Secured Transactions Law Reform in Africa

Marek Dubovec
and
Louise Gullifer

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © Marek Dubovec and Louise Gullifer, 2019

Marek Dubovec and Louise Gullifer have asserted their right under the Copyright, Designs and Patents Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3) except where otherwise stated.

All Eur-lex material used in the work is © European Union, http://eur-lex.europa.eu/, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Dubovec, Marek, author. | Gullifer, Louise, author.

Title: Secured transactions law reform in Africa / Marek Dubovec and Louise Gullifer.

Description: Oxford ; New York: Hart, 2019. | Includes bibliographical references and index.

Identifiers: LCCN 2019035722 (print) | LCCN 2019035723 (ebook) | ISBN 9781509913077 (hardback) | ISBN 9781509913091 (Epub)

Subjects: LCSH: Security (Law)—Africa, Sub-Saharan. | Suretyship and guaranty—Africa, Sub-Saharan. | Law reform—Africa, Sub-Saharan.

Classification: LCC KQC235.S43 D83 2019 (print) | LCC KQC235.S43 (ebook) | DDC 346.6074—dc23

LC record available at https://lccn.loc.gov/2019035722

LC ebook record available at https://lccn.loc.gov/2019035723

ISBN: HB: 978-1-50991-307-7
ePDF: 978-1-50991-308-4
ePub: 978-1-50991-309-1

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

1

Introduction

A. General Introduction

This book is the second in a series looking at secured transactions law around the world, with a particular focus on reform. The first book,[1] of which one of the authors was an editor, was a general discussion of reform so far, with particular focus on Europe and the possibility of reform in European countries. It included chapters on the history of reform in the United States and its transplant into Canada, Australia, New Zealand and the first African country to undertake wholesale reform, Malawi.

As mentioned below, there has been a relatively rapid take-up of the idea of reform in Africa and Latin America. This volume, therefore, concentrates on African countries, and the fourth volume in the series will concentrate on Latin America. The third volume will look at reform in Asia, particularly East Asia. These three volumes, therefore, each focus on a particular continent, and consider what reform has already taken place, the reasons for and the challenges raised by the reform process, the lessons learned and the likelihood of reform in unreformed jurisdictions.

This book is both evaluative and informative. It is an academic study, involving critical analysis of the existing law (reformed or unreformed) and proposed changes, and makes a significant contribution to the debate about whether and how to reform secured transactions law, especially in developing economies. The African continent is a mixture of common law, civil law and mixed systems, all of which are represented in this book, providing resources for comparative law scholars. The book will also be informative to those involved in reforming the law, as well as those who are learning about the reformed law, whether as students or as someone who engages with the law as a matter of practice.

This introductory chapter not only introduces the subject matter of the book, but provides some information about matters which will be dealt with throughout the book, such as terminology, some specific legal issues, and some background about the legal and economic situation in Africa, as well as some common types of financing. It also considers secured transactions law reform in general, so as to place the reforms taking place in Africa in a more general context.

This introduction includes two tables. Table 1.1 gives the status of the reforms discussed in the book in tabular form for easy reference, plus an analysis of their Doing Business and Getting Credit rankings before and after reforms.[2] The Getting Credit Indicator contains two indexes: one measures the *strength* of legal rights, focusing on secured transactions and

[1] O Akseli and L Gullifer (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016).

[2] For more explanation of these rankings, see B2 below.

Table 1.1 Status of reform and changes in Ease of Doing Business and Getting Credit rankings post-reform

Country	Year of reform and reform status	Ease of Doing Business rank					Getting Credit rank								
							2 years before reform*			2 years after reform**					
		Model	2 years before reform*	2 years after reform**	Rank change	2019 rank	Getting credit rank	Strength of legal rights index	Depth of credit information index	Getting credit rank	Strength of legal Rights index	Depth of credit information index	Credit reporting reform?	Getting Credit Rank change	2019 rank
Common law															
Ghana	2012 – partial	Local drafting	92	67	+25	114	113	7 of 10	0 of 6	28	8 of 10	5 of 6	No	+85	73
Kenya	2017 – yes	ML	136	61	+75	61	116	3 of 12	7 of 8	8	10 of 12	8 of 8	Yes	+108	8
Liberia	2010 – yes	Art 9 and PPSA	170	151	+19	174	135	4 of 10	0 of 6	98	7 of 10	1 of 6	Yes	+37	112
Malawi	2013 – yes	NZ	133	164	−31	111	116	7 of 10	0 of 6	151	5 of 12	0 of 8	Yes	−35	8
Nigeria	2016 – yes	ML and Art 9	147	145	+2	146	13	9 of 10	5 of 6	6	10 of 12	8 of 8	Yes	+7	12
Sierra Leone	2014 – yes	Ghana	141	147	−6	163	126	7 of 10	0 of 6	152	5 of 12	0 of 8	Yes	−26	161
Zambia	2016 – yes	PPSAs and LG	83	85	−2	87	13	9 of 10	5 of 6	2	11 of 12	8 of 8	Yes	+11	3

(continued)

Table 1.1 *(Continued)*

Country	Year of reform and reform status	Ease of Doing Business rank					Getting Credit rank								
							2 years before reform*			2 years after reform**					
		Model	2 years before reform*	2 years after reform**	Rank change	2019 rank	Getting credit rank	Strength of legal rights index	Depth of credit information index	Getting credit rank	Strength of legal Rights index	Depth of credit information index	Credit reporting reform?	Getting Credit Rank change	2019 rank
Civil law															
Burundi	2016 – yes	ML but non–unitary approach, French law	140	164	−24	168	170	3 of 10	1 of 6	177	2 of 12	0 of 8	No	−7	178
Ethiopia	2019 – pending		125	159	−34	159	109	4 of 10	4 of 6	175	3 of 12	0 of 8	No	−66	175
Tunisia	2018 – pending	ML	74	80	−6	80	126	2 of 12	5 of 8	99	3 of 12	7 of 8	Yes	+27	99
Mixed law															
Rwanda	2013 – yes	Simplified Model	58	46	+12	29	32	8 of 10	4 of 6	4	11 of 12	7 of 8	Yes	+28	3
South Africa	No		41	82	−41	82	28	7 of 10	6 of 6	73	5 of 12	7 of 8	No	−45	73
Zimbabwe	2017 – yes	ML and PPSA	171	155	+16	155	104	5 of 12	3 of 8	85	5 of 12	6 of 8	Yes	+19	85

* or 2014 if no reform.
** or most recent data.

the rights of creditors inside and outside of insolvency, and the other measures the *depth* of credit information. Table 1.2 summarizes the relevant reforms measured in the latter index. Reforms of secured transactions regimes and credit information systems are taken together to establish the country's ranking in the Getting Credit indicator.

Table 1.2 Credit information reforms

Country	Year of credit information reform*	Description of reform
Burundi	No reform	—
Ethiopia	No reform	—
Ghana	No reform	—
Kenya	2015	Improved its credit information system by passing legislation that allows the sharing of both positive and negative credit information and establishes guidelines for the treatment of historical data
	2016	Improved access to credit information by passing legislation that allows the sharing of positive information and by expanding borrower coverage
	2018	Improved access to credit information by starting to distribute data from two utility companies
	2019	Strengthened access to credit by introducing a new Secured Transactions Law, creating a unified secured transactions legal framework, and establishing a new unified and notice-based collateral registry
Liberia	2009	Improved access to credit information by creating a nascent public credit registry in its central bank
Malawi	2012	Improved its credit information system by passing a new law allowing the creation of a private credit bureau
Nigeria	2018	Improved access to credit information by guaranteeing borrowers the legal right to inspect their credit data from the credit bureau and by starting to provide credit scores to banks, financial institutions and borrowers (also strengthened access to credit by adopting a new law on secured transactions and establishing a modern collateral registry)
Rwanda	2011	Enhanced access to credit by allowing borrowers the right to inspect their own credit report and mandating that loans of all sizes be reported to the central bank's public credit registry
	2012	The private credit bureau started to collect and distribute information from utility companies and also started to distribute more than two years of historical information, improving the credit information system

(continued)

Table 1.2 ***(Continued)***

Country	Year of credit information reform*	Description of reform
Sierra Leone	2012	Improved its credit information system by enacting a new law providing for the creation of a public credit registry
	2013	Improved access to credit information by establishing a public credit registry at its central bank and guaranteeing borrowers' right to inspect their personal data
	2015	Improved its credit information system by beginning to distribute both positive and negative data and by increasing the system's coverage rate
South Africa	2015 (negative effect)	Made access to credit information more difficult by introducing regulations requiring credit bureaus to remove negative credit information from their databases, such as adverse information on consumer behaviour or enforcement action accumulated on a consumer's record before 1 April 2014
Tunisia	2017	Strengthened credit reporting by starting to distribute historical credit information and credit information from a telecommunications company.
Zambia	2015	The credit bureau improved access to credit information by starting to exchange credit information with retailers and utilities
	2016	The credit bureau began to provide credit scores.
	2016	Strengthened access to credit by introducing a new Movable Property Act and by setting up a new collateral registry. The new law implemented a functional secured transactions system. The collateral registry is operational, unified geographically, searchable by a debtor's unique identifier, modern, and notice based
Zimbabwe	2016	The credit bureau began to provide credit scores
	2017	Improved access to credit information by allowing the establishment of a credit registry
	2018 (negative effect)	Improved access to credit information by launching a new credit registry; however, credit scoring was discontinued, reducing access to credit information.
	2019	Improved access to credit information by increasing the coverage of the credit registry and providing consumer and commercial credit scores to banks and financial institutions

B. Reform of Secured Transactions Law

1. What is Secured Transactions Law?

Very few jurisdictions have a single statute or code encompassing everything that is usually seen as secured transactions law before reform takes place; indeed, codification is one of the main characteristics of a reformed system.[3] Thus, pre-reform, there is no such thing as 'secured transactions law'. Instead, there are a number of devices that are used for the same purpose, namely, so that a creditor can have recourse to a proprietary interest in one or more assets if the obligation due to it is not performed. The interest has to be proprietary since it must be enforceable against third parties who also claim an interest in the asset or assets, including an insolvency officer. As discussed later,[4] under the pre-reform law the interest could be granted to the creditor or it could be retained by the creditor in an asset it already owns, and it may not be denominated as a security interest even though it performs a security function.

