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COULD CONTINENTAL EUROPE ADOPT A UNIFORM COMMERCIAL CODE ARTICLE 9-TYPE SECURED TRANSACTIONS SYSTEM? THE EFFECTS OF THE DIFFERING LEGAL PLATFORMS

Abstract

With the entry into force of the Australian *Personal Property Securities Act 2009* (Cth) in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. Australia joined the United States of America (the source-jurisdiction), Canada and New Zealand. Given the success of the Unitary Model, it is natural to question whether a similar breakthrough is to be expected in Europe as well. From a legal perspective, the key dilemma is whether the Continental European civil law systems — the majority of Europe's jurisdictions — are compatible with the Unitary Model at all. This depends to a great extent on the inherited yet differing legal platforms — the concepts, principles and rules characteristic of common law or civil law systems. This article aims to exemplify the discrepancies that might prove to be obstacles to transplanting the Unitary Model and which still have not yet been properly analysed in comparative scholarship.

I Introduction

> [I]t is now time for fundamental reform with a view to a new and unified European [personal property security law] system …[1]

> The end result of the different systems will often be the same. Lawyers have a tendency to overstate the importance of a legal concept. For businessmen [sic], a property and security is merely a means to an end. They work around the problem: in practice very few problems occur …[2]

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1 Ulrich Drobnig, 'Basic Issues of European Rules on Security in Movables' in John de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge-Cavendish, 2010) 444, 444.

2 Kristof Cox, 'Summary of the Discussion at Leiden University' in Ulrich Drobnig, Henk J Snijders and Erik-Jan Zippro (eds), *Divergences of Property Law: An Obstacle to the Internal Market?* (Sellier, 2006) 231, 233.

A *The Unitary Model in Continental Europe: What Has Been Achieved So Far?*

With the entry into force of the Australian *Personal Property Securities Act 2009* (Cth) ('*APPSA*') in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. The quintessential feature and innovation of this model is the so-called *unitary concept of security interest*, bringing all secured transactions on personal property and fixtures under the same roof if a transaction 'in substance secures payment and performance of an obligation … regardless of its form or who has title to the collateral.'[3] Although there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features — in particular the unitary concept of security interests — remain the same. Hence, it makes sense to refer to these jurisdictions as 'Unitary Systems'. The group includes, besides Australia, the United States (the birthplace of the model), the Canadian provinces and New Zealand. One should also add to this list Book IX of the sui generis soft law instrument named the 'Draft Common Frame of Reference' ('DCFR')[4] because it represents that farthest reaching project made in the direction of the Unitary Model in Europe.

Unfortunately, in Continental Europe today, there is no indication that the modernisation of personal property security laws ('PPSL')[5] will be given top priority any time soon. The adaption of the Unitary Model appears even less likely. This is notwithstanding the many developments in this area, owing in part to the groundbreaking work of many international organisations. These organisations include the European Bank for Reconstruction and Development ('EBRD'), the United Nations Commission on International Trade Law ('UNCITRAL') and the International Institute for the Unification of Private Law ('UNIDROIT'). Mention ought to be made also of the work of many enthusiast comparative scholars. After the orchestrated secured transactions reforms in Central and Eastern Europe ('CEE') in the 1990s, the hesitant, incremental changes in France in the first decade of the 21st century, as well as the appearance and subsequent laying aside of the DCFR with its Unitary Model-inspired Book IX, the steam of reform and modernisation seems to have lost its strength. Despite the still unfolding Common European Sales Law

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[3] Craig Wappett, *Essential Personal Property Securities in Australia* (LexisNexis, 2012) xxvii.

[4] The DCFR was planned to become Europe's first common civil code, but the idea was soon dropped. Consequently, it has the size and features of a traditional civil code. It was drafted by a large group of scholars from EU Member States, led by those from the economically strongest countries. See Christian von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) — Outline Edition (2009) European Commission <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>.

[5] 'PPSL', 'secured transactions law' and 'security law' will be used interchangeably in this article.

('CESL')[6] project that grew out of the DCFR, the European Union's lawmakers in Brussels do not intend to repeat that with Book IX. Changes may naturally ensue if the prospective elected politicians come to Brussels with different preferences. All the same, it is highly uncertain given that in Europe no meaningful discourse on the need to harmonise the diverging national PPSL regimes has even been initiated, excepting in the academe and the United Kingdom.

As this article is interested only in the prospects of the Unitary Model in Continental Europe, the basic feature of which is *comprehensiveness*, achieved through the unitary concept of security interests, two preliminary observations ought to be added. First, though quite a number of Continental European countries have already undertaken reforms in this domain, none of them was comprehensive and none of them was based on such a unitary concept of security interests as known by any of the Unitary Systems. Consequently, economically pivotal financing forms (typically title and receivables financing) continue to subsist as distinct PPSL segments. Second, the reforms were uncoordinated and aided by international organisations or governments supporting more or less differing models. This therefore leads to varying levels of incompatibility among the national systems of Continental Europe, creating barriers to cross-border trade.

The prohibitive complexity generated by Continental Europe's colourful legal systems suggests that things will only change for pressing economic reasons. At the moment nothing foreshadows such a scenario; rather, the overall climate is unfavourable to the cause. Casting a favourable word on the Unitary Model in Europe today is an almost certain recipe for being perceived as a harbinger of United States legal hegemony. This could, to a great extent, be attributed to the present crisis of neoliberalism as manifested by the sovereign-debt crisis, the after-effects of the Global Financial Crisis (triggered by the US credit crunch) and the resulting International Monetary Fund ('IMF') and European Union ('EU')-dictated austerity measures, as well as singular local calamities like the burst of the foreign-currency-denominated housing mortgage bubbles in a number of European countries.[7]

Such aversion to the Unitary Model is blind to the fact that US law is not the only source that could be consulted with respect to the potential economic benefits of a common European PPSL. This applies especially to the advantages of the recent *APPSA*, which has a drafting style much closer to European standards than the over-technical Revised Version of art 9 of the United States Uniform Commercial

6 The CESL is an optional instrument for cross-border (including online) sales transactions. It is hoped that the single, more predictable and heavily consumer-protective CESL will boost cross-border sales within the EU and will become favoured especially by small and mid-scale businesses. See *Common European Sales Law to Boost Trade and Expand Consumer Choice* (11 October 2011) European Commission <http://ec.europa.eu/justice/newsroom/news/20111011_en.htm>.

7 The three most affected CEE countries seem to be Croatia, Hungary and Poland: Agnes Lovasz, *East European Swiss-Franc Loan Defaults May Fan Euro-Area Crisis, UBS Says* (24 August 2011) Bloomberg <http://www.bloomberg.com/news/2011-08-24/east-europe-s-swiss-franc-loans-may-fan-euro-crisis-ubs-says.html>.

Code ('Article 9').[8] The *APPSA* also contains solutions that draw from earlier modernising efforts in Canada and New Zealand, many potentially of use to Europeans as well.

In this economically important domain of commercial law, Europe is incapable of agreeing on a common model. So far, very few seem to have realised the economic consequence of this.[9] Notwithstanding the growing popularity of law and economics, the causal link between the relentless financing problems of the Continent and the quality of PPSL regimes is not seen. This is despite myriad recent reports on the problems Europe has faced due to lack of access to finance (especially by small and mid-scale enterprises) and the fact that, contrary to the EU's basic pillars — known as the fundamental principles or 'four freedoms' — capital still does not cross borders as seamlessly as it should. The inertia of European scholars, causing them to lag behind the developments, is also an impediment that should be reckoned with on the road towards a version of the Unitary Model.

B *The Missing Pieces of the Puzzle*

Despite the small number of PPSL reform projects that have been undertaken in Continental Europe, it would be a mistake to think that Europe has simply remained immune to the idea of realignment with the Unitary Model. Nonetheless, Europe has even failed to address, let alone firmly resolve, related key legal and economic issues. As far as the legal aspects are concerned, first and foremost, debates that could resemble the intensity of the ones in the United Kingdom have not yet even been launched.[10] This justifiably leads to the conclusion that there is a significant insensitivity to thinking that instead of formal elements of law, the emphasis should be placed on the law and growth nexus. While the leading economies, which are also the major legal systems that serve as models for others, seem to be satisfied with what they have, the rest are struggling with the continuing challenges caused by the sovereign-debt crisis and local problems such as reform fatigue and EU scepticism.

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[8] ('UCC'). Frisch noted that the 1999 Revised Version of Article 9 added 66 new sections to the 'pre-revision text [that] was unquestionably simpler [because] the drafting committee had to weigh the implications of judicial decisions spanning more than four decades, as well as the societal changes they reflected.' This adds up to 133 sections (compared to the 57 of the earlier version), a number that may only partially be indicative of the complexity of the system: David Frisch, 'Commercial Law's Complexity' (2011) 18(2) *George Mason Law Review* 245, 245–6.

[9] Roy Goode, 'Removing the Obstacles to Commercial Law Reform' (2007) 123 *Law Quarterly Review* 602, 606.

[10] Reference is made here to the decades-old 'battle' between the supporters of reforming the system following the American Unitary Model and '[p]ractitioners [who] have been at best, indifferent, and at worst, outrightly hostile to the idea' — and which has been repeatedly won by the latter (at least this was the verdict in 2013). See Gerard McCormack, 'Pressured by the Paradigm — the Law Commission and Company Security Interests' in John de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge-Cavendish, 2010) 83, 83.

