The UNCITRAL Legislative Guide, Model Law and Three Country Comparison

By

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Abstract

The UNCITRAL encourages States to implement a comprehensive secured transactions regime. In addition to the Legislative Guide on Secured Transactions, the UNCITRAL recently started drafting a model law. This thesis will focus on the advantages and disadvantages of model law reform. The reforms in Belgium, New Zealand and Australia show that model law reform can help States avoid drafting mistakes and make good policy choices. The implementation of a well-drafted and well-functioning model law can also increase economic efficiency and international economic appeal which can help outweigh the transition costs associated with model law reform. Model law reform does not solve all issues related to secured transactions reform, but recent reforms highlight the potential benefits of model law reform. The previous examples can help support the UNCITRAL’s project to draft a model law.
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Chapter 1
Introduction

1 Starting Point

The United Nations Commission on International Trade Law (hereafter, UNCITRAL) created the Legislative Guide on Secured Transactions (hereafter, the Guide) “to assist states in developing modern secured transactions laws with a view to promoting the availability of credit.”¹ Now the UNCITRAL has embarked on the creation of a Model Law on Secured Transactions (hereafter, Model Law).² The Model Law will be “simple, short, concise, based on the general recommendations of the Guide and consistent with all texts prepared by the UNCITRAL on secured transactions.”³ It aims to support States in the adoption and implementation of a modern and efficient secured transactions law as envisioned by the UNCITRAL.⁴ Scholars have offered different opinions on the effects of legislative guide and model law reform with respect to secured transactions. On the one hand, scholars are worried about the costs of creating a model law and model law reform. They are concerned how States will respond to a Model Law so similar to Article 9 of the Uniform Commercial Code of the United States (hereafter, Article 9)⁵ and the Canadian PPSAs.⁶ On the other hand, the Model Law is considered a useful tool to adopt a coherent secured transactions regime, avoid drafting mistakes and a method of reform that can increase international economic appeal and economic efficiency.⁷ This thesis will use recently secured transactions reforms as examples in support of

¹ UN, UNCITRAL Legislative Guide on Secured Transactions (New York: UN, 2010) at 1 [The Guide].
⁴ Ibid.
⁵ Uniform Commercial Code - Article 9 (2010) [Article 9].
⁶ See infra Chapter 2.2.1 Arguments against Model Law Reform at 9.
⁷ See infra Chapter 2.2.2 Arguments in Favor of Model Law Reform at 12.
model law reform and its benefits. The first part will look at how non-model law reform, in Belgium and Australia, or departures from model law reform, in New Zealand, led to drafting mistakes or different policy choices. Model law reform could have helped avoid unintended negative consequences and inefficiencies. The second part will look at some of the economic incentives for secured transactions reform. States are being told increasingly that secured transactions reform can help attract foreign investment and reduce transaction costs. This part will look at how model law reform can help increase the predictability for foreign investors and increase States’ international economic appeal. The adoption of a tried and tested regime through model law reform can help off-set some of the transition costs associated with secured transactions reform.

2 Three Country Comparison

Belgium adopted its new Pledge Act in 2013. The Pledge Act uses the flexible approach promoted in the Guide and implemented only some of its recommendations. This approach will be referred to as “legislative guide reform.” New Zealand enacted its version of the PPSA in 1999 and implemented it on 1 May 2002.


9 It allows reforming States to make their own policy and drafting choices to achieve the Guide’s objectives. See Orkun N Akseli, International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments (London: Routledge, 2011) at 17 [Akseli, Facilitation of Credit].


11 Personal Property Securities Act 1999 (NZ), 1999/126 [New Zealand PPSA].
They chose to model their reform after the Saskatchewan PPSA, and they only occasionally departed from it. New Zealand in effect treated the Saskatchewan PPSA as a model law, serving much the same function as the UNCITRAL proposed Model Law. This approach will be referred to below as “model law reform.” Australia adopted its PPSA in 2009. The drafters started from the same principles as in the New Zealand and the Saskatchewan PPSA but departed from these models frequently. The Review Report of the Personal Property Securities Act 2009 (hereafter, Review Report) indicates that Australia wanted to create a “best of breed” secured transactions regime by putting together different elements from offshore models. The Australian PPSA is, therefore, a hybrid between legislative guide and model law reform. The Australian approach will be referred to below as the “hybrid reform.” The Belgian, New Zealand and Australian reforms will be used to show the benefits of model law reform and support the UNCITRAL’s project to create the Model Law.

3 Structure

The first part will give background information on the objectives and goals of the UNCITRAL in creating the Guide and the Model Law. This will be followed by an overview of the scholarly literature on the Guide’s transition into a Model Law and the advantages and disadvantages of model law reform. The following chapters will look at examples of issues that arose in Belgium, New Zealand and Australia because their reforms did not rely on or diverted from the Guide or model laws. The last chapter will look at what States should expect in terms of costs and

12 *Personal Property Security Act*, 1993, SS 1993, c P-6.2 [*Saskatchewan PPSA*].

13 The New Zealand PPSA is not a literal copy of the Saskatchewan PPSA and there are some variations with respect to priority in registration, efficacy of unperfected security rights and fixtures (in Mike Gedye, “A Distant Export: The New Zealand Experience with a North American Style Personal Property Security Regime” (2006) 43 Can Bus LJ 208 at 211-216 [Gedye, Distant Export].

14 *Personal Property Security Act 2009* (Cth.) [*Australian PPSA*].


17 *Ibid* at 31.
economic effects when they adopt a comprehensive new secured transactions regime. Australia and New Zealand will be used as real-life examples of the effects of secured transactions reform on economic efficiency and how model law reform may positively affect the outcome.
Chapter 2
The UNCITRAL Model Law on Secured Transactions

1 From Legislative Guide to Model Law

1.1 The UNCITRAL Legislative Guide

The Guide was created under the auspices of the United Nations. Due to a lack of consensus amongst the various States, the UNCITRAL abandoned the project to harmonize secured transactions law internationally. In 1997, the project was revived for transfers of receivables. In 2002, the importance of modern and efficient secured transactions laws for the furtherance of the economy was brought to the United Nation’s attention after which it decided to allow the UNCITRAL to do an in-depth study. After preliminary research, the UNCITRAL decided to invest in a project on secured transactions. The prevailing view was that the UNCITRAL should undertake this project because of the beneficial economic impact of a modern secured credit law. The UNCITRAL focused especially on the short- and long-term macroeconomic benefits of an effective and predictable secured transactions framework.

1 Akseli, Facilitation of Credit, supra note 9 at 16.


20 Cohen, Harmonizing, supra note 19 at 181-183.


The Working Group\(^{24}\) had a broad mandate to ensure an appropriately flexible work product.\(^{25}\) The initial choice for a legislative guide, instead of a model law or convention, stemmed from the desire to create a highly flexible and adaptive legislative tool.\(^{26}\) After careful consideration, the UNCITRAL adopted the Guide in 2007 during its 62d session.\(^{27}\) The Guide aims “to rise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in States with different legal traditions.”\(^{28}\) It recommends changes in domestic legal systems that will lead to harmonization on a global level.\(^{29}\)

Reform based on the recommendations in the Guide aims to harmonize and modernize secured transactions regimes among States.\(^{30}\) The recommendations are in agreement with the Guide’s general objectives and are the result of discussions on the different policy concerns and approaches in secured transactions law.\(^{31}\) The recommendations provide “a detailed statement of


the legal rules that States are encouraged to incorporate into their legislation.\textsuperscript{32} The Guide distinguishes between its general objectives and the legal framework through which it wants to achieve its objectives. The general objectives are the following: (1) to promote low-cost credit by enhancing the availability of secured credit, (2) to allow debtors to use the full value inherent in their assets to support credit, (3) to enable parties to obtain security rights in a simple and efficient manner, (4) to provide for equal treatment of diverse sources of credit and of diverse forms of secured transaction, (5) to validate non-possessory security rights in all types of assets, (6) to enhance certainty and transparency by providing for registration of a notice (hereafter also, financing statement) in a general security rights registry, (7) to establish clear and predictable priority rules, (8) to facilitate efficient enforcement of secured creditors’ rights, (9) to allow parties maximum flexibility to negotiate the terms of their security agreement, (10) to balance the interests of persons affected by a secured transaction and (11) to harmonize secured transactions laws, including conflict-of-laws rules.\textsuperscript{33} In addition to the general objectives the Guide provides a legal framework “within which States can establish a modern secured transactions regime.”\textsuperscript{34} The legal framework the Guide suggests is: (1) comprehensiveness in scope, (2) functional approach, (3) allowing security rights in future assets and proceeds, (4) clear rules on effectiveness between parties and towards third parties, (5) creation of a security rights registry, (6) allowing multiple security rights in the same collateral, (7) priority rights and (8) effective enforcement rights.\textsuperscript{35} Gerard McCormack points out that “the Guide essentially is an exhortation to States to be as comprehensive as possible in the process of framing their secured credit law and not to leave gaps in coverage.”\textsuperscript{36} However, the Guide is considered soft

\textsuperscript{32} The Guide, \textit{supra} note 1 at 22.

\textsuperscript{33} \textit{Ibid} at 19-22; McCormack, \textit{Secured Credit, supra} note 29 at 131.

\textsuperscript{34} The Guide, \textit{supra} note 1 at 22.

\textsuperscript{35} \textit{Ibid} at 23-26.

\textsuperscript{36} McCormack, \textit{Secured Credit, supra} note 29 at 130-131.
law and is limited to making recommendations. It can only try to persuade States to be comprehensive in their reforms.

1.2 The Model Law

In later reports, the idea was introduced that a model law should be created to accompany and support the Guide. The Guide consists of 242 recommendations accompanied by over 400 pages of discussion on policy and approaches. To coherently draft and organize a well-functioning law, States will have to interpret and translate the Guide’s recommendations into the correct legislative language. Drafting a secured transactions law based on the Guide is likely to be a slow and daunting process. Therefore, the Working Group proposed to present the UNCITRAL with a project “to develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by the UNCITRAL on secured transactions.” The UNCITRAL considered the idea during its 45th session.

It was widely felt that a simple, short, concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting the implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions.

37 Garro, supra note 19 at 362.
38 Ibid.
40 Cohen, Model Law, supra note 27 at 327.
41 Ibid at 329.
Moreover, there was support for the idea that a model law could greatly assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.\textsuperscript{43}

In this time of financial downturn, the UNCITRAL aims to help States speed up the process of reform and help economies gain access to credit. The Commission confirmed the decision during its 68\textsuperscript{th} session and gave the Working Group permission to go ahead with the model law project.\textsuperscript{44}

2 Views on the Creation of a Model Law

Scholars have offered mixed views on the UNCITRAL’s transition from a legislative guide to a model law for secured transactions. Through the creation of the Guide, UNCITRAL was able to create consensus in the difficult and technical area of secured transactions law.\textsuperscript{45} Now the UNCITRAL hopes that the creation of a Model Law will help States adopt the Guide’s recommendations.\textsuperscript{46} As will be shown below, scholars are divided on the advantages and disadvantages of model law reform.

2.1 Arguments against Model Law Reform

A first concern is that the UNCITRAL might spend a lot of time and money on the creation of a model law without any guarantee that it will encourage States to implement this secured transactions regime.\textsuperscript{47} Macdonald points out that there is currently an oversupply of model laws for secured transactions but only one Guide. The Guide’s flexible reform method offers a unique

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\textsuperscript{43} Ibid at 25.


\textsuperscript{45} Cohen, Model Law, \textit{supra} note 27 at 327.


\textsuperscript{47} Cohen, Model Law, \textit{supra} note 27 at 331.
approach to secured transactions reform. The Guide allows States to decide what will be part of the law that will contain their “general reform” and what they want to regulate in “other laws.” The Guide does not prescribe that the new secured transactions regime has to take the form of one comprehensive code or act.

A further concern is whether the creation of a “one-size-fits-all” multi-jurisdictional model law is possible on an international level. Another option is the creation of multiple model laws that States can adapt to different jurisdictions. For Roderick Macdonald “the success of legislative reform is highly dependent on (1) how well the statute or Code in question reflects the conceptual structure of existing law, and (2) how closely the style of legislative drafting resembles the dominant style deployed in the jurisdiction in question.” The creation of multiple types of model laws would accommodate this view on secured transactions reform. However, it would require an even greater commitment by the UNCITRAL without any assurance that their model law(s) would be implemented. In addition to the costs of making the Model Law, there is the fear that the Model Law drafting process will launch States in a new round of debates on its content and structure. Neil Cohen agrees that this re-litigation can go from openly wanting to change the recommendations in the Guide, to more subtle tweaks here and there that can have a significant impact on the policies and approaches in the Model Law.

48 Macdonald, supra note 31 at 423.
49 Ibid at 427.
50 Bazinas, Utility, supra note 26 at 137.
51 Macdonald, supra note 31 at 421.
52 Bazinas, Utility, supra note 26 at 134-135.
53 Macdonald, supra note 31 at 422.
54 Ibid at 443.
55 Ibid at 422-423; Cohen, Model Law, supra note 27 at 332.
56 Ibid.
Other concerns focus on the drafting of the Model Law. The creation of a Model Law could, ironically, create the drafting mistakes it wants to help States avoid. It could lead drafters to make small alterations to the Guide’s original structure that could have negative consequences in the Model Law.\textsuperscript{57} The Working Group will have to draft the Model Law with great attention to detail and cannot rush.\textsuperscript{58} Drafting the Model Law would require making policy choices on the legislative technique that certain States could find difficult to accept. One of these drafting choices is the adoption of the functional approach that would result in making one set of rules that treats all functionally similar secured transactions equally.\textsuperscript{59} The functional, integrated approach in the Model Law would steer its drafting process to a great extent, as it did with Article 9.\textsuperscript{60}

Some States could perceive the choice for a Model Law as the UNCITRAL buckling under the influence of Canada and the United States.\textsuperscript{61} The fact that the Guide only makes recommendations can mask the similarities between the Guide, the Canadian provincial PPSAs and Article 9. States can reach the general objectives of the Guide in a variety of ways and are not limited to a PPSA or Article 9-like act.\textsuperscript{62} With the creation of a Model Law so similar to the techniques and concepts of the Canadian provincial PPSAs and Article 9, the UNCITRAL will

\textsuperscript{57} Ibid.

\textsuperscript{58} Gerard McCormack refers to the New Zealand PPSA to show how mistakes in what are considered details can have big consequences in the functionality and interpretation of the Act (in Gerard McCormack, “Personal Property Security Law Reform in Comparative Perspective – Antipodean Insights?” (2004) 33 Comm L Rev 3 at 30ff [McCormack, Comparative Perspective].


\textsuperscript{60} MacDonald, supra note 31 at 429.


