International and Comparative Secured Transactions Law: Essays in Honour of Roderick A. Macdonald

Spyridon V. Basinas & Orkun Akseli, eds.

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International and Comparative Secured Transactions Law: Essays in honour of Roderick A Macdonald[1] is a collection of papers presented as chapters in book format, loosely organized around the subject of global secured transactions law reform.[2] This is the third of a sequence of similar volumes edited or co-edited by Orkun Akseli — in this instance, in partnership with Spyridon Bazinas, another frequent contributor to the law reform literature.[3] Both editors are to be commended for their sustained commitment to advancing this important law reform project.

Like its predecessors, this book surveys aspects of reformed and unreformed systems of secured transactions law currently in place around the world, describes the challenges presented by the process of reform, identifies issues that should be addressed in reformed systems of law and generally advances the case for change. The series of instruments promulgated by UNCITRAL (the United Nations Commission on International Trade Law) in aid of the reform project is a recurring theme of the Akseli volumes:[4] a précis of the UNCITRAL process is warranted by way of context.

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[1] Spyridon V. Bazinas & N. Orkun Akseli, eds. (Portland: Hart Publishing, 2017). This reviewer's lack of capacity in French precludes comment on Chapter 9: Jean-Francois Riffard, "Sûretés Mobilières et Stocks : ou l'Art et la Manière de Résoudre la Quadrature du Cercle", written in French with an introductory paragraph in English.

[2] Footnote references to specific papers in the book are identified below by chapter number, author and chapter title without repeating the title of the complete volume.

[3] The earlier volumes are N. Orkun Akseli, ed., *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge: Cambridge University Press, 2013) and Louise Gullifer & N. Orkun Akseli, eds., *Secured Transactions Law Reform: Principles, Policies and Practice* (Oxford: Hart Publishing, 2016). The first book is the subject of a review essay by this reviewer: Tamara M. Buckwold, *Availability of Credit and Secured Transactions in a Time of Crisis* (Cambridge: Cambridge University Press, 2013), (2015) 30.2 B.F.L.R. 393.

[4] The scope of the Gullifer and Akseli volume, *ibid.* is broader in that it is primarily a survey

The UNCITRAL program was launched in 2001 with the subject-limited UN *Convention on the Assignment of Receivables in International Trade*.[5] In 2007, UNCITRAL promulgated recommendations for all-encompassing reform in the *Legislative Guide on Secured Transactions* (the "Legislative Guide"), supplemented in 2010 by the *Supplement on Security Rights in Intellectual Property* and in 2013 by the *Guide on Implementation of a Security Rights Registry*. Most recently, the 2016 *Model Law on Secured Transactions* (the "Model Law") and 2017 *Model Law on Secured Transactions: Guide to Enactment* (the "Guide to Enactment") were published to concretize the recommendations advanced in the Legislative Guide and provide a statutory template for reforming jurisdictions.[6] The Legislative Guide, Model Law and related documents offer guidance in the drafting and implementation of domestic legislation by countries that seek to achieve reform.[7] The goal is not to create an international legal regime to which countries may subscribe but to fuel economic growth and social development through the modernization of domestic laws and, to the extent possible, to promote harmonization of law among jurisdictions.

The UNCITRAL Model Law adopts the key features of Article 9 of the US Uniform Commercial Code, which are largely shared by the *Personal Property Security Acts* (PPSA) of Canada, New Zealand and Australia.[8] The two central and related features of the systems implemented by these statutes are the unitary conceptualization of security interest and the implementation of a registry-based priority regime. Any interest in personal property that is intended to function in substance as security for performance of an obligation (essentially, to ensure recovery of a debt through resort to the subject property) is treated as a security interest and, with certain exceptions, all security interests are subject to a single set of rules.[9] This unitary functional conception of security interest sets aside the

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of reformed and unreformed secured transactions law in a range of jurisdictions, though it includes papers specifically addressing the UNCITRAL instruments.

5 All of the UNCITRAL documents described in this paragraph are available online: http://www.uncitral.org/uncitral/en/uncitral_texts/security.html.

6 The Model Law departs from the recommendations advanced in the Legislative Guide on a few points of detail. The differences are identified in Chapter 4: Spyridon V. Bazinas, "The UNCITRAL Model Law on Secured Transactions".

7 Other inter-governmental and financial institutions, including UNIDROIT, the Organization of American States, the World Bank, the Asian Development Bank and the European Bank for Reconstruction and Development, have contributed to this effort through the development of model laws and other guiding documents. Among the most notable achievements are the 2001 UNIDROIT Convention on International Interests in Mobile Equipment and associated protocols, online: https://www.unidroit.org/instruments/security-interests/cape-town-convention.

