

## 28. International harmonisation of credit and security laws: the way forward

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### I. INTRODUCTION

The law of credit and security is at the core of commercial law. It has been traditionally regulated by domestic rules and interwoven throughout the law of property, contracts and corporate finance where the capital may be raised through borrowing.<sup>1</sup> However, with increasing market interdependency as a result of globalisation of financial markets, there is a commercial necessity in harmonising credit and security law at the international<sup>2</sup> level. The recent financial crisis clearly demonstrates that globalisation of financial markets must be accompanied by globalisation of the law of credit and security. Harmonisation of credit and security laws could substantially assist in reducing the cost of credit by creating certainty in cross-border financing transactions. Financing techniques such as raising finance against company assets and by assignment of receivables are important and their regulation varies under different jurisdictions which limit access to low cost credit. Facilitated access to low cost credit is said to drive economic growth, according to studies conducted by the World Bank.<sup>3</sup> There is a correlation between the facilitation of credit and lowering the

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<sup>1</sup> For a similar statement see Dahan, F (2000), 'Secured Transactions Law in Western Advanced Economies: Exposing Myths', *Law in Transition* 37, 39.

<sup>2</sup> In this chapter international harmonisation is used to express the idea of international or global harmonisation under the auspices of international organisation such as UNCITRAL or Unidroit (as opposed to regional harmonisation) and international activities intended to have a global effect. Therefore, international harmonisation and global harmonisation will be used interchangeably throughout the text. For more detailed treatment of harmonisation of secured transactions laws at the international level see Akseli, O (2011), *International Secured Transactions Law: Facilitation of Credit, International Conventions and Instruments* Routledge, Abingdon.

<sup>3</sup> One of the observations made by the US delegation during the negotiations of the UNCITRAL Convention was as follows: '[t]he benefits of global economics and trade have not yet been fully realized in many states, and the absence of adequate

cost of credit in the way that facilitated credit by harmonised and predictable rules may reduce the cost of credit for small and medium sized enterprises in emerging markets by minimising the risk of the financier not getting paid as the local secured credit laws may be poor.

What is most striking is that often harmonisation activities take place at regional level<sup>4</sup> rather than on a global level. When efforts on the global and regional levels are considered, conflicts may occur between global, regional and bilateral legislative harmonisation texts. Conflicts may also occur even at the domestic law level when a national legal provision and an international instrument on the same subject conflict. Therefore, there must be cooperation and coordination among these regional and international efforts. This chapter suggests that there is a necessity for harmonisation of credit and security laws at the international level and there should be more support for international harmonisation efforts rather than regional ones.

Section II will look at the harmonisation of secured credit laws in context. Section III will examine the necessity of harmonisation of the law of credit and security. Section IV will compare regional and international harmonisation of the law of credit and security and elaborate on the fact that international harmonisation is a necessity in this area. Section V will briefly examine the idea and concept of European Security Interest. Conclusions will be in Section VI.

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international commercial finance and credit in this important area is one of the obstacles for achievement of these goals. ... In addition to including substantive uniform rules for the assignment of receivables, the ... Convention provides States with options in order to adapt the ... Convention's provisions to their particular economic needs. On some other matters the ... Convention sets out rules to determine which national legal regime applies, which can also promote finance, provided that the rules reflect transactional practice, serve the needs of commercial efficiency and are not counterproductively premised on general notions of conflict of laws. The combination of these techniques in the ... Convention is aimed at assuring the necessary level of commercial certainty, which is critical to the willingness of capital markets to extend credit to areas previously underserved.' See A/CN.9/472/Add.3, at 3: Compilation of Comments by Governments and International Organizations; see also Murphy S.D. (2004), 'U.S. Signing of UNCITRAL Convention on Assignment of Receivables', 98 *American Journal of International Law* 368, 369 where the US position is demonstrated. See also Levine, R (2004), 'Finance and Growth: Theory and Evidence', National Bureau of Economic Research, Working Paper 10766 at 85; see also Machoka, PM (2006), 'Towards financial sector development – the role of the draft UNCITRAL Legislative Guide on Secured Transactions', 21 *Journal of International Banking Law and Regulation* 529 at 529; see also below, 'Modernisation of secured transactions laws for economic growth and increased foreign investment'.

<sup>4</sup> E.g. OAS Inter-American Model Law on Secured Transactions or recent discussion regarding the security interests in the draft Common Frame of Reference or the discussion with regard to the European Civil Code and the Principles of European Contract Law.

## II. HARMONISATION OF SECURED CREDIT LAWS IN CONTEXT

Harmonisation can take different forms. In certain cases harmonisation can be achieved through international conventions.<sup>5</sup> In other cases this can be achieved by model laws.<sup>6</sup> Legal reforms, directives and legislative guides are also means to achieve harmonisation.<sup>7</sup> While there are different views on the definition of harmonisation,<sup>8</sup> in the author's view, 'harmonisation', in the realm of the law of

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<sup>5</sup> Such as the UN Convention on the International Sale of Goods.

<sup>6</sup> E.g. UNCITRAL Model Law on International Commercial Arbitration.

<sup>7</sup> For more information on the means of harmonisation see Mooney, CW Jr (2001), 'Extraterritorial Impact of Choice of Law Rules for Non-United States Debtors under Revised Uniform Commercial Code Article 9 and a New Proposal for International Harmonization', at 187, 196ff. in Bridge, M and Stevens, S (eds), *Cross Border Security and Insolvency* (Oxford University Press, Oxford); see also Akseli, O (2008), 'On the Methods of International Harmonisation of Secured Transactions Law', in Andersen, C and Schroeter, U (eds), *Sharing International Commercial Law across National Boundaries Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill, London), at 1–12; see also Faria, JOE, *Legal Harmonization Through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)*, available at: [www.doj.gov.za/alraesa/conferences/papers/s5\\_faria2.pdf](http://www.doj.gov.za/alraesa/conferences/papers/s5_faria2.pdf).

<sup>8</sup> See also Mistelis, L (2001), 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in I Fletcher, L Mistelis and M Cremona (eds), *Foundations And Perspectives of International Trade Law* (Sweet & Maxwell, London) at 3–4: 'harmonisation is a process which may result in unification of law subject to a number of (often utopian) conditions being fulfilled, such as, ... wide or universal geographical acceptance of harmonising instruments, and with wide scope of harmonising instruments which effectively substitute all pre-existing law'; 'harmonisation' can be defined as 'making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar'. See Leebron, DW (1996), 'Claims for Harmonization: A Theoretical Framework', 27 *Canadian Business Law Journal* 63, at 66; for a different definition see Ziegel, J (1997), 'Harmonization of Private Laws in Federal Systems of Government: Canada, the USA and Australia', in Cranston, R (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press, Oxford), 131 at 133, where he states in relation to the commercial law that '[h]armonization in this field of law is a word with considerable elasticity [and] [i]n its most complete sense it means absolute uniformity of legislation among the adopting jurisdictions'; for different definitions of 'harmonisation' see Glenn, P (2003), 'Harmony of Laws in the Americas', 34 *University of Miami Inter-American Law Review* 223, 246; Zamora, S (1995), 'NAFTA and the Harmonization of Domestic Legal Systems: The Side effects of Free Trade', 12 *Arizona Journal of International & Comparative Law* 401, 403; Boodman, M (1991), 'The Myth of Harmonization of Laws', 39 *American Journal of Comparative Law* 699 at 707; Gopalan, S (2004), 'The Creation of International Commercial Law: Sovereignty Felled?', 5 *San Diego International Law Journal* 267, 276; Gopalan, S (2004), 'New Trends in the Making of International Commercial Law', 23 *Journal of Law and Commerce* 117, from 120.