Secured transactions law is the law relating to various critical aspects of these proprietary interests. First, how they come about (creation), which can be either by reservation or grant, but is (usually) consensual. Secured transactions law can include provisions relating to non-consensual interests but the focus of the law is on consensually created interests. Secondly, how they are made effective against third parties, so that they can be successfully asserted against competing claimants. Thirdly, how priority between competing claimants is determined, and fourthly, how they are enforced in the event of default of the secured obligation. Since the primary way of making a security interest effective against third parties is by making it public by registration (at least in a reformed system), the rules regarding the establishment of a registry and its operation also fall within this type of law. As with all law reform, it is necessary to consider conflict-of-laws rules and transitional provisions as well.[5]

2. Why Reform Secured Transactions Law?

Increasing access to credit, particularly for small and medium-sized enterprises (SMEs), has been on the agenda of many international organisations that are not directly involved in secured transactions reforms. For instance, the G20 recommended a set of actions to facilitate the expansion of financial services available to SMEs in its G20 SME Finance Action Plan adopted in 2015,[6] and also in the G20/OECD Effective Approaches for Implementing the G20/OECD High Level Principles on SME Financing. However, the main reasons why African countries undertake these kinds of reforms are the results of economic assessments showing a lack of access to credit, particularly for micro, small and medium-sized enterprises (MSMEs), attributable to a deficient legal framework governing secured transactions.[7] The other reason, which also shapes the direction of the reform in terms of

[3] Ch 2, A1.
[4] Ch 2, B2.
[5] See ch 2I and J.
[6] See G20, 'G20 SME Finance Action Plan Implementation Framework: Credit Infrastructure Country Self-Assessment' (July 2016) www.g20.utoronto.ca/2016/sme-finance-action-plan.pdf.
[7] The difficulties of accessing credit are noted in most chapters, see Zambia F.

particular policies and statutory solutions, is increasing the country's ranking on the World Bank's Doing Business index.

The Doing Business Report includes an account of the business infrastructure and commercial and regulatory law of each State, but also gives an evaluation of the 'ease of doing business' in various categories, the most relevant of which for present purposes is the 'Getting Credit' indicator discussed below. It also provides a ranking of countries in these categories, so that a desire to move up these rankings was a significant driver towards legal reform.[8] Although there is some merit in the Doing Business rankings, the fact that they are based on quite rigid criteria, and that they only consider the law on the books rather than how it works in practice, means that countries can rise up the list as a result of reforms, even though the actual operation of the law is still problematic.[9]

The Getting Credit indicator covers two aspects of the regulatory framework and infrastructure that affect access to credit: first, the availability of credit information measured in the credit information index; and, secondly, the protection of creditor and debtor rights under secured transactions and insolvency laws measured by the legal rights index.[10] The first aspect, the Depth of Credit Information Index, includes the coverage, scope and quality of credit information available through credit registries and credit bureaus. The second, the Strength of Legal Rights Index, evaluates the degree to which movable property can be effectively used as collateral and the protection of creditor rights. The Getting Credit indicator scores and ranks economies based on the above indexes, which are designed to align with international best practice. However, the Doing Business Reports have been subjected to considerable criticism for their methodology, including the selection of the criteria against which laws are benchmarked, and the way in which those criteria are applied.[11] One illustration of the Doing Business Reports not being reflective of the quality of secured transactions laws is the case of Zambia that in 2012 undertook to reform its framework based on the Canadian Personal Property Security Acts (PPSAs). In the 2012 Getting Credit indicator, Zambia ranked 8th, while Canada ranked 24th.[12]

The scoring and ranking mentioned above depends on the answers to a series of questions. The Depth of Credit Information Index had, formerly, 6 questions and now has 8 questions. The Strength of Legal Rights Index had, formerly, 10 questions and now has 12 questions. The data gathered for these indices comes from a questionnaire administered to lawyers in each country and is verified through analysis of laws and regulations as well as public sources of information on collateral and bankruptcy laws.[13] Table 1.1 sets out the Getting Credit Index scoring and ranking of the countries considered in this book before and after reform, as well as their overall Doing Business rankings at those dates. Information about the countries' Doing Business evaluations is also included in the country-specific chapters.

[8] Malawi A; Rwanda A; Burundi D; Ethiopia E4; Contrast Zambia (B) where rising up the Doing Business rankings was not a driver for reform because Zambia was already ranked at 8.

[9] See, eg, Rwanda A and B; Nigeria F. See also conclusion B1b.

[10] See www.doingbusiness.org/en/methodology/getting-credit.

[11] See, eg, G McCormack, 'Why "Doing Business" with the World Bank May Be Bad for You' (2018) 19 *European Business Organisation Law Review* 649, 650.

[12] See World Bank, 'Doing Business 2012 – Country Tables', www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-Chapters/Country-Tables.pdf.

[13] See World Bank, 'Doing Business Methodology Getting Credit', www.doingbusiness.org/en/methodology/getting-credit.

3. Who is Secured Transaction Law Reform For?

Every reform project studied in this book was aided by one or more economic assessments that revealed the lack of credit for businesses of all sizes, but particularly those operating in the informal economy as microbusinesses. These assessments also showed that financial institutions had identified the antiquated and complex legal framework as well as the absence of a modern electronic registration system as the main causes for their inability or unwillingness to extend credit secured with movable assets. This has had a negative impact particularly on MSMEs that do not own any land, which in many cases was the only acceptable form of collateral. The reforms enabled the use of movable assets as collateral, which facilitated loans of a few hundred pounds, allowing women to start a business or expend their microenterprises. At the same time, large corporates have also benefited from the greater certainty and predictability of the reformed frameworks, reducing their transactional costs associated with the creation of security rights, including the payment of stamp duties, or registrations where the fees were calculated based on the amount of the secured obligation. The reforms have also benefited consumers who can now acquire various types of assets on credit, either under purchase money loans or leases.

4. Who Does Secured Transaction Law Reform?

Dozens of international organisations are engaged in commercial law reform. In terms of their role as lawmakers, such entities are often referred to as 'formulating agencies'.[14] Many of these entities define themselves as international standard setters either because they have acquired expertise in legislative drafting or because the composition of their membership gives them international experience[15] These agencies include UNCITRAL,[16] UNIDROIT[17] and the World Bank,[18] but also those operating on the regional level, such as the EBRD,[19] the OAS,[20] and OHADA.[21] These institutions support the implementation of the respective instruments they adopt. In the case of the World Bank, its Principles for Effective Insolvency and Creditor/Debtor Systems, developed in collaboration with UNCITRAL amongst others, are an internationally recognised authority for norms concerning the protection of creditor rights in insolvency and debt resolution.[22] The Principles address several aspects, including the laws and institutions that recognise and enforce credit agreements (including security agreements) and the legal framework for

[14] L Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations' (2000) 34 *International Lawyer* 1055, 1056.

[15] ibid.

[16] United Nations Commission on International Trade Law. See agency website https://uncitral.un.org/.

[17] International Institute for the Unification of Private Law. See agency website https://www.unidroit.org/.

[18] See agency website www.worldbank.org.

[19] European Bank for Reconstruction and Development. See agency website https://www.ebrd.com/home.

[20] Organization of American States. See agency website http://www.oas.org/en/.

[21] Organisation pour l'Harmonisation en Afrique du Droit des Affaires (translates to the 'Organization for the Harmonization of Business Law in Africa'). See agency website https://www.ohada.org/index.php/en/ and OHADA chapter A.

[22] World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Rights System' (2015), http://documents.worldbank.org/curated/en/557581467990960136/Principles-for-effective-insolvency-and-creditor-debtor-rights-systems.

risk management and informal corporate workout systems, as well as formal commercial insolvency law frameworks and the implementation of these systems through sound institutional and regulatory frameworks.[23] However, for the actual drafting of local secured transactions law, UNCITRAL promotes its own instruments.[24]

Many other agencies are involved in a reform process, whether through the provision of financial assistance or other types of involvement, which gives them some leverage over the model chosen for the adoption. These include the United States Agency for International Development (USAID)[25] as well as the Japan International Corporation Agency (JICA).[26] USAID, for instance, promotes economic competitiveness in foreign countries, most recently in the Middle East and North Africa,[27] through comprehensive secured transactions reform.[28] JICA, in turn, has supported a number of commercial law reforms, including in the field of secured transactions, in East Asia,[29] but its approach differs in that it supports reforms of civil codes that contain provisions on secured transactions. In some cases, these agencies, especially USAID, may even 'export modified successful domestic legislation',[30] as in the case of Article 9 of the Uniform Commercial Code (UCC) in the United States.[31] These agencies often promote secured transactions reforms coupled with promises of financial assistance, as was the case in Central and Eastern Europe by the EBRD.[32]

5. The History of International Instruments and Models

The origin of the particular system of secured transactions law which has been adopted in many African countries was Article 9 of the Uniform Commercial Code, prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, which was first approved by the American Bar Association in 1951 and adopted by many US states during the 1950s.[33] UCC Article 9 was the first system based on the functional approach,[34] and stemmed from the severe fragmentation of the law relating to secured transactions in the US in the first half of the twentieth century.[35] It has been through

[23] ibid.

[24] See B5 below.

[25] See agency website www.usaid.gov.

[26] See agency website www.jica.go.jp/english/.

[27] C Sisko, 'Promoting Secured Transaction Reform in the Middle East and North Africa', *Chemonics* (11 May 2011) www.chemonics.com/blog/promoting-secured-transaction-reform-in-the-middle-east-and-north-africa/.

[28] USAID, 'Country Development Cooperation Strategy 2014–2018' (April 2014) www.usaid.gov/sites/default/files/documents/1869/Mexico%20CDCS%202014%202018.pdf.

[29] Miha Isoi (Senior Advisor to JICA), 'Conference on International Coordination of Secured Transactions Reforms II: Advancing Global Reforms and Building a Uniform System' (16–17 October 2018).

[30] ibid.

[31] X Nguyen and B Nguyen, 'Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries' (2014) 40 *North Carolina Journal of International Law* 52, which comments that the Legislative Guide 'represents the international best practices and epitomizes a modern secured transactions regime'.

[32] D Berkowitz, K Pistor and J Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163.

[33] For a full history of the genesis of UCC 9, and its development since the 1950s, see P Winship, 'An Historical Overview of UCC Article 9' in Akseli and Gullifer (n 1), 21.

[34] See ch 2, B2.