\textsuperscript{62} Cohen, Model Law, supra note 27 at 333.
have a harder time to deny similarities with American and Canadian regimes. In a climate of hostility towards “United States legal hegemony”, this can discourage some countries to adopt the Model Law.

Finally, model law reform will ask a serious investment from States to ensure an efficient implementation of the Model Law. First, the Model Law will contain abstract concepts and may be difficult to understand. For many States, the transition will entail adapting to an entirely new system of security rights, with different concepts concerning property rights, priority, third party-effectiveness and enforcement. Model law reform will ask for a greater investment in education. Second, the Guide’s flexible approach allows States to tweak the Guide’s terminology and recommendations so that they will work better with their existing laws which will lower transition costs. To ensure the compatibility of the Model Law and a State’s existing law, States will have to invest additional time and money.

2.2 Arguments in Favor of Model Law Reform

The arguments in favor of the Model Law depend on how the reform recommended in the Guide is perceived. On the one hand, the Guide is lauded for its flexibility and the manner in which it

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63 Similarities that have already been picked up with respect to the Guide (in McCormack, Secured Credit, supra note 29 at 152-153; McCormack, Export, supra note 61 at 57).


67 This is reflected in the Guide’s reform objectives that recommend States to make changes with respect to the creation, priority, third-party effectiveness, enforcement of their security rights (in ibid at 19-22).

68 Ibid at 27-28.

69 Ibid at 28. This is also known as the transplant effect and is more extensively discussed in Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, “The Transplant Effect” (2003) 51 Am J Comp L 163 at 171.
allows States to pick and choose from its various policies and recommendations to reach its general objectives. The flexible approach in the Guide seems to allow for different types of secured transactions laws, various drafting techniques and multiple policy options. On the other hand, the Guide can be interpreted as more than a mere guideline consisting of policies and approaches. The Guide with its 242 recommendations represents a structured regime that “is a description of a complex, interdependent set of rules that must work well together.” These various rules concern the creation and third-party effectiveness (or perfection) of security rights, functional approach, security rights registry, priority system and enforcement regime. Adopting the Guide with all its recommendations is akin to implementing a PPSA- or Article 9-like secured transactions regime. When States are left to their own devices, they can incorrectly translate the Guide’s recommendations into a secured transactions law and create uncertainties, unintended consequences and inefficiencies. Confusion and uncertainty can be caused by incorrectly phrasing or organizing the recommendations of the Guide, adding unnecessary provisions, leaving out provisions or mechanisms that are essential parts of the inherent logic and disregarding certain policy choices. Model law reform can help States to maintain the inherent logic and would significantly decrease the amount of expertise necessary to implement the secured transactions regime the Guide recommends. The Model Law is made by the same drafters as the Guide, who know the workings of the regime inside and out. States that reform

70 Macdonald, supra note 31 at 423; Cohen, Model Law, supra note 27 at 328.
71 Ibid.
72 See infra Chapter 2. 2.2.1 Arguments against Model Law Reform at 9.
73 Cohen, Model Law, supra note 27 at 330.
74 The functional approach means subjecting all functionally similar transactions to the secured transactions law. In this approach substance prevails over form (in the Guide, supra note 1 at 56).
75 McCormack, Export, supra note 61 at 57; Halliday, supra note 61 at 73.
76 Cohen, Model Law, supra note 27 at 329-330.
77 Ibid at 329.
based on the Model Law will likely end up with a higher standard of domestic law than rules
drafted by local lawyers and lawmakers.\textsuperscript{78}

Secured transactions law reform has increased in popularity because it is said to facilitate access
to credit, increase economic growth and enhance cross-border transactions.\textsuperscript{79} Lenders feel more
comfortable to engage in cross-border credit transactions if they can predict outcomes in secured
transactions regimes.\textsuperscript{80} Harmonization of secured transactions laws between States can enhance
the level of predictability and certainty.\textsuperscript{81} The flexible reform in the Guide could counteract the
harmonization effort. The Guide allows States to achieve the Guide’s objectives through their
hybrid secured transactions regimes that can be far removed from what the Guide has in mind.\textsuperscript{82}
Foreign investors can be reluctant to trade with these countries since it will force them to
investigate these hybrid regimes or translate them to their terms.\textsuperscript{83} The Model Law could aid the
harmonization effort and increase the predictability of cross-border transactions.\textsuperscript{84} The
UNCITRAL Model Law would also provide the first global model law that is not aimed at
specific circumstances or regions.\textsuperscript{85} Implementing a well-functioning Model Law can guarantee,
to a greater extent, that there will be no more kinks to work out and that it will work efficiently.\textsuperscript{86}

\begin{thebibliography}{99}
\bibitem{78} \textit{Ibid} at 330.
\bibitem{79} The Guide, \textit{supra} note 1 at 1; Akseli, \textit{Facilitation of Credit, supra} note 9 at 43; Orkun N Akseli, “Utility and
Efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit” in Orkun Akseli, ed, \textit{Availability of credit and secured transactions in a time of crisis} (Cambridge, UK: Cambridge University Press,
2013) 185 at 188-189 [Akseli, Assignment of Receivables].
\bibitem{80} Akseli, \textit{Facilitation of Credit, supra} note 9 at 43.
\bibitem{81} Spyrodon Bazinas, “Harmonization of International and Regional Trade Law: the UNCITRAL Experience”
\bibitem{82} Cohen, Model Law, \textit{supra} note 27 at 333.
\bibitem{83} Akseli, \textit{Facilitation of Credit, supra} note 9 at 67-68; Cohen, Harmonizing, \textit{supra} note 19 at 176.
\bibitem{84} Bazinas, Harmonization, \textit{supra} note 81 at 54 & 58.
\bibitem{85} Jan-Hendrik Rover, “The EBRD’s Model Law on Secured Transactions and its Implications for an UNCITRAL
Model Law on Secured Transactions” (2010) 15 Unif L R 479 at 504 [Rover]
\bibitem{86} Duggan & Gedye, Impetus for Change, \textit{supra} note 64 at 676 & 678. This will be discussed in more detail below
see \textit{infra} Chapter 4 Incentives for Model Law Reform at 53.
\end{thebibliography}
Chapter 3  
Model Law Drafting

Although the Guide is made up of extensive discussions on policy and approaches in secured transactions law, it does recommend a very specific legal framework through which it wants to reach its objectives.\(^\text{87}\) Coherently drafting and structuring the intricate rules for the creation, third-party effectiveness, priority, registration and enforcement of security rights requires a thorough understanding of all these concepts.\(^\text{88}\) The Model Law can help States get the adoption of such a secured transactions regime right, make good policy choices and avoid drafting mistakes.\(^\text{89}\) The following chapter will give examples of how the Guide’s flexible approach in Belgium or departures from the Saskatchewan PPSA in New Zealand and Australia led to drafting mistakes, uncertainties, confusion and unintended consequences. These examples highlight how model law reform can help: achieve correct legislative language, correctly represent the underlying principles of the secured transactions system, dissuade States from adding or deleting provisions and implement a law that is the result of taking into account all the various policy choices.

1  
Belgium: Legislative Guide Reform

1.1 Pre-reform Law

The former Belgian secured transactions regime consisted of various types of security rights.\(^\text{90}\) In the tradition of the Code Napoléon, the existence of a security right without taking possession of the collateral was inconceivable.\(^\text{91}\) As a result “the fundamental device used to grant a security

\(^{87}\) Cohen, Model Law, supra note 27 at 330.

\(^{88}\) Ibid.

\(^{89}\) Ibid.


\(^{91}\) Ibid.
interest over a movable asset was the possessory pledge” (art. 2073 of the Belgian Civil Code\textsuperscript{92} (hereafter the BCC)).\textsuperscript{93} The pledge, however, is not very useful commercially since it keeps the debtor from using the secured collateral.\textsuperscript{94} Creditors would create semi-pledge regimes where the publicity function of dispossession was fulfilled otherwise.\textsuperscript{95} Other types of secured transactions were slowly introduced, such as retention of title mechanisms.\textsuperscript{96} The mixture of different security right mechanisms made for a confusing and archaic secured transactions regime.\textsuperscript{97} The reformers wanted to modernize and unify the security rights system but at the same time they were worried about the transition costs associated with wholesale reform.\textsuperscript{98} A legislative guide reform was thought to be ideal. It allowed the drafters to limit their reform to those policies and approaches that would lead to a more efficient and unified secured transactions law while fitting within the existing Belgian system.\textsuperscript{99}

\textsuperscript{92} Burgerlijk Wetboek 21 maart 1804, Belgian State Gazette 3 September 1807 1804032155, online: Belgian State Gazette, \url{www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1804032130} [BCC].

\textsuperscript{93} Dirix, \textit{supra} note 90 at 172.

\textsuperscript{94} The Guide, \textit{supra} note 1 at 44.

\textsuperscript{95} Examples of this are the pledge over a business which relied on a registry (\textit{Wet betreffende het in pand geven van de handelszaak, het disconto en het in pand geven van de factuur, alsmede de aanvaarding en de keuring van de rechtstreeks voor het verbruik gedane leveringen 25 oktober 1919}, Belgian State Gazette 5 November 1919 1919102550, online: Belgian State Gazette, \url{www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1919102531&table_name=wet.}) and the pledge over a receivable which created the dispossession fictionally through the creation of the security agreement and notification of the debtor of the receivable (\textit{BCC, supra} note 92 at art. 2075).

\textsuperscript{96} Retention of title was recognized in insolvency proceedings and was subject to stringent formalities. See Dirix, \textit{supra} note 90 at 173 and \textit{Faillissementswet 8 augustus 1997}, Belgian State Gazette 28 October 1997, 1997009766, online: Belgian State Gazette, \url{http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1997080880} [Belgian Bankruptcy Act].

\textsuperscript{97} Dirix, \textit{supra} note 90 at 175.

\textsuperscript{98} \textit{Ibid.}

\textsuperscript{99} \textit{Ibid.}
1.2 The Reforms

The Belgian reformers wanted to reach the general objectives of the Guide while staying true to their existing framework. The Pledge Act follows some of the recommendations in the Guide but occasionally the Belgian reformers made different policy choices or only partially implemented what the Guide recommended. As a result, some of these policy and drafting choices have created inconsistencies and inefficiencies in the law.

The Belgian reform adopts the functional approach and the creation of a security rights registry to bring together some of the different security rights. Most of the pre-existing pledges are brought under the Pledge Act with, as its biggest innovation, the creation of a non-possessory security right. The parties will create the pledge through the security agreement. Third party effectiveness is separated from the creation of the pledge. Third-party effectiveness is no longer limited to possession but can also be achieved through registration or control. Registration will play a crucial role in the working of the Pledge Act. Belgian drafters could have gone further in guaranteeing the registry’s correct operation.

For many Civil Law jurisdictions, it is a big step to include retention of title transactions in the working of the secured transactions regime. Prior to the Belgian reform, application of retention of title clauses was limited to insolvency proceedings (art.101 of the Belgian Bankruptcy Act).

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100 Ibid at 172 & 175.
101 Ibid at 177-178.
102 Pledge Act, supra note 8 at art. 2.
103 Dirix, supra note 90 at 176.
104 Ibid.
105 Ibid at 177.
107 Belgian Bankruptcy Act, supra note 96 at art.101; Dirix, supra note 90 at 178-179.
Only during bankruptcy proceedings and subject to certain conditions,\textsuperscript{108} could the seller rely on his retention of title and reclaim the sold goods.\textsuperscript{109} Under the current regime, retention of title clauses are considered security rights and are subject to the Pledge Act.\textsuperscript{110} However, retention of title transactions are excluded from the publicity requirement in the registry.\textsuperscript{111} The implications of the Belgian reform will be discussed further below.

### 1.2.1 Transactional Filing

An essential element of the security right registry is the type of filing system. The Guide recommends the implementation of a notice registration system.\textsuperscript{112} A notice is usually an online form which contains a limited amount of information such as the grantor’s name, the encumbered collateral, the grantor’s address and potentially the maximum amount for which the security right is granted.\textsuperscript{113} Future creditors and third-party buyers can use the registry to find out to what extent the grantor’s assets might be encumbered.\textsuperscript{114} Most States that use a notice filing system will not require their registrants to file the security agreement, nor provide evidence

\textsuperscript{108} The additional conditions were: (1) retention of title has to be in writing (the buyer is not require to sign, express or implied agreement was sufficient), (2) the goods remained with the buyer, (3) the goods are not attached to real property, nor mixed or comingled with other goods and (4) the claim to return the goods to the seller has to be submitted prior to the trustee in bankruptcy submitting his first status report on the bankruptcy estate (in Melissa Vanmeenen, Lesnota’s Insolventierecht – Les 10 (course notes delivered at the Faculty of Law, University of Antwerp, 2011-212) [unpublished] at 4-5.

\textsuperscript{109} Ibid at 2-3.

\textsuperscript{110} Dirix, supra note 90 at 178-179.

\textsuperscript{111} Ibid at 179.

\textsuperscript{112} The Guide, supra note 1 at 21. The Guide considers the system of notice filing an effort to address the inefficiencies, costs and delays caused by a diversity of approaches and multiplicity of registries (in the Guide, supra note 1 at 150).

\textsuperscript{113} Ibid at 151-152.

\textsuperscript{114} Ibid at 21. A notice filing registry will not be the same positive source of information that a title registry system was. The presence of a notice in the registry will not guarantee the existence of a security right over this grantor’s assets. The security right will only come into existence through the off-record creation of the security agreement but this cannot be verified through the registry. Searchers will have to make follow-up inquiries with the parties. In a notice filing system the prospective lenders or purchasers will rely on the absence of the registration to decide if they will advance funds (in Ronald CC Cuming, Catherine Walsh & Roderick J Wood, \textit{Personal Property Security Law} (Toronto: Irwin Law, 2012) at 324-326 [Cuming, \textit{Personal Property Security Law}].
of the security right’s existence to which the registration relates.\textsuperscript{115} A notice filing system will protect the grantor’s and secured party’s privacy and will enable registrants to register their security right in advance of the conclusion of the security agreement.\textsuperscript{116} The secured party can register and obtain his priority position without having to wait how the negotiations with the grantor work out.\textsuperscript{117} It avoids the registration being ineffective due to defects in the security agreement at the time of registration\textsuperscript{118} and allows a notice to be registered before the security right comes into existence.\textsuperscript{119} The secured party can register the notice and each time a security right in a new asset is created, the time of registration of the original notice will determine the priority. Notice filing makes security rights in inventory and receivables possible without secured parties having to register a new notice each time the grantor acquires new assets.\textsuperscript{120} 

The Belgian reformers chose for a system of transactional filing instead of notice filing.\textsuperscript{121} The authorization to register the security right is in the security agreement (art. 29 of the Pledge Act).\textsuperscript{122} Logically this means that registration can only take place after the security agreement is signed thereby ruling out advance registration.\textsuperscript{123} Transaction filing in Belgium does not require the submission of the security agreement. Some prefer transaction filing since notice filing is said to decrease the reliability of the security rights registry: “divorcing registration from particular individual transactions opens up the possibility that the register might become less reliable as a source of information. A searcher cannot be sure whether a particular entry on the register relates to an actual transaction between the parties or whether it relates to a transaction

\textsuperscript{115} Ibid at 327-329; The Guide, \textit{supra} note 1 at 174.