secured credit, can be defined as the process whereby the laws of countries to the extent that they are related to secured credit are approximated with each other by certain legislative instruments (such as conventions, model laws and legislative guides) or methods (such as legal reforms). Due to differences in public policies it is almost impossible to unify secured credit laws, but it is possible to harmonise them.<sup>9</sup> Unification can only be achieved by a truly uniform manner of interpretation.<sup>10</sup> Harmonisation leaves an opportunity for experimentation, whereas uniformity does not and can be regarded as the ‘imposition of one legal model on all jurisdictions’<sup>11</sup> through indirect influence. Wider participation and encouragement of legal cultures as well as uniform interpretation by national courts are necessary elements for an instrument to lead nations to successful and desirable uniformity.

### III. NECESSITY FOR HARMONISATION OF CREDIT AND SECURITY LAWS

The commercial necessity for the harmonisation of credit and security laws is acutely felt by emerging markets. This is particularly true for small and medium sized enterprises operating and the financiers lending therein who need to access to low cost credit with long term maturities. Harmonisation of the laws governing credit and security is necessary to facilitate the terms of credit for especially small and medium sized enterprises in emerging markets to access lower cost credit and to increase cross border trade. From this perspective harmonisation of the laws of credit and security is critical to create predictability and certainty for lenders, which will in turn provide access to lower cost credit. The lender who is confident about the consequence of his transaction, at this point, will not include the risk calculation in his interest rate and lend with long maturity.<sup>12</sup> Harmonisation is also said to reduce legal conflicts arising out of lending

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<sup>9</sup> See Cuming, RC (1986), ‘National and International Harmonisation: Personal Property Security Law’, in King, DB (ed.), 1986, *Commercial and Consumer Law from an International Perspective* Rothman, Littleton, CO 471, 485–6; for a similar view see also Buxbaum, HL (2002), ‘Conflict of Economic Laws: From Sovereignty to Substance’, 42 *Virginia Journal of International Law*. 931, 948; see A/CN.9/378/Add.3 where UNCITRAL concludes that ‘worldwide unification of the law of security interests in goods ... was in all likelihood unattainable’.

<sup>10</sup> On a truly uniform manner of interpretation see e.g. Ferrari, F (2001), ‘Applying the CISG in a Truly Uniform manner: Tribunale di Vigevano (Italy), 12 July 2000’, *Uniform Law Review* 203–15.

<sup>11</sup> See Zamora, *supra* n. 8, at 405.

<sup>12</sup> For a similar argument see McCormack, G (2007), ‘The UNCITRAL Legislative Guide on Secured Transactions Functionalism and Form’, in Foëx, B Thévenoz, L

transactions where both parties are not certain with regard to the consequences of the transaction. Furthermore, the applicable law may be less efficient and not protect the interest of the creditor. With facilitated access to lower cost credit economic growth is said to be maintained. Secured lending is also said to reduce poverty.<sup>13</sup> Facilitated access to low cost credit enables small and medium sized businesses to obtain immediate liquidity, which in turn enables them to invest on further projects. Creditors' confidence may be obtained by virtue of predictable rules governing credit and security law. Finally, as a general proposition, it can be argued that activities on the harmonisation of the law of credit and security demonstrate the importance of intangibles as collateral.<sup>14</sup>

Taking security lowers the cost of credit by reducing the risk of non-payment in the event of the debtor's insolvency.<sup>15</sup> The primary function of international secured transactions law conventions, in general terms, is to modernise and harmonise domestic laws to the extent that they are applied to cross-border secured transactions. There are differences in domestic laws regarding the use of movables and intangibles as collateral. Differences among national secured transactions regimes 'create uncertainty and transaction costs that lower the expected value of a transaction to the creditor'.<sup>16</sup> The same differences are also obstacles to the harmonisation process. In some developed countries the use of intangibles and movables is more attractive, whereas in economically less developed countries the use of immovables as collateral is more attractive or more acceptable by financiers.<sup>17</sup> If there is no harmonisation there may be

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Bazinas SV (eds) (2007) *Réforme des sûretés mobilières. Les enseignements du Guide législatif de la CNUDCI / Reforming secured transactions. The UNCITRAL legislative guide as an inspiration* Schulthess, Geneva 214.

<sup>13</sup> For the poverty reduction effect of the harmonised law of credit and security see Kozolchik, B (2007), 'Secured Lending and Its Poverty Reduction Effect', 42 *Texas International Law Journal* 727.

<sup>14</sup> E.g. UN Convention on the Assignment of Receivables in International Trade [http://www.uncitral.org/uncitral/en/uncitral\\_texts/payments/2001Convention\\_receivables.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html); Hague Conferences Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=72](http://www.hcch.net/index_en.php?act=conventions.text&cid=72). But cf. in a study conducted in 60 countries World Bank studies demonstrate that immovables are preferred mainly as collateral: Safavian, M, H Fleisig and J Steinbuks (2006) 'Unlocking Dead Capital', *Viewpoint*, Note Number 307 (March) at 2 and Figure 3.

<sup>15</sup> See generally McCormack, G (2003), 'The Priority of Secured Credit: an Anglo-American Perspective', *Journal of Business Law* 389, 402; McCormack, G (2002), 'The Nature of Security over Receivables', 23 *Company Lawyer* 84, 85.

<sup>16</sup> Cohen, N B (1998), 'Harmonizing the Law Governing Secured Credit: The Next Frontier', 33 *Texas International Law Journal* 173, 176.

<sup>17</sup> See e.g. Safavian, M (2006), 'Firm Level Evidence on Collateral and Access to Finance', 'Presentation made at the International Workshop on Collateral Reform and

uncertainty, which can mean in this context 'credit at a high cost, less or no credit, depending on whether the risk can be reasonably estimated'.<sup>18</sup> Cuming and van Erp argue that these differences arise out of the fact that the secured transactions laws of states 'are grounded in property concepts some of which are peculiar to particular families of law'.<sup>19</sup> Differences may be eliminated by virtue of harmonisation of secured transactions laws and creating certainty and predictability in cross-border credit transactions. International secured transactions conventions present various solutions to these problems arising in the context of cross-border credit transactions. Thus, these projects are supported by international financial organisations.

Access to lower cost credit requires an efficient and modern secured lending regime supported by a prudent supervision regime.<sup>20</sup> Modernisation or modernised harmonisation of credit and security laws can successfully be achieved by either legal reform or international instruments. The former has the risk of imposing rules from top to bottom if it is presented by a foreign national insti-

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Access to Credit', EBRD, London on 8–9 June 2006; see generally World Bank FDP Forum (2007) 'Making Finance Work for Africa: What Role for Collateral Reform' (Washington, DC: World Bank); IFC?MPDF (2007) 'Vietnam Increasing Access to Credit through Collateral (Secured Transactions) Reform' (Washington, DC: IFC); FIAS/IFC PEP China (2007) 'Reforming Collateral Laws and Registries: International Best Practices and the Case of China' (Washington, DC: World Bank).