8 My colleague Rod Wood makes the valid point in our discussions around this issue that Article 9 and the Canadian, New Zealand and Australian PPSAs respectively are far from uniform and can only be considered part of the same "model" in a very general sense.

9 That is not to say that all security interests are equal. As most readers will know, a

formal distinctions between the variously defined types of property interest traditionally associated with the different security arrangements that characterize legal regimes.[10] The rules that determine the priority of security interests in the same collateral as among themselves and as against other claims are based primarily on whether and when the security interest or interests in question were registered in a publicly searchable registry. Among the enduring and most significant debates surrounding reform in this area is the question of whether this "unitary" approach is suited both conceptually and practically to all jurisdictions and all systems of law.[11] The debate is sometimes cast in terms of whether Article 9 is exportable. We will return to this point shortly.

The commendable motivation behind the book, and perhaps the inducement that inspired many or all of its authors to contribute, was the desire to honour the late Roderick A. (Rod) Macdonald, distinguished professor of law at McGill University and an influential participant in UNCITRAL's work on secured transactions: several of the papers attest to his impact on the UNCITRAL project and most of the contributors worked with him in its early phases. The stated purpose of the book, as distinguished from that motivation, is "to provide an analysis of the relevant issues (in secured transactions law around the world) and make a case for law reform."[12] The recognition accorded Rod Macdonald is certainly deserved and the book has positive features. However, the content of the collection feels somewhat random and the quality of the included papers is uneven. While the UNCITRAL project underpins many of the papers, the book reflects the broadly stated scope of its purpose: the only common factor among its chapters is that each is connected in some way with secured transactions reform.

Some of the papers in the book make a material and stimulating contribution to the increasingly large body of published work addressed to secured transactions law reform but others add relatively little to what has previously been written. Several of the papers revisit territory already explored in the two

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"purchase money security interest" will have an elevated priority status relative to other security interests if certain conditions are fulfilled. Further, some transactions that do not meet the functional test are nevertheless subject to the rules that apply to security interests. As discussed below, leases that are not in substance intended to function as security are subject to the statutory priority rules. In some systems, the same approach is applied to outright assignments of accounts and commercial consignments that are not in substance security agreements. These "deemed" security interests are not subject to the *inter partes* enforcement rules that apply to "true" security interests. For the treatment of deemed security interests under the Canadian PPSAs, see Cuming, Walsh & Wood, *Personal Property Security Law*, 2nd ed. (Toronto: Irwin Law, 2012) at 155 *et seq*.

[10] This is true of the Model Law. The Legislative Guide accommodates the retention of distinct formal categories but recommends that all types of security rights be brought within a unified registration and priority regime.

[11] The term "unitary" is often used as a short-hand descriptor of this statutory model. See e.g. Bazinas, *supra* note 6 at 56.

[12] Bazinas & Akseli, Introduction, at xxvii.

Akseli volumes that preceded it and elsewhere in the literature: the key features of the UNCITRAL Legislative Guide and Model Law;[13] the desirability and feasibility of applying a unitary approach to the very different conceptual and structural frameworks of the civil and common law traditions;[14] the regulation of anti-assignment clauses in security agreements;[15] British recalcitrance towards the implementation of comprehensive reform.[16] A reader who has followed international reform efforts, even at a relatively superficial level, is likely to feel that they have heard much of this before.

The lack of a discernable structure in the organization of the book is also unfortunate. The two earlier volumes are divided in parts composed of thematically linked papers. The papers in this book simply follow one after the other with only a tenuous association between their disparate topics and without benefit of defined connecting themes.[17] A more deliberative approach to the composition and organization of the volume might have enhanced its readability. These criticisms aside, the book has its strengths and several of the articles offer interesting insights. I will highlight a few.

Catherine Walsh's eloquent paper on leases circumvents the debate over the exportability of Article 9 ideas, illustrating a possible bridge between systems that employ the unitary conceptual approach to security interests and systems that preserve distinct categories of security.[18] Walsh compares the treatment of leases under the Canadian PPSAs as representative of the first and their treatment under the Quebec *Civil Code* as representative of the second. The PPSA obviates the distinction between a lease designed to function in substance as a security device and a true lease[19] for purposes of establishing the priority of

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[13] Bazinas, *supra* note 6, Chapter 8: Bénédict Foëx, "The Rights and Obligations of the Parties to the Security Agreement According to the UNCITRAL Model Law on Secured Transactions" and Chapter 9, *supra* note 1. The similarities between the Bazinas paper in Chapter 4 of this volume and Chapter 23 in *Secured Transactions Law Reform: Principles, Policies and Practice, supra* note 3, by the same author, go beyond thematic congruence. Passages in the text of the latter volume appear unaltered in this book.

