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# Testing the equivalence of the new comprehensive Australian Personal Properties Securities Act, its segmented European equivalents and the draft common frame of reference

## **Abstract**

With the new *Personal Property Securities Act 2009* (Cth) ('APPSA') Australia has become the fourth jurisdiction to embrace a comprehensive system of personal property security law ('PPSL'). At its centre lies the concept of unitary security interests, the prototype for which was art 9 of the United States' *Uniform Commercial Code*. This is a new page in the global regulatory competition in this domain, and is causing other countries to rethink their unsystematised and hence less predictable and less competitive laws. This applies especially to fragmented Europe, which should pay increased attention to these Australian developments as they represent a gradually emerging international standard for access to financing (especially by small and medium size businesses), attraction of capital and economic growth. Only some have heeded this message, as illustrated by reforms in France and Central and Eastern Europe, as well as by Book IX of the recent soft law equivalent of a pan-European Civil Code, the Draft Common Frame of Reference. There is meaningful resistance, as the City of London's successful blocking of realignment with the Unitary Model shows. It is less known, however, that quite a number of European national laws possess 'segments' of PPSL resembling the new Australian system. This article offers the first holistic comparison of the two continents' PPSLs for the benefit of comparative lawyers and practitioners.

## **Keywords**

Australian Personal Properties Securities Act 2009, European equivalents

# TESTING THE EQUIVALENCE OF THE NEW COMPREHENSIVE AUSTRALIAN *PERSONAL PROPERTY SECURITIES ACT*, ITS SEGMENTED EUROPEAN EQUIVALENTS AND THE DRAFT COMMON FRAME OF REFERENCE

TIBOR TAJTI \*

With the new *Personal Property Securities Act 2009* (Cth) ('*APPSA*') Australia has become the fourth jurisdiction to embrace a comprehensive system of personal property security law ('PPSL'). At its centre lies the concept of unitary security interests, the prototype for which was art 9 of the United States' *Uniform Commercial Code*. This is a new page in the global regulatory competition in this domain, and is causing other countries to rethink their unsystematised and hence less predictable and less competitive laws. This applies especially to fragmented Europe, which should pay increased attention to these Australian developments as they represent a gradually emerging international standard for access to financing (especially by small and medium size businesses), attraction of capital and economic growth. Only some have heeded this message, as illustrated by reforms in France and Central and Eastern Europe, as well as by Book IX of the recent soft law equivalent of a pan-European Civil Code, the Draft Common Frame of Reference. There is meaningful resistance, as the City of London's successful blocking of realignment with the Unitary Model shows. It is less known, however, that quite a number of European national laws possess 'segments' of PPSL resembling the new Australian system. This article offers the first holistic comparison of the two continents' PPSLs for the benefit of comparative lawyers and practitioners.

## I THE ROADMAP FOR THIS ARTICLE

### A *Theses, Goals and Methodology*

The enactment of the Australian *Personal Property Securities Act 2009* (Cth) ('*APPSA*') went essentially unnoticed in Europe. This was also the case in Australia with the French and Central and Eastern European ('CEE') reforms of personal property

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security laws ('PPSLs'). The same neglect seems to await the most recent product of European elite academia, the Draft Common Frame of Reference ('DCFR'),<sup>1</sup> although its Book IX propounds a comprehensive PPSL system, similar to the *APPSA*, for the very first time in the Old Continent. This much can be gleaned from the pages of the leading law reviews of the two distant continents. This article aims not only to fill the gap in comparative scholarship but also to highlight some of the practical consequences of these three seemingly unrelated developments: the *APPSA*, the PPSL reforms of various European national jurisdictions and the DCFR.

The subtle message hidden in the DCFR is that notwithstanding the resistance of such major European jurisdictions as Germany or the United Kingdom ('UK') there is global regulatory competition in this domain. The winning model seems to be the Unitary Personal Properties Securities ('PPS') System Australia has subscribed to with the passage of the *APPSA*.<sup>2</sup> The soft law nature of the DCFR and the lack of consensus that will prohibit its metamorphosis into the first Civil Code of the European Union ('EU') does not diminish the validity of this claim. Neither does the fact that a genuinely comparative and interdisciplinary analysis of the legal and economic advantages of Unitary PPS Systems compared to the European segmented ones is still lacking. This should, however, make Australians more interested in European solutions.

Given these topics and aims, a comparative methodology is natural for this article. The ensuing analysis aims primarily to fill those gaps in comparative law that subsist partially because of the 'tyranny of distance.' Preconceptions still exist that prevent better discourse between scholars of the two continents, such as the a priori exclusion of the possibility of any salutary cross-fertilization between common and civil laws.<sup>3</sup> As far as the Old Continent is concerned, mundane reasons add to this, such as: the

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<sup>1</sup> The outline edition of the text of the 648 page long document entitled 'Principles, Definitions and Model Rules of European Private Law', referred to in a shorthand manner as the Draft Common Frame of Reference ('DCFR'), is available electronically at <[http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)>.

<sup>2</sup> The chosen shorthand reference to the PPSL of Australia, Canada (though primarily the leading common law provinces – Ontario and Saskatchewan), New Zealand and the United States of America ('US') is the above stated Unitary PPS System or PPSL. Comprehensiveness and the unitary concept of security interests are common to each. The latter denotes that in lieu of a number of differing security devices exploiting personal property as collateral 'one device and one set of basic terms' was opted for: Lynn M Lo Pucki and Elizabeth Warren, *Secured Credit – A Systems Approach* (Wolters Kluwer, 6<sup>th</sup> ed, 2009) 1149.

<sup>3</sup> The legal systems of continental Europe are normally referred to as 'civil law systems' or 'continental European legal systems'; though some authors use also the designation of 'civilian systems'. In this article these three will be used interchangeably.

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Babylonian cavalcade of languages; parochialism coupled with national pride, and the visible rivalry among legal scholars. As a result, for example, even though English is widely spoken in Scandinavia, only a few sources can be found on the PPS systems of the Scandinavian states – which interestingly are not devoid of elements quite similar to the ones in the *APPSA* (as demonstrated below).

Specifically in the domain of PPSL, European mainstream scholarship suffers from a high level of introversion which then affects what is thought of PPSL reform. *Internally*, European systems are still largely uninterested in each other's affairs in this domain. For example, the French reforms of the first decade of the 21<sup>st</sup> century have not triggered much attention in neighbouring Germany. Hence, it is little wonder that as yet no attention has been paid to exposing the significantly differing PPS systems, even of the major European jurisdictions, to in-depth comparative and economics-type analysis. The latter would put the economic effects at the forefront instead of eulogies on which system's *written* laws are preeminent. The available value judgments therefore remain of quite limited reach and are primarily descriptive.

*Externally*, comparisons of European PPS systems with Unitary PPSLs are isolated attempts rather than officially supported projects – again, with the exception of the mentioned DCFR, as well as the French and the CEE reforms. Theoretical and empirical research adequately supporting the European position on, for example, the advantages of the segmented and registration-hostile German PPS rules, or that of the compartmentalised system of the UK over the comprehensive Unitary Models of Australia or the US is absent. This applies even to the system with the closest ties to Australia, the UK, where reforms have been, in essence, obfuscated based on the simplistic wisdom of 'if it's not broken, don't mend it.' For these reasons Book IX of the DCFR, with its novel comprehensive PPSL, is obviously a brave though sensible step forward.

This article demonstrates the importance of the similarities between a number of the European PPS laws' 'segments' and the new *APPSA*; going beyond previous work that was restricted to comparing Australian and UK laws. Yet Australians conduct business not only in the British Isles or the more developed western part of Europe.<sup>4</sup> Therefore, the pre-eminence Australian scholars give to Europe's western

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<sup>4</sup> The numerous Australian trade representation offices in CEE are telling. Yet there are even more concrete traces of the presence of Australian businesses. For example, note the joint venture of the Reserve Bank of Australia and UCB, a Belgian manufacturer, or, the Keller Group Pty Ltd acquisition of the Czech 'Borsta spol sr. o.' foundation's specialist company in 2008. See also the website of ABIE (Australian Business in Europe) at <<http://www.abie.com.au/>>.

hemisphere should become more balanced. Although it is not the goal of this article to provide Australians with investment advice, unearthing the so far unnoticed similarities or discrepancies between the two continents' PPS laws might, indeed, open new vistas for doing business as well. This is particularly so given the vacuum left by European universal banks, which have been forced to abandon various market niches due to the recent financial crisis, the increased capitalisation requirements imposed by Basel III and the linked European stress tests.<sup>5</sup>

Finally, the juxtaposition of the *APPSA* and its European segmented kin highlights some so far inadequately researched areas of PPSL. These include the industry-PPSL interface, the interdependence of PPSL and bankruptcy or consumer protection law, and the role of contempt of court rules in making the common law PPSLs work efficiently – compared to their European toothless functional equivalents. While this article will not answer all these queries, it will show, based on concrete examples, that comparison of the *APPSA* and selected European examples would benefit scholars and practitioners of Australia, Europe and beyond. Ultimately it might be that the differences that exist among the world's systems are not as insurmountable as presumed.

## **B Why is Secured Credit Important and Why the Interest in the Australian Reform?**

The first claim of this article is that the reform of secured transactions law has become a global issue. A number of legal models are competing for pre-eminence, led by the comprehensive one enshrined in art 9 of the United States' ('US') *Uniform Commercial Code* ('UCC').<sup>6</sup> Following Canada and New Zealand, the US model has materialised in Australia in the *Personal Property Securities Act 2009* (Cth).<sup>7</sup> While the PPSLs of

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<sup>5</sup> Due to the cumulative effects of all the pathological phenomena – from the Greek sovereign debt crisis to the systemic pitfalls of the foreign currency denominated housing mortgage deals in many CEE countries – a major restructuring of the largest European universal banks is unfolding. For example, the rescue of Greece has so far cost the Royal Bank of Scotland (RBS) £1.45bn, the German Commerzbank (the second largest German bank) €2.2 billion, and the Franco-Belgian Dexia €11.6 billion. See James Wilson, Scheherezade Daneshkhu, Tom Burgis and Patrick Jenkins, 'Exposure to Greece Hits Europe Banks Hard', *Financial Times* (London), 24 February 2012, 13.

<sup>6</sup> In the US PPSL is called 'secured transactions law.' Contrary to real estate mortgage law, this branch of law became harmonized on the level of the States. The European Bank for Reconstruction and Development ('EBRD') also opted for this designation for its project assisting more CEE countries to reform their respective laws. In this article the two terms will be used interchangeably.

<sup>7</sup> See also the unambiguous reference to these developments in the Australian PPSL reform-related pages of the Australian Attorney-General's website – with links to the texts of the

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these jurisdictions (the Unitary PPS Group or the Group) admittedly differ, quite significantly on certain issues, their underlying philosophy, basic policy choices, key categories and principles are substantially similar if not identical. Hence, it is not wrong to place them in the same box.

Compared to the holistic picture of the Unitary Model, all the other developed (and underdeveloped) models are differentiated by being segmented. That is, various more or less compact and identifiable segments of PPSL exist in different parts of the legal system, often in isolation from one another. The best examples are how receivables and title financing transactions are far removed from paradigm secured transactions like possessory pledges or chattel mortgages. For instance, in this respect English law is as far from the Unitary Model as any of the civilian systems. From 1990 onwards these differences seem to have started to disappear in some parts of Europe. Not only France but also many of the CEE post-socialist countries have reformed their laws using the Unitary Group's laws – or the derivative European Bank for Reconstruction and Development ('EBRD') Secured Transactions Model Law – for guidance.

For the purposes of this article the starting position is that secured credit is a good thing. We leave the elaboration of the causes and negative consequences of the credit crunch and the uncontrolled extension of consumer credit to others. Mention of CEE systems in this analysis is also useful to demonstrate the invaluable role developed PPSLs play. A look at CEE economies reveals the severe consequences the shortage of financing might cause. For example, in many parts of the war-torn Balkans credit is still not available even on the strength of many types of personal property. In some countries bribing the bank officials is a precondition for getting a loan – conditions virtually unimaginable in Australia or in the developed world. Yet it is not only the Balkans that lack the necessary legal framework.

Based on this realisation, this article aligns itself with the pragmatism of Homer Kripke and the now long-forgotten position he advanced in 1985, which disapproves of abstract, economics-cum-mathematics, formulas-based criticism of PPS (or secured transactions) laws. CEE and many emerging markets do not enjoy the fruits of that branch of law, which contributed to making the 'greatest outpouring of goods in the 20<sup>th</sup> century possible in the US'<sup>8</sup> and which was also of fundamental importance in

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other laws of the Group: Attorney-General's Department, Australian Government, *International PPS Reform* (5 October 2011) <<http://www.ag.gov.au/PPS/Pages/InternationalPPSreform.aspx>>.

<sup>8</sup> Homer Kripke, 'Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact' (1985) 133 *University of Pennsylvania Law Review* 929, 931. The seminal article of Homer Kripke ended a phase in US secured transactions scholarship. It

making Australia a welfare society envied by many others. Australians, when questioning the justification for the PPS reform,<sup>9</sup> should perhaps examine the countries lacking the necessary legal paraphernalia to understand the direct effects of PPSL on availability of credit and economic growth. Metaphorically, while emerging markets must learn how to forge the necessary minimum set of conditions that can later be improved to see the first economic results generated by PPSL, Australia will enjoy the benefits of the synergies of PPSL systematisation.

This article's position is that the inertia of the EU as far as PPS law reform is concerned is a mistake, the economic consequences of which are yet to be seen – though not necessarily in the short term. This is a claim that deserves closer attention notwithstanding the raised eyebrows of sceptics,<sup>10</sup> many of whom have changed their stance, discouraged by the meagre economic output in some underdeveloped reform countries. The prevailing fragmentation of national PPS systems and the fundamental differences that exist among them has its price: unavailability of credit (especially to small and medium sized enterprises ('SMEs')) and obstacles to cross-border movement of capital. With the lack of an unequivocal direction from the EU, the often irreconcilable reform incentives, in particular those addressed to CEE, have caused not just confusion and frustration but measurable damage because of contradictory rules or conflicts arising from irreconcilable transplants – best illustrated by the case of Poland.<sup>11</sup>

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was a critical reply to the criticism of secured transaction law by Professors Jackson and Kronman put forward in their article 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 *Journal of Legal Studies* 1. Although it is far from fashionable to revisit and pay due regard to scholarship that is not of the most recent vintage in the US, for others the persuasiveness would suffice. Hence this reference.

<sup>9</sup> Indeed, the Australian reform dates back to the limited support the idea gained in the early 1970s – the first document being the 1971-72 Report of the Molomby Committee (an ad hoc committee of the Law Council of Australia). For an overview of the process see: Attorney-General's Department, Australian Government, *History of PPS* (10 November 2011) <<http://www.ag.gov.au/PPS/Pages/HistoryofPPS.aspx>>.

<sup>10</sup> For a recent article of a sceptical inclination, see Roderick A Macdonald, 'Transnational Secured Transactions Reform: Book IX of the DCFR in Perspective' (2009) 15(4) *Zeitschrift für Europäisches Privatrecht* 745.

<sup>11</sup> For a critical overview of the post-1990 Polish PPSL system and the idiosyncratic problems of Poland see John A Spanogle, 'Secured Transactions Law in Eastern Europe: the Polish Experience as an Example' (2010) 31 *Thomas Jefferson Law Review* 279, 291. Spanogle characterized the Polish *Law on Registered Pledges and the Pledge Registry 1996* (Poland) (ie, the Polish PPS Act) as an act that 'is a highly modified transplant, written by Poles especially for the Polish legal system, which works, but not as well as it could.' In his view, the main reason why the new secured transaction system did not work well was that each



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**C *Preliminary Caveats***

Three preliminary caveats are essential in an article comparing the laws and surrounding milieu of two continents divided by the *tyranny of distance*: the meaning of the geographic designations used; the hidden limits of European – or Australian – legal scholarship; and the problems caused by the ever increasing speed of socio-economic change affecting laws. To start with, it is not only the hectic history and the inherent complexity of Europe but also the subtle alterations geographic designations have undergone lately that require a few cautionary words. To remedy this group of problems and to avoid misunderstandings, two basic rules are employed here: first, the commonly established geographic designations will be maximally adhered to; and secondly, whenever something specific applies to a particular part, country or region this will be emphasised. Thus, the phrase ‘continental Europe’ does not extend to the British Isles. It will cover only the legal systems in the so-called ‘civil’ or ‘civilian’ legal family.

Two further typical sources of confusion must be mentioned: first, the terms ‘Europe’ or ‘European.’ EU-based mainstream scholarship frequently and incorrectly conflates the narrower EU with the entirety of the Old Continent. This pattern will *not* be followed here. Instead, the designation ‘Europe’ will include – besides continental Europe – Ireland and the UK in the west and Russia in the east (including Kamchatka). The justification is simple. Much more has occurred concerning PPSL at the nation state level as opposed to the EU level. Therefore, should Australians be interested in exploiting any of the European spectrum of security devices, the local national secured transactions laws – and not the laws of the EU – should primarily be explored. Here it should be noted that the DCFR, as a partially EU-sponsored project, notwithstanding its Book IX with the first ever European compact PPSL in history, is only a soft law instrument, that might – but need not – begin a very slow, piecemeal process of rapprochement in the domain of PPS law at the EU level.

The second well of potential miscommunications is the phrase ‘Central and Eastern Europe’. For the purposes of this article this designation will invariably encompass all the former socialist countries but will exclude the Central Asian successor states of the Soviet Union; even though these were earlier epitomized as ‘socialist.’ Mongolia is in any case out of reach. While many things have changed in this group’s countries

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secured transaction required the judicial confirmation that: first, a pledge was created, and; secondly, all the requirements of Polish law were adhered to. In other words, the new system became extremely onerous, document-based and anything but based on notice-filing: at 288.

that have acceded to the EU in the meantime,<sup>12</sup> it still makes sense to refer to them using the same umbrella expression especially as the central theme of this article – the reform of PPS law – has specifically targeted *all* the CEE countries and not only those that have become part of the EU.

Non-Europeans should bear in mind a few further matters related to European legal scholarship as well. What one may readily presume is that Europe and its major jurisdictions – that used to serve as diffusers of law or models for others – are to a non-negligible extent introvert. The repeated refusal to revamp English PPSL following the pattern of the Unitary Group’s laws, now embraced also by Australia, is a prime example. Nonetheless it would be hard to deny that Europe is also increasingly influenced by US law or assert that cross-fertilisation is non-existent. Quite to the contrary: compared to twenty years ago, the influence of foreign laws – especially that of US law – is much bigger in Europe today. Notwithstanding the changes parochialism still prevails and therefore it should not come as a surprise that no European source seems to have ventured so far as to compare the new Australian PPS law-related developments with the European landscape. Besides filling this gap, this article is out of the ordinary for its desire to canvas a broader, pan-European perspective, of which European mainstream scholarship is typically devoid. The other professed aim of this article is to be neutral and to represent neither the position of mainstream European scholarship, nor of any national ‘scholarly industry’<sup>13</sup> (including Hungary). It aims to provide a balanced yet critical account of a scholar who is enthused by the Australian developments but who has neither a particular reason to favour any of the known models, nor to disregard, or for that matter praise, the role US law has played in the still unfolding process of global convergence. The fact that Australian or US scholars are not interested in the work of the others, however, is not a justification for European mainstream scholarship to do the same. In Europe the scholars and experts of the few leading systems arguably enjoy a monopoly not just in the academic world but also in the lawmaking processes. For example, a cursory look at the names of the key drafters of the DCFR is telling.

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<sup>12</sup> The CEE countries that have acceded to the EU in the post-1990 period are: on 1 May 2004, the three Baltic States (ie, Estonia, Latvia and Lithuania), the Czech Republic, Hungary, Poland, Slovakia and Slovenia; in 2007 Bulgaria and Romania, and; finally on 1 July 2013 Croatia is expected to become the 28<sup>th</sup> member. Note as well that in 2004 Cyprus and Malta acceded to the Union together with the mentioned post-socialist countries.

