec* is a virtuous example of legislative awareness of the importance of shaping reform to adhere and fit to context, especially if the legal patterns upon which the reformed legal regime is designed are drawn from exogenous sources.[181] An awareness lacking, as we will see, in the reformed legal regime of secured credit in Belgium, where among the key objectives of the reform particular importance is placed upon overcoming inherited and longstanding rules in favour of harmonisation intended as the vehicle carrying efficiency, economic growth and prosperity.

[180] *Supra* note 161 at 285.
[181] *Ibid.* at 289.

3.2. Belgium 2013 and France 2006 Reforms

3.2.1. Belgium

Belgium, a highly developed democracy with a high standard of living, has reformed its secured transactions legal regime only in 2013.[182] The process of reform began in 2012 when a reform project entitled *"Projet de Loi modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière"* was presented to and approved by the Belgian parliament.[183] The intended goals of the reform are clearly stated on the third page of the reform project. The parliament in Brussels, by reforming the local legal regime of secured transactions, specifically aimed at creating a more efficient system, which is also thus capable of spurring economic development. Therefore, the laws regulating secured transactions contained in the Civil Code of Belgium are to be reformed to create a simplified non-possessory pledge, whose effectiveness against third parties is assured by a newly established requirement of public registration.[184]

The reform engines in Belgium were ignited by the widespread belief among legal and business communities that the local secured transactions framework was out of

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182 Loi 11/July/2013 "*Loi modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière"* – English Translation: "Law that modifies the Civil Code in the regulation of securities on movable properties and that repeals various dispositions in the field".

183 Projet de Loi 24/October/2012 – English Translation: "Project of Law that modifies the Civil Code in the regulation of securities on movable properties and that repeals various dispositions in the field".

184 *Supra* note 183 at 3.

sync with the needs of modern society.[185] In particular, the focus was on reforming securities over movable properties, which were believed to be missing a general coherence with today's lending practices.[186] In order to achieve the prefixed goals Lawmakers in Brussels had to overcome the rule that connected the successful creation of the *gage* – a pledge over movable property – to a mandatory loss of possession for the debtor. The rule *"pas de gage sans dépossession"*, inherited from the *French Code Napoleon* and embodied in the *Belgian Civil Code* was - according to the local parliament - the main reason preventing the country from having a system of secured transactions capable of making their economy perform well.[187]

The fact that the *Belgian Civil Code* was largely inspired by the French civil code, created an issue for the lawmakers involved in the reform process. In fact, in order to achieve the proposed goal, they had to change the rule that made dispossession as a requirement for a charge on movable property. This rule appeared to be in contrast with the doctrine of the unitary non-possessory security interest over movable property; a practice that was already considered to be broadly accepted worldwide. As such, the development of the new Belgian secured transactions legal regime was based on five starting points: one, it had to be not only efficient but also flexible, in order to ease the process of getting credit and strength the national economy; two, it had to treat lenders and borrowers – creditors and debtors – at the same level, by

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185 On this point see *Supra* note 179 at 7: "Tout le monde s'accorde à dire qu'à part les sûretés qu'à part les sûretés immobilières (hypothèques) et les sûretés sur les créances et les actifs financiers, notre système juri- dique ne répond plus aux exigences de notre époque. C'est surtout le système des sûretés mobilières qui doit être qualifié de sous-développé".

186 See supra note 179 at 7 and Eric Dirix, "Functionele anlyse van zekerheidsrechten" in Feestbundel Hugo Vandenberghe, *Vigilantibus Ius Scriptum* (Bruges,2007) at 119-128.

187 *Ibid.*

respecting their interests as well as the interests of third parties affected by the secured transaction; three, it had to be functional according to the Recommendation 8 of the UNCITRAL *Legislative Guide on Secured Transactions*; four, it had to be systematically engineered to be contained within the Civil Code rather than scattered across multiple laws and five, it had to contribute to the harmonization of private law in Europe, adhering therefore to the evolution of the field in the continent.[188]

The reform project makes sure to explain what it means by functional approach. Accordingly, it means that the new reform law intends to implement a rational and integrated approach to secured transactions - analogue types of security interests must produce the same effects, independently from their conceptual differences.[189] In the same way the project clarifies what it means by gathering the entirety of the new legal regime within the Civil Code. Prior to the 2013 reform the rules governing secured transactions were spread across different laws, as such the fourth point of departure for the creation of the newly established system of secured credit has to be, according to the project, designed in a way that all the rules are contained in a single place: the Civil Code.[190] Main objective of the reform was a radical policy shift towards *"a gage sans dépossession uniforme"*.[191] The Civil Code of Belgium, until the reform, required the debtor to lose possession of the secured property in order for the charge to be validly established. The rule embodied the article 2076 of the *Civil*

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[188] *Supra* note 183 at 10.

[189] The Reform Project states at page 10: "On entend par là une approche rationnelle et intégrée dans le cadre de laquelle des figures de sûreté analogues doivent avoir les mêmes effets juridiques, indépendamment de leurs différences conceptuelles. Le système du droit des sûretés est inscrit tant dans le droit des contrats que dans le droit des biens. Concernant ce dernier point surtout, la cohérence du système du droit patrimonial doit notamment être prise en considération."

[190] See Supra note 183 at 10 and also Walter Van Gerven, "De verkokering van het privaatrecht" (1991) TPR at 1021-1022.

[191] *Ibid.* at 14. Translation: "a unitary charge without dispossession".