[35] See KN Llewellyn, 'Problems of Codifying Security Law' (1948) 13 *Law & Contemporary Problems* 687.

several modifications since the 1950s, and the current version, adopted by all the US states with only very minor variations, is the 2010 amendment.[36]

The UCC Article 9 model has now been adopted by many jurisdictions around the world. The first jurisdiction to do so was Canada,[37] whose various provinces enacted PPSAs from 1976 to 2001. These PPSAs differed considerably from UCC Article 9, both in drafting style and, to a limited extent, in content, but the basic ideas were the same.[38] Quebec, a Canadian civil law province, also adopted a version of UCC Article 9 in its Civil Code of 1994.[39] From the 1990s, the ideas and concepts from UCC Article 9 and the Canadian PPSAs influenced secured transactions law reform in many different parts of the world. The EBRD produced a Model Law in 1994 for use in transition countries in Central and Eastern Europe,[40] and, as a result, many countries in that area reformed their law. Other regional models were developed, such as the Model Inter-American Law on Secured Transactions,[41] and Book IX of the European Draft Common Frame of Reference, an academic text produced in Europe as part of a harmonisation initiative.[42] Some countries, such as New Zealand[43] (which was heavily based on the Saskatchewan PPSA), introduced reforms based on national models, while others took the concepts and structure, but drafted from scratch, such as Australia[44] and Jersey.

The UCC Article 9/PPSA model influenced the United Nations Convention on the Assignment of Receivables in International Trade (2001 Receivables Convention),[45] adopted in 2001 by UNCITRAL. Building on this, UNCITRAL embarked on a programme of work to produce an international model to aid reform around the world. The UNCITRAL Legislative Guide on Secured Transactions, adopted in 2007,[46] drew on the experience of States which had already introduced the Article 9 model, but also had input from delegates from many other States whose systems were different. Importantly, these States were both common law and civil law jurisdictions, and the purpose of the Legislative Guide was to assist States from all legal cultures in developing modern secured transactions laws.[47] Most of the recommendations in the Legislative Guide were turned into legislative drafting in the UNCITRAL Model Law on Secured Transactions,[48] adopted in 2016. Some, however, were not included, and these are also discussed in this chapter as they have been adopted by some African States.

[36] Legal Information Institute, 'UCC – Article 9 – Secured Transactions (2010)' www.law.cornell.edu/ucc/9.

[37] See C Walsh, 'Transplanting Article 9: The Canadian PPSA Experience' in Akseli and Gullifer (n 1) 49.

[38] These ideas are reflected in the 'modern principles' discussed in ch 2.

[39] Civil Code of Québec, CQLR c C-1991, Book Six – Prior Claims and Hypothecs.

[40] See F Dahan, 'The EBRD's Experience in Secured Transactions Reform: How Can Outsiders Help?' in Akseli and Gullifer (n 1) 445.

[41] Adopted in 2002 by the Organization of American States, and which has influenced many reforms in Latin America. See OAS, 'Model Inter-American Law on Secured Transactions', www.oas.org/dil/model_law_on_secured_transactions.pdf; see also B Kozolchyk, 'Implementation of the OAS Model Law in Latin America: Current Status' (2011) 28 *Arizona Journal of International & Comparative Law* 1.

[42] See H Eidenmuller et al, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' (2008) 28 *OJLS* 659. Book IX has never been used as a model for reform in a particular country.

[43] See M Gedye, 'The New Zealand Perspective' in Akseli and Gullifer (n 1) 115.

[44] D Brown, 'Australian Secured Transactions Law Reform' in Akseli and Gullifer (n 1) 145.

[45] Full text of law available at 'United Nations Convention on the Assignment of Receivables in International Trade' (New York, United Nations, 2004).

[46] 'Legislative Guide on Secured Transactions' (Vienna, United Nations, 2010) (LG).

[47] ibid 1, paras 1 and 3.

[48] 'UNCITRAL Model Law on Secured Transactions' (Vienna, United Nations, 2016) (ML).

Much of the analysis in this book uses the UNCITRAL Legislative Guide and Model Law as a comparator for the reforms already enacted or proposed in African States. The Model Law is the most suitable benchmark for various reasons. First, it is very recent and embodies most of the up-to-date international consensus about secured transactions law best practices.[49] Secondly, it is relatively short and drafted in a straightforward manner, while embodying a fully worked out scheme and not a 'simplified version'.[50] Thirdly, it is developed to be used in both common law and civil law jurisdictions, and, fourthly, it is truly international and therefore not tied to the economy, legal culture or idiosyncrasies of any particular region or State.

The content and structure of the Model Law is discussed in chapter 2 of this book, which examines the modern principles on which it is based, and explains the reasoning behind these principles and many of the Model Law rules. In common with UCC Article 9 and the PPSAs, the Model Law is divided up into a number of chapters, each dealing with a different aspect of secured transactions law.[51] Part of each chapter includes general rules, and the other part includes rules relating only to specific assets, such as receivables, bank accounts, negotiable documents, negotiable instruments and non-intermediated securities.[52] The detailed provisions dealing with the registry, however, are contained in the Model Registry Provisions, which are separately numbered. Footnote references in this book, therefore, will either be to the Model Law ('ML') or the Model Registry Provisions ('MRP'). The Legislative Guide will be referred to in footnotes as 'LG'. In the text, the terms 'Legislative Guide', 'Model Law' and 'Model Registry Provisions' will be used.

6. Legal Transplant Theory

Secured transactions reforms seek to implement an internationally recognised set of principles,[53] which, as discussed in the previous section, were developed initially in the United States and eventually became the basis of various international instruments, including the Model Law. The implementation of laws based on these principles raises a number of questions from the perspective of comparative law, particularly in the context of legal transplants. This book examines secured transactions reforms in common law, civil law and mixed jurisdictions underpinned by the modern principles, thus providing a fertile ground to assess how the principles have been integrated into those legal regimes and how they operate.

The term 'legal transplant' means the transfer of law between societies during a process of lawmaking or legal reform.[54] Large-scale legal transplantation began in the colonial era when it was used as a tool for colonists to control their new settlements.[55] In the post-World

[49] Even this is not always the case, in that technology and ideas have, in some respects, moved on since 2016 and this is pointed out in this book where relevant.

[50] See conclusion C1d.

[51] This is reflected in the subheadings in ch 2 and in many other chapters considering reformed law.

[52] For more discussion of the scope of the ML, see ch 2, B3.

[53] See ch 2.

[54] M Carfield, 'Participatory Law and Development: Remapping the Locus of Authority' (2011) 82 *University of Colorado Law Review* 739.

[55] L Lin, 'Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *American Journal of Comparative Law* 711.

War II era, however, legal transplants became an integral part of State-building among dozens of newly liberated territories, many of which borrowed extensively from Western countries.[56] The legal transplantation of the colonial and post-World War II periods were typically wholesale transfers from one legal system to another, thus forming various legal families.[57] The disintegration of the Soviet Union and the legal reforms pursued in the former socialist States, as well as the related movement toward global economic integration, became 'a powerful engine pushing the wave of legal transplants to its apex'.[58]

The topic of legal transplantation first attracted the attention of scholars in the 1970s when two competing theories began to take shape.[59] Watson's theory[60] posited that legal transplants are an essential feature of many countries' legal systems because those in control of the legislative function identify the apparent merits that could be derived from transplanting a foreign law.[61] In other words, legal transplantation is not, according to Watson, the inevitable consequence of the social structure of the transplant country, which would not have otherwise adopted the law without a model to copy.[62] Otto Kahn-Freund's theory,[63] on the other hand, proposed that legal transplants cannot be separated from the social circumstances out of which those laws arose.[64] Even though a country transplants a foreign law, the purpose and application of that law in the adopting country might, according to Kahn-Freund, be completely different compared to that in the country of the law's origin.[65]

Building on Watson's and Kahn-Freund's theories, scholars of legal transplantation have identified a problem referred to as the 'transplant effect', which occurs when the transplanted law does not mesh well with the conditions and institutions existing in the recipient, weakening the effectiveness of the imported legal order.[66] Proponents of this theory argue that although legal transplantation has accelerated the development of a formal legal order, it has also profoundly altered the pre-existing legal order, 'and not infrequently with a detrimental outcome'.[67] In order to avoid problems associated with the transplant effect, there must be demand for the law and participation among local stakeholders in the law's uptake; this, in turn, will spur voluntary compliance and investment in the institutions required for upholding the new legal order.[68] All the reform projects undertaken in Africa have engaged a variety of local stakeholders.[69]

Advocates for a participatory approach to law development argue that an effective legal reform strategy should ensure that measures are taken to adapt the law to the local conditions of the transplant country.[70] A number of other international organisations have demonstrated sustained involvement in commercial law-making initiatives, particularly in their role as standard setters in terms of commercial law principles, including the World

[56] ibid.
[57] ibid. See, eg, the transplant of English company law to African countries, E1b below. See also Kenya B 4.
[58] ibid.
[59] Mistelis (n 14).
[60] Set out in his seminal text, A Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, University of Georgia Press, 1974).
[61] Mistelis (n 14).
[62] ibid.
[63] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR* 1.
[64] Mistelis (n 14).
[65] ibid.
[66] Berkowitz et al (n 32).
[67] ibid.
[68] ibid.
[69] See Conclusion C3.
[70] Berkowitz et al (n 32).