\textsuperscript{116} Ibid.

\textsuperscript{117} Ibid.

\textsuperscript{118} Ibid; Gilmore Grant, \textit{Security Interest in Personal Property} (Boston: Little Brown, 1965) at 468-469.

\textsuperscript{119} The Guide, \textit{supra} note 1 at 174.

\textsuperscript{120} Ibid at 174-175.

\textsuperscript{121} Dirix, \textit{supra} note 90 at 177.

\textsuperscript{122} \textit{Pledge Act, supra} note 8 at art 29.

\textsuperscript{123} Dirix, \textit{supra} note 90 at 177.
that was contemplated but never in fact materialised.”\textsuperscript{124} The price for a slightly more reliable security rights registry will be an increase in costs and delays associated with providing proof of the underlying security agreement.\textsuperscript{125} The Pledge Act’s departure from the Guide can impede the economic efficiency of the new secured transactions law although this is one of its main objectives.\textsuperscript{126}

Belgium’s choice for transaction filing could be aimed at preventing vexatious or frivolous advance registrations in a notice filing system. Advance registrations without the existence of an underlying security agreement can occur to harm a debtor. It can make a debtor’s assets look more encumbered than they are, making him look undesirable toward a potential creditor.\textsuperscript{127} If registration is only possible after the conclusion of the security agreement, frivolous or vexatious registrations can be avoided.\textsuperscript{128} The UNCITRAL is aware of the potential vexatious or frivolous nature of advance registrations in a notice filing system.\textsuperscript{129} Article 9 and the Model Law offer as a solution that the grantor’s authorization is required either before or after the registration.\textsuperscript{130} This approach can eliminate the delays and costs of having to wait for the conclusion of the security agreement while guaranteeing that registrations are not made frivolously.\textsuperscript{131} In addition to grantor authorization, the Guide and Model Law recommend the registration of cancelation notices when the debt is paid, the security agreement is never concluded or the debtor has not given authorization.\textsuperscript{132} It can ensure the registry’s reliability and avoid frivolous and vexatious

\begin{itemize}
\item \textsuperscript{124} McCormack, \textit{Secured Credit}, \textit{supra} note 29 at 142-143; Cuming, \textit{Personal Property Security Law}, \textit{supra} note 114 at 325.
\item \textsuperscript{125} The Guide, \textit{supra} note 1 at 151-152.
\item \textsuperscript{126} Explanatory Memorandum to the Belgian Law on Secured Transactions, \textit{supra} note 10 at 9-10.
\item \textsuperscript{127} Cuming, \textit{Personal Property Security Law}, \textit{supra} note 114 at 339.
\item \textsuperscript{128} \textit{Ibid}.
\item \textsuperscript{129} The Guide, \textit{supra} note 1 at 176.
\item \textsuperscript{130} Article 9, \textit{supra} note 5 at §9-509 (a); UNCITRAL, \textit{Draft Model Law on Secured Transactions}, 27\textsuperscript{th} Sess., UN Doc A/CN.9/WG VI/WP. 63/Add.1 (2015) at art. 28 [\textit{Model Law Art.26-60}].
\item \textsuperscript{131} The Guide, \textit{supra} note 1 at 176.
\item \textsuperscript{132} \textit{Ibid} at 182, Recommendation 72; \textit{Model Law Art.26-60, supra} note 130 at art. 39.
\end{itemize}
registrations. At this moment, the Pledge Act only contains the provision that when the secured debt is paid the registration is to be removed. In Belgium, a provision for grantor authorization in combination with clear rules on the registration of cancelation notices can offer the same guarantee as transaction filing but without interfering with the possibility of advance registration. Belgium’s departure from the Guide might have been with good intentions, but it could have achieved its goals through other, less commercially disruptive, methods.

1.2.2 Registration Amendments

The registry system aims to be a reliable source of information that allows searchers to find out to what extent a grantor’s assets are encumbered. However, States should not go too far in guaranteeing the reliability of the security rights registry. A proper balance needs to exist between protecting third party-effectiveness and searchers’ reliance on the registry.

The Guide recommends a grantor-based security right registry. Searchers of the registry will search under the grantor identifier to assess to what extent the grantor’s assets can be encumbered. If the grantor identifier changes, searches under the new information will not show up. When that happens, a searcher will assume that this person has not encumbered his assets and he will proceed based on this information. The change in name will not make the registration ineffective, but it will have consequences for the determination of priority.

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133 The Guide, supra note 1 at 176.
134 Pledge Act, supra note 8 at art. 36.
135 A similar suggestion is made to Australia to amend their approach in s.151 (1) of the Australian PPSA (in Anthony Duggan, “Trials and Tribulations of Personal Property Security Law Reform in Australia” [unpublished] at 19 [Duggan, Trials and Tribulations]).
136 The Guide, supra note 1 at 149.
137 Ibid at 181, Recommendation 61 & 62.
138 Ibid at 157 & 179, Recommendation 54(h).
139 Ibid at 168.
140 Cuming, Personal Property Security Law, supra note 114 at 325-326.
141 The Guide, supra note 1 at 168.
Searchers’ reliance on the security rights registry should be protected, but secured parties should also have a chance to retain their third-party effectiveness when grantor information changes. The Guide recommends a grace period in the event of a change in the grantor’s name during which time the secured party can change the information in the notice to retain third-party effectiveness.\textsuperscript{142} Failure to register an amendment notice within the grace period will result in the loss of the secured party’s priority to intervening secured parties or buyers who acquire rights after the identifier change but before the registration amendment.\textsuperscript{143} A registration amendment outside the grace period will not affect the security right’s priority position towards secured parties, buyers, lessees and licensees who acquired rights in or in relation to the encumbered assets prior to the identifier change.\textsuperscript{144} This approach strikes a balance between the need for a reliable registry for searchers and protecting secured parties’ third party effectiveness. States can increase or decrease the protection of secured parties by deciding when the grace period will start: (1) the moment the grantor’s name changes or (2) when the secured party finds out about the change. In the Guide, the grace period starts immediately when the grantor’s name changes. The secured party will lose his priority to intervening claimants if he does not amend the registration within the grace period, whether or not he knew about the name change.\textsuperscript{145}

A transfer of the collateral can also affect the reliability of the security rights registry. A transfer of collateral outside the ordinary course of business will transfer with the security right attached.\textsuperscript{146} This can result in an inability to find the notice in the registry since “a search against the transferee’s name by third parties dealing with the encumbered assets in the hands of the transferee will not disclose a security right created by the transferor.”\textsuperscript{147} The Guide does not recommend an approach when confronted with transfers of collateral outside the ordinary course

\textsuperscript{142} Model Law Art.26-60, \textit{supra} note 130 at art. 35; The Guide, \textit{supra} note 1 at 168-169.

\textsuperscript{143} \textit{Ibid}.

\textsuperscript{144} \textit{Ibid}.

\textsuperscript{145} \textit{Ibid} at 168 & 181, Recommendation 61.

\textsuperscript{146} \textit{Ibid} at 169.

\textsuperscript{147} \textit{Ibid}.
of business, but it does explicitly recommend that States take a stance on the matter.\textsuperscript{148} Since the transfer is without the consent of the secured party, the third-party effectiveness of his security right should be given some protection.\textsuperscript{149} The Model Law offers three options: (1) the secured party has a grace period to register a financing change statement that starts once the collateral is transferred, (2) the secured party has a grace period to register a financing change statement that starts when the secured party finds out about the transfer or (3) the security right remains effective against third parties and retains its priority notwithstanding the transfer of the encumbered asset.\textsuperscript{150}

In Belgium article 30 of the Pledge Act lists which information, the secured party will have to submit for registration.\textsuperscript{151} Article 15 of the Pledge Act regulates the effects of registering incorrect information in the notice. The incorrect identification of the grantor that results in the registered notice being unsearchable will make the registration ineffective.\textsuperscript{152} Article 32 of the Pledge Act allows the secured party to amend a registration.\textsuperscript{153} The Pledge Act does not give the secured party a grace period during which time he can amend the registration to maintain third-party effectiveness. From the moment, the grantor information is incorrect, and the registration is unsearchable, the registration becomes ineffective and a competing claimant can overtake the secured party’s priority ranking. The combination of article 15 and 32 of the Pledge Act suggests that registration amendments will restore third-party effectiveness from the moment of the amendment and not from the initial registration.\textsuperscript{154} This approach is harsh for secured parties who are at an immediate risk after a change in grantor information.

\textsuperscript{148} \textit{Ibid.}
\textsuperscript{149} \textit{Ibid.}
\textsuperscript{150} \textit{Model Law Art.26-60, supra note 130 at art. 37.}
\textsuperscript{151} The secured party will have to provide (1) the secured party’s name, (2) the grantor’s name, (3) the collateral, (4) the secured debt, (5) the maximum amount for which the security is granted and (6) a statement by the secured party that he is responsible for all damages resulting from submitting incorrect information (\textit{Pledge Act, supra note 8 at art. 30}).
\textsuperscript{152} \textit{Ibid art. 15.}
\textsuperscript{153} \textit{Ibid at art. 32.}
\textsuperscript{154} \textit{Ibid at art. 15 & 32.}
With respect to transfers of the collateral outside the ordinary course of business a similar rule applies. Article 24 of the Pledge Act states that the security right will follow the collateral in the hands of a transferee if the transfer occurs outside the ordinary course of business, without the secured party’s consent or the third-party acquired the collateral in bad faith.\textsuperscript{155} Article 25 of the Pledge Act displaces a professional’s\textsuperscript{156} good faith if the security right is registered in the security right registry.\textsuperscript{157} When collateral is transferred in any of the circumstances mentioned in article 24 of the Pledge Act, the transferee will be considered the new grantor of the security right, making the original registration information incorrect.\textsuperscript{158} Combined with article 15 of the Pledge Act this means that once the collateral is transferred the grantor information is incorrect until the secured party changes it to the third-party transferee. As a result, a secured party will lose his third-party effectiveness without a grace period. By making the register more reliable, the Belgian reform makes the regime too strict. Secured parties will immediately suffer the consequences of changes in the registered information without a grace period during which time they can retain their original third-party effectiveness.

1.2.3 Retention of Title Clauses

Modern secured transactions regimes such as the Guide and the Canadian PPSAs aim to create a comprehensive regime that applies to all transactions that serve a similar security function.\textsuperscript{159} Retention of title transactions (hereafter also, acquisition security rights) such as conditional sale agreements, serve a security function. They are included in the Canadian PPSAs\textsuperscript{160} and the

\begin{itemize}
\item \textsuperscript{155} \textit{Ibid} at art. 24.
\item \textsuperscript{156} Professionals means non-consumers. For consumers the transfer outside the ordinary course of business and without authorization of an asset subject to a security right will take place in good faith despite the registration (in Explanatory Memorandum to the Belgian Law on Secured Transactions, \textit{supra} note 10 at 47).
\item \textsuperscript{157} \textit{Pledge Act}, \textit{supra} note 8 at art. 25.
\item \textsuperscript{158} Explanatory Memorandum to the Belgian Law on Secured Transactions, \textit{supra} note 10 at 46.
\item \textsuperscript{159} The Guide, \textit{supra} note 1 at 55-58; Cuming, \textit{Personal Property Security Law, supra} note 114 at 6; Bridge, \textit{supra} note 59 at 572.
\item \textsuperscript{160} Cuming, \textit{Personal Property Security Law, supra} note 114 at 122-124.
\end{itemize}
recommendations of the Guide.\textsuperscript{161} Their inclusion as security rights is said to create equal opportunities for all credit providers and enhances competition amongst them.\textsuperscript{162} To encourage acquisition financing, the Guide allows title holders a super-priority subject to certain conditions.\textsuperscript{163} Super-priority of acquisition rights is an accepted method to break through creditor monopolies. Often creditors will take a first ranking security right in all the debtor’s present and after-acquired property. Any asset the debtor acquires at a future time will automatically fall under this security right and its first ranking priority. It is very unappealing for future lenders to provide financing for assets subject to a security right. The acquisition right’s super-priority can break this monopoly by offering a super-priority for lenders who provide financing for new assets.\textsuperscript{164}

Civil Law jurisdictions have struggled to recognize and harmonize retention of title clauses.\textsuperscript{165} Belgium did not recognize the effectiveness of retention of title clauses in insolvency proceedings until 1997.\textsuperscript{166} As part of the functional approach, the retention of title transactions are now included in the Pledge Act. They are considered a security right and supposedly subjected to the same rules.\textsuperscript{167} A notable exception to this is the exclusion of retention of title transactions from the registration system. The only formal requirement for third-party effectiveness is that the retention of title clause is part of a written agreement between the secured party and the grantor.\textsuperscript{168} The European States surrounding Belgium have similar

\begin{itemize}
\item\textsuperscript{161} The Guide, supra note 1 at 61, Recommendation 2(d).
\item\textsuperscript{162} Ibid at 335.
\item\textsuperscript{163} Ibid at 353 & 375, Recommendation 180.
\item\textsuperscript{164} Cuming, \textit{Personal Property Security Law}, supra note 114 at 440. See also Duggan & Brown, supra note 15 at 162.
\item\textsuperscript{165} Kieninger, supra note 106 at 23.
\item\textsuperscript{166} “Case 3: Machinery supplied to be used by the buyer” in E-M Kieninger, ed, \textit{Security rights in movable property in European private law} (Cambridge, UK: Cambridge University Press, 2004) 246 at 259; Dirix, supra note 90 at 178.
\item\textsuperscript{167} Ibid at 178-179.
\item\textsuperscript{168} Ibid at 179; Explanatory Memorandum to the Belgian Law on Secured Transactions, supra note 10 at 30.
\end{itemize}
rules.\textsuperscript{169} Given the interconnected economy between the European States, the reformers decided that it would be too difficult for Belgium to introduce a publicity system for retention of title transactions unilaterally.\textsuperscript{170} The written retention of title clause is also the basis for the super-priority. Secured parties will not have to fulfill other publicity requirements, such as registration, notice to other secured creditors or possession of the collateral.\textsuperscript{171}

It would be difficult for title-holders to come to grips with the subordination of their ownership rights to a secured transactions regime.\textsuperscript{172} Nonetheless, the equal treatment of title-holders and security right holders is a direct effect of the functional approach\textsuperscript{173} and should not be disregarded whenever one pleases. Under the Pledge Act, retention of title transactions are considered to serve the same function as other secured transactions.\textsuperscript{174} Even though the secured party is the owner, his legal title is subjected to the Pledge Act and its rules determine the creation of a retention of title, rights of the title holder and enforcement proceedings.\textsuperscript{175} The publicity system is an integral part of the Pledge Act and intends to provide an objective source of information for interested third parties and facilitate the resolution of priority conflicts among competing claimants.\textsuperscript{176}

\textsuperscript{169} Ibid; Dirix, \textit{supra} note 90 at 177.