Code of Belgium: *"dans tous les cas, le privilège ne subsiste sur le gage qu'autant que ce gage a été mis et est resté en la possession du créancier, ou d'un tiers convenu entre les parties"* was created to mirror the possessory principle first written in the *Code Napoleon* in 1804, which was the result of years of legal development in the field in civil law. The proposed new unitary non-possessory security interest – *the gage* – was conceived first of all to overcome the internal separation between *gage civil* and *gage commercial* and then as a revolutionary tool to enable lenders and borrowers to secure their transactions by means of a simple agreement. In the wake of the Recommendation 1 of the UNCITRAL Legislative Guide the project in fact states that *"[l]'innovation fondamentale est donc de supprimer la dépossession en tant que condition constitutive de gages. Dorénavant, le gage est une convention consensuelle."*[192] The new *gage*, therefore, appears to be based not only on the UNCITRAL guidelines, but also on the Article 9 of the *Uniform Commercial Code*. The intention of the parliament in Brussels to engineer a new security interest that allows every credit to be secured by every type of movable property with a simple and efficient procedure appears evident.[193]

However, the *"gage avec dépossession"*[194] contained in Article 2760 will still continue to exist after the reform, even though only as an option. As the project explains, if parties were to choose the latter to secure their credit, the validity of the security right against third party would be given by the dispossession rather than from

[192] Supra note 183 at 15. Translation: "Fundamental innovation is to suppress dispossession as a constitutive requirement of the charge. From now on, the charge is a consensual agreement.".
[193] *Supra* note 183 at 14.
[194] Translation: "Charge with dispossesion".

a filing in a public registry.[195] Publicity and the related opposability of the security to third parties are subject, according to the reform project, to a general requirement of registration, which has to be created – following the example of Article 9 – in the form of a national centralized electronic system capable of allowing online filing and easy accessibility to all those parties bearing an interest on the transaction or on the secured property.[196] Furthermore, for a registration to be valid, parties have to enter in the electronic system: their identity; the description of the property used as a security and the amount of the secured credit.[197] The moment of registration, in particular the date entered in the system, defines the ranking of subsequent creditors according to the rule *prior tempore, potior iure.*

The changes brought about by the reform demonstrate the intention of Belgian lawmakers to harmonize their secured transactions legal regime in the light of a common European private law[198] with the aim of fostering trade and commerce with neighboring countries. In particular, Belgium looked for inspiration[199] at the new Civil Code introduced in the Netherlands in 1992, where a comprehensive reform had

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[195] *Supra* note 183 at 17.
[196] *Ibid.* at 22.
[197] *Ibid.* at 23.
[198] On the Harmonisation of European Private Law and Secured Transactions Law see: Eva M. Kieninger , ed., *Security Rights in Movable Property in European Private Law* (Cambridge: Cambridge University Press, 2004); Harry C. Sigman and Eva M. Kieninger, eds., *Cross-Border Securities over Tangibles* (Munich: Sellier, 2007); Horst Eidenmüller and Eva M. Kieninger, eds., *The Future of Secured Credit in Europe* (Berlin: De Gruyter, 2008) and Eva M. Kieninger and Harry C. Sigman, eds., *Cross-Border Security over Receivables* (Munich: Sellier, 2009).
[199] See *Supra* note 183 at 12: The Belgian project also cites other sources of inspiration upon which the reform was designed - the *German Burgerlisches Gesetzbuch* (BGB), the *Model Law on Secured Transactions by the European Bank for Reconstruction and Development* (EBRD), the *Draft Common Frame of Reference* (DCFR)[199], the *Legislative Guide on Secured Transactions by United Nations Commission on Trade Law* (UNCITRAL), the *Dutch Burgerlijk Wetboek* (NBW) and the *Uniform Commercial Code (UCC).*

also established a renewed legal regime of secured credit based on a unitary non-possessory security interest, [200] and at France, which had already reformed its secured transactions framework in 2006 by passing a law entitled *"des sûretés".*[201]

3.2.2. France

The reform in France stemmed from the celebration of the bicentenary of the Civil Code in 2004, which inspired the French legal community to question the suitability of the rules contained in the Code to respond to the needs of the twenty-first century society.[202] This process of questioning and evaluating began already in 2001 when – with a ministerial nomination – an *ad hoc* scientific committee led by Professors Michel Grimaldi and Jean-Louis Halperin was created.[203] The commission started working on reforming the main institutions of French private law. It aimed at reshaping the Civil Code in order to enhance its comprehensiveness and, on the wake of the reform of the German BGB enacted in 2001[204], to ensure that the primacy and the prestige on the international scene of the *Code Napoleon* remained untouched.[205] In particular, it seemed to the commission that the best way to modernize the Civil

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200 Article 3:225 of the Dutch Civil Code. For further see: Ross G. Anderson and J. Biemans, "Reform of the Law of Assignation in Security: Lesson from the Netherlands" (2012) 16 Edinburgh Law Review at 24-57.

201 Ordonnance n. 2006-346 du 23 mars 2006 relative aux sûretés, JO n. 71, 24 mars 2006

202 Francesca Fiorentini, "La Riforma Francese delle Garanzie nella Prospettiva Comparatistica" (2006) 3 Europa e Diritto Privato 1155-1202 at 1155.

203 See Bicentenaire du Code Civil, online: www.bicentenaireducodecivil.fr and Jacques Chirac, ed., *Le Code Civil 1804-2004, Livre du Bicentenaire* (Paris, 2004).

204 The *Gesetzes zur Modernisierung des Schuldrechts* 26/11/2011 implemented important European Union Directives regulating contract law in the sphere of the BGB.

205 *Supra* note 202 at 1156.

Code and French Law in a scenario of regulatory and economic competition[206] was to enact reform in crucial fields such as contracts and secured transactions.

In summer 2003 the Ministry of Justice, following on an initiative by the *Association Henri Capitant Friends of the French Legal Culture*[207], established a second commission with the task of engineering a reform in the field of secured transactions. The commission chaired by Professor Grimaldi[208] began working on the economically crucial field of secured transactions in the moment when the *World Bank* in the first issue of the *Doing Business* reports ranked the French legal system 44th worldwide.[209] The *travaux préparatoires*[210] to the 2006 reform, which "emphasized the need for French law to become more competitive",[211] illustrate that the Doing Business reports, had a huge impact on the reforming agenda of the Grimaldi commission and by extension on the French government. In 2005, the same year in which the Grimaldi Commission handed its preliminary report to the Parliament, the President of *la Cour de Cassation*, Guy Canivet asserted that:

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[206] For an economic perspective on regulatory competition see: Francesco Parisi, Norbert Schultz and Jonathan Klick, "Two Dimensions of Regulatory Competition" (2006) 26 International Review of Law and Economics at 56-66.

[207] Name in French: "Association Henri Capitant Amis de la Culture Juridique Française".

[208] Professor at the Universuité Panthéon-Assas, Paris II and President of the Association Henri Capitant Friends of the French Legal Culture".

[209] Anne-Julie Kerhuel and Bénédicte Fauvarque-Cosson, "Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law (2010) Georgetown Business, Economics & Regulatory Law Research Paper No. 10-10 at 812.