Bank Group and the International Monetary Fund.[71] However, it has been argued that 'the externally induced drive to modernize institutions of commercial law … by transnational organizations like the World Bank … that placed great stock in models offered by economists in their employ' has 'generated an approach to commercial law reform that treated law as a dependent variable, easily malleable under the relentless hammer of economic analysis',[72] and, consequently, the transplanted regimes created confusion and incoherence in other areas of law, which as a result had to be restructured.[73]

The Model Law has been the basis of a number of reforms in Africa, but in none has it been implemented as adopted by UNCITRAL. Local stakeholders not only considered the options set out in the Model Law, such as whether a security agreement must indicate the amount for which a security right may be enforced, but also alternative approaches not set out in any of the UNCITRAL instruments, such as designating registration as the sole method of third-party effectiveness[74] or providing for specific expeditious remedies involving the registry.[75]

An important aspect of many commercial law reforms is the harmonisation of the legal principles and concepts underlying common law and civil law regimes, which often differ considerably, particularly as they relate to secured lending.[76] Writing about his experience as a consultant in relation to secured transactions law reforms in Quebec and Ukraine in the early 2000s, Macdonald wrote that the three most important factors to consider in a secured transactions law reform are, first, the economic, political, social and institutional conditions that make it possible for security on property regimes to enhance access to credit; secondly, the citizenry's confidence in the judiciary as a fair and honest arbiter of disputes; and, thirdly, the capacity building of legal actors both prior to enactment and for decades afterwards.[77] Secured transactions reforms do not directly address the second factor, although in providing for a predictable and certain regime they inevitably reduce the legal risk and reliance on the judiciary. The third factor has not always been the case in Africa, particularly with unstructured and delayed deployment of capacity-building exercises.[78]

C. The Status and Background of Secured Transactions Law Reform in Africa

1. Secured Transactions Law Reform in Africa

During the last decade, Africa and Latin America were the leading reformers of secured lending frameworks. The impetus for reform of the law in both continents was the introduction of collateral registries established on top of inadequate legal frameworks, in Ghana and Mexico, respectively. Ghana's Collateral Registry attracted the attention of many stakeholders in African

[71] ibid.
[72] R Macdonald, 'Article 9 Norm Entrepreneurship' (2006) 43 *Canada Business Law Journal* 240.
[73] ibid.
[74] See Conclusion D4.
[75] ibid D6b.
[76] See M Boodman and R Macdonald, 'How Far Is Article 9 of the Uniform Commercial Code Exportable? A Return to Sources?' (1996) 27 *Canada Business Law Journal* 249.
[77] Macdonald (n 72).
[78] See Conclusion C2.

countries, who started looking at the effect of collateral registries on access to credit secured with movable assets. Gradually, they understood that collateral registries must be designed and operated pursuant to an efficient legal framework. Ghana's redesigned, web-based Collateral Registry was the centrepiece of a pan-African peer-to-peer learning event held in Accra, Ghana in July 2012 and attended by stakeholders from 14 African countries, five of which expressed an interest in seeking assistance from the International Finance Corporation (IFC) in reforming their secured transactions law.[79]

This book includes chapters examining the reform process and its results in a number of African countries, as well as considering some unreformed jurisdictions. The reformed systems range from fully implemented laws (Malawi and Zambia), to those where certain elements are or have been missing (such as capacity building in Kenya). They also include jurisdictions that enacted laws but are yet to establish registries (Burundi and Zimbabwe), as well as those where a bill is awaiting enactment (Tunisia). Reform efforts are being undertaken in a number of other jurisdictions not covered in this book (Botswana, Madagascar, Morocco and São Tomé), including some in which one of the authors has been involved (Lesotho, Mozambique, South Sudan and Uganda). Many of these projects are supported by the IFC, but other entities are also involved, including the Financial Sector Deepening Trust of Kenya and Uganda, USAID, and its German counterpart Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

One author has been involved, in some capacity, in most of the projects covered in this book. This involvement started in 2010 with a reform project in Malawi and entailed various activities, such as writing diagnostic reports identifying the deficiencies in legal frameworks and formulating recommendations for reform, assisting in the drafting of laws and regulations, as well as delivering capacity-building exercises. As a result of that involvement, the chapters include some insights into the debates on a number of issues in the reform process, and describe the policies or reasons considered by the stakeholders. In addition to secured transactions law reform, one of the authors has collaborated with other experts engaged to reform related areas of the law, especially insolvency, leasing and warehouse receipts. The greatest challenge of coordinating these reform activities has been helping the stakeholders to understand the functional approach to security rights,[80] and its proper reflection, particularly in insolvency and leasing laws.

2. African Legal Systems[81]

There are three main types of legal family represented in Africa. The central part of this book contains chapters in three groups reflecting these legal families: common law systems, civil law systems and mixed law systems. The legal culture of many of the jurisdictions considered stems, in large part, from their colonial history.[82]

[79] See IFC, 'IFC and Bank of Ghana to Increase Access to Finance for Businesses in Sub-Saharan Africa through Secured Lending' (July 2012) www.ifc.org/wps/wcm/connect/1a4ca9004bf0dce49473f71be6561834/Summary+Ghana+P2P+Event.pdf?MOD=AJPERES.

[80] See ch 2, A2a.

[81] See further, E below.

[82] See CN Okeke, 'African Law in Comparative Law: Does Comparativism Have Worth?' (2011) 16 *Roger Williams University Law Review* 1, 2.

Those countries, which were, in the past, British colonies are largely common law jurisdictions. Their law is, at least in part, based on English law, although there may be other influences, such as customary law. Typically, there will be a 'reception clause' in a constitutional statute providing that English law statutes of general application in force at a particular date are in force in the relevant country.[83] The reception clause can also refer to other aspects of the common law, such as equity. The common law jurisdictions have, of course, developed the law by case-law and statute, but they have largely kept the common law method and, until reform, their secured transactions law broadly mirrored English law in outline, though not necessarily in detail. The common law jurisdictions considered in this book are Ghana, Kenya, Liberia, Malawi, Nigeria, Zambia and Sierra Leone. Some of the civil law countries were French colonies and their law is based on the Napoleonic Code, while others were Belgian, Portuguese or other colonies. The OHADA group of countries were all French colonies, although the Northwest and Southwest regions of Cameroon were previously British colonies and continue to apply English law. Apart from a chapter considering OHADA, the civil law countries covered in this book are Burundi, Ethiopia and Tunisia, the legal regimes of which are all inspired by French law.[84]

There are also mixed jurisdictions, the law of which has several influences. In this book, 'mixed' means that there are civil law and common law influences on the law of a jurisdiction. For example, in Rwanda, the law is a mixture of Belgian civil law and English common law; it is transitioning from a civil law to a common law system.[85] The law in South Africa is a mixture of Roman–Dutch law and English common law, and this is also the case in Zimbabwe.

3. African Economies

The IMF estimates that in 2019, like in 2018, sub-Saharan Africa will be home to some of the fastest growing economies in the world,[86] including Ethiopia, Rwanda, Ghana and Kenya.[87] The region is expected to record 3.8 per cent economic growth, slightly higher than the global forecast of 3.7 per cent.[88] However, the overall growth projections are affected by the stagnation in the continent's largest economies, Nigeria and South Africa. Excluding those two economies and Angola, aggregate growth for sub-Saharan Africa is projected to be 5.7 per cent for 2019.[89] Agriculture remains the primary source of job creation, providing 60 per cent of all jobs.[90] Nonetheless, Africa's rapid population growth necessitates consequential improvements in agricultural productivity of up to 60 per cent by 2030. Yet, many African countries depend on commodities, especially from the extractive sector, for public

[83] See, eg, the Courts Act 1965 (Sierra Leone) s 74; and the Interpretation Act 1958 (Nigeria) s 45.

[84] See below E2.

[85] Rwanda A.

[86] Y Adegoke, 'Africa Will Have Some of the World's Fastest-Growing Economies in 2019 – and a Looming Debt Crisis', *Quartz Africa* (13 January 2019) www.qz.com/africa/1522126/african-economies-to-watch-in-2019-and-looming-debt/.

[87] ibid.

[88] ibid.

[89] ibid.

[90] M Diop, 'Foresight Africa 2016: Banking on Agriculture for Africa's Future', Brookings (22 January 2016) www.brookings.edu/blog/africa-in-focus/2016/01/22/foresight-africa-2016-banking-on-agriculture-for-africas-future/.

revenue, rendering them vulnerable to fluctuations in global commodity prices.[91] The informal sector accounts for a high percentage of Africa's economic productivity, contributing 38 per cent of sub-Saharan Africa's GDP even though the businesses operating in this sector face sizeable access to credit challenges.[92] The IFC estimates that the finance gap for SMEs in Africa exceeds US$331 billion. In 2013, the IFC concluded that less than a quarter of adults in sub-Saharan Africa have access to formal financial services.[93]

4. Types of Financing in Africa

Several types of financing products have been, generally, available to African businesses, but the options are limited by the unreformed legal regimes and the lack of expertise, although the position is changing as charted in this book. The traditional asset-based loan secured with inventory and receivables practically does not exist in Africa. Lenders extend credit in three main ways. First, credit secured with collateral that does not fluctuate, such as motor vehicles, equipment, or crops deposited in a warehouse. Secondly, credit that is dependent on there being a creditworthy large company initiating reverse factoring of its accounts payable, and thirdly, a minimal amount of wholly unsecured credit. This section explains in more detail the operation of these financing products and provides examples from African countries.

a. Microfinance

Many microbusinesses, if they have external finance at all, use microfinance.[94] This typically consists of very short-term loans of low amounts from microfinance institutions. Interest rates tend to be high.[95] These loans are heavily based on the relationship between the borrower and the representative of the lender who makes the decision to lend, who typically is local and knows the borrower personally. Monitoring takes place through direct contact, which is frequent and regular. The underlying business model is to establish a stable lending relationship: replacing one very short term loan with the next, repeatedly, gradually increasing the loan amount based on repayment performance, providing the financial flexibility needed for the business to grow.[96] This long-term relationship approach works, in a way, as a form of security; the more loans are repaid, the more certain it is that the debtor

[91] K Ighobor, 'Commodity Prices Crash Hits Africa', Africa Renewal Online (December 2016–March 2017) www.un.org/africarenewal/magazine/december-2016-march-2017/commodity-prices-crash-hits-africa. See CTC E9, highlighting the effect of the MAC Protocol on these sectors.

[92] T Collins, 'Closing Africa's MSME Finance Gap', *African Business Magazine* (5 October 2018) www.africanbusinessmagazine.com/company-profile/4g-capital/closing-africas-msme-finance-gap/.

[93] IFC, 'Access to Finance: Sub-Saharan Africa', IFC (2013) 2, http://documents.worldbank.org/curated/en/599611468202144127/Access-to-finance-Sub-Saharan-Africa.

[94] World Bank Group, 'Improving Access to Finance for SMEs: Opportunities through Credit Reporting, Secured Lending and Insolvency Practices' (May 2018) 5.

[95] In Zambia, for example, the average lending rate to microbusinesses was 94.6% in 2012. Bank of Zambia introduced interest rate caps in 2013, which cut this rate in half, but repealed the caps in 2015 following a decline in microfinance lending. See A Ferrari, O Masetti and J Ren, 'Interest Rate Caps – The Theory and the Practice' (2018) World Bank Group Policy Research Working Paper 8398, 25.