The often-reiterated paradigm that a good PPSL system is the token of increased access to cheaper financing and, through that, to economic prosperity, is wisdom materialised only within national borders (if at all) rather than at an EU-level. The EBRD, once at the forefront of PPSL reforms in Europe, keeps its related activities at a low profile in Europe and has instead expanded its activities to Central Asia and North Africa. Enthusiasm in CEE in the 1990s for the EU and everything that came from the West has also subsided significantly by now. Moreover, forceful competing philosophies have surfaced on the direction that the secured transactions and related reforms should take.[11]

It must also be understood that the economic and practical justifications that were sufficient to tilt the balance for the benefit of the Unitary Model proponents in Australia, Canada or New Zealand are inferior to the underlying sociopolitical considerations in Continental Europe. In other words, what is normal and commonly presumed in Australia is not necessarily so in Continental Europe. For example, the new Australian system's biggest practical advantage — the radical simplification through the substitution of 75 separate statutes with the *APPSA* and the myriad registries with a centralised one[12] — is not an issue in Europe as most civil law systems only have extant real property registries. In Europe, the question is whether the benefits of establishing brand new registries for personal property securities would outweigh the concomitant costs.

The same also applies to the traditionally accepted economic justifications of secured credit and the Unitary Model: they apply mutatis mutandis but are insufficient to cause the major breakthrough that the realignment of Continental Europe with the Unitary Model requires. The economic analysis and justification of the benefits that the Unitary Model could generate for Europe is in its infancy.

C *Lack of a Common Legal Platform*

While differences had existed among the Unitary Systems themselves, the transplantation of the Unitary Model in these countries was largely possible because

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[11] Ralph Atkins, 'Right Financial Medicine for West is Not Best for EM [Emerging Market] Nations', *Financial Times*, 15 May 2013, 24, highlighting, on the one hand, that it is more and more realised — as suggested by the article's title — that what works in the West does not necessarily work elsewhere and, on the other hand, that the approach to credit known by common law systems so far promoted by the EBRD is now confronted by the German savings culture. The latter tries to replicate the pattern of German savings banks (*Sparkassen*) in Africa by 'stress[ing] the importance of building a domestic savings culture [especially] targeting the young.'

[12] Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis, 2012) 113 [6.3], referring to the Australian Attorney-General's Department, *Review of the Law on Personal Property Securities: Discussion Paper 1 — Registration and Search Issues* (November 2006).

of significantly uniform legal platforms[13] and the close economic ties of these countries. As will be shown, such a high degree of commonality does not exist between civil law systems in Continental Europe and the common law in other Unitary Model countries. The discrepancies, in other words, are more significant and more profound. As a consequence, it is harder to answer whether and how the two differing legal stratospheres could be reconciled. Further, it ought to be noted that, perhaps with the exception of the DCFR, none of the international projects attempted to forge a monolithic common legal platform in this sense. The UNCITRAL Legislative Guide, for example, is a systematised matrix of known solutions offered by a select national system from which States 'that [either] do not currently have efficient and effective secured transactions laws … [or] wish to modernize their laws and harmonize them with the laws of other States'[14] can cherrypick the most sympathetic solutions.

The greater differences in the legal platforms, however, should not necessarily doom the idea of rapprochement to the dustbin of history. The achievements, even if imperfect, of those civil legal systems that have attempted to reform their laws by integrating elements from common law systems should be seen as encouraging. The appearance of the DCFR itself, Book IX of which is clearly a huge step towards the Unitary Model, is similarly promising. This instrument, especially if read together with its Comments,[15] is a valuable, albeit not impeccable, starting point. For example, in some important respects it displays the tenets of English law,[16] yet in other cases it tilts towards German solutions,[17] potentially making it irreconcilable with the Unitary Model. It is pertinent, however, that Europe already

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13 Reflecting on Quebec's amendment of its Civil Code (Book Six, Title Three of the Quebec Civil Code) along the lines of the Unitary Model, Ronald Cuming not only listed the main Canadian differences as compared with UCC Article 9 but also noted that '[i]t would be unreasonable to expect that every aspect of Article 9 will find acceptance in jurisdictions that have legal traditions and public policy choices that differ from those of the United States.' Ronald C C Cuming, 'Article 9 North of 49°: The Canadian PPS Acts and the Quebec Civil Code' (1996) 29 *Loyola of Los Angeles Law Review* 971, 989. Each of the subsequent models deviated from the earlier model(s) relied on as well.

14 United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (2010) 1 <http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf>.

15 The reference to the Comments is Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference (DCFR) — Full Edition* (Oxford, 2010), hereinafter referred to as 'DCFR Comments'.

16 This applies especially to enforcement of contracts relying on retained title — named 'acquisition finance devices' by the DCFR — in which case out-of-court enforcement (self-help repossession) cannot even be excluded by the parties to such contracts, in sharp contrast to all the other secured transactions covered by the system. Ibid art IX 7:103.

17 For example, the provisions on the so-called 'global security' which only partially overlap with the Unitary Model's floating lien concept.

has a version of the Unitary Model, even if only in the form of soft law that could serve as a suitable platform in the future.

The tasks of European legal scholars pondering the possibilities of the adaption of the Unitary Model follow on from the above and revolve around two central questions. First, which are the crucial conceptual and other idiosyncratic building blocks of civil law systems that seem to be irreconcilable with the Unitary Model and why? After having identified these key elements, the second question is how these could be reconciled with the Unitary Model (if at all)?

Even though books could be written about the above queries, this article will be limited to mapping and exemplifying all the tensions that prevent rapprochement, rather than resolving them. Proceeding from the general and abstract towards the specific and concrete, the following layers of discrepancies ought to be differentiated and dealt with: inter-branch as well as intra-branch and then principles-based differences to be followed by industrial practices, conceptual, and finally terminology related ones. The justification and most important examples of each of the categories are outlined below.

The first, most abstract and general layer of systemic differences concerns the way civil law systems perceive the relation of PPSL and other branches of law (inter-branch systemic differences). For our purposes, of utmost importance is the nexus of PPSL with two branches of law: bankruptcy and enforcement (and in particular the role of self-help).

The second, an already more exact layer, relates only to systematic differences between PPSL and civil law concepts (conditionally yet conveniently thus it will be referred to as intra-branch systemic differences). Three presumptions of civil law systems ought to be mentioned here: the indivisibility of real property and PPSL, the relationship of personal and real securities and the *numerus clausus* of proprietary rights.[18]

Third, as, contrary to the Unitary Model, civil law systems continue to attribute key importance to some securities-related *principles*, there are potential tensions with civil law systems' requirements that the debt to be secured must be specific, that security interests are of accessory nature and that overcollateralisation is prohibited. Here, one should mention also the declining publicity principle and the lack of tracing in civil law.

Fourth, differing industry-dictated practices are quite concrete obstacles as well. Some of these — like the use of investment property as collateral — fit well with

18 The Latin phrase *numerus clausus*, quite often used by civil law scholars, means a closed or laundry list. Thus, the *numerus clausus* of proprietary rights expresses that a legal system recognises only a limited number of proprietary rights and besides the ones listed in the civil code (or in other source of law of equal importance) new ones cannot be invented.

the Unitary Model, yet others differ significantly, in particular title and receivables financing.

The fifth degree of difference is generated by the fact that some — for the Unitary Model, quintessential — legal concepts are (or seem to be) unknown by civil law systems, like the tandem concepts of floating lien and purchase-money security interest or attachment and perfection. The concepts like notice filing, title and bailment deserve attention as well.

Finally, terminology discrepancies require heightened attention. As was demonstrated yet largely remained unrecorded, the heedless neglect of terminology was the source of many headaches and misunderstandings during the CEE secured transactions reforms.

In this article I shall explain and exemplify the essence of these important civil law discrepancies and develop thoughts on the possible solution. As will be demonstrated, some of the discrepancies could peacefully coexist (for example, the *numerus clausus* of security rights), while others would require some minor alterations (such as accessoriness). In certain instances, the discrepancy is false or without practical repercussions (for example, retained ownership versus title). There is also another group of conflicting solutions where more significant sacrifices are inevitable. This seems to be the case with all the changes the adaptation of floating lien requires from civil law systems. On the other hand, the civil law functional equivalent of self-help repossession (the law of preliminary and provisional measures, ex parte or otherwise), while imperfect, should satisfy the requirements of Unitary Systems.

Lawyers accustomed to the pragmatic language of secured transactions law undoubtedly question the focus on abstract doctrines and principles, given that the Unitary Model is largely devoid of them.[19] This is more than a platonic question because herein lies an important character of the Unitary Model as compared with civil law systems: the Unitary Model is based on the philosophy that *predictability* is the supreme value that hardly tolerates the inherent vagueness of principles. As a consequence, principles were affected in two ways: while some manifestations of principles have been solidified and morphed into concrete provisions of the Unitary Model, the reach of the remainder was reduced to the minimum.[20] In contrast, principles survive unrestricted in civil law systems, except those specific security forms that have become subject to statutory regulation. Thus, for system-thinking

[19] Principles as obstacles to adopting the Unitary Model have been only very indirectly hinted at by the doyen of German and European commercial law, Ulrich Drobnig, who also noted that 'in Europe the problems are on a much greater scale.' Yet in his formulation, the main impediments are great diversity of 'substantive and formal differences between the legal regimes for proprietary security rights in the member states,' the differing general laws surrounding PPSL (property, contract, enforcement and bankruptcy) and linguistic dissimilarities: Drobnig, above n 1, 452–3.

[20] See, eg, UCC § 1-103 on the Supplementary General Principles of Law, which reads: 'Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant … shall supplement its provisions.'

civil law practitioners, these cannot be bypassed. For them, principles must apply generally no matter what kind of security device is at stake and regardless of the fact that their exact contour may be difficult to distinguish.

Transplantation of the Unitary Model, without proclaiming what exactly is to be done with the civil law systems' principles and other abstract and general corollaries, would be a mistake. Yet this is exactly what has happened with the DCFR. While the text of Book IX (the PPSL part) resembles the exactness of UCC Article 9 or the *APPSA*, the inextricable web of cross-references to the general principles common to personal securities[21] is clearly a trace of the civil-law way of thinking. The problem is that the exact status and the correlation of the general principles and Book IX remain unclear.