[210] The Grimaldi Commission delivered in 2005 a proposal for reform of French Secured Transactions Legal Regim to the Minister of Justice entitled*"Groupe de travail relatif à la réforme du droit des sûretés, Rapport à Monsieur Dominique Perben, Garde des Sceaux, Ministre de la Justice", online:* http://lesrapports.ladocumentationfrancaise.fr/BRP/054000230/0000.pdf.

[211] Muriel Renaudin, "The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets" (2013) 24:11 International Company and Commercial Law Review 385-392 at 386.

> French law is, in the global order, suddenly reminded of efficiency imperatives by American Schools of Law and Economic Analysis. They postulate that the quality of laws and regulations governing commercial transactions play a decisive roles in economic growth. Their studies have observed many systems of law, and aim to demonstrate that the most burdensome regulations produce the worst results because they are usually accompanied by inefficient public institutions, long delays within decision-making, high costs of bureaucracy, inefficiency within judicial proceedings, higher unemployment and corruption, less productivity and the drying up of investment. Based on these criteria, systems derived from the French model appear to be adversely rated and classified.[212]

This extract, that clearly refers to the *World Bank* and its *Doing Business reports*, was immediately perceived by the Parliament and by the French legal community as creating a necessity to reform and climb up those rankings to demonstrate that French civil law, its history and its worldwide influences cannot be reduced to an econometric evaluation.[213] Thus this rationale is internalized in the law giving the mandate to the Grimaldi Commission. The law entitled *"loi pour la confiance et la modernisation de l'économie"*[214] explicitly mentions, although without a direct reference to secured transactions, what is the main goal of the reform: modernizing French economy.

The reform law entitled the "Des sûretès"[215] introduced a new fourth book entirely dedicated to the regulation of secured transaction into the *French Civil Code*. The new fourth book is divided into two subsections: one, "Des sûretés personnelles"[216] and two, "Des sûretés réelles".[217] The latter is in turn comprised of three parts. The

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[212] Inaugural speech of the President of the French Cour de cassation in 2005, online: http://www.courdecassation.fr/institution_1/occasion_audiences_59/debut_annee_60/monsieur_guy_caniv et_60.html.
[213] *Supra* note 209.
[214] "Loi pour la confiance et la modernisation de l'économie" J.O. 27/July/2005.
[215] Ordonnance No 2006-346 "Des Sûretés".
[216] Translation: "Personal Securities".
[217] Translation: "Real Securities". See *Supra* note 202 at 1167.

first one contains general dispositions, while second and third parts respectively regulate securities on movables and on immovables.[218] The subtitle concerned with the regulation of securities on movable property in fact, introduces a new legal regime composed of two different securities on movable property: one, the *gage* which can be created over corporeal movables and; two, the *nantissement* which enables to secure incorporeal assets.[219] Both securities can be created over present and future goods, over a single asset or a group and over fungible or non-fungible assets as well. At the same time, the regulation of securities on immovable property is comprised of three main concepts: liens, antichresis and hypothec.[220]

Methodologically, already a first glance at the text reveals the route chosen by French lawmakers – efficiency and flexibility of the rules.[221] In particular, flexibility is deemed as a prerequisite for efficiency, since its goal – from an exegetical reading of the French reform – appears to be a strong reduction of transaction costs (time and bureaucratic requirements), which lead to market efficiency and a better circulation of capitals.[222] Nevertheless, while the Belgian reform has chosen to gather the newly established *system des sûretés* in the Civil Code, in France the new *Fourth Book* of the Civil Code contains just the general regulation of secured transactions. Specific concepts and their regulation are in fact devolved to *ad hoc* special laws.[223]

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[218] See Article 8 *Supra* note 210.
[219] *Supra* note 210 at 211.
[220] *Supra* note 202 at 1168.
[221] *Ibid.* at 1169.
[222] Michel Grimaldi, "Orientations Générales de la Reforme" (2005) 140 Droit et Patrimoine and *Supra* note 202 at 1169.
[223] Michel Grimaldi, "Orientations Générales de la Reforme" (2005) 140 Droit et Patrimoine at 52.

The introduction of two non-possessory concepts of securities on movable property seems to be a half measure between the functional-unitary approach of Article 9 and the formalistic trait of Civil Law based secured transactions. As per the reform in Belgium, in France a consensual agreement rather than a real one now establishes securities over movables as well.[224] The validity of the agreement is subject to a few requirements: one, it must contain the amount of the secured credits and; two, it must indicate in detail the assets object of the security.[225] The validity of the *gage* against third parties, not of the *nantissement*, is subject to a requirement of registration in a public registry. The registration serves also the purpose of creating the priority among subsequent creditors. However, the possessory charge remains available, as an alternative. The loss of possession at the same time does not subside to the registration in a public registry.[226] On the contrary, the reform does not provide a requirement of registration for the *nantissement*, which validity against those parties foreign to the transactions is ensured by simply creating a written agreement that indicates the amount of the secured credit and a detailed description of the sum of money used as collateral.[227]

In terms of securities on immovable property, the new legal regime produces relevant effects on the regulation of the concept of hypothec. The latter has always been prevented by the general orientation of French courts and their jurisprudence from enabling debtors and creditors to secure future credits unless clearly defined. The reform, overcomes the jurisprudential orientation through the new Article 2421, which allows parties to secure, by means of a hypothec, future credits as long as the

[224] See Article 2330 French Civil Code.
[225] See Article 2336 French Civil Code.
[226] See Article 2337 French Civil Code.
[227] See Articles 2356 and 2361 French Civil Code.

amount is clearly defined in the constitutive agreement, otherwise subject to penalty of nullity.[228] With this requirement, the reform implicitly prohibits the creation of the so-called hypothec *omnibus*, which allows parties to secure every future credit that might arise. This particular concept of hypothec was introduced in Belgium in 1995, where those parties that create a valid hypothec can also decide to secure future credits as long as their amount is determinable.[229] An important feature of the hypothec *omnibus* or *pour toutes sommes* is that the same agreement can be used for multiple financing operations. Parties, once the obligation has been fulfilled, have the option of securing a new obligation, producing therefore a sort of recharging effect.[230] The Grimaldi reform, however, while does not provide a hypothec *omnibus*, has introduced a radical new concept called *hypothèque rechargeable.* The rechargeable hypothec, as called in English, allows according to the regulation contained in Article 2422[231] of the French Civil Code, debtors to set up a hypothec to secure different credits with different creditors.[232] Ultimately, in 2014 amid growing concerns following the Eurozone crisis, French legislators abolished the *hypothèque rechargeable.* The reason for the abolishment is rooted in the fact that allowing debtors to recharge a hypothec could potentially lead to an over-indebtedness bubble, which could be conducive, on the macroeconomic sphere, of a crisis similar to the one that occurred in the United States in 2008.[233]

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228 See Article 2423 French Civil Code and *Supra* note 199 at 1186.