\textsuperscript{171} The Guide, \textit{supra} note 1 at 375, Recommendation 1, Alternative A & B.

\textsuperscript{172} Whittaker, \textit{supra} note 16 at 26-27.

\textsuperscript{173} Bridge, \textit{supra} note 59 at 572.

\textsuperscript{174} Dirix, \textit{supra} note 90 at 178.

\textsuperscript{175} Explanatory Memorandum to the Belgian Law on Secured Transactions, \textit{supra} note 10 at 30-31.

\textsuperscript{176} Ibid at 22.
The Guide recommends registration of acquisition security rights because “the registration of an acquisition security right is meant to provide a notice to third parties that such a right might exist and serve as a basis for establishing priority between a secured creditor and a competing claimant.”\textsuperscript{177} Excluding retention of title transactions from the publicity regime will make the security rights registry less reliable. It will be harder for lenders to discover to what extent the debtor’s assets are encumbered since they cannot be sure if the collateral is subjected to a retention of title clause.

Furthermore, giving retention of title transactions an automatic super-priority gives title holders a disproportionate advantage over other secured parties. The title holder can rely on a single, written retention of title clause to invoke super-priority over all other secured parties.\textsuperscript{178} In the Guide, the acquisition financer (or title holder) first has to register to create third-party effectiveness and obtain priority-ranking. Then, to acquire super-priority, the secured party will have to go through additional steps, such as notifying other secured parties that a super-priority security right has been created.\textsuperscript{179} This in an effort to clarify to all parties involved what their priority position is towards one another.\textsuperscript{180} The Belgian approach makes one wonder to what extent the position of title holders has changed in the Pledge Act except for the fact that retention of title will now be recognized in all insolvency proceedings.\textsuperscript{181} Their position and superiority as \textit{de facto} title holder towards other secured parties seems to remain in the Pledge Act.

Secured transactions laws benefit from a coherent and consistent approach throughout the law. Excluding retention of title transactions from the publicity mechanism disrupts the consistency of the secured transactions law, makes the registry unreliable and makes it harder for competing claimants to predict their priority position. The legislative guide reform has led Belgium to exclude retention of title mechanisms so it can align itself with other European secured

\begin{footnotesize}
\begin{enumerate}
\item The Guide, \textit{supra} note 1 at 344.
\item \textit{Pledge Act}, \textit{supra} note 8 at art. 69.
\item The Guide, \textit{supra} note 1 at 375, Recommendation 180.
\item \textit{Ibid} at 353.
\item Dirix, \textit{supra} note 90 at 178.
\end{enumerate}
\end{footnotesize}
transaction laws. It remains to be seen if the regulatory consistency with other European States compensates for the unreliability of the registry and the inconsistency in registration and priority policy.

1.3 Conclusion

The previous examples have shown that the legislative guide approach can lead to incorrect policy choices. The flexible approach in the Guide might seem a good idea, in theory, to overcome differences between jurisdictions. Unfortunately, it does not offer sufficient guidance for States aiming to create a comprehensive secured transactions regime. Belgium started out with the best intentions, but their desire to return to a security right system that they know and are comfortable with, led them to make some bad policy choices. A supporting model law could have guided Belgium towards a correct adoption of the secured transactions regime recommended in the Guide.

2 New Zealand: Model Law Reform

2.1 Pre-PPSA Law

Before the PPSA, New Zealand had many different types of security rights which were all regulated by various acts or common law rules. According to Gedye

Prior to the introduction of the PPSA, New Zealand’s regulatory regime for personal property securities was distinguished by an amalgam of poorly defined common law principles overlaid with ad hoc statutory refinements dating from Victorian times. The result was an archaic registration regime that drew ill-considered distinctions based on whether or not the debtor was incorporated, the legal form the transaction took and the practical collateral in issue.


183 Gedye, Distant Export, supra note 13 at 209.

184 Ibid.
Problems resulted from “the different registration requirements, and the dissimilar consequences of non-registration, that followed from the status of the debtor, the form of the documentation, and the type of collateral.”¹⁸⁵ These complexities and anomalies within the previous regimes led to an increase in uncertainty and costs in secured transactions law.¹⁸⁶

2.2 The PPSA Reforms

The New Zealand PPSA resolves many of these issues: it brings together all transactions that serve a similar security function under one Act, unifies all former registries into one security rights registry and places substance over form.¹⁸⁷ For the most part, the New Zealand reformers stayed true to the Saskatchewan PPSA and only occasionally departed from the Saskatchewan model law. It is those departures that have caused some problems in the New Zealand PPSA.¹⁸⁸ The New Zealand reformers made changes to the Saskatchewan PPSA either to maintain the regime they had in the old secured transactions laws or because they wanted to draft the necessary provisions themselves. The choice not to subordinate unperfected security rights to the trustee in bankruptcy is such a remnant of the old secured transactions laws.¹⁸⁹ The changes the reformers made in the registration system were seemingly small alterations with big implications and to the detriment of the registration system.

2.2.1 Security Rights Registration

When New Zealand was drafting its PPSA legislation, it passed up on Canadian experts’ assistance to set up the registration system.¹⁹⁰ Instead, the New Zealand reformers decided to


¹⁸⁶ *Ibid* at 3.

¹⁸⁷ *Ibid* at 4-8.

¹⁸⁸ Duggan & Gedye, Impetus for Change, *supra* note 64 at 676-677.

¹⁸⁹ Gedye, Distant Export, *supra* note 13 at 213.

¹⁹⁰ *Ibid* at 220-221.
build it from the ground up. Conceptually their self-drafted registry system resembles those in the Canadian PPSAs. New Zealand did allow for more liberties when it came to drafting certain provisions. Interestingly, these are the provisions that are causing difficulties in the New Zealand PPSA. The provision of the register’s search criteria is an example of a self-drafted provision with unintended consequences.

To make the registry an easy tool to work with “the entries in a registry must be organized according to set search criteria to permit retrieval by searchers.” A first step is to decide which registered information will be a search criterion to retrieve the registration. The grantor identifier is generally used for searching the security rights registries in PPSA-like regimes. Serial numbers can be searched in the event that collateral has a serial number (for example, motor vehicles, aircraft and boats) and to the extent that the legislation permits or requires registration against the collateral serial number. The Saskatchewan PPSA combines grantor

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191 Ibid at 221.

192 The registry system also works with notice registrations, is based on a combination of grantor and serial number registration, is electronically organized, allows for advance registration and registrations of multiple security agreements, provides rules for transfers of the collateral and changes to the debtor’s name and provides rules for compulsory amendments and removals from the registry (in New Zealand PPSA, supra note 11 at s.135-175).

193 Duggan & Gedye, Impetus for Change, supra note 64 at 677; Gedye, Distant Export, supra note 13 at 221.

194 Ibid.

195 Cuming, Personal Property Security Law, supra note 114 at 330.

196 This will be either the identity of a natural person based on his birth certificate or information in other official documents, or the name of a legal entity based on the information in the constituting document (in the Guide, supra note 1 at 180-181, Recommendation 58-60).

197 Grantor based searching will give searchers a general impression which of the grantor’s assets are encumbered. The Guide refers to the possibility of combining grantor based registration with serial number registration for certain assets but leaves this decision up to the States (in ibid at 157-158).

198 Serial number registration is possible when the assets have an individual, permanent identification number (in Cuming, Personal Property Security Law, supra note 114 at 331). Serial number searching is added as a solution for transfers of the collateral from the original grantor to a new transferee (A-B-C-D problem). A person investigating the encumbered assets of the transferee will not find anything when searching under the transferee’s name. Searching the serial number in this case would turn up the encumbered asset and put the searcher on notice (in the Guide, supra note 1 at 157).
identifier with serial number registration and both types of information can be searched.\textsuperscript{199} The Guide limits its registration and search criteria to the grantor identifier.\textsuperscript{200} Next, States will have to choose between an exact or similar match search system. The choice determines whether an error in registration information will lead to the registration’s non-disclosure when entering the notice information.\textsuperscript{201} In an exact match system, the smallest error in the registration can make a registered notice unsearchable and thereby seriously misleading and ineffective.\textsuperscript{202} Allowing searches based on detailed and changing information in an exact match system increases the chance of making a seriously misleading error in the registration. A similar match system allows for some leniency and retrieves information even if it does not exactly match the information that is listed in the registration.\textsuperscript{203} A similar match system will lead to fewer cases of seriously misleading errors. The Guide approves of this more lenient approach and recommends a similar match system.\textsuperscript{204} The same is true of the registration system in Saskatchewan.\textsuperscript{205}

The security rights registry in the New Zealand PPSA is based on a combination of asset and grantor registration and works with an exact match system.\textsuperscript{206} The grantor’s name, address and date of birth always have to be registered.\textsuperscript{207} Asset registration, based on serial numbers, is used when the collateral is a motor vehicle or aircraft and is acquired by the grantor as consumer

\textsuperscript{199} Saskatchewan PPSA, supra note 12 at s.48(1).

\textsuperscript{200} The Guide, supra note 1 at 157.

\textsuperscript{201} Ibid at 165; Cuming, Personal Property Security Law, supra note 114 at 365.

\textsuperscript{202} The Guide, supra note 1 at 165; Ontario uses the exact match search system. The Fairbanx case showed that the smallest error in the grantor’s company name was sufficient to make the registration ineffective (in Fairbanx Corp v Royal Bank of Canada, 2010 ONCA 385, 319 DLR (4th) 618). See also Duggan, Dropped HS, supra note 15 for more information on exact match searching in Ontario.

\textsuperscript{203} Cuming, Personal Property Security Law, supra note 114 at 365; The Guide, supra note 1 at 165.

\textsuperscript{204} Ibid at 180, Recommendation 58. See also Model Law Art.26-60, supra note 130 at art. 36.

\textsuperscript{205} Cuming, Personal Property Security Law, supra note 114 at 365.

\textsuperscript{206} Gedye, Distant Export, supra note 13 at 222; Gedye, Personal Property Securities, supra note 185 at 474.

\textsuperscript{207} New Zealand PPSA, supra note 11 at s.142.
goods or equipment. Section 172 of the New Zealand PPSA lists the seven possible search criteria: (1) the name of the debtor, (2) the name and address of the debtor, (3) the name and date of birth of the debtor, (4) if the debtor is a company, the unique number assigned to the company by the Registrar of Companies, (5) the serial number of the collateral (in certain circumstances), (6) the registration number assigned under s.144 and (7) any other criteria specified in the regulations. The grantor’s name or the asset’s serial number are typical search criteria. The exact match system requires a higher level of accuracy from the registrant than the similar match system, but the criteria above are not prone to change and can be found in official documentation. Both the registrant and searcher should be able to get the information right when registering or searching the registry, barring any transcription errors or mistakes.

The list of search criteria also contains combinations between the grantor’s name and his date of birth or address. When searching for the grantor’s name and address or date of birth, the New Zealand exact match system prescribes that both entries have to be correct to retrieve the registration. The date of birth and address can be found in the same documentation in which

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208 Gedye, Personal Property Securities, supra note 185 at 460. Serial number registration is usually limited to consumer goods or equipment so registrants do not have to update their registration each time the grantor acquires new assets in inventory (in the Guide, supra note 1 at 157).

209 New Zealand PPSA, supra note 11 at s.172.

210 The Guide, supra note 1 at 156; Cuming, Personal Property Security Law, supra note 114 at 330-331.

211 The Personal Property Securities Regulations 2001 (NZ), 2001/79, clause 2(2) lists the official documents to determine the proper name of a debtor who is an individual. The various documents are the birth certificate, marriage certificate, certificate of New Zealand citizenship, passport, driver’s licence, or other similar official document evidencing the name currently used by the debtor. If the debtor is an organisation, the following data should be used: (a) if the debtor is incorporated under an enactment, the statutory or registered name of the organization; (b) if paragraph (a) is not applicable, the name of the organisation as set out in its constitution or other document defining its constitution; (c) if paragraphs (a) and (b) are not applicable, the trading name of the organisation or the name by which it is commonly known (if it does not have a trading name) (in The Personal Property Securities Regulations 2001 (NZ), 2001/79, clause 6). See also Gedye, Personal Property Securities, supra note 185 at 479-481.

212 Michael Gedye is not in favor of an exact match system. He fears that it requires an extremely high level of accuracy and that exact match system imposes an unreasonable burden on registrants (in Gedye, Distant Export, supra note 13 at 222).