II The Differing Legal Platforms: Discrepancies From the General and Abstract to the Specific and Concrete

A *Inter-Branch Systemic Discrepancies*

1 *Secured Transactions versus Bankruptcy Law*

The relationship between PPSL and bankruptcy law is neither readily visible nor quantifiable, yet it is an important distinguishing factor that should be considered when attempting to adapt the Unitary Model. Due to the impact of system-thinking and a philosophy (still) not tolerant of business failures, in Continental Europe these two fields of law are looked upon, taught, and often written about, separately. Ulrich Drobnig is absolutely right that '[t]he acid test of security is … its status and effectiveness in the event of the debtor's insolvency'.[22] However, this is a link and wisdom that is a typical corollary of common law systems only. Consequently, most civil law practitioners today still perceive security interests as creditor-protective tools for the non-bankruptcy context. This conclusion should go uncontested even though Grant Gilmore speaks of the 'uncertain correlation of the provisions of Article 9 of the [UCC] with those of the Bankruptcy Code.'[23] Notwithstanding the unfathomable nature of the relationship, however, he did find it important to devote

[21] See, eg, DCFR Comments, above n 15, art IX 2:401 sub-s (3) on the so-called 'global security', the definition of which may be found in Book IV on personal securities and the Comments thereto (Comments A to F on art IV G 2:104). As per the DCFR Comments art IV G 1:101, global security 'is a dependent personal security which is assumed in order to secure a right to performance of all the debtor's obligations towards the creditor …' The only difference between sub-s (3) of DCFR art IV G 2:104 and IX 2:401 is that while the former speaks of 'obligations', the latter speaks of 'rights'.

[22] Drobnig, above n 1, 449.

[23] Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Co, 1965) § 45.1, 1283. In a related note on the same page he also admits that his views 'on many specific points [may be] at variance with what may be considered to be the standard or conventional position of [US] experts in bankruptcy law.'

a long chapter to this issue in addition to the many references to bankruptcy law throughout his seminal book on PPSL.

The close ties of PPSL and bankruptcy law is a common feature of all Unitary Systems, the national variations of which are worth examining by civil law practitioners as well. For example, the 1988 Ziegel and Garton Study[24] could be very instructive in Europe, where the overall importance of insolvency has grown exponentially since the 1990s, and where the perception is gradually changing from the fatalistic stigmatisation of bankrupts[25] to a regular business risk for which solutions do exist. Open-minded businesspeople also now know in Europe that the recovery by a secured creditor versus the unsecured one in North American bankruptcy proceedings is roughly in the ratio of 43 cents versus 5 cents in the dollar.[26] Unfortunately, as in many civil law jurisdictions, the bankruptcy system does not function properly; despite the visible focus and the recent wave of amendments, the outcomes are still quite unpredictable. The pathology ranges from mass scale resort to bankruptcy as a means of escaping from creditors ('bustouts' and 'bleedouts')[27] to the milder problems with the domestication of the US law-inspired reorganisation ('fresh start' and 'second chance') culture. This applies also to Germany, where 'bankruptcy of the bankruptcy system' (*Konkurs des Konkurses*) emerged as a problem in the 1970s. Even though the new German *Insolvency Act*[28] was enacted in 1994 (but came into force in 1999), Germans are still looking for appropriate solutions.[29]

24 The Study examined '95 business bankruptcy files chosen at random from business bankruptcies that occurred in Metropolitan Toronto over a five year period.' See Jacob S Ziegel, 'The New Personal Property Security Regimes — Have We Gone Too Far?' (1990) 28 *Alberta Law Review* 739.

25 Such perception of bankruptcies in many CEE countries could be indirectly deduced from the fact that in this region it is not private creditors but tax authorities that initiate bankruptcy proceedings. See generally Katharina Pistor, 'Who Tolls the Bells for Firms? Tales from Transition Economies' (2008) 46 *Columbia Journal of Transnational Law* 612.

26 This was suggested, for example, by the mentioned Ziegel and Garton study: see Ziegel, above n 24, 745.

27 The difference between 'bustouts' or 'planned bankruptcies' and 'bleedouts' — which both lead to depletion of the company's assets — is that in the latter, removal of the assets is attributed to company insiders who materialise their plans over a longer period of time. See, eg, Stephanie Wickouski, *Bankruptcy Crimes* (Beard Books, 3rd ed, 2007).

28 *Insolvenzordnung* [Insolvency Act] (Germany) 5 October 1994, BGBl I, 1994, 2866.

29 One German Act's title is indicative of the continuing problems: *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* [Act on the Modernisation of the Law on Limited Liability Companies and on the Measures against Misuses] (Germany) 23 October 2008, BGBl I, 2008, 2026. See, eg, Eberhard Braun, *Insolvenzordnung (InsO)* [Commentary on the German Insolvency Act] (Beck, 2012).

However, Germany is emblematic in criminalising both risk-taking[30] and delayed filing (*Insolvenzverschleppung*).[31]

Continental European scholars could very easily notice not only that in the US the two subjects are often taught together, but also that the overwhelming number of secured-transactions-related cases occur in the context of bankruptcy. In Europe, it is telling that Book IX of the DCFR and its related Comments, developed by an elite group of scholars with predominately civil law backgrounds, do not mention bankruptcy. Since these sources are proposed to be used for teaching European private law,[32] one may wonder how teachers, let alone students, may realise why this link is important. Or, as Drobnig suggested — how would teachers and students realise that Book IX is primarily to be exploited as a protection in the context of bankruptcy?

This may be attributed to the different approaches to bankruptcy, most visible in the contrast between the US 'fresh start' and 'second chance' philosophy[33] and the 'one failure only' climate still prevalent in Continental Europe. The special emphasis given to the problems associated with stigmatisation of bankrupts within the EU[34] is not just evidence of the meaningful presence of this dichotomy but also of the incapability of the law to change people's attitude. It is also evidence of the inevitable conclusion that promotion of the Unitary Model in Europe could hardly proceed without satisfactorily resolving the tensions caused by the complexities of the PPSL and bankruptcy interface. The growing number of cross-border bankruptcies that challenge the parochialism of local laws and courts, in addition to other side effects of globalisation, undoubtedly drive developments in the same direction.[35]

A final observation ought to be made here. Though it is difficult to quantify the 'intensity' of stigmatisation of bankrupts, what has been said about stigmatisation in Continental Europe applies also to Australia, Canada and England if compared

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30 See *Strafgesetzbuches* [Criminal Code] (Germany) § 283(1).

31 The member of the management board or the managing director bears tortious and criminal liability for not filing, filing incorrectly or for not filing in time. Under § 15a para 1 of the *Insolvency Act*, it is their duty 'to file for insolvency without undue delay, but in no event later than three weeks following the occurrence of illiquidity or over-indebtedness of the company.' See Daniel Gubitz, Tobias Nikoleyczik and Ludger Schult, *Manager Liability in Germany* (Beck, 2012) 117.

32 See Christian von Bar, 'A Common Frame of Reference for European Private Law — Academic Efforts and Political Realities' (2008) 23 *Tulane European & Civil Law Forum* 37.

33 Tellingly, Niall Ferguson noted in relation to his 2007 visit to Memphis how fascinated he was 'by the ubiquity and proximity of both easy credit and easy bankruptcy.' See Niall Ferguson, *The Ascent of Money* (Penguin, 2009) 60.

34 See, eg, the 2007 Commission Communication, *Why and How to Overcome the 'European Stigma'*.

35 See also Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46 *Texas International Law Journal* 601.

with the US (though with less intensity).[36] Figuratively speaking, it is not without reason that Niall Ferguson speaks only of the US as the 'bankrupt nation'[37] and does not extend the qualification to other common law systems. For this reason, the study of English insolvency law might not be as illuminating as the study of US bankruptcy law and is insufficient for grounding law reform in Continental European jurisdictions.

2 *Secured Transactions, Self-Help and its Functional Equivalents in Civil Law Systems*

Civil law systems display open hostility to self-help, an indispensable element of the Unitary Model. This position stems from civil law systems' very limited concept of self-help.[38] The concept hardly goes beyond averting imminent threats to one's property or life and only with proportionate measures. This hostility is more than a minor conceptual discrepancy as it demonstrates the entire civil law system's view of enforcement by reducing the role of self-help to a minimum. The policy is evident in the small number of related court cases in Europe and stands in stark contrast to the US, where even issues such as the abuse of arbitration as a means for resolving the disputes of consumer debtors and private debt collectors has reached the Congress.[39] In other words, what Continental European systems have is a far cry from their common law kin and something that could not serve as an acceptable substitute. On the level of jurisprudence, the two legal families and the respective PPSL are quite distinct. While self-help is a fundamental principle encouraged in common law systems and the Unitary Model, the opposite is true for civil law systems.[40]

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[36] See, eg, Nathalie Martin, 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *American Bankruptcy Institute Law Review* 367, 368 which states that '[w]hile in most parts of the world business failure causes less stigma than personal financial failure, both forms are viewed far more negatively in England, Australia, and Canada than in the United States.'

[37] See Ferguson, above n 33.

[38] German law (which could be taken as the prototype) recognises the categories of '*Besitzwehr*' (§ 859(1) BGB) (protection of possession) and '*Besitzkehr*' (§ 859(2) BGB) (return of possession). While the first is 'a specific form of self-defense,' the latter is entitlement of the possessor 'to recover the object from the dispossessor immediately after the interfering act.' See Sjef van Erp and Bram Akkermans, *Cases, Materials and Text on Property Law* (Hart Publishing, 2012) 115.

[39] The conclusion of the Federal Trade Commission document *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2010), Executive Summary, at i, is telling of the dimensions of the problem as it concluded that 'the current [US] system for resolving consumer debts is broken, … because consumers are not adequately protected in either debt collection litigation or arbitration.'