229 François T'Kint, *Sûretés et Principes Généraux du Droit de Poursuite des Créanciers* (Bruxelles: Editions Larcier, 2004) at 283.

230 *Ibid.*

231 In its original version the Article posits that the Rechargeable Hypothec *"peut être ultérieurement affectée à la garantie de créances autres que celles mentionnées par l'acte constitutif"*.

232 *Supra* note 202 at 1187.

233 See *"Loi Relative à la Consommation"* Loi du 17/March/2014: JO du 18/March/2014. It comes without surprise that the law that abolishes the concept of Rechargeable Hypothec is a law regarding consumers' protection. Studies have

On the basis of the foregoing analysis a major difference among the reforms in France first and in Belgium then comes to light. Besides the technicalities and the structural differences, France has decided not to move forward from tradition and therefore from formalism. The Grimaldi Commission, whose work has given birth to the reform, was capable of perfectly understanding that in a delicate field such as secured credit, a field that is so deeply interconnected with the cultural, historical and sociological context of a country, embracing exogenous – foreign – induced legal patterns[234] could result in a risky asynchronicity between law and society.[235] Opening towards non-possessory security interests and towards an overall normative simplification, while at the same time deciding not to abolish the distinction between *gage* and *nantissement*[236] is an example of what could be defined as modernised traditionalism – something that is missing in the reform in Belgium. The French reform appears to have clearly found a compromise between two different approaches to secured transactions without neglecting the reason why the reform was designed in the first place: economic efficiency.

shown that the biggest impact of the 2008 financial crisis in the United States has been on consumers, their savings and their homes.

[234] On the point see also Luigi Bruno, "Reforming by Numbers: the World Bank Induction of Legal Patterns" (Paper delivered at the 4th Annual Conference of the Young Comparativists Committee of the American Society of Comparative Law at Florida State University – Tallahassee, FL, USA, 16-17 April 2014 [unpublished].

[235] Mauro Bussani, "Il Diritto delle Garanzie Reali nella Prospettiva Transnazionale" in, *Studi Onore di Piero Schlesinger* (Milano: Giuffrè Editore, 2004) at 849 and 865.

[236] *Supra* note 202 at 1202.

3.3. A Long Reform Process in Italy: Re-Gaining Credibility on the Markets?

Italy, a country that now more than ever is in need of rebooting its national economy, is heavily questioning to what extent reforming and modernising its secured transactions laws can yield substantial benefits. The reform project of the 12th of February 2014 entitled *"Delega al Governo recante disposizioni per l'efficienza del processo civile, la riduzione dell'arretrato, il riordino delle garanzie mobiliari, nonché alter disposizioni per la semplificazione e l'accelerazione del processo forzato"*, also known as bill Cancellieri[237], has given a mandate to the Italian government to adopt a law aimed at modernising the legal regime of securities on movables in the interest of bolstering lending to *Small and Medium Enterprises* (SMEs) by increasing its availability and reducing its costs.[238]

The bill states that the need for Italy to reform its secured transactions framework has been asserted by many national experts, as well as by International Organisations and international case studies, which have all concluded that the country's fragmented and extremely rigid legal regime of secured credit appears not to be efficient in regulating the process of getting credit, therefore representing an obstacle that needs to be overcome for the Italian economy to thrive.[239] Specifically, the reform project

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237 The bill is commonly referred to as "Disegno di Legge Cancellieri" as a reference to the name of the Minister of Justice.

238 "Delega in Materia di Garanzie Mobiliari senza Spossessamento" in Disegno di Legge "Delega al Governo recante disposizioni per l'efficienza del processo civile, la riduzione dell'arretrato, il riordino delle garanzie mobiliari, nonché altre disposizioni per la semplificazione e l'accelerazione del processo di esecuzione forzata (collegato alla legge di stabilità 2014) – 12/Febraury/2014 at 7.

239 *Ibid*.

Cancellieri posits that this ineptitude of the current legal regime can be traced in two main issues: firstly, the rules governing the field are scattered across various and numerous national and European laws as well as unevenly contained in many court cases; secondly, the regulation of security rights on movable property, as contained in the *Italian Civil Code* of 1942, appears to be out of date in light of modern business practices and economic paradigms.[240]

In particular, in Italy as well, the regular creation of a security on movable property is dependent on the loss of possession by the debtor. The principle of *"pas de gages sans dépossession"* – although under a different form – is contained in the Article 2786 of the Italian Civil Code, which explicitly stipulates that the validity of a pledge is dependant upon delivery of possession to the creditor.[241] Therefore, in light of the UNCITRAL *Legislative Guide on Secured Transactions* and of the reforms enacted in France, Belgium and Quebec, the bill proposes a reform that is designed with the goal of modernising the legal regime of secured transactions by enacting efficient and flexible rules and by gathering the new rules in a single *corpus legis*: the Civil Code.[242]

The intention of the Italian legislator of harmonising the law and making it adhere to the international practice appears clear by looking at the key objectives of the reform law: one, creating a unitary non-possessory security right; two, establishing that the validity of the security right against third party is conditional upon registration in an online public registry; three, the proposed unitary non-possessory security right must

[240] *Supra* note 238.
[241] See Article 2786 Italian Civil Code.
[242] *Supra* note 238 at 8.

allow parties to secure a plurality of credits, be they present or future, whose amount can determined or determinable; four, introducing a special concept of rechargeable security on movable property; five, establishing the general principle that the debtor has the right to use the asset(s) object of the security according to their function and; six, the law must provide reasonable limits to the contractual freedom of the parties, in the event that the debtor is a consumer.[243]

The Italian interest for economically efficient laws dates back almost a decade. Among other initiatives, on the 25th of June 2007 twelve Italian regions have signed an agreement called *"Carta di Matera"*.[244] By signing it, regions formally committed to fostering the use of methodologies to evaluate and measure the impact that laws have on everyday life.[245] With regard to secured transactions, a manifestation of this orientation is certainly Article 46 of the Legislative Decree n.385/1993.[246] The latter introduced a limited non-possessory charge – a special privilege – applicable to those security interests created upon assets intended to be used by the debtor in a business activity.[247] However, although the special privilege marks a step towards a first attempt to modernise the Italian legal regime of secured credit in an economically efficient way, the requirements for the privilege to be valid show a strong attachment

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243 *Ibid.* at 8.