<sup>13</sup> With respect to the West: ‘the academics in the scholarly industry ... develop loyalties and in little time their radical critiques and exposing modes are marginalized and silenced, [even though on the surface being] open and pluralistic.’: Ugo Mattei and Fernanda Nicola, ‘A ‘Social Dimension’ in European Private Law? The Call for Setting a Progressive Agenda’ (2006) 41 *New England Law Review* 1, 29.

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This criticism can be substantiated by browsing leading European law journals, books published on 'European law' and the documents drafted under the auspices of the EU or other organisations active throughout Europe (for example the EBRD). For CEE systems, EBRD typically limits itself to a cursory mention of 'the others'<sup>14</sup> or self-congratulation;<sup>15</sup> notwithstanding that this organisation has in fact learned what reform is about from the experiences in these countries. An even better indicator of this trend is the anaemic referencing to authors from the 'smaller' European states. Consequently, what Australians could extrapolate from European sources about the opinion of the 'rest' of Europe on the PPS law reforms is, in fact, largely the opinion of these Western European elites. This tacit centralism normally means the imposition of a 'common view,' typically formulated by these elites and reflecting only their conceptions; no matter the potential misfit. To be fair, admittedly scholars from non-leading systems display notable passivity, sometimes even animosity, towards the repeatedly imposed western conceptions.<sup>16</sup>

This article's occasional yet, in the domain of financial law, inevitable resort to unorthodox sources of law – reflecting rapid change – is also something quite unusual in European legal scholarship.<sup>17</sup> European scholarship has problems with

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<sup>14</sup> See, eg, Eva-Marie Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Cambridge, 2004); Harry C Sigman and Eva-Maria Kieninger (eds), *Cross-Border Security over Tangibles* (Sellier, 2007); Harry C Sigman and Eva-Maria Kieninger (eds), *Cross-Border Security over Receivables* (Sellier, 2009).

<sup>15</sup> A good example is the EBRD publication '*Law in Transition*' which is undoubtedly a valuable source on what is happening to secured transactions laws in Europe, yet only represents the views of EBRD, its staff and linked experts. As such it portrays an overly rosy picture spiced with very modest criticism. That however should not tarnish the role EBRD has recently played in disseminating knowledge on the importance of credit and security in CEE and beyond.

<sup>16</sup> This desire for democratisation of European scholarship, however, should not be mixed up with the next to impossible task of attributing equal detail and attention to each and every European system. Obviously this article is not in the position to cover the entire universe of PPSL either, yet it is hopefully a more balanced account, shedding light on until now largely unnoticed nuances. The blame for the neglect, however, should not be ascribed solely to the economically stronger states, which are in fact economically more capable of financing the prohibitive number of law reform projects. In case of reforms, with financing comes, however, the expectation to take the laws of the donor as the model.

<sup>17</sup> In Europe journals such as the *Financial Times* or *Wall Street Journal* are only rarely cited by law review articles or other traditional publication formats. Yet changes have become so frequent in our globalised world that often simply there is less and less time to catch up and react in due time to challenges through the conventional avenues used by legal scholars. In jurisdictions with more conservative academia, hence, years may pass until a proper analysis sees the daylight, or a particular problem becomes known through a

how to metamorphose into a new paradigm that can better face the challenges of contemporary fast-paced globalised times. It would be mistaken to attribute this merely to the legacy of legal dogmatism and positivism of continental European legal systems.<sup>18</sup> However, Australian lawyers – inevitably accustomed to more pragmatism – could be puzzled by the rosy, almost impeccable legal stratosphere that emanates, for example, from the commentaries of traditional European comprehensive codes and European scholarly publications. Leafing through the latest product of European legal academia, the DCFR and the drafters' comments, reveals no more than 'best principles' extrapolated from a selection of national codes or statutes, international treaties or principles hovering in the European imaginary superstructure.<sup>19</sup>

#### D *The Structure of the Article*

Given the heterogeneity of Europe and the less known changes that have occurred in the domain of PPSL in the last few decades, Part II of this article provides the reader with a typology of European PPS laws – or their functional segmented equivalents – based on their closeness to the new Australian system. This materialises in a 'resemblance test.' Such macro-level comparison demonstrates that – in addition to English law best known by Australians – numerous segments of other European jurisdictions' laws contain much more than a randomly gathered set of commonalities with the new APPSA. Part III is devoted to the comparative review of those socio-economic and other determinants that affect the efficiency of PPSL and

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publicised court case. Yet, financial law – including all the cogwheels of PPSL – is one of those areas that changes so fast, and is so influenced by exogenous factors, that numerous phenomena simply are bypassed if not taking a regular look into these other, unconventional sources of law.

<sup>18</sup> Put simply, legal dogmatism could be best described as system-thinking, or thinking to which it is quintessential to find and place each and every legal category in the hierarchy of law. The main problem with this model is that it inevitably entails rigidity because often ill-suited principles are forced upon new legal categories or problems. This has happened to such American successes as leasing, franchising or factoring upon their arrival to Europe. Again, with a significant simplification, positivism is such understanding of law to which only the enacted law matters at any one point in time. Admittedly, these were primarily the features of civilian legal systems; though they existed in their clearest forms somewhere in the 19<sup>th</sup> and early 20<sup>th</sup> century – subject to geographic variations. Many things changed in Europe by the 21<sup>st</sup> century.

<sup>19</sup> For example, comment to paragraph 2) of section IX – 1:105 of the DCFR, entitled 'Exclusions,' mentions the UNIDROIT *Convention on International Interests in Mobile Equipment*, open for signature 1 November 2001 (entered into force 1 April 2004) ('Cape Town Treaty'). See Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law* (Oxford, 2010) vol 6, 5402.

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attitudes to reform. It also lists the major differences between Europe and Australia along the lines of the building blocks of the Unitary PPS Group's laws. Before offering some concluding thoughts, Part IV briefly comments on some interesting solutions of the *APPSA*.

II EUROPE'S APPROACH TO REFORM OR MODERNISATION OF  
PPS LAW

A *Europe's Janus-faced Approach to Reform of PPSL*

1 *From Complete Rejection of the Idea to Book IX of the DCFR*

Europe's approach to the question of PPS law reform is Janus-faced: there are many promising developments yet one could hardly talk of a common European position. The main reason is that the Old Continent's PPS systems differ radically and as a rule possess no compact autonomous PPSL, instead the rules are scattered throughout other branches of law. Due to this fragmentation comparisons should be undertaken primarily on the level of identifiable 'segments' of PPSL but always having in mind the distortions that the lack of a common background may cause. For example, albeit both Australian and German law know various types of retained title, in Australia they are subject to registration but that is not the case in Germany.<sup>20</sup> Consequently, German law does not know of the super-priority of purchase money security. The conflict of a retained title with another security is resolved otherwise – to the detriment of predictability.

Wood's venerable classification of legal systems according to the ease with which various types of secured transactions could be enforced and exploited readily corroborates the *raison d'être* of a segments-based approach.<sup>21</sup> Namely, while the difference between the Australian and a French (Croatian, Scandinavian, or Hungarian) floating security is not negligible, in any event, it is much smaller than the discrepancies that characterise an Australian retained title versus a German one. In other words, the testing of the equivalence of the entire PPS systems (ie, the

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<sup>20</sup> Bearing that in mind, one may legitimately ask whether the German security devices could be named as 'security interests' at all given that the requirement of provision of public notice is lacking except for possessory pledges – where the security interest comes into existence (as in Australia) by transferring the possession over the movable to the secured creditor.

<sup>21</sup> No classification is impeccable and so the more angles from which an object is studied, the closer one gets to reality. The previously applied classification of European systems supplements such accepted classifications as the one attributed to Philip R Wood. See Philip R Wood, *Law and Practice of International Finance* (Sweet & Maxwell, 2008) Ch 2, containing the map of 'World Financial Law.'

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aggregate of all segments) would differ from the results of segments-based testing. Otherwise, the various segments of European PPSLs differ from the APPSA from minor technical details to polar underlying policy choices. Consequently, it is not only hard to identify exactly what the common European position is but all statements must be accompanied by qualifications. Before making any business decision, therefore, Australian businessmen are well-advised to thoroughly investigate whether a seemingly familiar institution or rule is in effect identical with the rule in Australia; especially as some writings make oversimplified and potentially misleading claims.<sup>22</sup>

The nearly insurmountable diversity of European PPSLs should primarily be blamed for Europe's incapability of departing from the status quo. Setting Book IX of the DCFR, the French and the CEE reforms aside, one could say that Europe – in particular the EU as a supranational organisation – has failed to meet the secured transactions law reform-challenge. Not much changes with the DCFR either, which as a soft law instrument aims solely to 'serv[e] as a source of inspiration for law making and law teaching at all levels.'<sup>23</sup> Therefore, one may only very conditionally characterise it as the expression of common European thought on this branch of law. At best, one may posit the DCFR as a promising starting point that might realign Europe with the Unitary PPS Group model. For the time being, however, it is not an exaggeration to claim that Europe still regards voices and trends promoting such rapprochement with a high degree of suspicion.

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<sup>22</sup> For example, often the registration requirement and/or the provision of public notice as the backbone of UCC art 9 and now also of APPSA are disregarded. Such simplification leads to the false conclusion that, for example, the German popular bank 'security transfer' (*'Sicherungsübereignung'*) is the equivalent of the common law security device 'chattel mortgage'. Yet registration is a condition *sine qua non* of chattel mortgages in the US and also in Australia (see APPSA s 21(2)). Michael Bütter and Thomas Krüger, for example, while correctly concluding that 'there are no real equivalents to the fixed and floating charge in German law,' posit the 'security transfer' as the closest equivalent. In justifying this opinion, however, they list only the following features as crucial: 1. possibility to cover both present and after-acquired property by the security transfer; 2. right of the debtor to continue using the assets encumbered by the security transfer in the ordinary course of business, and; 3. requirement of the identification of the assets covered. See Michael Bütter and Thomas Krüger, 'The English Fixed and Floating Charges in German Insolvency Proceedings – Unsolved Problems under the New European Regulation on Insolvency Proceedings' in Hans-Bernd Schöfer and Hans-Jürgen Lwowski (eds), *Konsequenzen wirtschaftlicher Normen: Kreditrecht – Verbraucherschutz* (DUV/Gabler Edition Wissenschaft, 2002) 33, 55.

<sup>23</sup> Christian von Bar, 'A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 1 <<http://www.ejcl.org>>.

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The increased interest in the economic potential inherent in PPSL and in the Unitary Model seems to have started at the EBRD's conference in Budapest in 1992.<sup>24</sup> That could be interpreted as the turning point from a rapprochement and reform-hostile stance, largely attributable to UNCITRAL's early position,<sup>25</sup> to a paradigm that no longer excludes convergence per se. The conference set the ball rolling although it focused primarily on the eastern part of the continent as the predominant view was that only these countries lacked adequate PPSLs. Almost all former socialist countries launched PPSL reforms typically sponsored in some form by international organisations. As each project followed one particular but differing pet model, substantially varied systems were created, some with incompatible transplants. In the worst case scenario, attempt was made to borrow from both the German and one of the common laws systems. The first allows the creation of security interests on chattels without any registration (i.e., simply by inclusion of a clause into the underlying credit contract) and the latter requires registration. Not infrequently the least painful approach was employed by local 'reformers' and instead of a real in-depth scrutiny and appropriate adaptation of the foreign transplants, laws were by and large mechanically copied. EBRD's daring move – later subscribed to by UNCITRAL, the International Institute for the Unification of Private Law ('UNIDROIT') and the World Bank – eventually led to gradual infiltration of elements of the Unitary Model into the most recent European achievement, the

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<sup>24</sup> The idea that the lack of credit-friendly security law – in particular PPS – in the post-socialist CEE countries should be addressed by a Model Law was proposed by CEE commercial law experts Stanislaw Soltysinski and Petar Šarčević at the Round Table held at EBRD's First Annual Meeting in Budapest in April 1992. The EBRD sponsored CEE reforms have broken the dogma that rapprochement in this domain is impossible and have meant the beginning of the decline of the 'Drobnig-era'. See generally Jan-Hendrik Röver, 'An Approach to Legal Reform in Central and Eastern Europe: The European Bank's Model Law on Secured Transactions' (1999) 1 *European Journal of Law Reform* 119.

<sup>25</sup> The report prepared by the German expert Ulrich Drobnig in 1977 was the first international document comparing security interest law in the modern era. See Ulrich Drobnig, 'Legal Principles Governing Security Interests' (1997) VIII *UNCITRAL Yearbook* 171. Unfortunately the idea that there could be rapprochement, especially between common and civil law systems in the field of PPSL, was put aside by the decision of the Thirteenth Session (1980) of UNCITRAL stating that 'world-wide unification of the law of security interests in goods ... was in all likelihood unattainable. [Hence]..., no further work should ... be carried out by the Secretariat and the item should no longer be accorded priority.' See *Report of the United Nations Commission on International Trade Law on the work of its thirteenth session*, 13<sup>th</sup> sess, UN Doc A/35/17 (14-25 July 1980); available electronically at <<http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/a-35-17-e.pdf>>. Although UNCITRAL is an international organisation, the mandate and work of which is not limited to Europe, it determined the fate of PPSL reform in Europe as well.

DCFR. The more successful the DCFR is in persuading lawmakers of various European countries of the advantages of a comprehensive system of the Unitary Group's type, and the increased role the new CEE laws (inspired by common law) will play in economic life, the closer Europe will come to the APPSA.

## 2 *Reformed, Modernised and Unreformed Systems*

Two stages may be observed in the evolution of PPSL in Europe: the incremental organic upgrading of various segments of PPSL by individual states, ongoing virtually throughout the 20<sup>th</sup> century; and the post-1990 targeted reforms as exemplified by the French and CEE developments. The different degree of change and the more prolonged introduction justifies referring only to the latter category as 'reforms,' the former ought to be labelled rather as forms of 'modernisation.' Even though scarcely documented – let alone systematised – in English language sources, quite a number of PPSL modernisation projects are known. The main German innovations – the '*kautelarische Sicherheiten*,'<sup>26</sup> or contract clause-based security devices – popular since the 1950s not just within the then West-Germany but also outside it – are the best, though not the only, cases in point. The introduction of the local equivalent of English law's floating charge by the Scandinavian states, or attempts to follow suit by Hungary and Poland in the pre-WWII period, are equally illustrative.

From the end of the 20<sup>th</sup> century, however, targeted reforms seem to have become the norm in Europe. The French revamping of the field, starting in 2002 and still unfolding in 2011, is the leading Western European example. The many CEE post-1990 initiatives are examples from the eastern part of the continent. Interestingly, the French upgrading of laws seems to have attracted less attention outside France and francophone countries than the typically international organisation-sponsored reforms of CEE.<sup>27</sup> The common denominator of the two is that they undoubtedly represent a rapprochement with the Unitary PPS Group. The French reforms have a

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<sup>26</sup> There are not too many English language sources dealing with these peculiar security devices yet; for an in-depth study resort to venerable German sources is a must. The leading English language authority is Rolf Serick, *Securities in Movables in German Law: An Outline* (Kluwer, 1990). For a German language discussion on both personal and proprietary security devices see the treatise written by Peter Bülow, *Recht der Kreditsicherheiten* (CF Müller Verlag, 1997).

<sup>27</sup> The scarcity of English and other non-French-language sources about French law and the self-distancing of French scholars from international developments has become a major problem, parallel with English acquiring the position of contemporary *lingua franca*. Hence, although it is less known and less discussed, France has a system that is much closer to the APPSA. For an example, consider main title financing transactions, which are also registrable in France – but escape registration in Germany.



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wider reach as they eventually affect even those African countries that follow the French law-inspired OHADA Model Law.<sup>28</sup> The fact that European developments cross the geographic borders of the Old Continent is a further justification for this article.

Besides those mentioned there are European jurisdictions that have either escaped the winds of change or passed laws that remain dead letter: the unreformed systems. Moldova might be an example of the former and Albania of the latter. The lesson that should be borne in mind is, however, that geographic location is no longer necessarily indicative of the credit-friendliness of a system and some Eastern European jurisdictions might have a PPS that is not just closer to the Australian system but might even be functioning better. Partially due to language barriers, it is hard to classify such countries as Greece, Portugal or Spain, which acceded to the EU relatively recently after a prolonged, hectic period that was hardly concerned with reforming commercial law. For example, the impressive Spanish statistical data on securitisation of home mortgages from the pre-‘credit crunch’ period<sup>29</sup> demonstrates how far the financial law of the largest Iberian country has developed, but this does not equally apply to PPSL. Australians must realise how divided Europe is; the resultant transaction costs and their economic consequences, in particular, on cross-border businesses.

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<sup>28</sup> ‘OHADA’ is the acronym taken from the French designation of the Organization for the Harmonization of Commercial Laws in Africa (*L’Organisation pour l’Harmonisation en Afrique du Droit des Affaires*) which has 16 African countries as members. The organisation was established by a treaty signed on 19 October 1993 in Port Louis, Mauritius, *inter alia*, to harmonise commercial law (including the law of securities) mainly following French law. The Uniform Act Organizing Securities, however, contains not just rules on a version of floating security but it regulates also suretyships (ie, personal securities). Africa is lagging behind in modernising commercial and financial laws.

<sup>29</sup> Data from 2005, 2006 and 2007 shows that Spain was second-ranking after the UK in Europe. See, eg, the Association for Financial Markets in Europe, Securitisation Division (12 June 2012) <<http://www.europeansecuritisation.com>>. While this was prior to the 2008 financial crisis referred to as a major advancement, by 2012 it became clear that securitization was in fact a vehicle for uncontrolled borrowing that brought Spain to the brink of collapse. The credit crunch and the global financial crisis put an end to the exponentially growing popularity of ‘off balance sheet’ type securitisation in Europe. The German ‘on balance sheet’ variable, however, seems to be ongoing, but at a much smaller rate. The smaller CEE states have been again left on their own, without guidance from the EU. In fact, there is good in the bad that the uncritical euphoria surrounding the American-type of securitisation has not substantially caught these systems, otherwise they might have also suffered direct shocks. For the case of Lithuania see Lina Aleknaite, *The Prospects of Asset Securitization in Lithuania in the Light of Experiences from the United States of America and Europe* (Doctoral Thesis, Central European University, 2009).

## B The Typology of European Segmented PPS Systems

### 1 The Benefits of Identifying the Similar Segments

Many reasons justify this seemingly only theoretical probe. First and foremost, determining the extent to which various segments resemble each other has very practical consequences, as the misfortunes of some creditors have already demonstrated in practice – and is but a Sisyphean labour. The leading international case seems to be *Hong Kong Shanghai Banking Corp v HFH USA Corp*<sup>30</sup> in which a German supplier to the US lost his priority over the delivered goods because he was ignorant of the fact that retained title is subject to filing and the priority system of the Unitary Model in the US. Now under the APPSA retained title is also subject to registration as in the US, but there is a crucial difference. While the American system has explicitly formulated extraterritorial effects, potentially sparking concerns about comity, the restrained Australian approach seems to have bypassed the hardships that recognition and enforcement of foreign security interests may cause in Australia.<sup>31</sup> In other words, even though not yet tested the outcome of the *Hong Kong v HFH* case, with a German supplier and a partner having perfected a security interest in Australia, may resolve differently. The more often security interests cross borders, especially interests from systems based on contrasting policy choices, the more the importance of this concern will increase.<sup>32</sup>

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<sup>30</sup> 805 F Supp 133 (WD NY, 1992). In this case the American court did not recognize the priority of the German supplier based on a retained title (or in Europe a retained ownership) (ROT) duly created under German law – not requiring provision of public notice through registration – irrespective that the parties had agreed that the applicable law to the transaction would be that of Germany.

<sup>31</sup> Reference is here made to APPSA pt 7.2 entitled ‘Australian laws and those of other jurisdictions.’