[96] See 'Microfinance in Africa: Overview and Suggestions for Action by Stakeholders' (UN Office of Special Advisor on Africa, February 2013) 20–21.

is reliable and worthy of future support. In addition, the relationship of mutual trust and friendship adds a further incentive to repay the loan, so that collateral is seldom required.[97] Usually, a group structure is used, where the loans are made to several microbusinesses who, in effect, monitor, put pressure on or, even, help each other to repay.[98] Since this type of finance typically operates within close-knit communities, one of the major incentives to repay the loan is the preservation of reputation. Thus, despite the fact that these loans tend to be unsecured, the percentage of non-performing loans in the microfinance industry tends to be low.[99]

In Zambia, the Munda Small-Holder scheme uses group pressure to ensure repayment of loans to District Farmers Associations (DFAs) secured with a 50 per cent cash collateral deposit by the DFA.[100] The loans fund DFA members' purchases of agricultural inputs. DFAs that do not repay their loans on time are prohibited from participating in the programme the following season.[101] Another example comes from Tanzania. Here, a microfinance organisation accepts livestock as collateral and lends to individuals rather than groups.[102] Instead of focusing on single-crop production cycles, this product is designed for smallholder farmers who have diversified incomes. It therefore allows variable repayments over the loan cycle to accommodate expected fluctuations in the borrowers' income.[103]

The secured transactions reforms affect the mechanics of this type of financing in some African countries.[104] Although the amounts of the microloans remain low, the security for repayment is not provided in the form of a group guarantee, but rather the microloan is given to an individual borrower who provides some of its assets as collateral for that loan. In Ghana, one of the largest users of the Collateral Registry is a microfinance institution.

b. Financing of Warehouse Receipts

In a number of African countries, farmers are able to access credit, but, in the main, only once they have deposited their crop into a warehouse and obtained a warehouse receipt. However, very little financing is provided against growing crops, either because of the number of risks associated with such financing that lenders are unable to effectively mitigate (for example lack of crop insurance) or the uncertain legal framework. Secured transactions laws facilitate financing not only against growing crops, but also those stored in warehouses. However, for the warehouse receipts financing to have the potential to

[97] ibid 21.

[98] ibid.

[99] eg a 2013 IFC survey of 26 MFIs in 12 African countries reported that only 3% of almost 1.2 million microloans were more than 90 days past due, see IFC, 'IFC Financing to Micro, Small, and Medium Enterprises in Sub-Saharan Africa', http://documents.worldbank.org/curated/en/728781468194050087/pdf/948700BRI0AFR00d0Medium0Enterprises.pdf. A similar global survey in 2012 that included 113 MFIs in 53 countries found that only 3% of more than 14 million microloans were more than 90 days past due; see IFC, 'IFC Financing to Micro, Small, and Medium Enterprises Globally (FY2013)', www.ifc.org/wps/wcm/connect/3f845500432c1e1683feef384c61d9f7/2013-MSME-Brochure-Global.pdf?MOD=AJPERES.

[100] *A Market Study on Microfinance Services in Zambia* (Lusaka, Agri-ProFocus Zambia, 2014) 57.

[101] ibid.

[102] S Harten and S Buri, 'Who Are the Microfinance Clients? A Case Study on Customer Segmentation and Product Development' (IFC, 2015) 2, 4, www.ifc.org/wps/wcm/connect/97ca40004a7181c39d8edd9c54e94b00/Field+Notes+-+MF+Clients+-+A4+Pages+-+EN+-+11-3-2015.pdf?MOD=AJPERES.

[103] ibid.

[104] See, eg, Ghana C3 and D.

grow, proper warehouse receipts laws must also be implemented. Malawi enacted one such law in 2018,[105] and both Ghana and Kenya are considering bills that should lead to the enactment of such laws in the near future. Furthermore, one of the best-known commodity exchanges for warehouse receipts operates in Ethiopia.[106]

c. Leasing

Leases are also popular in Africa. They are used to enable businesses to acquire equipment and consumers to acquire, in particular, motor vehicles. They exist in the form of financial leases that, under reformed secured transactions regimes, are treated as security rights.[107] Financial leasing is a form of specialised financing in which the lessor purchases an asset for use by a lessee for a specific period, in exchange for periodic payments. Typically, the lessee has an option to purchase the asset for a nominal price (for example 10 per cent of the asset value) at the end of the term. Unlike in an operating lease, the lessee's obligation is not subject to termination in the absence of default. A number of African jurisdictions have recently undertaken leasing reforms.[108]

d. Supply Chain Finance

Supply chain finance optimises the management of working capital and liquidity in supply chain processes, and facilitates the flow of capital between those participating in the supply chain. It facilitates strategic relationships among suppliers, buyers and lenders, which leads to increased trade volumes resulting from greater economies of scale.[109] Reverse factoring is the financing product most commonly deployed in a supply chain.[110] In reverse factoring, the debtor owing the receivable (the 'customer'), who is usually a big and creditworthy company, arranges finance for its suppliers by arranging for a bank or other financial institution to buy receivables it owes to suppliers once they have been approved by the customer. The financier advances the purchase price (less a financing charge) to the supplier. The transaction is entered into and priced on the basis of the creditworthiness of the customer rather than the supplier. But other financing products, such as warehouse receipt loans may also support processes within the supply chain. For example, in partnership with the World Cocoa Foundation, Cargill launched a mobile payment system pilot for five farmers' cooperatives representing 10,000 farmers in Ivory Coast.[111] Farmers deliver cocoa to community warehouses where their beans are digitally weighed, assigned a bar code, and payment is made directly to the farmer's mobile phone or e-wallet. Details of the cocoa beans are

[105] Malawi C.
[106] Ethiopia D7.
[107] Ch 2, B2b.
[108] See, eg, Burundi C; Liberia B; and Nigeria D1.
[109] IFC, 'Technology-Enabled Supply Chain Finance for Small and Medium Enterprises Is a Major Growth Opportunity for Banks' (June 2017) www.ifc.org/wps/wcm/connect/868b5c66-827d-4f15-b56b-81b44ae107b5/EMCompass+Note+39+Supply+Chain+Financing+FINAL2.pdf?MOD=AJPERES.
[110] J Lamoureux and T Evans, 'Supply Chain Finance: A New Means to Support the Competitiveness and Resilience of Global Value Chains', SSRN (25 November 2012) 295, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179944.
[111] See 'Mobile Banking in Côte d'Ivoire', Cargill (16 October 2017) www.cargill.com/story/mobile-banking-in-c%C3%B4te-d-ivoire.

recorded and linked to the barcode before the beans are transferred to central warehouses. Using the bar code, Cargill can trace each individual bag of beans to the individual farmer, creating a traceable supply chain.

D. Terminology

Apart from some country chapters where the terminology reflects the actual usage in that country's legislation, the book uses the terminology of the Model Law. In some instances, this differs from the terms used in the PPSAs or UCC Article 9. The terminology of the Model Law is based on the Legislative Guide, which explained that 'the terms used are not drawn from any particular legal system, and even if found in a particular national system, the Guide does not adopt the meaning of that term'. For instance, though the Legislative Guide and the Model Law are based on the principles of the PPSA and UCC Article 9 regimes,[112] the key concept of the Model Law is the 'security right' rather than the 'security interest'. Nevertheless, 'security interest' is the phrase used for the core concept in many reformed secured transactions laws across Africa.[113] A similarly (legal system) neutral term of 'third-party effectiveness' has been used instead of 'perfection' in the Model Law and its implementation.[114] The legal effect of both is to make the security right effective against third parties, as contrasted to creation upon which the security right becomes effective as between the two parties only.[115]

The Model Law refers to the person who creates a security right as the 'grantor', whether securing its own obligation or that of another person.[116] It also defines the term 'debtor' as the person who owes payment or other performance of the secured obligation.[117] The meaning of the term 'debtor' in the PPSA/UCC Article 9 regimes is completely different from the Model Law, as they define a debtor as a person who creates a security interest.[118] The term 'grantor' is used in this book unless the context specifically requires use of the term 'debtor'.

The Legislative Guide introduced the term 'notice' as opposed to financing statement, but without changing the PPSA/UCC Article 9 approach to what must be registered in a registry, which is a set of prescribed data relating to a prospective transaction rather than a security agreement. This book uses 'notice' as opposed to 'financing statement', again, unless the country-specific legislation uses a different term. In the context of registration, the following terms are used without any difference in the meaning: 'collateral registry' as opposed to 'secured transactions registry', 'registry' as opposed to a 'filing office', 'to register' as opposed to 'to file', a 'registrant' as opposed to a 'filer'. The Guide to Enactment to the Model Law explains that some terms may need to be adjusted to fit the local legal culture

[112] See B5 above.
[113] See Ghana D1 (2017 Bill); Sierra Leone C2; Zimbabwe C1; Zambia D1; Nigeria E1; Liberia C1; Rwanda C1; and also Malawi.
[114] For legislation that uses 'perfection', see Liberia C3; Malawi B; Nigeria E2; Zimbabwe C1; and Zambia D4.
[115] See ch 2, C.
[116] ML, Art 2(o).
[117] ML, Art 2(h).
[118] See s 2 of Zambia's Movable Property (Security Interest) Act 2016 and s 2 of Zimbabwe's Movable Property Security Interest Act 2017 that refer to 'debtor' as the person that creates a security interest.

and drafting conventions.[119] This has happened with a number of terms, especially the ones newly introduced by the Model Law, such as non-intermediated securities.[120]

Aside from the terminological difference, the meaning of the concepts and terms may also vary. In common with the Model Law,[121] the core concept of 'security right' encompasses, in most African statutes, the rights of transferees of receivables,[122] while in some that has not been the case.[123] Likewise, with respect to long-term operating leases, most African laws do not reflect the approach of the Model Law, which does not apply to such leases.[124] The reach of the concept of the security right then affects the meaning of the term grantor/debtor, as it determines whether a transferee of receivables or a lessee under a long-term operating lease will be included therein. Chapters in this book, which relate to particular countries, refer to the terminology of the law as enacted in that country.

E. Legal Issues

This section of the introductory chapter considers various key legal concepts to which reference is made in a number of the chapters of the book. The discussion here is reasonably generic: the issues arising in any particular African country are dealt with in the relevant chapter.

1. Common Law Concepts

a. Bills of Sale Acts and Companies Act

The bifurcated regime that developed under English law in relation to security interests created by companies and by individuals was adopted by many common law jurisdictions in Africa, and was often a driver towards reform.[125] This section considers this regime very briefly.

The Bills of Sale regime[126] originated in English law in the nineteenth century, partly as a consumer protection measure and partly to provide a registration regime to avoid fraud. It built on the existing common law, which continued to govern any issue which was not dealt with in the Acts. The regime consisted of two Acts governing documents by which individuals transferred title to goods (bills of sale), whether as consumers or as unincorporated businesses. The transfer of title could be outright, as in an absolute bill, or a bill by way of security. Absolute bills are covered by the Bills of Sale Act 1878, while the Bills of Sale

[119] 'UNCITRAL Model Law on Secured Transactions: Guide to Enactment' (Vienna, United Nations, 2017) (Guide to Enactment) 5.