244 The twelve regions are: Abruzzo, Basilicata, Emilia Romagna, Friuli Venezia Giulia, Lazio, Liguria, Lombardia, Marche, Molise, Puglia, Trentino Alto Adige and Veneto.

245 Antonio Gambaro, "Misurare il Diritto?" lettura di Mario Lauria, Accademia Pontaniana e Società Nazionale di Scienze, Lettere e Arti in Napoli (15/10/2010) at 21.

246 Article 46 "Privilegio Speciale sui Beni Mobili destinati all'esercizio dell'Impresa" in Legislative Decree n.385/1993 "Testo Unico delle Leggi in materia Bancaria e Creditizia".

247 Philip R. Wood, *Law and Practice of International Finance: Comparative Law of Security Interests and Title Finance,* 2nd ed. (London: Sweet and Maxwell 2007) at 465.

to formalism and, in particular, to normative specificity. The special privilege, in fact, "must be in a written deed to be valid. The deed must exactly describe the goods and the credits over which the special privilege has been established, the creditor bank, the debtor and the charger, the loan terms and the amount of the loan which is secured by the special privilege".[248] Evidently, a generic description of the goods is deemed as not sufficient.

A newly appointed reform commission in charge of reforming bankruptcy laws will re-examine the Cancellieri project,[249] in an attempt to adapt it to overcome those obstacles to a wider use of non-possessory security interests that are represented by the current Italian framework on insolvency proceedings. In the existing legal regime of secured credit, possessory securities are accorded quicker remedies in case of default.[250] On the contrary, as Tucci points out in relation to the special privilege under Article 46, non-possessory security devices in Italy enjoy less effective and – efficient – enforcement procedures in comparison to other legal systems in Europe and elsewhere.[251]

Overall the highlighted reform project in Italy shows that lawmakers have conducted a thoughtful and comprehensive analysis of the interests at stake in designing the reform project. The country's delicate financial situation together with the precarious employment opportunities have created a fertile ground wherein the seeds of

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[248] *Supra* note 246.
[249] "Nomina Commissione Riforma Procedure Concorsuali" Ministry of Justice, Decree 28/January/2015 at 1 and 2.
[250] Anna Veneziano, "Italy" in Harry C. Sigman and Eva Maria Kieninger, eds., Cross-Border Security over Tangibles (Munich: Sellier, 2007) at 160.
[251] Giuseppe Tucci, "Towards a Transanational Commercial Law on Secured Transactions: the Preliminary Draft UNIDROIT Convention and Italian Law" (1999) 371 Unif. Law. Rev. at 386.

exogenous legal patterns can be planted. Nevertheless, the strong roots of the Italian legal community in the civil law tradition and its approach to legal reform that embodies a mixture of caution and protection of national principles could potentially yield a reform more similar to France rather than Belgium - a reform that does not *tout court* sacrifice identity in name of efficiency.

4. Handle with Care: Secured Credit is a Delicate Matter

The analysis conducted in the previous chapters has shown two important aspects of this ample reform process that raise question and need to be approached from a critical standpoint. First of all, the implementation of reforms designed upon models foreign to legal systems that they are supposed to improve brings forth the concept of cultural specificity of the law. A concept that, in turn, lays the foundation for an inquiry into all the implications carried by this practice and largely neglected by the examined literature.

Secondly, the role of collateral in secured credit as a functional concept of economic and business development, its regulation and its implication on the overall macroeconomic and regulatory environment of countries require a deeper analysis aimed to evaluate whether the proposed solution can be more damaging than the problem itself. As we have examined, all the proposed and enacted secured transactions reforms, as well as the guides and models by international organisations converge on the idea that loosened – relaxed – collateral requirements have a key role in spurring access to credit, which in turn, is deemed as beneficial for the overall

economy. This idea shall be the fulcrum of the second part of this chapter's analysis, which will be realized through a thorough evaluation of the potential risks carried out by implementing reform that lower collateral requirements for secured transactions.

4.1 Context as a Base for Reform

When Oliver Wendell Holmes in 1897 said that "[f]or the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" [252], he had already forecasted with surgical precision what would have happened in *Law and Development* a century later.[253] Economic theories and econometric models have been fully assimilated within the field of *Law and Development*, and are now used by scholars to explain growth factors. This has led to a focus shift from the study of the law itself, as a social phenomenon, to a critical analysis, which looks at the law as a mean to an end.

Law as a facilitator or as a tool one might say is constantly subjected to an analysis conducted with the application of formulas and axioms that pretend – through a critical *reductio* to cardinal numbers – to explain the law and suggest how it should be designed to foster economic prosperity. This continuous analysis has brought the concept of efficiency, widely familiar to quantitative scientists, to be merged with the

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[252] Oliver Wendell Holmes, jr., "The Path of the Law" (1897) 10 Harvard Law Review at 457.
[253] Ralf Michaels, "Remarks by Ralf Michaels" (2011) Proceedings of the Annual Meeting of the American Society of International Law Vol. 105 at 47-49.

law and its institutions. In the same way in which carmakers are constantly re-imagining their engines designs in light of efficiency – less fuel consumption, more mileage equals more sales – law and development too has ignited a widely-spread process of legal engineering whose goal is to create efficient regulation – less transactions costs, more business activities equals economic growth[254].