<sup>32</sup> Be it the registration-hostile German or the Chinese model, the exact features of which are yet to crystallise. China is now in the process of eclectically transplanting those commercial laws (or elements from them), which fit its policies and which seem to be the best available tested models for boosting various segments of the economy. While USA law seems to be the most favored, German law’s influences should not be easily disregarded. For example, while UCC art 9 seems to be a good candidate for transplantation, the system and generally the influence of the *German Civil Code* have also left traces in this Asian country. It remains to be seen whether the final outcome will resemble the American model – thereby also APPSA – or rather the German secretive system. On the recent developments related to Chinese property law see Stefan Messmann, ‘Protection of Property in China – Changes under the new Chinese Legislation’ (2008) 15 *Zeitschrift für Chinesisches Recht* 113.

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2 *The Resemblance Test*

It can be safely predicted that it will not take long for a US court to decide that the *APPSA* has passed the equivalence test<sup>33</sup> enshrined in the conflicts of law provisions of *UCC* art 9, which is pronounced to be dependent on the anti-ostensible ownership devices employed.<sup>34</sup> As under the *APPSA* public notice is to be provided to the

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<sup>33</sup> The seminal article recognized only Canada as having a system 'equivalent' to that of the US. New Zealand – having reformed its system in 1996 following the PPSL of the Canadian common law province of Saskatchewan that was inspired by *UCC* art 9 – was not even contemplated by the author. Now, having *APPSA* handy, it could be speculated that the Australian embodiment of a comprehensive system drawing too on *UCC* art 9 would pass the equivalence test with the US. See Hans Kuhn, 'Multi-State and International Secured Transactions under Revised Article 9 of the Uniform Commercial Code' (2000) 40 *Virginia Journal of International Law* 1009, 1062-64. As far as Europe is concerned, the situation is not that rosy. Presumably only some specific segments of English law, some CEE reformed laws, and that of Book IX of the DCFR would pass the American 'equivalence test' enshrined into the new conflicts of law rules of the 1999 Revised Version of *UCC* art 9 (in particular § 9-307(c)). The European systems resemble rather the comparison of Mexico to the US. As Kuhn formulated, the juxtaposition of Mexico and its northern neighbour was 'an invitation to compare apples with oranges because the structure and the terminology of Article 9 is not comparable to most foreign systems': at 1062. Still he cautiously questioned whether the fact that provision of public notice (registration) is not a general requirement on all secured transactions would make the Mexican system non-equivalent? The position of this article is clearly that some segments in most European systems would pass the equivalence test both with Australia and the US – however so far that has not been dealt with by courts or by scholars.

<sup>34</sup> See *UCC* § 9-307(c) that recognises as equivalents of American security interests – 'as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral' – only such non-possessory security interests that were validly created under a foreign law which requires for perfection filing, recording or registration: ie, provision of public notice by means known to *UCC* art 9. Hence, while the new Australian, Canadian or New Zealand's security interests would presumably pass the 'equivalency test', the German security transfers or retained titles – not subject to any kind of registration – would not. The CEE systems that know these secret security devices would not be recognised by American courts either. In all cases where the debtor is not located in the USA or in a system of substantially equal perfecting requirements, the American system presumes that such debtors are located in the District of Columbia (§ 9-307(c)) and security interests on property, unless filed, in the District of Columbia. The question of whether the extraterritorial reach of *UCC* art 9 and the security interests registered in the District of Columbia on property of foreign debtors would be also recognised by foreign courts is yet-to-be-tested as *In Re Flag Telecom Holdings* (Unreported, United States Bankruptcy Court, Gropper J, Bankruptcy Judge, 23 October 2006) suggests it is far from easy to find appropriate solutions in reality when two jurisdictions with diametrically

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participants in the market by methods virtually analogous to those applied in the US and Canada, the outcome of the query of equivalence seems quite certain. The European systems, however, are still radically different from the Unitary PPS Group's model and only some of their segments may, at least theoretically, satisfy the test. For that reason, when examining Europe one should rather think in terms only of a *resemblance* rather than an *equivalence* test.

Here, the necessary caveat is that the US equivalence test is based on the economically most important segments of PPSL only. In other words, the judgment on equivalence is passed based on these significant segments only and full overlap is not required. The differing treatment of such non-paradigm secured transactions as consignments may not necessarily be evaluated and thus irrespective of the discrepancy the US equivalency test might be passed. However, as no precise formula is explicitly spelled out anywhere in US PPSL for the application of the equivalency test, courts ought to have a final say on this issue. Yet it is mistaken to presuppose that commonalities exist only among common law jurisdictions given that even continental European civil laws systems resemble the *APPSA*, or *UCC* art 9, though with respect to some segments only.<sup>35</sup>

This is best epitomised by the fact that the rules on possessory pledges or on investment property significantly correspond, while there is less correspondence in the case of more complex secured transactions. Still, the *APPSA*'s mysterious concept of 'control' means roughly the same thing everywhere, as 'control' is dictated by the nature of the assets and the connected practices of the industries. In the absence of case law, this is but a theoretical claim, yet the French or the Hungarian floating securities – the constitution of which presumes provision of public notice by a method very similar to the one provided by the Unitary PPS Group's laws – would also pass, at least, a contingent resemblance test. The fact that these floating securities

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opposite features are at stake. In the case it was decided that as 'registration of the [underlying] Security Agreement was not permitted under Taiwanese law and could not have resulted in an enforceable security interest under Taiwanese law [all the parties could do was foresee in the agreement that the Taiwanese party would take] all actions to the maximum extent ... to ensure the legality, enforceability, validity and perfection of *such* Security Interest': at 1.

<sup>35</sup> Hungary used to be the leading PPSL reform system in the 1990s and to a certain extent may be taken as representative of CEE; though the reform of each of the CEE countries is a story in itself. As the case of Hungary illustrates, reform of PPSL with common law elements has reached the Old Continent. CEE systems no longer blindly follow their once venerable continental European models; which in Hungary's case has traditionally been Germany.

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do not cross borders so frequently however does not lead to the conclusion that there is nothing common between the *APPSA* and European laws.

### 3 *Western European Systems*

#### (a) *Commonalities and Caveats*

The development of Western European systems was incremental and uninterrupted by socialism, a system inherently hostile to credit. As a result, in none of them was there a point in time when radical PPSL reforms should have been introduced with urgency. This applies even to the French efforts undertaken in the first decade of the 21<sup>st</sup> century. Rather, gradual, segmented modernisation is the way to define the ongoing process in these countries. *Gradual*, because – unlike the complete paradigm shift that occurred with the enactment of the *UCC* by the US States or the *APPSA* – here changes occurred incrementally in an organic process of evolution. *Segmented*, as a comprehensive system of PPSL has not yet been embraced by any European country; definitely not of the *APPSA* sort. There is no better example than title financing, which is looked upon as completely distinct from mortgages and pledges by most countries, including England. Here, the caveat is that the conceptual unity of in rem rights on immovables and movables in civil law systems should not be confounded with the functional approach of the unitary concept of security interests forming the backbone of the Unitary PPS Group's model.<sup>36</sup>

The other factor that makes comparison hard relates to the operation of the rule of law and its impact on the overall efficiency of PPSL systems. Admittedly, compared to CEE or countries on the periphery of the continent (eg, Greece and Portugal), the cogwheels of the rule of law have been performing much better in the western part of the continent.<sup>37</sup> This is a valid qualification even today, although many CEE systems have caught up with the West in certain respects, especially those that have acceded

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<sup>36</sup> A statute that would clearly demarcate the division between security interests on real versus personal property – as is now the case with the short title in the *APPSA* – cannot be found in civilian systems. As a result civilian lawyers think in terms of a single 'security law' in which, however, the stronger real property security law simply overshadows its deemed-to-be weaker brother. For example, this is the reason that for them it is virtually a dogma that the 'first in time, first in rights' is the single priority rule deemed to be sufficient to satisfy all needs. Finding the local equivalent of such complex priority rules as the super-priority of purchase-money security would be thus hard to do.

<sup>37</sup> Compare, for example, the corruption-related data of the Scandinavian states and Italy to see that there is merit in this caveat. It is also already commonly recognised that some rule of law indicators of certain CEE states have become better than those of a few Western European ones. For example, according to some recent evaluations, litigation and enforcement no longer lasts the longest in the court systems of the region.

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to the EU. This is of relevance for comparisons because, first, notwithstanding the quality of CEE PPS reform laws, reforms could not materialise sufficiently because of the defects in the rule of law. Secondly, the significantly greater observance of the rule of law in the West was a kind of substitute for the inherent deficiencies of their PPSLs.<sup>38</sup>

Finally, two caveats before proceeding to the aperçu of Western European PPS systems. The first is that national pride is often a characteristic even of western systems. This continues among the expert elites from essentially the same set of 'developed' countries,<sup>39</sup> obviously not to the benefit of comparative law.

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<sup>38</sup> The embeddedness of law is an important factor, for example, when thinking about whether to propose the introduction of self-help enforcement of security interests in such emerging markets as the CEE systems were (and some still are). Namely, while in Germany (or any of the Scandinavian countries or Switzerland) one could – at least that is what conventional wisdom suggests and what German experts claim – safely presume that in the case of default average debtors the first thing to do will *not* be to hide, dispose of or otherwise prevent the secured creditor enforcing his rights, and that secured creditors will be in the position to efficiently enforce their rights through courts. Yet in no CEE system has the behaviour of debtors been so impeccable and in no system are courts-cum-semi privatized bailiffs efficient enough. In any event, the embeddedness of law on citizens and businessmen is an important factor that matters in reforms, though due to path dependence and the fact that the rule of law is typically a constitutional law matter the interplay of the rule of law and PPSLs has not been properly analysed so far.

<sup>39</sup> Absolutely illustrative and telling in this respect is Ulrich Drobnig's criticism of Philip R Wood's 'Global Law Map'. Drobnig, as a German scholar, first 'respectfully disagreed' with Germany's placement only into the second – 'quite friendly to security' – group, instead of sharing the first place with UK and Ireland. Then, he defended France criticizing Wood for using outdated criteria for qualification. See Ulrich Drobnig, 'Basic Issues of European Rules on Security in Movables' in John de Lacy (ed), *The Reform of UK Personal Property Security Law* (Routledge-Cavendish, 2010) 444, 446-47. The point is that both scholars may be legitimately criticised on a number of accounts, from completely disregarding half of Europe through to their suppressed but still, at least, indirectly noticeable anti-American bias. The marginalisation of CEE is a problem because in fact due to the post-1990 secured transactions reforms (sometimes even more waves) in this part of Europe, the once underdeveloped systems have, at least, caught up with some of the Western European laws. As a result, one should not place a significant bet on a claim that, for example, the leading laws of Portugal or Greece are generations ahead of those of the Baltic States, Poland or Serbia; no matter which particular aspect of PPSL is looked upon and no matter from which point of view, that is, written versus 'living' law. The hostility to US law – perhaps more easily noticeable by scholars stemming from the rivaling 'main' European systems – is a problem because occasionally better solutions are offered by US law to emerging markets than what comes from Western European systems directly or with the commendation of the EU.

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Additionally, the rivalry is nothing more than 'simple reshuffling of the cards' rather than development of novel – preferably interdisciplinary and more quantitative – analysis-based tests for more in-depth comparisons.

(b) *Apercu of Western European PPS Systems*

The discussion would not be complete without a rundown of western systems based on the basic features of their PPS systems. This includes the UK, presumably that niche of Europe with which Australians are most familiar. With this in mind, a succinct claim will suffice: English law<sup>40</sup> will remain very much like the pre-*APPSA* (to wit, compartmentalised, with multiple registries, separate title and receivables financing rules) primarily due to industry pressure and irrespective of academic opinions to the contrary.<sup>41</sup> Notwithstanding the process of devolution and its mixed legal nature, Scotland shares many of the features of English PPSL; time will tell to what extent and in what direction that will change in the future.

France should be mentioned in particular for resembling the *APPSA* for recordation-subjected leasing ('*crédit bail*') and for recognising the limited equivalent of a floating charge ('*nantissement de fonds de commerce*').<sup>42</sup> The latter are unknown, for example, to German law. French rules on assignment and receivables financing are, however, ranked by many as unnecessarily formalistic and, as such, hindering development in this area despite the recent reforms.<sup>43</sup>

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<sup>40</sup> The same could be claimed also vis-à-vis Scotland (a mixed system) where resistance to realignment with the Unitary PPS Group seems to be equally present.

<sup>41</sup> As concisely described by McCormack '[p]ractitioners have generally been at best, indifferent, and at worst, outrightly hostile to the idea of ... reforming the English law of personal property security along the lines of article 9 of the United States Uniform Commercial Code which was first adopted in the 1950s and whose influence has since spread to the common law provinces of Canada, New Zealand' and now to Australia. 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* (Routledge-Cavendish, 2010) 83, 83.

<sup>42</sup> See *Code de commerce* [Commercial Code] (France), Title Four, Chapter Two – [Charges on a Business]. English translation of the code is available at <[http://www.legifrance.gouv.fr/html/codes\\_traduits/commercetextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm)>.

<sup>43</sup> Special statutes had regulated the various specific aspects of the personal property law in France until 2002, when they were integrated into two new codes extending, however, only to commercial law. The one inheriting the old designation of '*Code de commerce*' took over the topics on enterprise mortgages (floating charges), warehouse receipts, hotel equipment, oil stockpiles, industrial and commercial equipment as well as retention of title, the other one – entitled '*Code monétaire et financier*' [Monetary and Financial Code] (France) – now contains the rules on leasing, assignment and pledge of commercial receivables as well as

With the exception of the mortgage and the so-called 'land charge' – a tandem of security devices on immovables<sup>44</sup> – German law is a registration-hostile system but has a number of almost routinely used contract-based security devices known as the '*kautelarische Sicherheiten*'.<sup>45</sup> These devices were invented by businessmen and recognised by courts but are not subject to registration. This is the case with retention of title ('ROT') clauses regularly added to supplier contracts in Germany.

These devices are interesting phenomena because their existence casts new light on three fundamental tenets of German law: (i) the absence of the *stare decisis* doctrine; (ii) the comprehensiveness of codes, and; (iii) the inviolability of the principle of *numerus clausus* of proprietary interests. As to (i) and (ii): the court-recognised security devices have survived decades without statutory support and were invented because the codes did not offer appropriate devices for the exploitation of personal property as collateral. As such, they managed to legitimise themselves by, in effect, contravening the principle of the *numerus clausus* of proprietary rights according to which 'legislation is the most important and, strictly speaking, the only legitimate source of rules on proprietary security rights.'<sup>46</sup> Even though they could be taken as demonstrating that the rigid, dogmatic codes are capable of entertaining changing business needs, the lack of detailed rules on the effect, priority position and other issues that are regulated by a typical Unitary PPS Group statute makes the system less predictable. This requires a more in-depth comparative analysis of these systems,

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securities and other financial instruments. See Drobnig, 'Basic Issues of European Rules on Security in Movables', above n 39, 445.

<sup>44</sup> German law is known for having two separate types of liens (security interests) on immovables – that could be taken to be the equivalent of common law 'real property'. The crucial difference between the two is that the mortgage ('*Hypothek*') is accessory, contrary to the land charge ('*Grundschild*') that is not. A security device is accessory if its fate is dependent on the underlying secured transaction. The land charge, as per definition not being accessory, can be transferred independent of the underlying transaction. In fact, this device was invented to allow for easy sale of mortgages on the capital markets.

<sup>45</sup> Normally the following devices are listed under this heading: 1. security transfer; 2. retained title; and 3. security assignments, together with their extended and expanded versions. The security transfer is extensively used by banks and is similar to common law chattel mortgage with the exception that it is not subject to registration. As opposed to that, ROT – the simple form of which is regulated by the *Civil Code* – is likewise routinely used by suppliers without any kind of recordation and is included into the underlying supply contract or transport documents. See Serick, above n 266; see also Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai könyvkiadó, 2002) Chapter on Germany.

<sup>46</sup> See Drobnig, 'Basic Issues of European Rules of Security in Movables', above n 39, 445.



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which in addition to Germany include Austria, the Czech Republic, Poland, Slovenia and some other successor states of the former Yugoslavia.<sup>47</sup>

The saga of the Scandinavian states – which belong to the civil law legal family yet form a special sub-part of it with common features and shared legal institutions (some idiosyncratic) – is quite unique.<sup>48</sup> It is regrettable that little attention has been devoted to these economically strong systems by international scholars apart from the Norwegian '*Lov om of pant [panteloven]*'<sup>49</sup> that used to be mentioned as a Scandinavian precursor to changes in the direction of UCC art 9. From a macro perspective, they are as fragmented as the pre-APPSA regime. On closer scrutiny, however, the fact that Sweden provides for a 'business mortgage' ('*företagsinteckning*') should not be taken as more than a rough functional equivalent of the floating charge,<sup>50</sup> the peculiar characteristic of which is its limited scope.<sup>51</sup>

Much less is known about the other Western European systems. This is so partly because they are overshadowed by the 'major systems', to a great extent because much less is written in languages other than local languages, by local scholars. What is available is very positivistic, limited to the reproduction of what written laws say,

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<sup>47</sup> Some degree of uncertainty plagues claims concerning countries like Poland or the successor countries of ex-Yugoslavia, on one hand, because no statistical data exists on the use of these security devices (as they are not subject to registration). On the other hand, in some of them reforms have been launched following the Unitary Model and hence it is not clear whether the new system has pushed out the old, German originated system, and if so, to what extent and in what niches of the economy.

<sup>48</sup> Of relevance to the present work is, for example, that as part of the Nordic legal cooperation, Denmark, Norway and Sweden enacted a *Uniform Conditional Sales Act* during 1915-1917. Though the Act regulated only the relations of the parties to these contracts and did not deal with their effect on third parties. See Drobnig, 'Legal Principles Governing Security Interests', above n 25, 208-09 [2.6.1.1].

<sup>49</sup> The English translation of the Liens Act's text is available at <<http://www.ub.uio.no/ujur/ulovdata/lov-19800208-002-eng.pdf>>.

<sup>50</sup> The Swedish 'business mortgage' has, at least, three idiosyncratic features. First, a specific asset of the debtor pledged separately will not be included into the assets serving the business mortgage. Secondly, the floating security can be activated (roughly equivalent to crystallisation in English law) solely upon the opening of bankruptcy proceedings. Thirdly, this security device has priority over general creditors only up to the 55% of the bankruptcy estate that is formed after creditors with super-priority have been paid. See Zoran Stambolovski and Maria Tholin, 'Sweden' in David Franklin and Steven A Harms (eds), *International Commercial Secured Transactions* (Carswell, 2010) 221, 225-26

<sup>51</sup> Besides Sweden, the unrestricted, big floating charge-equivalents were introduced in Finland but their reach was downsized to 55% (Sweden) and to 50% (Finland) of the value of the enterprise assets used as collateral because of misuses. See Drobnig, 'Basic Issues of European Rules on Security in Movable', above n 39, 448.

coupled with abstract commentaries without much empirical evidence or references to court cases. This makes the overall picture of these systems limited, unrealistically rosy and hence, to a certain extent, misleading. This is another characteristic that makes lesser known European systems similar to laws of CEE. The fact that these systems have escaped the degradation of private property due to communist ideology, including credits and all forms of security law, however, is an advantage many CEE countries have been unable to make up in the past 20 years or so. That is another reason why it should be tempting for CEE reformers to make a quantum leap by embracing the more efficient common law-inspired Unitary Model of PPS law.

#### **4** *Post-socialist Systems of CEE*

##### *(a) Common Trends*

A good starting point is that the classification of the CEE countries along the traditional lines of legal families continues to be useful. These systems still primarily model themselves after one or more of the 'main' continental European laws and they routinely look first to a longstanding benchmark. Now numerous factors blur the distinctions so that it is not as easy as it used to be to enlist these systems under any classical heading. Four trends ought to be stressed in that respect: first, increased influence of common law (though primarily US and English law); secondly, increase of cross-border activities on all levels; thirdly, growing regulatory competition caused by the desire to attract foreign capital; and finally, changing receptiveness to foreign law and business practices.