213 New Zealand PPSA, supra note 11 at s.172 (b) & (c).

214 Gedye, Personal Property Securities, supra note 185 at 485-486.
the official name of the grantor is found.\textsuperscript{215} The date of birth is unchangeable, but it is another piece of information that can be entered incorrectly and lead to non-disclosure.\textsuperscript{216} The grantor’s address can frequently change, and the New Zealand PPSA does not clearly prescribe how the address should be registered.\textsuperscript{217} An un-amended change in the debtor’s address can make the registration unsearchable.\textsuperscript{218}

The New Zealand PPSA does not explicitly list the debtor’s address and date of birth as information that can lead to a seriously misleading error.\textsuperscript{219} Nonetheless, their incorrect registration can lead to non-disclosure that can lead Courts to decide that errors in the date of birth or address are seriously misleading.\textsuperscript{220} Recently the New Zealand High Court decided that an error in a debtor’s company incorporation number, another search criterion under section 172 of the New Zealand PPSA,\textsuperscript{221} was seriously misleading although it is not listed as one of the errors in information that leads to a seriously misleading defect.\textsuperscript{222} New Zealand Courts decided that “what is required for a registration to be seriously misleading turns on the effectiveness or

\begin{itemize}
\item \textsuperscript{215} The Personal Property Securities Regulations 2001 (NZ), 2001/79, clause 2(2) & 6.
\item \textsuperscript{216} Gedye, Personal Property Securities, supra note 185 at 485.
\item \textsuperscript{217} Michael Gedye suggests that the grantor’s address should not be listed as a search criterion in an exact match system. He gives two reasons for this (1) the address can change frequently placing a heavy burden on a registrant to continuously update the registration and (2) the phrasing in the New Zealand PPSA allows for various ways to record the debtor’s address thereby adding to the uncertainty for registrants. Michael Gedye suggests that the address as search criterion is either repealed or that searches under the name and address will retrieve all registrations under the name regardless of the accuracy of the address. This would limit the effect of the debtor’s address to situations where it is used to verify which of the various registrations belongs to the debtor you’re searching for (in ibid at 486).
\item \textsuperscript{218} Michael Gedye does not think that incorrect registration of the grantor’s address should lead to a seriously misleading error but it is the New Zealand Courts who will have to decide if such an error is seriously misleading (in ibid at 486).
\item \textsuperscript{219} New Zealand PPSA, supra note 11 at s. 150.
\item \textsuperscript{220} The test to determine a seriously misleading error “is to regard an error that prevents the registration from being disclosed by a properly formatted search” (in Gedye, Personal Property Securities, supra note 185 at 472). The date of birth and address are not listed in section 150 of the New Zealand PPSA but Courts can still decide that errors in this information leading to non-disclosure will give rise to a seriously misleading error (in Gedye, Personal Property Securities, supra note 185 at 485-486).
\item \textsuperscript{221} New Zealand PPSA, supra note 11 at s. 172(d).
\item \textsuperscript{222} Polymers International Limited v Toon, [2013] NZHC 1897 at para 26.
\end{itemize}
otherwise of information provided in the statement, which allows an effective search using the PPSA’s search criteria.”223 The company’s incorporation number must be registered, and it is one of the search criteria in section 172 of the New Zealand PPSA.224 An error in the incorporation number can lead to non-disclosure that the court considered sufficient to invalidate the registration.225 Courts can apply a similar line of reasoning to the incorrect registration of the grantor’s date of birth or address. Both the grantor’s address and date of birth must be registered and can be searched in combination with the grantor’s name.226 The incorrect registration of the date of birth or address can lead to non-disclosure and Courts could consider the error seriously misleading.227 This can place a heavy burden on secured parties to follow-up with their debtors and update the address in case of changes. In any event, Courts will have to decide which errors in registered information will be seriously misleading,228 or the legislator can intervene and limit the number of search criteria.229 In the meantime, registrants remain uncertain on the effectiveness of their registration. Until New Zealand Courts have decided which errors will

223 Those criteria are set out in s 172 [of the New Zealand PPSA] (ibid at para 9).

224 Ibid at para 15.

225 Ibid at para 23-26. The New Zealand High Court decided against imposing the “reasonable person” concept on searchers of the registry. The “reasonable person” concept was introduced in Re Lambert where the court decided that the incorrect registration of the grantor’s name would not invalidate the registration if the serial number was correct. This reasoning only applies for those situations where both pieces of information have to be registered (Re Lambert (1994), 20 OR (3d) 108 (CA) at para 47-49). The reasonable person is a person who knows the ins and outs of a registration system and such a person would not rely on a grantor’s name search alone and would conduct a serial number search as well (in Anthony Duggan, “The Australian PPSA from a Canadian Perspective: Some Comparative Reflections” (2014) 40 Monash University Law Review 59 at 71). New Zealand follows the Canadian Courts that have taken a different approach to this. They think it would be unreasonable to ask of searchers to undertake various searches of the registry based on different types of information (in Kelln (Trustee of) v Strasbourg Credit Union Ltd. (1992), 89 DLR (4th) 427, 9 CBR (3d) 144 (Sask. CA); Case Power & Equipment v 366551 Alberta Inc (Receiver of) (1994), 118 DLR (4th) 637, 23 Alta LR (3d) 361 (Alta.CA) as cited in Anthony Duggan & Jacob Ziegel, Secured Transactions in Personal Property, 6th ed by Anthony Duggan (Toronto: Edmond Montgomery Publications Limited, 2013) at 261).

226 New Zealand PPSA, supra note 11 at s.172 & 142.

227 Gedye, Personal Property Securities, supra note 185 at 485-486

228 Michael Gedye thinks it is undesirable that an error in the debtor’s address would be considered seriously misleading because it is so unclear for registrants and searchers which information to use to register or search based on the debtor’s address (in ibid at 486). An error in the date of birth could give rise to a seriously misleading error but this also depends on the court’s interpretation and decision (in ibid at 485).

229 Ibid at 484-486.
invalidate a registration, searchers are discouraged from relying on the combination of the grantor’s name and date of birth or address.\textsuperscript{230} It is said to be too difficult for searchers to (1) obtain accurate information as a third party and (2) give in all the information correctly.\textsuperscript{231}

The exact match system combined with various search criteria place a heavy burden on registrants. In New Zealand, it is estimated that 25\% of the registrations are ineffective as a result of registering inaccurate information (depending on how the seriously misleading test is applied).\textsuperscript{232} Adding more search criteria has not led to a more efficient system. Instead, it has led to increased uncertainty for both searchers and registrants.

\subsection{2.2.2 Unperfected Security Rights}

As indicated above, New Zealand stayed true to the Saskatchewan PPSA and departed only occasionally from this model. One of these occasions was the decision not to make unperfected security rights\textsuperscript{233} subordinate to the trustee in bankruptcy.\textsuperscript{234} New Zealand justified its choice “on the basis that unsecured creditors (and consequently a trustee in bankruptcy who represents their interests) cannot claim to be deceived by apparent ownership of goods in a debtor’s possession or to rely upon a search of the register when making lending decisions.”\textsuperscript{235} The New Zealand approach continues that its PPSA provides rules to protect third parties, buyers or other secured parties adequately by subordinating unperfected security rights to buyers and perfected security rights.\textsuperscript{236} Previously it was established that secured parties have an increased risk to be

\begin{itemize}
  \item \textsuperscript{230} \textit{Ibid} at 485-486.
  \item \textsuperscript{231} \textit{Ibid} at 485-486 & 523.
  \item \textsuperscript{232} Gedye, Distant Export, \textit{supra} note 13 at 222.
  \item \textsuperscript{233} A perfected security rights means that it has attached and that the necessary steps for perfection (usually registration, possession or control) have been taken (in Cuming, \textit{Personal Property Security Law}, \textit{supra} note 114 at 296).
  \item \textsuperscript{234} Gedye, Distant Export, \textit{supra} note 13 at 213-214.
  \item \textsuperscript{235} \textit{Ibid} at 213.
  \item \textsuperscript{236} \textit{Ibid} at 214.
\end{itemize}
unperfected due to the exact match registration system and the extensive list of search criteria. Making unperfected security rights subordinate to trustees in bankruptcy in addition to this, is felt to generate an unwarranted windfall for trustees.

Obviously the Saskatchewan PPSA takes a different approach to the subordination of unperfected security rights to trustees in bankruptcy. The Saskatchewan PPSA is in line with all other Canadian PPSAs that subordinate unperfected security rights to the trustee in bankruptcy. This provision in the Saskatchewan and other Canadian PPSAs represents a policy choice that “an unsecured creditor’s position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.” The milestone case in this matter is Re Giffen. Justice Iacobucci used the competing claims of a leaseholder and a trustee in bankruptcy as background to explain the underlying policies of subordinating unperfected security rights to trustees in bankruptcy. This policy choice can be put in fairness terms or economic terms. From a fairness perspective, the policy aims to maintain a balance between the rights of unsecured parties inside and outside bankruptcy proceedings. The analysis starts with the subordination of an unperfected security right to an execution creditor. An execution creditor does rely on the publicity of security rights to inform him of which assets it

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237 *Supra* Chapter 2, 2.2.1 Security Right Registration, *supra* at 29.

238 Gedye, *Personal Property Securities, supra* note 185 at 472.

239 *Saskatchewan PPSA, supra* note 12 at s.20(1).


242 *Re Giffen*, 1998 1 SCR 91, 1 RCS 91 [*Re Giffen*].


244 Duggan & Ziegel, *supra* note 240 at 232.

245 *Ibid* at 231.
will be worth his time and money to execute. Unperfected security rights will be ineffective against the execution creditor, and he will be able to enforce his rights. Once the debtor goes into bankruptcy, the (unsecured) execution creditor’s proceedings are stayed, and the trustee in bankruptcy takes over for him. As a result, the trustee in bankruptcy should be given priority over unperfected security rights to treat execution creditors the same inside, as well as outside, bankruptcy proceedings. From an economic perspective, the choice to give priority to the trustee in bankruptcy aims at avoiding that parties use bankruptcy law opportunistically. An unperfected security right will be subordinated to an execution creditor but not to a trustee in bankruptcy in New Zealand. An unperfected secured party could benefit from bankruptcy proceedings in which he takes priority over the trustee in bankruptcy and escapes the execution creditor. Creating a situation that incentivizes parties to initiate unnecessary bankruptcy proceedings is obviously not good for the economy.

New Zealand did not choose the policy of subordinating an unperfected security right to a trustee in bankruptcy. The reformers justified their choice by referring to (1) the fact that unsecured creditors (and the trustee in bankruptcy by extension) cannot claim to be deceived by apparent ownership when making lending decisions, (2) the other provisions that provide protection to prospective buyers and secured parties and (3) the heavy burden that an exact match system with many search criteria places on registrants in the security rights registry. In their decision, the drafters of the New Zealand PPSA might overlooked the Re Giffen considerations to treat

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246 Gedye, Personal Property Securities, supra note 185 at 371-372; McCormack, Comparative Perspective, supra note 58 at 19. For this reason unperfected security rights are also subordinate against execution creditors in the New Zealand PPSA (in New Zealand PPSA, supra note 11 at s. 103; Gedye, Distant Export, supra note 13 at 213).

247 Re Giffen, supra note 242 at para 41.

248 Ibid at para 42; Duggan & Ziegel, supra note 240 at 231-232.

249 Ibid at 232.

250 Ibid.

251 Gedye, Distant Export, supra note 13 at 214.

252 Gedye, Personal Property Securities, supra note 185 at 472.
unsecured creditors equally inside and outside bankruptcy proceedings.\textsuperscript{253} It must be said that \emph{Re Giffen} was decided based on the British Columbia PPSA which operates under a similar match search system.\textsuperscript{254} The similar match system can mitigate some of the risks of making a seriously misleading error resulting in an unperfected security right. If New Zealand had followed the registration system in the Saskatchewan PPSA, they could have avoided the uncertainty for registrants and searchers and the higher number of unperfected security rights. This in turn could have given more room to consider the benefits of subordinating an unperfected security right to the trustee in bankruptcy. This example shows how departures from the model law can have ripple effects in different parts of a PPSA and can impede the weighing of the costs and benefits of a policy choice.

2.2.3 Collateral Description

Collateral description requirements are part of most Canadian PPSAs, the Guide and the Model Law.\textsuperscript{255} Secured parties are required to provide this information in both the security agreement and the registration, so it has to be clear to them what is expected to fulfill this requirement.

Including collateral descriptions in security agreements helps “to enable third parties dealing with assets in the debtor’s hands to determine which of those assets are encumbered. It serves to deter a secured party from claiming a security interest in a greater range of collateral than that to which the debtor actually agreed.”\textsuperscript{256} The security agreement is not the main source of information for third parties to find out about the encumbered collateral. The security agreement is not registered, and third parties may never see it.\textsuperscript{257} Third parties should be able to rely on the information in the registered notice.\textsuperscript{258} The Canadian PPSAs and the Model Law prescribe that

\begin{thebibliography}{99}
\bibitem{253} \textit{Re Giffen}, supra note 242 at para 42.
\bibitem{254} Cuming, \textit{Personal Property Security Law}, supra note 114 at 365.
\bibitem{256} Cuming, \textit{Personal Property Security Law}, supra note 114 at 271.
\bibitem{257} Gedye, \textit{Personal Property Securities}, supra note 185 at 145.
\bibitem{258} \textit{Ibid}.
\end{thebibliography}
the registered notice contains a collateral description to give searchers an idea of the grantor’s encumbered assets.\textsuperscript{259} Collateral descriptions help increase the information value of the registry record for insolvency administrators and execution creditors.\textsuperscript{260} The absence of a description in the notice could also limit the grantor’s ability to resell the collateral or encumber it with another security right.\textsuperscript{261}

The Saskatchewan PPSA prescribes that a security agreement for a non-possessory security right must contain “a description of the collateral by item or kind.”\textsuperscript{262} When describing goods by item or kind, the use of generic categories of personal property is permitted.\textsuperscript{263} In the Canadian PPSAs, except Ontario,\textsuperscript{264} the collateral description in registered notices is limited to “a description by item or kind” or as “all present and after acquired personal property” or “all present and after acquired property subject to specified item or kind exclusions.”\textsuperscript{265} In the Saskatchewan PPSA the use of the specific categories “goods”, “chattel paper”, “security”, “document of title”, “instrument”, “money” or “intangible”\textsuperscript{266} is allowed. The Model Law prescribes a collateral description in security agreements that reasonably allows the collateral’s identification. It then further specifies that this can be done through a generic description.\textsuperscript{267} The Model Law uses the same requirement for collateral descriptions in the financing statement as it

\textsuperscript{259} Model Law Art.26-60, supra note 130 at art.34; Cuming, \textit{Personal Property Security Law}, supra note 114 at 347-349.

\textsuperscript{260} Ibid; the Guide, supra note 1 at 170.

\textsuperscript{261} Ibid; Cuming, \textit{Personal Property Security Law}, supra note 114 at 347-348.

\textsuperscript{262} Saskatchewan PPSA, supra note 12 at s.10(1)(d).

\textsuperscript{263} Cuming, \textit{Personal Property Security Law}, supra note 114 at 272. See also for example the Saskatchewan PPSA, supra note 12 at s.10(1)(d)(i): crops, goods, chattel paper, investment property, document of title, instrument, money, intangibles.

\textsuperscript{264} Ontario works with a system in which the registrant only has to check one of the following collateral categories: consumer goods, equipment, accounts or other. An additional description may be given but this is optional (in Cuming, \textit{Personal Property Security Law}, supra note 114 at 349).

\textsuperscript{265} Ibid at 348.

\textsuperscript{266} \textit{The Personal Property Security Regulations}, RRS c P-6.2 Reg 1 at s.14(2).

\textsuperscript{267} Model Law Art. 1-25, supra note 255 at art.9.
uses for security agreements. The provisions as mentioned earlier clearly and consistently describe what collateral description is required in a security agreement and to register a valid notice.