[40] As far as the common law is concerned, this was most clearly expressed in Roy Goode, 'The Codification of Commercial Law' (1998) 14 *Monash University Law Review* 136, 148.

The reality is that the discrepancies are diminishing, even if only in a piecemeal manner, unnoticed by scholars. On the one hand, the role of self-help has shrunk in the UK, due in particular to increasing consumer protection regulation.[41] In CEE countries, on the other hand, with the penetration of the common-law-inspired PPSL, some forms of out-of-court enforcement have become acceptable. The tolerated out-of-court enforcement forms range from disposition of the collateral by a professional auctioneer to outright statutory blessing of a self-help repossession variant. Good examples can be seen in Hungary and Romania. The former has opted for a cautious approach, introducing only a soft version of self-help repossession in the 2013 Civil Code. The latter daringly (advised and supported by the United States Agency for International Development) introduced its first Unitary-Model-inspired reform Act in 1999.[42] What has not been properly noted yet is that private debt collection has long been present in Scandinavia, and has been regulated for decades.[43] Further, there is a growing market share of private debt collection companies across Europe. The 2008 passage of the German Law on Out-of-Court Provision of Legal Services (*Gesetz über aussergerichtliche Rechtsdienstleistungen*) listed debt collection as one category of out-of-court legal services. This proves how meaningful these changes have become, notwithstanding the limited nature of these services, which clearly exclude self-help repossession.[44] There is a reality versus academic mismatch. In a sense, the scholarly rhetoric on these forms of private ordering is misleading. The exception is the DCFR, which foreshadows an increasing role for out-of-court enforcement in Europe.[45] Interestingly, and contrary to UCC Article 9 or the *APPSA*, the DCFR offers a more powerful position to creditors relying on retention of ownership ('ROT')[46] (that is, acquisition finance).[47]

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41 See, eg, John MacLeod, *Consumer Sales* (Cavendish, 2002) s 24.27, 763.

42 On Romania, see Ileana M Smeureanu and Florentin Giurgea, 'Enforcement of Contracts in Romania' in Stefan Messmann and Tibor Tajti (eds), *The Case Law of Central and Eastern Europe — Enforcement of Contracts* (Europe University Press, 2009) 726.

43 For example, the *Inkassoloven* [Debt Collection Act] (Denmark) passed in 1997, the English version of which seems to be unavailable. For a brief English synopsis see Erik Werlauff, *Civil Procedure in Denmark* (Wolters Kluwer, 2010).

44 See Michael Kleine-Cosack, *Rechtsdienstleistungsgesetz (RDG)* (C F Müller Verlag, 2008) 143.

45 As DCFR Comments, above n 15, 5613, Comment A to art IX 7:101 states, '[r]ules on the substantive aspects of security in movables would be toothless, or would fail to achieve the goal of harmonizing proprietary security in movable assets in Europe, if they left enforcement of those rights entirely to the — diverging — procedural laws and rules of the Member States.'

46 Or retained title — in civil law systems the concept of 'title' is not used, replaced with 'ownership'. As a consequence, retained title is known as retained ownership.

47 See DCFR Comments, above n 15, 5613, Comment A to art IX 7:103(3), stating that in cases of 'retention of ownership devices the parties may not agree to exclude extra-judicial enforcement' — what they may do whenever non-ROT-based secured transactions are at stake.

There are other problems as well. For example, Continental European legal scholars have written very little about self-help. This is to be attributed primarily to the above-mentioned narrow concept that, as such, does not seem to have any connection to PPSL.

Furthermore, very little is known about the potential functional equivalents of self-help: those devices that could be resorted to for prompt — and, ideally, ex parte — protection of the secured creditors' interests. This is related to the law specifically on various preliminary and provisional measures, whether issued ex parte or not. Notwithstanding that all Continental European civil procedure acts contain a chapter on these measures, it is hard to determine from the otherwise similarly formulated provisions in exactly what circumstances and with what chances one could resort to them. Even without an exact test for comparing various laws, it can be validly presumed that in some jurisdictions it is easier to obtain such measures than in others. The additional caveat to civil law systems is that a court decision awarding such a measure may not guarantee its efficient implementation. Likewise, though it seems that there is no civil law equivalent of the English Mareva injunction, it should not be concluded that civil laws cannot offer appropriate substitutes. In any event, on the road towards the Unitary Model, all these issues should be properly addressed.

B *The Complicating Dictates of System Thinking*

Theodor Viehweg's *Topics and Law*[48] tries to demystify the system-thinking of civil law as compared with the topics-focused pragmatism of common law. Although complex, what system thinking means, and thus what the difference between the two ways of perceiving law is, is susceptible to an easy explanation. In a sense, system thinking resembles Darwin's systematisation of species. It is based on an understanding that every legal institution has a defined place in the hierarchy of law, which should not be disturbed without reason. This also means that if two legal institutions share a key feature, they should be treated and should rank equally. Examples may properly show what this denotes.

In the context of security laws, two such presumptions must be highlighted: the civil law systems' unwillingness to separate, first, real property mortgage and personal property security law and, second, personal (in personam) from proprietary (in rem) securities. Although exceptions exist, it suffices to examine the structure of civil codes and textbooks that deal with security laws, or even the DCFR, to realise that, in civil laws, PPSL is almost always ancillary to its two mentioned relatives.

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[48] See Theodor Viehweg, *Topics and Law — A Contribution to Basic Research in Law* (Peter Lang Verlag, 1993), translated into English and foreword written by Cole Durham. See also Tibor Tajti, 'Viehweg's Topics, Article 9 UCC, the "Kautelarische Sicherheiten" and the Hungarian Secured Transactions Law Reform' (2002) 6 *Vindobona Journal* 93 which tries to express that successful transplantation of the Unitary Model to Hungary is predicated on tilting the balance for the benefit of pragmatic thinking instead of the inherited dictates of system thinking — known in Hungary (as well as in German-speaking jurisdictions) as 'legal dogmatism'.

Because of the presumed infallibility of the system, it comes naturally to civil law that the various securities should be linked even by artificial and practically unnecessary 'bridges'.

It is well-known in the US and Australia (after the passage of the *APPSA*) that none of these presumptions is necessary for the Unitary Model, which has no more links with either real property mortgage law or personal securities than those necessary for business. These include, for example, rules on fixtures and a section or two for settling the priorities between conflicting security interests and sureties.

1 *The Inseparability of Real versus Personal Property Security Law*

One of the idiosyncrasies of civil laws is their *uniformity* as compared with the common laws' *fragmented* approach to proprietary securities. This is why, in the latter, PPSL can survive undisturbed by real property mortgage law as demonstrated by the laws of any jurisdictions belonging to the Unitary Group.[49] As opposed to that, for civil law the two are still not perceived as distinct, and the historically more venerable real property mortgage law continues to serve as the benchmark. Consequently, Continental European civil codes or their equivalents[50] typically regulate both in the same chapter, though some of the reform countries have opted for a special statute to introduce the common-law-inspired PPSL. The contrary regulatory pattern speaks for itself; while in Australia, Canadian common law provinces and New Zealand, a completely distinct PPSL was enacted, the American UCC does not extend to transactions in real property. Indeed, in Article 9 of the UCC only the rules on fixtures denote the link to real property.[51] Moreover, the real property mortgage laws of the American states remain, conceptually and otherwise, substantially different and largely unreformed. The separate life of PPSL has even brought with it variations in the terminology. Another consequence of the divide is that specialisation in secured transactions law in civil law systems is almost unheard of and would be considered too narrow.

Underlying the divergent views, there is a further fundamental yet mundane dichotomy: the importance the different physical features of personal property should be given in designing the contours of security laws. It is not without reason that the Unitary Model, like common law systems themselves, gives clear priority to these. Contrary to that, civil law systems attribute little (if any) importance to these. The best example is self-help repossession, the efficiency of which could hardly be

49 Van Erp and Akkermans, above n 38, list land law, trust law, personal property law and claims as those self-standing fields of law that make the property law of common laws fragmented: at 64.

50 For example, the successor countries of Yugoslavia have, in lieu of a single civil code, a set of statutes, the most important being the *Act on Obligations* (often mistakenly named the 'Code of Obligations').

51 UCC § 9-102(41) defines fixtures as 'goods that have become so related to particular real property that an interest in them arises under real property law' and the *APPSA* s 10 as 'goods, other than crops, that are affixed to land'.

substituted by court processes. While the common law departs from the realisation that personal property is 'much more susceptible to dealings by one who has no right to sell' as compared with real property,[52] to civil law this is of little relevance. As a result, while common law tolerates self-help, civil law systems do the exact opposite. The ultimate dilemma is, in other words, whether efficiency, or rather the neatness of the abstract system of legal categories, is to be given priority in light of what would better suit the needs of the 21st century.

2 *Personal versus Proprietary Securities*

The few explicit provisions in UCC Article 9 that mention personal securities are a response to a specific circumstance: conflict of the financing bank and the surety company issuing a performance or payment bond.[53] This seemingly straightforward set of circumstances had generated a series of cases in the US requiring courts to judge whether the rights of secured creditors with a perfected security interest trump those of the subrogating surety.[54] Resolution of this dilemma found its expression in the 1999 Revised Version's category of 'supporting obligation'[55] and 'secondary obligor'.[56] Apart from the resolution of this pragmatic problem, for Article 9 — or (it seems) also for the *APPSA* — personal securities are distinct and out of scope.

As opposed to that, civil law systems — finding the common denominator or the *genus proximus* in the 'security' function of all security devices — tend to exploit that as a reason for forging common rules, no matter how abstract and ill-suited they may be. The inextricable web of cross-references, significantly worsening the transparency of the entire system, between the parts on real versus the part of personal securities[57] in the DCFR could be attributed to the inexplicable dictate of system thinking. This is so notwithstanding that the Comments themselves declare that the degree and nature of concomitant risks is different in the case of the two groups of security devices.[58] If under the Unitary Model the primary benefit of an efficient

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52 See Roy Goode, *Commercial Law* (Penguin, 2nd ed, 1995) 34.