In many areas of law the increased influence of Anglo-American law is readily visible, from bankruptcy to intellectual property to all laws touching upon finance. In the case of PPSL, that was primarily due to the reforms sponsored by countries or international organisations promoting principles inherent in the Unitary PPS Group's model. The voluntary application of common law-based business patterns, though, was perhaps an even more significant factor.<sup>52</sup> On the other hand, the clearly increased role of court cases is presumably more ascribable to genuine exigencies caused by the high rate of change in these states due to transition, the ongoing

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<sup>52</sup> As a result, now many banks offer, for example, 'escrow account services', the English designation not even being transmuted into a local language equivalent. Heeding to common law, covenants have also become standard paraphernalia of, especially, international financial contracts, though it seems none of the local languages has a separate term for them – hence the easiest explanation of what 'covenants' are is referring to them as contractual clauses of special significance but not creating in rem rights.

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regulatory competition,<sup>53</sup> or – in those that acceded to the EU – the peculiar nature of the European Court of Justice’s judgments.<sup>54</sup>

The cross-border nature of business has also become a routine driving force for developments. German banks brought with them their tested patterns and the Scandinavian ones theirs. Indeed, the two most successful newcomer-advanced transactions – ‘leasing’<sup>55</sup> and ‘franchise’ – seem to have arrived in the CEE via Western Europe. Although the receptiveness of CEE countries has varied – from exuberant and uncritical openness to everything western in the first years of the 1990s, to reform fatigue, through to outright hostility – socialist law, or other remnants of the system, have virtually disappeared, except for the unreformed healthcare or pension systems that have also become a problem in the rest of Europe. The progress of PPS law reform was often overshadowed by acute governance issues such as healthcare and pension reforms. While the significance of PPS law reform is well understood by industry, professionals and economists, the average citizen has

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<sup>53</sup> A number of CEE countries have already introduced important changes with respect to the publication of court decisions and changes seem to continue. Ukraine has, for example, in May 2006, statutorily required the uploading of the text of all court decisions into a centralised computerised database. The system seems to work, though the text of decisions that are politically sensitive often are not necessarily retrievable. On the contrary, in Hungary in May 2011 the predominant portion of court cases is available only to judges and court staff. That is a problem because – irrespective that officially, and according to the established doctrine, there is no *stare decisis* in that country – courts in effect do follow and take into account the decisions of other courts. However, with a lack of appropriate empirical analyses this is hard to prove.

<sup>54</sup> Officially there is no *stare decisis* in the EU and hence the decisions of the European Court of Justice (ECJ) or the Court of First Instance do not have the binding effect known to common law. Yet the ECJ has introduced a number of important principles that, to a certain extent, amount to more than adjudication and come close to law making – which is not the function of courts according to traditional civilian doctrines. One such important tool ensuring the primacy of the ECJ in interpreting EU law is the *acta clara* doctrine.

<sup>55</sup> A terminology caveat is a must here. Namely, what has come to be known as ‘leasing’ in continental as well as CEE is in fact the amalgam of various title financing transactions in common law systems. Hence, a contract entitled ‘leasing’ - yet on the basis of its content (clauses) - might amount to any of the known title financing devices in Anglo-Saxon systems; ie, hire-purchase, conditional sales or leasing (or, even the local idiosyncrasies similar to the Pennsylvania bailment-lease). In Hungarian, for example, the following designations used to be in use: ‘*lizing*’ (the English term written according to the generally accepted Hungarian pronunciation), ‘*tartós bérlet*’ (roughly: continuous lease), and ‘*bérlet-vétel*’ (hire-purchase). As leasing has become regulated with the new *Civil Code* in Hungary of 2009, the effect that will have on the use of designations and on the behaviour of businesses remains to be seen.

little knowledge or understanding of the issues. The benefits of an effective PPS system are indirect, and likely to be overshadowed by pressing daily problems such as healthcare funding shortages. The media tend to focus on more current issues directly affecting the citizenry. By comparison, problems concerning adequate credit and effective PPSL are mostly only discussed in scientific, academic and industrial circles. Because healthcare and pension reform are burning issues that demand immediate attention, governments focus primarily on these issues, which also provide more opportunities for populist rhetoric and initiatives. Having this in mind, it is striking that the new APPSA was also partly a product of some level of reform fatigue, though obviously of different origins.<sup>56</sup>

Turning to our central field, however, reforms were not embarked upon with equal enthusiasm in all parts of CEE. Exogenous influences, primarily the models and expectations of sponsor organisations, have often eclipsed local considerations, in clear contradistinction to Australia. Ultimately, three groups of countries can be distinguished depending upon their position vis-à-vis the reform of secured transactions laws: first, the unreformed systems; secondly, the facially comprehensive reformers; finally, those that opted for sector-specific legislation embodied in one or more *leges specialis*. Admittedly, this division is imperfect because, inter alia, the 'comprehensiveness' of these reforms is not to be equated with that inherent in the APPSA. Nonetheless, it is helpful to give some insight into what has been occurring in this particular part of Europe.

(b) *Different Reform Paths*

One of the most successful newcomer Member State of the EU in 2004, Slovenia, for example, was bypassed by the winds of change and yet it managed to thrive quite well economically until recently. Some other western Balkan countries (notably, Bosnia and Herzegovina and Macedonia) have largely remained intact but at the price of far less encouraging economic results. As these systems had earlier modelled themselves primarily on civil law systems during the 19<sup>th</sup> and 20<sup>th</sup> century, typically Germany and Austria, they inherited a registration-hostile PPS system. Other former-Yugoslav states have rather opted for a sector-specific regulation: while Croatia has passed only a law on leasing,<sup>57</sup> Serbia enacted one on financial leasing and a separate

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<sup>56</sup> See 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, 385.

<sup>57</sup> Croatia passed a special leasing act in 2006 (*Leasing Act 2006* (Croatia)) to create the necessary legal environment for the then increasingly popular newcomer advanced contract in CEE invariably known as 'leasing' – which in fact is the amalgam and a single

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one on registrable charges.<sup>58</sup> Romania also had a *lex specialis* on leasing and Lithuania is in the process of implementing similar.<sup>59</sup> Hungary may be taken as the prototype of a facially comprehensive reform system because, importantly, 'leasing'<sup>60</sup> remained uncovered and has not been equated with 'charges.'<sup>61</sup> Slovakia followed the same pattern under the guidance of the EBRD.

(c) *The Future of PPS Reforms*

Two final points need to be made here. The first is that typically the reforms have occurred in CEE in waves<sup>62</sup> and – irrespective of claims to the contrary – in many

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substitute for 'conditional sales', 'hire-purchase', and 'leasing' as known by common law systems.

<sup>58</sup> The two separate Serbian Acts introducing common law-inspired novelties and regulating for the first time ever the respective fields – both passed in 2003 – were *The Law on Financial Leasing* (Serbia) and *The Law on Registered Pledges over Movable Property* (Serbia). See Slobodan Doklešić and Zoltán Víg, 'Enforcement of Contracts in Serbia', in Stefan Messmann and Tibor Tajti (eds), *The Case Law of Central and Eastern Europe – Enforcement of Contracts* (European University Press, 2009) 849, 850. Serbia stepped onto the reform path later than the other CEE countries because of the Balkan Wars. No reforms have been undertaken until the ousting of Milosevic in 2001. It is also interesting that the modernisation of the Serbian real property mortgage law and the upgrading of the land registry system was financed by the German GTZ Fund and hence influenced by German law.

<sup>59</sup> The first Romanian leasing regulation was the 1997 governmental Ordinance No. 51 (amended more times later) and the act embodying the common law-inspired law on personal property security law the Law No. 99/1999 on Security Interests in Movable Property. See Ileana M Smeureanu, 'Good News from Romania: the Leasing Market is Expanding' in Stefan Messmann and Tibor Tajti (eds) *CEE Case Law– Leasing, Piercing the Corporate Veil and the Liability of Managers and Controlling Shareholders, Privatization, Takeovers and the Problems with Collateral Laws* (European University Press, 2007) 264, 273.

<sup>60</sup> Two main reasons could be mentioned for the hesitance to bring title finance under the PPSL system in CEE: first, the equalisation of retained title with the idea of pledge was too farfetched and hard to digest from the perspective of dogmatic -thinking-based systems, and; secondly, the controversial rules of the EBRD Secured Transactions Model Law on 'vendor's lien' were not helping the cause.

<sup>61</sup> As the English designations 'lien' and 'security interest' were largely unknown in Europe among the English speaking legal communities and as the terms 'pledge' and 'mortgage' have a precise meaning in English legal terminology, the designation 'charge' was opted for by EBRD for the central proprietary interest of its Secured Transactions Model Law. The EBRD 'charge,' in other words, is broader than either the fixed or the floating charge from the pre-*APPSA* period, and is in effect equal to 'security interests' or consensual liens.

<sup>62</sup> For example, the Hungarian local equivalent of the Australian floating charge – the property encumbering charge ('*vagyont terhelő zálogjog*') – became quite popular in a short

countries they are still ongoing, either because of unsatisfactory economic results or recognised deficiencies. Secondly, many of the newcomer institutions are being exploited quite routinely, naturally with significant variations from state to state. For example, while leasing (including its variants of equipment leasing or what is known in Australia as hire-purchase) is something widely exploited everywhere, field warehousing seems to have had success in only some of them.<sup>63</sup> Thus, from an Australian point of view it might be comforting to realise that it would be an error to look at these systems as being completely different from the APPSA. Nonetheless, it should be borne in mind as well that no European system has set out to emulate the unitary and comprehensive PPS blueprint of the Unitary PPS Group as of yet; save the idiosyncratic soft law instrument – the DCFR.

### III REFORM DETERMINANTS COMPARED

#### A *The Position of Politics, Academia and Industry*

##### 1 *The Impact of Affected Industries, Politics and Academia*

###### (a) *Commonalities and Differences*

A comparison of the position and role industries, politics and academia played in shaping the future of PPSL on the two continents may reveal that many of our presumptions are mistaken – similarly to our presumptions about PPS law. For example, it is surprising that the reform in Australia was facing similar challenges as in CEE and that – unlike the UK – in Australia the determinative stumbling block postponing the passage of the APPSA was not the resistance of industry. While Australia eventually became a member of the Unitary Group, the City of London was

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period of time after its introduction in 1996 irrespective of the unclear provisions on the exact time of its constitution and at what point in time it creates a priority position. This was caused by the fact that the first reform act's rules were not clear as to whether the charge is a fixed or a floating one – to make use of the pre-APPSA terminology. Two Supreme Court decisions were needed to fix this problem by holding that the priority position is acquired at the time of registration. See, eg, Zsófia Oláh and Csongor István Nagy, 'Enforcement of Contracts in Hungary' in Stefan Messmann and Tibor Tajti (eds), *CEE Case Law – Enforcement* (European University Press, 2009) 216, 285.

<sup>63</sup> The low popularity in Australia versus the more frequent resort to field warehousing in the US was attributed by Gillooley – in the pre-APPSA period – to the high costs of the appropriate storage capacities and the onerousness complexity had dictated but also by the risk of such a pledge to be found a sham floating charge. Consequently, in Australia, field warehousing was resorted to only 'if the financier wished the goods to be separately stored or warehoused to ensure a high level of security.' See Michael Gillooley, *Securities over Personalty* (Centre for Commercial and Resources Law, Federation Press, 1994) 155-156.

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in a position to block the realignment of English law with the model yet another time in 2009 – in a thirty-year tug of war with venerable scholars and government at one end and industry on the other.<sup>64</sup>

As for the role these social factors play, compared to Australia, Europe shares some common features. First of all, as already stressed, the EU has not placed the harmonisation of PPSL on its agenda; Member States are largely left on their own in this respect. The DCFR may make the national legislators rethink their stance, which may but need not be accompanied by concrete steps. Secondly, perhaps with the exception of the UK, the main players in the world of finance are still the large universal banks; though their dethroning seems to have begun after the 2008 global financial crisis. Thirdly, in Europe the making of laws, especially the areas covered by civil and commercial codes, is the bailiwick of academia – including PPSL. The voice of industry in these domains is directed to the scholarly elite, which acts as a filter that is inclined to sacrifice the requests of the industries on the altar of abstract principles. This is exemplified by examining the list of the drafters of the DCFR and the few meagre ways whereby the voice of industry has been heard and comparing that with the role stakeholders played in the *travaux préparatoires* in Australia.<sup>65</sup> No request for ‘greater consistency with existing international PPS models’<sup>66</sup> could, for example, be found either in the comments to the DCFR, or in the overwhelming part of European mainstream scholarship.

Needless to say, each of the regions and states has some additional specificity. For example, in CEE the primary drive for reform came in the form of incentives, often amounting to pressure, from international financial organisations. Initially that was received with genuine enthusiasm often coupled with clearly unrealistic expectations. Later, unfortunately, the cause of reforms became the hostage of politics and populist rhetoric. Hence, a politician could not be identified who could be attributed such a pivotal role as that of Philip Ruddock, whose ‘conversion to the cause’ was determinative for the destiny of the *APPSA*.<sup>67</sup> Further, CEE in particular

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<sup>64</sup> See McCormack, above n 41, 83.

<sup>65</sup> See, eg, the reference to the consultation process with stakeholders in section 5 on page 11 of Australian Government, Attorney-General’s Department, *Personal Property Securities Reform – Regulations to be made under the Personal Property Securities Act* (5 October 2011) <<http://www.ag.gov.au/pps/Pages/default.aspx>>.

<sup>66</sup> *Ibid.* See also the description of the consultation processes on the Department’s webpages at <<http://www.ag.gov.au/PPS/Pages/Personalpropertysecuritiesconsultation.aspx>>.

<sup>67</sup> Duggan and Gedye ascribe a determinative role to the ‘conversion to the cause’ of Philip Ruddock, the third longest serving parliamentarian in the history of the Australian Parliament. No similar politician could be mentioned in CEE, partly because the whole idea of secured transactions reform has been brand new and not fully understood even by

has failed to cross the intangible threshold to a world in which politics heeds business interests rather than the reverse.

With the exception of a few, the local academics were caught by surprise with the unprecedented speed of changes that came completely out of the blue. The mindset based on the introverted socialist legal systems was to change virtually overnight into an open and receptive one. Understanding of a complex new system of law akin to the APPSA under such circumstances could only be unrealistic. Compare that, not just with the interminable discourse that preceded the APPSA but also, with the fact that in Australia the scattered cogwheels of the system were known and the task was 'merely' to gather them under the same umbrella – as opposed to starting from scratch in CEE. The need to relaunch the reforms was partly attributable to this incomprehension, often coupled with outright hostility towards all the transplants. Such academic intolerance of all things non-European is a characteristic of Western European scholars as well; in particular where US law is concerned.

Exogenous pressure on CEE countries has caused unease, if not outright backlash, on the part of local scholars and some political factions which criticise the World Bank or the EBRD. Worse, advice that proved mistaken, or the various belt-tightening requests – notwithstanding that they were only remotely (if at all) linked to a PPSL reform agenda – distorted the social discourse on the need for and directions of PPS reforms. In the western part of Europe, however, the lobbying capabilities of banks, and to a lesser extent other financial industries, are an important factor in shaping development; not necessarily in the right direction. The novelty triggered by the post-2008 sovereign-debt crisis is that austerity measures, demonstrations, high unemployment rates, threats to the survival of the Euro-zone itself mean priorities have been reset in the entire EU.

(b) *Bank-based Europe versus Market-based Australia: the Consequences*

The fact that all continental European systems are bank-based should not be overlooked, as that is certainly a factor which determines what may happen to PPSL, let alone the exploitation of this branch of law.<sup>68</sup> This equally applies to the UK –

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leading scholars, let alone politicians. See Anthony Duggan and Michael Gedye, 'Personal Property Security Law Reform in Australia and New Zealand: the Impetus for Change' (2009) 27 *Penn State International Law Review* 671.

<sup>68</sup> The role banks play in financing European businesses has become a routine but improperly researched topic. A brief quote from Richard Milne, 'Money for Nothing – and the Debt is (almost) for Free' *Mastering Growth: Part 2 – Financing and Funding*, *Financial Times* (London) 25 May 2011, 3 properly illustrates one side of the coin. As the author put it 'Europe continues to lag far behind the US in the depth of access to capital markets. Small- and medium-sized companies – those with up to 250 workers – make up a higher proportion of



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which is still characterised as a 'market-based' system with a wider spectrum of participants – as unambiguously illustrated by the capability of the City of London to turn back the wheels of change and prevent the UK's realignment with the Unitary Model. Similarly, German law can hardly be understood unless the starting point is the quintessential role banks play in the financial world and in controlling the economy. As German banks have acquired controlling stakes in the German economy, they are in a position to control the inflow of credits and generally the indebtedness of their corporate clients. Hence, they can – at least it used to be so until the 2008 global financial crisis – react in due time to prevent bankruptcy and the ensuing creditors' race. A similar role is played by banks in other continental systems, though in many of the CEE countries the size of the corporate sector is significantly smaller. In 2008, however, many things seem to have begun to change; among others the number of bankruptcies and the stance of banks, which instead of forestalling the bankruptcy quagmire push businesses into bankruptcy as they enjoy priority. However, quantitative analysis unearthing and documenting what has changed, not just in the frequency of bankruptcies but also in the behaviour of banks in that context, is lacking.

Universal banks' other important role as far as PPSL is concerned is extending their home-country business practices to other jurisdictions. The popularity the German contract-based, non-registrable security devices have gained in some CEE countries is attributable to this role of banks. The problem is that – similarly to the 'credit crunch' events – no authority was entrusted with monitoring systemic risk, so nobody noticed that the common law-inspired and registration-based new reform law is barely reconcilable with the registration-hostile German transplants. Poland especially faced challenges of this sort.

In CEE, the contributions of the untransformed banking sector in the early 1990s – the only potentialpliers of the new PPS laws – had little merit. Some of the local banks have managed to metamorphose into genuine universal banks, though typically at the price of becoming affiliated with western banks and sharing the same features – like a great degree of conservatism. National variations, however, do exist. For example, in Hungary it was the banks and their requests that gave a boost to the unprecedented growth of field warehousing companies. This seems to be an unparalleled development because this PPS law-linked industry has appeared neither in Germany, nor in the UK and given the lack of data it might be presumed that the same applies also to most other European countries. Field warehousing – named by Hungarians differently as 'artificial warehousing' ("*művi raktározás*") –

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businesses and GDP in Europe, yet nearly all remain heavily dependent on bank financing.'

became in Hungary, especially in agricultural financing, the main anti-fraud device that prevents raising two credits on the strength of single collateral. The change occurred virtually unnoticed by legal scholars. As a result, now multi-billions of dollars worth of value is circulating through this booming private non-banking industry. From the neighbouring countries only Croatia seems to have followed the same development path as the scarce data from the last few years suggest though, for example, some of the Hungarian field warehousing companies began offering these peculiar services also in some of the neighbouring countries.<sup>69</sup>

The quite lucrative business sector is wide open to Australians as well. In other words, Australia could look to the European experience to query whether non-banking financial organisations are genuinely needed to boost credit, and thereby economic activity and growth. This is an important question given that the success of PPS law reform depends also on how widespread the exploitation of the new possibilities becomes and in particular what role industries could play in disseminating the new knowledge. This was undoubtedly the Achilles-heel of CEE reforms: a region without the necessary industries capable of readily understanding and exploiting the innovations. Given the dominance of academia – the abstract at the detriment of the pragmatic and empirical – in drafting the latest achievement of Europeans, the DCFR, this lesson was not learned.

(c) *The Law-Industry Growth Nexus*

Scholarship on PPSL has so far failed to properly focus on the role of industry in the lawmaking process,<sup>70</sup> a mistake because virtually the entire secured transactions framework stands on industrial underpinnings, with professionals performing self-help repossession, factoring and leasing, to searching registries.<sup>71</sup> Due to this path dependence, many aspects of the law-industry relationship have escaped attention,

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<sup>69</sup> See the webpage of Concordia Zrt offering these services also on the territories of Slovakia, Romania, Austria and Slovenia at <<http://www.concordia.hu/pages/muvi.html>>.