The New Zealand PPSA has written its provisions for collateral descriptions in security agreements and registrations. Section 36 of the New Zealand PPSA prescribes for security agreements “an adequate description of the collateral by item or kind that enables the collateral to be identified.” It is unclear how Courts will interpret the wording in New Zealand, but it seems to place a more onerous burden on parties to a security agreement. It could imply that secured parties need to give a more exact description of the collateral and not a broad description by class. A similar provision in the Ontario PPSA states that a security agreement needs to contain “a description of the collateral sufficient to enable it to be identified.” Courts have interpreted this to mean that secured parties can use the generic PPSA categories in their description. It is hoped and presumed that the New Zealand Courts will interpret the cryptic New Zealand provision to allow generic descriptions. Until Courts make a decision on what kind of description is sufficient, parties to a security agreement are advised to be prudent and to employ more detailed collateral descriptions.

The collateral description in the New Zealand security rights registry is also causing uncertainty and confusion. First registrants have to choose

\[\text{Footnotes:}\]

268 The collateral description has to identify the collateral but this can be done through reference to a generic category or class of assets (in Model Law Art.26-60, supra note 130 at art.34 juncto Model Law Art.1-25, supra note 255 at art. 9).

269 New Zealand PPSA, supra note 11 at s.36(1)(b)(i).

270 Until then the question will be “whether the collateral description within the security agreement must be entirely self-contained (so that a third party can identify from a security agreement every individual item of collateral that is the subject of the agreement) or whether extrinsic evidence can be adduced to identify individual items of collateral from within a broadly defined class” (in Gedye, Distant Export, supra note 13 at 215).


272 Gedye, Distant Export, supra note 13 at 215; Cuming, Personal Property Security Law, supra note 114 at 272; Access Advertising Management Inc v Servex Computers Inc [1993], 15 OR (3d) 635 at para 5, 43 ACWS (3d) 465.

273 Michael Gedye gives various reason as to why the New Zealand PPSA indicates that there is no intention for the New Zealand PPSA to depart from the approach in the Canadian PPSAs (in Gedye, Personal Property Securities, supra note 185 at 146-147).

274 Ibid at 147.
one of the categories to which their collateral belongs.\textsuperscript{275} Then section 142(e) of the New Zealand PPSA mandates that the registration contains “a description of the collateral […]”.\textsuperscript{276} The description is mandatory, but the provision gives no further explanation of how specific the description must be.\textsuperscript{277} The collateral description requirement is unclear and leaves secured parties uncertain as to the validity of their registration. This led some registrants to adopt what is considered the safer option of the “all present and after acquired personal property” description.\textsuperscript{278} An overly broad collateral description that can hinder the grantor’s ability to raise finances elsewhere leaves secured parties open to damages.\textsuperscript{279} Debtors can file a claim for damages caused by a breach of the reasonable commercial standards of section 25 of the New Zealand PPSA.\textsuperscript{280} The departure from the clear language in the Saskatchewan PPSA causes uncertainty and relies on judicial interference to settle the interpretation of this provision.

### 2.3 Conclusion

This section identified three instances where the New Zealand reformers departed from the Saskatchewan PPSA to the detriment of the New Zealand PPSA. The alternative policy choice and drafting mistakes highlight the risks of trying to improve a system while the reformers might not have enough understanding of the underlying principles to make those changes. Secured transactions reform does not benefit from partial adoptions or unexpected changes to the model law. The changes to the registry system increased uncertainty and confusion for both the registrants and searchers of the registry. The changes to the search criteria and the choice of an exact match search system might also explain New Zealand’s different policy with respect to unperfected security rights and trustees in bankruptcy. A stricter adherence to the Saskatchewan PPSA registry system could have avoided the added burden caused by the exact match system.

\[\textsuperscript{275}\text{ Gedye, Distant Export, supra note 13 at 223.}\]
\[\textsuperscript{276}\text{ New Zealand PPSA, supra note 11 at s.142(e).}\]
\[\textsuperscript{277}\text{ Gedye, Distant Export, supra note 13 at 223.}\]
\[\textsuperscript{278}\text{ Ibid.}\]
\[\textsuperscript{279}\text{ Ibid; New Zealand PPSA, supra note 11 at s.176.}\]
\[\textsuperscript{280}\text{ Ibid at s.25; Gedye, Distant Export, supra note 13 at 223.}\]
and the additional search criteria. It could have helped convince New Zealand of the merits of subordinating unperfected security rights to a trustee in bankruptcy. The unintended consequences of New Zealand’s departures from the Saskatchewan PPSA are an indication that States benefit from staying true to the model on which they base their reform.

3 Australia: Between the Guide and the Model Law

3.1 Pre-PPSA Law

Australia’s pre-PPSA secured transactions law suffered from the same problems as the New Zealand pre-PPSA regime. The Australian pre-PPSA laws consisted of different security rights that created various outcomes for functionally similar situations. They ranged from possessory and non-possessory security rights, such as the pledge and the charge, to retention of title arrangements, such as conditional sales or hire-purchase agreements. Parties’ rights differed depending on whether the secured party held a legal or equitable interest or whether the interest was transferred by the grantor to the secured party or arose out of a title retention arrangement. The pre-PPSA laws operated on a form over substance basis which meant that the rules varied depending on factors that, for the most part, had no sound basis in policy or business convenience. The various security rights and the many different registries made the Australian pre-PPSA secured transactions law a cumbersome and archaic secured transactions regime.

281 Duggan & Brown, supra note 15 at 14.

282 For a complete overview of the security rights in Australia pre-PPSA see ibid at 4-14.

283 Ibid at 8.

284 Ibid at 14.

3.2 The PPSA Reforms

All these different secured transactions have now been unified in a PPSA that applies to every transaction that in substance creates a security right. Under the Australian PPSA, the form of secured transaction is completely irrelevant. Grantors and secured parties may continue to rely on the old forms of security rights without this affecting the PPSA’s application. Together with the unification of all the various security rights, the Australian PPSA unified the many different registries that existed and created one, nationally, centralized security rights registry.

The Australian PPSA is a hybrid between legislative guide and model law reform. The Australian reform started from the Canadian and New Zealand PPSAs and Article 9. Australia was keen to improve the Saskatchewan model and introduce different approaches from different models and jurisdictions. The Australian PPSA remains truer to the original structure and terminology of the Saskatchewan PPSA than Belgium did with the Guide, but it departs more often from the Saskatchewan PPSA than is the case in New Zealand. The three following examples highlight how the hybrid approach led to a misunderstanding of policy choices, unnecessary provisions and drafting mistakes.

3.2.1 Multiple Collateral Registration

All PPSAs work with a security rights registry, not a collateral registry. Registrants file a notice for a security right that links to the grantor of the security right. They will not register the individual pieces of collateral that are encumbered by a security right. Ronald Cuming explains

286 Ibid at 16.
287 Ibid at 7 & 12.
288 Ibid at 44.
289 In Australia they managed to overcome differences between the provinces and created one national register for the whole of Australia (in ibid at 19); John G H Stumbles, “Personal Property Security Law in Australia and Canada: a Comparison” (2011) 51 Can Bus L J 425 at 426.
290 Duggan & Brown, supra note 15 at 16.
291 Whittaker, supra note 16 at 31.
292 Cuming, Personal Property Security Law, supra note 114 at 324.
that “PPSA drafters recognized the fundamental difference between a system for recording title to assets and one for recording security rights. A title registry functions as a conclusive source of positive information for third parties about the current state of title to specific assets.” 293 The same cannot be said of a security rights registry where the registration of a security right only signifies that a security right exists or that one may be contemplated. 294

One of the misunderstandings the Australian reformers had about the registry was that they saw it as a collateral registry as opposed to a security rights registry. 295 The Australian reformers realized their mistake and changed their collateral registry to a security right registry while drafting their PPSA. This operation was not entirely successful, and some provisions still refer to the collateral based registry. 296 One of these provisions is section 153 of the Australian PPSA. The provision mandates that “the collateral must belong to a single class of collateral prescribed by the regulation.” 297 As a result of this provision the Australian PPSA only allows a single registration per collateral class. 298 If a security agreement provides for a security right over multiple collateral classes, the secured party must register multiple financing statements. 299 This is a unique feature of the Australian PPSA and adds to the costs and complexities of the registration process. 300 In case of uncertainty, the registrant is better off paying an extra registration fee for another security registration since under-registration may result in the security

293 Ibid at 325.

294 Ibid.

295 Whittaker, supra note 16 at 243-244; Duggan, Trials and Tribulations, supra note 135 at 11.

296 Ibid at 11-12; Whittaker, supra note 16 at 243.

297 Australian PPSA, supra note 14 at s.153(1), Item 4(c).

298 Anthony Duggan, “A PPSA Registration Primer” (2011) 35 Melb U L Rev 865 at 891 [Duggan, PPSA Registration]; Whittaker, supra note 16 at 169; Australian PPSA, supra note 14 at art.153(1).

299 Duggan & Brown, supra note 15 at 133.

300 Ibid; Duggan, PPSA Registration, supra note 298 at 891.
right being unperfected. It makes the registry more cluttered and makes it more difficult for searchers to make sense of results because they have to sift through different registrations.

Registering a notice with an “all present and after acquired property” (hereafter, ALLPAP) collateral description, does not offer a solution. Due to section 151 of the Australian PPSA “a secured party may not register a financing statement unless he believes on reasonable grounds that it holds a security interest in the collateral as described.” A breach of section 151 of the Australian PPSA will not invalidate the registration but will result in a civil penalty. The use of the phrase “all present and after acquired personal property except collateral not covered by the security agreement” does not help either. Section 10 of the Australian PPSA prescribes that “description” means “a description that identifies a class.” The regulation prescribes that “ALLPAP, except” means “all present and after acquired property, except for an item or class of personal property stated in the financing statement.” As a result, “the words following except must refer either to a specific item of collateral or a prescribed class of collateral.” Referring to “collateral not covered by the security agreement” is not a valid collateral description.

States should be careful when interpreting and re-drafting provisions from a legislative model. The mistake made by the Australian drafters was based on a misconception of what the security rights registry aims to do and how it should be organized. The misunderstanding has led to

301 Ibid; Duggan & Brown, supra note 15 at 133.
302 Whittaker, supra note 16 at 208; Duggan, Trials and Tribulations, supra note 135 at 12.
304 Ibid.
305 Ibid at 13.
306 Duggan & Brown, supra note 15 at 133.
307 Ibid; Australian PPSA, supra note 14 at s.10.
308 Personal Property Securities Regulations 2010 (Cth.) at 1.6.
309 The policy behind this is that a searcher can discover the scope of the security right from the registered notice itself without having to consult the security agreement (in Duggan & Brown, supra note 15 at 134; Re Noriega, 2003 ABQB 265 at para 23, 15 Alta LR (4th) 79).
differences between the Australian and Saskatchewan PPSA and uncertainty for the registry users.

### 3.2.2 Circular Priorities

Circular priorities can occur in PPSA-like regimes when there are three or more competing claims to the same asset.\(^{310}\) A true circularity problem arises when the application of the default priority rules in secured transactions law does not result in a stable outcome.\(^{311}\) An apparent circularity problem can arise when “the highest ranked secured party subordinates its claim to the lowest ranked claim.”\(^{312}\) Subordination agreements are allowed in most PPSA-like regimes and can be beneficial to both grantors and secured parties.\(^{313}\) The following is an example of the consequences of a subordination agreement:

Secured Party 1 (hereafter, SP1), SP2 and SP3 are all given a security interest in the same collateral. SP1 registers first followed by SP2 and SP3. Their priority ranking is determined by the time of their registration. Then SP1 enters into a subordination agreement with SP3 which means that SP1 agrees to postpone his claim to that of SP3.\(^{314}\)

The Australian PPSA created a separate provision to solve problems caused by both true and apparent circularities.\(^{315}\) Section 59 of the Australian PPSA says:

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311 *Ibid*.

312 *Ibid* at 490.

313 The Guide gives an example of the benefits of subordination agreements: “lender A, holder of a first-priority security right in all existing and after acquired assets of a grantor, may agree to permit the grantor to give a first-priority security right in a particular asset to lender B so that the grantor can obtain additional financing from lender B based on the value of the asset” (in the Guide, *supra* note 1 at 219).

314 Duggan & Brown, *supra* note 15 at 156.

315 *Australian PPSA*, *supra* note 14 at s.59.
A security interest (the first security interest) has priority over another security interest (the last security interest) if, by the operation of this Act (including this section):

(a) The first security interest has priority over security interests of a particular kind (the intermediate security interests); and

(b) The intermediate security interests have priority over the last security interest.

The provision’s convoluted phrasing is difficult to understand and apply. The Review Report interprets the provision as inapplicable to true circularity problems because it “does not provide a mechanism for deciding which of the security rights should be the “first security interest” for the purpose of this section.” It recommends that in case of discussion as a result of a circularity problem the Courts simply rely on the default priority rules where they apply and that section 59 of the Australian PPSA is deleted.

The second issue with this provision is that it tries to solve apparent circularity problems as well. The fact that SP1, through a subordination agreement, surrendered his first-ranking priority interest to SP3 causes apparent circularity problems. A possible interpretation of section 59 of the Australian PPSA could be that “SP1 would retain priority over SP3 notwithstanding the subordination agreement. The provision appears to preclude subordination agreements in a case involving one or more intermediate security interests.” This interpretation would be an undesirable outcome since grantors and secured parties can benefit

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316 Ibid.
317 Whittaker, supra note 16 at 314.
318 Ibid at 314-315.
319 Duggan & Brown, supra note 15 at 157.
321 Duggan & Brown, supra note 15 at 157.
from engaging in subordination agreements.\textsuperscript{322} A better solution to apparent circularity problems is to rely on the established legal principles of partial or total subordination.\textsuperscript{323} The application of either partial or total subordination depends on a combination of the wording in the subordination agreement and the commercial circumstances.\textsuperscript{324} Under partial subordination, SP1’s funds will be set aside and from this fund SP3’s claim will be satisfied. If there is any surplus in this fund, it will go to SP1. Next SP2’s claim will be satisfied from the remaining (total) funds.\textsuperscript{325} Any surplus of these funds will go to SP3 first and then to SP1. As a result of partial subordination, “the subordination agreement between SP1 and SP3 is effective only as between those parties and has no effect on the relative priority of SP2.”\textsuperscript{326} Full subordination results in SP1 moving to the back of the priority ranking and all of the intervening creditors moving up one place in priority.\textsuperscript{327} The outcome of the example under the complete subordination approach is that SP1 would simply move behind SP3. The new priority order then is SP2, SP3, and SP1. SP2’s priority would improve as a result of the subordination agreement between SP1 and SP3 while SP1 would move back two places.\textsuperscript{328} Canadian Courts have resisted the complete subordination approach unless the parties very clearly intended full subordination in their agreement.\textsuperscript{329} The application of either total or partial subordination can solve apparent circularity problems thereby making section 59 of the Australian PPSA unnecessary.\textsuperscript{330} Until
section 59 of the Australian PPSA is removed, parties can consider it as a default priority rule that they can contract around by choosing for either total or partial subordination in their security agreement.\footnote{Ibid.}

The Australian reformers attempted to pre-emptively solve a problem by adding section 59 of the Australian PPSA. Unfortunately, the provision does not solve true circularity problems, and apparent circularity problems do not require a specific priority rule. The Saskatchewan PPSA is a balanced secured transactions regime. States adopting this regime can rely on it to provide solutions for must situations. It would be exceptional for a State, new to the PPSA, to find an issue that requires an additional provision. Australia’s departure from the Saskatchewan PPSA was not successful and ended up making its law more confusing and inefficient.