53 For a detailed description of the problem, see Gilmore, above n 23, ch 36, 947.

54 See, eg, *The National Shawmut Bank of Boston v New Amsterdam Casualty Co*, 411 F 2d 843 (1969).

55 As point (f) of the Comments to UCC § 9-102 reads: 'This new term covers the most common types of credit enhancements — suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition.'

56 See UCC § 9-102(71) and point 2 of the Comments thereto pointing to 'the law of suretyship to determine whether an obligation is secondary [more concretely to] [t]he Restatement (3d), Suretyship and Guaranty § 1 (1996).'

57 DCFR Book IX contains PPSL (ie proprietary securities) and Book IV Part G the law on personal securities.

58 The DCFR Comments, above n 15, 5422, to art IX 2:107 note two crucial differences between personal and real securities, applicable, however, only to consumer debtors or grantors of personal securities: first, the greater risks due to the potentially unlimited reach of personal securities, and second, the fact that in case of personal securities the security is given by a person other than the principal debtor as a rule.

PPSL is that security interests survive bankruptcy, for civil laws the priorities are elsewhere. As the DCFR Comments reveal for civil law systems — unwittingly presuming a legal system devoid of floating liens and ignoring bankruptcy completely — personal securities are perceived to be 'more powerful' and, for the debtor, 'more dangerous' given that proprietary security 'exposes the security provider only with respect to the specific encumbered assets.'[59] This unwritten presumption then requires lawmakers to ensure proper protection for providers of personal securities which, if extended to PPSL, may turn out to be nothing but obstacles diminishing the efficiency of the system. Even this brief outline may properly show that some of the fundamental values civil law practitioners uncritically adhere to could, indeed, be easily bypassed by simply giving greater recognition to the requirements of business interests and the nature of things.

3 *The* Numerus Clausus *Doctrine of Civil Laws*

The doctrine of *numerus clausus* of proprietary rights is invariably listed as an inevitable element of civil laws. Moreover, it is mistakenly considered irreconcilable with the Unitary Model. As the conventional explanation goes, the doctrine means that only by mandatory law determined *nominated* (*Typenzwang* or limitation by type) and *content-fixed* (*Typenfixirung* or content fixing) property rights may be enforceable against third parties (*erga omnes effect*).[60] This applies equally to security interests as peculiar forms of proprietary rights with at least two important consequences for PPSL. First, the doctrinal starting position is that private parties can neither invent new proprietary security devices nor vary the content of the known ones.[61] The second repercussion is that lawyers trained in the civil law tradition still think in terms of nominated transactions like those which used to be the case in the Unitary Systems before the adoption of the Unitary Model. Similar to English law, civil law systems still deal primarily with 'pledge,' 'mortgage' or 'enterprise charge' transactions rather than with the general category of 'secured transactions'.

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59 See DCFR Comments, above n 15, Comment A to art IV G 1:101, 2486.

60 As one venerable German source put it, the principle requires the legislature — given that in civil law systems per definition courts only apply but do not make law — to first enshrine in law the possible in rem rights, and second to determine 'at least the outlines of the content' of those: F Baur, J F Baur and R Stürner, *Sachenrecht* [Property Law] (C H Beck'sche Verlagsbuchhandlung, 18th ed, 2009) 3, quoted in van Erp and Akkermans, above n 38, 69.

61 As the Explanation to the Draft of a Civil Code for the German Nation — Property Law (1888) formulated, '[t]he parties … cannot be free to create any right, which sees to an object, and provide property effect to it. The starting point of the freedom of contract, that governs the law of obligations, does not apply to the law of property. Here, the opposite applies: the parties involved can only create those rights, which are allowed by the law. The number of property rights is therefore necessarily closed.' Reproduced in van Erp and Akkermans, above n 38, 65.

This limitation creates, in the eyes of civil law practitioners, the false impression that the dizzying list of security devices appearing in writings[62] or statutory texts[63] on PPSL cannot be reconciled with the *numerus clausus* doctrine. One might contrast the single possessory pledge of the German Civil Code with the non-exhaustive list of nominated secured transactions in any of the Unitary Systems. However, the apparent incompatibility between the two is false. They share two quintessential common denominators:[64] the basic underlying policy choices and the main challenge faced by both. In fact, the drafters of the DCFR have recognised that they were in a position to bring every known type of secured transaction under the same roof in Europe.

The essential policy choice inherent to both models is that only those proprietary security devices are afforded in rem (proprietary) effects that satisfy the requisite rules of the system. Even under the Unitary Model, parties are not given the opportunity to invent such new devices that would have in rem effects without satisfying the attachment and perfection and other rules. Both, in other words, rest on *mandatory* rules in this sense, even if this policy choice is not explicitly spelled out, statutorily or otherwise. In the context of PPSL this means that unperfected security interests cannot be enforced against third parties, yet they are valid and enforceable between the parties to the transaction (*inter partes*). This, in effect, means nothing else but reduction to a mere obligation.

The two legal models also share common concerns, given that both traditions struggle with such innovations that try to bypass the burdens imposed by the system without losing the proprietary effects. The best example of this is the rent-to-own business model spreading in some countries these days. The difference between the two approaches is that while, historically, common laws and the Unitary Model have never closed the doors to innovation, the civil law systems have tried to do that by the sheer force of law — primarily through the *numerus clausus* doctrine. If one is pondering which method is the right one for the swiftly changing 21st century, suffice to refer to the recognition of the so-called non-code-based security devices on personal property (*kautelarische Sicherheiten*) by German courts: namely, these came into being exactly by bypassing the *numerus clausus* doctrine in the second half of the 20th century. In other words, as these idiosyncratic German proprietary

62 See, eg, Gilmore, above n 23, ch 1, which lists — besides the possessory pledge — the ‘independent security devices’ (ie chattel mortgage), conditional sale (discussed together with consignments and leases), trust receipts, factor’s liens, field warehousing as well as receivable financing. He then discusses, hidden in the text, the concept of ‘floating lien’ — the US equivalent of the English floating charge (and with respect to the priority point — crystallisation also resembling the fixed charge): at § 11.7, 359.

63 To lawyers from unreformed civil law systems, who know only mortgage on real property and possessory pledges of tangible goods as proprietary securities, the non-exhaustive list — made of 12 nominated secured transactions — of already known and utilised security devices in s 12(2) of the *APPSA* indeed looks dizzying.

64 Here the reference is *not* made to the common law’s closed list (*numerus clausus*) of property rights in land. See, eg, van Erp and Akkermans, above n 38, 302 referring also to the English case of *Hill v Tupper* (1863) 2 H & C 121.

security devices prove, the list of proprietary security devices is, in reality, not closed, even in Germany or in the civil law systems that follow it. In any event, if the registration-hostile German secured transactions law has an advantage over the Unitary Model, that advantage is definitively not the principle of the *numerus clausus* of property rights with all of its discussed ramifications.

C *Principles-Level Discrepancies*

The policy choices of civil laws and of the Unitary Model differ fundamentally concerning the roles of principles as well. The Unitary Model, in the name of simplification and predictability, reduced their role to the bare minimum. The UCC, for example, mentions only the freedom of contract principle and then explicitly entrusts general principles with only a supplementary role.[65] Perhaps the drafters of Article 9 have materialised this idea most radically, not just by eliminating 'equitable liens' but also by creating a system based on explicit rules; a principle-free world of its own. The courts also subscribe to this idea, which in the US has allowed equity to triumph over statutory law only in very few secured transactions cases, led by the recognition that 'a predictable system of priorities ordinarily outweighs the disadvantage of the system's occasional inequities.'[66] Put simply, the token of the predictability and stability inherent to the Unitary Model was the maximal reduction of the role general principles — ranging from equity to unjust enrichment — could play.[67] The same approach was adopted by the other Unitary Systems.[68]

As opposed to this, in civil law doctrines, principles and similar general, abstract and thus inherently less predictable creatures known to law have not lost their importance. Textbooks still open with and devote significant attention to them. This means, in other words, that in civil laws the reach of security interests is still to a great extent dependent on the interpretation of principles, in addition to the concrete provisions (if any) of the agreement of the parties. As a result, in civil law systems both invoking principles and prevailing based on them is more realistic — even if exact formulae for the exploitation of principles could hardly be forged.[69] Notwithstanding the heightened role, principles fit best with security interests on fixed collateral, like possessory pledge or chattel mortgage, whereas their application to shifting collateral is already problematic. This prestige and omnipresence of

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65 UCC § 1-103.

66 *Knox v Phoenix Leasing Inc*, 35 Cal 2d 141 (Ct App, 1994).

67 Ibid.

68 For example, the Ontario PPSL Act 'prescribes a single system of law in place of the [earlier] disparate and sometimes conflicting structures of common law, equity and statutory law relating to security agreements.' See Jacob S Ziegel, Bejamin Geva and Ronald C C Cuming, *Commercial and Consumer Transactions — Cases, Text and Materials* (Emond Montgomery Publications, 1995) vol III, 16.

69 Van Erp and Akkermans, above n 38, ch 5(II), list (without necessarily fully explaining) five features of security interests: the accessory nature of security interests; specificity of security interests; prohibition of disproportionate securities; prohibition of unjust enrichment; and publicity of proprietary security rights.

principles in civil laws makes their juxtaposition to the Unitary Model inevitable. The ensuing exercise will reveal that many of the dichotomies are false and reconcilable, and that the two systems overlap. A useful example is the secured creditor's duty to account for surplus in case of disposition of collateral. This is common to both sides.