<sup>70</sup> See, eg, Duggan and Gedye, above n 67, 670. Whether the hostile-attitude of the entire Australian banking sector could have been attributed to the opposition by Dr William Gough, the expert of company floating charges, is a dilemma the resolution of which is to be left to Australians themselves. Admittedly the interplay between the industries and scholars in the reform process is country-specific as well as an interesting topic, and it normally fundamentally determines the direction reform or modernisation processes take.

<sup>71</sup> Concerning the USA see, eg, LoPucki and Warren, above n 2, 290-91, stating that – irrespective of whether the research is to be conducted in a State with a filing system that allows direct physical search of records or in a State where only employees have permission to access records – the normal course of events is to hire a ‘service company,’ a private business to do that. As a result clients pay two fees: one to the filing office and the other one to the service company.

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not just by lawyers but by economists as well, who have problems fitting this area into the established confines of either macro or micro-economics. This myopia – characteristic even of the latest-generation elite schools of thought like the ‘law and finance literature’ – was a consequence of the lack of interest in the experiences of countries other than the few leading western systems.<sup>72</sup> They departed in their analysis solely from the laws of the leading systems, with a high respect for the rule of law, centuries-old professional industries and, in general, an efficiently functioning PPS system. These *sine qua non* factors were simply presumed. The black letter PPS laws transplanted to milieus without these factors then logically could not produce the same results as in the countries of origin. The role the established professional service industry plays in the life of PPSL is the best example of the point.

Moving from the macro to the micro-level question of how to solve the financing needs of SMEs, more cautious predictions are needed instead of taking for granted that an APPSA-type new system is a panacea for the financing problems of SMEs. That may not be the case in a country like Australia where a developed PPSL had been in place even before the APPSA. In Europe, this is one of the major problems conspicuous since the 2008 credit crunch and its aftermath with banks giving up markets and radically reducing their credit activities. It is a mystery why the EU has failed to pay more attention specifically to the linkages between the quantity of PPS laws and financing of SMEs, especially since awareness of the importance of this branch of law emerges clearly from Book IX of DCFR and the SMEs-related projects of the EU. Australian experiences might be helpful also to illuminate this particular connection.

Europe will presumably soon be forced to rethink this issue driven by the recent financial disarray in the Euro-Zone and the sovereign debt crisis. Europe is building the so-called ‘social market economy’ version of capitalism, whereas it used to be ‘paternalistic’ in this domain. As a consequence, it is simply presumed that governments have the duty to come up with subsidised finance projects for SMEs or

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<sup>72</sup> It is apt to quote the isolated modestly-critical voice of Kenneth W Dam in his book: *The Law-Growth Nexus – the Rule of Law and Economic Development* (Brookings Institution Press, 2006) 5: ‘A major conclusion reached [by the law and finance literature] was the countries whose legal systems originated in the English common law have enjoyed superior per capita income growth compared with so-called civil law countries, whose law is based on European codes, especially those countries whose law is based on the Napoleonic codes and hence on French law. [T]heir conclusion has drawn criticisms on various grounds, especially because many civil law countries – not only those in Western Europe but also some developing countries – have enjoyed superior economic growth and because many common law countries in the third world have done quite poorly in the economic growth tables.’

to otherwise back this vulnerable segment of the economy.<sup>73</sup> Notwithstanding some concrete projects and prophecies, the reoccurring financing problems of SMEs require more targeted research of the PPSL-SME sector nexus.<sup>74</sup> Lacking empirical studies, however, the few papers positing PPSL as the signature financing method for SMEs do nothing more than opaquely promise a 'Canaan.'<sup>75</sup> Australia may in that respect become a test case, as easing SMEs' access to credit has long been one of the main justifications for the reform of the earlier unpredictable system.<sup>76</sup> Now, with a comprehensive Act in place, the pre- and post-*APPSA* developments could be more

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<sup>73</sup> In Hungary, for example, one such government-sponsored program is the so-called '*Szecsényi-Card Project*.' SMEs may apply for a revolving credit account plus a credit card up to 25 million Hungarian Forints, at a favourable interest rate, based on a simplified review, and using the planned enterprise's assets as the collateral. A special purpose vehicle (a closed corporation) was formed by the Hungarian Association of Entrepreneurs and Employers and by the Hungarian Chamber of Industry and Trade to implement the program. Yet only those entities may apply that have, at least, one successful business year behind them (in addition to not having unpaid taxes or other public duties). As the capital markets are essentially closed to SMEs and venture capital is only exceptionally available, start ups still have tough times to raise money. See in Hungarian at <<http://www.kavosz.hu/ceginformacio.html>>. Even though local banks as well as the EBRD (in the countries in which it operates) have special finances available to SMEs, it would be sheer exaggeration to state that the financing needs of these entities have been completely solved.

<sup>74</sup> Leading English language journals were virtually filled with articles complaining about the financing problems of SMEs in the post-credit crunch period. The so-called *Mittelstand* companies in Germany, for example, were facing a record level of bankruptcies in 2010 – up 16.6% compared to 2009, reaching the figure of 40 000 insolvencies. The problem was that this segment of the economy, mostly made of privately held SMEs, does not just dominate the export-oriented part of the German economy but is also the biggest employer in the country. About two-thirds of all German employees work in this sector, that is more than 90% of all German companies. Yet they do not have the lobbying power of the genuine giant corporations, of the Volkswagen or Opel sort and hence they were not of primary concern to the federal government. See Laura Stevens, 'German Failures may Slow Recovery', *The Wall Street Journal*, 6 April 2010, 6.

<sup>75</sup> One of the best articles written on the relationship of secured transactions law and financing of SMEs was written by John A Spagnole – in fact addressed to Australians. Still, the article fails to show to those from emerging markets – where the industrial framework, two centuries of experiences and the needed know-how are lacking – how an American-style security transactions law could develop out of a cost-efficient system for financing this segment of the economy. See John A Spanogle and William Wallace Kirkpatrick, 'Security interests US Style: A Device for Financing Small Businessmen and Protecting Yourself in Liquidation' (1992) 4(2) *Bond Law Review* 115.

<sup>76</sup> See Anthony Duggan, 'Globalization of Secured Lending Law: Australian Developments' (2000) 34 *International Law* 1107, 1120.

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easily compared to draw conclusions on the role PPSL, fragmented versus comprehensive, plays in financing SMEs. On the level of rhetoric the realisation that PPSL is the key for financing of SMEs and that presumably a unitary system might improve that existed also in Australia. Allegedly the increased access to credit by SMEs was one of the reasons behind the *volte-face* of Australian banks from rejecting to supporting the new PPSL system. Even though the biggest Australian banks had been operating in New Zealand and thus had been able to see how the reformed comprehensive PPSL of a close neighbour had been unfolding in business life, unfortunately the effect on the financing of SMEs of the shift from a fragmented to a comprehensive model was neither documented nor explored in more depth.<sup>77</sup>

The related Australian experiences, if scientifically analysed and empirically supported, would be of great use in Europe because the future of PPSL in the leading jurisdictions – setting also the model for the rest of the countries – will primarily depend on the governmental and banking sectors. The voice of SMEs will hardly be heard. If things change it will not be because of legal sabre-rattling but because of the interests of banks. The partial (or complete) failure of reforms in CEE should also be attributed partly to their bank-based nature, dominated by a mixture of Western European universal banks' subsidiaries and national favourites, to which the new common-law inspired laws were often foreign. Non-banks are only slowly emerging and are incapable of seriously challenging the monopoly of banks. For example, the popular 'leasing companies' are typically only banks' captive subsidiaries. Hence, for years to come, financing of SMEs will remain a problem in Europe as bank finance – at least as far as European banks are concerned – will remain heavily restricted. Obviously this is a gap that potentially might be filled by non-European financiers, including Australian ones. In any event, Europeans should pay closer attention to how the *APPSA* – the new comprehensive system – is shaping the financing of SMEs even though admittedly these matters are hard to quantify precisely. However, there is a level of truth in the claim that Australia is better capable of satisfying this important goal than many of the bank-dominated systems of Europe, *inter alia* because it has a larger variety of financial institutions and a market-based system.<sup>78</sup> A more predictable comprehensive PPSL, in other words, is a way also to give a green light to the activity of non-banks, which by supplementing

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<sup>77</sup> Duggan and Gedye posed a question mark next to the Janus-faced approach of Australian banks to the issue of reforms, that was in particular surprising 'given that all of the major New Zealand banks are Australian owned and some of the Australian parent banks at least initially opposed similar reforms in Australia.' See Duggan and Gedye, above n 67, 670.

<sup>78</sup> See, eg, Asli Demirguc-Kunt and Ross Levine, *Bank-Based and Market-Based Financial Systems: Cross-Country Comparisons* (World Bank, 1999) Table 12.

or supporting the work of commercial banks, may better serve the needs of SMEs; a goal that is obviously one of the tokens of the future success of the APPSA.<sup>79</sup>

## 2 *The Role of Academia and the Legal Profession*

No discourse on PPS law reforms would be complete without a comparative examination of the role various groups of lawyers have played in the process on the two continents – in particular scholars (or academia in European vernacular). To understand the importance of the determinative role they may play, it is sufficient to recall how much was unknown, uncertain and risky in Australia during the discourse surrounding the APPSA reforms. Similar qualifications could be made in relation to post-1990 CEE. However, while Australia had more tested and proven benchmarks available to learn from – in particular the successful Canadian and New Zealand PPS reforms – reformers in CEE had no such privilege and faced dilemmas not just of the ‘known knowns’ type but also the ‘known unknowns’ type. Often neither the western advisors, nor the local experts, were in a position to make a full list of contingencies that should have been addressed. That made the reformers sometimes excessively cautious or forced them to improvise solutions for unexpected dilemmas. A perfect example is the still largely unclarified role that financial and other covenants play in the context of secured financing and whether the ‘policing’ of debtors’ affairs is something to be regulated or rather left to business practices.<sup>80</sup>

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<sup>79</sup> If the seminal book devoted to non-banking financial organisations is to be trusted, non-banks play two crucial roles in developed systems. First, they complement banks – ‘by filling gaps in the range of banking services and providing either services that are inappropriate for banks to engage in or services that banks produce inefficiently.’ Secondly, they compete with banks and force banks to be more efficient and sensitive to the needs of customers. See Jeffrey Carmichael and Michael Pomerleano, *The Development and Regulation of Non-Bank Financial Institutions* (World Bank, 2002) 207.

<sup>80</sup> This issue concerns the abandonment of the ‘Benedict ritual’ in the United States by the drafters of UCC art 9, that was otherwise a precondition for the validity of liens on accounts receivable based on the famous Supreme Court decision in the *Benedict v Ratner* 268 US 353 (1925). The fatal misunderstanding between CEE reformers and the American experts was that nothing in the text of UCC art 9 requires policing anymore as a precondition for the validity of a security interest. The American system simply makes a presumption that that is known by the industry. However, such a presumption is possible only in the United States because the result of that case was the professionalisation of the industry – ie, development of sophisticated ‘rituals’ whereby everybody learned how to satisfy the Benedict rule. By the time Gilmore and the drafters of UCC art 9 began work, the industry routinely applied the rituals and hence it was not necessary anymore to impose the duty by law. See point (1) of the Official Comment to section 9-205 in UCC art 9 which declared repeal of the rule of *Benedict v Ratner* 268 US 353 (1925). Yet in countries without such

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Starting with Duggan and Gedye's claims,<sup>81</sup> if *UCC* art 9 was a difficult subject in Australia, it must have been even more difficult to understand from a completely different basis: that of the civilian legal tradition of continental Europe. Naturally, the UK was a different case. There national prestige, excessive caution and the interests of the City of London seem to have been the main reasons for rejecting the initiative to reform the system. As there is an unwritten wisdom in Europe that if something is to be borrowed from common law then it must be what is offered by English law, and given that the efforts to realign with the Unitary Group's model were blocked by the City in the UK, civilian lawyers of Europe were struggling to reconcile the often incompatible concepts of English and US law during the PPS law reforms.<sup>82</sup> This was just an additional hurdle to the generally present distrust for the principles of American law.<sup>83</sup> However, Canadian and US secured transactions laws were directly promoted not just when assisting reforms on national levels, but also when relying on the EBRD Model Law that integrated elements from *UCC* art 9 into its system.

In CEE, there was also an attitude that 'we can do it better ourselves', though often the exercise was akin to making a four wheel BMW out of a bicycle. 'Better the devil you know', however, was not an issue: first, because the foreign sponsors required clear outcomes in the form of the fundamental revamping of the existing possessory pledge and real property mortgage laws. Secondly, because often no identifiable 'devil' was known and the new systems had to be developed from scratch, which could most efficiently be achieved by resorting to prime models. The fact is that CEE systems underwent more waves of reform, which is perhaps the best objective indicator that ignorance on the side of both foreign and local experts and the

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professionalized industries, which was the case in all CEE systems, such expertise was simply non-existent.

<sup>81</sup> Duggan and Gedye listed under the heading of 'The Legal Profession's Reactions' the following: 1. the difficulty of the subject-matter; 2. the opaqueness of the *UCC* art 9 model and the unfamiliarity with its key concepts; 3. distrust of American law; 4. the irresistible urge to reinvent the wheel, and finally; 5. the 'better the devil you know' attitude. Duggan and Gedye, above n 67, 661-69.

<sup>82</sup> See, eg, the modest reference – to the level of a single footnote – in John Simpson and Joachim Menze, 'Ten Years of Secured Transactions Reform' (Autumn 2000) *Law in Transition* 21, (note 5).

<sup>83</sup> American scholarship could equally be criticised for its heavy parochialism. Not just for equally neglecting Australians and Europeans but also for deeply believing that they are not given the privilege of making mistakes. Though, occasionally the criticism of US law is too far reaching. For example, albeit the number of internationally recognised Italian comparativists is large compared to jurisdictions in similar situations, few critical papers have seen the daylight about the Italian system.

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concomitant mismatch of what was on offer and what was required were omnipresent factors.<sup>84</sup>

Western Europe, on the other hand, did not talk of ‘reforms’ – with the exception of France and the UK. As far as the latter is concerned, the PPS law reforms were again abandoned,<sup>85</sup> despite experts vouching for realignment with UCC art 9. The City won,<sup>86</sup> leaving the compartmentalised system intact with minor cosmetic surgery only. In Germany and in other countries a debate has not even begun to compare their system to the offerings of the Unitary PPS Group. The suppressed criticism inherent in German system thinking<sup>87</sup> is to a great extent attributable to the fact that some of the new, court-developed security devices – the “*kautelarische Sicherheiten*” – have not yet found their place in the venerable *German Civil Code*. The doubts CEE experts had when first facing the common law-inspired models could be ascribed, to a great extent, to the high regard for German jurisprudence. The problems caused by

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<sup>84</sup> Whether some limited pre-WWII laws containing chattel mortgages or simplified forms of floating charges – such as in Hungary and Poland – could have created a solid basis whereupon to start building the end of 20<sup>th</sup> century modern system is debatable. Spanogle in his brief article devoted to Polish experiences with the PPSL reforms starts his tale in 1991 and makes mention only of the 1996 *Law on Registered Pledges and the Pledge Registry* (Poland). See Spanogle, above n 11, 280. Yet Polish lawyers are not just proud of their pre-WWII history of PPSL but they have tried to start building the post-socialist secured transactions law based upon the once existent, during socialism and left virtually unexploited, laws. This explains, among others, the use of the somewhat contradictory ‘registered pledge’ English phrase in English translations of Polish PPSLs.

<sup>85</sup> The last such attempt began in 2001 at the initiative of the Company Law Review Steering Group that – similarly to the earlier reports, like that of Professor Diamond – proposed stepping onto the UCC art 9 path. The Law Commission’s initial support of the idea expressed in Law Commission (UK) *Registration of Security Interests*, Report No 164 (2002) and then corroborated in its 2004 Consultative Report, Law Commission (UK), *Company Security Interests*, Report No 176 (2004), subsided to zero by the time of the publication of Law Commission (UK), *Company Security Interests*, Report No 296 (2005). See Gerard McCormack, ‘The Law Commission and Company Security Interests’ in John de Lacy, *The Reform of UK Personal Property Security Law* (Routledge-Cavendish, 2010) 83, 84.

<sup>86</sup> McCormack identified two pressure groups: the City of London Law Society ([www.citisolicitors.org/](http://www.citisolicitors.org/)) and the Financial Markets Law Committee (<http://www.fmlc.org>). Their positions on the Law Commission proposals can be found on their websites. McCormack above n 85, 84.

<sup>87</sup> On the meaning of ‘systemic’ (or dogmatic) thinking see Theodore Viehweg, *Topics and Law: A Contribution to Basic Research in Law* (Cole Durham, Peter Lang Publishing Inc, 1993), with a foreword written by Cole Durham (the translator to English). For how systemic thinking is affecting the field of secured transactions law see Tibor Tajti, ‘Viehweg’s Topics, Article 9 UCC, the “*kautelarische Sicherheiten*” and the Hungarian Secured Transactions Law Reform’ (2001) 6 *Vindobona Journal of International Commercial Law and Arbitration* 93.



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the parallel importation of some of the German non-registrable security devices – especially the fiduciary transfers<sup>88</sup> – that are consequently incompatible with the *APPSA*-type newcomer security interests were also partially due to that.

On a critical note, it is hard to understand the approach of German – and much of continental European – academia. Such behaviour, including an outright refusal of any comparison and limited analysis, does not serve the interests of the economy. Many changes have been caused by our increasingly globalised world, some of which have taken effect unnoticed, and it is very uncertain whether the existing economic conditions will continue intact. One of the central points neglected by scholarship is whether the approach to bankruptcy will change in the near future in Germany and countries modelling themselves after it. There is no need for a complex priority system of the sort in the *APPSA*, for example, while the number of bankruptcies remains low – as is still the case in Germany – and given bankruptcy is criminalised. Directors will do everything to avoid that eventuality, even at the price of curbing credit-based financing to the detriment of business growth. Clearly, that will only be possible until the powerful German universal banks, having control over their company debtors, are in a position to fill the financing gaps. In times of crisis, as it became clear during the recent global financial crisis, however, they withdraw from the market and the credit markets suddenly dry up. Due to their conservatism, though, exploitation of personal property for raising credit multiple times and from different creditors is still the exception rather than the rule even in times of growth. If and when multiple credits based on the same asset become the norm, defaults and insolvencies would more readily occur. The increased number of bankruptcies would require complex priority rules of the sort in *UCC* art 9, or for that matter, now in the *APPSA*. The fact that a number of continental European systems have recently introduced personal bankruptcy should be attributed to the pandemic increase in the number of bankruptcies – to a great extent due to housing mortgage defaults and not to PPS law.

The lack of interest of Australian scholars in the differing solutions of Europeans is likewise hardly explicable solely on the basis of the ‘tyranny of distance’ argument. Namely, comparison of the *APPSA* with the registration-hostile German law, which is on the other end of the spectrum of PPS laws, might not just corroborate but might potentially also raise doubts as to the correctness of one’s presumptions – some being

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<sup>88</sup> For example, *Zakon o osnovno-svojinskim odnosima* [Law on Proprietary Relations] (Montenegro) 26 February 2009, s 14 regulates the so-called ‘fiduciary ownership’, which is a kind of putative title on a movable or immovable asset giving a priority of payment to a creditor. However, as per s 378, only fiduciary ownership on an immovable asset is subject to registration with the respective cadaster. This institution was obviously taken over from German law.

nothing but dogmas. For example, the American *UCC* art 9 seems to suffer because of its length, casuistic language and level of detail that is foreign not just to continental Europe accustomed to principles-based drafting, but even to the *APPSA* or to traditional English drafting techniques. This is then further exacerbated by the high relevance of its official comment and the connected burgeoning line of precedents.<sup>89</sup> While it is easy to recommend that American drafting techniques should not be followed, it is difficult to find the properly balanced drafting model. Remembering that the *UCC*'s system is to some extent attributable to the German legal training of Karl Llewellyn, *UCC*'s chief editor, one can see that German system thinking might deserve some attention even by the contemporary editors of *UCC* art 9. They seem to have lost the sense of balance that ought to be maintained between detail and general principles. The *APPSA* mastered this problem much better and hence its drafting style and system is closer to European standards. However, one may also mention some more concrete examples of resemblance like that idiosyncratic feature of New Zealand's *PPSL* which provides that unperfected security interests are effective against a bankruptcy trustee.<sup>90</sup> This provision is similar to the German law regarding unregistered security devices – like the widely utilised retention of title clauses. 'The distance is a tyrant,' indeed, or at least this is what the meagre number of papers comparing any of the building blocks of *PPSL* of Australia and Europe suggests. For that scholars and researchers are primarily to be blamed.