<sup>18</sup> See Bazinas, SV (2006), 'Modernising and Harmonising Secured Credit Law: The Example of the UNCITRAL Draft Legislative Guide on Secured Transactions Part 1', 01 *Journal of International Banking and Finance* 20.

<sup>19</sup> For more information see *infra* n.42 et seq and the accompanying text. See also Cuming, RCC (1997), 'The Internationalization of Secured Financing Law: The Spreading Influence of the Concepts of UCC, Article 9 and its Progeny', in Cranston, R. (ed.) (1997) *Making Commercial Law Essays in Honour of Roy Goode* (Clarendon Press, Oxford) 499 at 499; for a discussion of harmonisation from the legal-historical and comparative perspectives see Erp, SV (2003), 'Civil and Common Property law: Caveat Comparator – The Value of Legal Historical-Comparative Analysis', *European Review of Private Law* 394.

<sup>20</sup> The recent financial crisis has clearly demonstrated that banks and financial institutions must be supervised in especially their credit transactions which are open to abusive usage. Capital must be maintained at all times and must be prudently supervised. Securitisation transactions are perfect examples of this. Securitisation technique has been used by banks over and over again on recycled receivables. One can argue that the soundness of the securitisation technique has nothing to do with the crisis, but it is those financiers who used the technique without any safeguards and without taking into account the risk they are passing onto other clients on the recycled receivables. See also Sigman, HC and Kieninger, EM (2007), *Cross Border Security over Tangibles* 1 (Sellier, Munich, 2007), where they state that '[u]nder the Basel II requirements, financial institutions require a clear and certain legal structure to support the efficient supply of credit, generating an immediate need for modernisation of the law governing security in movables'.

tution, and thus creating more difficulty to that economy than being useful.<sup>21</sup> The latter, on the other hand, is more effective in creating modernisation and harmonisation in the medium to long term. However, it also has a risk. That is to say that if the international instrument has been influenced by a particular legal system, then it may be argued that the instrument may not be easily adopted as it does not reflect the recipient jurisdiction's legal and economic structure and imposes one legal system on all jurisdictions. This is critical in the field of credit and security; more so, it has particular relationship with insolvency law and the law of property which are deeply rooted to the legal culture of a jurisdiction. From another perspective it can also be argued that if a particular international instrument does not contain a vital feature of the credit and security law regime, then it may not be efficient and acceptable.<sup>22</sup>

In order to achieve access to lower cost credit for small and medium sized businesses in emerging markets apart from adopting relevant international instruments, it is necessary to build appropriate infrastructure, judiciary and enforcement mechanisms.<sup>23</sup> Furthermore, legal systems must have predictable and comprehensive rules that fit that infrastructure in order to promote secured credit.<sup>24</sup>

During the process of harmonisation both international and national law reform institutions may encounter certain problems. These include difficulty in reaching a compromise between certain major states, the complexity of national laws on certain areas, resistance to changing traditional national legal approaches on certain points of law and the multiplicity of international instruments or activities on similar topics.<sup>25</sup> However, it can be argued that the main problem seems to be experienced between regional and international harmonisation activities.

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<sup>21</sup> See below for more information on legal reform activities.

<sup>22</sup> Such as the Unidroit Convention on International Factoring which does not contain priority of claims and formal validity features, thus leaving these unsolved.

<sup>23</sup> Bazinas rightly argues 'such an economic result [cannot be achieved immediately and] automatically through the enactment of appropriate legislation but depends largely on the relevant infrastructure, judiciary and enforcement mechanisms': see Bazinas, S (2004), 'UNCITRAL's Work in the field of Secured Transactions' 36 *Uniform Commercial Code Law Journal* 67.

<sup>24</sup> For a discussion of some best practices and policy options see Welsh, A (2003), 'Secured Transactions Law: Best Practices and Policy Options', *IRIS Discussion Paper No. 03/06* (The IRIS Discussion Papers on Institutions and Development, Center of Institutional Reform and the Informal Sector at the University of Maryland, August 2003).

<sup>25</sup> E.g. the overlap between the Unidroit Convention on International Factoring and the UNCITRAL Convention on the Assignment of Receivables in International Trade.



#### IV. REGIONAL VERSUS INTERNATIONAL HARMONISATION FROM THE LAW OF CREDIT AND SECURITY PERSPECTIVE

There is a tension between regional and international harmonisation.<sup>26</sup> The issue has political aspects. The tension stems from both whether regional or international harmonisation efforts in the field of secured credit be given preference and the competition between the international and regional organisations. The issue becomes extremely critical when the link, which is traditionally deeply rooted to national legal cultures, between the law of credit and security, insolvency and the law of property, is considered.

Mistelis observes as follows:

Inevitably there are at least two competing strategies in the harmonization of international commercial law on a worldwide basis: (i) the 'global' conventions proposed by international organizations and (ii) the regional agreements drafted by regional organizations. The goals of such regional conventions often derive from quite different motivations, but often produce agreements that concern the same subject matter as the global conventions. In principle, the conflict between harmonization initiated by intergovernmental organizations and nongovernmental organizations may not be as acute, provided that lobbyists from one side and state functionaries on the other side communicate clearly the interests they represent and that the necessary compromises are made.<sup>27</sup>

As a general proposition one can argue that regional harmonisation activities may undermine international harmonisation activities.<sup>28</sup> Firstly, regional harmonisation activities deal with only regional financial and legal problems with limited or no contribution from extra-regional cultures and legal systems. Expanded contribution from all legal cultures and continents enhances the acceptability of an instrument and makes it more comprehensive and useful.

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<sup>26</sup> For a historical relationship between the regional and international efforts of harmonisation of private law see Basedow, J (2003), 'Worldwide harmonisation of Private Law and Regional Economic Integration-General Report', *Uniform Law Review* 31; for a similar view see also Bazinas, S (2003), 'Harmonisation of International and Regional Trade Law: The UNICTRAL Experience', *Uniform Law Review* 53 where he states that '[s]ince the 1997 Treaty of Amsterdam gave the European Union (EU) a mandate in the field of private international law, the relationship between international and regional harmonisation of private law is increasingly being described as one of tension'.

<sup>27</sup> Mistelis, L (2000), 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law reform – Some Fundamental Observations', 34 *International Law* 1055, 1062–3.

<sup>28</sup> Drobniig, U (2003), 'Brief Considerations on Coordinating Developments in the Field of Secured Transactions Law', *Uniform Law Review* 353 where he argues that 'various regional efforts will produce instruments with differing regimes'.