Reconciliation of the two systems is not hopeless. The two most far-reaching examples are the German contract-based security devices (*kautelarische Sicherheiten*)[70] and the fact that a number of civil law countries have a version of enterprise mortgage that could be taken as the substitute of the floating lien.[71] These represent nothing else but living examples of the extension or breaking of the confines dictated by general principles. Some of the dilemmas are in reality easily resolved as they do not represent any practical problem.[72] Europeans would certainly have to reconsider whether excessive reliance on principles is the solution in this domain.

Making the system entirely predictable, however, should not necessarily require Europeans to relinquish some of their venerable principles. The best illustration is the issue of paternalistic European rules against excessive security that could survive even though being foreign to the Unitary Model as the two are not mutually exclusive. The challenge is rather to develop a model that successfully reconciles the two, and does not leave the protection of debtors against excessive exposure to incumbent governments, national banks and their ad hoc policies.

A final observation: the list and designation of principles may vary depending on the jurisdictions covered and even of authors' choices in comparative works. For example, it is questionable whether the prohibition of unjust enrichment should be listed as a general securities-related principle at all,[73] as this legal institution is

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70 These are in particular simple ROT (*Eigentumsvorbehalt*), security transfer (*Sicherungs*übereignung) — the so-called expanded and extended versions of these (amounting to nothing else but expansion to after-acquired property up to a level and to future advances) — as well as security assignment (*Sicherungsabtretung*). The security transfer resembles the common law chattel mortgage except that no public notice is provided on its existence. See, eg, Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai könyvkiadó, 2002).

71 The so-called *small* enterprise mortgage is known in Belgium and France and the *big* version in Finland and Sweden: Drobnig, above n 1, 448. These variations of the enterprise lien were introduced in the CEE reform countries like Hungary and, more recently, Croatia. Interestingly, Hungary abolished it in the brand new Civil Code of 2013. The reasons for the change are, at least to this author, unclear.

72 The same was concluded by Simon Fisher in relation to the Australian PPSL reforms: Simon Fisher, 'Personal Property Security Law Reform in Australia — History, Influences, Themes and the Future' in John de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge-Cavendish, 2010) 366, 367.

73 See, eg, van Erp and Akkermans, above n 38, 436, who merely declare the omnipresence of the principle without clarifying how it relates to the principles of accessoriness or excessive security.

part of law in both civil and common law systems. Likewise, while some systems have more exact rules against excessive securities (for example, Germany), this is not necessarily the case in others. Yet there is no need to get lost in this abstract quagmire; the Unitary Model is about prioritising predictability, achieved also by reducing the role of principles. Unfortunately this has not been realised by either the drafters of the DCFR (who have rather followed the inertia dictated by civil law systems) or by European scholarship. This lacuna makes a theoretical issue a pragmatic one and justifies examination of the main principles through the lens of the Unitary Model hereinafter.

1 *The Accessoriness of Security Interests in Civil Law Systems*

Accessoriness of security interests is, as a general principle, presumed by civil laws and hence no reputable textbook on property or security law is devoid of it. As opposed to that, accessoriness is neither proclaimed to be a general principle nor can it be easily tracked down in statutory texts or scholarly publications on common laws; the same applies also to the Unitary Model.[74] The Unitary Model and common law systems, it may seem, survive without making a fundamental principle out of accessoriness. Andrew Steven attributed this to two historic reasons: the nature of the conventional mortgage, which presumed transfer and retransfer of title, and the 'division in English law between the common law and equitable rules relating to mortgage.'[75] As real property was in a sense the benchmark for PPSL centuries ago, it is legitimate to presume that the same reflections and principles applied by analogy in the PPSL context as well. This should not, however, lead to the conclusion that the relationship of the obligation and the linked security is of no relevance whatsoever to common law systems or to the Unitary Model.

The gist of civil law accessoriness, inherited from ancient Roman law, is expressed in the shortened legal maxim '*accessorium sequitur principale*':[76] the security interest depends on or follows the obligation it secures.[77] Accessoriness may be

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74 As a rare exception see Andrew J M Steven, 'Accessoriness and Security over Land' (2009) 13 *Edinburgh Law Review* 387, an article devoted to Scottish (thus a mixed system) real estate mortgage law. With respect to English law, he refers to Goode, above n 52, who defines guarantees (personal securities) as 'accessory engagements.' In the case of real securities, the word 'accessory' is not even used. His examples from the US include the American Law Institute's *Restatement of the Law: Property: Mortgages,* which makes mention of accessoriness solely with respect to the effects of the transfer of the obligation secured by the mortgage and a 19th century US Supreme Court case (*Carpenter v Longan* 83 US (16 Wall) 271, 21 L Ed 313 (1872)) proclaiming that 'the debt is the principal and the mortgage is the accessory.'

75 Steven, above n 74, 391.

76 Bryan A Garner (ed), *Black's Law Dictionary* (West, 7th ed, 1999), in the Appendix 'Legal Maxims', mentions two *sententias* that might have been the sources of the shortened version: '*Accessorium non ducit, sed sequitur, suumprincipale*' (An accessory does not lead, but follows, its principal) and '*Accessorius sequitur naturam sui principalis*' (An accessory follows the nature of its principal): at 1616.

77 See van Erp and Akkermans, above n 38, 432.

thought of in terms of a tripartite formula: existence, scope and identity. *Existence* denotes that a security interest attaches (gets created), follows,[78] extinguishes and can be enforced if and as long as the underlying obligation (debt) exists. *Scope* implies that the amount the security interest secures is dependent on the amount of a *specific* obligation (debt).[79] *Identity* expresses that the claim-holder is simultaneously the secured creditor.

If research is not conducted based on the use of the 'accessoriness' catchword but is instead based on the content of the earlier listed features of accessoriness, its presence becomes visible both in English law[80] and the Unitary Systems. The difference is that those features of accessoriness that serve the policy choices of the Unitary Model have become enshrined into concrete provisions and, contrary to civil laws, the role of accessoriness ends there. Examples include the preconditions for attachment of security interests,[81] the definitions of the 'debtor' and the 'secured party,' the duty to account for surplus and the liability for deficiency,[82]

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78 In other words, if the debt is transferred, the security follows it. See UCC § 9-203(d) and pt 9 of the Official Comment to this section, codifying 'the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.' This may arise, as point 1 of the Official Comment to UCC § 9-508 exemplifies, when the sole proprietorship operated by an individual debtor later becomes incorporated or in cases when the debtor corporation is merged into another one. See also *APPSA* s 10(b), which contains the definition of 'debtor' that includes 'a transferee of, or successor to, an obligation' that is secured by a security interest in personal property. This also means that the transfer of collateral does not extinguish the security interest. See UCC § 9-315 and *APPSA* s 79.

79 As Gilmore states:

> On default the amount of what the Code calls the 'obligation secured' becomes of importance from two points of view. It determines the extent of the secured party's claim against the collateral and also determines the amount which the debtor must pay or tender in order to redeem the collateral or reinstate the security transaction. (Emphasis added)

Gilmore, above n 23, § 43.5, 1199.

80 See, eg, Goode, above n 52, where he discusses the 'ingredients of attachment' of security interests (as in rem securities) in English law: at 679. He lists as the fourth precondition of attachment that '[t]here must be some current obligation of debtor to creditor which the asset is designed to secure.' As an example he mentions that if 'at a given time there is no current indebtedness … attachment ceases and the security interest again becomes inchoate, reviving ab initio as soon as the missing element is once more supplied.'

81 As White and Summers put it, '[l]ending money is giving value; and a binding obligation to make a loan is value sufficient to support a security interest.' Moreover, even if the debtor and secured creditor sign an agreement that the secured creditor is not obliged to lend money, 'in those cases there will almost never be an issue whether value has been given because *there will be no Article 9 dispute unless a loan is made*.' See James J White and Robert S Summers, *Uniform Commercial Code* (West, 6th ed, 2010) 1192. For similar attachment rules see UCC § 9-203 and *APPSA* s 19.

82 See UCC § 9-615(d); *APPSA* s 132(3)(e); DCFR art 9-7:215(5).

as well as in all forms whereby a security gets discharged[83] (though some specific rules could also be found).[84] It should not come as a surprise, therefore, that the 'visibility' of accessoriness differs in various Unitary Systems. Moreover, its presence began to fade with the new versions of Article 9, which shows that the drafters follow the dictates of industrial practices and not general principles that have never been pronounced in the US.[85] This presumably unnoticed development in US law, however, may be a double-edged sword, as the ultimate function of accessoriness is the protection of the debtor. In the age of consumer protection[86] — speedily expanding also to the protection of the small and mid-scale business sectors — this is obviously a consideration worth reflecting upon. Such corollaries of the Unitary Model like the floating lien (or similar non-fixed comprehensive securities) together with the rules on after-acquired property, future advances and proceeds (or 'proceeds of proceeds') do cause some unease for accessoriness. But even in these cases, the amounts collectible by secured creditors are linked to the size of the obligation secured. Additionally, no major problem is caused by the otherwise commonly subscribed to rule that the costs of enforcement of a security interest may be collected in addition to and in priority of the basic debt.[87]

Yet for our purposes the ultimate question is whether this principle is an obstacle to adopting the Unitary Model in Continental Europe; the answer could be as straightforward as 'no'. The DCFR has, indeed, already managed to reconcile the approaches of the two legal families. The principle is declared as generally applicable to all

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83 Sometimes the relationship of the two is explicitly spelled out, like in s 140(5) of the *APPSA*, which reads: 'An amount paid, or personal property or proceeds applied, in accordance with subsection (2) [ie the order in which the price must be distributed] discharges an obligation secured by an interest in the collateral to the extent of the amount paid or the value of the proceeds or property applied.' Yet in most cases discharge is presumed from the rules on disposition, redemption and strict foreclosure. See, eg, *APPSA*: 'Retention of collateral' (ss 134–6); DCFR on 'appropriation of encumbered asset by secured creditor' (art IX 7:216).