## **B Common Features of European Systems Affecting the Attitude to Reform and Modernisation**

### **1 Unresolved Systemic Dilemmas of European Systems**

European systems share some idiosyncratic dilemmas that make discussions on reforms difficult. As they were the product of a shared legal history (in articulated form or through less conspicuous borrowing or cross-fertilisation) their commonality creates a distorted image of perfection. The grave consequences of this become apparent when compared to non-European systems, such as Australia. Two examples will be mentioned.

#### *(a) Uncertainties Concerning the Classification of Property and of Security Devices*

Juxtaposing the main classification-related problems of Australians and Europeans reveals that something not insignificant is at stake. Namely, while the Unitary *PPS* Group's biggest concerns are what assets qualify as fixtures and the number of

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<sup>89</sup> It is enough to look at the size and detail of Gilmore's initial and the latest 1999 Revised Version to see the tendency of expansion – seeing the solution of all dilemmas and challenges in the expansion of the text.

<sup>90</sup> See Duggan and Gedye, above n 67, 677.

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classes of personal property that are needed to craft a system that suits the needs of business even more - to wit, focussing on concrete, pragmatic problems - Europe is looking exactly in the opposite direction, and is lost in an abstract metaphysical world of law. This is explicable by Continental European system thinking and dogma shaped at the end of the 19<sup>th</sup> or beginning of the 20<sup>th</sup> century. For example, for dogmatic thinking the classes of assets are to be defined according to their natural or ideal features, completely disregarding that such a classification is insufficient for and causes problems in business life. Concretely, while European civil codes are based on the trilogy of immovables, movables and intangibles, common law goes further and creates rules on such sub-categories as fixtures, equipment, inventory, or various types of investment property. This mismatch caused headaches for continental European experts trained in the dogmatic legal tradition during the secured transactions law reforms. One was related to the question of in which part of the code to place the new PPS law rules: the property law or the contracts part?<sup>91</sup> Another dilemma was to what extent to separate PPSL from real property mortgage law? Similarly, it was highly questionable whether the subsuming of intangibles under the heading of 'movables' was the proper approach given that, for example, receivables – as a form of intangibles – behave completely differently from tangible goods and hence require radically different perfection, priority and enforcement rules.<sup>92</sup>

Dogmatic (or systemic) thinking, typical of continental Europeans, is also incompatible with forging rules that would be different for security interests created

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<sup>91</sup> The dilemma rests on the Janus-faced nature of security interests, which are created by contracts but which constitute proprietary (*in rem*) rights. While their consensual nature would require placement in the chapter on obligations (ie, contracts and torts), the fact that their primary utility is the creation of a property right makes them equally (if not more) fit for the part on property law.

<sup>92</sup> It is not unusual that Europeans extend the coverage of 'movables' also to include the latter, sometimes even without proper explanatory words. See, eg, Kieninger, *Security Rights in Movable Property*, above n 14 – uniquely based on case studies though only from the western hemisphere of Europe (usurping the designation 'European' only to that part of the Old Continent) – is devoted to 'movables' and yet covers other types of collateral apart from 'goods' in the UCC art 9 sense. Perhaps, Harry C Sigman's gloss might in such cases be of help. In chapter three he resolved the 'personal property' versus 'movables' dilemma by saying that 'Article 9 ... seeks to facilitate financing secured by 'personal property', ie, movables, whether tangible or intangible, as distinct from 'real property', ie, land and buildings.' See Harry C Sigman, 'Security in Movables in the United States – Uniform Commercial Code Article 9: A Basis for Comparison' in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Cambridge University Press, 2004) 54.

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on real versus personal property because of and according to the features of these two major asset classes. The unwritten assumption handed down from generation to generation of lawyers was that, as land is the most venerable property type, the rules should be drafted primarily to fit the needs of land-based financing and then applied by analogy to collateral made over other types of assets. Notwithstanding that few commonalities are to be found between a piece of land and a receivable intended to be used to secure a debt, old attitudes are not easily discarded.<sup>93</sup> For example, the reluctance to create more priority rules than the single 'first in time, first in right' inherited from real property financing is partly to be ascribed to this. The APPSA's clear exclusion of real property security should, however, remind Europeans that the relationship of real and personal property should be reconsidered – especially as wealth is far more often locked in items of personal property than it was in the 19<sup>th</sup> and early 20<sup>th</sup> century when the civil codes were drafted.<sup>94</sup>

(b) *The Impact of European Data Privacy Rules*

Data privacy is normally analysed as a constitutional and administrative law matter and the impact of these rules on banking and PPSL has escaped attention. Yet there is an obvious dependence between the two: the more effective and onerous data privacy laws are, the less 'business friendly' the other fields become. Data protection laws may, for example, prevent sale of receivables, or constrict lending by limiting access to data on debtors' credit history.<sup>95</sup> Such systemic risks do plague EU and

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<sup>93</sup> A slightly differing opinion is put forward by Fiorentini, who suggests that in the western part of Europe there is a clear tendency of treating security over movables separately from those over immovables. See Francesca Fiorentini, 'Proprietary Security Rights in the Western European Countries' in Mauro Bussani and Franz Werro (eds), *European Private Law: A Handbook* (Carolina Academic Press, 2009) 415, 425. The important lesson for common law lawyers is, however, that the exact consequences of the lack of statutorily clearly spelled out division between real versus personal property security law has not been fully detected yet. Hence, in the lack of an explicit rule to the contrary, a civilian judge may decide the case by applying real property mortgage rules by analogy for resolution of a case involving a personal property security.

<sup>94</sup> See APPSA s 3 which defines personal property as including 'many different kinds of tangible and intangible property', but which excludes real property. On the contrary, for example, the Hungarian *Civil Code* s 251(1) not only provides a definition of security interests that is common to all asset types used as collateral but also contains five longer sections that are also applicable to both real and personal property securities.

<sup>95</sup> For example, all German banks are members of the data clearing house, a private organization, named SCHUFA ('*Schutzgemeinschaft für allgemeine Kreditsicherung*') in order to exchange data on their clients' credit history. The law requires banks to disclose and obtain consent from their clients for listing their data. A standard SCHUFA-clause was drafted by the industry itself and ever since these clauses are boilerplates included in all

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national laws as well, though it should not come as a surprise that even in the most developed systems these issues remain, to a significant extent, unclear.<sup>96</sup>

**2 *Different Building Blocks of Unitary Personal Property Security Systems***

*(a) European Segmented Systems versus the Unitary Concept of Security Interests*

Compared to the *APPSA*, no European system is comprehensive – they resemble it only in respect of some of its segments. This feature finds its expression first and foremost in the lack of a single statute that would cover all security interests in personal property – as the *APPSA* now does. For example, title financing devices are regulated either by separate legislative acts or by provisions located in distinct parts of civil codes. It is true that the reconciliation of ‘security’ and ‘true’ leases has not been an easy task in the US either, yet on this side of the Atlantic no theory has been advanced, in pragmatic terms, that would duly explain why the different treatment of ‘leasing’ and ‘mortgage of movables’ is justified. The abundant case law that quickly developed related to the nature of ‘leasing’ contracts and therefore the specific rights of the lessor and lessee in many European countries is proof that insufficient attention has been given to the practical repercussions, let alone the experiences of common law jurisdictions – which were in fact the inventors of title financing contracts (ie, conditional sales, hire-purchase and leasing).<sup>97</sup>

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contracts made by banks. The clause frees the banks from a large portion of their data protection obligations and gives the bank the rights also to inform the organisation on termination of the credit contract. See, eg, Francesca Bignami, ‘Cooperative Legalism and the Non-Americanization of European Regulatory Styles: the Case of Data Privacy’ (2011) 59 *American Journal of Comparative Law* 411, 427-28. See also the website of SCHUFA at <<http://www.schufa.de>>.

<sup>96</sup> For example, the IXth Senate of the German Federal Court – charged with banking and capital markets law – passed its related decision only in 2007. Bundesgerichtshof [German Federal Supreme Court], XI ZR 195/05, 27 February 2007. The judgment pronounced that bank-secrecy and the federal data protection laws do not hinder the assignment (transfer) of loan-based-claims. Text available in German at <<http://juris.bundesgerichtshof.de>>.

<sup>97</sup> Similar developments characterise CEE laws. In the lack of statutory definition, the courts treated these contracts – and have thus applied the pertaining rules from their contracts laws enshrined into Civil Codes – either as ‘hire’ (or rent) or as ‘sales’ contracts. Only exceptionally was it found that they are sui generis agreements for which tailor-made rules were then coined by courts. Later subjection of ‘leasing’ to regulation in some of the CEE countries, however, did not mean bringing the device under the PPSL system. For Czech and Slovakian cases see Peter Jedinak, ‘Leasing in the Czech and the Slovak Republic’ (at 206), on the Baltic experiences as illustrated through Lithuanian law see Lina Aleknaite, ‘Leasing in Lithuania’ (at 240), and for an insight into the Balkans see Pavle Flere, ‘Leasing in Slovenia – the Fastest Growing Financial Service Industry notwithstanding the

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It is rarely noted in comparative works that, besides title financing, there are important areas of PPSL that are conceptually ill-suited for equating with security interests. Field warehousing,<sup>98</sup> factoring or consignment are typically not mentioned in the works of even the most far-reaching reformers. While there is no system that would not know of some form of warehousing used in particular in agricultural finance – these are typically named as ‘terminal warehouses.’ It is ‘unknown’ how many warehouses have expanded to the next level – field warehousing. In Hungary, it was the commercial banks that drove the few warehouses to develop their field warehousing techniques because of the epidemics of egregious frauds of agricultural debtors. As a result, by 2008, field warehousing became not just the main form of warehousing but also a very lucrative new industry. Interestingly, this is a development not paralleled in many other CEE countries – hence this is another business niche that is open to Australians. One may only speculate, but the conservative nature of European banks and the heavy agriculture subsidising environment of the EU and nation states might be the reasons for their absence. Often, the business wisdom in paternalistic Europe is to have good political leverage to ensure access to subsidies, rather than turning to banks. This heavy reliance on government paternalism – partly a remnant from socialism in CEE, and partly an outcome of EU policies – might be the reason that field warehousing is hardly, if ever, spoken of or is completely unknown in many parts of Europe, especially CEE. Consignments are even more distant from PPSL; though the DCFR’s subjection of some forms of consignments to the PPSL system encapsulated in Book IX heralds a

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Discrepancy between Theory and Practice’ (at 362); in Stefan Messmann and Tibor Tajti, *CEE Case Law – Leasing* (European University Press, 2007) respectively. Sometimes courts have tried to determine the legal nature of ‘leasing’ contracts by resorting to whether the transaction was a bipartite or a tripartite transaction. See Yuliya Guseva, ‘Leasing as an Evolving Financing Device in Russian Law and Economy’ in Stefan Messmann and Tibor Tajti (eds) *The Case Law of Central and Eastern Europe* (European University Press, 2007) 298, 321.

<sup>98</sup> Field warehousing – contrary to terminal warehousing – was a product of the US from the 19<sup>th</sup> century. It was based on the possessory pledge idea and became a maximally routinised secured transaction exploited for inventory financing. In a simplified form, the professional field warehousing company took possession of the goods serving as collateral by going out to the plant of the debtor, segregating the collateral-inventory there and then issuing warehousing receipts to the secured creditor-bank on that basis. As this is a very specific business form, very little is known about the transaction’s fate outside the US. It seems fair to say that it is, in fact, a way to expand to a higher, and more sophisticated level of doing business by warehouses. For a description of the US history of field warehouses see the chapter ‘Field Warehousing’ in Grant Gilmore’s classic *Security Interests in Personal Property* (Little, Brown & Co., 1965, republished in 1999) 146.

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new dawn.<sup>99</sup> These may be additional reasons why Australian experiences should be of interest.

(b) *German Law's Hostility towards Registration of Security Interests in Personal Property*

Germany is taken as an example because, apart from a few very specific assets,<sup>100</sup> it is the paradigm of a European system hostile to registration. Except for the systems that have modelled themselves after German law, all other systems have subjected some secured transactions to registration or provision of public notice by other means. This example should be of interest to Australian reformers facing criticism for the APPSA's detailed regulation of the registration system, which generates its own set of specific risks. Put simply, the crucial difference revolves around the benefits of the registration-free and thus cheaper German model and the more predictable, but more costly, Unitary PPS Group model.

The problem is that here one is forced to compare inherently distinct complex patterns. It is also difficult to express the benefits of long term 'predictability' provided by a Unitary PPS model in monetary terms, and compare it with the short term benefits offered by the German system. In Germany, the substitute for public notice is the presumption of good faith in a business financing context, or a presumption that 'merchants are expected to know that nowadays most items of major equipment are bought on credit and that the purchased items serve as

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<sup>99</sup> One of the problems with the DCFR's treatment of consignments is that it fails to determine which types of consignments are exempt under the system. It is not without reason that UCC art 9's rules on consignments are very complex given that certain types of consignments have their own life and no legitimate interest dictated their subjection to the secured transactions system. Europe should have perhaps started by collecting empirical studies on all the places and forms in which consignments appear in business life rather than only drafting from general principle. See Tibor Tajti (Thaythy), 'Consignments and the Draft Common Frame of Reference' (2011) II(2) *Pravni Zapisi* 358; available also via <<http://www.SSRN.com>>.

<sup>100</sup> Liens on ships – themselves being subject to mandatory registration – must be registered where the register for the ship is kept *Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken* [Act on the Rights Relating to Registered Vessels and Vessels under Construction] (Germany) 15 November 1940, BGBl I, 2010, 1864, s 8). Similarly, liens on aircraft must be registered, however, with a single register kept at the Local Court in Braunschweig *Gesetz über Rechte an Luftfahrzeugen* [Act on Rights in Respect of Aircraft] (Germany) 26 February 1959, BGBl I, 2010, 1864, s 3. See York Strothmann, 'Chapter on Germany' in Winnibald E Moojen and Matthieu Ph Van Sint Truiden (eds), *Bank Securities and other Credit Enhancement Methods* (Kluwer, 1995) 158.

security'.<sup>101</sup> Given the high litigation rate (especially in the case of buyers' bankruptcies), however, as admitted by a leading German authority, the initial costs saved due to the lack of a registration system are lost.<sup>102</sup> Many Continental European countries have similar 'secret' securities and thus these caveats equally apply to them.

(c) *The European Substitutes for the APPSA's Complex Priority Rules*

As the APPSA warns and explains, the 'priority rules are relevant when the same personal property is subject to two or more security interests'.<sup>103</sup> In other words, in systems in which such instances are unknown,<sup>104</sup> or are exceptions rather than the rule, there is no need for more complex rules than the 'first in time, first in right' inherited from real property mortgage law. That may be the case in oligopolistic banking systems where the few participants steadfastly adhere to the same banking terms and conditions and due to the unavailability of competing creditors they are in a position to control how much credit is given – like in continental European bank-based systems. Alternatively, it may be the case in countries in which, simply because of the very features of the law, or out of ignorance and fear of the proliferation of credits, indebtedness encumbering the same asset by multiple security interests is simply not possible or customary. This was and is to a certain extent still the case in CEE jurisdictions, where there is simply no need for more than a 'first in time, first in right' rule yet. This is, however, a mistaken presumption because, in reality, these systems resolve the conflicts between security interests and contracts with retained

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<sup>101</sup> See Drobnič, 'Basic Issues of European Rules on Security in Movables', above n 39, 448.

<sup>102</sup> *Ibid.*

<sup>103</sup> APPSA s 54.

<sup>104</sup> Empirical data is lacking yet it is known that there are some other typically European lending habits. Two examples should properly illustrate that. The first is that 'renegotiation' is still the exception rather than the rule (especially in CEE) for debtors' defaults. That is visible from the information on failed credits due to the 2008 global financial crisis' spillover effects. In the lack of regulation, banks typically sell the loans, instead of renegotiating them. Another interesting contrast is related to the enforcement of real estate mortgages. Namely, in Europe the rule of the day is that if the consumer-debtor defaults with their home-mortgage they will not just be evicted but would have to continue paying the installments until the satisfaction of the full credit as initially agreed upon. Especially in CEE - the predominant part of consumer loans was denominated in foreign currencies (typically Swiss francs, Euros or Japanese yens) yet payable in local currency installments and the local currencies were significantly devalued as a result of the financial crisis. That had a domino effect on mortgage-backed loans. Simply leaving the collateral-real estate to the bank without being liable for the deficiency price – a more widely utilised custom in the US and presumably also in Australia – is virtually unknown in continental Europe.



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title (eg, leasing or consignment) not through complex priority but by other rules. The need for complex priority rules will become urgent when all proprietary security devices on personal property are brought under the same roof – as heralded by the DCFR.

Things have started to change, however, even in the least developed parts of Europe, with the exponential growth of leasing transactions during the last two decades and with the appearance of the floating security. It is in the floating security's nature to tolerate the creation of more securities. Therefore, in any system which has recognised it, the need for more complex priority rules has also arisen. German law's extended and expanded security devices<sup>105</sup> – which could be perceived as nothing more than very limited versions of non-public floating liens extending to future advances and after-acquired property – resolved the priority puzzle by relying on good faith and courts in lieu of forging synthetic yet internally coherent statutory priority rules.

The concomitant problems caused by the inevitable conflict of bank securities (similar in effect to floating liens) and ROTs of suppliers – for which the *APPSA* and the other members of the Unitary Group have developed one of the most criticised institutions known as the purchase money security interest ('PMSI') with its super-priority – are therefore resolved by courts in Germany on a case by case basis.<sup>106</sup> This is detrimental to predictability and increases transaction costs but, presumably due to the complexity of the entire theme, has escaped attention. The neglect is tolerated because in many segments of the economy such industry practices are in place to prevent conflicts arising by controlling the client's debt exposure. Yet, as the 2008

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<sup>105</sup> While Rolf Serick (Rolf Serick, *Securities in Movables in German Law: An Outline* (Springer, 1990)) uses these English terms, others have translated these categories as 'enlarged' and 'elongated' securities (eg, Stefan A Riesenfeld and Walter J Pakter, *Comparative Law Casebook* (Transnational Publishers, 2001). Both are mirror translations of the German terms and the inconsistency is attributable to the simple fact there is no established canon on how to translate the names of idiosyncratic German legal categories. As such, they mean nothing more than 'extension and expansion' of security interests to secure future advances or to make the security interest expand also to after acquired property as defined in the *APPSA*'s dictionary in s 10 – by adding appropriately formulated clauses to the security agreements.

<sup>106</sup> Most importantly that was the case with the conflict of security interests held by banks and suppliers. In the lack of statutory priority rules, the courts were given the task to determine who has priority and the courts have sided with the suppliers. See Jürgen F Baur and Rolf Stürner, *Lehrbuch des Sachenrechts*, (C H Beck, 15<sup>th</sup> ed, 1989) 604, referred to in Stefan A Riesenfeld and Walter J Pakter, *Comparative Law Casebook* (Transnational Publishers, 2001) 3. Note here that German law, more precisely the case law and scholars, 'think' in terms of 'bank securities' versus 'supplier' securities – which is not the case with the *APPSA*.

financial crisis demonstrated, the level of indebtedness and the potential conflicts of financiers' interests are controllable only in times of 'peace'; once crisis hits with insolvencies interfering, they may easily escape control. Security interests perfected by control or pledging of certificates issued by warehouses provide perfect examples. Again, where universal banks, directly or through their captive subsidiaries, are the only credit-providers no problems arise as the banks will ensure that the right 'credit versus market' value of collateral will be maintained. Moreover, in German law, due to the rule against excessive security, the release of collateral above a threshold is a necessity.<sup>107</sup> The lesson for those familiar with the *APPSA*, or of the systems with sophisticated priorities, is that European systems are deficient in this respect and that apart from the very basic rules, all other specific conflicts are barely based on exact rules and are, to a certain extent, unpredictable. Australia has obviously parted with these intricate problems at the price of a somewhat complex, yet fixed priority system. Regardless of the occasional heavy criticism, from Europe it seems, this was the right thing to do.