Secondly, as Drobnig rightly suggests there is still ‘differing levels of development [and] the need for credit may not everywhere be as pressing as it is in certain highly developed countries’.<sup>29</sup> This is equally true even within regional organisations and even ‘national and regional legislators may place different degrees of emphasis on the protection of the secured creditor ... and... of the debtor’s unsecured creditors...’.<sup>30</sup> With regard to the EU, for instance, as McCormack correctly states, trade within the EU functions properly and there is no necessity for a common law of proprietary securities<sup>31</sup> within the framework of the Common Frame of Reference.<sup>32</sup> On the other hand, for other regions there may be a need for a regional approach. For instance, Garro makes a pragmatic argument for harmonising national attitudes to secured transactions at a regional level.<sup>33</sup> His arguments are based on the harmonisation experience of Latin American countries which have strong commercial ties, a common legal tradition and similar social and economic approaches to credit and security transactions.<sup>34</sup> Furthermore, the argument is that developed economies’ secured transactions systems cannot easily be adopted by the Latin American countries which have developing economies with a shortage of capital, lack of a conceptual framework (mainly based on Roman law concepts which are not similar to Anglo-American concepts<sup>35</sup>) and lack of experience in secured lending.<sup>36</sup> Thus it seems that regional harmonisation within Latin American countries may be a reasonable step for that particular example.<sup>37</sup> However, the same argument may

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<sup>29</sup> *Ibid.*, at 354.

<sup>30</sup> *Ibid.*, at 354.

<sup>31</sup> McCormack, G (2008), ‘The CFR and Credit Securities – a suitable case for treatment?’, *WG Hart Workshop Paper*, at 6 (University of London, 24 June 2008).

<sup>32</sup> But cf. European Parliament Committee on Legal Affairs and the Internal Market Report which prompts harmonisation on security rights in movables: see Kieninger, EM (2004), ‘Introduction’ in Kieninger, EM (ed.), *Security Rights in Movable Property in European Private Law* (Cambridge University Press) at 21.

<sup>33</sup> Garro, A (1990), ‘The Reform and Harmonisation of Personal Property Security law in Latin America’, 59 *Revista Juridica Universidad de Puerto Rico* 1, at 14–16.

<sup>34</sup> *Ibid.*, at 16.

<sup>35</sup> But cf. Kozolchik, B and Wilson, JM (2002), ‘The Organization of American States: The New Model Inter-American Law on Secured Transactions’, *Uniform Law Review* 69, 74ff where they argued that Roman legal institutions were more compatible with Anglo-American secured transactions law than the Latin American law they influenced.

<sup>36</sup> See Garro, *supra* n. 33, at 15;

<sup>37</sup> However, since the early 1990s, there have been three model laws and reforms none of which had been enacted in Latin America. These model law texts were prepared by the Centre for Economic Analysis of Law, Central Bank of Argentina and the National Centre for Inter-American Trade Law. See Mistelis, L (1998), ‘The EBRD Model Law on Secured Transactions and Its Impact on Collateral Law Reform in Central and Eastern Europe and the Former Soviet Union’, 5 *The Parker School Journal of East European Law* 455, at 459 and n. 13.

not be equally applicable to the European Union or its efforts.<sup>38</sup> The divergence between the Civil and Common law approaches to credit and security<sup>39</sup> inherent among the EU member States cannot be found in Latin American countries although there is an established common market in the EU. The EU presents a different picture.<sup>40</sup> Security interest regimes within the EU are fragmented; however, the 'intra community trade seems to function perfectly well without a common law of [credit and security]'.<sup>41</sup> A simple example can be given from England where the law of credit and security is fragmented<sup>42</sup> and different rules apply for hire-purchase, conditional sale, mortgages, equitable charges and pledge.<sup>43</sup> The credit and security law systems of former transition economies, some of which are also members of the EU, have recently been reformed.<sup>44</sup> Civil

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<sup>38</sup> But cf. Garro, *supra* n. 33, at 15 and n. 34.

<sup>39</sup> Goode, R (1998), 'Security in Cross Border Transactions', 33 *Texas International Law Journal* 47, at 48. Goode suggests that the basic difference between the Common law and Civil law systems on security interests is

[the] philosophy and legal culture concerning the extent to which a security should be recognized at all and the conditions necessary, for the validity of a security interest. Common law jurisdictions, which are generally sympathetic to the concepts of party autonomy and self-help, have a liberal attitude towards security. This attitude allows security interests to be taken with a minimum of formality over both present and future assets to secure existing and future indebtedness. [T]hey allow universal security rather than require specific security. By contrast, civil law jurisdictions have been more cautious in their approach to non-possessory security and have been anxious about the false wealth which such practices are perceived as permitting. [Therefore, one can find in civil law jurisdictions...] requirements of specificity or individualization of collateral, the requirements of notice to the debtor as a condition of the validity (not merely priority) of an assignment of debts, and restrictions on self help remedies such as possession and sale of the collateral.

<sup>40</sup> For a critical study of whether or not the EU should act on security interests see di Luigi, MC (2008), 'Divergences of Security and Property Law in the European Union: The Need for Action', *Journal of Business Law* 526.

<sup>41</sup> McCormack, *supra* n. 31, at 6.

<sup>42</sup> For a similar view see Goode, R (1998), *Commercial Law in the Next Millennium The Hamlyn Lectures Forty-Ninth Series* (Sweet and Maxwell, London) at 64.

<sup>43</sup> Despite this fragmentation in the law of credit and security, the UK is the 5th largest economy in the world with 2,727,806 million US\$ gross domestic product according to World Bank ranking in 2007/2008. See <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last accessed October 2008).

<sup>44</sup> See 'Ten Years of Secured Transaction Reform', available at [www.ebrd.com/pubs/legal/lit002b.pdf#page=2](http://www.ebrd.com/pubs/legal/lit002b.pdf#page=2) (last accessed on 10 September 2008); the EBRD's Legal Reform Work: Contributing to Transition [www.ebrd.com/pubs/legal/lit022.pdf#page=39](http://www.ebrd.com/pubs/legal/lit022.pdf#page=39) (last accessed on 10 September 2008); see also Dahan, F and Simpson, J (2004), 'Secured Transactions in Central and Eastern Europe: European Bank for Reconstruction and Development (EBRD) Assessment', 36 *UCCLJ* 77.

law jurisdictions have historically been hesitant about non-possessory personal property security.<sup>45</sup> In some civil law systems within the EU, such as Germany, pledge over receivables and assignment of receivables for security are regulated by different rules<sup>46</sup> and the Civil Code is 'patchy, non-uniform and inconsistent [and] [f]or different types of assets, different security devices are used'.<sup>47</sup> In certain countries non-possessory security arrangements in personal property have been frowned upon on the ground that 'devices which [allow] the debtor to possess and enjoy its assets while purporting to shield from the claims of its common creditors [are] considered immoral and misleading'.<sup>48</sup> However, for instance, the recent reform in France has demonstrated the fact that a civilian law jurisdiction 'can move towards more efficient and credit oriented secured transactions law without [losing] its civilian heritage'.<sup>49</sup> A better view to avoid fragmentation could be stronger participation by the EU in international harmonisation activities on the law of credit and security, where as an important economic power it can obtain workable results rather than attempting to create a binding or non-binding set of rules from new on the law of credit and security which may or may not be acceptable to all member jurisdictions. Thus, the necessity of international harmonisation that encompasses all regional activities under one instrument is once again evident.

Thirdly, there will still be problems of the influence of developed economies in a particular regional organisation and on a particular legislative text. Although the idea is to modernise the law while at the same time harmonising it, this may go against the idea of lowering the cost of credit, as the law of a developed economy influencing the structure of the regional harmonisation instrument may not be compatible with other credit and security regimes.