3.2.3 Continuous Perfection

An important part of PPSA regimes is the implementation of coherent and understandable rules for third-party effectiveness and priority.\footnote{Ibid at 103; Duggan & Brown, supra note 15 at 96-97.} The registration system will play an important role in the creation of third party effectiveness in PPSA-like regimes.\footnote{The Guide, supra note 1 at 103; Duggan & Brown, supra note 15 at 96-97.} Besides the security rights registry, third party effectiveness can usually be achieved through other methods such as possession or control.\footnote{Ibid at 133.} If multiple methods of third party effectiveness exist then secured parties will have the opportunity to switch between these different methods.\footnote{Ibid.} Most States provide a rule that preserves the continuity of third-party effectiveness while switching from one method to another as long as the security right is effective against third parties through some method at all times.\footnote{Ibid at 146, Recommendation 46; Cuming, Personal Property Security Law, supra note 114 at 298.} If the security right is continuously effective against third parties, the date

\footnote{Ibid.}

\footnote{Ibid at 103; Duggan & Brown, supra note 15 at 96-97.}

\footnote{The Guide, supra note 1 at 103; Duggan & Brown, supra note 15 at 96-97.}

\footnote{Ibid at 133.}

\footnote{Ibid.}

\footnote{Ibid at 146, Recommendation 46; Cuming, Personal Property Security Law, supra note 114 at 298.}
to determine priority will be the original date of third-party effectiveness. The Saskatchewan PPSA provision for continuous third-party effectiveness goes as follows:

23(1) if a security interest is originally perfected pursuant to this Act and is again perfected in some other way pursuant to this Act without an intermediate period when it is unperfected, the security interest is continuously perfected for the purposes of this Act.337

The Model Law and New Zealand PPSA both have similar provisions.338 Australia drafted its provision to guarantee continuous third party effectiveness.

For the purposes of this Act, a security interest is continuously perfected after a particular time if the security interest is, after that time, perfected under this Act at all times.339

The first problem is the abstruse way this provision is phrased which makes it a difficult provision to apply.340

A second problem with section 56(1) of the Australian PPSA is the example following this provision.

Examples: A security interest could be perfected in 2 or more different ways as follows:

(a) By possession and by a registration;

(b) By 2 different registrations.341

337 Saskatchewan PPSA, supra note 12 at s.23(1).
338 Model Law Art.1-25, supra note 255 at art.18.2; New Zealand PPSA, supra note 11 at s.42.
339 Australian PPSA, supra note 14 at s.56(1).
340 Whittaker, supra note 16 at 152.
341 Australian PPSA, supra note 14 at s.56(1).
The Australian drafters consider overlapping registered notices as continuously effective against third parties from the registration date of the first registered notice until the expiration of the second registered notice.\(^\text{342}\) This interpretation will interfere with the reliability of the security rights registry and the clear determination of priority among competing claimants.\(^\text{343}\) After the first notice expires, it will become unsearchable in the registry, but it will still provide the date to determine priority.\(^\text{344}\) Section 163(1) of the Australian PPSA\(^\text{345}\) could prevent this interpretation of section 56(1) of the Australian PPSA. Section 163(1) of the Australian PPSA states that after expiration a notice is no longer effective, so in combination with section 56(1) of the Australian PPSA, an expired notice could not determine priority.\(^\text{346}\)

New Zealand and Saskatchewan are clear in their provisions that third-party effectiveness is continuous when a secured party switches from one method to another without ever losing third-party effectiveness.\(^\text{347}\) In that case, the original date of third-party effectiveness will be used to determine priority. Since they clearly refer to changing methods of third-party effectiveness, this rule does not apply to overlapping registered notices. New Zealand scholars determine third-party effectiveness and priority for overlapping registered notices as follows:

\[
\text{there would be two discrete periods of perfection: an initial period from the registration date of the first financing statement until that financing statement} \\
\text{and the second period from the registration date of the second financing statement until the expiration of the second financing statement.}
\]


\(^{343}\) Gedye, Secured Transactions Jurisprudence, \textit{supra} note 342 at 705-706.

\(^{344}\) \textit{Ibid}.

\(^{345}\) \textit{Australian PPSA}, \textit{supra} note 14 at s.163(1).

\(^{346}\) Gedye, Secured Transactions Jurisprudence, \textit{supra} note 342 at 708; Duggan, Trials and Tribulations, \textit{supra} note 135 at 17.

\(^{347}\) \textit{New Zealand PPSA}, \textit{supra} note 11 at s.42; Saskatchewan PPSA, \textit{supra} note 12 at s.23(1).
expired and a second, though overlapping, period from the time of registration of the second financing statement until that registration expired.\textsuperscript{348}

Australia’s home grown drafting and statutory example allow the continuous third-party effectiveness of overlapping registered notices that impede the use of registrations to determine clearly priority.\textsuperscript{349} To clarify, the Review Report recommends that the wording of the Saskatchewan PPSA should be adopted.\textsuperscript{350} Unfortunately, the Review Report does not pick up on the problem of continuous third-party effectiveness of consecutively registered notices. It even states that the newly drafted section 56 of the Australian PPSA will have to provide for the continuous third-party effectiveness of consecutive notices.\textsuperscript{351} The uncertainty created by section 56(1) of the Australian PPSA undermines and complicates the efficient working of the registration and priority system.

3.3 Conclusion

The Australian reformers stayed conceptually true to the Saskatchewan PPSA but did not shy away from making changes where they saw fit. While trying to improve the Saskatchewan model, they ended up doing more harm than good. Australia’s hybrid reform relied on many different influences and changes to the Saskatchewan PPSA, but it did not increase the efficiency or functionality of their final PPSA. The alterations and additions to the Saskatchewan PPSA have great implications, and many will need legislative or judicial intervention to rectify. Australia should have relied on the competence with which the Saskatchewan PPSA was drafted and trusted that the regime works well. A stricter adherence to the Saskatchewan PPSA would have created less confusion and required less additional reform or judicial intervention.

\textsuperscript{348} Gedye, Secured Transactions Jurisprudence, supra note 342 at 706.

\textsuperscript{349} Ibid at 708.

\textsuperscript{350} Whittaker, supra note 16 at 153.

\textsuperscript{351} Ibid.
Chapter 4
Incentives for Model Law Reform

The previous examples demonstrate that model law reform can help States see the benefits of policy choices and avoid drafting mistakes that result in uncertainties, inconsistencies and unintended negative consequences. On top of that, States are being told increasingly that adopting a modern and efficient secured transactions regime will stimulate economic growth and efficiency. The secured transactions regimes found in the United States Canada and the Model Law are said to be especially beneficial to a State’s economy. This chapter will look at the effects of secured transactions reform on economic efficiency and to what extent model law reform can help increase efficiency and economic appeal. States that want to reform to a single secured transactions regime with a generic security right can benefit from model law reform. Unifying all different security rights and subjecting them to one, well-functioning set of rules and registration system, as in the Model Law, can increase the predictability and economic appeal of States’ secured transactions law. Also, model law reform can help more effectively reduce transaction costs that can offset the higher transition costs. However, model law reform comes with some side-effects that reforming States will have to take into account.

1 Attracting Foreign Investment

In the longer-term, modern secured transactions regimes are considered a useful tool to increase economic growth. A first aspect of this increase in economic growth is that efficient and harmonized secured transactions regimes can attract more credit from both domestic and foreign

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lenders.\textsuperscript{354} Creditors feel more inclined and comfortable to offer loans when the regime in which they are operating is predictable.\textsuperscript{355} In a predictable secured transactions regime “the financier can foresee the results of the transaction and does not need to conduct research on the details of the secured transactions laws of the emerging country and, therefore, credit at the lowest possible rate will be extended.”\textsuperscript{356}

The adoption of a comprehensive secured transactions regime with a generic security right can help increase the predictability of secured transactions laws for foreign lenders.\textsuperscript{357} As the Guide explains “such a system can much more easily accept a broad variety of foreign security rights, whether these are of a narrow or an equally comprehensive character, a circumstance that is likely to promote cross-border commerce.”\textsuperscript{358} The Guide continues that in a comprehensive secured transactions regime a potential creditor does not need to investigate the different prerequisites of the various alternative security devices and evaluate their respective advantages and disadvantages.\textsuperscript{359} The Model Law ensures the adoption of a comprehensive secured transactions regime that unifies pre-existing security rights into one generic security right. The generic security right is subjected to one body of law that will regulate its creation, third party effectiveness, priority and enforcement.\textsuperscript{360} Reform based on the Model Law can increase the predictability of secured transactions law and can make creditors feel more comfortable when interacting with the adopting States.\textsuperscript{361}

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\textsuperscript{354} The Guide, supra note 1 at 1. See also Kieninger, supra note 106 at 20-22; Roy Goode, “Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global Regional” (2003) 8 Unif L Rev 341 at 342; Rover, supra note 85 at 489-492.
\textsuperscript{355} Akseli, Facilitation of Credit, supra note 9 at 43; Tajti, supra note 64 at 151-152.
\textsuperscript{356} Akseli, Facilitation of Credit, supra note 9 at 75; Rover, supra note 85 at 490.
\textsuperscript{357} Tajti, supra note 64 at 167-169.
\textsuperscript{358} The Guide, supra note 1 at 57.
\textsuperscript{359} Ibid at 56. See also Duggan & Brown, supra note 15 at 14-15.
\textsuperscript{361} Tajti, supra note 64 at 167-169.
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Some aspects of the Model Law can dampen its effects on the predictability and international appeal of secured transactions regime. First, the adoption of the Model Law can increase predictability for lenders with a PPSA or Article 9 background but not for lenders with a different legal background. The former know the intricacies of a generic security right, third-party effectiveness, priority and the security rights registry. For lenders from States that are not familiar with a PPSA- or Article 9-like regime, the Model Law can be as complicated as the regime that was in place prior to the reform. This can discourage States from using the Model Law. Belgium, for example, chose to exclude the retention of title transactions from the security rights registry. Belgium did not want to be the only European State that implemented formalities for its retention of title holders. They wanted to remain a secured transactions regime in which retention of title holders from European jurisdictions felt comfortable.

Second the Model Law’s resemblance to Article 9 and the Canadian PPSAs can make States hostile towards the adoption of the Model Law, despite the potential benefits of model law reform. The Model Law can guarantee the adoption of a coherent and efficient secured transactions regime but not that all foreign lenders and creditors will want to adopt it or will necessarily find it easier to understand.

362 See for the fundamental differences between secured transactions laws Akseli, *Facilitation of Credit, supra* note 9 at 69-73. Many of the typical aspects of common law aspects can be found in the Model Law and can be difficult to understand for civil law trained lawyers.


364 Dirix, *supra* note 90 at 177.


366 This resemblance with Article 9 and the Canadian PPSAs is already established for the Guide but will be even starker for the Model Law. See McCormack, *Secured Credit, supra* note 29 at 130ff; McCormack, Export, *supra* note 61 at 40-41; Halliday, *supra* note 61 at 73.

Under the influence of the legal origins theory and the World Bank’s *Doing Business* reports, the adoption of the Model Law can lead to an increase in international economic appeal. Legal origins scholars promote the economic superiority of certain secured transactions regimes based on empirical research.\(^{368}\) The stronger secured transactions regimes are said to have accessible information sharing institutions and strong creditor protection rights.\(^{369}\) Legal origins theorists claim that States with a common law origin will perform better economically than those with a civil law origin.\(^{370}\) Legal origins theory has become a strong influence in the World Bank’s *Doing Business* reports.\(^{371}\) In the World Bank rankings “creditor-rights scores average 2.4 (out of a maximum of 4) in common-law countries, but only 1.5 for countries with French legal heritage.”\(^{372}\) Much like the legal origins theorists the World Bank has “tended to show that credit bureaus, stronger creditor rights and simple civil procedure rules have a significant impact on access to credit.”\(^{373}\) The *Doing Business* reports advocate the adoption of a public security right registry, effective and extra-judicial enforcement proceedings, the implementation of non-possessory security rights and clear priority rules.\(^{374}\) All these elements can be found in the Canadian PPSAs, Article 9 and the Model Law. The Australian and New Zealand reforms are

\(^{368}\) Lopez-de-Silanes relies on empirical results to encourage States to reform to “a sound credit institutional framework. He suggests that information sharing institutions, such as property registries and credit registries, and the availability of collateral combined with efficient enforcement mechanisms are essential to increase access to credit.” However, he also clearly states that “blindly copying principles or inserting some investor’s rights into the laws is not likely to lead to effective legal reform (in Lopez-de-Silanes, *supra* note 352 at 41-43).

\(^{369}\) *Ibid* at 42-43.


\(^{371}\) McCormack, Export, *supra* note 61 at 44.


\(^{373}\) *Ibid* at 55 & 64; McCormack, Export, *supra* note 61 at 44; Lopez-de-Silanes, *supra* note 352 at 42.

recent examples of the *Doing Business* reports’ effect. Australia saw an immediate rise in the World Bank’s “ease of doing business” ranking.\(^{375}\) The transition from a system that was a complex and disorganized patchwork of Commonwealth, State and Territory statutes and general law to a single set of rules that apply consistently across Australia to all types of personal property and all types of grantor\(^{376}\) was sufficient to make Australia go up in the ranking of the World Bank.\(^{377}\) A similar result was achieved in New Zealand when the World Bank lauded them for their system of credit sharing and the legal rights they give to creditors. The World Bank awarded New Zealand the first place in the category “access to credit” in 2015.\(^{378}\) The World Bank’s and legal origins theorists’ positive perception of common law regimes such as the Canadian PPSAs and Article 9,\(^{379}\) suggests that the adoption of the Model Law will also be positively viewed and rewarded.\(^{380}\)

Gerard McCormack points out that the World Bank’s “*Doing Business* reports have major resonance with national governments, which have often taken conscious steps to improve a country’s rankings.”\(^{381}\) States are even suspected of ‘gaming’ the system to improve their rankings rather than taking the politically more problematic step of actually addressing problems

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\(^{375}\) Whittaker, *supra* note 16 at 32.

\(^{376}\) *Ibid* at 31.


\(^{379}\) McCormack, Export, *supra* note 61 at 43-44.