The constant effort undergone by countries to achieve economic prosperity or growth is certainly not any different – to continue with the example above – from the quest for more sales sustained by carmakers. In both cases competition driven by profits or, from another perspective by a fear for bankruptcy, is what propels this process. Epistemologically one does not seem to differ from the other. The resulted outcome is an interest in exogenous factors, which has provided, on the one hand, a fertile ground for the *World Bank Doing Business* reports, its rankings and for the various model laws to be extremely influential on the agendas of worldwide policy makers, while on the other hand, it has induced a circulation of legal patterns; a phenomenon the reminds of the practice of legal transplants during colonial times. But that is another story. [255]

Undeniably countries' management – governments and lawmakers – are engaging into this practice with substantive reforms in those areas of the regulatory environment deemed to affect business and economic activities. Circumscribing this analysis, the aforementioned secured transactions reforms with their differences and

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[254] Economic growth has been defined by economists as "either an absolute or per capita increase in an aggregate measure of national income, such as the well-known gross national product (or its more recent variation, the gross domestic product)." See Robert M. Collins, *The Politics of Economic Growth in Postwar America* (Oxford: Oxford University Press, 2000) at 1.

[255] *Supra* note 245.

similarities invite the legal community, and in particular comparative lawyers, to a reflection exercise. What are the flaws of this process then?

Many scholars believe that the cross-borders circulation of legal norms is not easy to achieve in practice, since with different frontiers come different political and cultural backgrounds.[256] This induces to question if a law or "a legal institution really plays the same role in the recipient country as it does in its donor country", as well as the degree of political and cultural specificity of the migrated law.[257] In this regard looking at the context in which the Article 9 of the *Uniform Commercial Code*, which is at the core of the major international influences on secured credit policy reforms, was created appears to be relevant in trying to formulate an answer to the question above.

In 1952 – year in which the Article 9 was first developed – the political, cultural and economic context of the United States of America was quite unique. The decade that followed the end of World War II gave birth to an unprecedented interest in economic growth, which ended up being the foundation of most of the postwar American policy.[258] American political class of the time, notably President Truman and its *Council of Economic Advisers* (CEA), was fascinated by the idea that economic growth was related to a broader concept of abundance. The so-called postwar boom, a period spanning from 1947 to 1960 in which a sharp rise in demographic, as well as in the industrial production fostered income distribution among American families

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[256] Norman S. Marsh, "Comparative Law and Law Reform" (1977) 41:4 Rabels Zeitschift für ausländisches und internationales Privatrech 649-668 at 652.
[257] *Supra* note 245.
[258] Robert M. Collins, *The Politics of Economic Growth in Postwar America* (Oxford: Oxford University Press, 2000) at 1.

and a demand for workers, strengthened the idea that growth and abundance were synonyms.[259]

Not only this period strengthen this idea, it also generated an obsession for statistics and measurements. Legal historians have in fact asserted that most of the policies enacted during this period were conceived and designed under the consultation of economics experts, or more specifically of law and economics scholars. Many of them belonged to the school of thought of the University of Chicago, which was the first university in the United States to pioneer "the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions".[260] The approach adopted by the "Chicago Group" – as these scholars were soon called – had a much broader influence on the legislation of the time, rather than just being limited to trying to measure the law and its impact. The neo-liberal doctrine[261], which advocates a pro-market deregulation, was soon at the core of the growth-oriented legislative agenda of the post-war United States.

Clearly, the framework that brought to the inception and development of the first version of the Uniform Commercial Code as a whole and, for what concerns this analysis, of its Article 9, reflects such philosophy of abundance and the concepts behind the neo-liberal doctrine. The functionalist approach of the secured credit legal

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[259] *Supra* note 253 at 42.
[260] Charles K. Rowley, "Public Choice and the Economic Analysis of Law" (1989) Recent Economic Thought Series Volume 19 at 123.
[261] On this point it should be noted that an international organisation named "The Mont-Pelerin Society", which is mainly composed by economists and academics belonging to the "Chicago Group" strongly advocates in favor of the neo-liberal doctrine. See also Philip Mirowski and Dieter Plehwe, eds., *The Road from Mont Pélerin: The Making of the Neoliberal Thought Collective* (Cambridge MA: Harvard University Press, 2009).

regime introduced by the Article 9 was therefore conceived and designed to perform its function – law as a tool – in an environment of over-supply of credit, a context can be said, in which supply exceeded demand. In other words it was not created to ignite a process of growth but rather to accommodate the needs of a society that was already growing.

With this in mind, drawing a comparison with the political, cultural and economic context of the European countries in which reforms designed upon the functionalism of the Article 9 have been enacted or will be enacted shows a completely different picture. War-torn civil law Europe experienced a period of strong economic growth between the end of the second world conflict and the 1970s. Data has shown that during this period the GDP per capita in the EU rose to a level of more than 70% of that of the United States.[262] Clearly, in continental Europe during this time of growth the legal regime of secured credit was formal and, most notably, founded upon the strictly possessory pledge. Nonetheless, it sufficed to respond to the needs of a society that not only was growing but was also rebuilding itself. The political scenario was also very different. The end of the war ignited a process of transformation in many European countries. The renaissance of societies was based upon people rather than on the market and the welfare state became a reality.[263]

However, when reforms shaped along the design of the Article 9 began to be proposed in Europe, countries were experiencing recession and austerity. Both

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[262] Leszek Balcerowicz, Andrzej Rzonca, Lech Kalina and Aleksander Laszek, *Economic Growth in the European Union* (Brussels: The Lisbon Council, 2014) at 9.
[263] Ian Gough, "European Welfare States: Explanations and Lessons for Developing Countries" in Anis Ahmad Dani and Harjan de Haan, eds., *Inclusive States: Social Policy and Structural Inequalities* (Washington: World Bank Publications, 2008) at 3-38.

concepts are deeply in contrast with the philosophy of growth and abundance. Hence, how can the framework of the Article 9 be used not only to perform in a completely different scenario but also to provide a stimulus for economic growth? Providing this question with a definitive answer appears to be rather complicated.

Furthermore, if harmonisation as a key to facilitate cross-border commerce and trade is a goal of the *European Bank for Reconstruction and Development* and of the UNCITRAL, perhaps it could have been achieved in a different way. The case of secured credit reform in France, which as I have mentioned before, represents a demonstration of modernised traditionalism, provides the European legal community with, on the one hand, a template of reform that is in sync with the overall legal, cultural and historical environment. On the other hand, it also should make us – comparative lawyers – reflect on the possibility and feasibility of a European system of secured transactions that is both efficient and contextualised.