[120] See Kenya's Movable Property Security Rights Act s 2 for the definition of electronic securities.

[121] See ch 2, B2c.

[122] See s 2 of Kenya's Movable Property Security Rights Act 2017 and s 2 of Zambia's Movable Property (Security Interest) Act 2016.

[123] Nigeria E1.

[124] For instance, see Sierra Leone C, on the exclusion of operating leases from the scope of the Borrowers and Lenders Act of 2014. Conversely, see Zambia D, on the applicability of Zambia's Movable Property (Security Interest) Act 2016 to operating leases.

[125] See Conclusion B2a.

[126] See Nigeria C1; Zambia C3; Ghana C2.

Act (1878) Amendment Act 1882 applies to security bills, incorporating some of the 1878 provisions (the 1882 Act). The 1882 Act will apply to any document that is in fact given as security, whatever its form.

The 1882 Act did not attempt to cover all aspects of secured transactions: it only dealt with formalities for the creation of a valid bill, some restrictions as to which types of assets could be the subject of a security bill, registration and priorities. As a result of its consumer protection focus, the formalities for creation are very strict, and the penalty for failure to comply is severe. A security bill must be made in accordance with the precise form set out in Schedule 1 of the 1882 Act.[127] Failure to comply with this renders the bill void even as between the parties.[128] Only tangible goods can be the subject of a bill of sale, and these must be specifically described in the schedule to the bill. Future goods cannot be included. This means that floating charges cannot be given by an individual or an unincorporated business, and nor can fixed charges over future assets, which would otherwise be possible under the common law.[129] Security bills of sale have to be registered,[130] and priority is by date of registration.[131] The same registration regime also applies in the United Kingdom to general assignments of book debts by unincorporated businesses.[132]

The Bills of Sale Acts regime does not affect the granting of security interests over assets other than goods: it is just that there is no registration regime for security interests over other assets[133] and the common law applies. Moreover, the Bills of Sale Acts do not apply to devices based on retention of title, which developed in part as a means of avoiding the regime.

The regime applicable to companies was also entirely based on common law, and nearly all the statutory regime related to registration of charges.[134] The registration regime inherited by most common law African countries is discussed below. Other than registration, the common law governed, and was very liberal, permitting security to be taken over any asset, present or future, described generically in the charge agreement, including over the entire undertaking of the company.[135]

b. Fixed and Floating Charges

One of the most important common law concepts, which has been a part of all African common law jurisdictions for many years, is the floating charge, which is a type of security interest that can only be granted by a company.[136] The floating charge developed in English

[127] One result of the restrictive drafting is that a bill of sale cannot be used by an individual to secure a guarantee of business debts.

[128] S 9 1882 Act, although 'literal conformity' to the words of the Schedule is not required; *Thomas v Kelly* (1888) 13 HL 506, 516.

[129] *Holroyd v Marshall* (1861–62) 10 HLC 191.

[130] The register in the UK is very unsatisfactory, and is barely searchable; see *Law Commission Report No 369: Bills of Sale* (Law Commission, 2016) 2.24 et seq.

[131] Bills of Sale Act 1878, s 10.

[132] UK Insolvency Act, s 344.

[133] In the UK, there are specialist registers for some types of intellectual property in which security interests can be registered, and several private registers for hire purchase agreements. The Agricultural Credits Act 1928 (ACA) also applies to unincorporated farmers and provides for registration by the Land Registrar of charges created pursuant to that Act (ACA, s 9). Mortgages over land are registrable in the Land Registry.

[134] Now in UK Companies Act 2006, pt 25.

[135] See D1b below.

[136] See E1a above.

law in the later nineteenth century in the course of a series of cases concerning charges over the entire undertaking of companies, in which the courts found an express or implied power to dispose of the charged property free of the charge in the ordinary course of business of the company.[137]

There are two features of the floating charge which are critically important. The first is that the implied power to dispose enables a chargee to have a security interest in circulating assets, that is, assets which are either sold (for example the stock of a shop), made into another asset (eg raw materials used in manufacture) or consumed or destroyed in the ordinary course of business of the chargor (eg fuel such as coal or oil). On certain triggers, including an act of enforcement of the charge, the charge crystallises and becomes a fixed charge. This enables it to be enforced against the assets falling into the charge at the time of crystallisation (as well as any other future assets which fall within the charge).[138] The second is that, since a charge could be taken over the entire undertaking of the company, the floating charge holder could appoint a receiver and manager[139] who could take over the business, and either rescue the company by returning the business to profit or could sell the business as a going concern, thus capturing the extra value that comes from such a sale as opposed to a sale of the individual assets.[140]

These two features led to concerns that a floating charge holder was too powerful, since it could, effectively, take all the assets of the business on enforcement, leaving nothing for any other creditors. As a result, in 1897 the UK Parliament introduced preferential status, on enforcement by a receiver or on insolvency of the company, for employees of the company over the floating charge holder in relation to assets subject to a floating charge.[141] Since then, the technique of giving priority in relation to floating charge assets to certain creditors seen as non-adjusting has been a continuous feature of English law, and therefore the law in African States based on the common law.[142] The actual creditors entitled to this priority vary, but often include the tax authorities and employees. The expenses of the insolvency process are usually also paid out of floating charge assets before the claims of the floating chargee.[143]

It has long been the practice of lenders in common law jurisdictions to take fixed charges (or mortgages) over certain assets such as land or equipment, and for a 'debenture', that is, a loan to a company, to be secured by a mixture of fixed and floating charges as designated in the charge agreement.[144] It is clearly in the interest of the secured lender to have a

[137] *Re Panama, New Zealand and Australian Royal Mail Company* (1870) 5 ch App 318, 322, CA; *Re General South American Company* (1875) 2 ch D 337; *Re Florence Land and Public Works Company* (1878) 10 ch D 530, 546, CA; *Re Hamilton's Windsor Ironworks ex p Pitman & Edwards* (1879) 12 Ch D 707; *Wheatley v Silkstone and Haugh Moor Coal Co* (1885) 29 ch D 715; *Cox Moore v Peruvian Corporation Ltd* [1908] 1 ch 604.

[138] H Beale et al, *The Law of Security and Title-Based Financing*, 3rd edn (Oxford, Oxford University Press, 2018) 6.78–6.79.

[139] Later, in English law, called an administrative receiver.

[140] Of course, sometimes a 'fire sale' is inevitable, and this could also be effected by a receiver and manager. The ability to appoint a receiver and manager is not a feature of the enforcement provisions of the ML (see ch 2, H2). However, some African States with reformed law have retained this ability; see Zambia D7.

[141] Preferential Payments in Bankruptcy Amendment Act 1897, s 107.

[142] See the chapters in part II of this book.

[143] For example, UK Insolvency Act 1986, sch B1 para 99(3) (expenses of administration); Insolvency Act 1986, s 176ZA (expenses of liquidation).

[144] This practice is given legislative status in companies legislation in some African States; see, eg, Ghana C6 (discussing s 86(2) Companies Act 1963).

fixed charge over as many assets as possible, since these assets would not be subject to the preferential claims mentioned above, and, at least under English law, considerable case-law grew up concerning the distinction between fixed and floating charges, as a result of lenders attempting to take fixed charges over all sorts of assets, including circulating ones.[145] Put very simply, a fixed charge is a charge where the chargor cannot dispose of any of the charged assets without the consent of the chargee, while a floating charge is any charge that is not a fixed charge. The application of this test in the case-law is complicated.

In reforming the secured transactions law of a common law jurisdiction, one major challenge is how to deal with the floating charge. The effects of a floating charge outside insolvency (or enforcement by a receiver and manager) are easily replicated in a reformed system. Under such a system, a security interest can be taken over present and future assets, and the assets need only be identified generically.[146] Moreover, the secured creditor can authorise the disposal of encumbered assets (in advance or specifically) in which case the acquirer takes free of the security interest.[147] In addition, buyers of goods in the ordinary course of business,[148] and transferees of money and money equivalents (such as funds in a bank account or negotiable instruments) take free of security interests, provided that they do not know that the disposition is in breach of the security agreement.[149]

However, once a functional approach is adopted,[150] the distinction between fixed and floating charges becomes legally irrelevant, and should no longer exist, since all security interests are subject to the same rules.[151] This, however, leads to the problem that the distinction between fixed and floating charges needs to be replaced by a new test distinguishing between those security interests over whom the preferential creditors and the expenses have priority and those over whom they do not. The alternative is to reform insolvency law to remove all claims having priority over floating charge assets: this route could be considered if the relevant jurisdiction was also reforming insolvency law at the same time.[152] In the absence of such change, the need for a distinction remains. This issue caused particular difficulties in the United Kingdom when reform to the English law of secured transactions was suggested by the Law Commission in 2005.[153] Two jurisdictions have fairly recently dealt with this issue.

The New Zealand PPSA 1999 introduced a provision limiting the priority of preferential creditors to security interests over receivables and inventory, but excluding purchase money security interests and transfers of receivables where new value is given.[154] Although this formulation seems reasonably simple, it has also given rise to some difficulties, especially in relation to the definition of 'receivable'.[155] In Australia, references to floating charges in the

[145] For discussion of the case law, which culminated in the decision of the House of Lords in *re Spectrum Plus Ltd* (2005) 2 AC 680, see Beale et al (n 138) 6.97–6.141.
[146] See ch 2, B3.
[147] See ML, Art 34(2) and (3).
[148] See ch 2, F3.
[149] ibid.
[150] Ch 2, B2.
[151] See A Duggan and D Brown, *Australian Personal Property Securities Law*, 2nd edn (Australia, LexisNexis Butterworths, 2016) 1.31–1.36.
[152] See J Armour, 'Should We Redistribute in Insolvency?' in J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford, Oxford University Press, 2006) 189.
[153] See *Law Commission Report No 369: Company Security Interests* (Law Commission, 2005) 3.165 et seq.
[154] Companies Act 1993, sch 7 para 2.
[155] See *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* (2008) 23 NZTC 22,074; *Strategic Finance Limited v Bridgman* (2013) NZCA 357.

relevant statutes have been replaced with references to 'a circulating security interest',[156] that is, a security interest that has attached to a circulating asset.[157] The term 'circulating assets' is defined by a list of possible types of assets[158] but also includes the subject matter of a security interest where 'the secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor's business, free of the security interest'.[159] The drafting is quite complex and there are numerous exceptions to these relatively simple rules and this approach has been the subject of some criticism.[160]

This particular issue raises both technical and policy considerations, and the optimal approach is not obvious.[161] However, it is an issue that needs to be considered in every reform of the secured transactions law of a common law jurisdiction. Greater consideration has been given to this issue in some African jurisdictions than in others.[162]

There are typically other provisions referring to floating charges in the companies and insolvency legislation of a common law jurisdiction. One example is that, where the insolvency legislation has been reformed to include a corporate rescue regime similar to that of administration under UK law,[163] a 'qualifying floating charge holder' can usually appoint an administrator out of court.[164] It is relatively easy to replace this criterion with one compatible with a reformed secured transactions regime, since what is meant by a 'qualifying floating charge holder' is a secured creditor who has a security interest over all or substantially all of the assets of the company.[165] If the jurisdiction does not include an administration regime, it is likely that a chargee with fixed and floating charges over all the undertaking of the company can appoint a receiver and manager.

c. Registration Regime

It is necessary to discuss the registration regime that operated under English law until recently and which was adopted by most common law countries in Africa, since this is the regime against which the reforms in common law jurisdictions discussed in this book have taken place. This section will highlight particular aspects of the registration regime that applied under the 1948, 1985 and 2006 UK Companies Acts until it was reformed in 2013.