\(^{380}\) If this results in an actual increase in economic activity and cross-border transactions is hard to say. See Teemu Juutilainen, “Secured Transactions: Centralized or Spontaneous Harmonization” (2010) 1:3 Edinburgh Student L Rev 14 at 21-23. It does seem that States believe so and that they are willing to go quite far to increase their economic appeal in the eyes of the World Bank (in McCormack, Export, *supra* note 61 at 44).

\(^{381}\) *Ibid*. 
highlighted in the *Doing Business* reports. Model law reform could help avoid these types of situations. An ill-constructed secured transactions regime could cause a rise in *Doing Business* rankings but is unlikely to create an actual increase in economic efficiency. Rushing secured transactions reform in the hopes of immediately increasing economic efficiency can have an adverse effect. Even reform efforts that states have committed to can go wrong as was proven by the hybrid reform in Australia. The Model Law provides a regime that is likely to create a rise in the World Bank ranking while providing States with a well-functioning and efficient secured transactions law. This will hopefully dissuade States from drafting their own ill-constructed version of a secured transactions regime, for instance based on the Guide, in the hopes of pleasing the World Bank and international lenders without actually causing an increase in economic appeal or efficiency.

2 Reducing Transaction and Transition Costs

The previous section shows that the positive perception of a secured transactions regime with a generic security right and “a public security right registry, effective and extra-judicial enforcement proceedings, the implementation of non-possessory security rights and clear priority rules” can encourage States to adopt the Model Law. The UNCITRAL is aware of the costs and work States will have to put in to adopt a modern secured transactions regime as recommended in the Guide. The Guide explains that “producing the acculturation necessary for quick acceptance of any new law does not occur by happenstance.” Secured transactions reform aims to reduce transaction costs by creating a more efficient and less formalistic

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383 Australia’s adoption of a PPSA-like regime might have caused a rise in the World Bank ranking but the drafting and implementation of the Australian PPSA did not go well. The complexity and confusion increased after the transition to the PPSA. This was due in part to the novelty of the new PPSA regime but also to drafting mistakes made by the reformers (in Whittaker, *supra* note 16 at 23-33).


385 The Guide recommends that adopting States must attend to the following four issues: (1) preparation of explanatory legislative commentary of the new law, (2) preparation of contractual models on which practitioners can rely, (3) educational campaigns to educate both practitioners and end-users and (4) an efficient publication of judicial decisions and commentary to increase legal certainty (in The Guide, *supra* note 1 at 29-30).
This part will focus on the transition costs of model law reform and how model law reform can help offset some of these costs by more effectively decreasing transaction costs.

Education and litigation costs seem unavoidable when it comes to secured transactions reform of this size. Australia adopted its partly modeled, partly self-drafted PPSA in 2009. It set up an extensive educational campaign, but more efforts are still required. As it stands “many businesses, particularly small businesses, are not sufficiently aware of the Act and the implications for them, whether positive or adverse.” The educational campaigns should especially target the leasing businesses and businesses that engage in conditional sale agreements. Losing sovereignty of title as well as their submission to PPSA formalities such as registration or other forms of third party effectiveness will come as a surprise to title holders.

The Australian Review Report highlights that understanding and appreciation of the Australian PPSA lacks in the hiring sector and for suppliers who have sold goods on retention of title basis. A similar situation arose in New Zealand where, despite education efforts, the title based financiers did not comply with PPSA regulations due to a high level of ignorance of the Act’s impact on their practices. Title holders under the PPSA were the first to bring cases to

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386 The Guide, supra note 1 at 20. See also the UNCITRAL report on international trade law: “in the shorter term, modern secured credit regimes are said to help States in efficiently enforcing their security rights and facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing” (in UNCITRAL, Report of the United Nations Commission on International Trade Law on its thirty-fourth session, 56th Sess., UN Doc A/56/17 (2001) at 66).

387 Duggan & Brown, supra note 15 at 19.

388 Whittaker, supra note 16 at 25.

389 Ibid at 27.

390 Ibid; Conceptualizing a true lease as a security interest in which a debtor has sufficient rights to subject it to a security interest himself requires a thorough understanding of what PPSAs try to achieve. See McCracken, Sheelagh. “Conceptualizing the Rights of a Lessee under the Personal Properties Securities Regime: The Challenge of ‘New Learning’ for Australian Lawyers” (2011) 34 UNSWLJ 547 at 557ff for more detailed explanations on the rights in collateral” in leased goods.

391 Whittaker, supra note 16 at 27.

392 Gedye, Distant Export, supra note 13 at 236.
New Zealand and Australian Courts. The judicial outcome and the commentary in Australia and New Zealand will hopefully teach lessors and other title based financiers the formalities they are required to fulfill. Another source of litigation and costs will be the interaction between the new secured transactions law and the existing domestic laws. Secured transactions interact closely with insolvency and bankruptcy laws. Preferably the new law would provide in provisions that regulate the relationship between the new and the old laws. In New Zealand, such provisions helped the interaction between the old and new laws which helped prevent uncertainty and litigation.

The Model Law prescribes a similar regime that expands its scope to conditional sale agreements, finance leases and outright transfers of collateral. Besides this, it will implement new rules on the creation, third-party effectiveness, priority and enforcement of security rights. Prior to implementation, States will have to adapt their existing domestic laws so they can interact with the new secured transactions regime. After implementation of the Model Law, States will have to help their end-users as much as possible during the transition. This will include a very strong educational campaign, specifically aimed at small businesses that do not have the resources to hire legal support.

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396 New Zealand did not manage to solve all possible conflicts between the New Zealand PPSA and its existing laws, leaving them with some situations that could lead to disputes and court intervention (in Gibbons, supra note 395 at 46-47).

397 Model Law Art. 1-25, supra note 255 at art.2(a) & (jj).

398 Akseli, Facilitation of Credit, supra note 9 at 72.

399 As with the Guide, the Model will have to be accompanied with educational efforts (in the Guide, supra note 1 at 30). See also Whittaker, supra note 16 at 20.
States will have to depend on their judicial bodies to publicize court decisions as quickly as possible to allow for commentary and interpretation, as was the case in New Zealand and Australia.

Secured transactions reform and specifically model law reform will translate in transition costs for the reforming states. Model law reform can, however, reduce transaction costs by implementing a well-functioning, well-drafted secured transactions regime. States will have to weigh the costs and benefits of adopting an entirely new secured transactions regime to the reduction in transaction costs it is likely to generate. New Zealand, for example, implemented the tried and tested Saskatchewan PPSA and made very few changes. They acknowledge that the implementation of the PPSA has suffered from some teething problems and caused some litigation. This was a result of (1) the general confusion after the implementation of such a ground-breaking new regime and (2) departures from the Saskatchewan model. Besides this, New Zealand did not encounter many unexpected problems with the working of their PPSA since most of the issues had already been worked out by the Canadian lawmakers. Most end-users agree that “despite these teething problems the PPSA regime is still a considerable improvement on what went before.” In Australia, the lawmakers took a different approach. In

401 Gedye, Secured Transactions Jurisprudence, supra note 342 at 709ff; Gibbons, supra note 395 at 35ff.
402 Whittaker, supra note 16 at 20.
403 Duggan & Gedye, Impetus for Change, supra note 64 at 677-678.
404 For some European States the establishment of an electronic, centralized security rights registry and the implementation of a generic security right will mean a very large investment of which they can be unsure it will be offset by a reduction in transaction costs (in Tajti, supra note 64 at 153). This can make it harder to convince them of the merits of such a secured transactions regime.
405 Duggan & Gedye, Impetus for Change, supra note 64 at 676-677; Gedye, Distant Export, supra note 13 at 211; Gedye, Personal Property Securities, supra note 185 at 19.
406 Portacom, supra note 393 and Bloodstock, supra note 393.
407 Duggan & Gedye, Impetus for Change, supra note 64 at 677.
408 Ibid at 678.
409 Gedye, Distant Export, supra note 13 at 238.
an attempt to improve on the New Zealand and Saskatchewan PPSAs, they departed at numerous points from those models. The Review Report shows that

the architects of the Act may have tried too hard to be helpful. The Australian PPSA is far longer than its Canadian and New Zealand counterparts, even allowing for the additional provisions that were included to accommodate constitutional and machinery requirements. The developers of the Act appear to have endeavoured to produce a ‘best of breed’ piece of personal property securities legislation, by picking out the best elements of the offshore models and then adding additional detail in an effort to explain more clearly [and] exactly what is required. Rather than helping Australian businesses, however, this has had the effect of creating very specific and detailed operational requirements. It limited flexibility and required changes to operating practices in order to align them with the structures required by the new rules.410

Unfortunately, Australia’s desire to create an optimal PPSA has led to more confusion and uncertainty that will have to be rectified in additional law reforms.411 In the meantime, this added confusion and uncertainty will likely increase transaction costs and litigation.

Model law reform is not a magic bullet that will necessarily remove the political resistance to adopting a model law that is so similar to Article 9, nor will it remove all transition costs associated with a reform of this size. For States that want to adopt a secured transactions regime with a generic security right and unified rules on creation, third-party effectiveness, priority, registration and enforcement, model law reform will probably more effectively reduce transactions costs. The adoption of a tried and tested regime can help reduce transaction costs more efficiently which can make up for the higher transition costs.412

410 Whittaker, supra note 16 at 31.

411 See the recommendations in Whittaker, supra note 16 and Gedye, Secured Transactions Jurisprudence, supra note 342 at 701-702.

412 Whittaker, supra note 16 at 32-33.
Chapter 5
Conclusions

The starting point for this thesis was to see how and when model law reform can help States reform their secured transactions regime. The UNCITRAL aims to encourage States to adopt a comprehensive, modern secured transactions regime. The Model Law is drafted to aid States in implementing this secured transactions regime. The counterarguments for model law reform focus on the costs, its inflexibility when dealing with different jurisdictions and its resemblance to the secured transactions regimes in the United States and Canada. The arguments for model law reform focus on the drafting mistakes that can follow from flexible reform and the positive effect the Model Law can have on attracting foreign investment and the efficiency of secured transactions.

Model law reform will be an asset when it comes to drafting a comprehensive secured transactions regime. The Belgian, New Zealand and Australian examples show that States can easily get lost when their reforms take into account different policies and approaches from various jurisdictions. The Belgian examples show that the recommendations in the Guide do not always succeed in conveying their superiority over other policies and approaches. Belgium felt comfortable departing from the Guide’s recommendations on various occasions although it is to the detriment of their overall secured transactions regime. The examples in New Zealand showcase the strength of model law reform by highlighting that when New Zealand departed from the Saskatchewan PPSA they made drafting mistakes or disregarded some of the underlying policies of the Saskatchewan PPSA. The Australian examples show that a model law can help States remain true to the secured transactions regime they want to create and that the reform will not benefit from States’ desire to re-invent the wheel.

If States can be persuaded to adopt the Model Law, it can have a harmonizing effect and can increase the predictability of secured transactions regimes. The Model Law can guarantee the uniform adoption of a comprehensive secured transactions regime with a generic security right and functional approach. This can increase cross-border transactions with those lenders that are familiar with the secured transactions regime in the Model Law. Model law reform will entail greater transition costs because of the novelty of the new regime, adapting the new and old laws to each other, educational campaigns and a likely increase in litigation. However, the Model
Law’s well-functioning and well-drafted secured transactions regime will likely operate more efficiently and has worked through most teething problems. The increased efficiency caused by model law reform can outweigh its greater transition costs.

Model Law reform is not a silver bullet and will not remove all problems concerning secured transactions reform. We can conclude that model law reform and the Model Law can be (1) useful drafting tools for States that have committed to reform their secured transactions law to the regime the UNCITRAL envisions and (2) can help enhance the economic effects of secured transactions. These benefits of model law reform can help support the arguments in favor of model law reform and the UNCITRAL’s project to create a Model Law.
a) Legislation

(i) Codes, Regulations and Legislative Memorandums

Australia:

*Personal Property Securities Act 2009* (Cth.).

*Personal Property Securities Regulations 2010* (Cth.).

Belgium:

*Burgerlijk Wetboek 21 maart 1804*, Belgian State Gazette 3 September 1807 1804032155, online: Belgian State Gazette,


*Wet betreffende het in pand geven van de handelszaak, het disconto en het in pand geven van de factuur, alsmede de aanvaarding en de keuring van de rechtstreeks voor het verbruik gedane leveringen 25 oktober 1919*, Belgian State Gazette 5 November 1919 1919102550, online: Belgian State Gazette,


*Wet betreffende het in pand geven van de handelszaak, het disconto en het in pand geven van de factuur, alsmede de aanvaarding en de keuring van de rechtstreeks voor het verbruik gedane leveringen 25 oktober 1919*, Belgian State Gazette 5 November 1919 1919102550, online: Belgian State Gazette,

*Faillissementswet 8 augustus 1997*, Belgian State Gazette 28 October 1997, 1997009766, online: Belgian State Gazette,  

Ontwerp van wet tot wijziging van het Burgerlijk Wetboek wat de zakelijke zekerheden op roerende goederen betreft en tot opheffing van diverse bepalingen ter zake, n° 2463/001, Memorie van Toelichting Belgian Parliament, 24 October 2012, online: Belgian Parliament,  

Wet tot wijziging van het Burgerlijk Wetboek wat de zakelijke zekerheden op roerende goederen betreft en tot opheffing van diverse bepalingen ter zake van 11 juli 2013, Belgian State Gazette, 2 August 2013 48463, online: Belgian State Gazette,  

Canada:


*The Personal Property Security Regulations*, RRS c P-6.2 Reg 1.

New Zealand:


United States:

*Uniform Commercial Code Article 9* (2010).
(ii) Legislative models and reports


(iii) UN Documents


b) Case Law


CIF Furniture Limited Re, 2010 ONSC 505, 183 ACWS (3d) 910.


Graham v Portacom, [2004] 2 NZLR 528.

Kelln (Trustee of) v Strasbourg Credit Union Ltd. (1992), 89 DLR (4th) 427, 9 CBR (3d) 144 (Sask. CA).

Polymers International Limited v Toon, [2013] NZHC 1897.

Re Giffen, 1998 1 SCR 91, 1 RCS 91.

Re Noriega, 2003 ABQB 265, 15 Alta LR (4th) 79.


Waller v New Zealand Bloodstock, [2005] 2 NZLR 549.

c) Secondary Materials

   (i) Articles


-----------------------. “The Development of New Zealand’s Secured Transactions Jurisprudence” (2011) 34 UNSWLJ 696.


(ii) Books


(iii) Online Documents


(iv) **Course materials**

Melissa Vanmeenen. Lesnota’s Insolventierecht – Les 10 (course notes delivered at the Faculty of Law, University of Antwerp, 2011-212) [unpublished].