Surely one might think that the general trend for the harmonisation of secured credit, through the adoption of reform based on the functionalism of the Article 9 stems from a strong corporate lobbying effort.[264] Public choice and political science scholars have long exposed the ins and outs of this process,[265] which is set in motion by multinational corporate actors with the ultimate goal of creating a regulatory environment that allows them to easily set up new branches and business activities. Loosened collateral requirements and a centralised registry system of credit are not only deemed as capable of lowering transaction costs and reduce information

[264] See José Angelo Estrella Faria, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) Rev. Dr. Unif. at 5.
[265] Thomas Eger and Hans-Bernd Schäfer, *Research Handbook on the Economics of European Union Law* (Cheltenham: Edward Elgar Publishing, 2012).

asymmetries on the markets for both lenders and borrowers, but they also generate another economic effect. They enable companies to yield more profits.

4.2. Collateral as a Source of Economic Development: Is it Risk Free?

Throughout the thesis the term collateral has been used many times. Nevertheless, while the reasons why economists and International Organisations have placed so much importance on collateral reform have been highlighted, its true significance and its implications for businesses, for the market and ultimately for consumers, still demand some clarifications.

Modern credit systems are organised in the form of a marketplace in which parties – borrowers and lenders – exchange a specific type of good: money. Credit plays a fundamental role in what is defined as the real economy or the economy of production. Credit is the engine that allows the economy of production to function, since it generates wealth through the circulation of liquidity and produced goods in the market.[266] An example of this process is certainly the housing market. Houses as a good belong to the real economy. Given the average house price, which is higher than the average citizen annual salary, buyers in the market need to borrow money to finance the purchase. Lenders, whose role in the market is to provide borrowers with

[266] Massimo Amato and Luca Fantacci, *The End of Finance* (Cambridge: Polity Press, 2012) at 26.

money, with a loan, perform their function looking for two outcomes: one, a profit on the loan and two, security that the lent sum will not be lost. In order to do so, borrowers are asked to pay a premium on the loan – interests – and to guarantee the fulfilment of the obligation by allowing the lender to establish property rights on a given asset – on a collateral - which are conditional to the repayment of the debt. Ultimately, for the overall economy this process results in the creation of wealth: the buyer acquires an asset and both lender and homebuilder make a profit that allows the first to finance more purchases and the second to build more houses. Hence, liquidity circulates and production continues.

Credit is also at the core of the financial economy. This in turn creates a strong relationship between the real economy and the financial economy. However, while the financial economy is independent of the real economy, the contrary is not necessarily true.[267] Collateral and its function are therefore that necessary gear that allows the mechanism of the financial economy to work, supplying credit that fuels the real economy. This mechanism and the role played by collateral have been extensively studied together by economists and *law and development* scholars. Their studies have concluded that collateral requirements are a significant factor in economic development.[268]

Their analysis, empirical in nature, is mostly based upon the findings of Hernando de Soto, who argued that burdensome legal requirements pose a threat to the ease of

[267] *Supra* note 260 at 30.
[268] Mehnaz S. Safavian, "Firm-level Evidence on Collateral and Access to Finance" in Frederique Dahan and John Simpson, eds, *Secured Transactions Reform and Access to Credit* (Cheltenham, UK: Edward Elgar, 2008) at 110.

doing business.[269] The centrality of collateral requirements as a tool to access credit and the need for countries to adopt a system that provides for loosen collateral requirements, is believed to stem from the fact that:

> [strict] collateral requirements often preclude businesses from participating in credit contracts: businesses without 'sufficient' collateral will not be able to access bank finance for many types of investment loans, and even for short-term working capital lines of credit. Conventional wisdom would suggest that these firms are excluded from financial sector contracts because they are asset-poor. But this is not true: most businesses have a wide array of assets at their disposal, assets that in many countries would be considered excellent sources of collateral. In certain countries it is only because the legal framework governing movable property precludes these assets from being used productively in loan contracts: in other words these assets are 'dead capital'.[270]

Reforming the law of secured credit in this sense is believed to allow businesses to enlarge the pool of assets at their disposal that are suitable to be used as collateral. As a consequence, this transforms dead capital into productive capital.[271] This philosophy also posits that collateral perform another important function on the credit market: it allows borrowers to obtain better terms on their loans. Empirical data taken from the lending terms of the *World Bank/International Monetary Fund Staff Federal Credit Union* has led economists to argue that secured lending allows lenders to dispense loans with lower interest rates as compared to unsecured lending.[272]

While in theory this sounds fascinating and advantageous, the reality is another. First of all, most of the studies conducted analyse collateral regulation, its reform and the alleged economic benefit from a business perspective: in other words there is no

[269] *Supra* note 137.
[270] *Supra* note 268 at 110.
[271] *Ibid*. at 119.
[272] See Heywood Fleisig, "The Economics of Collateral and of Collateral Reform" in Frederique Dahan and John Simpson, eds, *Secured Transactions Reform and Access to Credit* (Cheltenham, UK: Edward Elgar, 2008) at 86.

accountability for the possible outcomes on individual consumers. Secondly, data concerning the role of collateral in providing borrowers with lower interest rates appears to be biased, since it looks at just an infinitesimal fraction of the global credit market – the World Bank/IMF Lending System. The house purchase example above was not accidental; it is perfectly fit for the analysis of the impact of credit supply on the market and on consumers. Empirical data, concerned with analysing the reasons behind the 2008 financial crisis, has shown worrisome traits related to relaxed collateral requirements.[273]

Collateral requirements are inversely proportional to credit demand. Less requirements equals more credit demand. "Therefore, interest rates should rise to convince the lenders to satisfy this additional demand".[274] Such rise provides lenders with enough liquidity to satisfy the growing credit demand: in other words, it generates cash flow. Then, why did interest rates not rise in the United States, where the article 9 provides for such collateral requirements? And, most importantly, why loosened collateral requirements are so strongly believed to produce the opposite outcome?

Relaxed collateral requirements, high-risk lending, low interest rates and simultaneous large credit supply are a product of the advent of loan securitisation. As a matter of fact:

> Until the mid 1980s, a lending bank had several roles to play in the lending game. It held the contact with the customer and had made the evaluation of the customer's creditworthiness – that is, his or her

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[273] Andrea Tambalotti, Alejandro Justiniano and Giorgio E. Primiceri, "Credit Supply and the Housing Boom" (2015) Federal Reserve Bank of New York Staff Reports No 709.