[156] See Corporations Act, ss 51C, 433, and 561.

[157] Australian PPSA, s 339(5). There are other references to floating charges in Australian statutes other than those dealing with the priority of preferential creditors and expenses, and this is the case in many common law jurisdictions.

[158] Such as trade receivables, inventory, bank accounts; see Australian PPSA, s 340(5).

[159] ibid s 340(1)(b).

[160] See D Turner, 'Fixed Charges over Receivables and the Personal Property Securities Act' (2011) 19 *Insolvency Law Journal* 71; and the five-year review of the Australian PPSA in which it was recommended that the provisions on 'circulating assets' and 'control' be replaced with simpler wording similar to the New Zealand provisions. B Whittaker, *Review of the Personal Property Securities Act: Final Report* (2015) 9.2.1. No changes, however, have yet been made.

[161] For a discussion of the wider implications, see S Paterson, 'The Insolvency Consequences of the Abolition of the Fixed/Floating Charge Distinction' (Secured Transactions Law Reform Project, January 2017) https://stlrp.files.wordpress.com/2017/01/paterson-fixed-and-floating-charges.pdf.

[162] See Conclusion C6bii.

[163] See UK insolvency Act, sch B1.

[164] UK Insolvency Act, sch B1 para 14.

[165] ibid.

Under this regime, registration was not of a notice, but of a security interest (or interests). Only certain interests were registrable: there was a list[166] including charges over land, charges over tangible assets (which were described as charges created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale),[167] charges over book debts (receivables), floating charges, charges over ships and aircraft, and charges over goodwill and intellectual property. The main exceptions were charges over securities and (probably) charges over bank accounts. Only non-possessory security interests (mortgages and charges) were registrable, and this had to be done within 21 days of creation:[168] there was no registration in advance. This gave rise to a period of invisibility. If the charge was not registered for 21 days, during this period searchers would not see the registration. For this reason, advances were often not made until 21 days after creation of the charge, and after the lender had executed a clear search.[169]

If a charge was not registered within the requisite time period, it was void against other secured creditors and any insolvency officer.[170] However, if the lack of registration was inadvertent the chargee could apply for leave of the court to register late, subject to the rights of any person who had acquired an interest in the relevant assets in the intervening period.[171]

The obligation to register the charge was that of the company, which stemmed from the fact that registration was originally merely in the register held by the company rather than a public register.[172] Although, for many years, registration had been carried out by the secured creditor, the legislation still reflected the company's obligation, so that a failure to register on the part of the company was a criminal offence.[173] Moreover, if a charge was not registered within the required period, the obligation secured became immediately due and payable.[174] This was not only a sanction on the company, it also provided the company with an incentive to create a new charge in favour of the secured creditor, which might have been an easier route to repair a failure to register in time than to ask for the leave of the court.

Many of these elements remained within the companies legislation of common law African States, and some still remain post-reform.[175]

2. Civil Law Concepts

The secured transactions legal framework of African countries belonging to the civil law tradition is fragmented and formalistic.[176] The fragmentation may be partially attributed to the *numerus clausus* principle under which only certain rights are characterised as security rights (for example pledges), whereas others are enforced according to the specific set

[166] UK Companies Act 2006, s 860 (now repealed).
[167] See D1a above.
[168] UK Companies Act 2006, s 870 (now repealed).
[169] Beale et al (n 136).
[170] UK Companies Act 2006, s 874 (now s 859H).
[171] ibid s 873 (now s 859F).
[172] UK Companies Act 1862.
[173] UK Companies Act 2006, s 860(4) (now repealed).
[174] ibid s 874(3) (now s 859H(4)).
[175] The provision in the Kenyan Companies Act stating that failure on the part of the company to register is a criminal offence (s 878(8)) has not been repealed or amended as a result of the MPSR; see Kenya B4.
[176] Tunisia C1.

of rules governing that particular transaction, irrespective of its function.[177] Even the recently enacted OHADA Uniform Act takes a formalistic and individualist approach to the various security rights, providing different sets of rules for their creation, third-party effectiveness, priority and enforcement.[178] The four regimes examined in this book have been largely inspired by French law.[179] The frameworks include codes as well as specific legislation to provide for the use of security devices in specific contexts and transactions, such as for warehouse receipts or leases.[180] Some security devices may be available only to particular types of creditors.[181]

The core security device is the possessory pledge, typically recognised in the civil code.[182] There is still a valid pledge if the pledged collateral is possessed by the secured creditor constructively, such as when it is in possession of a negotiable document (for example, a warehouse receipt) or has appointed an agent to manage the collateral.[183] A pledge of intangible assets requires a notification of the person who owes the payment or other performance, such as the debtor of the receivable or the bank that maintains the bank account subject to a pledge.[184]

Non-possessory security devices are limited to certain types of transactions and assets, such as pledges over motor vehicles or an enterprise.[185] In addition, these frameworks recognise a number of devices where the creditor retains or acquires ownership of the asset while the grantor retains possession or some form of control. The enterprise pledge (mortgage of a business),[186] which may be viewed as analogous to the common law floating charge or the Model Law 'all assets' security right, has a number of limitations, such as its inapplicability to inventory as well as most intangible assets,[187] and the need to describe the assets of the enterprise specifically, which make it a much less effective and efficient security device.[188]

Creation of a security right typically requires the satisfaction of a number of formalities, such as the notarisation of signatures of the parties to a pledge agreement. Often, additional requirements apply, such as the recording of an agreement with a tax authority.[189] Furthermore, claims may not be assigned when the agreement under which they arise contains an anti-assignment clause.[190]

Third-party effectiveness is achieved by registration only for a few categories of security rights, though the trend has been to gradually subject more security devices to registration for their third-party effectiveness.[191] But the approach is not uniform. For instance, some countries require registration of financial leases for some purposes, such

[177] See OHADA B, which explains why the Uniform Act does not apply to finance leases.
[178] ibid.
[179] Ethiopia B.
[180] ibid C.
[181] Under the OHADA Uniform Act, security transfers of receivables and funds may be taken only by entities conducting banking or credit operations in the regular course of business. OHADA B3.
[182] Burundi B1 and Ethiopia C.
[183] Ethiopia D1.
[184] ibid.
[185] Burundi B1 and Tunisia D2.
[186] Ethiopia C.
[187] Typically, an enterprise pledge covers only intellectual property rights, logo, and goodwill. See Tunisia C 2.
[188] Burundi B2.
[189] Tunisia D.
[190] Ethiopia D2.
[191] See OHADA C explaining the approach to retention of title.

as the protection against buyers[192] only, while in others, the failure to register renders the lessor's right ineffective against all third parties.[193] It is not uncommon for a law to require the registration of a particular right, but no registry has in fact been established for that very purpose.[194] Civil law countries have not established general security rights registries, though the OHADA Uniform Act is a step in that direction.[195] Furthermore, where available, registries require the submission of the agreement that creates the particular security right for examination by the registrar, as well as its recording. Notice registration is unknown in unreformed civil law jurisdictions in Africa.[196] The registries process agreements submitted in a physical form, which creates inefficiencies. On top of that, registrations must be submitted to a country-based registry office where the collateral or the grantor may be located.[197] This may require multiple registrations in different countries where the collateral may be located, as well as monitoring of the movement of the grantor and the collateral.[198] The failure to register renders the security right ineffective not only against third parties, but also as against the grantor.[199]

The absence of a coherent legal framework creates a potential for complicated priority disputes for which the existing rules do not provide any answers, thus increasing the legal complexity.[200] The rules are not set up to deal with conflicts arising when a single asset is encumbered under two or more different security devices.[201] This is particularly the case for motor vehicles that may be pledged, sold under a retention of ownership, acquired under a finance lease or form a part of a larger collateral package supporting an enterprise pledge, or equipment may be encumbered under five distinct devices.[202] The laws also have many gaps, such as the legal effect of movement of the assets, subject to a pledge of creditor A, to another country and the taking of a pledge in the same assets by creditor B.[203] For the competing rights in the same asset established under the same law, and for which a registry has been established, generally the time of registration establishes the priority.[204] However, for those where no registry exists, the time of creation may be determinative.[205]

Civil law jurisdictions have recognised extrajudicial enforcement in some narrow contexts (for example in some jurisdictions they are only available to banks),[206] but lack a general recognition of such remedies.[207] In some instances, exceptions have been made for particular transactions, such as pledges of bank accounts.[208] The lack of such remedies is compensated by the availability of expeditious judicial remedies, including those that may

[192] Ethiopia D5.
[193] Tunisia D4.
[194] Ethiopia D4.
[195] See OHADA.
[196] Tunisia C2.
[197] Ethiopia C and Tunisia C2.
[198] Tunisia D3.
[199] Burundi B2.
[200] Ethiopia C.
[201] OHADA I.
[202] Tunisia C1.
[203] ibid E.
[204] OHADA E and Tunisia E3.
[205] Tunisia E.
[206] Ethiopia C.
[207] Burundi B4 and Tunisia F.
[208] Tunisia F.

be granted provisionally.[209] The absence of the functional approach requires the application of a remedy specific to the security right used to secure the obligation.

It remains to be seen whether these challenges can be successfully overcome, as the implementation of reforms in civil law countries in Africa has languished. Ethiopia, Burundi and the OHADA Member States have enacted laws, but are yet to establish centralised collateral registries.