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<sup>45</sup> See Moglia Claps, GA and McDonnell, JB (2002), 'Secured Credit and Insolvency Law in Argentina and the US: Gaining Insight from a Comparative Perspective', 30 *Georgia Journal of International and Comparative Law* 393 at 396. However, recently, for instance, France has reformed her security interest laws. See below for more information on the reform of French credit and security law.

<sup>46</sup> See generally Hausmann, J (1996), 'The Value of Public-Notice Filing Under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property', 25 *Georgia Journal of International and Comparative Law* 427ff; Rakob, J (2007), 'Germany' in Sigman, HC and Kieninger EM (eds), *Cross Border Security over Tangibles* (Sellier, Munich) at 64; see also Haag, H and Peglow, O (2008), 'Germany' in Johnston, W (ed.), *Security over Receivables An International Handbook* (OUP) at 193ff.

<sup>47</sup> See Rakob, *supra*, n. 46 at 65.

<sup>48</sup> See Moglia Claps and McDonnell, *supra* n. 45, at 396.

<sup>49</sup> Ancel, ME (2006), 'Recent Reform in France: the Renaissance of a Civilian Collateral Regime?', in *Collateral Reform and Access to Credit*, EBRD–World Bank Seminar, London, 9 June, at 3.

Fourthly, although the idea is that with complete regional harmonisation under different regional organisations<sup>50</sup> there may be fewer systems to deal with during international harmonisation efforts,<sup>51</sup> this may have conflicting results. Regional organisations' regimes will act as divergent regimes during international harmonisation activities. Furthermore, as a result of a regional harmonisation process there may well be notional conflicts or overlaps within regionally harmonised rules and between international and regional legislative texts. Conflicts may occur on critical issues, for instance as to whether there should be a functional approach in the way that the domestic law should treat all devices that perform security functions as secured transactions, and thus registration is required. The UNCITRAL Legislative Guide on Secured Transactions, like the UCC Article 9, has a functional approach and treats all devices that perform security functions as secured transactions. This may not be compatible with a particular regional harmonisation activity. Basedow argues that '[c]onflicts between the regional instruments and the existing universal treaties are ... not at all different compared to traditional conflicts of conventions'.<sup>52</sup> For instance, the Unidroit Convention on International Interests in Mobile Equipment clearly avoids any conflicts with the UN Convention on the Assignment of Receivables.<sup>53</sup> A similar cross-reference can be found in the UN Convention on the Assignment of Receivables with regard to the Unidroit International Factoring Convention.<sup>54</sup>

Finally, regional harmonisation activities may take binding and non-binding forms<sup>55</sup> which affect the adoption decisions of member states and the fate of the

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<sup>50</sup> Such as NAFTA and the EU.

<sup>51</sup> For this view see Bazinas, *supra* n. 26, at 54ff. where he states that 'national or regional harmonisation promotes national or regional trade, ... and facilitates international harmonisation at least to the extent that it enhances certainty, helps to reduce the number of legal systems and provides a basis for international harmonisation ... [and] [t]his is why UNCITRAL from its inception has encouraged unification and harmonisation efforts at the national or regional level.'; for examples from regional attempts see generally Garro, A (2003), 'Harmonization of Personal Property Security Law: National, Regional and Global Initiatives', *Uniform Law Review* 357ff.

<sup>52</sup> Basedow, *supra* n. 26, at 35.

<sup>53</sup> The Unidroit Convention on International Interests in Mobile Equipment makes a clear reference to the UN Convention in article 45bis. Article 45bis of the Cape Town Convention reads as follows: '*Relationship with the United Nations Convention on the Assignment of Receivables in International Trade* This Convention shall prevail over the United Nations Convention on the Assignment of Receivables in International Trade, opened for signature in New York on 12 December 2001, as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.'

<sup>54</sup> The UN Convention, by virtue of Article 38(2) prevails over the Unidroit Convention on International Factoring and the latter, by virtue of Article 15, already acknowledges that it will not prevail over any treaty that may be entered into.

<sup>55</sup> For these possibilities see Drobnig, *supra* n. 28, at 354.

harmonisation activity. When there is an international harmonisation activity, regions as well as member states will, again, have to reform their systems, which will result in loss of time, efficiency and efforts. Furthermore, that international instrument may not be compatible with the regional system and there may be unnecessary overlaps or critical contradictions. In addition, with a non-binding type of instrument member states may wish not to reform their systems, as it is optional<sup>56</sup> and this may cause conflicting results within a regional organisation and increase the cost of credit as well as of transactions.<sup>57</sup> Even if they wish to reform their laws, a new instrument creating a new terminology and a new system, especially for Common Law jurisdictions in relation to the latter, will create uncertainties. With respect to the Common Frame of Reference, McCormack correctly argues that it 'may straightjacket States into an unpromising and unprofitable uniformity'.<sup>58</sup> In addition, even though Drobnič points out that 'competition is fertile',<sup>59</sup> this type of competition where a regional organisation attempts to harmonise an area of law through an optional text where there is no necessity to do so in intra-community trade and where there is a newly adopted and comprehensive Legislative Guide prepared by an international formulating organisation in which member states of that regional organisation are also full members, may create infertility.

International efforts are generally promoted by UNCITRAL or Unidroit. These organisations, together with others,<sup>60</sup> coordinate the scope of their activities. Harmonisation activities conducted under the auspices of UNCITRAL and Unidroit take into account and target global problems, as opposed to regional ones, and receive global cooperation and assistance during the preparation phase. These organisations' efforts and products are more comprehensive and inclusive of global legal cultures and systems.

Organisations such as the Organisation of American States (OAS), the European Union (EU) and the OHADA<sup>61</sup> are regional organisations and mainly deal

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<sup>56</sup> With regards to the Common Frame of Reference/European Civil Code which seems to serve as an optional instrument and supplement national law see Grundmann, S and Stuyck, J (2002), *An Academic Green Paper on European Contract Law* Kluwer Law International, The Hague, Part IV.

<sup>57</sup> For an opposition view to optional form from the transaction cost perspective see Collins, H (2002), 'Transaction Costs and Subsidiarity in European Contract Law' in *ibid.*, at 277 and 281.

<sup>58</sup> McCormack, *supra* n. 31, at 34.

<sup>59</sup> See Drobnič, *supra* n. 28, at 354.

<sup>60</sup> E.g. the Hague Conferences on Private International Law, another international organisation working on the unification and harmonisation of private law, has prepared a Convention on the Law Applicable to Certain rights in respect of Securities Held with an Intermediary. For further information see [http://www.hcch.net/index\\_en.php?act=conventions.textIcid=72](http://www.hcch.net/index_en.php?act=conventions.textIcid=72).