84 See, eg, in UCC Article 9 the very specific case of 'pledging' of the so-called 'supporting obligation' that occurs automatically upon the attachment and perfection of a security interest in the 'supported collateral.' See UCC §§ 9-203(g) and 9-308(e). See also Harry C Sigman and Eva-Maria Kieninger, *Cross-Border Security over Receivables* (Sellier, 2009) 21.

85 Gilmore initially clearly expressed that there cannot be a security interest without a debt by referring to the definition of 'debtor' saying that '*the Code 'debtor' must owe something to someone*.' Gilmore, above n 23, 303 (emphasis added). The same follows from the UCC definition of security: at 334.

However, the definition of 'debtor' in the 1999 Revised Version does not reflect accessoriness so clearly because it achieves the same ends through the combination of the definition of 'debtor' (emphasising having interest in the collateral) and of the 'obligor.' See UCC Revised Version § 9102(28) and (59).

86 As Steven puts it, 'security restricted to a fixed debt is extinguished by the payment of that debt; an unrestricted, all-sums security is suspended by repayment.' See Steven, above n 74, 416.

87 *APPSA* s 140(2)(b); UCC § 9-608(a)(1)(A); DCFR art IX 7:216(2).

securities[88] and yet its concrete meaning is not left to indeterminate interpretation but is expressed in the detailed provisions in Book IX on secured transactions. Further, it has been recognised in Europe that departure from accessoriness opens new financing opportunities, as exemplified by the German land charge, the French 'rechargeable hypothec' and the *Eurohypothec* project.[89]

2 *The Lack of the Principles of Tracing and the Resulting Limited Concepts of Fruits and Products*

The starting position of Continental European systems is typically that a security interest extends only to the 'first generation' of proceeds generated by the collateral and not to the subsequent ones.[90] This is in stark contrast to the Unitary Model, which explicitly proclaims that 'proceeds of proceeds' are themselves 'proceeds'.[91] As a result, the civil law functional equivalents — the concept of 'fruits and products' — are inherently narrower, not just from the Unitary Model but also from common law kin. It is not without reason, then, that international projects on secured transactions take over the broader common law concept and vouch for automatic extension of security interests to proceeds of proceeds. What is less known is that such expansion of the concept of proceeds 'for an indefinite period or number of transactions'[92] in common laws was possible due to its inseparable companion: the equitable principle of 'tracing'.

Tracing serves as a tool to reach the cutoff point in a series of transactions — going beyond the 'first generation' — whereby the security interests cease to

[88] See DCFR art III 5: 115(1), which states that '[t]he assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights', and III 5:105(2), which adds that '[a] right to performance which is by law accessory to another right is not assignable separately from that right.' The Official Comment confirms the accessory nature of security interests in movables hidden in the comments to Article IX 5:301 on transfer of the secured right, proclaiming that this Article 'contains the generally accepted principle that proprietary security devices *as accessory rights* follow the secured right if the latter is transferred to another creditor …' (emphasis added). See DCFR Comments, above n 15, 5591.

[89] See Otmar Stöcker, 'The Eurohypothec — Accessoriness as Legal Dogma?' in A Drewicz-Tulodziecka (ed), *Mortgage Bulletin 21: Basic Guidelines for a Eurohypothec* 39 (2005) 46 <http://www.en.ehipoteka.pl.>. See also Steven, above n 74, 419.

[90] See, eg, Heywood Fleisig, Mehnaz Safavian and Nuria de la Peňa, *Reforming Collateral Laws to Expand Access to Financ*e (World Bank, 2006) 33–4 <http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/BEE+Collateral+Access+to+Finance/$FILE/Reforming_Collateral.pdf>.

[91] In the context of Article 9, it is to be noted that contrary to the pre-1999 version that had separate provisions on that (§§ 9-203(3) and 9-306), in the Revised Version '[t]he definition of 'proceeds' no longer provides that proceeds of proceeds are themselves proceeds. That idea is [rather] expressed in the revised definition of 'collateral' in Section 9-102. No change in the meaning was intended.' In the *APPSA* see s 31(1)(a).

[92] See Fleisig, Safavian and de la Peňa, above n 90, 34.

exist.[93] No such general 'nominated' principle is known to civil law,[94] which instead typically makes use of a complex set of rules developed typically on a case-by-case basis. These are in fact contractual clauses extending and expanding the reach of the security interest up to a relatively fixed cut-off point, at least as demonstrated by German practices.[95] The weakest point of this approach is that instead of a clear priority point benefitting a *single* creditor, it may make the creditors co-owners[96] — a clear disadvantage given that in case of co-ownership two parties, not one, are entitled to a priority or to make decisions. In unreformed systems, moreover, co-ownership often ends in a stalemate if the titleholders cannot agree. Given the growing complexity of business life and the increased speed and number of transactions that may occur, the rules on proceeds admittedly cannot be anything but complex no matter which of the described approaches is examined. Yet in the race between competing models, the system offering co-ownership over a clear priority to the secured creditor — who is supposed to be interested to extend credits at favorable terms and conditions — is doomed to lose. It is exactly because of this that UNCITRAL is right in concluding that 'in reality these labels are of little use: what matters is the policy decision a jurisdiction makes on how far the system allows the security interest to extend.'[97]

Admittedly, the limited civil law concepts might have served the expectations well in the 19th century, the age of the enactment of venerable Continental European civil codes, but it obviously cannot properly serve the complex needs of the 21st

[93] For example, *APPSA* s 31(1) defines proceeds as 'identifiable and traceable personal property' of the listed sort.

[94] For example, 'real subrogation, comparable to tracing in English law, is unknown to the German legal system, except in a limited number of statutory grounds.' See K Lipstein, 'Introduction: Some Comparisons with English Law' in Rolf Serick, *Securities in Movables in German Law — An Outline* (Kluwer, 1990) 1.

[95] See, eg, one of the landmark German cases of the Federal Supreme Court of Germany (Bundesgerichtshof) from 1957 — BGH NJW RR 2003, 1490 — in which a longer retention of title of clause is quoted including an anticipatory assignment of the claims 'resulting from a resale of the merchandise subject to the retention-of-title clause, even if and to the extent that the merchandise has been processed.' Case reproduced in English in Stefan A Riesenfeld and Walter J Pakter, *Comparative Law Casebook* (Transnational Publishers, New York, 2001).

[96] BGH NJW RR 2003, 1490. The third sentence of point (d) of the aforementioned clause reads as follows: 'If the merchandise subject to the retention-of-title clause is processed together with goods not belonging to the seller, *the seller becomes co-owner* of the new merchandise in proportion of the value of the merchandise subject to the retention-of-title clause to the other processed goods.' (emphasis added).

[97] See, eg, United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (2010) pt 63, 252 <http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf>. The Guide differentiates the categories of first, natural fruits (of the collateral), second, civil fruits or revenues stemming from the collateral and third, the products of manufacture. The Guide also concludes that common laws have tracing that helps finding the limits: at pt 20, 36.

century. The practical advantage of the Unitary Model is that it ensures the security interest automatically extends to all identifiable and traceable proceeds. Under civil law systems, this could require negotiation and the conclusion of two separate secured transactions, entailing the doubling of risks and transaction costs.[98] In other words, the Unitary Model's formula better serves the realities of present times: a general presumption that the security interest extends to all identifiable and traceable proceeds. This additionally does not exclude the right of parties to fix the cutoff point or to agree that some specific categories of proceeds are treated as a separate transaction. Sometimes it was the courts that had set the cutoff rules.[99]

In unreformed systems, these antiquated rules stymie the emergence of floating lien (or equivalent)[100] and of chattel paper financing.[101] The drafters of the DCFR seem to have realised this, as they have not heeded mechanically to civil law but have

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98 See Fleisig, Safavian and de la Peňa, above n 90, 34.

99 In the US, for example, the initial position was that proceeds are lost when commingled with non-proceeds. See Gilmore, above n 23, 736. Yet later courts have changed this, mainly by borrowing equitable principles from other areas of law. For this specific situation finally the so-called 'lowest intermediate balance rule' was accepted and eventually enshrined into § 9-315(a)(2) of the Revised Version of UCC Article 9. For the meaning see, eg, *Chrysler Credit Corp v Superior Court* 22 Cal 2d 37 (1993).

100 Unlike the fixed or floating charge — as nominated transactions — known in Australia, Canada, New Zealand or the United Kingdom and its followers, it is only a 'concept' under UCC Article 9 that rests on five pillars, or five different sets of provisions that (a) validate the after-acquired property interest and (b) future advance arrangements, as well as (c) those that allow for automatic extension of the security interest onto identifiable and traceable proceeds. Finally, the overruling of *Benedict v Ratner*, 268 US 353 (1925) and introduction of simple notice filing was also needed. See, eg, Gilmore, above n 23, § 117 and note 1, 359. The key section in Article 9 today is § 9-315(a).

German law, for example, knows neither a nominated equivalent nor such a more or less formed concept. Yet through contractual clauses — as referred to above — it could achieve similar effects, though of limited reach exactly because each new transaction that may qualify as 'proceeds' presumes negotiation and contracting. Moreover, as these rules are statutorily not defined but are based to a great extent on court rulings, they are plagued by unpredictability.