[14] The theme appears in several chapters but most clearly in Chapter 1: Michael Bridge, "Secured Credit Legislation: Functionalism or Transactional Co-Existence", Chapter 3: Neil B. Cohen "Reflections on Misgivings about a Model Law", and Chapter 6: Steven O. Weise, "Dealing with Concepts of Property in the UNCITRAL Legislative Guide on Secured Transactions and the UNCITRAL Model Law on Secured Transactions".

[15] Chapter 5, N. Orkun Akseli, "Non-assignment Clauses and their Treatment under UNCITRAL's Secured Transactions Law Instruments". The Model Law follows the Article 9/PPSA pattern.

[16] Bridge, *supra* note 14.

[17] The editors' attempt to group the papers in their introductory overview is of limited assistance in this regard.

[18] Chapter 2: Catherine Walsh, "'Functional Formalism' in the Treatment of Leases under Secured Transactions Law: Comparative Lessons from the Canadian Experience".

[19] The PPSA definition of security interest as it applies to a true lease is limited to a "lease for a term of more than one year", which includes a lease that has the potential to extend

the lessor's interest in the leased goods as against an interest asserted by a third-party dealing with the lessee: the lessor's interest is by definition a security interest and therefore subject to the priority rules that apply to security interests generally, regardless of whether the lease is in substance a security lease. The *Civil Code* retains the conceptual distinctions between nominate transactions, including the distinction between a true lease and a security lease. However, both systems provide for registration of the lessor's interest as a prophylactic against third parties' injurious reliance on the lessee's apparent ownership, regardless of whether the lease is a true lease or a security lease, and both recognize the special priority of the lessor's interest as against third party claims, albeit by different routes. Under the PPSA, the properly registered security interest of a lessor has the super-priority status of a purchase money security interest as against competing security interests while under the *Civil Code*, the properly registered ownership interest of a lessor is enforceable against third parties by virtue of registration and has priority over the claims of the lessee's secured creditors by virtue of the fact of ownership. In the result, both systems meet the needs identified by Walsh as the primary concerns of secured transactions law.[20] Registration meets the need for public discoverability of the otherwise invisible property rights of the lessor, however those rights are characterized. The existence of clear priority rules linked to the registration requirement meets the need for certainty in the ranking of claims to the leased goods. In effect, the central role of the registry is the functional bridge that connects the conceptually unitary and non-unitary systems.[21]

Walsh's paper lends force to the view that the goals of certainty and predictability that animate the law reform project may be substantially achieved by effective use of the registration feature of the UNCITRAL model without adoption of a unitary conceptual approach to characterization of security rights — a view advocated by a number of commentators including the collection's honoree, Rod Macdonald.[22] That view is elaborated by Guiliano Castellano with reference to the need for reform in Italy[23] and endorsed by Michael Bridge[24] in their respective papers.[25] Neil Cohen, a USA delegate to the UNCITRAL

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beyond more than one year. See e.g. *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 1(1)(z).

[20] Walsh, *supra* note 18 at 27-28.

[21] Walsh's paper addresses related issues including the extent to which lessees are protected against oppressive enforcement of the lessor's rights, and the manner in which the distinction between true leases and security leases is addressed for legal purposes outside secured transactions law.

[22] For one of a number of his published works expressing that view, see Roderick A. Macdonald, *Article 9 Norm Entrepreneurship* (2006), 43 C.B.L.J. 240.

[23] Chapter 15: Guiliano G. Castellano, "Reverse Engineering the Law: Reforming Secured Transactions Law in Italy".

[24] Bridge, *supra* note 14.

[25] Walsh's paper, no doubt unintentionally, responds to a suggestion advanced in my

Working Group on Security Interests, contributes a carefully inconclusive reflection on the validity of Rod's concerns, and his own, about the decision to produce the Model Law as progeny of the Legislative Guide.[26]

By way of counterpoint, Steven Weise's short paper describes with approval specific instances of how the Legislative Guide and Model Law avoid problems arising from differing conceptions of property by defining rights and obligations in terms of function rather than through formalistic categories. Weise contends that "[t]he use of the functional approach served as the basis for solving the apparent conundrum of resolving the differences of how civil law and common law regimes addressed the meaning of property." That assessment may hold true for the Legislative Guide, which describes the *result* that reforming legislation should achieve — i.e., the function to be served by the enacting jurisdiction's statutory rules, which may or may not be drafted in terms that reflect a unitary conception of security. However, the proposed statutory language of the Model Law implements the unitary conceptual approach and may therefore meet resistance in jurisdictions that are unwilling to reconceptualise property rights under a reformed system.