<sup>61</sup> Organization for the Harmonisation of Business Law in Africa.

with regional harmonisation issues.<sup>62</sup> Financial organisations have legitimate financial concerns<sup>63</sup> in initiating and participating in individual and independent harmonisation activities.<sup>64</sup> Thus, in the regional and financial organisations example, the impact of those efforts on possible future international harmonisation may be limited to a particular region, country or organisation.<sup>65</sup> Drobniġ rightly states that ‘financing will and should not be limited to regional scopes’.<sup>66</sup> Regional organisations should focus their activities on either coordinating regional positions or implementing international instruments,<sup>67</sup> thus assisting

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<sup>62</sup> E.g. OAS Inter-American Model Law on Secured Transactions. The OWS Model law has been prepared for lenders to provide credit at competitive rates in their region as well as all around the world. The Model law has a uniform security interest mechanism. OAS Model Law article 1 reads as follows: ‘The objective of this of the Model Inter-American Law on Secured Transactions (hereinafter, the ‘Law’) is to regulate security interest in movable property securing the performance of any obligations whatsoever, of any nature, present, future, determined or determinable. A State may declare that this Law does not apply to the types of collateral expressly specified in this text. A State adopting this Law shall create a unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework, in order to give effect to this law.’ UCC §1-201(37) defines security interest as ‘an interest in personal property or fixtures that secures payment or performance of an obligation’.

<sup>63</sup> For example, the World Bank subjects the extension of credit to appropriate legal reform in the law of credit and security. The investment clients of the IMF lend to developing countries and hence the pressure to modernise the law of credit and security in those countries. See [www.ifc.org/ifcext/about.nsf/content/About\\_IFC\\_Financing](http://www.ifc.org/ifcext/about.nsf/content/About_IFC_Financing) (last accessed 18 September 2008). For an example of the World Bank’s role in harmonisation efforts see e.g. World Bank Working Group Paper on ‘Building Effective Insolvency Systems: Debtor–Creditor Regimes’ at 2; see also The World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, April 2001.

<sup>64</sup> For example ‘EBRD’s objective is to act as a ... catalyst of change in the region by facilitating credit for other investors’. See Dahan, F and McCormack, G (2002), ‘International Influences and the Polish Law on Secured Transactions: Harmonisation, Unification or What?’, *Uniform Law Review* at 715; see also Simpson, J and Röver, JHM (1998), ‘An Introduction to the European Bank’s Model Law on Secured Transactions’, in Norton, JJ and Andenas, M (eds), *Emerging Financial Markets and Secured Transactions* (Kluwer) at 165.

<sup>65</sup> Berkowitz, D et al. (2003), ‘The Transplant Effect’, 51 *American Journal of Comparative Law* 163, 164 where it was stated that ‘newly designed model laws for secured transactions marketed the value of Western law to their counterparts in the East, backing their campaign to transplant their home legal system with financial aid promises and/or the prospect of joining the European Union’.

<sup>66</sup> Drobniġ, *supra* n. 28, at 354.

<sup>67</sup> For those views and similar expressions indicated in the Questionnaire of the Inter-American Juridical Committee of the Organisation of American States see Vazquez, CM (2003), ‘Regionalism versus Globalism: A View from the Americas’, *Uniform Law Review* 63, at 66–7. But he also argues that ‘there are fewer legal systems at the regional level than at the global level and because the legal systems within any given region are

international harmonisation activities. Nonetheless, one may also argue that these activities may have the value of serving as a model or inspiration for future international reform activities provided that they do not jeopardise international efforts.

The critical point in every harmonisation type is the risk of overall hegemony of a legal system. In other words, a particular legal system may be taken as an example or as a catalyst in a particular harmonisation instrument.<sup>68</sup> This is equally applicable in regional and international harmonisation activities. This presents problems of enforcement and implementation. Put in another way, a well established system or a concept may not easily be adopted by another system. Concepts, methodology, terminology and business practices and usages may be totally different. The rationale is that if a legal system (which may be called the 'donor' system) has been developed by existing business practices rather than through imposed rules from above<sup>69</sup> there is the possibility that the same legal system may not fit the business practices, culture or financial level of the recipient country. Legal transplants, as Kronke correctly points out, 'rarely work'.<sup>70</sup> For a successful legal transplant or legal reform, precedents and academic opinions of the donor country as well as the black letter must be adopted

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less diverse, it is possible to tackle a problem in greater depth at the regional level than at the global level'.

<sup>68</sup> For example, the exportability of UCC Article 9 as a model has been debated in the last few decades. See e.g. Cuming, RCC (1995), 'Harmonisation of the Secured Financing Laws of the NAFTA Partners', 39 *St. Louis University Law Journal* 809; Gabriel, HD (2000), 'The New Zealand Personal Property Securities Act: A Comparison with the North American Model for Personal Property Security', 34 *International Law* 1123; Davies, I (1988), 'The Reform of Personal Property Security Law: Can Article 9 of the US Uniform Commercial Code be a Precedent?', 37 *International & Comparative Law Quarterly* 465; McCormack, G (2003), 'Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code' 24 *Comparative Law* 69; Davies, I (2004), 'The Reform of English personal property security law: functionalism and Article 9 of the Uniform Commercial Code', 24 *Legal Studies* 295ff.; Bridge, M (1996), 'How Far is Article 9 Exportable? The English Experience', 27 *Canadian Business Law Journal* 196.

<sup>69</sup> For a similar statement see Cooter, R (1998), 'Normative Failure Theory of Law', 82 *Cornell Law Review* 947, at 948.

<sup>70</sup> Kronke, H (2008), 'Why Transplants Rarely work – why convergence is insufficient in Commercial Law – methodical changes in paradigm in the harmonisation of commercial law', Presentation made at 'Commercial Law – Where from and Where to' Conference held at Queen Mary University of London, Centre for Commercial Law Studies, 7 February. He gives successful examples of transplantation through imperialism (e.g. Rome and England to colonies etc.) and invitation (e.g. Switzerland to Turkey, France to Latin America, Germany to Greece) and doubtful/failed examples of transplantation which are invited or solicited by scholars, donor countries or business interests (e.g. USA and other to Central Asia, USA to Rwanda).



for a successful reform.<sup>71</sup> This must also be supplemented by appropriate infrastructure.<sup>72</sup> In the last few decades developing economies have experienced problems in the process of harmonised modernisation of credit and security laws. Modernisation activities have been in the form of legal reform where rules were imposed from above without any concerns as to their compatibility with the recipient or host jurisdiction.<sup>73</sup>

In relation to the question whether guidance can be drawn from the UNCITRAL Legislative Guide for the Common Frame of Reference, McCormack submits that '[the Guide is] too prescriptive in tone and too American in orientation to be much of a model'.<sup>74</sup> That may equally be applicable to the UN

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<sup>71</sup> See also Watson, A (2000), 'Legal Transplants and European Private Law', 4 *Electronic Journal of Comparative Law Ius Commune Lectures on European Private Law* [www.ejcl.org/44/art44-2.html](http://www.ejcl.org/44/art44-2.html).

<sup>72</sup> See Bazinas, *supra* n. 23 and the text thereof.

<sup>73</sup> For more information on legal reforms and problems during that process see Mistelis, L (2000), 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law reform-Some Fundamental Observations', 34 *International Law* 1055, 1064–1065. Mistelis correctly argues that

[r]egrettably, ... many emerging states have occasionally experienced the services of opinionated and expensive foreign experts who attempted to export their legal system or their understanding of it without any concerns as to its compatibility with the system of the host country. Incidents of competition between foreign experts from different countries or from different agencies of the same country have also been seen in the recent years. This is often due to lack of international or local coordination. Hence, confusion of the host country experts is the natural result. Experts from the same country or from different countries who speak, however, diametrically different views as to what is 'right' or 'wrong' with respect to one legal issue can be of questionable assistance to their host countries. Further, foreign experts usually have little or no knowledge of the existing legal system of the host state and so give inappropriate or unhelpful advice. As a result of either competition between foreign experts, lack of knowledge, or academic arrogance, voices against reform were strengthened and little or no reform was motivated by foreign presence. Recipients of technical assistance are interested in the conceptual framework and some statutory variants; they are able to choose and produce their own national variation that meets better their domestic needs. It seems appropriate that such coordination is left to international organizations, provided that they will do it effectively, rather than to a potential self-constraint or willingness of foreign technical assistance.