3. Concepts in Mixed Jurisdictions[210]

The secured transactions legal framework of African countries with a legal system rooted in Roman–Dutch law, namely South Africa and Zimbabwe, adapted by the courts and legislature, which often drew on English law, relies on a variety of legal devices to secure obligations. The absence of a coherent and functionally oriented framework increases legal complexity and the cost of structuring many types of secured transactions, but especially those secured with fluctuating assets such as inventory. The four principal devices used to secure obligations with a right in movable assets are: (i) pledge, (ii) cession (assignment), (iii) general notarial bond and (iv) special notarial bond.[211] In addition to these generally applicable devices, laws have been enacted to facilitate various retention of title arrangements, including under hire-purchase agreements and leases.[212] Furthermore, the countries enacted specific legislation to support financing in certain industries or particular groups, such as for agriculture and cooperative societies.[213]

Tangible assets can be used as collateral for pledges, general notarial bonds and special notarial bonds, but each of these devices limits their usefulness in the modern business environment. Pledges require the pledgor to transfer possession or legal control of movable assets, tangible or intangible, to the secured creditor (pledgee).[214] Constructive possession is recognised.[215] A pledge over intangibles is generally made by means of cession that becomes effective when executed, and without any form of a public notice.[216]

The execution of a notarial bond must be attested by a notary public, and the bond must then be registered in a local deeds registry.[217] In addition to notarisation, a stamp duty is payable on certain agreements.[218] The situation is clouded by the uncertainty with respect to the possibility to create security rights in future assets, and the override of anti-assignment restrictions.[219]

The effectiveness of a notarial bond is limited, both in the types of collateral it may cover and in the protections and priority it gives the secured creditor. The special notarial bond is

[209] Burundi B4.
[210] Note that Rwanda is also included in the part of this book entitled 'Mixed Jurisdictions' but the law there is not based on Roman–Dutch law. Rather, it is based on Belgian law but is transitioning to common law.
[211] South Africa C and Zimbabwe B1.
[212] South Africa C1 and Zimbabwe B1.
[213] Zimbabwe B1.
[214] South Africa C2a.
[215] ibid C2b.
[216] ibid C3a.
[217] ibid C4b; Zimbabwe B1.
[218] Zimbabwe B2.
[219] South Africa C3c–d. For further discussion of the merits of an anti-assignment override, see E4 below.

a security interest created by statute, and is deemed to be a non-possessory pledge.[220] It is limited to tangible assets that are specifically described so that they are 'readily recognisable' in a manner that enables third parties to clearly identify which assets of the grantor remain unencumbered.[221] Thus a special notarial bond cannot be used to encumber fluctuating collateral. A general notarial bond, inspired by common law, can be granted over assets of the grantor described generally and can include future assets.[222] However, it does not confer on the bondholder a real security right; instead the bondholder merely has a preference over unsecured creditors in insolvency.[223] The grantor can dispose of its assets freely until its insolvency or until the secured creditor takes possession of assets and therefore becomes a pledgee.[224] Moreover, the general notarial bond must cover all of the grantor's movable property, both present and future; it cannot be limited to some portion of the grantor's movable property.[225] Retention of title devices are effective without any form of a public notice.

Registration entails the submission of actual copies of agreements, and this must be done within a prescribed period of time after their execution.[226] Digitisation of the registries in which bonds are registered would not solve the underlying deficiencies in their legal nature.

Roman–Dutch law jurisdictions generally do not recognise extrajudicial enforcement, even with respect to pledges of intangible assets that do not raise any risk of a potential conflict with the grantor.[227] However, certain exceptions have been recognised by the courts.[228]

4. Common Barriers to Accessing Secured Credit

a. Anti-Assignment Clauses

Agreements which give rise to receivables often include a term prohibiting or limiting the transfer of the benefit of the receivables, and the creation of a security right in those receivables ('anti-assignment clause'). To the extent that these terms are intentionally included, and not just as a result of boilerplate drafting, they have several possible purposes. One is to ensure that the receivables debtor only ever deals with the receivables creditor, and not with a third-party transferee or secured creditor. Another is to eliminate the risk of paying the wrong party, if, for example, a notice of assignment is overlooked, with the result that payment may need to be made twice.[229] A third is to eliminate the risk of not being able to assert a set-off against the receivables creditor, since transfer or the creation of a security right can prevent the assertion of set-off in some situations, depending on the applicable law.

[220] South Africa C5.
[221] ibid C5.
[222] ibid C4c.
[223] ibid.
[224] ibid.
[225] ibid.
[226] Zimbabwe B2.
[227] South Africa B and Zimbabwe B2.
[228] South Africa C3e.
[229] This would depend on the applicable law.

The effect of an anti-assignment clause will vary according to the applicable law, but generally it will not only mean that the creation of a security right in the receivables (including an outright transfer) is a breach of contract by the receivables creditor, but that there will be adverse consequences for the secured creditor (or transferee). First, it may not acquire a right effective against third parties (including an insolvency officer) to the receivables. Secondly, it may be difficult or impossible for it to enforce against the receivables, especially by suing the receivables debtor. The likelihood of these adverse consequences is such that those financing against receivables (whether they use a security right or a transfer to protect their position) either refuse to finance against receivables containing an anti-assignment clause or have to use expensive workarounds, including obtaining waivers from receivables debtors in relation to the anti-assignment clauses, which increases the cost of the financing. Another concern (although perhaps overblown in the context of trade financing) is that financiers would have to examine all the contracts giving rise to the receivables to discover whether they contain anti-assignment clauses.[230] Further, anti-assignment clauses are seen as interfering with the alienability of assets, thus preventing the maximisation of available collateral.[231]

For all these reasons, many modern secured transactions regimes, as well as international instruments such as the UNCITRAL Convention on the Assignment of Receivables in International Trade and the Model Law, include a provision overriding anti-assignment clauses. These provisions vary a little in effect: some render the clause entirely void,[232] and others provide that the receivables debtor can still obtain a remedy for breach of contract, but not the remedy of termination of the contract itself.[233] The scope of the override also varies, but most regimes limit it to trade receivables because different considerations apply to receivables owed to financial institutions.[234]

b. Taking Security Over After-Acquired Assets

There are a number of good reasons why a secured transactions regime should permit and, indeed, facilitate secured creditors to include assets in which the grantor does not yet have an interest[235] within the security agreement. First, it reduces costs by obviating the need to enter into a new security agreement every time the grantor acquires a new asset. Secondly, it facilitates the taking of security over circulating assets, such as inventory and receivables, which are constantly being acquired, as well as constantly being disposed of. Thirdly, and

[230] One of the authors conducted empirical research in the UK, which showed: (i) that receivables financiers always look at the contracts in any event, not just to check for anti-assignment clauses but to look for all sorts of contractual provisions; and (ii) many of the contracts, especially those used by large customers, are in standard form so as long as the customer's identity is known the terms are also known. See L Gullifer, H Beale and S Paterson, 'A Case for Interfering with Freedom of Contract? An Empirically-Informed Study of Bans on Assignment' (2016) 3 *Journal of Business Law* 203, 219.

[231] G Gilmore, *Security Interests in Personal Property*, vol 1 (Boston, MA, Little, Brown, 1965) 212.

[232] UCC §9-406(d); UK Business Contract Terms (Assignment of Receivables) Regulations 2018 (SI 2018/1254) reg 2(1).

[233] See, eg, Australian PPSA, s 81(2); New Zealand PPSA, s 87; and ML, Art 13.

[234] LG, ch II para 108; ML, Art 13(3); UK Business Contract Terms (Assignment of Receivables) Regulations 2018 (SI 2018/1254) regs 1(3) and 4 (the UK override only applies to trade receivables owed to SMEs).

[235] A grantor may not yet have have an interest in assets either because they do not yet exist, or because it has not yet acquired them.

as an extension of the second point, it enables security to be taken over all the assets of the grantor.[236] Fourthly, it simplifies the application of priority rules, since, instead of priority depending on when the asset was acquired by the grantor, it can be determined by reference to a single date, such as the date of the security agreement[237] or, under a reformed system of secured transactions law, from the date of registration.

In many unreformed jurisdictions, it is difficult or impossible to take security over future assets, at least in some circumstances. Examples include the common law Bills of Sale Acts, which prohibit the granting of security by individuals over future goods[238] (although it has been possible since the nineteenth century in common law regimes for a company to be able to grant security over its future assets, and for an individual to be able to grant security over future assets other than goods), and the civil law requirement that the collateral be described specifically.[239] Modern secured transactions regimes all include provisions enabling a secured creditor to take security over after-acquired assets,[240] and this is replicated in reformed regimes in Africa.

F. The Shape of the Book

This book is divided into five parts. The first part is introductory, and comprises this chapter and the chapter in which the principles of a modern secured transaction law, with particular reference to the Model Law, are discussed. The next three parts contain country-specific chapters. Each discusses the current and, in reformed jurisdictions, the previous law of secured transactions. Discussion of reformed law is generally divided into the various components of such law, namely, creation, third-party effectiveness, registration, priorities, enforcement, conflict of laws, and transitional provisions, although the structure of each chapter is dictated by the legal position in the relevant jurisdiction.

This paragraph describes the country-specific parts of the book. Part II focuses on common law jurisdictions, and charts the reform initiatives in seven of these. One, Malawi, was the subject of a chapter in the first book in this series, and so the chapter in this book considers developments in that jurisdiction since that first chapter was written. Part III focuses on civil law jurisdictions which have reformed their law or in which reform is actively being considered. One chapter considers the OHADA Uniform Act, which applies in 17 African civil law jurisdictions. Part IV focuses on mixed jurisdictions: the two Roman–Dutch/common law jurisdictions of South Africa and Zimbabwe, and the Belgian/common law jurisdiction of Rwanda.

Part V contains an important chapter on the current and likely future effect of the Cape Town Convention and its Protocols on equipment financing in Africa. The Convention and the Aircraft Protocol are widely ratified in Africa, and the Luxembourg Rail Protocol and future Mining, Agricultural and Construction MAC Protocol have the potential to greatly increase investment in the African rail sector and mining, agriculture and construction

[236] See E1b for discussion of some of the advantages of this.
[237] This is the case under English law. See Beale et al (n 136).
[238] See E1a above.
[239] See E2 above.
[240] See, eg, ML, Art 7; ch 2, B3.

industries, were they to be widely adopted. The second chapter in Part V moves away from a legal analysis to consider what infrastructure is needed to underpin a modern secured transactions law. The third chapter concludes the book by providing a thematic analysis of the information and discussion in all the other chapters, and reflects on the drivers for reform, the reform process itself, and the substance of reform, drawing on examples from all the jurisdictions considered in this book.