[274] *Ibid.*

> ability to repay. It collected interest and amortizations form the borrower. It had also funded the loan, most often by its own short-term deposit taking.[275]

Securitisation, on the contrary, frees lenders from having to inscribe loans into their balance sheets. Through a process of financial engineering loans are transformed into negotiable securities, which are then sold to investors.[276] As a consequence, securitisation allows lenders to:

> on the one hand […] immediately collect the entire sum of the credit supplied, plus a commission charged for the operation, which is often proportionate to the sum of the loan. On the other hand, the [lender] is no way exposed to credit risk – the risk, that is, of the debtor proving insolvent. Any such risk is passed on to the purchaser of the securities.[277]

Every kind of loan or mortgage can be subject to securitisation and transformed into a negotiable financial product. Among the latter, widely known are the so-called *Mortgage Backed Securities* (MBS), *Asset Backed Securities* (ABS) and *Collateralized Debt Obligations* (CDO). MBSs and ABSs are essentially the same thing; only difference being that the first are created on mortgages, whereas ABSs are created upon every type of loan.[278]

Ultimately, a legal regime that provided for relaxed collateral requirements followed by sophisticated products of financial engineering which transformed lending into a extremely profitable, zero-risk practice enabled lenders – banks – to satisfy the consequentially growing demand for cheap credit. Evaluating borrowers' capabilities to repay the loan became an obsolete practice since MBSs and ABSs allowed lenders not only to transfer the risk but also to profit from it. This growing amount of no-risk

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[275] Johan A. Lybeck, *A Global History of the Financial Crash of 2007-10* (Cambridge: Cambridge University Press, 2010) at 141.
[276] *Supra* note 266 at 69.
[277] *Ibid.*
[278] For a detailed explanation see *Supra* note 275 at 141.

profit therefore, drove lenders to offer more and more credit to those borrowers that under normal circumstances would not be able to get any. In the end, when borrowers became unable to repay the loans and investors were left with MBSs and ABSs that had no value, that is when the 2008 financial crisis exploded.[279]

The ample worldwide diffusion of MBSs, ABSs and CDOs, on the one hand, and the large amount of investment conveyed into those products by consumers, hedge funds and institutional investor – that is governments, retirement funds and others – have caused an incredible amount of wealth, liquidity and savings to vanish. Hence leaving millions of people with nothing left.[280]

The aforementioned repealing of the *hypothèque rechargeable* in France was a measure targeted to prevent consumers on the one hand to indulge into borrowing more than they can repay and, on the other hand, prohibit consequential lending practices that may take advantage of the phenomenon. The law that repeals the concept of rechargeable hypothec from the French secured transactions legal system is a law created for consumers aimed at protecting them and protecting the national economy from a market crash.[281]

In this light, the prospective introduction of a concept of rechargeable security by the Italian legislators raises a few concerns. The current fragility of the Italian economic and political environment, followed by a banking system that, in the last decade, has

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[279] See *Supra* note 275 for a complete and detailed historical account of the 2007-2010 financial crisis.

[280] See Warwick J McKibbin and Andrew Stoeckel, "The Global Financial Crisis: Causes and Consequences" (2009) Lowy Institute for International Policy Working Papers in International Economics No 2.09.

[281] See *Supra* note 233.

experienced episodes of corruption and other forms of illegality – notable is the case of Monte dei Paschi di Siena[282] - should induce the Italian government to carefully weigh the interests at stake. The introduction of a rechargeable security interest should be accompanied by *ad hoc* regulatory measures in other areas of the legal system – namely banking law, consumers' protection and bankruptcy law. Failing to do so, could produce, once the reform is enacted, risks that are far bigger than the benefits that such security interests could produce.

To sum up, the circulation of legal patterns in the field of secured credit for the purpose of economic development, has to be taken with a grain of salt. The intricate net of relations existing today between secured transactions, the economy of production, the financial economy and consumers should raise awareness circa the implications carried by this process of normative circulation. The importance of embracing a multidisciplinary approach to legal reform – especially in sensitive fields like secured credit – should not be neglected any longer. A one-size-fits-all approach cannot be used to respond to the growing substantive necessity to mould reform laws to the needs of each legal system. Surely, looking at the law of other countries to grasp similarities and differences – in the spirit of comparative law – as we all know is beneficial to lawmakers, but that does not mean that this has to be done looking for the magic pill.

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[282] See Silvia Aloisi and Stefano Bernabei, "Monte Paschi puts derivatives loss at 730 million euros", Reuters, (6 February 2013), online: < http://www.reuters.com/article/2013/02/06/us-montepaschi-derivatives-board-idUSBRE91509Y20130206>.

5. Conclusion

The analysis carried out in this thesis has shown important traits related to the issue at stake – traits that also lay the foundation for subsequent research. First of all, the detailed overview of the reform processes in Quebec, France, Belgium and Italy, combined with the extensive inquiry into the birth and development of secured transactions legal regimes across the two main legal families and with the analysis of the modernization and harmonization efforts by the EBRD, the UNCITRAL and the World Bank has led us to bring to light the importance of contextualizing the creation of reform laws.

In this light, the 2006 reform in France seems to have been perfectly capable of collecting in the same normative box modernization and economic efficiency, without neglecting the past – that is the spirit of the civilian tradition – and its citizens, with the recent repealing of the rechargeable hypothec. An achievement that should be of great help to many other countries engaged in reforming their secured transactions laws.

Secondly, observing the reform processes in various countries opened another scenario: questioning the feasibility of legal transplantation in secured credit. Interestingly, this has shown how the disguised normative injection of models designed upon the functionalism of the Article 9 appears to be rather counterproductive in light of the concept of cultural specificity of the law. A concept

that should be born in mind by lawmakers concerned with reforming their laws in the attempt of igniting economic growth and development.

Thirdly, the economic analysis of the effects produced by loosened collateral requirements has demonstrated on the one hand, the closed connection between secured transactions and the financial system and, ultimately the perils that this relation carries for consumers and for the overall economy. On the other hand, it should also make lawmakers think about the importance of evaluating the systemic relations between fields of law in the process of reform.

However, in light of the amply seen process of legal harmonization and transplantation a question arises: if this process takes also place in other fields of law, will it bridge the gap between legal families? And if so, are traditions disappearing? Trying to answer these questions appears to be particularly relevant not only for lawmakers but also for comparative lawyers, whose job is the inquiry in the differences and dichotomies between legal families and traditions. If differences disappear to make room for a *one-size-fits-all*, will there be anything left to compare?

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