<sup>74</sup> McCormack, *supra* n. 31, at 9, 34 and 35. Similar arguments have also been made by Civil law jurisdictions with regard to the guidance of the UN Convention on the Assignment of Receivables on certain provisions of the Rome I Regulation (former Rome I Convention): see generally Flessner, A and Verhagen, H (2006), *Assignment in European Private International Law* (Sellier); see also Verhagen, H (2006), 'Assignment in the Commission's "Rome I Proposal" *Lloyds Maritime and Commercial Law Quarterly* 270; Steffens, L (2006), 'The New Rule on the Assignment of Rights in Rome I – The Solution to all our Proprietary Problems? Determination of the Conflict of Laws Rule in Respect

Convention on the Assignment of Receivables<sup>75</sup> as it contains a particular bit of UCC Article 9 legislation,<sup>76</sup> or the Organisation of American States' Model Inter-American Law on Secured Transactions.<sup>77</sup> Certainly guidance from the EBRD Core Principles on Secured Transactions Law for EU Member States may be more appropriate for the Common Frame of Reference, given the fact they drew upon the EBRD Model Law which attracted criticism from North American lawyers.<sup>78</sup> Furthermore, the EBRD Core Principles are less prescriptive.<sup>79</sup> However, at least when these Principles are converted into a legislative instrument it should be left to Member States to decide how and whether they will incorporate them in to their systems and what type of reform needs to be made in their credit and security laws, rather than a regional organisation prescribing what needs to be done which may carry the risk of influencing and pressurising a country to adopt another developed legal and financial system or indeed something totally new and untested. This argument in no way suggests an optional

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of the Proprietary Aspects of Assignment', 4 *European Review of Private Law* 543. See also reports of the Financial Markets Law Committee, Issue 121 – European Commission Final Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') October 2006 and April 2006.

<sup>75</sup> The text of the UN Assignment of Receivables Convention can be found at [www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf](http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf) (last accessed on 10 September 2008). For instance the United States is considering the ratification of the UN Convention on the Assignment of Receivables. [www.law.upenn.edu/bll/archives/ulc/aor/2007june\\_proposeddraft.htm](http://www.law.upenn.edu/bll/archives/ulc/aor/2007june_proposeddraft.htm) (last accessed on 10 September 2008). Furthermore, in 2005 the National Conference of Commissioners on Uniform State Laws initiated a project with the Uniform Law Conference of Canada and Uniform Law Centre of Mexico to harmonise the domestic laws in North America to conform to the rules of the UN Convention on the Assignment of Receivables in order to benefit the provisions from the provisions of the Convention in cross-border receivables financing among the three countries. See [www.law.upenn.edu/bll/archives/ulc/aor/2007june\\_am-report.htm](http://www.law.upenn.edu/bll/archives/ulc/aor/2007june_am-report.htm) (last accessed 10 September 2008).

<sup>76</sup> E.g. there is a uniform security interest concept under the UCC Article 9 and the UN Convention does not make any distinction between legal and equitable assignments or floating or fixed security interests, and an assignment will be valid as against third parties notwithstanding an anti-assignment clause.

<sup>77</sup> For more information on the OAS Model Inter-American Law on Secured Transactions see e.g. Kozolchik B and Wilson, JM (2002), 'The Organization of American States: The New Model Inter-American Law on Secured Transactions', *Uniform Law Review* 69ff.

<sup>78</sup> E.g. Spanogle, J (1998), 'A Functional Analysis of the EBRD Model Law on Secured Transactions', in Norton, JJ and Andenas, M (eds), *Emerging Financial Markets and Secured Transactions* (Kluwer), 157, at 171–3; Sigman, HC (1998), 'The Case for Worldwide Reform of the Law Governing Secured Transactions in Movable Property', in Ziegel, J (ed.), *New Developments in International Commercial and Consumer Law* (Oxford, Hart), at 229–34. For further information see Mistelis, *supra* n. 37, at 463ff.

<sup>79</sup> McCormack, *supra* n. 31, at 33.

set of rules, but it suggests an international or national reform rather than a regional reform. The decision should also be left to Member States whether the UNCITRAL Legislative Guide and the UN Convention on the Assignment of Receivables are better options. In any case since the Common Frame of Reference is planned to be an optional text this seems more appropriate, though one can still argue that there is no need to have another regional harmonisation text in the field of the law of credit and security. However, in this approach there may be different possibilities (i.e. some member states may wish to choose the UNCITRAL Legislative Guide type of law of credit and security, some may choose the EBRD Core Principles and some may prefer the rules prescribed in the Common Frame of Reference). This would be against the concept of harmonisation and create more divergence. Thus, one can argue that the best strategy should be to follow the international harmonisation efforts, be more active and adopt international instruments.

In relation to the above argument, it is submitted that the fact that the UNCITRAL texts contain certain UCC Article 9 type secured credit concepts which may or may not be suitable for other systems should not be a resistance point or ground to look for other avenues. Firstly, the relevant UNCITRAL texts have been prepared with great effort by a multinational working group and adopted by a multinational Commission which consists of states representing both civil and common law jurisdictions including some of the EU Member States.<sup>80</sup> In any case, the EU's point of view is also presented at both the Working Group and Commission meetings.<sup>81</sup> Secondly, decisions are taken by consensus and not by majority voting.<sup>82</sup> Thus it seems axiomatic that states present at the UNCITRAL meetings during the deliberations (some of which are also EU Member States) could have intervened and have non-UCC Article 9 concepts incorporated into these texts. In addition, the EU has the power to intervene in international

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<sup>80</sup> There are currently 60 member states elected by the General Assembly representing various geographic regions, economic and legal cultures: see [www.uncitral.org/uncitral/en/about/origin.html](http://www.uncitral.org/uncitral/en/about/origin.html) (accessed 23 July 2008).

<sup>81</sup> For a detailed discussion of EU, difficulties and consequences of international law making see Basedow, *supra* n. 26, at 41 and 43ff. The main difficulty arises out of the fact that the EU as well as other regional organisations is not a member of any international formulating agencies and a position as an observer is not sufficient for regional organisations. This also presents the conflicting problem of becoming a contracting party to international conventions and, for instance, within the context of the law of credit and security the UN Convention on the Assignment of Receivables does not allow the participation of entities other than states. On the other hand, the Unidroit Convention on International Interests in Mobile Equipment Article 48 allows regional organisations to become contracting parties.