The papers comprising Chapters 7 (Kohn), 10 (Dobovec and Sigman), 11 (Deschamps) and 12 (Garrido and Smith) deserve mention for their attention to subjects not included in the previous volumes and otherwise given limited coverage in the literature on secured transactions law reform.

Richard Kohn's paper is a call for law reform as a stimulant to economic growth through the promotion of asset-based lending.[27] Kohn says little about the UNCITRAL documents and makes no comment on their particular approach, other than by way of a favourable reference to Belgium's adoption of legislation based on the Legislative Guide. Instead, he explains how specific features of the existing laws of various countries affect the practices of lenders in the asset-based lending market, thereby contributing to or restricting the domestic economy. Kohn offers a highly accessible "real world" description of how lenders think and act, providing illuminating context for the evaluation of current and proposed law.

Marek Dubovec and Harry Sigman expand on the critical importance of the registry and supporting legislation as the infrastructure of successful reform.[28]

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review of the first Akseli volume, namely, that a comparison of the unitary approach with the approach taken under the *Civil Code* of Quebec would offer useful insights into the debate over the exportability of Article 9. While I argued that the civilian legal mind is as capable as the common law mind of reconceptualizing security rights, I pointed out that "the CCQ reflects the proposition that adoption of a unitary and functionalist conception of security interest is not the only feasible approach to reform." See Buckwold, *supra* note 3 at 401.

[26] Cohen, *supra* note 14.

[27] Chapter 7: Richard M. Kohn, "Current Issues in Cross-Border Asset-Based Lending: Lessons from the Field on the Need for Secured Transactions Reform".

[28] Chapter 10: Marek Dubovec & Harry C. Sigman, "Some Thoughts (and Facts) about the

They canvas in comprehensive detail the issues that should be addressed in the design and operation of a registry and argue that the Model Law and Guide to Enactment should have provided more specific legislative and operational guidance on important registry features. The paper is a valuable resource for anyone interested in the improvement of existing registry systems as well as for those charged with developing new ones.

Michel Deschamps's comparative review of conflict-of-laws rules governing the resolution of secured transactions disputes involving non-intermediated securities covers largely neglected territory in the law reform literature.[29] The discussion is relatively brief but useful, offering an outline of the policy objectives of conflicts rules, summarizing the approaches adopted in US and Canadian law and evaluating the approach adopted in the Model Law against those policy objectives and alternative models.

José Garrido and Edwin Smith[30] make the important but sometimes overlooked point that protection against insolvency risk is the primary reason for obtaining security, and offer a comparative analysis of various approaches to the enforcement of secured creditors' rights in insolvency proceedings involving a business debtor. They identify a range of issues that arise in that context and offer a practical assessment of the effect of alternative rules adopted by various jurisdictions. The paper does not address the UNCITRAL documents or secured transactions law as such, but is certainly relevant to law reforms affecting the rights of secured creditors.

The book also includes papers focussing on the potential for reform in specific jurisdictions; namely, India[31] and Italy.[32] Given their narrow focus, these are of limited general interest but may be a useful resource for readers with a particular interest in those countries.

How, then, to conclude this review? My difficulty in framing a meaningful summative statement reflects my ambivalence about the volume. The book as an entity is hard to evaluate. It is neither a cohesive collection of papers nor a completely disconnected one; neither fish nor fowl. The papers all say something

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Process of Secured Transactions Law Reform, with Special Emphasis on Registration, the Key to Achievement of Reform's Goals".

[29] Chapter 11, Michel Deschamps, "Conflict-of-Laws Rules on Security Rights in Non-Intermediaries Securities". The term "Non-Intermediaries" is a misnomer and does not follow the author's usage of the term "non-intermediated", the scope of which is explained in the paper. The attentive reader will discover a few other editorial oversights in some of the papers.

[30] Chapter 12: José M. Garrido & Edwin E. Smith, "Comparative Approaches to the Enforcement of Secured Credit in Insolvency".

[31] Chapter 13: Madhukar R. Umarji, "Comparative Study on Indian Secured Transactions Law and the UNCITRAL Legislative Guide on Secured Transactions".

[32] Chapter 14: Andrea Tosato, "Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals" Castellano, *supra* note 23 also surveys the problematic state of Italian law.

about secured transactions law reform and the UNCITRAL documents are a recurring leitmotif but not a consistent theme. Some papers are very good and useful, some considerably less so. This is not, in my view, the kind of book that goes down well as a whole: only those who are unswervingly fascinated by both the broad themes and minute details of secured transactions law reform are likely to enjoy a start-to-finish read. However, the papers may fruitfully be consulted as individual resources on the particular topics they respectively address in the same way that one consults individually published journal articles or papers. From that point of view, the book is a worthwhile effort.