(d) *European Hostility towards Self-help*

What is a truism to Australians is a tough subject for continental European lawyers: the main token of the efficiency of the Unitary PPS Group is the availability of self-help. Civilian systems prohibit, rather than posit, self-help – especially self-help repossession – as one of the basic principles of commercial law.<sup>108</sup> English law has, as well, seriously limited the instances in which it pays to resort to self-help repossession. A number of factors, such as the faster tempo of doing business, the reoccurring economic crises and a greater awareness of what is happening in competitors' backyards, however, are changing this attitude. Furthermore, almost completely unnoticed by academia, private collection agencies are developing

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<sup>107</sup> The jurisprudence has been changing on this *sui generis* German debtor-protective instrument over time. The problem was primarily about how to determine the value of the collateral in order to compare it to the amount of the outstanding loan. The figures now seem to range between 110% to 150% of the value of the collateral. The more important takeaway for comparativists is that this rule forces creditors to constantly monitor the loan and release the excess collateral above this threshold. This rule obviously causes problems in the case of shifting collateral, like the so-called 'global assignment' as security of present and future receivables of the debtor or security transfer of inventory.

<sup>108</sup> Goode listed eight principles that together form the 'philosophy of commercial law' – at least, the common law version of it. From the list the 'encouragement of self-help' is definitively foreign to civilian systems; though qualifications should be made about the 'facilitation of security interests' principle. See Roy Goode, 'The Codification of Commercial Law' (1988) 14 *Monash University Law Review* 136, 148.

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throughout Europe.<sup>109</sup> Moreover regulation of this particular type of 'legal services' became eventually a must even in such countries as Germany in 2007 although via the back door: the Act on Provision of Legal Services (*Rechtsdienstleistungsgesetz*).<sup>110</sup> In many of the war-torn Balkan countries a significant portion of the populace owns weapons, and many of the CEE countries struggle with building a more efficient judiciary and bailiff system, so it is understandable that the appearance of self-help repossession agencies is not desirable in the short run. The mere fact that papers or initiatives dealing with private enforcement are lacking in mainstream Western European scholarship is the best indicator that in this part of Europe academic circles do not think that changes are needed notwithstanding the developments

Moreover, private collection agencies grow by offering more services which come close to clear self-help repossession. In some jurisdictions, cases have reached even the highest courts in a relatively short period of time.<sup>111</sup> Risks inherent in the work of

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<sup>109</sup> For examples of trans-nationally active private collection agencies see the company history of 'Intrum Iustitia' at <<http://www.intrum.com>> being at the moment active in 22 European countries – with the tendency of expansion, or that of the 'EOS Group' headquartered in Hamburg (Germany) at <<http://www.eos-solutions.com/en/eos/>>. Tempted by the unregulated-yet-lucrative market, local collection agencies have also appeared. Often their existence cannot be tracked down because they have no associations, are not registered as collection agencies – rather only as 'commercial companies' or 'factoring organizations', are professional at avoiding courts, and often threaten consumers by hardly legal means. In brief, many parts of Europe essentially are now repeating the regulatory history of private collection companies of common law countries. CEE collection companies include, for example, the Polish 'Kruk' companies – which became listed on the Warsaw Stock Exchange on 10 May 2011 (<<http://www.kruksa.pl/en/>>), and the Romanian 'Millennium Services Securities' (<<http://www.mss.com.ro>>). Still, court enforcement is problematic in Europe and that is the reason for the increased interest in the services of private collection agencies (even if they are named as receivables handling businesses).

<sup>110</sup> *Gesetz über aussergerichtliche Rechtsdienstleistungen* (Law on Out-of-Court Legal Services) of 12.12.2007. According to this law, collection (*Inkasso*) agencies are subject to registration and regulatory oversight. While repossession of chattels and collection of receivables is admittedly different, the borderline between the two is far from being clear. This is why this German development is important for Europe.

<sup>111</sup> The saga of self-help is particularly interesting in Romania, which has introduced it without much ado, following EBRD's advice in 1999 and conspicuously following the pertaining sections of UCC art 9 (*Law on Legal Treatment of Security Interests in Personal Property* (Romania), ss62, 63). Little empirical data is available to draw properly supported conclusions, yet it is fair to say that the system has failed the expectations. The newer development that may affect the future fate of self-help was related to the amendment of the *Code of Civil Procedure* (Romania) in 2006 to increase the efficiency of court enforcement. The new art 373 allowed for the issuance of the enforcement writ without a judge – giving freedom to bailiffs. This new solution was then attacked before the Romanian

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these agencies have escaped the attention of the EU and state legislators as well as academia. This is problematic because private collection agencies can exploit their strategic position, expertise and the inertia of lawmakers to the detriment of consumers. Scrolling through local law reviews or books in search of the topic would be to no avail because the few isolated reports on the abuses are only discussed by daily newspapers or business journals. In other words, instead of overcoming matters of pride and looking at the related and rich experience of common law systems, including Australia, Europe has opted for a piecemeal evolution of its own that will make these systems, their consumers and businesses, pay the price of experimentation – especially in CEE. All this is occurring with the tacit cooperation of academia, legal communities (like the associations of attorneys and public notaries directly facing these challenges), regulatory agencies and eventually all those who could be in the position to help introduce appropriate ‘regulatory firewalls.’<sup>112</sup>

(i) *Much of Europe Lacks Adequate Consumer Protection Laws against Abuses of Collection Agencies*

Similarly to the European treatment of self-help, while the significance of the complementarities of PPS and consumer protection laws is self-evident in Australia – as correctly emphasized in Australia through the consumer finance-related provisions in the APPSA with its cross-references to the Australian *National Consumer Credit Protection Act 2009* (Cth) (‘NCCPA’) – that is absolutely not so in Europe. To begin with, due to the difficult combination of EU and national consumer protection laws of Europe and the concomitant large variations,<sup>113</sup> it is quite a challenge to find

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Constitutional Court which passed its Decision no 458/2009 on it in 2009 (published in the Official Gazette no 256 of 17.04.2009). The Constitutional Court ruled that due to the provision enforcement – originally judicial for the involvement of a judge – became an administrative matter, which was contrary to the constitutional principle of the separation of powers. If this decision is to be taken as the expression of the prevalent legal opinion on measures aiming to make enforcement more efficient, then presumably this decision will deal the final blow also to the short-lived self-help repossession in Romania. See Klaudia Fábíán, Alexandra Horváthová and Cătălin-Gabriel Stănescu, ‘Is Self-Help Repossession Possible in Central Europe?’ 4 *Duke Journal of Eurasian Law* 83.

<sup>112</sup> Irrespective of the strong data and privacy protection rules of Europe – less viciously enforced in CEE, especially in the non-EU Member States – debt purchasing became a lucrative routine business in Europe, including CEE. On the three phases of the metamorphosis of private collection agencies in the US and the parallel (if any) developments in Europe see Emil Hartleb, ‘The Changing Face of the Commercial Collection Agency’ in David Franklin, *International Commercial Debt Collection* (Thomson, 2007) 159.

<sup>113</sup> As the first comprehensive book on EU consumer protection law aptly describes: ‘There are probably as many models of consumer protection as there are Member States in the EU.’

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answers to numerous corollary problems; additionally the framework has gaps.<sup>114</sup>As consumer protection law is scattered over more – frequently amended – sources of law, both on EU and national levels, one can never be certain whether the correct and complete answer has been found. For these reasons, the comprehensive Australian *NCCPA* might become a model for Europe to follow (unlike the fragmented US system with the prominent *Fair Debt Collection Practices Act*, 15 USC § 1692 ('*FDCPA*') or the even more fragmented UK set of consumer legislation). In particular, the clearly demarcated rules on protections against the abuses in the context of PPS law. Europe seems to have been lost in that respect, as instead of separately addressing the threat from the financial arena, the provisions became mixed with and are overshadowed by 'more traditional' forms of consumer protection.<sup>115</sup>

The increased attention devoted to protection of consumer debtors is partially linked to the pivotal role self-help plays in the Unitary PPS Group. In civilian systems, where security interests must be enforced via courts – meaning scrutiny by judges, a right to appeal, and enforcement by government employed, or semi-private bailiffs – significantly fewer sector-specific problems arise.<sup>116</sup> It may be forecast, however, that due to the foreseeable excesses and the growth of private collection agencies, that will change.<sup>117</sup> Europe's leading common law system, the UK, not only has a proper

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The differences are most obvious if one looks at remedies. Each Member State has its mixture of public (criminal) law and private law remedies, both in terms of sanctions and procedures..' Hans-W Micklitz, Jules Stuyck, Evelyne Terryn and Dimitri Droshout, *Materials and Text on Consumer Law* (Hart, 2010) 54.

<sup>114</sup> One such suitable example would be the fate of 'acceleration clauses', playing a crucial role in instalment contracts. *NCCPA* ss 92 and 93 could be ideal models for many European systems – however, regrettably, borrowing from outside of the Continent is far from usual.

<sup>115</sup> To start with: Europe's consumer protection law is per se very fragmented, hardly transparent and insensitive to the idiosyncratic features and problems inherent to consumer credits. It is also fair to claim that neither the US laws – in particular the *FDCPA* – let alone the *NCCPA* of Australia are known in Europe, even though a comprehensive code that would in detail, with proscriptive language, regulate and hence protect vulnerable consumers is very much needed. The tension between classical and consumer protection in the financial fields, however, is felt and that is why numerous provisions have been added to the respective EU directives. The product, a hardly transparent directive, without a proper emphasis of the underlying policy choices – and simply skipping the threats caused by the spread of unregulated collection agencies – obviously is not in the position to appropriately tackle these problems.

<sup>116</sup> Put simply, the entire body of law around the 'without breach of the peace standard,' or its equivalent in Australia, is simply non-existent in Europe; or is in the process of development.

<sup>117</sup> Modigliani and Perotti's hypothesis concerning private enforcement from 2000 seems to have fully materialized now, not just in CEE but also in Western Europe. According to

protection system in place (even if scattered through a quite intricate set of interlinked statutes) against self-help excesses, but has come closer to the continental systems in suffocating self-help repossession through increased regulatory intervention. Lacking any specific regulatory protections against excesses by private enforcement agencies, however, many of the CEE countries face problems rather similar to those that are known to the US rather than to the UK. Still, compared to the UK and the US, the Australian comprehensive system has a lot of competitive advantages – that should be heeded by Europeans notwithstanding the ‘tyranny of distance.’

(e) *Europe’s Continued Stigmatisation of Bankrupts*

In Europe, bankruptcy carries with it a social stigma and therefore the conventional business wisdom is to avoid it, rather than to contract for protections through security interests.<sup>118</sup> Or worse, bankruptcy is automatically equated with complete loss, an abyss from which no debts could be recovered. As a consequence, it is quite common, especially in CEE countries, not to participate in bankruptcy proceedings at all even though local bankruptcy laws provide creditors, especially the large ones (typically banks), with powerful positions. Local businessmen too often perceive

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Modigliani and Perotti, in the first phase, because of the unreliability of the enforcement systems, ‘transactions tend to be intermediated through institutions or concentrated among agents bound by some form of private enforcement.’ This is already readily visible in Europe – though not through legal scholarship. See Franco F Modigliani and Enrico C Perotti, ‘Security versus Bank Finance: the Importance of a Proper Enforcement of Legal Rules’ (FEEM Working Paper No 37.99, Social Science Research Network, 2000) available electronically at <<http://www.SSRN.org>>. The more problematic corollary is that these private agents prosper without properly being regulated and hence nothing prevents them transgressing the borders of the imaginary, yet undefined, legality. Needless to say, they are also targets of organized crime as very lucrative market niches. In Hungary, for example, some of these de novo agencies have purposefully disguised identity (eg, no website) precisely to escape public attention. The panacea to this particular set of problems – which should be entrusted to the EU – is a detailed regulation, including licensing, as well as criminal, administrative and civil remedies against abuses similar to the Australian NCCPA.

<sup>118</sup> This is quite properly visible from the comparison of bankruptcy-related data of France, Germany and the US. In 2002, for example, in Germany 99% of all business bankruptcies (37 579) and in France 90% of all business bankruptcies (43 800) ended in liquidation (ie, disappearance of the businesses from the market). That figure for the ‘land of second opportunities’ was 70% only (out of 1 577 651 bankruptcies), which is to a great extent attributable to the different US bankruptcy philosophy. See John Carreyrou and Matthew Karnitschnig, ‘Paris Looks to U.S. – on Bankruptcy’, *The Wall Street Journal Europe*, 25 September 2003.

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bankruptcy proceedings as a way to disappear with the creditors' assets unscathed. Hence, the number of reorganizations is small in the region; though as this form of insolvency proceeding is relatively new in such major jurisdictions as France or Germany, these jurisdictions fare only a little better on this front. As the predominant opinion is that in case of a debtor's insolvency no court can be of use, even banks – typically having high priority and the biggest claims – fail to resort to fraudulent transfers' law (ie, wrongful trading rules).

This reasoning in part explains why the value of security interests is not fully recognized in continental Europe. PPSL is conceived not just by typical SMEs but also by experts of banks as something of use outside the context of bankruptcy. What is commonplace in Australia or other common law systems with developed creditor-enhancement techniques – that the utility of PPSL is best tested in the context of bankruptcy – is not necessarily known. The EU has not been in the position to change much in that respect yet.<sup>119</sup> In truth, the EU is focused solely on how the 'bankruptcy stigma' – ie, the perception that bankruptcy is equal with fraud and that no business should be conducted with people who have ever become bankrupt – should be eradicated without trying to unearth the reasons that led to such common view in the first place. As suggested above, until the law allows debtors to accumulate huge debts, move that money out of sight and then escape any liability by resorting to bankruptcy law, the stigma will not disappear. The 2008 global financial crisis may, but will not necessarily end in a paradigm shift. In any event it is a matter of fact that, for example, in Germany, the industrial engine of Europe, some forms of non-fraudulent bankruptcy are still criminalised.<sup>120</sup> To wit, the system believes that bankruptcy frauds can be adequately tackled by criminal law – which always reacts *ex post facto* and imposes the most onerous burden of proof on prosecutors.

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<sup>119</sup> See especially EU Commission communication of 5 October 2007 *Overcoming the Stigma of Business Failure – For a Second Chance Policy – Implementing the Lisbon Partnership for Growth and Jobs* (COM/2007/0584 final); Commission Communication of 25 June 2008: *Think Small First – A Small Business Act for Europe* (COM, 2008, 394 final); and Commission communication of 1st of October 2004 *Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty* [2004] OJ C 244/2.

<sup>120</sup> The same could be said of Italy and some other Continental European systems, which – contrary to common law's retreat from the philosophy that criminalised also the honest but unfortunate debtors somewhere in the 19<sup>th</sup> century – still punish managers and entrepreneurs that would go free of criminal charges in common law. See Maurizio Pontani, 'Pre-Bankruptcy Crimes and Entrepreneurial Behavior: Some Insights from American and Italian Bankruptcy Laws' (German Working Papers in Law and Economics, 14, 2004).

The issue of bankruptcies in CEE is more complicated because sometimes the number of insolvent companies (both non-privatised business from socialism and newly created ones) is prohibitive. Serbia is a good example as here the restructuring – by way of privation or otherwise – of the inherited heavily indebted public sector companies has still not been concluded in 2012. In many instances, formal bankruptcy proceedings are not even initiated because of the deficiencies in the administration of bankruptcies. Especially for SMEs, bankruptcy is generally perceived as something designed solely to escape from liabilities after cash has been removed from the reach of authorities and creditors. Part of the story, similarly scarcely researched, is that the law on wrongful trading (or in the US, the law of fraudulent conveyances) is underdeveloped and no appropriate remedies are given to creditors<sup>121</sup> – notwithstanding that the piercing of the corporate veil doctrine has been recognised by many jurisdictions though only for very exceptional cases.

#### IV THE INVISIBLE QUINTESSENTIAL MOSAICS OF THE APPSA

##### A *Visible and Invisible Industries*

From the perspective of European bank-based systems it is interesting to see how the industry-specific rules are accommodated by such a comprehensive system as the APPSA. The first such accommodation is the drafters' choice to include explicit reference to pawnbrokers.<sup>122</sup> The delimitation of which pawnbroker transactions come under the system is important not just because of the benefits that stem from enhanced predictability but also for better handling of the idiosyncratic risks inherent to the industry and the industry's growth potential that may drive it to expand to new fields.<sup>123</sup> Pawnbrokers are known also in Europe, even in the least developed

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<sup>121</sup> Most civilian states' law on fraudulent transfers is in two acts: in the bankruptcy act and in the civil (or commercial) codes. While the provisions on fraudulent conveyances in the context of bankruptcy have become a routine, the civil code device normally is still known under its ancient Roman designation the '*Actio Pauliana*', or in its English version the '*Actio Pauline*'. See, eg, *Civil Code* (Hungary) s 203. Germany has a special act for out-of-bankruptcy fraudulent conveyances, initially enacted in 1879, last consolidated version from 1994 – as amended last in 2010: *Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens* [Law on the avoidance of acts of a debtor outside the insolvency proceedings] (Germany) 21 July 1879, RGBl, 277 .

<sup>122</sup> See APPSA s 8 (1)(ja) and (6) and the exceptions in s 47.

<sup>123</sup> Reference is here made, for example, to Cash America International, Inc, - present since 2009 also in Australia – a corporation that became listed on NYSE (symbol: CSH) in 1990 [initially in 1987 listed on the American Stock Exchange] and which thus may be an example of what potential is hidden in the fringe banking exploiting PPSL. For data on



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systems. This omnipresent industry, however, is simply not visible in the new reform laws, partly presumably because foreign pawn companies typically have not come to much of Europe and locally nobody seriously believes that pawnshops could grow into stock exchange listed giants. Therefore the options proper PPSL might offer this specific industry are generally unknown; research of this segment of the economy and the expertise of Australian or US companies dealing with pawnbrokers and their expansion should be welcome. This is why prescriptive and direct language of the sort in the *APPSA* on pawnbrokers, perhaps even with more details inspired by the experiences of developed systems, would be beneficial especially in less developed jurisdictions in Europe. We should not forget the eternal truth that pawnshops can prosper and provide credit even in bad times – even to SMEs.

In light of the explicit pawnshop language in the *APPSA*, it is puzzling why such more specific regulation of rent-to-own or consignment is absent – at least to forestall, or foreclose the attendant dilemmas. Admittedly, this question is based on an analogy with the US history of secured transactions law, which was to a great extent about escaping from onerous regulations and finding a safe haven in a new independent security device. In other words, the doors should have been closed at least with respect to known dilemmas, for instance in the rent-to-own industry which is a financial innovation of quite recent vintage. The coverage of all leases above a threshold value is a good example.<sup>124</sup> It is less certain whether the solutions are adequate, however, for consignments<sup>125</sup> and rent-to-own<sup>126</sup> transactions, which are obviously transactions present in Australia.

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Cash America see <<http://www.cashamerica.com>> or its Australian webpages at <<http://www.dollarsdirect.com.au/>>. The activities of the largest Hungarian pawnbroking company, the BÁV ZRT (see <<http://www.bav.hu/>>) remains limited to traditional forms of pawning and expansion solely to increasing the number of shops – that in 2007 amount to twenty. Albeit the literature on pawnbrokers is scarce, to say the least, mention must be made of Oeltjen C Jarret, 'Pawnbroking on Parade' 37 *Buffalo Law Review* 751, and Jarret C Oeltjen, 'Florida Pawnbroking: An Industry in Transition' (1996) 23 *Florida State University Law Review* 995.