<sup>82</sup> See [www.uncitral.org/uncitral/en/about/methods\\_faq.html](http://www.uncitral.org/uncitral/en/about/methods_faq.html) (accessed 23 July 2008) where it is stated that '[t]he basis of consensus is that efforts are made to address all concerns raised so that the final text is acceptable to all'.

negotiations<sup>83</sup> and it could have achieved that result. In that connection, it can be submitted that it is not the Guide or the Receivables Convention itself which creates this divergence in the law and proves itself more 'American in tone', but it is the delegations who hesitated to contribute actively to the process and to the substance of these international instruments to make them more generally acceptable by the majority of countries. This contribution could have been in the form of either active lobbying or presenting opposing views to the UCC Article 9 type legislation. In any case, the UNCITRAL Legislative Guide presents solutions to problems acutely felt by small and medium sized businesses in emerging markets (i.e. access to low cost credit) and financiers (i.e. certainty and predictability in the law of credit and security) with a comprehensive set of rules. Arguments opposing UNCITRAL texts and instruments do not assist harmonisation activities within the framework of the law of credit and security but rather pave the way for future inefficiency, overlap, sometimes confusion and loss of time in harmonisation activities and cause every regional organisation to come up with differing regimes. More than a decade ago, Goode rightly argued that the legal literature was full of international instruments which had never been ratified and which overlapped with each other.<sup>84</sup> One can argue that this argument still keeps its freshness and will seem to do so within the next decade.

## V. EUROPEAN SECURITY INTEREST?

The European Security Interest<sup>85</sup> is a novel concept which may reduce conflicts that may occur during intra-Community security and credit transactions and which may present a harmonised picture of EU credit and security law. However,

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<sup>83</sup> See Basedow, *supra* n. 26, at 35 and 36.

<sup>84</sup> For a similar statement see Goode, R (1997), 'International Restatements of Contract and English Contract Law', *Uniform Law Review* 231, 232 where he states that 'the treaty collections are littered with Conventions that have never come into force, for want of the number of required ratifications, or have been eschewed by the major trading States. There are several reasons for this: failure to establish from potential interest groups at the outset that there is a serious problem, which the proposed Convention will help to resolve; hostility from powerful pressure groups; lack of sufficient interest of, or pressure on, Governments to induce them to burden still further an already over-crowded legislative timetable; mutual hold-backs, each State waiting to see what others will do, so that in the end none of them does anything.'

<sup>85</sup> This suggestion was made by Professor Hugh Beale during the WG Hart Workshop plenary session on 24 June 2008; for a similar argument see also Kieninger, EM and Sigman, HC (2007), *Cross Border Security Over Tangibles* (Sellier, Munich), at 34ff. where it is argued that the European Security Right could be introduced through regulation issued pursuant to EC Treaty Article 308 or through a European Model Law.

this concept may conflict with the UNCITRAL Legislative Guide or other international efforts. The concept is similar to the *international interest* concept of the Unidroit Convention on International Interests in Mobile Equipment. Firstly, it may be argued that it is necessary for EU Member States to have a consensus on the concept of 'European Security Interest'. Some of the Member States may not be familiar with or due to technical or sociological reasons prefer to retain their traditional security interest concept<sup>86</sup> or prefer to adopt the UNCITRAL Legislative Guide. In addition, the scope of applicability of this concept must be well drawn and any potential conflicts with already prepared conventions and instruments must be addressed. In other words, it should be made clear whether it would apply to credit transactions in intra-Community or external trade. Furthermore, it may not be beneficial to adopt a European Security Interest if there are future plans to adopt the UNCITRAL Legislative Guide's rules unless the European Security Interest is developed along the lines of the UNCITRAL Guide, which would in the future ease the efforts on harmonisation and be more efficient. Traditional hostility of civil law jurisdictions towards non-possessory security interests and the tension between common and civil law in that area must also be taken into consideration.<sup>87</sup>

The European Security Interest concept may instigate diverse results, as all other regional organisations may wish to create a similar concept but with differences, and this may postpone the chance to have overall harmonisation at international level. It would be more desirable to have an international effort to create an international security interest under the auspices of international formulating agencies and with the full participation of the EU. When one considers the fact that even within the EU there are already multiple projects relating to the law of contracts<sup>88</sup> competing and conflicting with each other, it is not

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<sup>86</sup> For European doubts, for example, on public filing system see e.g. Krupski, J (2007), 'Cross Border Receivables Financing at the Cross roads of Legal Traditions, Capital Markets, Uniform Law and Modernity', *Uniform Law Review* 57, at 77ff.

<sup>87</sup> However, it should also be noted that recently reforms have been made in certain civil law jurisdictions. See e.g. Ancel, ME (2006), 'Recent Reform in France: the Renaissance of a Civilian Collateral Regime?', in 'Collateral Reform and Access to Credit', EBRD – World Bank Seminar, London, 9 June; see also Krupski, *supra* n. 86, at 78ff.; Kieninger, EM and Sigman, HC (2006), 'The Rome-I Proposed Regulation and the Assignment of Receivables', *The European Legal Forum/Forum iuris communis Europae*, issue 1, at 1 and fn. 7.

<sup>88</sup> The notable ones are the the Principles of European Contract Law (PECL), the Common Frame of Reference, the Acquis Group working on the Principles of the existing EC Contract Law, the Insurance Group. None of these study groups is backed by an international formulating agency to my knowledge and yet they work within the EU (although their framework may be different). Nevertheless there must be clear coordination and cooperation, rather than having multiple fragmentation. Also there are other

therefore difficult to see the necessity of international harmonisation through coordination and cooperation under one international formulating organisation.

## VI. CONCLUSION

In conclusion, it can be argued that for a comprehensive, harmonised and predictable regime of credit and security there is a commercial necessity to proceed with international harmonisation. Regionalism presents issues of multiplicity, fragmentation and lack of legal cultural pluralism. International harmonisation presents comprehensiveness, pragmatism and the participation of different legal cultures. There are studies on the ratification of the UN Convention on the Assignment of Receivables within the framework of harmonising the assignment of receivables rules in cross-border trade in North America. Similar legislative activities may be undertaken within the EU to be part of international harmonisation. Certainly, the North American activity should not be seen as a regional harmonisation effort but an effort to be a part of the international harmonisation.<sup>89</sup> This is also a clear indication of the values of the UN Convention on the Assignment of Receivables and possibly the Legislative Guide.

Efforts to harmonise the law of credit and security may get quite confusing if it is left just to regional organisations or member states of regional organisations or academics of certain regional institutions. New ideas and cooperation should be sought from other jurisdictions, legal cultures and countries in order to create comprehensive and international harmonisation.<sup>90</sup> Furthermore, previous law reform or regional harmonisation efforts have proved that lack of local or international coordination, competition among groups or even experts may lead to unsuccessful results. Thus coordination should be left to experienced international formulating agencies or, indeed, any international harmonisation of secured transactions law should be pursued under the auspices of international organisations.<sup>91</sup>

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not very significant groups or associations dealing with different aspects of contract law (such as the Association Henri Capitant).

<sup>89</sup> See *supra* n. 75.

<sup>90</sup> Mistelis rightly suggests that '[e]very legal system, even the most sophisticated and developed Western one, can be improved and the impetus in newly independent or emerging markets can offer remarkable ideas to traditional systems. Both the reform impetus and the reception of diverse foreign legal concepts and ideas can be beneficial to any system in need of reform.' See *supra* n. 27, at 1065.

<sup>91</sup> For similar views see *ibid.*, at 1064ff.