101 Jackson argued that the creation of the special subcategory of collateral — chattel paper — is justified primarily by the advantages that 'paperizing' of an obligation brings. Put simply, besides increased predictability, the benefit is its increased negotiability — which means a further financing method. See Thomas H Jackson, 'Embodiment of Rights in Goods and the Concept of Chattel Paper' (1983) 50 *University of Chicago Law Review* 1051, 1058–59. McCormack questioned the legitimacy of carving out chattel paper from receivables financing, criticising the Canadian and New Zealand drafters for uncritically following the American solution that presumably is 'more a historical remnant than a barometer of contemporary financing and industry practices.' This applies mutatis mutandis to the *APPSA* given that s 10 contains the definition of this specific collateral category. See Gerard McCormack, 'Reforming the Law of Security Interests: National and International Perspectives' (2003) *Singapore Journal of Legal Studies* 1, 26.

extended the reach of security interests from the first generation of proceeds by way of exceptions.[102] To wit, the basic rule remains that security interests extend only to the originally encumbered asset. It may extend further, however, in a restricted number of specific cases. In the end, as this soft law instrument proves, the two systems can be reconciled and the divergent law on fruits versus proceeds is not an insurmountable stumbling block for the Unitary Model.

3 *The Civilian Requirement that the Secured Claim must be Specified and the Rules against Excessive Security (Overcollateralisation)*

It is claimed that a common characteristic of many civil law systems, distinct from accessoriness, is that they possess rules against excessive security. This applies to both proprietary and personal securities.[103] These rules allow the secured creditor to collect no more than the principal debt, the interest, as well as enforcement and some other justified ancillary costs. It may be presumed that their function is to defend the debtor by making the value of the collateral and the money to be collected proportionate to the credit. The requirement that the secured claim be specified (the specificity principle) — by case law moderated to the standard of 'determinable'[104] — is obviously a prerequisite benchmark for determining the value of the collateral. Both principles seem to be foreign to the Unitary Model, a model that does not aim to be paternalistic and which, in its US version, suggests that '[t]he law should not impair the ability of debtors to secure as much or as little of their debts with as much or as little of their existing and future property as they deem appropriate.'[105] Indeed, it is sufficient to examine a financing statement to see the materialisation of this policy; the definition of attachment does not require specification of the amount of credit, but only that value has been given for the security interest.[106]

In fact, the rules against overcollateralisation also show how paradoxical some of the general principles and doctrines are, given that, notwithstanding the high esteem surrounding them, they could be bypassed in business life. It is especially unclear

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[102] For the definition of 'proceeds' in the DCFR see art IX 1:201(11). The system goes beyond what paradigm civil law principles dictate only by way of three exceptions, 'each [having] a rationale and scope of its own.' For example, the security interest will extend to proceeds of proceeds only if the parties so agree, which reflects the influence of the referred to German contractual practices. See DCFR Comments, above n 15, 5458–9.

[103] See van Erp and Akkermans, above n 38, 434.

[104] See *Bank Lambert et Banque industrielle et commercial de Charleroi v Assurances du Crédit en Bottriaux, Cour de cassation, 28 March 1974,* excerpts in van Erp and Akkermans, above n 38, 434.

[105] See Steven L Harris and Charles W Mooney Jr, 'A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously' (2012) 80 *Virginia Law Review* 1994.

[106] See UCC § 9-203(b)(1) and, for the definition of 'value', § 1:204. It is also indicative, as White and Summers, above n 81, note, that '[t]here are few cases on what is value and fewer yet are noteworthy': at 1192. For *APPSA* see s 19(2). The filing requirements do not list the value of the credit either: see UCC § 9-516(b); *APPSA* ss 153, 154.

how the rules against excessive security could be enforced and monitored in reality. Needless to say, the related statutory bases,[107] the methods of measurement and the thresholds[108] themselves differ from jurisdiction to jurisdiction — eventually leading also to the inevitable conclusion that this element of civil law does not necessarily rest on solid footholds. German law seems to have the most articulated rules, yet, curiously, they are based primarily on Federal Supreme Court positions rather than on specific statutory laws.[109] Further, the divergence of the positions taken by different divisions of the Supreme Court adds a layer of uncertainty.[110] One of the established corollary rules is the obligation of the secured creditor to release part of the collateral if, for a longer period of time, the security becomes excessive while the underlying credit is outstanding. One may conclude that the determination of what constitutes excessive security, or for what period of time the distortion should exist, generates both controversy and a voluminous literature. Put simply, the rule is far from simple. This tension is visible even on the DCFR, which does not seem to pronounce such a threshold percentage in an explicit rule, though it contains a number of provisions whereby it protects consumer debtors.[111]

Whether this sui generis form of paternalism could be deemed a minor mosaic reflecting the social sensitivity inherent in the social-market economy model of Europe is uncertain. What is clear, however, is that common laws and the Unitary Model do not fix the upper limits of the security compared to the credit extended.[112] On the contrary, as was stated in a US case, overcollateralisation is a tool in the hands of the secured creditor to 'hedge against credit risk' in addition to providing

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107 For example, while French law grounds this type of principle 'in the wrongful act of a professional credit-lender,' for German law this is a good-faith issue: van Erp and Akkermans, above n 38, 443.

108 Because in Germany the law on excessive security is based on changing case law, it is not easy to determine the exact content of it. As Bülow put it, 'when the total value of the security is 120% of the credit, in most cases that would not amount to excessive security.' See Peter Bülow, *Recht der Kreditsicherheiten* (C F Müller Verlag, 1996) § 947. Overcollateralisation could be attacked as resulting in 'immoral transactions'. The last publicised case of the Federal Court seems to be Bundesgerichtshof [German Federal Court of Justice], IX ZR 218/02, 15 May 2003 reported in (2003) BGHZ 1490, 1492.

109 In particular, *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* [Law on General Terms of Trade Contracts] (Germany) 9 December 1976, BGB1 I, 1976, 3317.

110 See Riesenfeld and Pakter, above n 95, 428.

111 See DCFR art IX 2:107, where consumer debtors are protected by three means: first, requiring that all the assets used as collateral must be identified individually to prevent abuse; second, after-acquired property can be offered as collateral only if the credit was extended exactly for the acquisition of such items; and third, such future regular payments as salary, wages, pensions or similar income is exempt and cannot be used as collateral up to the minimum necessary for subsistence of the debtor and his family. For a similar provision in the *APPSA* see s 8(1)(iv).

112 For English law, see van Erp and Akkermans, above n 38, 444.

them with more flexibility.[113] A fuller panoply of dilemmas surrounding overcollateralisation (or excessive security) often arise in relation to the liability of secured creditors having control of collateral. In particular, investment property is extremely sensitive to changes on the capital markets. In that specific context, the hardships and pitfalls of the application of a formula known to German law are not just more readily visible but show that similar results could also be achieved using less rigid rules.[114] Simply, on the increasingly volatile capital markets, the 'lasting for a sufficiently long period of time' precondition of the German rules against excessive security could hardly be applied. In any event, the rules against excessive security deserve merit, yet are neither necessary nor irreconcilable per se with the Unitary Model.

4 *Publicity of Proprietary (In Rem) Securities*

Paradoxically, it is questionable in Continental Europe whether this principle is generally applicable in the case of personal property securities, as in more jurisdictions latent (secret) securities could validly be created, contrary to real property security interests (ie mortgages). The mentioned German contract-based securities (*kautelarische Sicherheiten*) — which have been exported to a number of neighbouring countries as well — are paradigmatic examples. It is paradoxical how German courts could have validated them and how they could have gained such a wide popularity in the most system-thinking jurisdiction of Europe, where bypassing the Civil Code is almost unimaginable.

This is interesting as both common and civil law systems (including German law, one of the major civil law jurisdictions) have departed from the same concern: to wit, ostensible ownership (false wealth). Later development took different routes. Common laws have tended to impose the precondition of public notice on all new security devices, while German law and its followers have tried to provide protection by way of the *numerus clausus* doctrine (that is, the doctrine of statutorily limited proprietary rights prohibiting 'invention' of new proprietary rights, including new in rem security devices) which was then broken by the mentioned contract-based *non-registrable* securities. Yet from the perspective of the prospects of Europe adopting the Unitary Model, it is of utmost importance that the common roots are visible also from the DCFR, which was positioned to find the common denominator,

113 See *Layne v Bank One, Kentucky, N A* 395 F 3d 271 (US Ct App 6th Cir, 2005) ('*Layne*').

114 The facts of *Layne* are telling of the sui generis nature of investment property as collateral. Here, according to the agreement of the parties, the loan-to-value ratio provided that the market value of the stock used as collateral must have always been at least twice the outstanding balance of the credit owed. In case of changes, the debtors had five days to remedy the situation or risk the bank declaring default at its discretion — including the right to sell the shares subject to ten days' prior notice. After the Internet Bubble and months of vacillation (February 2001 through July 2001) the Bank finally sold the stock at a large deficit. The issue was whether the bank as the holder of shares had the duty to sell the collateral because of a market decline — regardless of the overcollateralised loan — which was answered in the negative by the Court.

bringing all security devices — including the German latent securities — under the same roof and subjecting them to the same perfection requirements.[115] Thus, reconciliation is possible on this issue in Europe.

III Conclusion: Or Why There is Still Much to Do

The legal platform that serves as the foundation for the introduction of the Unitary Model differs radically along the line of common law systems versus Continental European civil law systems. However, the answer to whether common and civil law systems could reconcile their PPS laws has changed radically from a decisive 'no' in 1980, through the timid, limited and contingent 'yes' in the 1990s, to a quite encouraging affirmation — best materialised in the soft law instrument DCFR and the PPSL reforms in some of the European civil law countries during the last two decades. Roughly 32 years were needed to reach this point; less time might be needed to show that Europe can have a common PPSL that is potentially compatible with the Unitary Model. This article is a modest attempt to make headway in that direction through pinpointing a number of key discrepancies in the common versus civil law legal platforms affecting PPSL that have not been properly explored yet. It has hopefully *ad minimum* proven what Mary Hiscock warned us when writing on the internationalisation of law: 'there is [still] much to do.'[116]

115 See DCFR art IX 1:102(4) listing the German *kautelarische Sicherheiten.*

116 Mary Hiscock and William van Caenegem (eds), *The Internationalisation of Law* (Edward Elgar, 2010) xxv.