<sup>124</sup> See *APPSA* ss 12(h) and 13 defining the 'PPS lease' – including its basing variants, ie, lease of bailment of goods for a term of more than one year (sub-s (a)), and – for an indefinite term (sub-s (b)). This solution – obviously inspired by Canadian experiences – at first sight seems to be better than the quite indeterminate, more-factor dependent, and case-specific tests developed by US courts. Although no exact comparative statistics seem to exist the Australian-Canadian solution are more cost efficient because of the higher predictability and requirement of less litigation.

<sup>125</sup> See the definition of 'commercial consignment' in *APPSA* s 10. The US experience or struggle with this particular type of transaction, however, should have been telling to drafters of the *APPSA*. At the moment, the scarce language on commercial consignment in

## B Contempt of Court Rules and PPS Law

From the perspective of civil law systems, the system of statutory penalties resorted to by the APPSA against wrongful filings or searches is also of interest.<sup>127</sup> The solutions admittedly resemble their US counterparts, although with significant variations. These include non-statutory punishment,<sup>128</sup> compensatory and consequential damages,<sup>129</sup> allowing equity to step in and deprive the secured creditor of its priority<sup>130</sup> and allowing for the filing of a correction statement.<sup>131</sup> These,

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the APPSA as contrasted with that of UCC art 9 raises doubts as to whether the corollary dilemmas have properly been regulated. As a reminder, the Revised Version of UCC art 9 was forced to bring almost all consignments under the system. This was a policy choice based on the recognition that '[s]ince commercial consignments function as a form of purchase money financing, they create an ostensible ownership problem for the consignee's creditors and purchasers [who] may assume that the merchant owns the inventory that it possesses.' Elizabeth Warren and Warrant Walt, *Secured Transactions in Personal Property* (Foundation Press, 2007) 349.

<sup>126</sup> Rent-to-own (RTO) as a nominated type of transaction is yet to arrive too, for example, in the CEE. The struggle to bring them under the penumbras of UCC art 9 is still ongoing in the US; with the RTO industry normally prevailing. Most of the state statutes foresee that terminable RTOs are 'true leases', not instalment contracts or transactions subject to secured transactions law. Courts, however, often have a different opinion. In *Perez v Rent-a-Center* 186 NJ 188, 892 A.2d 1255 (2006) the New Jersey Supreme Court found the RTO contract to be a conditional sale and thus subject to UCC art 9. See Warren and Walt, above n 1195, 334.

<sup>127</sup> As the full APPSA Pt 6.3 is devoted to penalties, the obvious conclusion is that the system has entrusted this institution with important disciplinary functions. Yet penalisation of the registration of non-existent security interests (s 151(1)), the failure to amend (s 151(2)) and for unauthorised searches of the register (s 172(3)) seem to make sense especially for emerging markets without established and tested registry systems and especially registry-maintenance and user culture.

<sup>128</sup> See UCC § 9-625(e) punishing, among others, the wrongful filer, in addition to any compensatory and consequential damages with \$500 in each case.

<sup>129</sup> See UCC § 9-625(b) foreseeing liability for damages 'in the amount of any loss caused by a failure to comply with [art 9, including] loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.'

<sup>130</sup> In *Woods v Bath Industrial Sales Inc* 549 A.2d 1129 (1988) the court 'invoked the good faith requirement of UCC 1-203 to find a security interest unperfected when the creditor knew of an impending name change by the debtor (that would be seriously misleading) but nevertheless filed the financing statement under the then existing name of the debtor without indicating the contemplated name change.' See James J White and Robert S Summers, *Uniform Commercial Code* (West Publishing, 4<sup>th</sup> ed, 1995) 803.

<sup>131</sup> See UCC § 9-518 and the connected official comment which – expressing the underlying policy choices – states that the 'problem of "bogus" filings' is not limited to the UCC filing

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together with the generally available contempt of court tools, perhaps more visibly exploited in the context of bankruptcy, are safeguards in Australia for which there is no appropriate substitute in many European systems.<sup>132</sup> The role punitive damages play in the US to protect consumer debtors against the abuses of private collection agencies, however, might be of common interest to Australia and Europe.<sup>133</sup> As contempt of court rules have escaped the attention of scholars (particularly when connected to bankruptcy proceedings), Europeans and emerging systems could learn much from Australia. Hungary for example, has resolved some of these problems by entrusting the public notary system with the responsibility of recording and maintaining the register for charges on movables since 1997. Both entry on and search of the registry are to be performed physically in an office of a public notary, when parties must be informed also of all the elements of the credit and the linked security transaction.<sup>134</sup> There is no appropriate remedy against a bankrupt debtor being unwilling to present anything more than a skeleton financial statement with summary data on his pre-bankruptcy dealings, whereby creditors are in fact prevented not just from resorting to law on wrongful trading (ie, fraudulent transfers) but especially from bringing criminal charges. The Hungarian law and the connected dilemmas are not an idiosyncratic problem of this country only. True, these thoughts do not apply solely to Australia, yet the crucial role contempt of court

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system but extends to the real-property records, as well. A summary judicial procedure for correcting the public record and criminal penalties for those who misuse the filing and recording systems are likely to be more effective and put less strain on the filing system than provisions authorising or requiring action by filing and recording offices.

<sup>132</sup> The comparative scrutiny of contempt of court rules has a very scarce literature. For example, seeing the pivotal role these rules play in the context of bankruptcy in common law it is difficult not to agree with the opinion of Michael Chesterman, who was impressed rather by what French law offers. See Michael Chesterman, 'Contempt: In the Common Law, but not the Civil Law' (1997) 46 *The International and Comparative Law Quarterly* 521, 560. The CEE experiences from the post-1990 period undoubtedly ask for closer attention to this issue because first, excessive behaviours in the courtrooms have become quite frequent and the sanctions for not performing what courts ask are weak; secondly, corruption is also often a problem just like the problems with the proper training of judges.

<sup>133</sup> For example, in *Nissan Motor Acceptance Corp v Baker* 239 BR 484 (ND Tex 1999) the secured creditors' failure to return the repossessed motor vehicle within two months, after having learned about the debtor's Chapter 7 filing actual damages in the amount \$23 000 plus punitive damages, was upheld by the court because that was a willful violation of the automatic stay.

<sup>134</sup> See 11/2001. (IX. 1.) *IM rendelet a zálogjogi nyilvántartás részletes szabályainak megállapításáról* [Decree No. 11 of year 2001 (1<sup>st</sup> of September) with Detailed Rules on the Operation of the Charge Registry].

rules play in making the PPS system efficient is something that is simply presumed and not researched – which should be primarily noted by Europeans.

## V WHAT LESSONS FOLLOW?

### A *The Repercussions of the Heterogeneity of Europe*

From the perspective of non-monolithic Europe, the simplification introduced by the APPSA is a long-awaited logical step that is the subject of only wishful thinking on the Old Continent. It is unlikely that the radical novelties of DCFR will change things enough to bring Europe closer to the Unitary PPS Group. Irrespective of the changes, Western Europe is self-contained and CEE is tired of reform. That PPSL has not become an issue at the EU level is evidence of that fact. In an age of drastically increased cross-border business activity, the drive for forum shopping for the most suitable bankruptcy system within the EU, paralleled with the debilitating unpredictability inherent in widely differing PPS national systems, can only be explained rationally by the leverage exercised by lawmaking elites. That is a major impediment to change that Australia has managed to overcome.

CEE is equally diverse, complicated, and constricted by the stance of the local legal communities – including introverted academia, a large percentage of whom speak no foreign languages and who are incapable of catching up with the challenges of globalisation. This is also partly because of a strong positivistic tradition and the lack of a culture of critical thought.<sup>135</sup> Overshadowed by the voting population, more visible problems affecting the healthcare or pension systems and the omnipresent reform fatigue led by the challenging transposition of the '*acquis communautaire*', have rendered the PPS reforms less important politically. Still, the achievements of France or some of the CEE systems in reforming their PPSLs are not to be dismissed. The

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<sup>135</sup> A separate book on this might be written on the features, roles and problems of the world of academia in Europe and especially in CEE. Unfortunately, these institutions have, in many countries of the region, become ivory towers impenetrable not just by representatives of unorthodox thinking but by new thinking itself. However, comments ought to be made, not just strictly related to these institutions but, to the way lawyers tend to perceive things. For example, it is typically thought that a reform or modernisation of a field of law - because of exogenous factors - is a one-shot type action. Commercial lawyers knowledgeable in international mercantile law, hence, have looked upon the PPSL reforms as something similar in nature to the *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980 (entered into force 1 January 1988) (Vienna International Sales Convention (CISG)). Yet, while every system possesses sales law and business practices developed to a certain extent, that was not the case with PPSL.

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systems that have followed the EBRD or one of the Anglo-Saxon laws now have segments, elements or business patterns also known in Australia.

As no European country has yet embraced the Unitary Model in full, some segments of local PPSLs remain, however, fundamentally different from the APPSA. For example, even the reform-oriented CEE countries have rejected subjection of title financing (ie, retention of title clauses) to the new public-notice-providing PPS system. Because of that it would be interesting to investigate the extent to which the near failure of one of Austria's main banks can be attributed to deficiencies in leasing laws. The Hypo-Alpe Adria bank was bailed-out by the Austrian government and ended up in a precarious position because of the collapse of the leasing schemes it employed in the Balkans.<sup>136</sup> Those results might also be relevant in determining whether Australia has taken the right direction with the APPSA by giving up the English approach that still looks at title financing devices as completely distinct from security interests – yet which is from that point of view consonant with Austrian and German law. Unfortunately, it is customary, even in such developed systems as Austria (let alone CEE), to sweep such unhappy experiences under the carpet. Hence, little if anything can be discovered about such pathological financial phenomena.

**B *Lessons for Practitioners and Scholars***

For practitioners, a number of conclusions may follow from the above. First, financing is needed in Europe; not just because European banks have been forced to decrease their lending activities as a consequence of the financial crisis, Basel III, the sovereign debt crisis and connected factors, but because many segments of European PPS systems are in need of serious upgrading.<sup>137</sup> Some market niches have simply not been fully discovered yet; in particular those that in the US or other typically common law systems are serviced by non-banking finance organisations. In other words, professional industries who know how to exploit PPSL may still find lucrative business opportunities. The question is whether Chinese, Australian, other non-European businesses, or such newcomer business forms as investment companies or the likes of Ireland's National Asset Management Agency will realize

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<sup>136</sup> Chris Bryant, 'Finance Probes Stretch Limits of Justice System', *The Wall Street Journal*, 22 October 2010, 3 (special supplement on Austria).

<sup>137</sup> Various funds are already filling some of the gaps left by the shrinking banking activities. Banks typically pull back lending to small companies – which is exactly one of the fields where PPSL and the linked non-banks might come in. On the other hand, investing in 'mid-cap European corporate debt [is also] a way to diversify ... credit exposures with an efficient risk return profile' – especially suitable to pension fund clients of investment funds; as Laurent Gueunier, the head of structured finance at AXA Investment Managers, put it. See Chris Newlands, 'Lending a Hand as Banks Pull Back', *Financial Times Fund Management* (London) 5 March 2012, 22.

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that sooner. The already mentioned success story of field warehousing in Hungary might be a telling example that, indeed, there is still room for improvement and market niches are still awaiting foreign investors.

Secondly, for those businesses from the Unitary Group that may venture to Europe in the not so distant future the above synopsis of legal systems, contrasting the comprehensive model now embraced by Australia with those of the segmented European jurisdictions, should be a useful business map to Europe's markets. The caveat is that irrespective of the rapprochement Europe remains heterogeneous. Floating charges, for example, even though grown from the same root, are not completely identical in Ireland and the UK,<sup>138</sup> nor is the Dutch remote functional equivalent a true 'replica' – notwithstanding the eloquent pronouncements of Dutch lawyers.<sup>139</sup> Contrary to what might be presumed in Australia, local idiosyncratic versions of the floating security now exist not only in the UK, but also in France and the Scandinavian states, and more importantly they have been successfully introduced also by many CEE countries - though with varying features and unusual names such as 'property encumbering charge' or the like.

Thirdly, albeit this article had a limited reach by focusing primarily on PPSL proper, as well as its closely linked relatives of bankruptcy and consumer protection laws, obviously one should not forget that no area of the 'law of finance' exists in isolation from the rest. This intricate web should always be presumed even at the cost of increasing uncertainty of the 'unknown unknowns' type.<sup>140</sup> At the moment, in the

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<sup>138</sup> According to the recent landmark judgment of the Irish High Court passed in the Belgard Motors liquidation (25 March 2011) government claims rank ahead of crystallised floating charges held by banks. The law is the opposite in the UK where the HM Revenue and Customs and other governmental agencies' claims are subordinated to crystallized floating charges of banks: *J D Brian Ltd (in liq) v Companies Acts* [2011] IEHC 113.

<sup>139</sup> The Netherlands belongs as well to the civilian legal family of continental Europe. Hence, only due to the recent Supreme Court ruling (HR 3 February 2012, LJN BT6947) is it possible to talk of the existence of the local twin sister of English floating charges. In fact the novelty is limited only to the possibility of encumbering all future receivables of corporate borrowers by banks. The essence of the practice invented by banks and now blessed by the Supreme Court is that a bank acquires an undisclosed pledge of its corporate borrowers future receivables by registering a so-called collective deed of pledge ('*verzamel pandakte*') on a weekly or even daily basis, based on a registered power of attorney prior to the bankruptcy of the debtor. Unless the transferability of certain receivables is excluded by contract, such agreements will be valid against other creditors and the bankruptcy trustee. See the announcement of the De Brauw Blackstone and Westbroek law firm at <<http://www.debrauw.com/News/LegalAlerts/Pages/DutchSupremeCourtacceptsfloatingcharge.aspx>>.

<sup>140</sup> See Carmichael and Pomerleano, above n 79.

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spectrum of financial tools ranging from the latest generation derivatives to the most traditional home mortgages, presumably one of the most 'conservative' and most stable fields seems to be PPSL. 'Presumably' due to asset-securitisation, or the ability of universal banks to engage in both conventional and investment banking, even those secured transactions that are the most remote from the capital markets are typically dependent at some level on connected, highly volatile investment transactions.<sup>141</sup> No perfect solution seems to have been invented yet on how to decouple these two niche markets with different risk profiles. Rather, we are compelled to learn anew virtually every day how to hedge against this particular contingency. For example, the requirement recently imposed on banks to formulate 'living wills'<sup>142</sup> increases predictability but is no panacea against failure. Leaving aside such conventional protections as bypassing the application of non-business friendly laws and avoiding the courts of problematic jurisdictions, however, new techniques ought to be developed. If sufficiently leveraged, financially and politically direct arrangements with governments, or their agencies, seem to have become increasingly realistic.<sup>143</sup> To recap, the suggestion that Europe still has a lot to offer should therefore be always understood with these caveats in mind.

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<sup>141</sup> It is sufficient to list some recent titles to prove that PPSL reform is overshadowed by developments in the banking, capital markets and sovereign-financing hemispheres. See eg, Vittorio Hernandez, 'Australian Banks but Loan Exposure to Europe', *International Business Times* (online), 27 January 2012 <<http://au.ibtimes.com/articles/288422/20120127/australian-banks-cut-loan-exposure-europe.htm>> or Shadforth Financial Group, *Is the Australian Banking Sector Exposed to Europe?* (1 October 2011), <[http://www.sfg.com.au/Knowledge-center/News/Articles/October-2011-\(1\)/Is-the-Australian-Banking-Sector-Exposed-to-Europe.aspx](http://www.sfg.com.au/Knowledge-center/News/Articles/October-2011-(1)/Is-the-Australian-Banking-Sector-Exposed-to-Europe.aspx)>.

<sup>142</sup> The 'living wills' in the world of finances 'formally known as recovery and resolution plans ... spell out how they could be stabilized or shut down in a crisis. [As it stands now], [m]ost UK and US banks are well into their planning, while the Japanese banks and some European banks have barely started.' It has become known during the last months that banks typically resort to divestiture (selling foreign-jurisdiction subsidiaries) or exiting remote markets. Irrespective of the increased number of laws on cross-border insolvencies, one of the biggest puzzles is still how will various national bankruptcy systems react. See Brooke Masters, 'Regulators Differ over Living Wills', *Financial Times* (London), 5 March 2012, 16.

<sup>143</sup> See at the moment the still unfolding drama of Greek bondholders that in the restructuring process will receive only 15 per cent of the face value of their bonds and a new one worth 31.6 per cent. The 'sweetener' – aimed at making the necessary majority agree with the swap – is issuing the new bonds not under Greek but English law 'making it impossible for the Greek parliament to force a default in the future.' See Peter Spiegel, 'Investors Help Athens to Clear Bailout Hurdle', *Financial Times* (London), 8 March 2012, 4.

Fourthly, on the level of scholarship, the above might be an addendum to the pages on 'pleading and proving foreign law'<sup>144</sup> or to the theory of incomplete contracts.<sup>145</sup> Globalization, with increased cross-border movement of assets used as collateral, cannot but lead to conflicts of various PPSLs; especially in the context of cross-border bankruptcies. The scenario in *Hong Kong Shanghai Banking Corp v HFH USA*<sup>146</sup>—a conflict between non-registered retained titles fully valid under German law and Australian registered security interests — is likely to be repeated elsewhere together with the corollary risks.

Last but not least, comparative law could profit from the kind of comparison this article dared to attempt. The message is simple: Australians should step out of the common law world and Europe should pay much closer attention to Australian developments. Numerous topics have escaped research, to a great extent because of the false premise of the 'tyranny of distance' or the dogma that civil law has nothing to offer to the common law — and vice versa. It is sufficient to mention the relationship of PPSL and bankruptcy or consumer protection laws, or such interdisciplinary topics as the industry-PPSL interface. Yet the *volte-face* encapsulated in Book IX of the DCFR and Australia's joining of the Unitary Group is something that eventually shows that the developments in the PPS domain do move in the same direction and that it is not true that the two continents have nothing to offer each other.

Eventually Europe might realise that a comprehensive PPS act — no matter how complex it might turn out to be — should replace the existing set of fragmented laws that in the aggregate is even more complex and is additionally seriously flawed because of its inherent unpredictability.<sup>147</sup> Australia should heed European experiences with codification or the reasons that make (at least) leading European jurisdictions cautious in reforming their PPSLs or the connected bankruptcy laws. For these and similar goals, as well as for their systemic analysis, something equivalent to

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<sup>144</sup> See James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400.

<sup>145</sup> See Andrew Key and Hao Zhang, 'Incomplete Contracts, Contingent Fiduciaries and a Director's Duty to Creditors' (2008) 32 *Melbourne University Law Review* 141.

<sup>146</sup> 805 F. Supp. 133 (W.D.N.Y.1992)

<sup>147</sup> As Duggan aptly put it 'criticisms of its complexity tend to overlook the complexity of the laws it replaces.' In a recent article, he proved this in the case of the so-called Romalpa clauses — in Europe appearing in the form of the myriad questions connected to various forms of retention of title (ROT) or retention of ownership clauses. As he put it, the benefits of unitary systems are: doing away with the earlier formalism; clearer and more balanced priority rules, and; simplified rules governing accessions. See Anthony Duggan, 'Romalpa Agreements Post-PPSA' (2011) 33 *Sydney Law Review* 645.



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the US Permanent Editorial Board ('PEB') or the APPSA-linked Australian task force would be needed;<sup>148</sup> the group of experts having drafted the DCFR seems to have become a remote equivalent of that in Europe.<sup>149</sup> From their side, Australian scholars should more daringly advance critical reviews of developments, now knowing that in Europe many would cherish such information. Hopefully this article has contributed to the unfolding of such a mutually fruitful discourse.

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<sup>148</sup> The caveats of the doyen of comparative law, Rudolf Schlesinger, on two disadvantages of Codification – to wit, that codes may become obsolete and codification may encourage parochialism – allegedly led, in the US, to the constitution of the PEB. See Peter Winship, 'As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code "In the Light of Comparative Law"' (1996) 29 *Loyola of Los Angeles Law Review* 1143, 1152.

<sup>149</sup> See the website of the DCFR Context Group for a list of selected publications on DCFR at <<http://cfr.iuscomp.org/>>.